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1. INTRODUCTION

The intent of this paper is to offer insights and methods directed at helping you achieve a higher settlement success rate at Settlement Conferences. If the parties cannot settle, then this paper is also intended to help you assist the parties at Settlement Conferences in effective preparation for trial.

This paper is not a complete compendium of methods.

A lot of what is said in this paper sounds as though you are being directed as to what to do. That is just my method of expressing the recommendations I offer. Pick and choose what if anything suits you best to achieve the purposes of Settlement Conferences, and present whatever you choose in your own way.

Your actual implementation of some of the suggestions might be short. Perhaps just a brief comment to the parties will suffice. Others will require more explanation and possibly supporting Orders.

Everything I offer is in keeping with your authority contained in the Small Claims Court Rules.

You have a lot to you need to accomplish in Settlement Conferences in a very limited time.

You must exercise and maintain firm control of the process to ensure the purposes of the Settlement Conference are met.

Before getting into the insights and methods offered in this paper, Sections 2, 3 and 4, are intended to provide you with some important perspective. They emphasize the importance of achieving settlement. They are not to affect your decision making, but may assist in your providing needed and essential guidance to the parties before you.

2. LITERACY IMPEDIMENTS TO ACCESSING JUSTICE IN THE SMALL CLAIMS COURT

I found this with a Google search on the Net.

The Conference Board of Canada provided the following information:

Forty-eight per cent of Canadian adults have inadequate literacy skills.

So almost half of the adult Canadian public struggle with literacy.

Dealing with Small Claims Court claims is complicated at the best of times, but trying to manoeuvre one's way to justice with inadequate literacy skills could be most difficult to achieve without your help.

It is important therefore that you assist those, with inadequate literacy skills, throughout the hearing. Not just at the start of it.

You can and should do that in order to ensure that the ultimate outcome is based on the merits of the case.

It can be done without your becoming or being seen to have become their advocate.

3. THE WORD "SMALL" IS RELATIVE

The cost to pursue justice in the Small Claims Court is anything but "small".

Hourly rates for representation are high and many hours are required.

That likely explains why so many litigants are forced to self represent.

Here are some stats taken from another internet search, and probably also reliable:

- Canada's median age is 40.2.
- For the age group of 25 to 54 the median income is \$49,900.00, and that is before taxes.
- The poverty line for a single person is \$19,930.

4. REPRESENTATION IS APPROPRIATE AND USUALLY QUITE NECESSARY, BUT VERY COSTLY

So, the jurisdiction of this court, at \$35,000, is anything but "Small".

The cost to pursue justice in Small Claims Court is a serious financial challenge for a large proportion of the public who appear before you.

Now to the insights and methods sections of this paper to assist in achieving settlement and failing that, effective preparation for trial.

5. OFFER REASONS TO SETTLE

I suggest that at the outset you advise the parties and their representatives of the following important considerations, to encourage settlement.

I suggest you might say something like this:

“- Settling will save you, and your witnesses, significant dollars arising from lost wages, that is the income loss for the time you and they will have to take off from work to come to court for your trial;

- Settling can result in significant savings for you by avoiding the disbursements you will incur if you end up going to trial. That includes disbursements such as expert’s expenses, which can be very costly;

- Settling will save you the very significant expense of your legal representation, which can be very high, sometimes running into thousands of dollars, if you have to go to trial;

- Even if you are successful at trial, only part, not all, just a portion of your legal expenses are capable of being recovered by you from the other side. This is because the Small Claims Court Rules provide that only part, not all, just part of your expenses are permitted to be ordered by the Trial Judge, at the end of a trial, to be paid by one side to the other side;

- If you lose at trial you might be ordered to pay a heavy costs award to the other side by the trial Judge;

- And, trials are risky, disruptive, time consuming, and anxiety producing.”

6. PURPOSES, PRESCRIBED IN THE RULES FOR SETTLEMENT CONFERENCES, WHICH YOU ARE SUPPOSED TO ACHIEVE

The purposes of Settlement Conferences is set out in Rule 13.03 (1) (a), (b), (c), (d) and (e).

That Rule sets out 5 things that you are supposed to achieve in a Settlement Conference.

You might consider these 5 purposes as what you are “mandated” to do.

These 5 purposes are as follows:

(a) and (b) are straight forward. To resolve or narrow the issues in the action, and expedite the disposition of the action.

(c) is the fundamental purpose, reflected in the name “Settlement” conference. It states: “(c) to encourage settlement of the action”.

But to get to that settlement and failing that to get the parties prepared effectively for trial, you must accomplish what is set out in sub rules (d) and (e), of Rule 13.03 (1).

These are as follows:

(d) **assist the parties in effective preparation for trial;** and,

(e) **provide full disclosure between the parties of the relevant facts and evidence.**

That is a lot to accomplish in your limited time.

As pointed out later in this paper, you may need to require a continuation of the Settlement Conference before you in order to complete it properly.

7. YOUR INTRODUCTORY REMARKS AT THE SETTLEMENT CONFERENCE

I suggest you tell the parties that this is a collaborative effort, and there are Rules that require their participation with which they must comply.

You can advise the parties that it is your intent, with their participation, to assist them in negotiating a settlement, but that if they cannot settle, then you intend to assist them to prepare effectively for trial.

You can tell them you intend to do the following:

- help them to resolve or narrow the issues;
 - make sure there is full disclosure of relevant facts and evidence; and,
 - ensure, in the presence of both sides, together at the same time, that there is an open, frank and fair exposure of the strengths and weaknesses of their case.
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8. IT IS OF FUNDAMENTAL IMPORTANCE FOR YOU TO BE THOROUGHLY PREPARED BEFORE YOU START THE SETTLEMENT CONFERENCE

There's an old maxim, "Failing to prepare is preparing to fail."

There is a Rule, regarding preparation, for the parties. Rule 13.02 (7) (a) provides:

"the court may award costs against a person who attends a settlement conference if, in the opinion of the court, the person is so inadequately prepared as to frustrate the purposes of the conference".

This is just one example of the purposes of a Settlement Conference being frustrated by a party.

As you will see, in this paper I suggest that if you are encountering any situations where the purposes of the Settlement Conference are being frustrated by someone, be that a party or the party's representative, then you should, without hesitation, use your authority and apply the Rules. This could result in you ordering a further Settlement Conference, and quite likely, making a significant costs award against the offender. Some reasons that may prove necessary and a process is outlined in this paper.

If the problem is encountered during a Settlement Conference you are in the process of conducting, then you should order it continue before you.

I also have a suggestion, below, regarding your approach to your costs Orders at Settlement Conferences for your consideration.

But, regarding that aforementioned Rule 13.02 (7) (a), on preparation by the parties, here is another saying you have likely heard.

It is: "What's sauce for the goose is sauce for the gander."

What I mean by that is that you, too, have to be adequately prepared.

And you have to do that in advance of the Settlement Conference so that you are not the one who ends up frustrating the purposes of the conference.

You have to prepare, before you begin to conduct the Settlement Conference, by having fully and completely familiarized yourself with the

facts, as disclosed by the contents of the court file, and by having considered the applicable law.

Litigants come before you expecting you to be knowledgeable about their case and the applicable law.

If you are not properly prepared you will be letting the parties down, and potentially leading them onto a tough and very expensive road ahead, perhaps to an avoidable trial, or into an unjust settlement.

9. WHAT DO YOU DO IF YOU ARE UNABLE TO GET WHAT YOU REQUIRE TO ACHIEVE YOUR PROPER PREPARATION IN ADVANCE OF THE SETTLEMENT CONFERENCE

However, proper preparation requires that, before you do it, you must have everything you need, and have it sufficiently in advance of the Settlement Conference that you are not left scrambling, trying hurriedly, with inadequate time, to review the materials, and consider the applicable law, in order to get prepared.

If you are unable to get all the documents you require, from the court staff or otherwise, in the timely fashion within which you require them in order for you to become properly prepared, then your ability to perform an effective Settlement Conference is thwarted.

That will fall upon the parties to their significant detriment.

The parties will not get all that they are supposed to get from the Settlement Conference.

