

Settlement Conferences with the Court

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1	Settlement; Generally	
a)	It is fundamental that the settlement of litigation ranks high in the public policy of this state.	<p><i>Ziegelheim v. Apollo</i>, 128 N.J. 250, 263 (1992);</p> <p><i>Nolan v. Lee Ho</i>, 120 N.J. 465, 472 (1990);</p> <p><i>Judson v. Peoples Bank & Trust Co.</i>, 25 N.J. 17, 35 (1957);</p> <p><i>Lahue v. Pio Costa</i>, 263 N.J. Super. 575, 595 (App.Div.), <i>certif. denied</i>, 134 N.J. 477 (1993);</p> <p><i>American Home Assur. Co. v. Hermann's Warehouse Corp.</i>, 215 N.J. Super. 260, 265-66 (App.Div.1987), <i>aff'd</i> 117 N.J. 1 (1989);</p> <p><i>Dep. of Pub. Advocate v. N.J. Bd. of Pub. Ut.</i>, 206 N.J. Super. 523 (App.Div.1985);</p> <p><i>Pascarella v. Bruck</i>, 190 N.J. Super. 118, 125 (App.Div.), <i>certif. denied</i>, 94 N.J. 600 (1983);</p> <p><i>Honeywell v. Bubb</i>, 130 N.J. Super. 130, 135 (App.Div.1974);</p> <p><i>Jannarone v. W.T. Co.</i>, 65 N.J. Super. 472, 476 (App.Div.), <i>certif. denied</i>, 35 N.J. 61 (1961).</p>
b)	As such, settlements should be encouraged.	<p><i>Ziegelheim v. Apollo</i>, <i>supra</i>, 128 N.J. at 263;</p> <p><i>Judson v. Peoples Bank & Trust Co.</i>, <i>supra</i>, 25 N.J. at 35.</p>
c)	Settlements should be encouraged, especially in family law actions.	<p><i>Davidson v. Davidson</i>, 194 N.J. Super. 547 (Ch.Div.1984).</p>
d)	The goal of the policy which encourages settlements, however, is not the salutary effect of settlements on our overtaxed	<p><i>Dep. of Pub. Advocate v. N.J. Bd. of Pub. Ut.</i>, <i>supra</i>, 206 N.J. Super. at 528.</p>

	judicial and administrative calendars, but the notion that the parties to a dispute are in the best position to determine how to resolve a contested matter in a way which is least disadvantageous to everyone.	
2	What is Impermissible when the Trial Judge Conducts the Conference?	
	Courts play an important role in effecting settlement. However, that role must always be exercised appropriately and with full recognition that the court must remain fair and impartial in order to ensure that the settlement is wrought by the parties, not by the court.	<i>75 Am.Jur.2d Trial</i> §§ 287 at 505 (1991).
a)	Court should not work to coerce or compel litigant to make settlement.	<i>In re NLO, Inc.</i> , 5 F.3d 154, 157 (6th Cir.1993); <i>Newton v. A.C. & S., Inc.</i> , 918 F.2d 1121, 1128 (3d Cir.1990); <i>Cropp v. Wolesslagel</i> , 207 Kan. 627, 485 P.2d 1271, 1276 (1971).
b)	Courts should not exert undue pressure on litigants to settle, especially in the context of a divorce settlement.	<i>Peskin v. Peskin</i> , 271 N.J. Super. 261 (App. Div. 1994); <i>Schunk v. Schunk</i> , 84 A.D.2d 904, 446 N.Y.S.2d 672, 672-73 (1981); <i>Chomski v. Alston Cab Co., Inc.</i> , 32 A.D.2d 627, 299 N.Y.S.2d 896, 897 (1969); <i>Wolff v. Laverne</i> , 17 A.D.2d 213, 233 N.Y.S.2d 555, 557 (1962).
c)	Courts should not use the threat of sanctions to force the settlement of a case.	<i>Shaffer v. Farm Fresh, Inc.</i> , 966 F.2d 142, 146 (4th Cir.) (1992); <i>Kothe v. Smith</i> , 771 F.2d 667, 669 (2d Cir.1985); <i>Del Rio v. Northern Blower Co.</i> , 574 F.2d 23, 26 (1st Cir.1978).
d)	The law does not countenance attempts by courts to coerce settlements and, therefore, courts must avoid the appearance (as well as the reality) of coercion of settlements from unwilling litigants.	<i>In re Ashcroft</i> , 888 F.2d 546, 547 (8th Cir.1989); D.L. Spillman, Jr., Annotation, <i>Propriety and Prejudicial Effect of Suggestion or Comments by Judge as to Compromise</i>

