Settlement Conference Techniques:

Caucus Do's and Don'ts

by Morton Denlow

A settlement conference can be divided into three distinct phases: 1) joint initial session; 2) separate caucus with each party; and 3) joint concluding phase.[1] The caucus phase is the most challenging and the most important. This is when the judge meets separately with each party to explore their underlying concerns, to discuss the merits of the dispute, to develop settlement options, and to obtain the next settlement proposal for presentation to the other side. During the caucus the judge must exercise judgment and develop strategies to move the case towards settlement. In the caucus, the judge engages each party in confidential discussions to determine their settlement goals and evaluate whether and how those goals can be achieved. Oftentimes, the merits of the case recede into the background while other concerns such as the emotional and financial stress of the litigation process come to the forefront. This article reviews common issues a judge confronts during the caucus phase and suggests steps a judge should take to further a settlement agreement.

THE INITIAL CAUCUS

Prior to the settlement conference, the parties exchange written settlement proposals in the form of an itemization of damages, a written settlement demand supported by a brief statement of reasons from the plaintiff, followed by a written offer and brief statement of reasons from the defendant.[2] Copies of the letters are submitted to me in advance of the settlement conference.

In order to underscore the importance of the settlement process, I conduct the initial joint session at one of the counsel tables in the courtroom. I explain the process and request each side to make an opening statement during

the initial joint session. In the large majority of cases, a resolution revolves principally around how much money the defendant will pay to the plaintiff, and if that is the case, I will begin to caucus promptly after the parties' opening presentations. If there are multiple issues at play, I normally stay in the joint session until all of the issues have been identified and an attempt has been made to together resolve at least some of the issues. Before breaking, I ask the parties if they have any further questions about how we are going to proceed.

At the conclusion of the joint session, I select one of the parties to come to my chambers for the initial caucus. I generally meet with the plaintiff's side first because I expect the plaintiff to make the next move in the negotiations. I invite and expect counsel and their clients to actively participate in the caucus. It is important for the client to develop trust and confidence in me and in the process. By being a full and active participant in the caucus, the client develops a better understanding of the issues and alternatives to be confronted, and I am able to directly hear the client's concerns and objectives. It is therefore critical that a client with full negotiating authority[3] be present, otherwise, the caucus phase may be a waste of time. In the caucus phase, it is my role to obtain and communicate a party's new proposal to the other side and to preserve as confidential, information they do not wish to disclose. This creates the expectation for parties that they can confide in me and that I will help analyze and transmit their new settlement proposals. The caucus provides an opportunity to engage in candid conversations separately with each side and to gather information they may not be prepared to share with the other side. For example, if a plaintiff asks me to communicate a reduced monetary demand of $100,000, but also informs me in confidence of a willingness to later move to $70,000, I will communicate the $100,000 proposal to defendant, but I will not disclose the $70,000 number until the plaintiff authorizes me to do so.

I conduct the caucus in chambers at my conference table. This provides a more relaxed venue for discussion, while at the same time reinforcing my judicial background and experience. When I take the plaintiff's representatives back to chambers, I instruct the defendants to remain in the courtroom and to think seriously about what has been discussed and to be prepared to come in and negotiate when they are called into my chambers after the plaintiff returns to the courtroom.

I begin the caucus phase with open-ended questions in order to encourage the plaintiff and counsel to express what is on their minds. The types of open-ended questions I use to begin the caucus include: "How can I help you today?"; "What do you hope to accomplish today?"; "How do you feel about going through the litigation process?"; and "Are there things you want to tell me that were not discussed in the joint session?" These questions often bring responses that reveal the clients' underlying concerns. "I can't take the stress"; "I cannot afford to litigate this case"; and "I just want to put this behind me" are among the responses I frequently hear.

