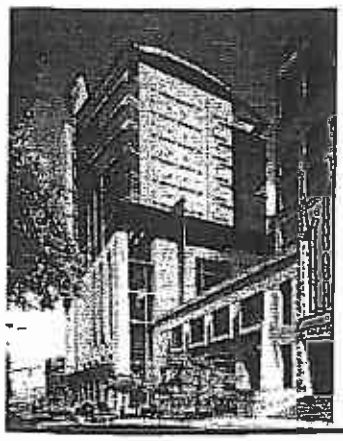

A Quarterly Newsletter of the Oregon Chapter of the Federal Bar Association

FOR THE DISTRICT OF OREGON

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TIPS FROM THE BENCH: EFFECTIVE JUDICIAL SETTLEMENT CONFERENCES IN FEDERAL COURT

By The Honorable John V. Acosta, United States Magistrate Judge

"The definition of a good settlement is that both sides got what they didn't want."

When considering whether to ask for a judicial settlement conference, start by asking yourself what objectives you and your client believe will be achieved by using a judge instead of a private mediator. Identifying these goals first is the best way to determine whether a judicial settlement conference is appropriate for your specific case. If you conclude that it is appropriate, then the next step is to properly prepare for the judicial settlement conference. This article suggests steps to effectively prepare for the settlement conference. These tips are the product of my experience, acquired first as a lawyer and now as a settlement conference judge. They are intended to give lawyers and their clients insight into both the judicial settlement conference process and how to navigate it to best increase the chances of an acceptable settlement. Be mindful that each judge has his or her own style and preferences; that said, the observations that follow probably enjoy general applicability and, thus, should be useful to guide your strategy, preparation, pre-conference submissions, and negotiating approach.

I. What a Settlement Conference Is and Isn't.

It's called a "settlement conference," not a "capitulation conference." Too often, lawyers or their clients seem to expect that the settlement conference judge will convince the other side that it is wrong or that its case is weak and that, once this occurs, the other side surely will see reason ("reason" defined as how you or your client have evaluated the case). But settlement judges aren't going to do that, nor will we tell the other side that it should accept a certain amount or offer a certain amount. More likely, we will share our perceptions of the facts, as well as our views about the parties' respective cases and case evaluations. We also will help the parties identify the risks of further litigation and the uncertainties of trial by jury, and will point out problem areas as well as the strengths of the case. In particular, we will offer you and your clients a perspective about the case that you or they might not yet have considered or considered fully.

II. Utilizing the Judicial Settlement Conference Format.

Parties often choose a judicial settlement conference over a private mediation for specific reasons. What, then, can a judicial settlement conference bring to the negotiation dynamic that private mediation cannot? In my experience, the reasons for choosing a judicial settlement conference often relate to the lawyers' belief that a judge or, more precisely, the aura of the judicial office, if you will, needs to be involved in the negotiation process. If that is a reason, and especially if it is the main reason, you've asked for a judicial settlement conference, then spend some time before the conference thinking about how best to

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plan and execute our younger lawyer and summer associate programs. **Kristin Olson** is a civil litigator at Bullivan Houser has chaired many of our young lawyer CLEs, and she was joined this year by **Kevin Sali**, a criminal defense attorney with Hoffman, Angeli, and **Steven Liday**, an attorney with Miller Nash. Assistant Federal Public Defender **Amy Baggio** joined the board this year and agreed to take on the daunting task of launching our new Federal Court holiday party at the Pioneer Courthouse. Sending 900 e-vites, booking a string trio, and getting the caterers through security were just a few of the items on her to-do list for that event. Our winter CLE on the forensic science of truth-telling is being organized by **Suzanne Bratis**, a former law clerk to Judge Susan Graber and an Assistant U.S. Attorney who specializes in prison litigation. Other Directors who regularly come to our rescue include immediate past President **Courtney Angeli**, a partner in her own employment law boutique firm, **Liani Reeves**, an attorney with the Oregon DOJ Trial, Torts & Employment section, **Erin Lagesen**, from the Oregon DOJ Appellate Division, and private lawyers **Jeffrey Bowersox, Jim Rice** and **Scott Hunt**.

None of our efforts would be possible without the generous support of our meeting host, **Bob Calo**, a former federal prosecutor who now co-chairs Lane Powell's White Collar Criminal Defense Practice Group. Bob also serves as our Publicity Chair, drafting press releases and news updates about our board and upcoming events. We also could not continue without the participation of **Judge Anna J. Brown** and **Magistrate Judge John Acosta**, who serve on our board and act as liaisons to the bench. They give us ideas about what the judges would like to see and hear, and they regularly attend and speak at our programs.

When asked why they joined the FBA board, here is what a few of our Directors had to say:

"Because of the great programs it offers for all attorneys and because of the organization's commitment to a strong working relationship with the federal bench."

