

A Magistrate Judge Reflects on Mediating the National Football League Lockout

In early April 2011, the Hon. Susan Richard Nelson, U.S. District Judge for the District of Minnesota, ordered the parties in the case of *Tom Brady v. National Football League* to enter court-supervised mediation.

Plaintiffs' class action complaint alleged violations of federal antitrust laws and, among other remedies, sought injunctive relief against the National Football League and each of its teams. Plaintiffs' action was commenced following a league-wide lockout of players by owners of each of the NFL's teams. The case immediately drew nationwide media attention.

Judge Nelson had been appointed to the Article III bench in December 2010. While she had only served as a District Court Judge for a few months, Susan Nelson was no stranger to big cases. Prior to her appointment, she had served as a Magistrate Judge for more than 10 years. Those years saw plenty of complex cases on her docket. In private practice as well, she had seen her share of such disputes. Perhaps the most notable was a landmark case brought against big tobacco. In that case, Judge Nelson and her team of plaintiffs' counsel, while in the middle of the jury trial, were successful in reaching settlement in the multimillion dollar litigation that they had brought on behalf of the State of Minnesota.

But it was during her tenure as a Magistrate Judge that she truly earned a well-deserved reputation as someone who could settle cases. Her prowess at achieving settlements, even in the most difficult cases, was due in no small part to her absolute refusal to consider any controversy as one that was impossible to settle. So, when *Brady v. NFL* hit her desk, one of the first things the parties learned was that Judge Nelson expected each side to engage in settlement talks and to seriously approach the court-ordered mediation in good faith and with a commitment to making it work.

The commitment to engage in settlement talks did not come easy. Just a few weeks before, the league and players had spent 17 long days under the supervision of the director and deputy director of the Federal Mediation and Conciliation Service. Their attempt to resolve their differences failed miserably. The lockout and lawsuit quickly followed. Additionally, neither side in this dispute could be described as a stranger to high-stakes litigation. Both sides came before the court with an army of highly paid and skillful litigation counsel. They were lawyers who were hired to litigate, not necessarily to settle. And, now, the Judge was telling both sides that despite their earlier failures, she

was insisting that they return to the negotiation table.

The long hours of failed talks in Washington, D.C., had left both sides bitter and suspicious of the other sides' motives. Distrust and perhaps a bit of dislike was evident in the parties' pleadings and arguments brought before the court. Neither side was anxious to return to the settlement table. Nor did they share the confidence of Judge Nelson that mediation was the appropriate course to follow.

Despite their doubts, both sides recognized the court's resolve. Accordingly, the parties advanced names of nationally recognized mediators for appointment. The qualifications of the suggested nominees were impressive. Each had national reputations in the field. But Judge Nelson had another thing in mind entirely.

Before her Article III appointment, Judge Nelson had been the Magistrate Judge assigned to a different case involving the NFL. Upon her elevation to Article III status, the assignment of that case fell to me. Through that assignment, I had become familiar with at least some of the attorneys representing the league. In Judge Nelson's opinion, that familiarity gave me a head start in conducting the mediation she was about to order. More importantly, beyond that familiarity, there was confidence that I shared with Judge Nelson—forged during our years together serving as Magistrate Judges and confirmed in her work as a District Judge—that the District of Minnesota's appointment of Magistrate Judges to serve as alternative dispute resolution neutrals, pursuant to the Alternative Dispute Resolution Act of 1998, 28 U.S.C. §653, had resulted in the creation of a roster of mediators whose experience was very likely unmatched in the private sector. Appointing an experienced Magistrate Judge who had mediated literally thousands of cases would, in Judge Nelson's view, serve the parties well.

