

Judicial Mediation of Cases Assigned to the Judge for Trial



**Magistrate Judges Celeste F. Bremer and Karen K. Klein
Interviewed by Wayne D. Brazil**

As the role of judges in settlement has evolved from merely telling the lawyers to go out in the hall and get their case settled to becoming actively involved in the details of facilitating a mediated result, the issue of whether it is appropriate for a judge who would preside at trial to host a settlement conference has taken on increasing significance. Some question whether a judge can remain neutral as a mediator, knowing that he or she may later hear the merits in the matter. Some wonder whether a judge hearing a case on summary judgment or at trial can disregard what he or she has learned as a result of mediating that same case. Others argue that it is advantageous to have the assigned judge serve as mediator because he or she is likely to have a richer understanding of the case.

Federal judges are specifically authorized by Rule 16 of the Federal Rules of Civil Procedure to meet with lawyers and parties for the purpose of encouraging settlement. But Rule 16 does not distinguish among judges who are specially assigned solely to host settlement negotiations, judges who also have case management duties (such as discovery management), and judges to whom a case is assigned for trial. So it is not inconsistent with Rule 16 for a judge to host a settlement conference in a case in which he or she would rule on dispositive motions or preside at trial. Nonetheless, there is considerable disagreement among federal judges about whether it is appropriate for a judge to be involved in settlement negotiations in a case in which that judge “has power” over the merits of the action.

To explore these issues, Wayne Brazil, professor at

Berkeley Law, interviewed US magistrate judges Celeste F. Bremer (Southern District of Iowa) and Karen K. Klein (District of North Dakota), both of whom have hosted innumerable settlement conferences. Despite their vast experience in this arena (as well as in case management and trial), these two judges have quite different views about the propriety of a judge “with power” over the merits of a case becoming involved in settlement negotiations.

Judge Bremer has almost exclusively mediated cases in which she was not assigned as the trial judge, while Judge Klein has served as the judicial mediator both in cases assigned to her for trial and in cases not assigned to her for trial.

Prof. Brazil: Opinion surveys indicate most attorneys believe that it is preferable to have a different judge mediate the case than the one assigned to the case for trial. What is your position on the advisability of judges mediating cases in which they will preside at trial?

Judge Bremer: I think the judge assigned to try the case should rarely or never serve as the settlement judge. In my district the magistrate judges serve as settlement judges in most cases and conduct mediation-style settlement conferences. When one of us is assigned as the trial judge on consent of the parties, another magistrate judge will serve as the settlement judge. Because our local rules provide that the trial judge should not be informed of any positions that parties take during an ADR proceeding, the settlement judge reports to the trial judge only that the case settled or didn't settle.

In cases assigned for trial to a district judge, the magistrate judges manage the pretrial phase of the cases, including discovery. If the magistrate judge has discovery issues under consideration that might affect case value, such as striking expert testimony, barring late-listed witnesses, or prohibiting exploration of subjects that one side believes are really important, we trade cases so that the magistrate judge who is managing discovery does not hold the settlement conference.

Judge Klein: It depends on the circumstances. I think it is perfectly acceptable for the trial judge to serve as the settlement judge if the practice is limited: (1) to situations in which the parties voluntarily consent to the trial judge's involvement in settlement; and (2) to jury cases that are fact-driven, rather than driven by issues of law.

In the District of North Dakota, the magistrate judges also conduct mediation-style settlement conferences, but as a small court, we do not have the luxury of multiple magistrate judges in the same location. We will travel to conduct settlement conferences in one another's trial cases, but we also offer the parties the option of choosing the trial judge as the settlement judge, and they often select that option.

In my view, the trial judge's involvement in settlement depends entirely on the parties' wishes, not the trial judge's. The parties should feel no pressure to agree to settlement discussions led by the trial judge, but if they understand the judge's dual role and voluntarily consent to it, the court should make that option available.

If the parties choose the trial judge as their settlement judge, they are probably highly motivated to settle and do not anticipate going to trial. I always assure the parties that if their case does not settle, we will reassess the propriety of my continued involvement as the trial judge.

In a nonjury case the settlement judge should never preside at the trial. On a few occasions, however, I have agreed, at the request of the parties, to serve as the settlement judge in a nonjury case that is assigned to me for trial, but on the strict condition that the case would be reassigned to another judge for trial if the parties could not reach a settlement. Fortunately, these cases all settled at the settlement conference.

