

**View from the Bench – A Few Thoughts on Settlement Conferences**  
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When I left the private practice of law a few years ago and began my new job as Magistrate Judge, I knew that conducting settlement conferences or mediations would be an important part of my responsibilities, but I have been amazed by both the volume of such proceedings and by the challenge they present.

Although I practiced law in Roanoke for twenty years before moving back to federal court, I had not had any experience in conducting mediations. Certainly, I had participated in dozens of them, both in proceedings conducted in federal court by the Fourth Circuit Mediator or Magistrate Judges and with private mediators, but I had not conducted any myself. Over the past three years, I have conducted well over one hundred settlement conferences and consequently have learned much about the process from the perspective of a neutral. I hope the following observations will help those who are preparing themselves and their clients for settlement conferences.

At the end of the day, the goal of any settlement conference is that justice be done. Because of the modern cost of litigation and the vagaries of trial, resolution of cases through mediation is far more prevalent than it was when I started practicing law. In the 1980s, mediation was unheard of, and if the lawyers could not get the case settled over the phone, the parties went to trial. These days, however, the cost of litigation is a much more significant factor for parties to consider when conducting a cost benefit analysis of any proposed resolution. Indeed, I believe that mediations are so popular these days in large measure due to the high cost of trying a case to verdict. The cost of litigation, therefore, is always an important factor in getting a case settled at mediation.

The Federal Judicial Center trains all new Magistrate Judges in mediation techniques, and annually conducts seminars for Magistrate and District Judges on the subject. While these excellent programs were certainly helpful in making the transition from mediation advocate to neutral, success as a mediator also depends on one's experience and practice. Having sent legal bills for more than twenty years, I can speak with some credibility to parties and their counsel about the cost of taking a deposition, writing a summary judgment brief, or trying a case. I think that is helpful in getting cases resolved. By the same token, the fact that I get to conduct settlement conferences in a federal courthouse also helps get parties motivated to settle cases.

In considering whether to seek a settlement conference in federal court, it goes without saying that it is of primary importance to know the practice of the District Judge trying your case. Here in the Western District, each District Judge approaches convening a settlement conference differently, and you have to investigate what each District Judge expects in that regard. Many

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District Judges address settlement conferences in their pretrial orders, so that is a good place to start. If the pretrial order does not address settlement conferences, here in the Western District you may request one by motion or by communicating with the District Judge assigned to your case. If the pretrial order already refers the case to the Magistrate Judge for mediation, counsel may communicate your interest in having a settlement conference scheduled by contacting that Magistrate Judge.

The timing of a settlement conference can be critical to a successful resolution. Depending on the amount in controversy and complexity of factual and legal issues, some cases cry out for settlement early in the case, even before any discovery is taken. Counsel should try to assess the goals of the litigation and the net cost of the litigation to the client early in the case. If the cost of litigation is significant in comparison to the likely outcome, it is often helpful to schedule a settlement conference early to avoid spending the client's money on counsel and transcript fees that could be better spent resolving the case.

Occasionally, early settlement conferences are not successful for a number of reasons. First, there seems to be a natural tendency for counsel to be more bullish about a case early on, before discovery reveals cracks and nuances in your legal theory. Second, and often more significant, clients appear less willing to settle a case before experiencing a bit of the process. We have all experienced clients whose firmly held settlement position of "millions for defense and not a penny for tribute" changes after being subject to a deposition, attending an early motions hearing, or receiving a few months of legal bills. Sometimes it takes the reality check of a taste of the litigation process for certain clients to appreciate the benefits of a settlement conference. Certain cases may require resolution of a legal issue or some factual discovery before serious settlement negotiations can be entertained. Whether a settlement conference is going to be more successful early on or later in the case is going to depend on a variety of factors, including the projected cost of discovery, the mindset of your client, and the stakes involved in the litigation. Counsel ought to think long and hard about when it makes the most sense to schedule a settlement conference.

From my perspective, no time is too soon to try to get a civil case settled. The costs of litigation are so prohibitive to most clients that parties in federal court ought to be thinking about mediating a case from the outset. In my practice, if we do not get a case settled at the first face-to-face mediation session, we have met with some success by staying involved and continuing settlement discussions with counsel over the telephone, or even by convening a second settlement conference. Obviously, the former is much more efficient, and frankly, sometimes certain parties need a bit of time to think about what was learned at the settlement conference before they are prepared to resolve a case.

In cases that I am conducting settlement conferences, I always enter a Settlement Conference Order which sets forth what is expected of the parties attending the settlement conference. Counsel need to read and pay attention to that order as it imposes certain obligations on counsel and the parties.