		<i>or Settlement of Civil Case</i> , 6 A.L.R.3d 1457 (1966).
e)	Trial court has duty to exercise highest degree of patience and forbearance with any party having trouble deciding whether to accept settlement.	<i>Peskin v. Peskin, supra</i> , 271 N.J. Super. at 278.
3	What is enforceable?	
a)	A settlement between parties to a lawsuit is a contract like any other contract.	<i>Nolan v. Lee Ho, supra</i> , 120 N.J. at 472; <i>De Caro v. De Caro</i> , 13 N.J. 36, 44 (1953).
b)	Settlement agreements must be voluntarily made and freely entered into.	<i>Pascarella v. Bruck, supra</i> , 190 N.J. Super. at 124.
c)	If a settlement agreement is achieved through coercion, deception, fraud, undue pressure, or unseemly conduct, or if one party was not competent to voluntarily consent thereto, the settlement agreement must be set aside.	<i>Nolan v. Lee Ho, supra</i> , 120 N.J. at 472; <i>De Caro v. De Caro</i> , 13 N.J. 36, 41-42, 44 (1953); <i>Honeywell v. Bubb, supra</i> , 130 N.J. Super. at 136-37.
d)	Matrimonial agreements need not necessarily be reduced to writing or placed on record to be enforceable.	<i>Harrington v. Harrington</i> , 281 N.J. Super. 39 (App. Div. 1995); <i>Bistricher v. Bistricher</i> , 231 N.J. Super. 143, 149 (Ch.Div.1987).
e)	Although it has been remarked that matrimonial agreements which are fair and just, fall within the category of contracts enforceable in equity, the basic contractual nature of such agreements has long been recognized.	<i>Petersen v. Petersen</i> , 85 N.J. 638, 642 (1981); <i>Massar v. Massar</i> , 279 N.J. Super. 89, 93 (App.Div.1995).
f)	Matrimonial agreements are enforceable, subject to <i>Lepis</i> and R. 4:50-1 considerations as well as considerations of unconscionability, fraud or overreaching.	<i>Massar v. Massar</i> , 279 N.J. Super. 89, 93 (App.Div.1995).
g)	Where the parties agree upon the essential terms of a settlement, so that the mechanics can be fleshed out in a writing to be thereafter executed, the settlement will be enforced notwithstanding the fact that the writing does not materialize because a party	<i>Lahue, supra</i> , 263 N.J. Super. at 596; <i>Davidson, supra</i> , 194 N.J. Super. at 549-50.

	later reneges.	
h)	A contracting party is bound by the apparent intention he or she outwardly manifests to the other party. It is immaterial that he or she has a different, secret intention from that outwardly manifested.	<i>Brawer v. Brawer</i> , 329 N.J.Super. 273 (App. Div. 1995); <i>Hagrish v. Olson</i> , 254 N.J.Super. 133, 138 (App.Div.1992); <i>Tung v. Briant Park Homes, Inc.</i> , 287 N.J.Super. 232, 239 (App.Div.1996).
i)	Objective manifestations of intent are sufficient and controlling.	<i>Leitner v. Braen</i> , 51 N.J.Super. 31, 38 (App.Div.1958) (stating that an expressed intent, and not the so-called real intent of a party controls.)
j)	Property settlement agreement between spouses is enforceable only if it is completely voluntary, fair, and equitable, and therefore, it is subject to amendment by the court when changed circumstances make its enforcement inequitable.	<i>Brawer v. Brawer</i> , 329 N.J.Super. 273 (App. Div. 1995); <i>Lepis v. Lepis</i> , 83 N.J. 139, 148 (1980); <i>Schlemm v. Schlemm</i> , 31 N.J. 557, 581-82 (1960); <i>Smith v. Smith</i> , 72 N.J. 350 (1977).
k)	Once issues of equity have been removed from a case, the enforceability of a settlement agreement is subject to the same standards as that in any other case.	<i>Berkowitz v. Berkowitz</i> , 55 N.J. 564, 569 (1970); <i>Harrington, supra</i> , 281 N.J.Super. at 46; <i>Rolnick v. Rolnick</i> , 262 N.J.Super. 343 (App.Div.1993).
4	Things to Settle, Short of Settlement	
a)	The admissions or stipulations of the parties with respect to any cause of action pleaded or material fact asserted by plaintiff or defendant-counterclaimant.	
b)	The factual and legal contentions of the plaintiff or defendant-counterclaimant, to the extent resolution is sought from the Court.	
c)	The factual and legal contentions of the plaintiff or defendant as to non-liability and affirmative defenses.	
d)	All claims as to any damages – if appropriate – and the extent of injury, and any admissions or stipulations with respect thereto; and this shall limit the claims	