Open-ended questions encourage parties to express what is on their minds and important to them. My goal is to elicit the concerns that drive the dispute and to identify the impediments to settlement. It is not unusual for the merits of the litigation to play a secondary role. For example, a plaintiff in an employment discrimination case who has found another job may be motivated by a desire for closure in

order to move on with her life. For some, a health concern, an immediate financial need or a desire to relocate out-of-town may be their motivating factor in seeking a settlement. For most plaintiffs, the financial consequences are key. Plaintiffs want to know how much their case is worth and how soon they can see the money. Helping parties analyze the financial implications of proceeding with litigation as compared to settlement plays a big part in the caucus discussions. Every case is unique and the use of open-ended questions enables the judge to learn what is important to the parties.

The initial caucus is also an opportunity to understand who controls the settlement decision—the client, the attorney, or some other family member or corporate officer. Most clients rely heavily upon their attorneys in framing acceptable proposals. Some clients place full reliance upon their attorneys; others make their own decisions. The caucus creates the opportunity to hear from each party regarding what terms will be required to achieve a settlement.

Some judges use the caucus to explore in great detail the legal and factual basis of each parties' claims and defenses, with pointed questions directed at the evidence the party expects to produce, the legal hurdles to be confronted, and a prediction of likely jury outcomes.[4] The court then develops a recommendation or a settlement range that becomes the focus of the settlement conference. This merits-based approach can be effective in those cases where the parties are seeking an evaluation and recommendation from the court. This approach places the judge, rather than the parties, at the center of the process.

I prefer to stay away from a point-by-point analysis of the merits for several reasons. First, because the attorneys have lived with the case, they are in a better position to analyze it and develop initial settlement ranges. Second, if I evaluate the case early on and put forth a settlement recommendation or settlement range, I may be perceived as biased towards one side. This will hurt my ability to be effective in settling the case. Third, the likely jury outcome is only one factor, and often not the most important, in settling a case. Because less than two percent of federal civil cases now go to trial, possible trial outcomes are less significant than they were in years past.

Settlement outcomes in other similar cases are much more significant.[5] Other considerations, such as a party's tolerance for risk, the desire for closure and certainty, and the cost of litigation, often play the determining role. For example, in Section 1983 civil rights cases involving claims of police misconduct, defendant municipalities are often motivated to settle because of the cost of defense and the time away from official duties by their employees in discovery and trial. In other cases, particularly employment cases, plaintiffs may be motivated to settle because they are not emotionally prepared to withstand the pressures of the trial process and they desire closure to move on with their lives. Defendants in employment cases are generally concerned with the cost of defense and possible adverse publicity.

I spend most of my time listening during the initial caucus. This is a perfect opportunity for the client to express his feelings regarding the litigation, his concerns, and how the litigation is affecting him, his family, his business and his future. For many clients who were reluctant to express themselves during the joint session, the caucus provides them with the opportunity to have their "day in court," to "tell it to the

judge," and to have their grievances heard by the judge. Venting by the parties is frequently a prerequisite to meaningful settlement discussions. By means of active listening,[6] I am able to empathize with the concerns expressed and to then direct the discussion back to the realities of the litigation and an exploration of settlement alternatives. Throughout the process, it is important to find the right voice in a given situation, because an effective settlement judge must be different things to different people. There is no one size fits all approach during the caucus. By listening carefully to the concerns expressed, the judge can adapt to the situation.

Oftentimes, clients and their counsel will say, "Judge, what do you think is a fair settlement?"; and "Judge, how do you evaluate the case?" Parties can even take a more aggressive approach, urging me to "convince the other side why they're wrong and why they have no case." I put them off in the initial caucus by saying I want more time to think about it and an opportunity to talk to the other side. I explain that I will weigh in if it is necessary after we have gone back and forth for a while. I prefer to continue to ask questions such as "How do you evaluate the points raised by defendant?"; "What are the personal, economic and other considerations you face if you go forward versus settling today?"; "Is there a relationship with defendant to be preserved if the case is settled?" Listening carefully to the answers will provide information to be used in framing a settlement.

The caucus is an opportunity to discuss and determine whether any of the seven advantages of settlement[7] I describe in the joint opening session may motivate a settlement. I call these advantages the Seven C's: 1) client control of the outcome; 2) control of future litigation and opportunity costs; 3) certainty of the outcome; 4) confidentiality; 5) creative resolution possibility; 6) preserving a continuing relationship; and 7) closure. These factors can be as important, if not more important, than the merits in bringing about a settlement. In my experience, some or all of the Seven C's drive most settlements.

