by Hon. James R. Knepp II

A Magistrate Judge Reflects on Settlement

While desirability of the disappearance of the civil jury trial is the subject of considerable debate, its fact is not. Any review of statistics and trends in federal court litigation demonstrates the miniscule number of cases that actually go to trial (perhaps 2 percent or fewer). Thus, almost all cases are either adjudicated by dispositive motion or, more likely, disposed of by settlement. Judicial participation in settlement conferences, particularly by Magistrate Judges, features more prominently on the palette of dispute resolution alternatives than ever.[1]

Modern practice in many federal districts involves judges taking a hands-on case management style, often discussing potential settlement at the initial pretrial conference and requiring party attendance at that time. Moreover, a growing number of judges purposefully structure the early phase of the case toward settlement. They direct that initial disclosures and discovery be targeted toward the development of an evidentiary record sufficient to provide meaningful evaluation of the case for settlement, as opposed to preparation of the case for trial or dispositive motion practice from the outset.[2]

Given the reality that most cases filed can, should, and/or will be settled, or at least ordered to a settlement conference or mediation, what are the benefits of proceeding before a Magistrate Judge?

Magistrate Judges provide an important judicial alternate dispute resolution function to the courts, conducting settlement conferences, not only in cases in which the parties have consented to the jurisdiction of a Magistrate Judge, but probably more frequently in cases referred for settlement by our Article III colleagues. As a judicial officer, a Magistrate Judge typically brings a degree of gravitas to the process which a nonjudicial neutral party presumably lacks. To bolster this advantage, I refer to the process as a "settlement conference," as opposed to a "mediation." Substantively, I know that what I really do typically progresses from facilitative to evaluative mediation. However, since it is a proceeding at the courthouse, scheduled by issuance of an order requiring certain preconference submissions and actions, and commanding the attendance of the real decision-makers in the dispute, I find the term "settlement conference" more descriptive.

During my 15 years in private practice as a civil litigator, I spent considerable time preparing for and participating in settlement conferences and mediations, both before judicial officers and private mediators (generally retired judges or esteemed practitioners). What I liked best about the private mediators was the level of preparation they typically demonstrated. It was good to hear a well-prepared mediator discuss, in detail, nuances of my case—both in plenary sessions and in caucus. This preparation and understanding made the mediator's suggestions to the parties resonate with discussions they either had, or at least should have had, with their lawyers. Of course, that preparation came at a cost. Literally.

On the other hand, too often my experience with certain judges conducting settlement conferences left me feeling like I was spending time educating the judge about the case during the conference itself. Candidly, I also felt, on occasion, that the judge was focused on resolving the case for the court's benefit—as a docket management tool or to avoid a trial or motion practice. Settlement conferences with that motivation, even where they are successful, have potential to leave parties feeling like they have been "railroaded."

Many of the same considerations that drive consent to the jurisdiction of Magistrate Judges in civil cases work to the advantage of Magistrate Judges, and to the parties, in settlement conferences. Magistrate Judges, although busy with civil dockets of referred and consented civil matters and responsibility for felony pretrial matters and misdemeanor trials and sentencings, are not subject to the same calendar urgency of felony trials or the burden of felony sentencing. Without those time-sensitive felony obligations, a Magistrate Judge may have the luxury of spending a little more time preparing for a settlement conference. Often, you may find the Magistrate Judge as prepared for your settlement conference as a private mediator would have been.

Like private mediators (and District Judges), Magistrate Judges typically have substantial "prior life" experience in the courtroom. And, as federal judges, we have training opportunities that are simply unparalleled.[3] It should be no surprise, then, that many of us are both confident in our settlement conference chops and proud of the contribution to the administration of justice we make by resolving lawsuits that would otherwise clog already-crowded dockets.

From my tenure on the bench, and from conversations with colleagues around the country, I am convinced there is great benefit to many litigants who have the opportunity to participate in a