The process will have failed them.

In that case, you have to adjourn the Settlement Conference to another date, although it need not be before you if you have not started the Settlement Conference.

You must be properly prepared so that you can fulfill the mandates of Rule 13.03 (1), (a) through (e).

If you don't properly prepare, and instead try to proceed, not fully and properly prepared as you need to and should be, that is not acceptable. That will result in a failure of justice.

You will then be sending the parties off:

- without your fully informed guidance;
 - without the benefit of the fuller disclosure of the facts, and evidence, and law, which they would have achieved with your help;
 - without the settlement that you might have achieved for them; and,
 - with the resultant harsh and heavy expenses and inconvenience of having to go to a trial which might have been avoided, (and which, by the way, also results in the need for much greater use of court time.)
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10. REQUIRING THE PARTIES ATTEND IN PERSON

The parties must be present for you to perform the numerous tasks that are mandated for Settlement Conferences Judges by Rule 13.03 (1) (a) - (e).

Rule 13.02 (1), regarding attendance by the parties, is phrased in a mandatory fashion, using the word “shall”:

It states:

“ A party and the party’s representative, if any, shall, unless the court orders otherwise, participate in the settlement conference,
(a) by personal attendance; or
(b) by telephone or video conference in accordance with rule 1.07.”

I suggest that you apply this Rule strictly, even where there is representative who attends before you, without their party, and advises that they have tried and settlement will not be occurring.

Or says that they are ready to proceed, in the absence of their client, and assert that they know all about the case, and have full authority, and that their client is reachable and can provide additional instructions, if necessary.

Or says that they are ready to proceed, in the absence of their client, and assert that they know all about the case, and have full authority, but their client is not reachable for further instructions.

You have to find out, first, why their client is not there.

If there is no valid reason, then I suggest that you tell that representative that regarding attendance by the parties, the Rule says “shall” and, as with all Rules, that Rule must be complied with.

Either they get their client, the party, there promptly, or you will be ordering an adjournment to another date, with a costs Order against their party.

You might also offer to bring the absent party into the Settlement Conference by video or telephone conference, or even by a cell phone on speaker phone mode, and proceed with the Settlement Conference once that has been done.

If, however, getting that attendance, in any fashion, is not going to be possible, then, subject to Section 13, below, you really have no choice. You should put the matter over with an appropriate costs award.

11. GET THE ATTENDING PARTY'S HELP TO TRY TO REACH THE ABSENT PARTY BEFORE PUTTING THE MATTER OVER

Where one party has attended and the other party has not, not even by representative, then before you order another date and address the question of costs, consider doing this, first.

Have the party who is present assist in calling the absent party, right then and there, to see why the absent party is not there. If needed, help out in making the call, with contact information from the court file.

On one occasion, when I did that, we reached the missing party and learned that she knew nothing about the Settlement Conference date as she had not received the Notice. She was brought in on the plaintiff's cell phone on speaker mode. We got that case settled then and there.

In another case we found out that the absent party was in hospital.

12. A "JUST IN CASE" APPROACH TO YOUR COSTS ORDER

Regarding your costs award, in the case of a missing and unaccounted for party, where there is no one appearing on their behalf, and if you cannot reach them with the attending party's help, or find out from the file, or from the court clerk you speak to (if you can reach one,) or otherwise the reason

for their absence, then consider doing this for your costs award, if you are intending to award costs.

What you can do is calculate the amount that you would award, and then endorse your costs Orders, but state the requirement to pay those costs in such a way in your Order that the attending party is to get those costs unless the absent party can satisfy the Judge, at the subsequent Settlement Conference, that there was an adequate reason for their non-attendance, sufficient to warrant the costs award not going against them, akin to a purging of contempt.

For example, as I indicated above, where the absent party was in hospital, had we not found out the reason for the absence, with the help of the party who did attend, and instead had I just made the usual Order for costs against the absent party, it would have been a done deal, and could have ended up a *fait accompli*, and inappropriately so. But if the Order was phrased as I am suggesting, an injustice might have been averted. But, include in your Order that the attending party is to get those costs, which you have calculated and set out in your Order, if no subsequent Settlement Conference is able to proceed.

13. IS IT APPROPRIATE TO TRY TO PROCEED IF A PARTY, WHO SHOULD HAVE BEEN THERE, IS NOT

In the case of a party not being there, but where their representative is, and when you are unable to bring the absent party in through any means to participate, you may decide to see if some benefit can still be achieved, with some preliminary discussion, before you put the matter over if no settlement is achieved. But do so strictly as an interim step, not the Settlement Conference *per se*, and be clear that is what you are doing. In that preliminary discussion you might tease out some of the agreed upon facts, and afford the parties an opportunity to exchange offers. After some discussion however, should the matter not settle, and if there is not going to be anything further that is beneficial that can be achieved, with your efforts, relating to at least some of the objectives of a Settlement Conference, that is if you reach a point where nothing more can be accomplished, then put the matter over to continue before you, and require the representative to attend on another date, with their client, and then deal with costs.

Even if both sides and their representatives say thanks but no thanks, they want to go ahead to trial, and not return, you must resist that because you

still have not satisfied all of the requirements imposed upon you by Rule 13, and it is important that you do so.

The expenses and requirements of going to trial are huge compared to the significantly lesser expenses and requirements of a settlement conference. You want and need to conduct an effective Settlement Conference.

That is for the benefit of the parties.

14. WHAT IF SOMEONE ELSE'S APPROVAL FOR A SETTLEMENT IS REQUIRED BY THE PARTY BEFORE YOU

If a party requires someone else's approval for a settlement, and that other person is not present, then the Rules also provide, in a mandatory fashion employing that word, "shall", that the party shall, before the settlement conference, arrange to have ready telephone access to the other person throughout the conference, whether it takes place during or after regular business hours.

Non compliance can be dealt with as described by me earlier for non attendance by a party, ultimately resulting in an adjournment with costs. First, however, and before any preliminary discussion as described in Section 13, do what you can to get the required person made available then and there by the party who should have done so, and require that they are available throughout the conference, even though that is a bending of the Rule which says that should have been done beforehand. You do so employing Rules 2.01 and 2.02, to avoid the need for a further attendance, if that can be achieved.

However, even in the case where there is compliance with the Rule, and the Settlement Conference can proceed, here is something to consider. It is really better that the remote person with authority be brought in, if they are willing, so that they can hear what the other side is saying, themselves, which might affect their thoughts on settlement, by hearing it first hand, not third hand.

Offer to conference them in by video or telephone conference, or even by cell phone on speaker mode, to achieve a better chance at settlement and better preparation for trial.

How long do they have to commit to do this? About an hour? Better to spend that hour as a participant at the Settlement Conference than lots of hours, and also expense, that will be required if the case does not settle.

15. DO NOT ADMIT NON PARTIES TO THE SETTLEMENT CONFERENCE (EXCEPT RARELY A SUPPORT PERSON)

When you are admitting parties to the Settlement Conference, deny entry to anyone not a party except, and at best and very rarely, perhaps a support person for a party if the party definitely satisfies you that they truly need one and, even with your help, that need cannot be overcome. However, attendance by a non party who is intended to be a witness could stymie the process, and compromise their evidence at trial. Better to require the party arrange to get a support person there who will not be a witness, or have that support person around, like in a breakout room, available, but keep them out of the proceedings, if that will work. In any event, it is also not a good idea because there is a risk that anyone not a party who attends may not comply with the non disclosure Rule.

16. WHAT DO YOU DO IF BOTH SIDES, (USUALLY COUNSEL,) SAY THANKS BUT NO THANKS TO YOU CONDUCTING THE SETTLEMENT CONFERENCE

There are going to be times that the parties, or their representatives, appearing before you will tell you that, for one reason or another, they do not require a Settlement Conference.

Inform them that Rule 13.01 (1) states:

“A settlement conference shall be held in every defended action.”

Tell them the Rule is mandatory, using the word “shall”, and say no to their request.

And hold to that no.

You must assert your position as the Judge in court, and advise that you follow the Rules. The Settlement Conference is mandatory, and has important objectives which you are required to fulfil, and that you intend to fulfil them, as mandated under the Rules.

