From the Bench

Can We Talk?

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Not long ago, the Seventh Circuit held that Rule 16 of the Federal Rules of Civil Procedure did not authorize a trial judge to direct a party to attend a settlement conference. *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 848 F.2d 1414 (7th Cir. 1988). That decision was, I think, justly criticized in the Fall 1988 issue of this magazine. More important, it was ultimately reversed by the full Seventh Circuit.

Despite the demise of *Heileman*, the panel opinion reflects a widespread misconception—the idea that a settlement conference attended only by lawyers can be productive. My experience as a trial judge has convinced me otherwise. Attendance of parties is essential. More than that, once the parties are involved, settlement conferences become a key part of a more efficient court system.

In Arizona, we avoided the problem that led to the panel opinion in *Heileman*. Our version of Rule 16 specifically provides that a judge may direct a party to participate in a pretrial conference. Our rule also allows the judge to require a nonlawyer, nonparty representative—an insurance adjuster, for example—to participate in the conference.

Our court has recently experimented with settlement conferences. Three of my colleagues and I participate in mandatory settlement conferences in *all* civil cases assigned to us that have been set for trial. After hosting hundreds of such conferences, we have concluded that it is absolutely essential that the parties be present. In fact, we have adopted a local rule *mandating* settlement conferences with the parties present. The party, not the lawyer, is the key to a successful conference. The party, not the lawyer, may harbor a hidden agenda and unrealistic expectations. It is the party, not the lawyer, who must come face to face with the realities of the litigation.

This is what we have learned:

First, be wary of lawyers who say they have complete, absolute authority from their client to settle. They do not. When they say they do, the case doesn't settle.

Second, effective risk evaluation, which is at the heart of successful settlement conferences, is impossible unless the client is present. The client's risks, after all, are at stake. Though the lawyer, sophisticated in the litigation process, may understand a case's pitfalls, the client, often driven by emotion or hidden motives, must be confronted personally with the weaknesses of the case to gain that insight.

Third, a client needs a day in court. The settlement conference can be that: It is an opportunity for the client to be heard by an impartial, neutral third party. Just telling the story can be cathartic for the client. Once catharsis occurs, working out the details of the settlement can be relatively simple.

Finally, participation makes the settlement the client's; it is less likely to be seen as an imposition by an overbearing lawyer or a misguided judge. A client often leaves a successful settlement conference feeling that, although the rewards were less than a trial might have yielded, his treatment was nevertheless fair and just.

Settlement Authority

It is worth reviewing these points, one by one.

First, settlement authority. Lawyers really do not have the authority they claim to have. I cannot tell you how many times I was burned by believing lawyers who said they did. Each time I acceded to a lawyer's request to hold the conference without his client, I regretted it. The case never settled. Everyone's time was wasted.

It never happens that a lawyer has absolute authority to settle a case. It is never true that a client will do whatever his lawyer says. The lawyer and client usually will have discussed the limits of the acceptable before the conference. The problem is that success at a settlement conference often requires the parties to reevaluate their positions; they must move beyond what they previously believed was acceptable. The lawyer alone cannot have authority to make such a move.

In a successful settlement conference, a plaintiff often agrees to take less, and a defendant agrees to pay more, than he intended before the conference began. If a party sets preconference limits, how can his lawyer later

tell him that those limits had to be exceeded to reach settlement? Only if the client is present to appreciate the need for concessions can a realistic compromise be reached.

Effective risk evaluation is also essential to settlement. This comes up in a number of ways. Consider, for example, the unsophisticated party who is unrealistic about the value of his case, a common and understandable phenomenon. The client has experienced the personal trauma of pain, unhappiness, or financial reverse that produced the lawsuit. For him, it is more a crusade than an intellectual exercise or business matter. The client's emotional investment impedes his ability to see the other side of the case. Self-imposed blinders fortify the client's headstrong refusal to accept a compromise.

A lawyer with such a client may have trouble dealing with this attitude. It is a great help to have her client hear the pitfalls of his case from the judge and the opposing party. The lawyer does not have to be the heavy; she need not fear the client's losing confidence in her. The judge and the opposing party can say the things that the lawyer never could. The result is that the message gets across without the lawyer losing a client.

Blinded by Zeal

It is not always the client who is unrealistic. The lawyer may have unreasonable expectations. Here again, hardheaded risk evaluation is needed. The unrealistic lawyer comes to a settlement conference armed with the weapons of excessive zeal and advocacy: She does not have the open, reasonable mind of someone prepared to explore settlement. In such a case, the judge can speak directly to the client. I do not mean that the lawyer is physically removed from the conference or the courthouse. Instead, the judge should address the client without passing his comments through the lens of the attorney's zealotry.

