

Instructions and Information for Settlement Conferences

Hon. Judge John Acosta

This document explains the settlement conference process as I conduct it and sets forth my expectations for settlement conference participants. Please read it carefully.

Voluntariness

Everyone is here because they want to be. Parties voluntarily agree to participate in a settlement conference and any party may elect at any time to discontinue its participation in a settlement conference. In other words, you can quit when you want and I won't make you stay. However, I expect that parties who voluntarily agree to participate in a settlement conference do so with the intent of participating in good faith and with a genuine interest in reaching a settlement agreement. So, don't request or participate in a settlement conference simply to make a record to be used later for some other purpose in the case. In the spirit of trying to resolve the case, I will devote the time reasonably necessary to assist the parties in reaching that goal. Remember that in the context of a settlement conference I will not exercise any authority as a judge to order or require any party to make an offer, accept an offer, or settle the case. If the case settles, it will be because the parties decide to settle it.

Confidentiality

This is a confidential process. That means two things. First, I will not disclose discussions with one party to another party without the consent of the disclosing party. Note, however, that I will advise all parties generally how I perceive the parties to be responding to the process and whether I believe progress is being made. Confidentiality survives the settlement conference whether or not the case is settled, and it continues to apply to any settlement discussions, written or oral, in which the I am involved after the conference.

Second, communications exchanged between the parties and me or between the parties during the conference are considered not admissible as evidence in the pending case, should settlement not occur. Likely, such communications, as well as communications between a party and its attorney regarding mediation and settlement, are not admissible in any other judicial proceeding as well. On these points, at least one judge in this district has so ruled. *See Fehr v. Kennedy, et al.*, No. 08-1102-KI, 2009 WL 2244193 (D. Or. July 24, 2009). However, the cases from other jurisdictions are not in complete agreement on this issue, so the parties should be aware that a court might rule that disclosure of such communications must be made in connection with a later dispute regarding settlement of the case or regarding matters discussed during mediation.

In any event, documents and facts disclosed by the parties during discovery or in other case proceedings that are subsequently used or referred to during the settlement conference are not confidential simply because they are used or referred to during the settlement conference. In

other words, discoverable information cannot be protected by using it or referring to it during a settlement conference.

Agreement to Mediate

An agreement to mediate is attached with these instructions. It covers confidentiality as well as other points to which the parties and their counsel will be asked to agree. Please review it and come to the settlement conference with a signed copy or be prepared to sign a copy of the agreement to mediate.

Attendees

Tell me the names of those who will attend the settlement conference on your side of the case and, if a party representative will attend, give me their title. Note that the trial attorney or, if different, the settlement attorney for each party must attend the settlement conference in person.

Each party also must be personally present or have present a representative who possesses full and final authority to settle the case without need to contact or confer with a person not present at the settlement conference. This is an important requirement. Telephone attendance at best is cumbersome and at worst frustrates the process. Therefore, it is not permitted unless a request is made in advance of the settlement conference, accompanied by one or more reasons that demonstrate good cause for the request. Note: geographic distance from Portland, by itself, does not constitute “good cause;” if participating in a judicial settlement conference to attempt a settlement is important to your client or client representative, then being here in-person to reach that goal should be equally important. Also bear in mind that in-person attendance is respectful of the other parties who are personally present.

Caucuses

During the settlement conference I will meet individually with each party and the party’s attorney, most likely more than once. These individual caucuses are intended to allow the parties and their attorneys to speak privately and candidly with me about the case and about options for reaching settlement. These individual caucuses will vary in length, depending on the complexity of the case and the settlement negotiations. There will be times when I am in the other party’s room for extended periods of time. During such periods your patience is appreciated.

Position Statement

The position statement is NOT a summary judgment brief. I mention this at the outset because I have received many such statements. I review the key pleadings before each settlement conference and will be familiar with the parties’ respective legal arguments. If the case file contains no briefs on the substantive legal issues in the case, you may reference key legal points, briefly, to illustrate your view of your position’s strengths and weaknesses. But

don't use the confidential position statement to convince me that you're going to obtain or thwart summary judgment, or that you'll prevail at trial. If you or your client are that confident about your case, then a settlement conference is a waste of everyone's time. Go to trial instead.

Be candid. It is completely unhelpful to me when a position statement trumpets the strengths of the party's case and admits to no weaknesses of any sort, and proclaims the myriad shortcomings of the opponent's case. Again, if you're that confident about your case, forego the settlement conference and go to trial. Remember that your statement is not given to the other parties; only I will read it. Thus, be candid; only if each party is candid with me can I identify the parties' common interests and start to build the foundation for a settlement agreement.