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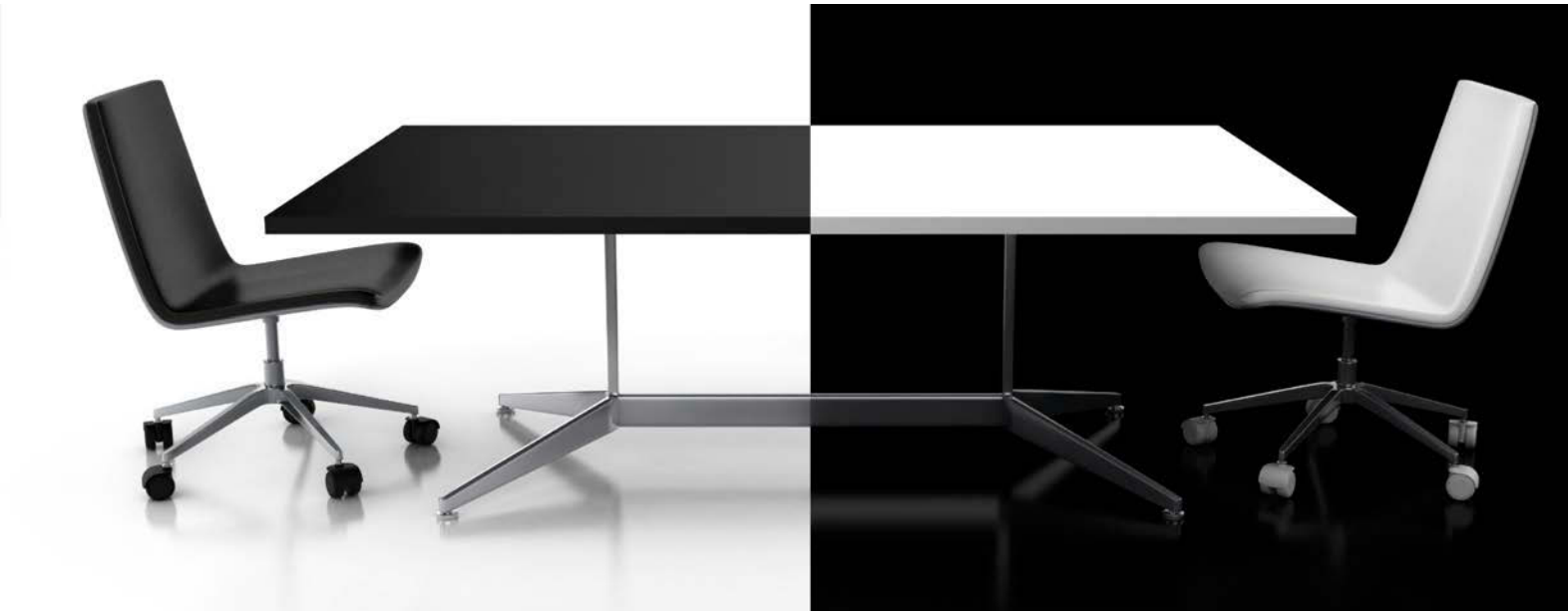
settlement conference with a judge. Being heard by someone in a position of authority facilitates their ability to rationally resolve the dispute. The conversation between the judge and the party or representative, plaintiff or defendant, paves the way for satisfaction with the end result, often making the settlement terms obvious to them, as opposed to some meet in the middle, compromise-for-the-sake-of-compromise result they feel pressured to accept. In many instances, litigants have firm personal convictions about particular aspects of the case, and I find such conversations help reconcile those strongly held feelings with the legal and evidentiary framework with which the dispute would ultimately be decided. My anecdotal observations about the psychological benefit of such conversations are confirmed by post-conference comments, as well as by the often-personal thank-you notes I receive from participants.



Another advantage to a Magistrate Judge conducting the settlement conference is ready-made enforcement of the agreement by the court. Where I spend considerable time participating in a negotiated settlement, and am convinced that the parties have intelligently and voluntarily agreed to its terms, I stand ready to enforce the agreement in the event that one of the parties gets cold feet. And, even in cases not on my consent docket, where part of the agreed remedy is injunctive or quasi-injunctive, I invite the parties, prior to entry of the consent judgment or dismissal entry, to consent to the case being transferred to my docket, and thus my continuing jurisdiction, to enforce the terms of the settlement. Assured by my understanding of the terms of the settlement agreement from my participation in its negotiation, the parties almost always accept that invitation.

The modern reality is that civil cases filed in federal court will likely never go to trial. The further reality is that settlement will almost always be suggested and considered, and will frequently be achieved. The availability of Magistrate Judges in the district courts facilitates the "just, speedy, and inexpensive"[4] resolution of controversies, tenents upon which case management by courts, and dispute resolution by counsel, should be premised.

We are honored to assist you and your clients when that opportunity arises. ⊙

Endnotes

[1]Indeed, Judge Morton Denlow suggests that rather than settlement being something that arises in the course of litigation, it should be an alternative relief requested in the earliest pleading of a party. Morton Denlow, *Making Full Use of the Court: Come to Settle First, Litigate Second*, 35 Litig. 1 (Fall 2008). As he further observes, a lawsuit seeking alternative dispute resolution as an alternative remedy provides the necessary infrastructure (exchange of information, compulsory participation, judicial enforcement, etc.) upon which successful settlement negotiations can be conducted. *Id*.

[2]While many judges accomplish this staging toward evaluation less formally and across a panoply of litigation, a pilot protocol has been circulated by the Federal Judicial Center for use in adverse action employment cases and has been adopted by individual judges in many districts. *Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action*, (Nov. 2011), *available at* www.cod.uscourts.gov/Portals/0/Documents/Judges/WJM/WJM_Initial-Discovery-Protocols-in-Certain-Employment-Cases.pdf.

[3]One of our Magistrate Judge colleagues, the Hon. Morton Denlow, recently retired from the Northern District of Illinois and now conducting private dispute resolution, is a frequent and generous lecturer at settlement workshops for judges. Judge Denlow has also written prolifically and thoughtfully about the settlement process. *See, e.g.,* Denlow, *supra*, note 1; Morton Denlow, *Settlement Conference Tips for Judges*, 13 Prac. Litig. 3 (May 2002); Morton Denlow, *Settlement Conference Techniques*, 45 Judge's J. of the A.B.A. 2 (Spring 2006); Morton Denlow and Jennifer E. Shack, *Judicial Settlement Databases: Development and Uses*, 43 Judge's J. of the A.B.A. 1 (Winter 2004); Morton Denlow, *Concluding a Successful Settlement Conference: It Ain't Over Till It's Over*, 39 J.A.J.A. (Fall 2002); Morton Denlow, *Breaking Impasses In Settlement Conferences*, 39 Judge's J. of the A.B.A. 4 (Fall 2000); Morton Denlow, *Settlement Conference Techniques: Caucus Do's and Don'ts*, 49 Judge's J. of the A.B.A. 2 (Spring 2010).

[4]Fed. R. Civ. P. 1.