First, it requires that parties negotiate in good faith. It serves no purpose to come to a settlement conference if the parties have little or no interest in settling a case. Each of us have had clients who tell us that they refuse to settle, and counsel need to explore that refusal with your client to see whether it is a knee jerk response to a lawsuit, is emotional, or whether there is a well thought out reason for such refusal. In my experience, it is very rare that a case truly has no settlement value. Indeed, sometimes the mediation process itself helps to persuade clients that settlement is in their best interest. Many times I have had counsel tell me that there is no chance of settlement, yet somehow the case gets resolved. Perhaps it is the persistent drumbeat of billable hours that, at a settlement conference, turns adverse parties into strange bedfellows. All that being said, if you have fully considered the issue with your client and believe that it is truly not in your client's best interest to settle a case and that your client is unwilling to settle, don't mediate it.

Second, mediations don't work if persons with authority to settle the case are not physically present. Telephone mediations seldom work, and I think there are several reasons for this. First, unless you are present, you do not have the same level of investment in the settlement process. Second, there is no way to know whether the person on the phone is really paying attention to the arguments made by the other side or whether they have the phone on mute and are playing Tetris. Third, I believe that one of the principal advantages of a settlement conference is to give the parties the opportunity to look each other in the eye and speak freely about the case without it being used against them. In the same vein, another advantage to mediation is to allow the neutral direct access to the clients without the filter of counsel. Finally, it is not a good idea to play games with the authority issue by bringing a minion disguised as the master; such efforts are readily transparent and can cause the other side to believe that your side is not really interested in settling the case.

Third, I believe that parties ought to exchange written mediation statements and allow their clients to review them. If the parties want to address settlement expectations or strategy, they can do so in a separate, confidential letter to the neutral. Optimal written submissions are short and consider the pros and cons of each case. It is very often helpful to attach critical documents or photographs and to reference controlling precedent. Attaching large volumes of discovery or pleadings is seldom helpful as key points can be buried in a mountain of paper. I require parties to include in their mediation statements the identity of the party representative attending the mediation and a representation that this person has full authority to resolve the case. I do so because the parties have had some dealings with each other prior to the settlement conference, and I want to make sure that any concerns about who the other side is bringing and their authority are resolved ahead of time. Further, if there are any unusual issues or concerns, it is often helpful to discuss them in advance of the session. Such calls can help save significant time and effort.

I have certain expectations of the parties coming to a settlement conference. First, I expect that counsel will have explained the process to their clients beforehand. While that may seem a bit obvious, I have had some mediations where it was obvious that counsel had not told

his client what to expect. In that regard, it is helpful if counsel has had a frank discussion with the client about realistic settlement expectations. Second, I require the parties to have engaged in some settlement discussions beyond an opening demand and offer. That helps the parties to assess whether coming to a settlement conference is going to be fruitful. Third, plaintiffs in personal injury cases need to have a clear understanding and plan concerning lien issues. If there is a significant lien issue, the lienholder should be included in the settlement process. Finally, it bears repeating that the parties negotiate in good faith and that the party representative present at the settlement conference has the authority to settle the case without getting the approval of others who are not present. The court devotes substantial time and effort to conducting settlement conferences and expects the parties to do the same. A settlement conference is often the best opportunity parties have to talk directly to each other and settle a case, and these efforts can be frustrated when one side comes to the conference without the actual decision maker.<sup>2</sup>

On the day of the settlement conference, I suggest that you have a realistic outcome in mind and prepare your client for it. If either counsel or the client are not prepared for the settlement conference, delay or frustration is likely to result. By the same token, taking extreme or outrageous settlement positions only prolongs the process. You and your client should be prepared to advocate your case and to do your own negotiating; you ought not expect the neutral to do it all for you. In that vein, during the opening session, talk to the other side. You should not address your argument and discussion to the neutral. An opening session at mediation is not oral argument on a motion for summary judgment. The neutral is not the decision maker in a mediation, so address the person who can help you get your case settled - the party on the other side. In that regard, remember that a heartfelt apology - client to client - can be effective in helping to bury the hatchet if it is done right. By the same token, a halfhearted effort can make matters worse. Sometimes parties feel the need to continue the litigation strategy of attacking the other side in the opening session of a settlement conference, calculated to scare the other side into settling. That strategy is almost always a disaster and does not help resolve cases. Instead, it generally causes folks to dig their heels in.

Settlement conferences can be very effective tools to resolve disputes, but only work when both sides bring persons who have the ability and willingness to resolve the case and when counsel and the client are prepared for the process. Rational people, facing the cost, distraction, pressure, and anxiety of a lawsuit, will nearly always choose to settle a case if each side is willing to listen to the other and explore realistic settlement opportunities. It is my privilege to help you try to do that.

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<sup>2</sup>It is for this reason that my Settlement Conference Order provides that if a party appears at a settlement conference without complying with the terms of the order, including the obligation to have the decision maker present, monetary sanctions representing the fees and expenses incurred by the other parties in attending the settlement conference may be awarded.