In all cases, certainty, control of costs (litigation costs and opportunity costs) and client control over the outcome play a decisive role in steering the parties toward settlement. In employment cases, confidentiality is important because the employer is often concerned about "setting a precedent" by settling with a disgruntled former employee. In other cases, the ability to fashion a creative resolution or the opportunity to preserve a continuing business or other relationship can drive a settlement.

At the conclusion of the initial caucus with the plaintiff, I request a new settlement proposal for me to communicate to the defendant. Generally, this proposal reflects a slight downward move from their initial written demand presented to defendant prior to the settlement conference. I deliver proposals on behalf of the parties to one another. I take notes during the caucus and before I excuse the plaintiff and invite the defendant in, I review the proposal I am authorized to present. In the event the plaintiff has discussed the possibility of later moving to a lower figure, I confirm I will not disclose that number without permission. By the end of the first caucus, the judge should understand the plaintiff's concerns and objectives, establish trust, and obtain a revised settlement proposal to be communicated to the defendant.

THE SECOND CAUCUS

I then invite the plaintiff to return to the courtroom to think about what we have discussed and I invite the defendant's representatives to join me in chambers. I engage in a similar discussion with the defendant before revealing plaintiff's new proposal. I once again begin with open-ended questions and engage in a wide-ranging discussion of the defendant's concerns, the issues presented by the litigation, and the advantages settlement may present. I delay describing plaintiff's new proposal until after defendant has an opportunity to vent and to tell me what is important to them. An early discussion of plaintiff's new proposal may cause the defendant to become angry, to shut down and prevent a full discussion of defendant's goals and concerns.

When presenting plaintiff's new proposal, I always attempt to be upbeat, even if there has only been a slight move. This is important because the judge's attitude towards the progress directly impacts the parties' perceptions. If you remain positive and upbeat, the parties will hang in there and continue to talk. If you appear negative and pessimistic, this will be picked up by the parties and can lead to an early end to the settlement conference. For example, I often exhibit optimism by relaying the other side's most recent move in the "good news, bad news" context.

Using the "good news, bad news" approach lends optimism to an otherwise difficult situation. This delivery also helps communicate the other side's latest offer: "The bad news is they didn't accept your last demand. But the good news is they increased their offer by 50%, to $15,000." Similar statements, such as "Can you feel the big mo?"; "We're on a roll"; and "Are we having fun yet?" demonstrate progress is being made and bring smiles to individuals' faces. A little levity can ease the tension and portray proposals in a better light; however, you must adopt a style that reflects your own personality and makes you and the parties comfortable. You must also be flexible and adapt your style to the particular parties and situation.

When a defendant is disappointed by a plaintiff's new proposal, which is typically the case, it is important to explain the negotiation process and to point out it may take a number of moves before an agreement is reached. Defense counsel is there to advise the client. I try to spend relatively equal amounts of time with each side because I want them to perceive they are being dealt with fairly. At the end of the session with the defendant, I request a new offer for me to present to the plaintiff.

In talking to a defendant, I am again looking for clues as to who is the decision-maker and what important factors need to be addressed. I seek to understand the defendant's objectives, identify the impediments to settlement, and determine what techniques I may later want to employ to break an impasse, if necessary.[8] I explore a variety of ideas and approaches to settlement. For example, I may ask whether defendant can suggest a range of numbers (e.g., $50,000 - $100,000), if the plaintiff was also prepared to discuss a settlement in that range. I also discuss the likelihood of obtaining summary judgment and the attendant costs, whether the case involves a fee-shifting statute and the possible consequences, and the signal the plaintiff has given and that the defendant will give by the moves they make in their settlement proposals.

From time to time parties disclose facts or other

important information to me that has not previously been disclosed to the other side, but which if disclosed, might cause the other side to substantially alter their settlement proposal. In those cases, I request permission to share this information with the other side if it will likely be disclosed later in discovery. If necessary, I will convene an additional joint session in order to permit the parties to share important information. For example, in a breach of contract case, the defendant shared with me its inability to pay a large settlement amount given its near insolvency. I convened a joint session in order to permit the Plaintiff to hear this information. This information was important to the plaintiff in accepting a reduced settlement.