You will be proceeding and conducting the Settlement Conference, fully.

Tell them, and make sure that they appreciate what you are saying, that in order to satisfy the Rules governing Settlement Conferences, you will require their full and complete cooperation, and the full and complete cooperation which you are requiring of them is mandated in the Rules.

It is your vehicle to control.

You can advise them that it is for the benefit of the parties, and it is. The fact is that in large part the reason you insist and persist and conduct the Settlement Conference fully is that the parties themselves best hear what you are mandated to cover, regardless of what you are being told by their representatives.

It will likely affect settlement possibilities and assist the parties in preparing effectively for trial if it does not settle.

Now, the kicker. The fact is that when I have done this, almost invariably the action settles. I do not remember one that did not.

17. COSTS THAT CAN BE AWARDED AT A SETTLEMENT CONFERENCE

What do you do regarding costs in the event of the need to put the Settlement Conference over for some reason where a costs order is warranted?

There are a number of situations which can occur where a further Settlement Conference is going to be required due to a party's inappropriate conduct which is frustrating the purposes of the Settlement Conference.

For example, Rule 13.02 (7) (a) referred to above, dealing with a person who attends a settlement conference inadequately prepared.

In situations where the inappropriate conduct is occurring during the Settlement Conference, then first give a warning, that unless that inappropriate conduct is promptly ended, if it can be, after this warning, then the offending party is facing a further Settlement Conference you will Order continue before you and a serious costs order as well against them.

As for those costs, the costs Rule for Settlement Conferences is Rule 13.10.

It states:

“The costs of a settlement conference, exclusive of disbursements, shall not exceed \$100 unless the court orders otherwise because there are special circumstances.”

That term “special circumstances” might warrant a careful look at the impact upon the innocent party of whatever happened that triggered the need for a costs Order being made.

It has to be soundly, juridically supportable, not punitive.

It could involve reimbursing the party who is adversely affected for the cost of their legal representation for that wasted attendance, and for time lost from work by the party with the measure being their lost wages, which might be reduced if you learn on inquiry that they are able to salvage part of their working day.

18. ADVISE THE PARTIES THAT A MAJOR REASON TO SETTLE IS THE LIMITED AMOUNT THEY CAN GET TOWARDS THEIR EXPENSES IF THEY FAIL TO SETTLE, EVEN IF THEY SUCCEED AT TRIAL

Another huge point for the parties to keep in mind is their costs of proceeding with the action if they don't settle.

That should be a factor they consider when looking at settlement possibilities, as a business consideration.

It is a significant motivator.

Parties can be told that their representative will tell them the legal expenses they have incurred so far, and what it is probably going to cost them, if they go forward to trial, as opposed to settling at the Settlement Conference.

The parties must understand that even if they are successful at trial they will still end up out of pocket for most of their legal bill.

Explain that, under the Rules of the Small Claims Court, except in the most egregious and rare circumstances, such as unreasonable conduct, the Judges who conduct the trial in Small Claims Court are not allowed to award anything:

- for their legal representative's preparation time leading up to their attendance at the Settlement Conference,
- and not for the representative's attendance at the Settlement Conference,
- and not for all the hours of preparation and work that lie ahead for their representative, in advance of the trial, if the case goes to trial.

Advise the parties that the reason for this is that Small Claims Court Rule 19.04 provides that if the successful party is represented by a lawyer, student-at-law or a paralegal, the Judge at trial, or at an assessment hearing, may award a reasonable representation fee.

The important words in that Rule for the parties at the Settlement Conference are “at trial”.

The Judge, at trial, can only award representation costs for the days of trial, and for subsequent submissions, such as written submissions requested by the Judge.

Not for all the other work that has been done for which their representative will be billing them.

Tell them that disbursements are treated separately, and generally have no maximum.

They can be awarded in full.

That is good if a party is successful and awarded costs, but if a party loses, they are exposed to those disbursements, which can be very expensive.

19. WHAT IS THE IMPORTANCE OF THE DISCLOSURE REQUIREMENT CONTAINED IN RULE 13.03 (1) (e) AND HOW DO YOU ACHIEVE IT

Rule 13.03 (1) (e), regarding purposes of the Settlement Conference says, “to provide full disclosure between the parties of the relevant facts and evidence.”

Full disclosure means no holding of cards close to the chest. All relevant facts and evidence are to be divulged, disclosed, with your assistance. Full disclosure provides an opportunity for the parties and their representatives to hear the good and the bad about their case and that of the other party.

And get a better understanding of the applicable law with your help.

This leads to their ability to effect an informed and appropriate settlement. Failing settlement it helps the parties be prepared for trial effectively, as required by Rule 13.03 (1) (d), requiring you to assist the parties in effective preparation for trial.

It is important to note that there is no Examination for Discovery available in the Small Claims Court.

The Settlement Conference is the only opportunity for the parties to obtain disclosure.

You have a very important obligation in that regard.

With no Examination for Discovery available in Small Claims Court it is essential that, during the Settlement Conference, you help the parties to get out, to disclose, those relevant facts and evidence upon which they are relying in support of their case.

Remind the parties that Settlement Conferences are off the record. There is no recording or transcript which the parties are permitted to access.

So encourage the parties to make good notes to help them to prepare for trial if they cannot settle.

Tell them that until after the action has been disposed of they cannot disclose to others, including the Judge at the trial, what was discussed at the Settlement Conference, but they are supposed to learn things there to help them to prepare effectively for trial if they cannot settle.

Advise them that they may learn of areas they will need to cover in their evidence at trial, and learn of things they will want to use in cross examination of the other party.

If they learn that something is being stated with which they disagree, they may conclude that they need to bring additional evidence, documents, another witness, or even an expert, to trial to support their position.

Remind them of their obligations if they do that.

20. WHAT DO YOU DO IF YOU ARE HAVING DIFFICULTY IN GETTING THAT FULL DISCLOSURE YOU ARE MANDATED TO ENSURE TAKES PLACE

How do you get that full disclosure?

Use Rule 13.03 (3).

It states, in mandatory fashion, using the word “shall”:

“At the settlement conference, the parties or their representatives shall openly and frankly discuss the issues involved in the action.”

Insist upon compliance with the Rules.

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If it becomes necessary, advise the parties, and their representatives, that if they do not comply, with open and frank discussion, then you have the authority to, and will require that they re-attend before you.

And you will not permit the action to move forward until they do openly and frankly discuss the issues involved in the action, as the Rule requires. You must control the process. Both sides must cooperate and participate. The parties are present and you are trying to help them avoid a trial, or be effectively prepared for trial, as Rule 13.03 (1) mandates you to do.

If only one party is violating that Rule, then they are frustrating the purposes of the Settlement Conference.

The other party is unfairly being deprived of their entitlement to your assistance in fulfilling those enumerated 5 purposes of the Settlement Conference found in Rule 13.03 (1).

It is not appropriate just to let it go and send the parties off to trial saying to them that they have missed an opportunity due to the failure of that non complying party.

That is patently unfair to the complying party.

Warn the offending party immediately, when that the problem first manifests itself, that you will order a further Settlement Conference to continue before you, on another date, unless they immediately comply with the Rule, and should that prove necessary you will be awarding significant costs against them, to the non-offending party.

As for the representatives I referenced earlier, who said they did not want or need to proceed with the Settlement Conference, they will especially have to pay heed to that warning if they are not complying with this Rule.

21. NON COMPLIANCE WITH DISCLOSURE RULE 13.03 (2) GIVING RISE TO THE NEED TO HAVE THE PARTIES RETURN FOR A CONTINUATION OF THE SETTLEMENT CONFERENCE

Another example of non compliance that might give rise to this need for a further Settlement Conference is found in Rules 13.03 (2).

As part of the very important disclosure requirements, there is a requirement in Rule 13.03 (2) to file enumerated materials at least 14 days before the date of the Settlement Conference.

The importance of this requirement is underscored by the fact in that same Rule dealing with inadequate preparation, that is Rule 13.02 (7) referenced above, there are costs consequences provided in that Rule for failing to file the items stipulated in Rule 13.03 (2).