Prof. Brazil: Some commentators argue that judges should not mediate cases assigned to them because doing so eliminates the distance between the parties and the judge that is necessary "to maintain the image of judge as dispassionate agent of justice."¹ Such concerns, among others, have led the ABA Section of Dispute Resolution to propose revisions to the Model Canons that, in many circumstances, would prohibit judges from mediating cases assigned to them for trial—on the theory that the "integrity of the adjudication process" is compromised when the trial judge mediates.²

How do you think the trial judge's participation in

mediation might affect the parties' perception of the integrity and fairness of the adjudication?

Judge Bremer: I am especially concerned about issues surrounding the "valuation" of cases. In mediation, all participants are likely to learn one another's views about the value of the case. Confidential information is disclosed that the judge would not otherwise have known.

In the mediation format I use, I begin with a very facilitative approach but often move, gradually, toward a more evaluative style as I learn more about how the parties and counsel assess the issues and value the case. It would be difficult for me to conduct a settlement conference without at some point dealing with the issue of value, so I do not think I should serve as the settlement judge in cases assigned to me for trial.

While, in some situations, it might help the parties to hear the assigned judge's thought process about the

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factual and legal issues, in most mediations the judge also learns about the parties' and counsel's thought processes, as well as their valuation of the case. If parties fail to settle, and the judge later presides at trial, the judge will have a hard time separating the confidential information from the evidence he or she hears when adjudicating the merits of the case. Even if a jury is the trier of fact, a judge who has learned the parties' confidential assessments of the merits of the litigation will have a hard time ignoring that information when ruling on potentially dispositive motions or on challenges to potentially important evidence.

Moreover, even if the judge really can compartmentalize his or her mind, the parties are likely to *believe* the judge can't "unring the bell"—that he or she won't be able to put aside everything learned during the mediation about the parties' analyses. Such parties will fear the judge has prejudged the issues (forming judgments during the settlement conferences—as reflected in the opinions

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he or she expressed at that time). Parties are likely to worry, for example, that the judge will conflate concessions they made during negotiations merely to advance the bargaining process with real weaknesses in their positions on the merits.

In addition, some parties may fear that, when ruling on motions or disputes about evidence, the trial judge is retaliating against them because they didn't agree with the assessments she articulated during the settlement conference or because they took positions that prevented the parties from reaching an agreement.

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Lawyers or litigants who anticipate these kinds of problems—or who anticipate worrying about them—may hold back and not participate fully or candidly in the mediation process. And if parties hold back, they may fail to learn through mediation what their best settlement option really is. When that happens, the court has served poorly both the parties and itself.

Judge Klein: I believe that how the lawyers and litigants feel about these kinds of issues depends in substantial measure on two factors: (1) how they feel about the human being who, in the judicial role, is hosting their mediation; and (2) the way that human being plays her role during the settlement conference.

If the parties know, respect, and trust the judge, they are not likely to be concerned about the possibility that something that happens during a settlement conference will color the judge's subsequent rulings. Moreover, if the judge's style during the settlement conference is respectful and analytically cautious, and if he or she expresses opinions on the merits only when her opinions are solicited and only with appropriately tempering prefaces or conditions, there is little risk that the judge's effort to help the parties explore their situation and their options will compromise the parties' confidence in the integrity of the judicial institution, or that it will provoke fear of contamination of the judicial mind or of retaliation for exercising Seventh Amendment rights.

In my experience, the parties' perceptions are

influenced greatly by the judge's mediation style. Some settlement judges are highly evaluative: they freely and assertively express their opinions on the issues and the likely outcome at trial. While the parties may invite such an evaluation from the trial judge (at least before they hear it), there is a real risk, if the case does not settle, that the parties will later become uncomfortable and question the judge's ability to remain impartial.

Like Judge Bremer, I generally use a facilitative style at the outset—but, if the case is not assigned to me for trial, I may move to a more evaluative approach as needed. When I am serving as both settlement judge and trial judge in a case, however, I try to remain facilitative throughout the entire process, exercising considerable caution about expressing my own assessment of the strengths and weakness of the parties' positions.

Instead, I use a facilitative form of reality checking, in which the parties assess their own and the other party's strengths and weaknesses, rather than listen to my assessment. I try to get the parties to acknowledge their own vulnerabilities, rather than naming them myself. And I try to limit my comments on value to suggesting where the parties' negotiations seem to be headed on their own momentum, rather than using my views of the merits to tell the parties where their negotiations should be headed.

By following this approach, I don't end up "owning" an opinion on the value of the case if it doesn't settle. I also go to great lengths to assure the parties that they control the outcome of the mediation, and that no adverse consequences will result from their failure to settle.

Prof. Brazil: The proposal by the Section of Dispute Resolution would permit a trial judge to serve as mediator if the parties freely consent. That proposal also would permit this practice when there is no realistic alternative, such as in a jurisdiction having only a single judge.