LATER CAUCUSES

Following the initial caucuses, I continue to meet separately with each side in shorter caucuses until agreement is reached. These later caucuses enable me to determine how close the parties will move towards settlement by means of revised proposals transmitted through me. In transmitting these proposals, it is important to be patient and to allow the momentum to build. The number of caucuses required will depend upon the negotiating strategies of the parties and the complexity of the issues to be resolved. I frequently caucus up to 4-5 times separately with each party before a settlement is reached.

Setting a firm deadline works wonders in motivating the parties. I generally set a 2-3 hour time limit for each settlement conference. The large majority of cases settle in that time frame. As the deadline approaches, parties are often more forthcoming and willing to compromise. As proposals move back and forth, the magnitude of the changes in the respective offers conveys signals. The moves become smaller and the parties become more open and candid in discussing their true settlement objectives.

Whether the judge views a settlement proposal as fair is important to many parties. For example, when the judge discuses recent settlements in similar cases or simply sets out why he believes a particular amount is within the range of reasonable settlements, the parties often view such feedback as paramount. Therefore, it is best to reserve such input until the parties have made headway towards settlement on their own. It is important to explain to parties there is no one correct number for a settlement, but there are a range of numbers in which a settlement can be perceived as fair. The reasonableness of a settlement depends in part upon the parties' own goals. The use of a settlement database containing settlement results in similar types of cases is a valuable tool.[9]

During the caucus phase, the judge has the opportunity to help guide the negotiations. This can be done by asking parties to explain what signal they are trying to send by their next offer and to discuss what signal they believe the opposing party has given through their offer. Once a party has explained the result they are seeking to achieve, the judge is in a position to discuss each move being made and to question the party as to whether the move is consistent with the desired goal.

For example, in a Section 1983 civil rights case, I made sure the plaintiff understood the message and the potential effect of his next move by helping evaluate the possible consequences of his next settlement demand: "I'm going to suggest the move to $70,000 will not be well received, but I'll communicate it if you want." I do this in order to help maintain positive momentum. I employed a similar

strategy in another case, where the plaintiff reduced his demand by only $50,000, from $1,250,000 to $1,200,000. In order for the defendant to send a message through her response, I asked the following questions: "What are you trying to achieve?"; "What range are you thinking about?"; and "Is it fair to say if plaintiff is at $500,000 or more, you have no interest?" Based on the defendant's response that she was unwilling to consider a number above $500,000, I told her we could explain to Plaintiff that if he remained at or above $500,000, the negotiations would not go anywhere.

In another civil rights case, I helped to guide the negotiations with the defendant. In response to Plaintiff's last demand of $14,000, Defendant was prepared to increase her offer from $7,000 to $10,000, but no more. I said to Defendant: "Do you recognize what signal you're giving by making that move?"; "Is that the signal you want to give?" Defendant decided to only offer plaintiff $8,000 at that time, because she ultimately wanted to pay no more than $10,000. This move gave her room to later increase her offer to $10,000.

My law clerk, courtroom deputy and law student externs frequently attend the settlement conferences. In addition to providing a learning experience for them, they also perform the function of a shadow jury and are sometimes called upon to provide their reactions to the case. The parties may find it helpful to obtain feedback from a larger group on issues that may go to a jury. For example, as a result of feedback from the "shadow jury" in a recent case, an extremely emotional plaintiff was able to take a more realistic view of his damages and propose a more reasonable settlement demand, which the other side accepted. The use of the shadow jury helps the parties to understand possible strengths and weaknesses of their case and provides additional feedback concerning the zone of reasonable settlement.

The caucus format also enables me to present a proposal as my suggestion if I believe it will be better received. For example, in a civil rights case, after the parties had shuttled back and forth numerous times, the parties were $30,000 apart. When I called the plaintiff back in, I suggested the possibility of splitting the difference. The plaintiff agreed on the condition the defendant also accept. The plaintiff directed me not to disclose his willingness to split the difference until the defendant also agreed. I recommended to the defendant that the parties split the difference. They agreed and the case settled. Parties are generally more receptive to a judge's suggestion than that of their opponent.