"Because I was impressed with the FBA's ongoing commitment to improving the level of professionalism in the Oregon Federal Bar."

"The FBA puts on some of the best CLEs available, our handbook is an invaluable resource to attorneys practicing in federal court, and our luncheons provide opportunities to hear dynamic and interesting speakers."

Many of our board members are also adjunct professors, high school and law school mock trial coaches, and professional mentors. Many have been listed in "Who's Who in American Law" and "Super Lawyers," and they have won countless awards for their outstanding service to their clients, the legal profession, and the community. That they are willing to contribute more, and contribute their valuable time and expertise to the Oregon FBA, speaks volumes about the quality of the practice here in Oregon.

TIPS FROM THE BENCH: EFFECTIVE JUDICIAL SETTLEMENT CONFERENCES IN FEDERAL COURT

By The Honorable John V. Acosta, United States Magistrate Judge

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leverage that element. Does the other party or its representative need to hear certain things from a judge because the party's expectations are unrealistic? Does the opposing lawyer need to hear from a judge certain points you believe he or she is not fully considering? Does your own client need to hear from a judge certain observations you've been making all along but that your client is reluctant to accept? Whatever the reason for requesting a judicial settlement conference, include information in the position statement relevant to that reason and be prepared to follow-up at the settlement conference.

Remember that in the District of Oregon lawyers are permitted to ask for a specific judge to preside over their settlement conference. This request may be made to the assigned judge or directly to the desired settlement conference judge. Choosing a settlement conference judge is as important as choosing a privately retained neutral to preside over a mediation because many of the same factors should be considered: style, experience, background, and knowledge of the case's subject area, among other factors. Time also is a consideration, as judges often must contend with scheduled hearings and other matters on the same day that the settlement conference is scheduled. Find out in advance what amount of time the judge can or is willing to set aside for your settlement conference so that you will know whether the judicial settlement conference will be effective for your case.

III. The Position Statement.

The purpose of the position statement is to inform the settlement judge of the relevant information and issues he or she must know to effectively conduct the settlement conference of the particular case. First, the position statement should not be a summary judgment brief. I mention this because I have received many such position statements. Don't use the confidential position statement to convince the settlement judge that you're certain to obtain or thwart summary judgment, or certain to prevail at trial. If that's true, why, then, did you agree to a settlement conference? To convince the other side to capitulate? If so, see Section I above. Settlement won't be achieved by asking the settlement judge to tell the other side how confident you and your client are about your case, so don't structure your position statement that way.

On this point, remember that the jury will not be deciding your case based on competing legal arguments but on the facts of the case. The settlement judge comes to the case as a disinterested party coming, and knowing, nothing about it except what the lawyers can impart in their position statements

or oral presentations at the settlement conference. In this context, the settlement judge sees the facts of the case a lot like a jury would; all the elements of fairness, common sense, and simple logic come into play. You'll be better served addressing those elements of your case than you will be by arguing some relatively subtle legal point in the position statement.

Second, your submission should be candid. You give the settlement judge little help by submitting a position statement that trumpets the strengths of your case and admits to no weaknesses of any sort, while cataloging the myriad shortcomings of your opponent's case. Don't expect the settlement conference judge to help the parties build a settlement if your position statement lacks the information necessary to construct it.

Candor is a particularly important point because it translates to credibility with the settlement judge, the establishing of which should always be a goal of your pre-conference submission. A good position statement sets out a balanced summary of the case that allows the settlement judge to gain full perspective of the case. Position statements that "spin" or characterize the facts, or that focus heavily on the law as the talisman that will vanquish the other side's case, detract from your credibility with the settlement judge. Remember that your position statement is not given to the other parties; only the settlement judge will read it. By being candid you will help the settlement judge identify the parties' common interests, which will form the basis for a settlement agreement and often produce results that could not have been obtained through trial.

Third, keep the analysis brief and focused, always being mindful that you are writing for the settlement conference judge and not the trial judge or jury. Supplement the statement by attaching key exhibits, such as documents constituting the contract, letters or e-mails that contain alleged admissions, and similarly critical documents necessary to understanding the case or the parties' respective positions. Often, only part of a document is relevant to the settlement analysis, so include only the relevant portions and highlight the passages that are most important.

Fourth, address the topics that the settlement judge usually wants to know about:

1. The most important legal and factual issues, including the best and worst facts for your case.

2. The factors making settlement difficult.

3. Any overlapping interests between the parties that might create common ground for reaching settlement.

4. What will happen – good and bad – if your client doesn't negotiate a settlement.

5. The outcomes that your client believes settlement could produce that would not be attainable through a trial or other formal disposition of the case.

