At Sidebar

by Michael A. McGlone

Settlement Conferences: When to Schedule

Article III judges have, in many parts of the country, mandated magistrate judge settlement conferences. Generally, these conferences are required to be scheduled four to six weeks prior to the pretrial conference; in some instances, the settlement conferences occur closer to the pretrial conference. It has become a rarity that settlement conferences, in the standing orders of the court, are first scheduled after the pretrial conference.

Settlement conferences that occur prior to the pretrial conference do not have the benefit of the trial judge's thoughts, comments, and pretrial rulings. That air of uncertainty may hamper settlement—except in those instances where uncertainty prompts a mutual desire to resolve the matter.

Some lawyers complain that settlement conferences following the pretrial require their clients to incur extra expenses in meeting with opposing counsel and formulating the pretrial order. Those lawyers favor settlement conferences significantly before the scheduled pretrial conference date. The drawback to early settlement conferences is that the litigants (one or both) may not be completely familiar with the case and its nuances. Such is especially true in those instances where the main litigator differs from the attorney who has "worked up" the matter. Early magistrate settlement conferences where the individual attorneys (and in some cases, clients) have not previously focused on the case are generally unproductive—there is no "pressure."

However, early settlement conferences tend to educate the magistrate judges as to that matter's individual problems and unique circumstances (not to mention the individual characteristics of the involved attorneys). An active, involved magistrate judge has a better ability to crystallize the issues in order to facilitate resolution. Many magistrate judges follow the initial, in-person settlement conference with additional telephone conferences in an attempt to encourage resolution. A magistrate judge who has conducted at least one in-person settlement conference before the pretrial, reviews the pretrial order, and then conducts additional telephone conferences, has a far better grasp of the litigation difficulties than the settlement arbiter initially entering the fray post pretrial conference.

Almost universally the district courts require the "first chair" trial attorney attend the pretrial conference. By this stage, that lawyer is intimately familiar with the case—he has to be. The same rationale would also apply to client representatives. In those instances, settlement conferences which occur after the pretrial conference should be (and often are) more productive. Aside from the familiarization issue, an added reason is that the parties both have the benefit of the trial court's comments, thoughts and, in some cases, *in limine* rulings. The parties in conferences held post pretrial are always aware of the court's thoughts even though these parties may have differing interpretations of the trial court's comments.

Many federal practitioners, especially those who engage in one-on-one litigation seem to favor settlement conferences post pretrial. Both sides view a settlement close to trial as one in which the best "deal" is obtained—for both sides.

There are probably several other reasons that post pretrial conferences result in a greater percentage of settlements than those which are held weeks before the pretrial. First and foremost, the pressure on the parties increases. Everyone is in the "trial mode." The danger is that the opposing sides may become polarized which leads to a loss of objectivity. As the invisible pressure escalates, so does the successful settlement percentage.

Secondly, during the final stages before trial some difficulties, previously unknown, now become apparent. Witnesses may be unavailable timely or at all, exhibit reproduction may encounter snags, flight plans go array, etc. Such occurs in one form or another in almost every case. These difficulties, never apparent prior to the pretrial, always encourage resolution. These problems are not limited to the litigants as there are situations in which court difficulties may also cause trial delays.

Finally, the trial itself involves a great deal of work with a concomitant increased stress level. Such is similar to the "pressure" discussion above. Blending these difficulties together, albeit days before the actual commencement of the contest, often leads to resolution.

The debate continues: Are settlement conferences weeks before the pretrial generally a waste of time for the parties and their clients? Are the increased expenses associated with trial preparation more likely to lead to resolution in post pretrial conferences? You decide. It is not likely that the in-place system will change in the foreseeable future. ⊙

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