I did this in a case of questionable liability, but tragic damages. A young man had been rendered quadriplegic from a dive into a shallow recreational lake. The lake was privately owned. Though there were many signs forbidding swimming, they did not warn of any specific dangers. Despite the signs, young people often swam in the lake.

The young plaintiff dived and hit an anchor lying at the bottom of the lake. Defendant's insurance company had offered $2.5 million to settle. Plaintiff's counsel was a renowned, successful, and high-powered attorney with a well-earned reputation for having the courage to back up his demands, take risks, and go to trial. But was his client willing to take the risk?

To reach a settlement, I had to neutralize the contribution of plaintiff's counsel. He was forever the advocate, a brave soldier ready to do combat, quick to point out how strong his client's case was. He was filled with bravado and confidence. Whenever I tried to explain to the client that there was a substantial risk of total loss—no recovery—the lawyer had a ready answer. He showed no fear. He would not back down.

In fact, the case had many weaknesses and could have been lost completely. It was the client, not the lawyer, who ultimately had to make the hard decision to settle or not. I kept emphasizing and explaining this to the client. He finally decided to settle and accept less than was demanded by his attorney, but more than was first offered by the defendant's insurer. If I had not spoken directly to the plaintiff, I believe there would have been no settlement.

What about catharsis? A settlement conference gives the client a day in court. It lets him unload and tell the story. Take, for example, the case of an elderly husband and wife who owned about 390 acres of farmland southwest of Phoenix. The couple had entered into a contract to sell 240 of the acres to a real estate developer. When the couple refused to perform, the developer sued for specific performance or, alternatively, damages.

Apparently the couple had previously entered into an option agreement with a third party to sell the same acreage at a lower price. There was a substantial question whether the third party had defrauded the couple into entering into the contract; but they nevertheless felt bound, and consummated the transaction.

The developer moved for summary judgment, arguing that the couple was in breach and that the only remaining issue was damages. The couple cross-moved for summary judgment to dismiss the complaint. I granted the developer's motion and set the matter for damages trial.

When the parties came in for a settlement conference, the couple, especially the wife, was outraged at my ruling. She let me have it with both barrels. I was told loud and clear that the husband and wife had labored mightily for 40 years to keep their farm—and I had taken it all away from them. The couple's lawyer became nervous and agitated as his client vented her spleen. At first with body language and then with words, the embarrassed lawyer repeatedly warned his client that she had said enough. I kept telling the lawyer to be quiet and let his client talk. The client did talk, and I listened.

Settlement Follows Anger

Once the wife had finished, the settlement came easily. She understood that I was not a faceless ogre out to destroy her, but a human being charged with evenhandedly applying the law as I understood it. I was able to help the parties come out of the dispute so that each side felt the result was beneficial. We created a joint venture to market 140 of the remaining 150 acres to produce a profit for both sides. The final ten acres continued as the couple's homestead.

As this example illustrates, an effective settlement conference leaves the parties believing that what they get—though not as much as they hoped for—is nevertheless fair and just. In this case there was something in it for me, too: the satisfying feeling of being transformed from a villain to a hero. All this was possible only because a party had an opportunity to express herself. Without the settlement conference, the case would have been tried. Instead of two parties who felt like winners, at best there would have been one winner and one loser. More likely, there would have been two losers.

My farm-sale case illustrates another important aspect of settlement conferences: They provide an opportunity for creativity and flexibility not possible in a litigated suit. In a trial, the issues and relief requested are circumscribed. We never could have reached the result we did through litigation.

Another example of the flexibility of settlement conferences is a case that involved the sale of a strangely shaped

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of reported opinions decline to punish litigants who have destroyed evidence as part of a routine program.

The relative success of document management programs underscores an important fact. The "intent" that makes evidence destruction sanctionable has traditionally been lawsuit specific, not general; the aim must be to hamper a particular lawsuit, pending or foreseeable. A general purpose to hamper all hostile litigation—though not something that has garnered judicial applause—has not often been condemned either.

Even so, evidence destruction is much more likely to have been intentional if not part of a formal program, but the converse is not true: Routine destruction is not necessarily inadvertent. For this reason, courts may find the requisite lawsuit-specific intent when a corporation fails to suspend operation of a document destruction program and litigation is pending or forseeable. Allowing destruction to proceed can constitute an intentional omission deserving the same consequences as an intentional act to destroy evidence.