6. The status of settlement negotiations, including the last settlement proposal made by each party and which party should make the next offer.

7. The fees and costs incurred to date, and an estimate of the anticipated fees and costs that will be incurred to prepare, try, and participate in an appeal of the case.

8. The range you and your client consider reasonable for settling the case (but not your client's "bottom line").

Usually, all of these topics come into play during the mediation, so addressing them in advance will allow the judge to be better prepared to conduct the settlement conference.

IV. Attendees.

The client should always be personally present. This is an important point. Any mediation, including a settlement conference, is premised on the mediator's or judge's ability to interact, in real time and in person, with the individual who makes the decision whether or not to offer or accept a specific amount of money. I have conducted settlement conferences that did not result in settlement or that were much more difficult and time-consuming to settle precisely because the decision-maker was not personally present. If your client has agreed to participate in a settlement conference, and particularly if your client is the party that requested the conference, then your client should give the process the importance it deserves and be there in person. And, in-person attendance is respectful of the other parties who are personally present; think about how you or your client would react if the other party decided to have its decision-maker "phone it in."

Arrive with full settlement authority. If the client is an entity, then a representative should be present who has full authority to settle the case. "Full authority to settle" does not mean that the representative has full authority to settle within the range the entity deems reasonable. It also does not mean that the attending representative can "make a call" and try to get additional authority from the person who really holds the authority to settle the case. I expect the party who is in the position of being the paying party (usually the defendant or defendants) to come to the settlement conference with enough authority to settle the case. Opinions will vary on what amount of money constitutes "enough." I appreciate that the parties disagree on the settlement value of the case and that they asked for a settlement conference at least in part for that reason. However, for example, "enough" does not mean that the paying party's attending representative has been told by someone not attending the settlement conference that settlement must not exceed "X." Such a position does not allow for the inevitable changes in perspective that the settlement judge's insights and observations often create during the settlement conference.

V. The Settlement Conference Mindset.

Settlement conference discussions will be more productive if you and your client don't approach it as simply an extension of the pending litigation. This only makes sense, since the goal of litigation is to win the case for your client (a process that does not require the parties to agree on anything), while the goal of settlement is to work toward and reach a mutually acceptable resolution of the case (an outcome that typically requires the parties to agree on everything). Thus, keep in mind the

following guiding principles.

Prepare for the settlement conference. Your client should understand the format and, in particular, that the settlement judge is not there to order either party to do something or to decide the case in any way. Also, spend some time explaining to your client what view of the case you will be sharing with the settlement judge: strengths and weaknesses, worst facts of the case, estimated chances of prevailing on liability, likely verdict ranges, and similar information. Your client shouldn't be hearing for the first time at a settlement conference your candid evaluation of the case.

Be reasonable. Of course, it depends on one's perspective – one person's ceiling is another person's floor. More tangibly, don't come to a settlement conference having staked out some ridiculously high or low number from which you hope to bargain to a number that is merely unrealistic. If everyone starts from a reasonable position, either the case will settle much faster or we will learn more quickly that the case cannot be settled.

Come prepared to give up stuff. Settlement is a compromise, not a capitulation (again, see Section I above), so don't show up expecting the other side to give you everything you want or that the settlement judge will be able to convince them to do so. Most all of the time, settlement is reached because the party seeking payment agrees to take less than it hoped to get through settlement and the paying party agrees to pay more than it hoped to pay through settlement.

Be prepared to move outside your comfort zone. At some point during the settlement conference it is very likely that you will be talking about a number, terms, or conditions that are outside the range you had in mind for settling the case. This is because judicial settlement conferences often produce information to each side that it hadn't considered before; sometimes, in fact, the judge's perspective is particularly enlightening to one or both parties. Thus, it is counter-productive and unrealistic to come into a settlement conference having decided that you will not take less than a certain amount or not pay more than a certain amount. Yes – that means it is counter-productive to enter into a settlement conference having determined your "walk-away number" before you've heard one word of what the settlement judge has to say about the case. I realize that this is a notion counter to conventional settlement strategy wisdom. But my experience has shown that almost always, parties who begin with that walk-away mindset end up changing their minds during the settlement conference, and settlement usually results. The more effective approach is to have discussed ranges and contingencies in advance but preserve an open mind about the case's settlement value.

Make meaningful and good-faith offers and counter-offers. Yes, it's scary to be the first one to make a "big" move. But, somebody has to do it first so it might as well be you. How does this help your settlement posture? Once you make a move, you give the settlement judge the leverage to convince the other side to make a similarly meaningful move, and you make it more difficult for the other side to justify only an incremental increase or decrease in their number. Plus, it moves the process toward final resolution more quickly and effectively.