By April 2011, my experience in litigation stretched over nearly 35 years. Sitting as Minnesota's Chief U.S. Magistrate Judge, I had served on that bench for close to 15 years. Before federal service, I had been a state District Court Judge, serving on Minnesota's general jurisdiction trial court for more than 10 years. I also had the experience of being in private practice as a litigator in a small town law office. That kind of practice gave me plenty of opportunities to represent both plaintiffs and defendants. Being in a small town firm allowed me to benefit from the wide experience lawyers from smaller practices are able to gain.

Experience as a private litigator, a general jurisdiction trial

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judge, and a federal Magistrate Judge serves one well only if you're willing to do your homework in each case. A successful mediator, just as a successful trial judge, must be a quick study. To be effective, a judge or mediator must have a command of the facts, law, and issues that each case brings. In the NFL mediation, my study began by following Judge Nelson's suggestion that I meet with each party for one full day prior to the time the joint sessions would begin.

Know Your Judge

Judge Susan Nelson was instrumental in the parties being able to achieve successful resolution. She insisted the parties engage in mediation. She supported my role as a mediator. Most importantly, while the mediation was ongoing, Judge Nelson attended to addressing the parties' dispositive motions. She did so in a firm and decisive manner. Also, while I was assigned the mediator's role, Magistrate



Prior to that initial meeting and the joint sessions that followed, each party submitted an *ex parte* confidential letter concerning their settlement posture. Like all good lawyers, each side made sure that I had an opportunity to learn about the facts and law as part of their presentation. Each party appeared before me as scheduled and was confident, given our initial meeting, that I was informed on the facts, the law, and the host of complicated issues that needed to be resolved.

The scope of the mediation, necessarily, focused not only on the issues raised in the class-action complaint, but also on the full scope of the future employment relationship between the players and the NFL member clubs and the process by which any agreements could be confirmed and ratified.

The mediation sessions began on April 12, 2011, and ended with a successful resolution of the lockout and a full complement of NFL games being played that fall. The final agreement between the parties resulted in a 10-year collective bargaining agreement on Aug. 4, 2011. That document runs more than 300 pages in length. The scope of the agreement covers a variety of topics, including NFL player contracts, the college draft, rookie compensation, veteran free agency, and salary caps.

Despite the complexity of the final agreement and length of time it took to reach that agreement, the process was not entirely different from other mediations that I've seen. There are some common lessons.

Judge Jeanne Graham attended to adjudicating the parties' nondispositive motions.

Judge Nelson's and Judge Graham's hard work in ensuring that the parties' litigation proceeded in an orderly manner was an important component in the eventual successful resolution. I've often heard it said that the best tool to reaching a successful settlement is to have a firm trial date. Judge Nelson's and Judge Graham's willingness to resolve the parties' disputes in a timely manner gave notice that in the absence of the parties reaching an agreement, decisions would be made for them. Uncertainty on how a judge may decide an issue, together with the knowledge that the judge is one who is diligent in arriving at and announcing decisions, are important tools in a successful mediation.

Do Your Homework

A mediator has to be a quick study. Successful mediations are arrived at when the parties are confident that the neutral party has a good understanding of the facts, law, and issues. In addition, the mediator must be a good listener. A mediator has to be aware of the motivations driving the parties' positions. Knowing each party's needs and how those can be fulfilled by successfully resolving the case are important ingredients to successful settlements.

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settlement conference with the judge who will consider the merits of the case for fear that if the case does not settle, something that the party says or does at the conference may negatively affect the judge's opinion about that party or about that party's litigation position. A settlement conference with a Magistrate Judge who will not be deciding the case eliminates that concern. As is often said about a trip to Las Vegas, "What happens at the conference stays at the conference." So, if the case does not settle, the parties can be secure in the knowledge that nothing will be said to the District Judge about what anyone said at the conference that "poisons the well" in further proceedings with the District Judge. That allows the parties to be more open with the Magistrate Judge during the mediation and increases the chances that the Magistrate Judge can help the parties reach a reasonable settlement.