Destroying Key Documents

In *Wm. T. Thompson Co. v. General Nutrition Corp., supra*, for example, the court found the defendant guilty of "knowingly and purposefully permitting its employees to destroy key documents and records." The court faulted the defendant's president for issuing a memorandum to all personnel "advising them that the [court's document preservation] Order 'should not require us to change our standard document retention or destruction policies or practices.' " According to the court, that memorandum "operated to authorize or condone . . . practices which resulted in the destruction of critical evidence" and (along with other questionable acts and omissions) justified money sanctions and entry of a default judgment. 593 F. Supp. at 1447–48, 1455–57.

In addition, courts are now beginning to define lawsuit-specific intent to include whole classes of litigation rather than particular cases. Corporations may thus risk sanctions if they routinely destroy documents they know will be subject to repeated requests in litigation the company often faces. Courts seem to be saying that the need to promote fairness and to resolve lawsuits on their merits forbid routine destruction of evidence relevant to lawsuits in which a corporation or agency is customarily engaged (at least through the period set by the applicable statute of limitations)—even if no specific suit is on the immediate horizon.

In *Lewy v. Remington Arms Co., Inc.*, 836 F.2d 1104 (8th Cir. 1988), for example, the defendant, a rifle manufacturer, routinely destroyed customer complaints and gun examination reports after three years. Remington argued that, because the reports were destroyed as part of a routine document destruction program, no spoliation inference was called for. An Eighth Circuit panel disagreed, stating that the trial court on remand could "find that under the particular circumstances certain documents should have been retained notwithstanding the policy."

The panel's description of what might constitute "particular circumstances" is instructive:

> . . . if the corporation knew or should have known that the documents would become material at some point in the future then such documents should have been preserved. Thus, a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy.

The appellate court asked the district judge to consider two factors on remand. The first was the reasonableness of aspects of the document destruction program: ". . . [T]he court should determine whether a three year retention policy is reasonable given the particular document." In determining reasonableness, the court should "consider whether lawsuits concerning the complaint or related complaints have been filed, the frequency of such complaints, and the magnitude of such complaints." The second factor was whether the document retention program was instituted in "bad faith." Bad faith could be found if "a document retention program is instituted in order to limit damaging evidence available to potential plaintiffs."

The law on destruction of evidence is dynamic. Cases like *Remington Arms* show that it continues to change. Fifteen years ago, there were only limited sanctions related to particular suits; today the available sanctions are many and can be severe. Fifteen months ago, regular disposal programs might have seemed a safe harbor, but that may change too.

Only one thing is certain: over the course of the last two decades, courts have become much less tolerant of evidence destruction. The trend shows no sign of reversal. Next time, think twice before you turn on the shredder.

From the Bench

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parcel of land formerly used as a dairy farm. Because of its strange shape, the land was hard to market, but a private school became interested in buying the property and building a branch on it. The deal required the buyer to exercise its best efforts to obtain the zoning necessary to complete the transaction. The contract price was $1,200,000.

The zoning changes were never obtained. The seller got an appraisal of the property at $600,000 and claimed damages of $600,000. The buyer insisted that the property was worth $1,200,000 as is and that there was no damage. At the settlement conference, I convinced the parties to have the property sold for $900,000 without the zoning changes. If the buyer sincerely believed the property was worth $1,200,000, it could not go wrong by buying it and either building a school or later selling the property for what it believed was its real value. The seller also benefited. It got a $300,000 profit. Neither party could lose.

Settlement conferences have value beyond their benefits to the litigants. I believe they are also essential for the system as a whole. The mandatory settlement conference with parties included will become an integral part of a "fast track" system that has made Maricopa County (Phoenix) Superior Court a model for case management and reduction of delay. (Our court was recently honored by the National Center for State Courts for its contribution to the improvement of the administration of justice.)

In the ten years since we implemented a fast-track system, we have

reduced the median time from filing to disposition from more than 32 months to approximately 18. The preliminary results of our experience with mandatory settlement conferences indicate that, along with other case-management techniques, settlement conferences reduce delay and improve the administration of justice.

Of course, the mandatory settlement conference is simply part of an overall approach to fast-track case management. We place control of the calendar in the hands of the court, not the lawyers. Virtually all cases are subject to a specific, presumptive pace of litigation. The parties must exchange a list of witnesses and exhibits before filing a motion to set trial. If such a motion to set is not filed within 11 months from the filing of the complaint, the case will be dismissed. In return for imposition of such strict time standards, judges are committed to delivering firm trial dates. Trials are not overbooked. Lawyers and the parties now know that a firm trial date means exactly that.

