

Making Full Use of the Court:

Come to Settle First, Litigate Second

by Morton Denlow

Your grocery chain client presents you with a \$750,000 breach of contract dispute, arising out of an agreement to purchase cheese from an out-of-state supplier. The cheese developed a green mold, making it unsalable. The parties have done business together for many years, and your client desires to resolve this dispute quickly and without great expense. But your client's efforts to settle this dispute directly have gone nowhere, and now she turns to you for action. Although she seeks her money back for the moldy cheese, she does not want to jeopardize the valuable business relationship with her supplier developed over many years.

You discuss with your client the possibility of mediating this dispute through private mediation. Your client has many questions. How can you bring the other side to the table? What is involved? What will it cost? How long will it take? Where will it take place? What do we do if we do not settle? How will we enforce the settlement if we reach an agreement?

After pondering these questions for a few minutes, you offer a suggestion: Why don't we let the court do it? We will file suit here and ask the court to help us settle the case. If that fails, we will proceed with adjudication of the dispute. In this way, you explain, we can file the suit here, pay one filing fee and have the court handle all settlement and trial functions, and the court can later assist us in enforcing the settlement if one is reached.

Your client gets it. "Brilliant!" she exclaims. She authorizes you to proceed. You draft a complaint, but in addition to the claim for monetary damages, you ask the court for the following alternative relief:

Plaintiff hereby requests the Court to conduct a mediated settlement conference or to refer the case to its court-annexed mediation program in order to assist the parties to bring about a settlement of this case.

**This article appeared in the Fall 2008 issue of Litigation, the Journal of the Section of Litigation of the American Bar Association, Volume 35, Number 1. Reprinted with permission. This information or any portion thereof may not be copied or disseminated in any form or by any means or downloaded or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.*

A few days later, you are seated in your office when a second client brings in a trademark and breach of contract suit recently filed against his company by a competitor. The action arises out of a licensing agreement between the parties. The lawsuit contains multiple counts, including causes of action for monetary damages and injunctive relief.

You discuss how to respond to this lawsuit. Among the alternatives are to call the other side to discuss settlement, file a motion to dismiss, file an answer and counterclaim, or file a pleading that seeks a prompt settlement conference. After weighing the alternatives, you decide to file an answer denying the essential elements of the complaint. However, as part of your prayer for relief, you request the following as an alternative form of relief:

Defendant hereby requests the Court to conduct a mediated settlement conference or to refer the case to its court-annexed mediation program in order to assist the parties to bring about a settlement of this case.

One of the stark realities of our current legal system is that only a tiny percentage of civil cases go to trial. *See* Mark R. Kravitz, “The Vanishing Trial: A Problem in Need of Solution?” 79 *Conn. B.J.* 1 (2005). The vast majority (approximately 98 percent) of cases are resolved either by means of a dispositive motion or through settlement. The issue our federal and state courts must face is whether the settlement function will become an integral part of the court’s activities or whether this function will be privatized. In fact, there is a role for both the courts and the private sector in the settlement process.

In the last 30 years, the role of judges,

especially federal magistrate judges, has changed dramatically. Judges now take a more active role in managing cases and helping to settle them. Judges now serve as problem solvers and not simply adjudicators. Similarly, for a host of reasons—including the rising cost of litigation and the desire to control their own destiny—parties now place greater emphasis on resolving their disputes by means of a judicial settlement conference or private mediation rather than through trial or other forms of adjudication.

Frank Sander expressed the concept of a multi-door courthouse in his seminal speech to the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice: “Varieties of Dispute Processing” (reported at 70 F.R.D. 79 (1976)). This concept has great significance for courts today as we think about the role judges and our legal system should play in assisting litigants to resolve their disputes. If our courts do not adopt rules and structures that facilitate the settlement process, our civil legal system will become marginalized.

I am convinced that parties should look to the courts in the first instance to help them peacefully resolve their disputes, and that plaintiffs and defendants should include requests for a mediated settlement conference as part of their initial pleading’s prayer for relief. This request serves to notify the court and their party opponent of the party’s interest in seeking a settlement. Recognizing that there are advantages and disadvantages, I also believe that this approach is consistent with congressional policy, recent amendments to the Federal Rules of Civil Procedure, and similar state court rules and procedures.

