

NEWSLETTERS

Don't Feel Pressured To Settle A Case That You Don't Want To Settle

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Clients participating in a settlement conference or mediation often feel pressure to settle. Many times, the pressure springs from legitimate considerations – such as the desire to liquidate the risks of an adverse outcome, eliminate the expense of future litigation, or prioritize other business interests. Other times, clients with strong convictions may not be interested in a traditional settlement dialogue – let alone making an opening offer. But even then, clients may feel pressured to settle a case that they don't want to settle based on fears that the presiding judge or arbitrator may not look favorably on them if they refuse to settle or make an offer.

Fears of retribution usually are not valid. Clients have the freedom to engage in settlement talks without fearing sanctions or other adverse consequences if the matter does not settle. Further, clients with strong convictions should not feel compelled to engage in a traditional settlement narrative of moving toward a mid-point, unless they have business reasons for doing so.

The body of law developed around settlement conferences and mediations establishes that clients have at least three core rights and protections relative to the settlement process:

- **You cannot be coerced to settle by threat of sanctions.**

Courts recognize that judges cannot coerce parties to settle by threatening sanctions for refusing to settle. *Gevas v. Ghosh*, 566 F.3d 717, 719 (7th Cir. 2009) (“A judge may not coerce a party into settling. Coercion occurs when a judge threatens to penalize a party that refuses to settle.”). Specifically, judges cannot threaten to sanction a party for refusing to agree to a settlement proposal. *Shaffer v. Farm Fresh, Inc.*, 966 F.2d 142, 146 (4th Cir. 1992) (“... a court may not use the threat of sanctions directly to force settlement of a case . . .”).

- **You cannot be coerced to settle by threat of other consequences.**

Courts recognize that judges cannot coerce parties to settle by threatening consequences other than sanctions. For example, a judge cannot threaten to rule against your position on a pending

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Matthew B. Barr

Partner
Indianapolis

P 317-231-6498
F 317-231-7433
matthew.barr@btlaw.com

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motion if the case does not settle. While the judge may rule against your position, judges may not make punitive rulings based on a party's refusal to reach a settlement. *Cantu v. U.S.*, 2012 U.S Dist. LEXIS 174944, *14 (D. D.C. Dec. 11, 2012) ("Coercing parties to settle is not only beyond a federal court's authority, but also is prohibited by the ethical rules that govern the conduct of federal judges").

- **You cannot be forced to make a settlement offer against your will.**

Protections against coercion extend so far that judges may not even require a party to make an opening offer at a mediation or settlement conference. *Dawson v. U.S.*, 68 F.3d 886, 897-99 (5th Cir. 1995) (finding a trial court abused its discretion in requiring party to make a settlement offer as part of a good faith effort to settle). A client filled with conviction has a right to elect to participate in a mediation or settlement conference without making an offer. *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 653 (7th Cir. 1989) ("If this case represented a situation where [defendant] had sent a corporate representative and was sanctioned because that person refused to make an offer to pay money – that is, refused to submit to settlement coercion – we would be faced with a decidedly different issue – a situation we would not countenance.")

Whether aggressive settlement positions are effective is a separate question that depends on a confluence of factors, including the personalities of persons involved in the case and the merits of your legal position. But fear of sanctions or other adverse consequences usually should not determine whether and how a client will negotiate. While it is true that judges can require parties to talk settlement, only the parties control whether a settlement occurs.

Matthew B. Barr is a partner in the Indianapolis office of Barnes & Thornburg LLP. He can be reached at (317) 231-6498 or matthew.barr@btlaw.com.

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