When this writer retired after serving 32 years as a United States Magistrate Judge in the Western District of Virginia, having presided over hundreds, if not a thousand, settlement proceedings and having reentered the law as what one colleague termed a “newly minted” private mediator, a single question continued to surface. That question was whether there are differences in dispute resolution proceedings where, on the one hand, an active or retired judge presides over a court-annexed or supervised conference, or, on the other, participates in a private mediation. For ease of delineation between the two, and for the reasons that follow, the court-annexed process will be called a “settlement conference,” and the private process will be called “mediation.” Either can be initiated because they are compelled or authorized by state or federal court pretrial procedures, or because they are initiated by mutual agreement of the parties. Each is intended to bring the parties together in negotiations that will end the controversy between or among them irrespective of whether a suit has been filed. However, this writer’s short answer to the question of whether there are differences in the role of a judge who participates in the two processes, is an unqualified “Yes.”

THE COURT-ANNEXED AND JUDGE-SUPERVISED SETTLEMENT CONFERENCES

Most trial lawyers are familiar with local state and federal pretrial procedures or local rules promoting, if not compelling, settlement conferences in civil cases. In some

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1 Judge Crigler served as a United States Magistrate Judge from 1981 until his retirement in 2013, and presided in hundreds of dispute resolution proceedings. He is currently a member of The McCammon Group whose members provide a range of high quality private dispute resolution and prevention services in Virginia, Maryland, and Washington, D.C. Judge Crigler expresses his appreciation to John McCammon, Esq., the Hon. F. Bradford Stillman (Ret.), and the Hon. Barry R. Poretz (Ret.) for their assistance with this article.
jurisdictions, notably the Eastern District of Virginia, an order is issued directing the lawyers and their clients, or a party’s representative with authority, to appear before a judge, predominately a United States Magistrate Judge, for a settlement conference that is scheduled for a fixed, relatively short period of time that day. In other courts, such as the Western District of Virginia, settlement conferences are encouraged, though most often they are initiated only by agreement of counsel. The schedule accommodates the calendars of the parties, counsel and the Magistrate Judge to whom the conference has been referred by order of the presiding District Judge. The time allotted by the court for these conferences varies depending on the complexity of the case, and ranges from several hours to days or weeks, all monitored by the assigned judge.

Despite jurisdictional variations in the model for settlement conferences, there are some common elements. First, the time available for the parties and the court to prepare for the conference itself and for any post-mediation follow-up is limited. More will be said about that below.

Second, although not usually robed, the judge conducting the settlement conference in endued with all the power of the court to compel attendance and control the timing and pace of the conference. As a reminder of that authority, the conference usually takes place in the judge’s chambers or at some other location in the courthouse, though there are occasions when judges attend in an office of one of the parties.

There should be no wonder then, that there is a more court-like atmosphere surrounding settlement conferences in which parties unfamiliar with the process often feel as though they are participating in a formal court proceeding. After all, the proceedings are being held “in the judge’s house,” so to speak, where court security convene the
participants. Irrespective of any disclaimer of interests in the outcome and a reminder of his/her neutrality, the settlement judge does represent a client with a stake in the outcome, namely the docket. The goal of the settlement conference judge is to serve the interests of the court by closing a case file and removing it from another judge's docket while leaving time to handle matters on the judge's own docket. The only means by which this can occur with any efficiency is with tight judicial control over the process.

There is also considerable confusion in court-annexed proceedings over the extent to which, if at all, a settlement conference judge may or should engage in *ex parte* communications. Everyone in litigation is acutely aware that a judge, sitting *qua* judge, is prohibited from engaging in *ex parte* communications except those relating to routine scheduling matters. Even then, most counsel wish to handle scheduling matters through a judicial assistant or law clerk. While the ethical rule restricting *ex parte* communications literally does not apply to a settlement conference judge, generally there is reticence on the part of counsel and the judge to engage in any *ex parte* pre-mediation conferences before convening the conference. While not participating in pre-mediation conferencing saves considerable preparation time for counsel and the court, and guards time the judge needs to spend on his/her own docket, an opportunity is lost for both the parties and the court to gain valuable, if not essential, insights that would guide the mediation toward reaching a settlement that both parties own.

