Mediation/Settlement Conferences

Recent Developments by the Judiciary

Sponsored by the Shreveport Bar Association

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1:00 p.m.-2:00 p.m.

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I. STATUTORY AUTHORITY

In the late 1980's Congress recognized alternative dispute resolution ("ADR") as a cost-efficient alternative to trial.

A. In 1988, Congress passed the Judicial Improvements and Access to Justice Act

This Act permitted U.S. District Courts to submit disputes to arbitration.

B. Civil Justice Reform Act of 1990

In December 1990, Congress passed the Civil Justice Reform Act ("CJRA"), which required the federal district courts to develop cost and delay reduction plans. The statute directed the courts to consider adoption of six case management principles, the sixth of which was ADR.

C. Post-CJRA

After the sunset of the CJRA in 1997 and based on the success of ADR in the court system, Congress passed the ADR Act of 1998 which mandates that courts provide ADR services to civil litigants. This act remains in effect *See* 28 U.S.C. §§ 651-658.

1. Requirements of the ADR Act

a. Each district court must by local rule authorize use of ADR.

b. Each court must by local rule create its own program.

c. Each court must provide at least one type of ADR.

d. By local rule, each court must require litigants to consider using ADR.

e. Courts may require litigants to use mediation and ENE.

f. Arbitration referrals require party consent.

g. Districts may exempt cases or categories of cases.

h. Courts must adopt processes for making neutrals available.

i. Neutrals must be trained.

j. Courts must adopt a local rule on confidentiality.

k. Courts must adopt a local rule on conflicts of interest.

l. Courts with programs must examine their effectiveness.

m. A program administrator must be designated.

n. Funding authorized.

o. Leaves type and scope of ADR to each district.

p. No appropriation of funds.

q. No reporting or enforcement requirements.

2. Programs Across the Country

a. mediation,
b. arbitration,[1]
c. early neutral evaluation,
d. summary jury or bench trials,
e. general authorization.

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[1]Note that, under 28 U.S.C. § 654, "a district court may allow the referral to arbitration of any civil action (including any adversary proceeding in bankruptcy) pending before it when the parties consent, except that referral to arbitration may not be made where--(1) the action is based on an alleged violation of a right secured by the Constitution of the United States; (2) jurisdiction is based in whole or in part on section 1343 of this title; or (3) the relief sought consists of money damages in an amount greater than $150,000."

Some districts authorize more than one type of ADR. The implementation of these types of ADR differs from district to district. For example, some districts utilize a "settlement week" approach where the court's facilities are devoted to mediation of a certain number of trial-ready cases. Attorneys from the district's bar serve as mediators.[2] Other districts use a mediation/arbitration approach where a case that does not settle at mediation proceeds to arbitration. There are also a number of districts that have specific mediation programs geared towards pro se litigations (some may limit to non-prisoner pro se, some to prisoner pro se, and some to both types of pro se litigants).

3. W.D. La. Program

a. Local Rule 16.3.1 provides:

> Both before the initial Rule 26(f) conference and within 60 days after the deadline for close of discovery, counsel must discuss with their clients and opposing counsel the appropriateness and timing of alternative dispute resolution (ADR).
>
> When the presiding judge in any civil matter determines that a settlement conference, mediation, or other method of ADR may assist in the resolution of a case, the presiding judge may refer the case to ADR either on motion of the parties, or sua sponte. If the parties agree upon an ADR method or provider, the court will respect the parties' agreement unless the presiding judge finds that another ADR method or provider is better suited to the case and parties.

b. In practice, the magistrate judges generally serve as the neutrals and conduct settlement conferences.

[2] Typically, litigants are required to pay the mediators. There are some districts who employ court staff to conduct mediations, whether or not the settlement week-type of ADR is used.

r. Some, but not all, of the district judges require civil litigants to certify that they have had settlement discussions and/or mediated in compliance with the Local Rule.

s. Some district judges will order a settlement conference; others permit the settlement conferences only if the parties consent.

t. Any magistrate judge can conduct a settlement conference in any case, if he or she is willing to do so.

u. If the magistrate judge who conducts the settlement conference is the assigned magistrate judge, he or she may recuse if the case does not settle. Some magistrate judges always recuse in that situation; some recuse if they have learned confidential information.

v. The magistrate judges have their own individual settlement conference orders.