	thereto at the trial.	
e)	Any amendments to the pleadings and – where necessary – the time fixed within which such amended pleadings shall be filed and served, etc.	
f)	A specification of the issues to be determined at the trial, including all special evidence problems to be determined at trial and issues, not raised by the pleadings, which occur to the trial judge, with an appropriate stipulation in the event if the attorney concerned does not wish to advance any such issue.	
g)	A specification of the legal issues raised by the pleadings which are abandoned or otherwise disposed of. If a ruling is sought on any such legal issue, the matter should be set forth with directions that formal motion be made thereon at a later time.	
h)	A list of the exhibits marked in evidence by consent.	
i)	Any limitation on the number of expert witnesses.	
j)	Any direction with respect to the filing of legal briefs, position papers, Pre-Trial Memoranda, etc. A request by the court for legal briefs should be included where the resolution of any general legal problem is not clear, or where special problems of evidence exist, as noted by the attorneys or on inquiry by the judge.	
k)	In special circumstances the order of opening and closing to the jury at the trial in a <i>Brennan v. Orban</i> -type domestic tort case.	
l)	Any other matters which have been agreed upon in order to expedite the disposition of the case.	
m)	In the event that a particular member or associate of a firm is to try a case, or if outside trial counsel is to try the case, the name should be specifically set forth.	

5	Settlement Techniques & Approaches to Breaking Deadlocks by the Court.	Jurists vary sharply on the advisability or propriety of some of these methods. Timing with respect to nearness of conference to Trial or age of case is sometimes controlling.
a)	Conference with attorneys alone.	
b)	Conference with attorneys and parties.	
c)	Caucusing with one attorney at a time.	
d)	Caucusing with one attorney together with respective party at a time.	
e)	Conferencing in various combinations with experts, guardians ad litem, attorneys for children, etc.	
f)	Conferencing on-the-record.	
g)	Conferencing off-the-record.	
h)	Referring out to previously uninvolved Judge for settlement conference.	
i)	Conferencing with Agenda specified in advance.	
j)	Conferencing with ad hoc Agenda.	
k)	Asking for various proffers at conference.	
l)	“Tipping hand” concerning inclinations on various issues at conference.	
m)	Creating and fostering appropriate bargaining ethos at conference.	
n)	Noting impressions concerning R. 5:3-5 (C)(3) reasonableness and good faith positions of parties at the conference.	
o)	Eliciting sealed settlement offers at conference; using R. 5:3-5 (C)(3) as analogue to Offer of Judgment Rule.	

p)	Using Position Papers, Trial Memoranda & Legal Briefs as adjunct to Settlement Conference.	
q)	Referring matter to ADR, etc.	
r)	Using “Compound Property Settlement Agreement” – incorporating agreed-upon, plus alternative competing terms of proposed settlement – as a “Single Negotiation Text;” a vehicle for focusing problem solving and negotiating settlement.	
s)	Deciding to bifurcate Trial as a strategy for facilitating settlement of later half.	
t)	Asking for settlement at the beginning of each day of Trial.	
u)	Using mid-Trial continuances as a vehicle for promoting <i>eleventh-hour</i> settlement efforts.	
v)	Asking for consensual value-weighting of objectives from respective parties during caucus.	
w)	Asking “ <i>Why do you want what you want</i> ” questions during conference to reveal additional problem-solving data.	
x)	Asking “ <i>What if we can come up with a different way of getting what you want</i> ” questions to escape from a zero-sum game.	
y)	Asking parties if they are willing to accept the risks of an outcome that they have chosen not to cooperatively create.	
z)	Exploring the possibilities of addressing some of the case dynamics and issues prospectively through follow-up, rather than forcing the decision today.	