Rule 13.03 (2) requires that at least 14 days before the date of the Settlement Conference, each party shall serve on every other party and file with the court:

- Firstly, a Form 13A, listing proposed witnesses. But, in addition to that, listing other persons with knowledge of the matters in dispute in the action;

- And, secondly, a copy of any document intended to be relied on at the trial, which was not already attached to the party's claim or defence. That would include, for example, any expert's reports.

Those would be additional documents a party intends to rely on at trial, in addition to the documents they attached to their pleadings pursuant to their obligations under Rule 7.01 (2) 2.

The breach of this Rule necessitates a return for the Settlement Conference, for the benefit of the parties, and likely a costs order.

22. NON COMPLETION OF THE OBJECTIVES OF THE SETTLEMENT CONFERENCE NECESSITATES HAVING THE PARTIES RETURN TO CONTINUE THE SETTLEMENT CONFERENCE BEFORE YOU

If you see time is running out to fully and properly complete the Settlement Conference, then advise the parties that if they do not settle, and should you determine that there is more required before you are able to conclude that you have fulfilled all of the objectives that Rule 13.03 (1) (a) to (e) mandates you to accomplish, then you will be making an Order and adjourning the Settlement Conference to continue before you so that you can complete it properly.

For example, if further documents need to be exchanged, or further information needs to be provided, or whatever else might be required to accomplish the fulfillment of those objectives, so important to the parties.

Do not send the case on for trial until you have completed what that Rule mandates for you, even if all parties strenuously object that they just want to get on to trial and not come back again.

Just sending the parties on to trial is consigning them to all the negative consequences referenced above which you are trying to avoid for them.

23. THE GREAT IMPORTANCES OF THE SETTLEMENT CONFERENCE BEING CONFIDENTIAL AND A WARNING

The parties get a great benefit from the confidentiality of the Settlement Conference, and it being off the record.

They should be reminded that Rule 13.03 (4) provides for confidentiality and that it states:

“Except as otherwise provided or with the consent of the parties (Form 13B), the matters discussed at the settlement conference shall not be disclosed to others until after the action has been disposed of.”

Inform them that this enables them to speak freely and gives them a lot of freedom for their negotiations at the Settlement Conference, because all offers at a Settlement Conference are informal, confidential, and off the record, and cannot be repeated to the trial Judge.

That Rule does not say so, but they can disclose everything to their representative if they hire one after the Settlement Conference for the trial.

Tell them that if they make an offer at the Settlement Conference, and it is not accepted, then they will not be creating a ceiling or a floor by suggesting numbers at which they would have been prepared to settle at the Settlement Conference.

Tell them that a party can't show up at the courtroom door, on the date set for trial, and say to the other party that they now accept the offer. Most likely the opportunity will be gone. There will have been preparation occurring and expenses being incurred, and that may well change the numbers from what they were at the Settlement Conference.

Advise that a party making an offer at a Settlement Conference is not bound to keep it open, if it is not accepted.

It is gone at the end of the Settlement Conference unless the party making the offer stipulates that they will keep it open for a set period of time, for example to give the other party time to consider the offer.

Otherwise, all offers disappear, they are gone, at the conclusion of the Settlement Conference.

The parties can be told that the trial Judge does not take into consideration offers made at the Settlement Conference when awarding costs.

Warn them that if they disclose anything that was discussed at the Settlement Conference to the Judge at trial, without the consent of both of the parties, that will almost certainly result in the trial Judge declaring a mistrial and a new trial being ordered by the trial Judge.

Tell them that the trial judge will likely order that the party who made the mistake must pay the other party costs to cover the additional expenses of the other party which they have incurred because of that mistake.

It is likely that the party wrongly disclosing to the trial Judge anything that was discussed at the Settlement Conference will have to cover the wasted expenses of the party who did not make that mistake caused by the need for the new trial, like the additional expenses the other party will now have unnecessarily incurred for their legal representative, and their experts, and the income loss of the other party and their witnesses, due to that mistake, whether the one who made the mistake wins later at trial, or not.

I used to provide the parties with what I referred to for them as a memory tag, something to help them remember the importance of keeping what was discussed at the Settlement Conference confidential.

I was also intending to help the parties to become less tense.

I would say:

“You have heard the saying, what happens in Vegas stays in Vegas?”

I would wait and there would be nods and smiles.

Then I would add:

“Well, what happens at the Settlement Conference stays at the Settlement Conference.”

24. AVAILABILITY OF A RULE 14 FORMAL OFFER

You can convey to the parties that, separate and apart from the informal offers which they may have made at the Settlement Conference, they can

make a different kind of an offer, a formal offer, using Rule 14 of the Small Claims Court Rules.

Advise that the trial Judge is also not to be told of the Rule 14 offer, and does not know about it until the end of the trial, when the Judge asks for submissions on costs.

You can tell them that a Rule 14 offer is very different and can have significant and important costs consequences which can even result in costs being awarded to an unsuccessful party if they had made the Rule 14 offer that should have been accepted by the successful party.

And advise them that the costs awarded to the party who made that Rule 14 offer that should have been accepted can even be doubled by the trial Judge due to the unreasonableness of the Rule 14 offer not having been accepted, the non acceptance of which resulted in an unnecessary trial that could and should have been avoided if the offer had been accepted.

25. YOUR INTRUSIVE QUESTIONS AND COMMENTS DURING THE SETTLEMENT CONFERENCE ARE VITALLY IMPORTANT TO YOUR ACHIEVING THE MOST IMPORTANT OBJECTIVES OF THE SETTLEMENT CONFERENCE, NAMELY ACHIEVING SETTLEMENT OR BEING EFFECTIVELY PREPARED FOR TRIAL

Be prepared to be “intrusive”, a lot.

It is important and a good thing.

Your intrusive questions and comments along the way will help to ensure that the objectives of the Settlement Conference are met.

You can't do it the same way at trial but not only can you, but you most definitely should be intrusive with questions and comments at the Settlement Conference, for the benefit of the parties.

26. KEEP THE DISCUSSION ON TRACK...CAREFULLY

Don't let discussion move off of the purposes of the Settlement Conference.

Help and guide, what might seem to be something irrelevant into relevance for the Action, if it exists.

If there isn't any, then exercise your judicial control. Get the discussion back on track. But be careful how you do it. You do not want to intimidate

the parties or their representatives, and scare them off from participating fully. You need their participation.

27. ASK PROBING QUESTIONS AND INTERRUPT TO DEAL WITH ANYTHING IMPORTANT THAT COMES UP OR IF ONE PARTY IS NOT GETTING IT

Test what you are hearing with appropriate probing questions and comments in the presence of both parties, together. Even interrupt, turning from one party to the other for a response. For example, if a party has said something particularly important, such as proffering a piece of strong evidence that could be pivotal at trial, it may be important and beneficial to discuss it with the parties right at that time.

Or if you think the other party is not getting what the one party is saying.

28. A CAUTIOUS APPROACH TO CHALLENGING AN “APPARENT” WEAKNESS OF A PARTY

When you are asking a question or making a comment that focuses on a weakness of a party afford that party an opportunity to advise why that position is not weak, but do so in a way to keep them participating.

29. MEETING PRIVATELY WITH THE PARTIES IS NOT A GOOD IDEA. DO NOT “CAUCUS”. THIS IS A SETTLEMENT CONFERENCE WITH DEFINED PURPOSES NECESSITATING BOTH PARTIES ALWAYS BE PRESENT. IT IS NOT A MEDIATION

It is not a good idea to meet privately with parties unless the private meeting is to control the process, such as bringing an unruly party under control.

But, if any of the purpose is to talk about the case, that is bad.

Do not do it.

It interferes with Rule 13.03 (1) (e) requiring full disclosure.

It deprives the parties of hearing everything the other party has to say, and hearing you, in the presence of each other.

It deprives the parties of learning the strengths and weaknesses of their case and that of the other party.

They need that to prepare for trial if they do not settle.

Hearing everything, for both parties at the same time, in front of each other, improves the prospect of a settlement, and importantly also results in better effective preparation for trial.