The absence of pre-mediation conferencing deprives the judge of an opportunity to gather information that would be useful to his/her understanding of case dynamics. Moreover, there is no opportunity to discuss elements of the process itself, such as who will be attending and the authority they bring, and whether any party personally will address
the others in any joint session. Instead, an order directs submission of a settlement
statement and other materials in advance of the conference. Most often, these statements
are little more than reconstituted briefs on dispositive motions, if not the briefs themselves.
Not surprisingly, many are adversarial in nature, and offer little more than assessment of
the facts and law in a light most favorable to each party. They rarely acknowledge the
party’s weakness or other troublesome areas the party reasonably anticipates will be
encountered during the conference. In other words, they offer little insight to the
settlement judge about things that might “drive” the settlement discussions once the
parties arrive, other than how far apart the parties stand on money.

Unfortunately, submissions tendered without pre-mediation communication
between the judge and counsel often forecast the tone a party will likely communicate
during the settlement conference. This may produce a combative, hostile, and contentious
atmosphere that can be impenetrable until late in the conference, rather than an
atmosphere of collaboration. Even worse, without pre-mediation contact, the judge has no
way of anticipating the willingness of each party to participate in the conference in good
faith. Parties often show up solely because they are ordered to do so.

Given the compression of time and the lack of more in-depth information about the
controversy, the mediator needs to maintain control over the process. In an effort to avoid
being seen as merely a messenger for the parties, the judge soon departs from a role of
facilitator and defaults to evaluating the merits and value of the case as well as the risks of
an appeal. One colleague has used the metaphor of the settlement conference judge as a
gunslinger who “points the judicial finger,” threatening to pull the trigger unless the parties
produce a settlement within the time frame allotted for the conference. It is not surprising,
therefore, that a party may well perceive the judge as advocate for the other side, or feel brow-beaten into agreeing to a settlement that actually would be unacceptable under other circumstances. At worst, the judge could be viewed as having interfered with the attorney-client relationship by going beyond evaluation and treading into providing legal advice. As a result, there can be “buyer’s remorse,” which fuels any number of post-conference problems, including wrangling over specific terms for formal settlement papers and attempts to avoid or void the settlement.

Finally, where the settlement conference fails to produce a settlement, there is little post-conference follow-up. The exception may be the complex case where numerous post-session communications and subsequent conferences are anticipated and necessary to resolving the case. Again, the chief reason for the absence of follow-up in the routine case is the lack of time available to the settlement conference judge. The value of post-session follow-up will be discussed below.

Notwithstanding the issues outlined above, court-annexed and judicially overseen settlement conferences are useful tools for alternative dispute resolution in Virginia, and have served to reduce clogged civil dockets.

PRIVATE MEDIATIONS: WHEN THE CAPE COMES OFF

In serving as a private mediator, the judge exchanges the robe for professional attire, holsters the “judicial finger,” and turns over what can be described as “the invisible wireless remote” of judicial power to the parties themselves. Possibly, for the only time in the history of the controversy, the resolution of the case is in their hands, not the hands of the judge-mediator, the trial judge or a jury composed of strangers. The loss of the imprimatur of the court and its authority as well as control of the process is a scary thought
for some former jurists who have spent a career in an outcome oriented position of “Settle or Else!”

If there is one thing that initially characterizes private mediation and distinguishes it from the typical settlement conference, it is that the parties, not the judge, are in control of the process. Private mediation is initiated by the parties who, upon advice of counsel, have determined that the case should be mediated. Often, counsel have agreed to use a particular private mediator, and they normally have selected the date(s) on which the mediation is to be scheduled and its location.

Additional distinguishing characteristics of private mediation relate to time afforded to the entire process, the means by which the parties and the mediator prepare, the time spent in mediation, quality of the mediation session itself, and the time devoted to post-mediation efforts where the case failed to settle during the mediation due to an impasse. Statistics have shown that each stage of the process is equally critical to a successful mediation, and if one is missing, the likelihood of success diminishes.

Impasse is the chief enemy of settlement. One wise mediator often counsels private mediators that the best way to avoid impasse and to continue dialogue between the parties during a mediation is to be sufficiently prepared so an impasse does not occur. The rules restricting ex parte communication by the settlement conference judge with the parties and lawyers are an impediment to preparation. However, they do not apply to private mediations. Thus, the judge-mediator is free to engage in both joint and individual pre-mediation conferences with counsel, and these tools should be employed as early and as often as the dynamics of the case require.
These conferences allow counsel and the mediator to go beyond the routine factual and legal aspects of the case. Discussions touch on a number of matters critical to adequate preparation such as the scope of any materials to be submitted for the judge’s review; the identity of those who may be participating in the mediation and their authority; the existence of potential “hot button” or sensitive topics that have crept into the case; corporate representation; and, in personal injury cases, issues related to insurance coverage or liens on any settlement proceeds. The more the mediator is informed about these matters, even if the information is received ex parte, the better the mediator will be prepared to assist the parties in avoiding impasse and facilitating a successful settlement.