II. THE MEDIATION/SETTLEMENT CONFERENCE PROCESS

A. Why mediate?

1. Conservation of Resources: money, time, mental, and physical effort;

2. Confidentiality: the process is confidential;

3. Flexibility: the parties are not limited to remedies at law; they are free to create their own solutions, best suited to the facts and circumstances and the positions of the litigants;

4. Relationships maintained: each party achieves something of value in a mutual settlement, and ongoing business or personal relationships may be able to continue for mutual benefit;

5. Enhanced Communication: the mediator facilitates the negotiations, and the parties often, and sometimes significantly, change their views regarding the events in question;

6. Retain Control: juries and other fact finders do not always give the same weight to key pieces of evidence, as each side would like them to do.

B. Mediation v. Settlement Conference

1. If you are considering mediation, take into account the following considerations:

   a. Choose a mediator who can help you settle the case with this particular client, versus this particular opposing party (and counsel), and given the nature of the dispute.

   b. Do you need someone with special expertise?

   c. Is the cost of mediation a factor? Who will pay?

2. **If you are seeking (or are ordered to) a settlement conference with a magistrate judge, consider the following:**

   a. Either the magistrate judge assigned to the case or another one in the district, subject to availability and willingness, may serve as mediator.

   b. For some parties, a settlement conference may provide the opportunity for their "day in court" with judge to hear their story and may result in a higher likelihood of settlement.

   c. If you or opposing counsel has a difficult client, he or she may be more willing to accept the evaluation of a magistrate judge in a position of authority to the mediation process. This is also true, at least in some cases if your opposing counsel is the one who is difficult. As there is the incentive to appear reasonable in front of the magistrate judge.

   d. Relatedly, unlike a mediator, the magistrate judge decides when the parties are at an impasses and controls when the settlement conference ends.

e. A settlement conference does not requirement payment of any fees and can be conducted by zoom or in person.

III. ADVICE FOR MEDIATION/SETTLEMENT CONFERENCES

A. Provide all information your mediator or magistrate judge asks for. While they understand your desire to hold information back, a neutral is only as good as the information provided to them.

B. Comply with all deadlines. You are setting the tone before the conference with your own behavior.

C. Perform your own due diligence, but have an open mind. The role of a neutral is to fairly evaluate the case and provide information to you; make sure that you are not so entrenched in your view, that you don't at least consider advice given to you.

D. Know what terms are important to you and your client. Nothing can sabotage a mediation faster than including a controversial term at the last minute.

E. Prepare your client, realistically, for the mediation or settlement conference. That means to have the tough conversations BEFORE the conference, not during. A mediator or magistrate judge can then reinforce your messages, rather than trying to do damage control with you for the first time at mediation.

F. Use the confidential settlement statement to alert your mediator/magistrate judge to potential problems.

G. Bring the right people/Have the right people present. Although it's possible to settle a case while the person holding the purse strings only available by telephone, it can sometimes be challenging. Another issue arises when your client brings a "support" person who may or may not share the same goals or view the case the same way.

H. Make sure you have considered all lien/intervention issues.

I. Include all (important) terms.

All of the terms of the agreement need to be included in the settlement document. If you want a confidentiality agreement, have that included in the settlement agreement. The same is true for court costs, the mediation costs, liens, receipt and release documents that are to be signed later, or any other matters that must be taken care of before the lawsuit is dismissed. If someone is reserving their rights against some other person or party, that should be described. If a minor is involved, the document should identify who will be responsible for getting the tutorship completed and for obtaining court approval of the settlement.

J. On the "record" or not?

If your client's greatest concern is confidentiality, a recording (by zoom or in court) may be considered a public record. While it is highly unlikely that anyone outside the case will request that recording, that is a possibility.

Remember in federal court, oral agreements are enforceable. Make sure that you've included a provision for the continuing jurisdiction of the Court to enforce that agreement, and you can always file a motion to enforce, if necessary.

However, **IF** you have an extremely difficult opposing party, counsel, or client, you may want to consider a recording or even preparing a written agreement with the basic skeleton terms to be signed before the parties leave.