One of the main advantages of a settlement conference is the opportunity to achieve a creative resolution. The caucus with each party enables the judge to understand the underlying issues and impediments to settlement and determine whether there is an opportunity to find a method of resolving the dispute, not otherwise achievable through litigation. For example, in employment cases, the types of elements that can be used to help bridge the gap may include a letter of reference, the conversion of a termination into a resignation, an agreement to resign and to not reapply, the allocation of settlement proceeds in the most tax-advantaged way, confidentiality, and the ability to make payments over time rather than in one lump sum.

In a commercial case, a settlement conference provides parties with the opportunity to preserve or to renew a business relationship. For example, a plaintiff and defendant in a breach of contract case recognized the importance of saving their five-year friendship and decided from a business perspective it was best to look forward and build upon the working relationship they had established rather than to proceed with costly and divisive litigation. The settlement was achieved by bringing plaintiff and defendant together to talk before me, outside the presence of their attorneys, but with their attorneys' permission, to make their own decision about how to work together. In another recent case, the parties found creative ways to do business together after I used another technique called "deliberate indifference," in which I told the parties they were at the point at which they deserved one another because they were refusing to explore the prospect of crafting business dealings as part of a settlement. Fearing the end of the settlement conference, the parties quickly crafted a settlement.

In a personal injury case, parties can negotiate and resolve outstanding medical liens, create structured settlements and provide confidentiality.

LAWYER BEHAVIOR THAT CAN PROMOTE OR IMPEDE SETTLEMENT

Lawyers can be part of the solution or part of the problem in achieving settlement. A lawyer who wants to assist her client to achieve a settlement can make a big difference. Lawyers who prepare their clients, deliver a well-reasoned written settlement proposal, present a professional opening statement in the joint session, and who approach the caucus with a sound strategy can facilitate settlement. In the caucus phase, the lawyer has the opportunity to counsel her client and to recommend settlement proposals. Good lawyers understand the process involves negotiating through a third party, the judge, and counsel should do her best to advocate on behalf of her client and establish rapport and credibility with the judge.

Client preparation includes a pre-settlement discussion with the client to explain the purpose of a settlement conference, the steps involved, an understanding of who will make the settlement moves, whether she will caucus with her client outside the judge's presence before a new proposal is presented, and how much information to disclose to the other side and to the judge and when to reveal it.

On the other hand, lawyers hinder settlement when they have not prepared their clients or themselves to engage in a meaningful discussion with the other side or the court. Examples of the type of lawyer conduct that can impede settlement include: 1) placing their own self-interest in attorney's fees ahead of their client's interest in achieving a reasonable settlement; 2) creating ill will during the joint session by engaging in personal attacks; 3) looking to the judge to dampen their client's expectations, after counsel created unreasonable expectations with their client; 4) failing to bring a client representative who has full settlement authority; 5) demanding new terms at the very end of the settlement conference, thereby creating an impasse; and 6) overlooking the clients' emotional or financial limitations and urging the continuation of the litigation, to the detriment of the clients.

APPROACHES TO COMMON PROBLEMS

Asking for a bottom line brings with it a

number of problems. First, it may cause the lawyer to lie, which is never a good thing. The attorney is there to achieve the best possible deal for her client. If a judge asks for a bottom line, the lawyer is placed in an awkward situation of achieving the best possible result for her client or possibly lying to the judge. The attorney fears that by disclosing the bottom line, the judge will only strive to achieve that number, rather than a better result. It is unfair to put an attorney in this position.

Second, receiving an answer may unnecessarily freeze the negotiations and make the party defensive of the bottom line. Having stated a bottom line, the party may feel it must stick to it, rather than change and lose face. Alternatively, it is better to ask "What are you hoping to achieve?" A response to this question allows the party to retain flexibility and does not freeze the negotiations. A bottom line can be flexible so long as a party with full authority is in attendance. This cannot be overemphasized. It is the norm that parties change their settlement "bottom lines" during the process.