Private discussion with one party is unfair to the other party, and it also eats up too much of your precious little time.

30. DEALING WITH PROBLEMS OF THE PARTY THAT FRUSTRATES THE PURPOSES OF THE SETTLEMENT CONFERENCE FOR BOTH PARTIES

You will encounter parties, or their representatives, whose conduct is frustrating your ability to conduct an effective Settlement Conference.

Curtail it.

Any conduct, by a party or their representative, that frustrates your ability to conduct an effective Settlement Conference, for both of the parties, must always be stopped, and dealt with promptly, failing which the offending party must be warned, and then face the consequences.

Different situations can arise causing that problem which lead to different methods of dealing with this kind of conduct.

By way of example, you may have a party, or their representative, who is so totally convinced that they are right, and the other side is wrong, that they are not prepared to participate and listen to, or appreciate, the other side's case, and the other side's interests.

For that kind of example, in order to engage them, your approach might be to start your effort of attempting to get them to listen and participate by giving them some potentially applicable and objective criteria that might

be employed in getting to appropriate conclusions in their case, namely the law as it could apply to the facts of their case.

You can:

- inform them as to the applicable legislation and case law;
- tell them how you have handled this at trial; and,
- advise what some of the possibilities might be if you were the trial Judge, based upon what you have heard to that point.

Reassure them that you do wish to hear what they have to say, but it is important for the Settlement Conference process that they participate.

And if that isn't working, then inform them that it isn't just a question of being nice, or polite for them to listen, the Rules require their participation. This is a court process, with Rules, and the Rules must be abided by.

But if you fail, with that or any other method you attempt, to deal with whatever is frustrating the purposes of the Settlement Conference, then if:

- the offending party still won't participate as required by the Rules;
- due to their conduct, you cannot complete the Settlement Conference and satisfy its purposes in the time allotted;
- you have warned the offending party that they are frustrating the purposes of Settlement Conference;
- and told them that they risk you exercising your authority, as the Judge, in accordance with the Rules of the Small Claims Court, and their conduct is going to result in you having to adjourn the Settlement Conference to another date to continue before you;
- and, if your warning has included, (which it should,) that you will be awarding costs against the offending party, if it is just one of them, due to that conduct, if they don't stop it, but they have not. Then you have to do what you warned you would. Put it over to continue before you, and if applicable, award the costs.

I recommend this approach, *mutatis mutandis*, in any situations where the conduct of a party, or their representative, is frustrating your ability to conduct an effective Settlement Conference for both parties.

If both sides are causing the problem with their obstinacy, then you advise that they must cooperate and if they don't, you are not going to let them proceed until they do. Remind them of the reasons they should.

31. CIRCUMSTANCES GIVING RISE TO THE NEED TO HAVE THE PARTIES RETURN FOR A CONTINUATION OF THE SETTLEMENT CONFERENCE, SUCH AS LATER DELIVERY OF DOCUMENTS, AND THE VERY SIGNIFICANT BENEFITS TO THE PARTIES OF DOING SO. AND AVOIDING TRIAL BY AMBUSH

There are many situations which will occur where you will need to, and you should, require the parties return for continuation(s) of the Settlement Conference before you.

Even over unanimous objections by the parties who tell you thank you, but now we'd like to go on to trial instead of coming back.

Do not see the requirement for the parties to return for a continuation before you as an imposition.

To the contrary.

Almost all cases will settle at a resumption.

I say this based upon personal experience.

I have even had a few actions with 3 resumptions of the Settlement Conference before me, which I required.

As I recollect, all cases for which I required a resumption settled, with the exception of just one.

These adjournments, to continue the Settlement Conference before me, were not infrequently done over the objections of the parties, they finally having agreed to something at least, objecting to having to come back. But to no avail because I ordered the continuation, as you have the authority to do in the Rules.

I had a function I was mandated to perform, to satisfy the purposes of the Settlement Conference.

I did not shirk that responsibility to the parties. Neither should you.

In other cases, the parties welcomed the opportunity to return, especially in complex cases the trial for which would have required several counsel over perhaps several days.

In one memorable case, pre-Covid, the parties and their representatives objected to coming back, but I had not yet completed satisfaction of the purposes of the Settlement Conference, and accordingly I required their return, not once but twice.

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They got it done on that third attendance, that is, at their second return which I had ordered, again over their objections.

At this second resumption, this third attendance, they now had what they required, and settled.

They were so delighted, at that third attendance, that they had achieved a settlement in a case that seemed destined to be battled out in a complex court action, that not only were they effusive in their appreciation expressed to me, but they also insisted on shaking my hand in thanks. (I admit, I happily complied with that request.)

And they went away together, not only settled but, importantly, with their relationship preserved.

Here is an important point. By requiring their return in certain situations you can also avoid such things as trial by ambush.

How so?

Trial by ambush, for example, due to documents, which were not dealt with at the Settlement Conference, which end up being delivered by one party to the other party after the Settlement Conference, even pursuant to an Order to do so.

You know that Order, 'documents to be provided', or 'exchanged', '30 days before trial'.

Those documents, received by a party after the Settlement Conference, then end up, unfairly, having to be dealt with, at trial, by the receiving party, without that receiving party having had the opportunities and benefits concerning those documents that would have been provided to them, with your help, at the Settlement Conference.

Unfair.

Purposes of the Settlement Conference not complied with.

If that looks like it will occur, or even looks like it may possibly occur, or if you just want to err on the side of avoiding a problem, then you should include in the Order you make, at the end of the Settlement Conference, that should either party receive a document after the Settlement Conference, then the receiving party is entitled to a continuation of the Settlement Conference before you, and a request to have the matter returned to you for that purpose shall be complied with by the court office. Maybe the request will be made, maybe not.

At the return, you can continue to pursue satisfaction of the purposes of the Settlement Conference, without limiting your efforts on behalf of the

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parties to deal only with the newly produced documents, albeit that is your primary objective in permitting that return before you.

As to your authority to require additional Settlement Conferences, Rule 13.02 (3) states that you can order the parties to attend an additional Settlement Conference.

In order to conduct a full and effective Settlement Conference, as mandated, for the benefit of the parties, do not shy away from liberal and appropriate use of that Rule.

Here are some rhetorical questions that clearly support doing that:

- Is it okay to send the parties off to trial and not have them back when there is more you determine is still required, to satisfy Rule 13.03 (1) (a) to (e)?
- Will that result in representatives being forced to put in many billable hours they will then have to spend preparing for trial, which includes their research and trial preparation, but also requires time preparing their client and witnesses at their client's expense? Billable time that a party cannot be compensated for later, after trial, in costs?
- And perhaps one or both of the parties requiring very expensive expert's reports, and incurring expert's fees to attend for trial?
- And requiring that the parties take more, and longer time off work, to prepare and be prepared for trial, and attending at trial, resulting in their incurring greater loss of income?
- And the same impact upon their witnesses?

The answer is that all of this can be avoided, within a contained quantum of time, by you requiring their return for continuation of the Settlement Conference before you.

And with far less cost to the parties.

At, say, one hour per Settlement Conference, plus an hour of their prep time, the total time spent at the resumptions you order in a case is far less than the time the parties will probably spend doing even a portion of the tasks described above.

And it may shorten the trial, because if they return on your Order, and don't settle at the resumption, there is probably still going to be time and money saved by their not having to do some of the preparation they otherwise would have had to, because of the additional facts and evidence

they will have obtained at the resumption, and perhaps their agreeing upon certain facts, and perhaps narrowing the issues, with your help.

When you require their return, the end result could well be that you will end up having saved the parties a lot of money from what they would have had to put out if you simply headed them off to trial.

Failing settlement at the resumption you will still be able to ensure that they are prepared more effectively for trial which is one of the stated purposes of the Settlement Conference according to the Rules.
(But the probability is that you will then be able to get them to settle.)