VI. Conclusion.

In conclusion, judicial settlement conferences can produce acceptable and even favorable settlements between litigants. To achieve that result, you and your client must be prepared to engage in a process that is likely to be much different from the litigation process that the parties have engaged in for many months prior to the conference. Advance preparation, a firm idea of what you want to achieve, and flexible thinking will serve you and your client well, and will help the settlement conference judge achieve a result that will satisfy your client.

DECEMBER 1, 2009 CHANGES TO THE LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

By Kathryn M. Pratt and James L. Hiller

In the last issue, we discussed the major changes to the Federal Rules of Civil Procedure, Appellate Procedure, and Criminal Procedure, which became effective December 1, 2009. Also on December 1, 2009, changes to the Local Rules of the United States District Court for the District of Oregon became effective. A complete list of those changes is on the included table. A summary of the major changes is discussed below.

General: In December 2007, there were many changes made to the Federal Rules of Civil Procedure. Most of these were not substantive, but were "stylistic" changes to make the rules easier to use. In doing so, some of the subsections of the Federal Rules were moved, and it was decided that the Local Rules Committee needed to review every one of the District Court's Local Rules, if for no other reason than to make sure that the Local Rules still had accurate references to the Federal Rules. While reviewing every one of Local Rules, the Committee decided to clean up the rules, eliminating most "rules without rules" (for instance, if the rule had only a cross-reference), and eliminating the word "shall" from the rules (which was one of the changes to the Federal Rules in 2007). The Committee also went "from dots to dashes," meaning the rules will now be numbered, for instance, 1-1 instead of 1.1. The Committee did this to avoid confusion because there were a few Federal Rules with dots (e.g., 4.1, 5.1, 5.2, 7.1, 23.1, 23.2, 44.1, 65.1, and 71.1).

The Committee also decided to try to get ahead of the curve

HON. JOHN V. ACOSTA
United States Magistrate Judge

APPOINTED: March 5, 2008

EDUCATION:

- San Diego State University, B.A., 1979, High Honors and Distinction in History, Phi Beta Kappa
- University of Oregon, J.D., 1982, *Oregon Law Review* (Managing Board)

BAR ADMISSIONS:

- Alaska, 1983
- United States District Court, Alaska, 1983
- United States Court of Appeals, Ninth Circuit, 1986
- Oregon, 1988
- United States District Court, Oregon, 1988
- Washington, 2001

PRIOR EXPERIENCE:

- Tri-County Metropolitan Transportation District of Oregon, Senior Deputy General Counsel, 2002-2008 – provided legal advice on employment and labor issues, state and federal regulatory compliance, free speech issues under the 1st Amendment and the Oregon Constitution, due process and equal protection, Title VI, ADA Title II, vendor contracts, public employee ethics, public records disclosures, immigration, policies and procedures, and development of ordinances and administrative rules.
- Stoel Rives LLP (Partner, 1994-2002; Associate, 1987-1993) – litigation and trial attorney in federal and state courts as member of firm's Labor and Employment Practice Group; prior to that responsible for litigation and trial of products liability and general commercial litigation cases.
- Hughes, Thorsness, Gantz, Powell & Brundin (Partner, 1987; Associate, 1982-1986) – litigation and trial attorney in federal and state courts, focusing on medical malpractice, products liability, personal injury, and insurance coverage cases.

PROFESSIONAL ACTIVITIES:

- Federal Bar Association, Oregon Chapter, 2009-present
- Oregon State Bar Federal Practice and Procedure Committee, 2010-present
- Owen M. Panner Chapter, American Inns of Court, 2008-present
- Oregon State Bar Joint Bench-Bar Commission on Professionalism, 2006-present (Chair, 2010)
- University of Oregon School of Law, Adjunct Professor, 2001-2007

COMMUNITY ACTIVITIES:

- Morrison Child & Family Services board of directors, 1998-2009 (Chair 2006-2008)
- La Salle High School Mock Trial Team head coach, 2001-2006 (Oregon State Champions 2006)
- March of Dimes Greater Oregon Chapter board of directors, 1998-2002 (Chair 2000)
- Coalition of East Vancouver Communities, 1999-2003
- Evergreen School District Citizens Advisory Committee, 1995-1999 (Chair 1996-1998)
- Fairbanks Community Mental Health Center board of directors, 1984-1987 (Vice-Chair 1986-1987)

PUBLICATIONS:

- "Effective Judicial Settlement Conferences in Federal Court," Federal Bar Association, Oregon Chapter newsletter, Winter 2009
- "Professionalism for Litigation and Courtroom Practice," Oregon State Bar (2007 revision) (co-author)
- "Jury Instructions, Jury Verdicts and Court Findings," Oregon State Bar Federal Litigation Handbook (2002 supp. revision) (co-author)
- "Employment Contracts," Oregon State Bar Damages Handbook (1998 revision) (co-author)