Third, a discussion of a bottom line may divert attention away from more creative ways to achieve a desired result. For example, allocating settlement proceeds in a tax-advantaged way may result in a plaintiff receiving more after tax dollars than a larger fully taxed settlement.

Litigation is expensive. Oftentimes an impasse arises because a party has spent more in attorneys' fees than is currently being offered. A party may be unwilling to settle if it is not able to at least recoup its out of pocket attorneys' fees and related costs. In these circumstances, it is useful to focus the plaintiff on the future and away from the past. The same is true for counsel. In contingent fee or fee-shifting cases, plaintiff's counsel may have spent disproportionate amounts of time relative to the value of the case.

In these situations, I encourage the plaintiff to analyze whether accepting the offer on the table is likely to net them more than continuing with the litigation. Pouring good money after bad into a case, or more hours into a case, will not necessarily result in a better net outcome. I sent this message to defendants in a case brought under the Fair Debt Collection Act, explaining it was a good time to settle because it could be a case in which a jury may be compelled to award punitive damages. In addition, I emphasized defendants should seriously consider avoiding the costs of discovery and briefing the case and cutting off fees. Hearing from a judge that "they may very well have this same conversation one year from now, so if they can cut off those costs now, it may not be a bad alternative" convinced them to settle.

In another case for breach of contract, I urged the plaintiff to treat the decision to settle as a business decision. I explained why it was in his best interest to "write off" the financial loss, just as he would do in the case of a bad loan instead of spending money chasing after it. Unless it is a matter of principle, I told the plaintiff, his calculation should be whether spending X today on attorneys' fees and costs going forward in the case will produce Y that is greater than the proposed settlement amount. Similarly, in a collection case, I urged plaintiff to "bite the bullet and move on, as life isn't perfect." If he were to pursue the case, he would incur additional expenses and anxiety in exchange for very little, if any, gain. Hearing from a judge that he should seriously consider the defendant's offer assisted the plaintiff in reaching a settlement.

Parties also benefit from having a judge explain how moving forward with the litigation can cause them to suffer psychologically. For example, in a breach of contract case in which a father and son were defendants, the son was looking backwards, holding onto resentment, and focusing on the merits. In contrast, the father was forward-looking and hoping to reestablish a relationship with the plaintiff. In the end, I capitalized on the virtues of the father's approach and explained why a settlement was truly in the best interests of father and son alike.

One of the more effective techniques to help bring about a resolution in the late stages of negotiations is to invite the reluctant party to write the court a letter. I will say: "If you accept this settlement, I want you to mark your calendar a year from now and let me know you regret having missed the opportunity to give your deposition, go to trial, pay additional fees and wait for another year to learn the outcome. In all my years on the bench, I am still waiting to receive the first letter from a party who regrets having settled." This approach causes the party to focus on what it means to continue litigating versus the certainty and closure created by settlement. It is most effective if used when the parties are close to an agreement.

"It's the principle of the thing" is a common refrain from parties who are refusing to settle. Oftentimes, when they say it's the principle, it is really about the money. In response to that line, I will tell the client: "Your attorney will be pleased to litigate to your last dollar on behalf of your principles." This generally causes the party to reflect on whether it is really principle or money that is important.

In contingent fee cases, a settlement will oftentimes require the plaintiff and his counsel to both be satisfied before a settlement can be reached. Whereas most defense counsel are paid regularly on an hourly basis, many plaintiffs' counsel work pursuant to a contingent fee agreement and are paid only from the settlement proceeds. In working to encourage a defendant to pay more money, it is useful to review with defendant that in order to settle, there will have to be enough money to satisfy plaintiff, his counsel, and sometimes a third party lien holder.

One of the surprising realities of settlement conferences is the number of tissue boxes we go through in a year. Tears are not uncommon in the caucus and a judge must be prepared to help. Tears are shed in all types of cases, including employment, personal injury and even commercial disputes. For example, in a sexual harassment case, the plaintiff cried in chambers when she detailed how her former coworkers subjected her to vulgar language, frequent invitations for sex, and unwelcome touching. In response, I expressed empathy for her and her situation and encouraged her to seriously consider settlement as a way to put the difficult memories behind her and move forward.