32. NON COMPLIANCE WITH THE RULES CAN DEFEAT THE PURPOSES OF THE SETTLEMENT CONFERENCE, FOR EXAMPLE INTERFERING WITH MUCH NEEDED FULL DISCLOSURE. DON'T JUST SEND THE MATTER ON TO TRIAL DUE TO YOUR REACTION OF FRUSTRATION

There are important Rules which, if not complied with, will defeat the purposes of the Settlement Conference.

Non compliance with the Rules is an important reason to require that the parties return before you for continuation of the Settlement Conference. It can also result in a significant costs order being made against an offending party. I have dealt with this earlier in this paper.

An important example is Rule 13.03 (3), to which I referred earlier, which requires the parties or their representatives to openly and frankly discuss the issues involved in the action.

Relative to that is Rule 13.03 (1) (e) stating that a purpose of the Settlement Conference is to provide full disclosure between the parties of the relevant facts and evidence.

The parties are entitled to and need both.

Compliance with those Rules is of fundamental importance.

Deal with the noncompliance as I related earlier.

Don't send it on to trial, even over objections and reassurances.

You have to suppress some normal human responses when dealing with obtuse parties and representatives.

You may feel, justifiably, that you are aggravated and that the parties deserve simply to be sent on their way to face their own fate at trial.

Don't do it. Pull up those Judge suspenders.

That would be surrendering to bad conduct and not complying with your mandate regarding satisfying the purposes of the Settlement Conference.

The parties need you to control the process, firmly but kindly.

You are a Judge. You have to do the full Settlement Conference for their benefit. Take a deep breath, and proceed.

Tell them that they are going to have to return to continue the Settlement Conference before you unless they cooperate. Mean it and do it.

As dealt with earlier, if one party is the offender, don't let that deprive the non-offending party of what they are entitled to and should get from you.

33. REMIND THE PARTIES THAT YOU CANNOT BE THE JUDGE AT TRIAL AND WHILE YOU MIGHT TELL THEM WHAT YOU WOULD DO IF IT WAS A TRIAL BEFORE YOU, THE TRIAL JUDGE MAY SEE THINGS DIFFERENTLY, AND WHY THAT IS SO

When you start to get deeper into their negotiations, tell the parties that later, if needed, you will be telling them what you would do if it was a trial before you. But tell them that the Judge at trial gets a lot more over the longer period of time which trials require, and that could result in a different decision than that which you offer to them as to what your decision would be.

Advise that the reason for that difference is that the Judge at trial will have a better chance to assess things than you do, for example because they will have the benefit of hearing the evidence under oath, and having the benefit of hearing examination and cross examination.

The parties should be advised that Rule 13.08 provides that the Judges who conduct Settlement Conferences are not allowed to be the Judge at trial.

And advise the parties that you will not be sharing anything with the Trial Judge, other than what goes into the Settlement Conference Memorandum which the trial Judge does get and reads, and which you will be preparing, there and then, before the parties, if the case does not settle.

34. A SUGGESTED APPROACH TO CONDUCTING THE SETTLEMENT CONFERENCE.

A PROPOSED PROCESS, FROM START TO FINISH

(A) BEGIN WITH NEGOTIATION:

Before starting to get into the case, I would begin with some negotiation, right off the bat, to see if the case is on the verge of a settlement. I would do this by asking the parties to exchange numbers, to see if I could get a number that works, even a midpoint.

(B) THEN, DIG IN:

Then, if no settlement, begin to dig in to get the facts and the evidence. You might begin, firstly, with having the plaintiff advise what they are claiming, and why they say that they are entitled to that, based upon the facts and evidence upon which they rely.

Make sure they say it all. Tease it out of the parties, if you have to.

Then get defendant to do the same thing.

Then get a reply by the plaintiff.

Continue this back and forth in a structured fashion, maybe with the defendant replying to the plaintiff's reply, and the process continuing like that. That is, unless there is already some fruitful discussion that is now taking place, with your guidance, in keeping with the purposes of the Settlement Conference, discussion which you keep on track.

(C) BE INTRUSIVE:

Be as intrusive as necessary to get out the relevant facts and evidence and positions of the parties.

Intrusive doesn't mean nasty. It means for example interrupting if needed for the benefit of the parties and being as inquisitorial as necessary, whenever you think best.

Ask questions of them, or make comments you'd like them to respond to. Your intervention helps maintain the focus, and move things along, as you work towards achieving the intended purposes of a Settlement Conference.

Then, at suitable points, see if a settlement is brewing.

(D) HERE IS A GREAT WAY TO GET A SETTLEMENT WHEN YOU ARE AT THE POINT THAT YOU CAN DO THIS:

One of my favourite techniques to get the case settled, which often was successful, was this.

I will have been formulating my views on liability and damages, as the facts, evidence and law have been emerging.

When I get to that point where I think I now pretty much get it, and the time is right, I then posit a hypothetical question to whichever party I believe would be the best to pose that to.

I am hoping for a yes, to my question, and choose the party I will put the question to based upon my hope for a positive response from them.

I would ask that chosen party to consider and respond to me the answer to a hypothetical question, which I am going to put to them, as follows.

I would say:

“I want to emphasize to you that the other side is not making the offer that I am going to propose. It is strictly a hypothetical...BUT, if the other party made an offer of a certain amount, which I am going to mention, and which I have calculated based upon what I have heard so far, then would that offer be accepted by you to settle the case?”

I then give the number to that party, and send that party out, with their representative if they have one, to consider that question, and ask that they return with an answer.

I have told the Parties before sending the one party out that I will not be discussing anything about the case with either of them in the other party's absence, and I don't.

I know that the other party is thinking about it. They know that they are going to have to respond.

When the party comes back into court, a significant number will often say yes, or sometimes they will have a number to which they would say yes.

I then send the other side out to consider whether they are willing to go that route.

The other side comes in with an answer.

It may be a yes, or a number that would work for them.

If necessary there may be some meeting in the middle I suggest.

Many cases settle at that point.

(E) YOU PROVIDE YOUR ANALYSIS HOLDING BACK ON YOUR NUMBER:

If still no luck getting that settlement, then you review with the parties what you have heard.

Focus on strengths and weaknesses, of both sides.

Use reality therapy about the facts, evidence and the law.

Advise what you would be doing and why, on liability, and your approach to the assessment of damages, if you were the trial Judge.

But hold back on giving the parties the number that you would award.

Before you give the number you'd award, give the parties another opportunity to settle.

(F) SEEING IF THERE IS A SETTLEMENT, ANSWERING QUESTIONS, AND THEN GIVING YOUR NUMBER IF NOT SETTLED:

You can and probably should ask the parties at this point if they have any questions or additional comments, and then respond to these.

Perhaps there will be something else that is relevant which a party brings up that warrants further consideration by you with the parties.

Asking for their questions or comments may help you to ascertain if they now do understand the relevant facts, and evidence, and how the law would apply to their case.

If it appears they are still short on appreciating the facts, evidence, and law, then you have more work to do in order to get the parties to that point.

If no luck in getting that settlement still, then now you tell them what you would award, and why, if you were the Trial Judge.

Then try again, to see if you can get a settlement.

But be very careful, do not force it.

It must be their decision. That is highly important.

(G) MOVE TO THE SETTLEMENT CONFERENCE MEMORANDUM REMINDING THE PARTIES TO KEEP TRYING:

Finally, if no settlement, prepare the Settlement Conference Memorandum, in their presence, and make the Order. Give the parties encouragement to keep on trying and that they should let the court office know if they settle.

Then you give the parties the opportunity to continue and set the matter down for trial.

**35. ALTERNATIVE METHODS OF SETTLEMENT:
YOU CAN PROPOSE SOME POSSIBILITIES TO THE PARTIES,
OR, ENCOURAGE THEM TO COME UP WITH THEIR OWN
ALTERNATIVES.
THIS EXCELLENT APPROACH TO AN ALTERNATIVE RESOLUTION IS
QUITE UNLIKE WHAT A JUDGE AT TRIAL CAN DO**

Settlement Conferences also offer a rare opportunity to explore alternative resolutions not available at trial, leaving trial as a last resort. Invite the parties to consider and explore this. Even make suggestions in that regard for their consideration.