Because there are fewer trials and more settlements, courts that develop a settlement database are also uniquely positioned to assist the parties in reaching a reasonable settlement. In our court, the Magistrate Judges created and maintain a settlement database of cases that appeared with frequency, such as employment discrimination, civil rights, personal injury, and consumer credit. By tracking the major characteristics of a settlement, including the settlement terms, the plaintiff's initial demand, the defendant's initial offer, the plaintiff's itemization of damages, the stage of the litigation, and brief comments from the judge, we were able to help parties determine whether the settlement proposals being made were consistent with other similar cases. Because of the large volume of cases, we were able to provide useful guidance to the parties on the appropriate settlement range.

Magistrate Judges are also in a good position to settle *pro se* lawsuits. *Pro se* cases in federal court comprise a significant percentage of the court's caseload. These cases can be difficult to resolve without adjudication because *pro se* litigants often do not comprehend the litigation process and may have unrealistic expectations about the likely outcome and monetary value of their case. An experienced Magistrate Judge can facilitate a settlement by explaining the litigation process and reasonable settlement terms.

In our court, we also developed a settlement assistance program, in which volunteer lawyers were appointed to represent *pro se*

litigants for the sole purpose of representing them in a settlement conference. This program has been successful in assisting *pro se* litigants, in providing defense counsel with an attorney with whom to negotiate, and in enabling the Magistrate Judge to preside at the settlement conference without the *pro se* looking to the judge to be "his" attorney in the process. This court-based program has further reduced the amount of motions and trials in *pro se* cases.

Magistrate Judge Settlement Conferences Help Put a Positive Face on the Judiciary

Many clients are frustrated by our court system because they never have their day in court. Too often, their cases are terminated without the client even seeing a judge or appearing before a jury. Clients are frustrated by the expense and delay that often accompanies litigation, as well as its impersonal nature.

A Magistrate Judge-led settlement conference can make going to court a positive experience for clients. In the settlement conference, parties can work with their lawyers and the judge to settle their case. Clients have control over their decision to settle; they can, save money, and obtain certainty and closure regarding their dispute. Clients can walk out with a positive feeling toward our legal system if their case is settled. They also feel they have had their day in court because they actively participate in the process. At the conclusion of a successful settlement conference, I oftentimes request the parties to mark their calendars for a year from the settlement and to write me a letter if they regretted settling the case. In my years on the bench, I never received a letter from a client expressing regret that he or she settled.

Conclusion

Courts should be encouraged to use Magistrate Judges to conduct settlement conferences. This is an effective use of judicial resources that can create tremendous benefits for the parties, their counsel, and the court. Magistrate Judges are in a unique position to determine the proper timing of a settlement conference. They can help parties to control their own destiny, save money and bring about a judicial system that is responsive to parties' needs in a day and age of few trials. ☺

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Patience

We spent 25 full days in settlement talks. If you add the 17 days that the parties spent before the Federal Mediation and Conciliation Service, one quickly sees that resolution in this particular matter was not quickly achieved. That is true in many cases, both big and small. A mediator has to be willing to stick with it until the matter is finally resolved. Being willing to do so is a strong signal to the parties that they, too, should continue to talk with a view toward reaching a resolution. Never be satisfied with simply saying, "at least we narrowed the gap." A mediator's job is only successful if he or she is able to bring full resolution to the dispute leading to a stipulation of dismissal. Only if the court is allowed to focus on all of the other important matters on the docket is there "success."

Have Decision-makers at the Table

Amazing things can happen when opposing sides to a dispute come face to face. Often times, despite the ill-will that litigation engenders, the parties find that when they have the ability to talk to each other, they have much in common. In the case of *Brady v. National Football League*, it was a shared love and respect for the game. Those sentiments were expressed both during official negotiation sessions and during the "after hours" socializing that was part of the process. That mutual responsibility that both sides felt of preserving the game of football helped drive an eventual bargain. It allowed both sides to see the importance of reaching an agreement, even if that meant yielding on significant points in contention. ☺