If the ability of the mediator to engage in pre-mediation joint and ex parte communications enhances preparation and effectiveness of the mediator, then some may be concerned about whether the mediator could use that information adversely against the parties during the mediation. However, that is not entirely true because strict rules of confidentiality apply, and they protect the integrity of the process. Customarily, all counsel, all parties, and all non-parties who participate in the mediation sign a mediation agreement, which spells out the terms of confidentiality. Under such agreement, all information gained in the course of the mediation that is not otherwise known or discovered in the case, remains confidential except to the extent waived by the affected party, or to the extent disclosure is required under the law. This has led one prominent mediator in Virginia to translate the protection of confidentiality into a broadened form of a well-known advertising slogan: “What is discussed privately remains private, and what

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2 Confidentiality is not the only rule, as preeminent as it might be. Courtesy and professionalism are right behind and are expected to be employed.
happens in the mediation, stays in the mediation.” Again, control of the confidentiality of any communication is in the control of that party.

So far, this article has emphasized that, in private mediation, control of the process lies with the parties and not the judge, and that the need for a free flow of information from the parties to the mediator is facilitated through joint and *ex parte* communication under the protection of confidentiality both before and during the mediation. Another significant distinguishing factor is TIME, something few court-annexed proceedings have.

Judicially overseen settlement conferences function under severe time constraints. In turn, the parties themselves are actually denied sufficient time to meaningfully process the events that take place in rather rapid succession. In other words, there is something productive, though inefficient, about allowing the process to reach a point in which parties can either take ownership of the resolution of their conflict, or know that despite their best efforts, the case could not be settled that day. As stated above, the settlement conference judge often employs techniques that may produce a settlement, but the settlement may be distasteful to a party because the party does not believe he/she played a role in crafting it.

On the other hand, the private judge-mediator serves to facilitate the flow of information in a way designed to keep the parties moving, even if ever so slowly, toward a resolution. Without information over which the parties have time to process, there is little hope of closure, much less for negotiating on the same track. This is not to say that a party must agree with his/her opponent on all matters, for there will always be those things that mediation cannot resolve; rather the goal is to have each side understand the case from the opponent’s perspective irrespective of whether they agree on the details. Once there is understanding, the road to settlement is much easier.
Of course, this requires the patience and perseverance from the mediator, and the parties. The judge-mediator must always remember that he/she no longer serves as an expeditor of the court’s docket, and that it is not the judge’s ideas about where, when, or over what terms the case should settle, but those of the parties. In that connection, the judge-mediator initially must stress, and then continually remind the parties to be patient with the process so that the process serves to frame the resolution, even if it does not appear at any one time that the opponent is moving in any direction, much less the right one. It is not until all movement stops that any party is able to make a fully informed decision about settlement. In other words, no one can make a choice until that person sees what the choices are. That simply takes TIME to reveal, and private mediation certainly affords the parties time to engage the process and then let it take effect.

Moreover, when progress stops without a settlement on the date of the mediation, the judge-mediator often follows up with counsel, the parties or the persons with authority in an effort to end the case. Settlement conference judges rarely have the luxury of time to engage in post-conference follow-up. It is estimated that post-mediation conferencing, again either joint or ex parte, increases the chance for settlement by as much as 15%.

There is a final distinguishing factor that may cause some to shy away from private mediation, namely its costs. Generally, there are no additional costs to the parties for the services of the settlement conference judge, whereas the parties must pay for a private mediator. While this writer is no statistician in this area, the costs are generally less than 1% of the settlement value of the case. This translates to an expense that is far less than the cost of counsel attending and taking one day of depositions in multiple party litigation.
The point here is that private mediations have saved parties billions of dollars in the last 20 years.

CONCLUSION

There are substantive differences between settlement conferences and mediation. The core differences have to do with control of the process, restrictions or lack thereof on joint and *ex parte* communications before, during, and after the mediation, and the time afforded the parties to mediate. The best settlement is one over which the parties have exercised control and have taken ownership. There certainly is a greater prospect of that when the cape comes off.

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