by Hon. Morton Denlow (Ret.)

Magistrate Judges' Important Role in Settling Cases

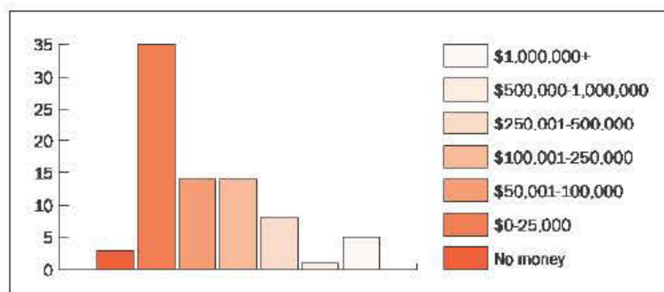
I spent 16 and a half years as a federal Magistrate Judge in Chicago before leaving the bench in October 2012. During that time, one of the principal duties of the Magistrate Judges in our court was to conduct settlement conferences. Each judge would conduct more than 100 settlement conferences a year and would settle the large majority of those cases. Our role in settling cases was highly valued by the District Judges, by the attorneys who regularly appeared before us, and by the clients whose cases were resolved.

District courts have great flexibility in how to use their Magistrate Judges. In some courts, Magistrate Judges concentrate primarily on handling criminal matters such as initial appearances, detention hearings, preliminary examinations, and pretrial motions. Many courts use their Magistrate Judges to supervise civil case management up to the point of trial in addition to their criminal duties. These duties can include discovery supervision, conducting settlement conferences, and preparing reports and recommendations on dispositive motions. In other courts, the Magistrate Judges are put on the civil case wheel and are directly assigned a share of the new cases filed; in those courts, parties consent to the Magistrate Judges in a large number of the cases, and the Magistrate Judges thus adjudicate the entire case without any further involvement by the District Judge.

In a number of courts, the settlement function is left to the parties or to private alternative dispute resolution providers. In this article, I explain why using Magistrate Judges to conduct judicial settlement conferences represents an appropriate and effective use that should be encouraged. There are a number of reasons why federal courts should employ their Magistrate Judges to conduct settlement conferences.

Most Federal Cases Are Resolved for Relatively Small Dollar Amounts

"Don't make a federal case out of it." We have all heard this statement from time to time when someone tries to blow something out of proportion. For many people, federal cases conjure up big-money disputes: antitrust, securities, RICO, class actions, intellectual property, and other big-dollar complex litigation. And, indeed, the federal courts handle many of these types of cases. However, federal courts also handle many cases that, while very important to the parties in these cases, involve far more modest amounts of money. In my experience, the large majority of federal cases that settle are resolved for relatively small dollar amounts. The following is a breakdown by settlement amount for the cases I settled from 2009 to 2011, during my last three full years on the federal bench:



Almost 60 percent of the cases were settled for less than $50,000, and more than 70 percent were settled for less than $100,000. I believe these statistics are representative of settlements reached by my Magistrate Judge colleagues in Chicago and perhaps around the country. Given these relatively small dollar amounts, being expected to pay private mediators to help settle these cases would create a financial hardship on these parties and their counsel. While the parties who engage in large-dollar federal cases typically can afford private mediation, that is not always true for the parties who litigate the small-dollar cases.

Magistrate Judges are quite capable of—and successful at—settling both large- and small-dollar cases. However, if courts do not provide a settlement function through their Magistrate Judges, or through some other forum, the likely result will be that more small-dollar cases will require adjudication, whereas, the large-dollar cases may still be privately mediated. Therefore, judges will spend an increasing amount of their time deciding summary judgment motions and conducting trials for cases that could take a half day or less to settle.

Few Federal Civil Cases Go to Trial

It has been well documented that few federal civil cases go to trial. In 2012, less than 2 percent of federal civil cases went to trial. This small percentage of trials reflects the general trend toward

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settlement and motions for summary judgment as the primary way most civil cases are concluded.

Trial is an expensive process. Given the relatively small dollar value of many federal cases, trial does not represent an economically sound proposition. In large urban centers such as Chicago, it is unlikely that most lawyers could prepare and try the typical single plaintiff employment or civil rights case for less than $50,000, unless they are representing a plaintiff on a contingent fee basis or they have agreed to a flat-fee volume discount for defending such cases. The legal fees incurred to defend these cases can often exceed the settlements paid or the judgments awarded if the plaintiff is successful.

Summary judgment motions are also expensive to prepare and time consuming for judges to decide. In our court, the summary judgment process requires parties to jump through a number of procedural hoops to identify whether a material issue of fact exists. If the motion is not successful, the cost pursuing it often will have been wasted. And, even if the motion is successful, the cost of pursuing it (and perhaps having to defend it on appeal) may well exceed the cost at which the case could have been settled. Summary judgment is no panacea for efficiently and economically disposing of cases.

A Settlement Conference Represents a Better Utilization of a Magistrate Judge's Time

In considering the use of Magistrate Judges, courts may face the choice of having their Magistrate Judges conduct settlement conferences or prepare reports and recommendations on motions to dismiss and motions for summary judgment. There is no question that conducting a settlement conference represents a smarter and more efficient use of judicial time.

Settlement conferences can take much less time than deciding a motion to dismiss or a motion for summary judgment. Many employment, civil rights, or personal injury cases can be settled by a Magistrate Judge in a three-to-five-hour settlement conference. On the other hand, the preparation of a report and recommendation on a summary judgment or dismissal motion in an employment case can take days to prepare.

Whereas a successful settlement conference can lead to an agreement to dispose of the case, a report and recommendation by a Magistrate Judge can be objected to by the losing party and require further decision by the District Judge. If the District Judge sustains a dismissal or summary judgment for the defendant, the case can still be appealed to the court of appeals.

In the Northern District of Illinois, the District Judges recognized the inherent waste of lawyer and judicial time and client money in the report and recommendation process, and they no longer refer motions to dismiss or for summary judgment to Magistrate Judges for reports and recommendation. Instead, they increased the number of cases referred to Magistrate Judges for settlement conferences. The result has been more settlements and fewer summary judgment motions, trials, and appeals from these cases.

Magistrate Judges Are in a Unique Position to Settle Cases

In those courts where Magistrate Judges are responsible for pretrial case management, the settlement role is a perfect fit. While performing their case management function, Magistrate Judges become familiar with and knowledgeable about the case and the attorneys. While supervising discovery, they can learn when the parties have enough information to intelligently discuss settlement. They can also require the parties to exchange settlement proposals in order to determine if the case is ready for a settlement conference. This familiarity with the case places them in a unique position to conduct a settlement conference.

In addition, Magistrate Judges who handle cases on referral are well placed to conduct a settlement conference because they will not be deciding a summary judgment motion or presiding at trial. We sometimes hear that parties are reluctant to participate in a

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. ⊙