For example, one party may give the other party an opportunity to make good on the problem that gave rise to the court action, and do a repair. Or do whatever else might be appropriate, and work, in order to avoid a trial. You can offer suggestions or there may be alternatives they can develop.

Their agreement should be put into writing by them, and they should each get a copy of what they have agreed upon. Do not put the terms into the court file. You must avoid them getting to the trial judge, if the case does not settle. That could taint the impartiality of the trial. It is not like a final settlement, with Minutes of Settlement, and does not have to go into the court file. What will go into the court file is your Order dealing with process.

You simply adjourn the action, with an endorsement along the lines of “Adjourned. Settlement pending. To be placed on the trial list at the request of either party upon payment of the required fee.” This keeps the matter on track to proceed to trial if no success in the alternative effort.

But that endorsement presumes that you have completed all the requirements to satisfy all of the purposes of a Settlement Conference. This alternative resolution may arise before that happens.

If you're not there, yet, then it would probably be best to adjourn the Settlement Conference to continue before you on a date you arrange to be set sufficiently far out to allow for the alternative resolution to be completed.

Then you proceed to complete satisfaction of the purposes of Settlement Conferences, which might include finding out why the alternative failed.

36. WHAT TO DO IN ORDER TO ENSURE THAT THE PARTIES ARE BEING FAIRLY TREATED, AND THE PURPOSES OF THE SETTLEMENT CONFERENCE ARE ACHIEVED, WHEN AMENDMENTS TO THE PLEADINGS ARE REQUIRED AND TO AVOID ANOTHER TRIAL BY AMBUSH

Rule 12, dealing with Amendment, Striking Out, Staying and Dismissal, can cause significant problems for the parties, similar to those referred to earlier in this paper regarding documents that end up being produced to a party after the Settlement Conference.

The party receiving the amended pleading is effectively being subjected to trial by ambush.

They are being ambushed because they are unable to deal with the new allegations and obtain what they could have at the Settlement Conference originally, if that was the pleading they were facing at the Settlement Conference.

Their ability to prepare effectively for trial at the Settlement Conference has now been denied.

That purpose of a Settlement Conference has been thwarted.

You can avoid this unfair result by dealing with it in a fashion somewhat similar to that related above, that dealt with production of documents which were produced to a party after the Settlement Conference.

First see if you can have the amendments made then and there and deal with them as part of the Settlement Conference you are conducting. If you cannot do so, then I suggest that you require, by Order, that if any amendments are made to the pleadings, by any party, the party receiving the amended pleading may require that the parties return for continuation of the Settlement Conference before you, and direct in your Order that the

court office is to place the matter back before you to continue the Settlement Conference.

Alternatively, you have the option to require that the matter come back before you, should a pleading be amended, rather than leaving it up to a party to request that, if you think best to go that route.

You could, if you think best, also make it possible for the party amending their pleading to request that the matter return before you to continue the Settlement Conference.

Perhaps they think it is so compelling it will result in a settlement there.

The intent here primarily is to ensure the amended pleading is dealt with in fair fashion for the benefit of the party receiving it, and perhaps for the benefit of the party making the amendment.

You might have to make that Order if you sense a possibility that an amendment might be forthcoming, even if it is not stated to you outright by a party that they will be doing that.

You can probably get a pretty good sense of that as the Settlement Conference proceeds.

**37. THE SETTLEMENT CONFERENCE MEMORANDUM:
AN IMPORTANT TOOL, NOT JUST A BRIEF SUMMARY.
IT MUST BE RESPECTED BY THE SETTLEMENT CONFERENCE
JUDGE WHO PREPARES IT, AND MUST BE CAREFULLY REVIEWED
BY THE JUDGE AT TRIAL, PRIOR TO TRIAL**

The Settlement Conference Memorandum is an important document you are preparing for the Trial Judge.

It requires careful preparation by the Settlement Conference Judge. It also requires careful review by the Trial Judge, before the trial.

The governing Rule as to content is Rule 13.06 (1).

It states:

“13.06 (1) At the end of the settlement conference, the court shall prepare a memorandum summarizing,

(a) recommendations made under rule 13.04;

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(b) the issues remaining in dispute;
(c) the matters agreed on by the parties;
(d) any evidentiary matters that are considered relevant; and
(e) information relating to the scheduling of the remaining steps in the proceeding. O. Reg. 78/06, s. 27.”

Importantly, included in these enumerated purposes of what the Settlement Conference Memorandum is to summarize is reference to the issues, in Rule 13.06 (1) (b):

“(b) the issues remaining in dispute”.

Therefore, the Settlement Conference Memorandum can make clear that certain issues were dealt with, pleaded or not.

That way, if the matter is raised by a party at trial, there cannot be an objection by the other party that they are being caught by surprise, for example because it was not pleaded.

It can be pointed out by the trial Judge, (who will as part of their preparation have carefully reviewed the Settlement Conference Memorandum,) or by the party, that the matter is in the Settlement Conference Memorandum because, as stated by Judge preparing the Settlement Conference Memorandum, it was dealt with at the Settlement Conference, and placed there so that it could be dealt with at trial.

The Settlement Conference Memorandum can therefore include such important things as information to make clear, to the Judge at trial, that an issue was raised and discussed, dealt with at the Settlement Conference, even if it does not make it into any of the pleadings.

If it has been fully and properly dealt with at the Settlement Conference, then better to have it clearly referred to in the Settlement Conference Memorandum as well, rather than risk it falling by the wayside to the detriment of a party who fails to make the amendment.

The better, and preferable course, when dealing with an issue that was not in the pleadings, is, rather than just putting a note in the Settlement Conference Memorandum, suggest the party amend their pleading.

Best to make the amendments then and there and deal with them during the Settlement Conference, if you can, and if it is appropriate to do so.

If the route taken is going to be, or may be, that amendments to the pleadings are going to follow, that is the later delivery of an amended pleading, you can then include as part of your Order, an Order along the lines referred to earlier in Section 36, above.

The importance of capturing important matters in the Settlement Conference is evidenced by the following event that occurred.

There is a case where a Deputy Judge rendered a judgment at trial in favour of the plaintiff which was correct and soundly based, but unfortunately the trial Judge raised the issue, upon which the plaintiff succeeded, at trial, *ex proprio motu*.

The defence appealed, successfully, as they complained that they had not had a chance to prepare for and defend what the Judge raised at trial.

If that additional basis utilized by the Judge at trial had been caught by the Judge at the Settlement Conference, it could and should have been dealt with there and then, either by suggesting the amendment the plaintiff should make, doing it then and there and dealing with it at the Settlement Conference, or including reference to it in the Settlement Conference Memorandum.

The problem giving rise to that appeal quite likely would have been avoided.

38. THE SETTLEMENT CONFERENCE MEMORANDUM CAN ASSIST THE ILLITERATE, UNINFORMED, UNSOPHISTICATED OR EVEN POORLY REPRESENTED PARTIES, TO ACHIEVE JUSTICE

As the Judge conducting the Settlement Conference, you may offer insights to help both parties at Settlement Conferences, including by offering observations regarding any additional bases for a claim, or a defence, that might not have been pleaded, such as a limitation period. These may lead to amendments to the pleadings.

If they relate to any evidentiary matters that are considered relevant, then they should be referred to, in the Settlement Conference Memorandum.

39. YOU CAN MAKE RECOMMENDATIONS TO THE PARTIES TO ENSURE REAL JUSTICE IS DONE

You have different opportunities to correct problems appropriate to the case in various ways.

Rule 13.04 is one example.

It enables you to provide recommendations to the Parties.

You should use it broadly and liberally to help the parties.

It states:

“13.04 The court may make recommendations to the parties on any matter relating to the conduct of the action, in order to fulfil the purposes of a settlement conference, including recommendations as to,
(a) the clarification and simplification of issues in the action;
(b) the elimination of claims or defences that appear to be unsupported;
and
(c) the admission of facts or documents without further proof.”

The Rule is important in its complete content, alone, but because prior to enumerating (a), (b) and (c), it begins by using the word, “including”, that word, “including” expands the scope of what is being said.

It expands what can be done by you.

So, you can do more than the three items enumerated there.