In another case, this time a personal injury action, two young children were injured on a ride at an amusement park; one of the children was present at the conference. When she told me about her injury and revealed the scar on her forehead, she and her parents cried. The family was also emotional when the young girl shared with the other side how her injury has affected her life. I found it was cathartic for the family to bring the two sides together so the plaintiffs could share the impact of the tragic injury on their lives, even though it was difficult for them. The exchange also

encouraged the defendant to seriously consider a higher range of settlement numbers.

Finally, in a recent civil rights case, the *pro se* plaintiff who was represented by appointed counsel through the court's Settlement Assistance Program cried during the first shuttle diplomacy session in chambers. A former gang member, he became emotional when he explained how he had turned his life around since his son was born. Admitting he had been arrested and convicted multiple times, he explained how he was trying to make sure his cousin, son and others do not join gangs by teaching them early and volunteering with community organizations. I expressed empathy for him, but cautioned a jury may not be able to look past his criminal history and recognize he has turned his life around.

These tearful encounters can be helpful as a means of giving parties their day in court and also in helping them understand they may have to undergo similar experiences in a deposition or at trial. A settlement conference therefore offers an opportunity to underscore the importance of attaining closure by means of a settlement.

CONCLUSION

The caucus is the most important stage of the settlement conference because it is where a settlement is negotiated. In order to be effective, a judge must be prepared to use a variety of tactics and strategies to achieve a settlement. The caucus with each party enables the judge to understand the underlying issues and impediments to settlement, determine whether there is an opportunity to find a method of resolving the dispute, not otherwise achievable through litigation, and to discern how to be most effective in resolving the dispute at issue. The parties, in turn, have the opportunity to have their "day in court," with a judge guiding them to explore their settlement options. During the caucus phase the heavy lifting takes place and settlements are reached. A judge can provide the necessary guidance to bring about a settlement by effectively conducting the caucus with each side.

Footnotes

1. I have previously written on the joint initial session, *Settlement Conference Techniques: A Judge's Opening Statement*, 45 The Judges' Journal of the American Bar Association 22 (Spring 2006), and the joint concluding phase, *Concluding a Successful Settlement Conference: It Ain't Over Till It's Over*, 39 Court Review 14 (Fall 2002).
2. *See* Appendix A.
3. My Standing Order Setting Settlement Conference provides in relevant part as follows:

   ATTENDANCE OF PARTIES REQUIRED. Parties with ultimate settlement authority must be personally present. An insured party shall appear by a representative of the insurer who is authorized to negotiate, and who has *authority to settle the matter up to the limits of the opposing parties' existing settlement demand*. An uninsured corporate party shall appear by a representative authorized to negotiate, and who has *authority to settle the matter up to the amount of the opposing parties' existing settlement demand or offer*. Having a client with authority available by telephone is *not* an acceptable alternative, except under the most extenuating circumstances.* Because the Court generally sets aside at least two hours for each conference, it is impossible for a party who is not present to appreciate the process and the reasons which may justify a change in one's perspective towards settlement.

4. *See, e.g.,* Calkins, Richard M., *Caucus Mediation—Putting Conciliation Back Into the Process: The Peacemaking Approach to Resolution, Peace, and Healing,* 54 Drake L. Rev. 289 (Winter 2006).
5. *See* Denlow and Shack, *Judicial Settlement Databases: Development and Uses*, 43 The Judges' Journal of the American Bar Association 19 (Winter 2004).
6. Roger Fisher, William Ury, and Bruce Patton, *Getting to Yes,* 34 (2d ed. 1992).
7. *See* Denlow, *Settlement Conference Techniques: A Judge's Opening Statement*, 45 The Judges' Journal of the American Bar Association 22 (Spring 2006).
8. For a detailed discussion of these impasse-breaking techniques, please refer to the following article: Denlow, *Breaking Impasses in Settlement Conferences: Five Techniques for Resolution*, The Judges' Journal of the American Bar Association 4 (Fall 2000).
9. *See supra* note 5.