What reasons do you think the parties might have for choosing the trial judge to serve as their mediator? And do you think the trial judge's involvement affects the behavior of the lawyers or parties, even where the parties have freely consented to the trial judge serving as their mediator?

Judge Bremer: I would only conduct mediation in a case assigned to me for trial if there were no other judges, or private mediators, available within a time or location constraint. In my one experience with this situation, I made certain that the parties and the lawyers agreed, on the record, that I could conduct a settlement conference using a mediation format, where case value would be discussed, and then preside at a subsequent jury trial if the case did not settle.

When we first started doing judicial mediation in our court, there were not many private mediators. Today, there are a number of qualified mediators in our area, so that resource is readily available to litigants, even if one party has to pay the entire cost. In today's environment,

I think involvement by the trial judge in mediation is rarely appropriate, given the ethical concerns.

When the judge assigned for trial hosts the settlement conference, the parties and lawyers will most likely hold back critical information, which may undermine the prospect of settlement. When they agree to mediate before the trial judge, they may hope, or even assume, their case will settle, but if they reach impasse, they will invariably be concerned about the judge's impartiality. Or they may feel pressured into agreeing to a settlement they don't want out of fear of displeasing the judge, who, they assume, will want their case off the docket. The risks are just too great to justify the practice, except in the most limited circumstances.

Judge Klein: Mediation is a process that empowers the parties to reach their own decisions, and that should include the power to choose the trial judge as their mediator, as long as they are well-informed about their options and really can choose among those options freely.

There are several reasons why the parties might want the trial judge to serve as their settlement judge. The trial judge in the case may have a reputation as an accomplished settlement judge, and the parties may prefer that judge's mediation style. The lawyers may know from experience that the judge will not bully them into settlement, and that she will be quite willing to recuse herself from adjudicating the case if her impartiality is called into question.

It is not clear to me that lawyers or parties handle themselves differently in settlement conferences hosted by the trial judge and in such conferences hosted by some other judge. It seems to me that most lawyers have developed styles or approaches by the time I encounter them in settlement conferences—and that they stick with those styles or approaches whether I would preside at trial nor not.

Some lawyers are always guarded in mediation and will only speak to their clients or allow their clients to speak after I leave the room—whether or not I might later preside at trial. Other lawyers speak freely and candidly in front of me and encourage their clients to do so as well, even though they know I would be their trial judge.

The parties themselves, the clients, may perceive “added value” in trial-judge-led mediation, and in many cases seem quite eager to tell their stories to “their” judge. Since most cases settle, the parties may feel that having the opportunity to address the trial judge in their own words will provide the equivalent of a “day in court,” which is actually more meaningful and rewarding than meeting with a judge they have never seen before or with a private mediator—and a lot more meaningful than responding to counsel's questions during direct and cross-examination at trial. This is particularly true for one-time litigants, who may be highly emotional and need to feel heard and understood before they can agree

to a settlement. They may feel a judicial system that offers them mediation before the trial judge seems more respectful toward them and more responsive to their needs.

I have never sensed during mediation of a case assigned to me for trial that the lawyers or parties felt any obligation to settle, or any duty to please me or to relieve my docket. If anything, because of the dearth of civil trials, the lawyers sometimes express regret at depriving themselves and the court of the opportunity to have a trial. Likewise, I have never felt that the lawyers or institutional-party representatives fear future appearances before me if they fail to settle. Whether or not I am assigned as the trial judge, I assure all settlement participants that mediation is the parties' opportunity to control the outcome of the dispute, and while the court encourages them to make a good faith effort to settle, the court has no stake in the outcome and is pleased to have a trial if they don't reach a settlement.

Prof. Brazil: Though you express different opinions on the appropriate frequency of mediation by the trial judge, you seem to agree that the practice should be limited to situations in which the parties have fully and freely chosen this option. You also appear to agree that the court should reassure the parties, before they participate in a

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settlement conference hosted by the assigned judge, that they will have the right to have the case reassigned to another judge for trial if they do not reach a settlement. Both of you also stress the importance of the judiciary providing the parties with meaningful service in the settlement arena—especially given the very small percentage of cases that can afford to proceed through trial.

While your gentle debate of these matters has exposed several important issues, it is quite obvious that both of you recognize that judicially hosted mediations must focus on the needs and interests of the litigants, and must honor, scrupulously, the parties' right to determine for themselves (without pressure from the court) whether to settle their case or take it to trial. ♦

Endnote

1. Peter Robinson, *Adding Judicial Mediation to the Debate About Judges Attempting to Settle Cases Assigned to Them for Trial*, 2006 J. DISP. RESOL. 335, 353.
2. *Id.* at 364.