Fast-Track Change

By implementing a fast-track system, we have changed the local legal culture. Under the old system, lawyers controlled the calendar. There was no deadline for securing a trial setting. A case could languish indefinitely. Even when a trial date was requested and set by the court, there was no expectation that the trial would go. Trials were continued—either because of overbooking or because the lawyers stipulated for a continuance, stating no reasons. It was not unusual to have as many as six continuances. The result was excessive delay and increased costs.

Fast track has changed all that. Cases no longer languish. They are prosecuted and disposed of efficiently. Delay has been reduced, and, in my view, the quality of justice has improved.

Fast track has not, however, been without its detractors. Judges must learn to say no, and this can make them unpopular. Lawyers must prepare for trial at a pace considerably less than leisurely.

There are also specific criticisms. Some critics say the fast track fosters sharp practices and technical maneuvering. No longer is the practice of law genteel and honorable, the critics contend. Instead of courteously accommodating one another, lawyers must watch their backs or risk seeming less than diligent to the judge. We still hear attorneys' plaintive cries for a return to the good old less stressful, harmonious days.

Despite such arguments, the judges and the great majority of the bar are committed to fast-track case management. In fact, the bench and the bar together implemented fast track ten years ago through a civil study committee made up of civil judges and leading lawyers. This same committee also pressed the court to become more active in settlement. Additional pressure came from an annual workshop held under the auspices of the Arizona Supreme Court at which judges throughout the state were taught settlement conference techniques.

Getting an effective approach to settlement, had some unexpected twists, however. Consider this: The principal settlement technique taught in the Supreme Court's workshop was "caucusing," a concept borrowed from professional mediators. Caucusing is simply another word for ex parte communications.

The workshop taught that only through caucusing could judges successfully facilitate settlements. Only through caucusing can they get the parties to talk openly and candidly. And only through caucusing can judges talk frankly to the parties. Without candor, a judge cannot effectively point out the risks of the litigation. Without candor, the parties remain guarded; they posture. Without candor, there is no meaningful dialogue. *But*—and this is the key—such candor may be stifled at first if the other side is present.

This creates a problem. Caucusing is fine for mediators, but caucusing—ex parte discussions—by judges potentially violates Canon 3(a)(4) of the Code of Judicial Conduct. That canon provides that, unless otherwise authorized by law, judges are prohibited from engaging in ex parte communications in any judicial proceeding.

The answer in Arizona was to amend the state's version of Rule 16. Language was added to permit a settlement conference judge to speak ex parte if all the participants in the settlement conference consented. The change is contained in Rule 16(a)(5), Arizona Rules of Civil Procedure. The "as authorized by law" exception to Canon 3(a)(4) was thus satisfied; judges could caucus.

Once the settlement rules were in place, they were given a test flight. The four judges who participated in the initial experiment set mandatory settlement conferences in civil cases approximately 60 days before the trial setting. The parties furnished memoranda to educate the court about the case and each side's positions. The contents of the memoranda were what you would see in a demand letter or in a response to one.

Survey Results

The court also required the presence of counsel and either the party or a nonparty representative with authority to settle. The parties were warned that failure to comply with the scheduling order or to participate in good faith could lead to sanctions under Rule 16(f), a provision contained in both the Arizona rule and the federal rule at issue in *Heileman*.

The judges participating in the experiment asked attorneys to fill out exit questionnaires. The responses showed that almost 60 percent of the attorneys would not have asked for a settlement conference on their own. About 75 percent indicated that no significant progress toward settlement had been made before the conference. Almost 70 percent agreed that their cases would not have settled without the conference. More than 90 percent agreed that the cases settled because of the judge's involvement. Eighty-eight percent of the attorneys and 85 percent of the clients reported satisfaction with the settlement.

Further analysis showed that about 82 percent of the cases submitted to the mandatory settlement conference process settled before trial, compared to a settlement rate of approximately 61 percent in the nonparticipating civil divisions. The time from filing to disposition in cases subject to mandatory settlement conferences was 18.7 months, compared to 20.7 months for all other cases. The time from the filing of the motion to set to disposition was 6.5 months in mandatory settlement conference cases, compared to 8.2 months for all cases. In short, more cases were settled, and they settled sooner.