The Rule also says “in order to fulfil the purposes of a settlement conference”.

That brings in and includes all of the important purposes set out in sub rules (a) through (e) of Rule 13.03 (1).

That terminology “the purposes of a settlement conference” gives a very broad and wide ranging authority to you to make recommendations.

In effect, therefore, you have the ability under the Rules to offer suggestions to the parties.

You may find yourself offering suggestions to the plaintiff and their representative if they have one, or the defendant and their representative if they have one.

It is not just a matter of protecting the functionally illiterate or unsophisticated party.

You act in a balanced fashion.

Don't let incompetent counsel drag down their client without your suggestions being made just because they are a representative and are supposed to be competent.

Your goal is fundamental.

To ensure that justice is not only done, but seen to be done.

You should not let recommendations go unmade if you perceive something that may be required.

I once offered recommendations to plaintiff's counsel, a lawyer, where the defendant was self-represented, which were necessary in order for the result to be one that was in keeping with the facts, evidence and the law. Counsel had misapprehended that they were precluded from relying on a statutory provision. It was fundamental to their case and to a just result. My correction resulted in the plaintiff being successful, and properly so.

40. EXPLAINING THE "HOW TO" OF SETTLEMENT NEGOTIATIONS TO THE PARTIES FOR EFFECTIVE DISCUSSION

Tell the parties that when they participate and negotiate at the Settlement Conference they have to communicate effectively.

Good listening may help them to settle, and failing that, it may help them to better prepare for trial. Offer some tips on good listening.

They have to understand where the other party is coming from.

They have to appreciate the other side's interests.

You can tell them this.

But also offer suggestions to help to avoid things going off the rails.

For example, if they disagree with what someone is saying, they must not use language that will result in anger, which can destroy the chances of a settlement, pushing themselves into a trial.

For example, if the other party says something they believe to be untrue, then rather than telling the other party that they are a liar, they can convey the same message, and keep discussion going, simply by saying that they disagree, and explaining why.

Tell them to to put aside their feelings towards the other side, and focus on the case and the issues, not the people.

Tell them that trial Judge's decisions are made in accordance with the evidence and the law, not how the Judge feels.

41. THE EQUALLY UNHAPPY PHENOMENON

A tried and true bit of advice for the parties to encourage settlement is to advise the parties of the equally unhappy phenomenon of settlements.

Tell them that Judges and legal representatives know that a good settlement is one where everyone goes away equally.....unhappy.

Unhappy because the person suing has received less than they want, and the person being sued has paid more than they would like to.

42. OFFER ASSISTANCE IF NEEDED IN PREPARING THE MINUTES OF SETTLEMENT

If the parties settle, you may have to offer assistance in the preparation of the Minutes of Settlement, which you request of them.

For example, if there are to be periodic payments, tell them that they should include a payment schedule, and that they should include what is to happen if there is a default, and perhaps include the right for either side to review the agreed upon payments at some point, to allow for a change in circumstances.

A defendant, may also want to include an agreement that upon the last payment being made, the action is to be endorsed on the court record as dismissed on consent without costs.

Here is an example of assistance in preparing Minutes of Settlement.

I had a case, conducted virtually on Zoom, between disputing neighbours who were not going to move.

They would continue to live beside each other.

The Settlement Conference quite properly required my Order for a resumption before me to obtain additional information to satisfy the

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purposes of a Settlement Conference, and which would assist in settlement discussion and effective trial preparation.

At the resumption of the Settlement Conference, I was able to get the parties focussed on the issues, and not the people. Sorting things out with the parties I was able to get the parties to come to an agreement on how to go forward.

But then came the task of putting together Minutes of Settlement. No mean task even for me as a Judge, let alone two intelligent but not legally trained litigants.

I was able to assist the parties in putting the Minutes of Settlement together, with most of the fine tuning work being required to be done by me, because it was somewhat complex, but based entirely upon their agreement, achieved by them with my help.

The parties were happy and expressed their thanks to me. They went away, disputes resolved, now able to live side by side without rancour.

There were things that needed to be done that had been agreed upon by the parties, but no payment of money by one side to the other was required.

A far better result than a costly trial and bitter and lasting acrimony which would otherwise have ensued.

The parties needed my assistance, very much, to put together the Minutes of Settlement with its various terms.

The settlement would probably have fallen apart without my involvement.

There was a combination of some of the suggestions I have mentioned above which I employed.

In particular:

- There was a resumption of the Settlement Conference which I ordered.
- There was an alternative resolution the parties explored and accomplished which would never have been achievable in court where there would instead likely have been a monetary award ordered, and where the parties would then have continued to be enemies, living next door to each other.

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- There was a lot of constructive intrusion by me as I proceeded to ensure that the purposes of the Settlement Conference as set out in the Rule 13.1 were being met.
- And there was a lot of assistance by me in putting together the Minutes of Settlement.

Everything that was done along the way was in keeping with the purposes of a Settlement Conference, stipulated in Rule 13.03 (1), and what you are being encouraged to do. In particular, trying to get the parties to settle, or failing that be prepared effectively for trial.

43. ULTIMATELY THE PARTIES MUST UNDERSTAND THAT THEY HAVE TO “OWN” THEIR SETTLEMENT. THAT IS THAT THEY MUST TAKE FULL RESPONSIBILITY FOR ANY SETTLEMENT WORKED OUT

Tell the parties that they have to “own” their settlement. They have to take full responsibility for any settlement they agree to. Tell them that they do not have to accept your recommendation and settle the way you might suggest. They have to be able to go home, look in the mirror, and say to themselves truthfully, it was their settlement, their decision. It has to be, it must be, their own decision. One that they are prepared to live with, and not look back on with regret in future years. They will know if they can do that, and if they cannot, then they should not proceed with that settlement. Let them know that but don't push it. In telling them that, you are also planting firmly in their minds a recollection for the future that they made that decision, on their own. You can reiterate for them what they are agreeing to and get their confirmation. Then make your Order bringing the Action to an end.

44. REASSURING THE FRIGHTENED PARTY THAT MIGHT BE SO AFRAID OF COURT THAT THEY COULD END UP SETTLING POORLY AND INAPPROPRIATELY DUE TO THEIR FEAR

If you have parties that are unable to focus effectively due to emotional involvement which is thwarting your ability to have an effective Settlement

Conference for them, then it is important to help de-emotionalize those parties that need it.

Hopefully you are always kind and controlled with those who appear before you, even though, being the Judge with an agenda you must complete in a limited time, you must be firm.

You might be able to help these individuals de-emotionalize by:

- helping them to understand, and to appreciate, that it is the problem, the issues in the case, that are the focus, not the people. They should not focus on the other party but rather focus instead on the issues of the case;
- encouraging them by telling them that they must deal with their facts, and with their evidence;
- that you will assist them with the applicable law; and,
- You need them to focus and work with you, so that you can help them to help themselves.

45. HELPING THE TONGUE TIED PARTY TO LOOSEN UP AND PARTICIPATE

AND THE CONCLUSION TO THIS PAPER

Another instance of a possible need for helping the parties, getting them functioning and participating in order to do what you must for and with them, may arise if you see that a party is floundering, or essentially tongue tied. Just unable to express themselves.

That can thwart the purposes you hope to achieve.

They may need to be reassured that it is normal for parties to feel anxious being in court.

Let them know that you understand that they may be very concerned, and nervous, being in a Court.

Tell them that you understand. It can be intimidating.

But that they should not let that be the reason they settle.

Don't be a comedian, but a little, very little, carefully measured and intentional humour, like the Vegas memory tag referred to earlier for

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confidentiality of the Settlement Conference, can help to calm their butterflies and untie a tongue.

In that regard, for the party who needs it, I used to say that I've been doing this for many years and I've yet to hear of a Judge biting anyone.

Then, to engage them, to get them participating in an effective way, you might try asking for their help to understand something about their case, and helping them to get it out. Somewhat like starting an engine using a pull cord.

That may help to get them focussed and communicating effectively.

Reassure them that Judges are public servants.

You are there to help both sides to achieve a just and fair result.

Because THAT is what you do, (and do so well.)