Be timely. Please send me your position statement five (5) business days in advance of the date the settlement conference will occur. I get many position statements only the day before the settlement conference, which reduces my ability to be fully prepared for the conference. Help me be prepared for your conference by timely submitting your statement. Note: to facilitate timeliness, you may e-mail your statement directly to me at John_Acosta@ord.uscourts.gov. If you e-mail your statement you need not also send me a copy by mail.

What to include. These things:

1. A description of the most important legal and factual issues.
2. An explanation of the issues or factors making settlement difficult.
3. Any overlapping interests between the parties that might create common ground for reaching settlement.
4. Your client's best alternative to a negotiated settlement agreement and worst alternative to a negotiated settlement agreement.
5. The outcomes that settlement could produce that would not be attainable through a trial or other formal disposition of the case.
6. The status of settlement negotiations, including the last settlement proposal made by each party. If the parties have settled some part of the case already, please tell me that and identify the issue or issues that have been settled.
7. The fees and costs you have incurred to date, and an estimate of the anticipated fees and costs you will incur to prepare, try, and participate in an appeal of the case.
8. The range you currently consider reasonable for settling the case. Note: this is not an invitation to tell me your "bottom line" number. In fact, I do not want to know that number, at least not at the outset of the settlement discussions. Nor is it an opportunity to stake-out some excessively high or low range from which you will bargain to a number that is merely unrealistic. If everyone starts from a reasonable position, we will get the case settled much faster or learn more quickly that the case cannot be settled.

Please keep the analysis brief and focused. You may attach key exhibits, such as

documents constituting the alleged contract, letters or e-mails that contain an alleged admissions, and similar documents, if the exhibits are critical to understanding the case or the parties' respective positions.

Tips. Settlement discussions will be more productive if everyone keeps in mind these points:

1. Come prepared to give up stuff. Settlement is a compromise, not a capitulation. Don't show up expecting the other side to give you everything you want or that I will be able to convince them to do so.
2. Expect that at some point during the process you will be outside your predetermined comfort zone. It is counter-productive and ultimately unrealistic to come into a settlement conference having already decided that you will not take less than a certain amount or not pay more than a certain amount. Almost always, parties who begin with that mind-set change their minds during the process. Keep an open mind and allow for the likelihood that you will hear information, arguments, and perspectives you hadn't known or considered previously.
3. Make meaningful and good-faith offers and counter-offers. Yes, it's scary to be the first one to make a "big" move. But, somebody has to do it first so it might as well be you. How does this help your settlement posture? Once you do, you give me the leverage to convince the other side to make a similarly meaningful move and you make it more difficult for the other side to justify incremental increases or decreases in their numbers. Plus, it moves the process toward final resolution more quickly and effectively.
4. Be reasonable. Really.

Settlement Authority

I expect the party who is in the position of being the paying party (usually the defendant or defendants) to come to the settlement conference with enough authority to settle the case. Opinions will vary on what amount of money constitutes "enough." I appreciate that the parties disagree on the settlement value of the case and that they asked for a settlement conference at least in part for that reason. However, for example, the paying party's representative should not attend the settlement conference if s/he has been told by someone else not attending the settlement conference that s/he must get a settlement for "X" because it won't agree to settle the case for more than that. Such a position does not allow for changes in the negotiating position when new information or new perspectives are revealed or discussed during the settlement conference. Such a position also is inconsistent with the requirement that the person with ultimate authority to settle the case attend the settlement conference.

Conclusion of the Settlement Conference

The settlement conference likely will result in one of three possible outcomes: settlement, no settlement, or continuation of settlement discussions beyond the day of the settlement conference. If the settlement conference results in an agreement to settle the case, I will ask the parties and their attorneys to sign a document that contains the essential terms of the parties' agreement before they leave the courthouse. In some cases a written agreement will be signed later because of agreed-upon contingencies that must be satisfied. In those cases, I will require the parties to sign a memorandum of understanding that states they have agreed in principle to settle the case, states the terms of the understanding, and makes clear that there is no agreement until the contingencies have occurred or been satisfied and a final agreement has been signed.

Post-Conference Procedure

If the parties reach a settlement, I will offer to retain jurisdiction over the settlement for purposes of resolving any disagreements about the settlement terms to which the parties agreed. I retain materials received or created in connection with the settlement discussions for a reasonable period of time following the settlement conference, in case I need to assist further settlement discussions, oversee implementation of the settlement agreement, or resolve any disputes arising out of the settlement agreement.