Such facts are significant. They highlight the systemic benefits of settlement conferences. But the most important thing that lawyers and judges in Mari-

copa County have learned on the subject is this: An effective settlement conference is the result of subtle, but dynamic, human forces. Lawyers and judges too often are cold and abstract as they approach dispute resolution. They are accustomed to intellectualizing or engaging in adversary combat. By bringing clients to the negotiating or mediating table, we address human needs, and we move cases along. The result is a better, more efficient, and more satisfying kind of justice.

Probing Questions

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Q. They can create new ones that weren't there, can't they?
A. They can't create new "points."
Q. They can make ones look like new ones that really shouldn't look like new ones, isn't that true?
A. It's possible, yes.
Q. And that's all said in these texts that you have read, isn't that true?
A. Yes.
Q. So, you have to be awful careful in lifting a fingerprint, isn't that so?

The trick, once you have gotten something good (possibly from open-ended questions), is to lock it in and hammer it home with leading questions. You must of course avoid cumulative or precisely duplicative questions. As in Spence's cross-examination, the point is to introduce a small variation with each leading question. The overall effect is to underscore the point for the trier of fact.

Another example of the combined use of ordinary probing and rhetorical leading questions comes from a case I tried. The suit was brought by a widow against her late husband's mother; it challenged certain transfers of property made while the husband was suffering from a brain tumor. An assistant clerk of court, a distant relative in the husband's family, testified that she had witnessed the husband's execution of a power of attorney in favor of the mother. Cross-examination uncovered certain facts by ordinary probing:

Q. Where was [the husband] when you witnessed the execution of this document, Plaintiff's Exhibit 52?
A. He was at his home, in his den.
Q. What time of day was it?
A. It was at night, about 8:00 o'clock.
Q. Who was there with him at that time?
A. His mother and his brother.
Q. Was his wife there?
A. No, she wasn't.
Q. Who asked you to go out to his house and witness the execution of this power of attorney?
A. Mrs. Wall [his mother] called and asked me to do it.
Q. In your career as an assistant clerk of court, had anyone ever asked you to do something like that before, to go to someone's home to witness the signing of a legal document?
A. No.
Q. Who told you that he wanted to sign this document, Exhibit 52?
A. Mrs. Wall.
Q. What did you say to Kenneth [the husband]?
A. I asked him if he had read the power of attorney and if he understood it.
Q. What did he say?
A. He said that he had. Then I watched him sign it and I completed the acknowledgement and sealed it.
Q. Did he read the power of attorney to you?
A. No.
Q. Did you see him read it?
A. No.
Q. Did you read it to him?
A. No.

These questions demonstrated that the witness could not know what the husband really understood about the meaning of the lengthy power of attorney, which, like most such documents, was full of enough legalese to choke a law professor. A question could have been asked just that way but it would have fallen flat. Instead, the point was driven home by rhetorical probing into the various paragraphs of the document:

Q. So you have no way of knowing whether he actually understood what this document meant when it said, "I do specifically authorize my attorney-in-fact in my name and on my behalf to sell or lease real estate or personal property, tangible and intangible, including automobiles, stocks, bonds or other evidence of ownership or debt in which I have or may hereafter have any interest whatever, and to endorse, sign or assign said stock certificates or bonds or other instruments therewith; . . . ."?
A. Well, no.
Q. And you also have no way of knowing whether he actually understood what this document meant when it authorized the attorney-in-fact "to execute deeds, leases, deeds of trust, and other instruments conveying or encumbering real or personal property, and generally to deal with such property as fully as I might if personally present and acting. . . ."?
A. No.

Similar questions followed for many of the 14 paragraphs in the power of attorney.

Irving Younger called his rules of cross-examination "commandments." Though adherence to his rules would vastly improve cross-examination as it is actually practiced, the term commandment is surely a rhetorical flourish. Better to call them "guides" or "starting points," and to recognize when creative violation is necessary.

In fact, trial lawyers today chafe under too many restrictions and rules. These days, a lawyer cannot approach a witness without permission from the judge. He cannot question prospective jurors in voir dire. He cannot "argue" in an opening statement. Trial lawyers are shackled by limits, restrictions, and rules that try to define good advocacy. Life is too varied for that; a lawyer should not slavishly adhere to a self-imposed set of rules for cross-examination.

Irving Younger was right to say that, usually, leading questions are the order of the day and that, usually, all answers must be known in advance. But advocacy is continually refined, and exceptions prove even Professor Younger's rules. A complete cross-examiner should be an artful prober as well as a good leader.