Requesting mediation as part of an alternative

prayer for relief has numerous advantages. First, you grab the other side's attention, and you require them to respond. By filing a lawsuit and forwarding it with a cover letter expressing a desire to mediate, you force the other side to let you know early its position on settlement. The defendant cannot ignore the summons without risking a default judgment. The response can be positive, in which case you can seek the assistance of the court or a court-annexed mediation process. The response can be "not now," in which case you can proceed with discovery or take other steps necessary to prepare the case for mediation or adjudication. The response can also be a resounding "no," in which case you proceed to litigate in your forum without further delay.

Second, a lawsuit provides a ready and well-understood mechanism for facilitating the exchange of information through the discovery and case management processes. Oftentimes, meaningful settlement discussions can take place only after information is exchanged. Rule 26(a)(1) disclosures in federal practice can provide an early look at important information. Document requests, interrogatories, and depositions may also be necessary prior to commencing negotiations. It is frustrating to attend a mediation and to see it fail because one of the parties lacks sufficient information to intelligently discuss settlement. The federal discovery rules and similar state discovery rules enable parties to obtain the necessary information to engage in serious settlement efforts.

Third, a lawsuit can help you tailor the timing of settlement. When is the best time? It can happen at any point in the litigation. Typically, a case is ready for a settlement conference when the parties are able to exchange letters in which the plaintiff makes a written settlement

proposal that includes an itemization of damages and a brief statement of why their proposal is justified, and the defendant makes a written settlement offer with a brief explanation of why the offer is justified. In addition, party representatives with full settlement authority must attend the conference. With those two conditions in place, almost every case can be settled.

Fourth, a court can order a recalcitrant party to participate through a representative with full authority. In *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 653-54 (7th Cir. 1989), the Seventh Circuit held that a district court has the power and authority to order represented litigants, including the corporate representatives of the litigants, to appear at a pretrial settlement conference. It is a waste of time to attend a settlement conference when the other side's representative does not have the necessary authority to make a deal. As *Heileman* held, a court can sanction such conduct.

Fifth, a judge carries experience, persuasive powers, and authority to help bring about a settlement. Settlement conferences can be facilitative, evaluative, or a combination of both. A judge who has been on the bench for several years can develop an understanding of the relative values of cases. In those courts where judicial officers conduct mediations on a regular basis, they develop expertise and may have access to data on the settlement value of different types of cases. Oftentimes, parties look to the court for guidance and assistance in determining the settlement value of the case. A judge's recommendation or facilitative skills can often bring about a settlement that the parties and their lawyers have been unable to reach.

Sixth, a court can retain jurisdiction to enforce a settlement, thereby avoiding the necessity of a separate lawsuit in the event a settlement agreement is breached. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994). This ability to retain jurisdiction is particularly important when the settlement contemplates a payment schedule over time or other promises of future performance. The knowledge that the judge who helped the parties to reach agreement will be there to enforce the agreement, if necessary, provides important peace of mind for the parties.

Seventh, if a judicial officer conducts the mediation, there can be substantial cost savings to the parties. Judicial officers provide this service after the plaintiff pays a court filing fee to initiate the lawsuit. In federal court, the filing fee is currently \$350. This fee provides access to justice for those who might not be able to bear the cost of private mediation, where customarily the mediator is paid by the hour. If the settlement function becomes totally privatized, many litigants will be unable to afford private mediation services.

Eighth, in the event the case does not settle, parties can proceed with the litigation without filing a new action. This enables parties to proceed on two tracks simultaneously—a litigation track and a settlement track.

Finally, court-supervised mediation puts the court in the business of responding to society's needs for non-adjudicative dispute resolution. There is no question that parties are seeking alternative means by which to resolve their disputes. Mediation is growing in popularity. Whether this is a good trend can be the subject of debate. However, the trend is there. The questions surround how the judiciary responds to this trend and whether it will be left to watch

from the sidelines.

Of course, there are also a number of possible disadvantages to seeking mediation through the courts. First, you cannot pick your judge when you file a lawsuit, while the parties can agree upon their private mediator. This can be important because not every judge is trained, interested, or has the necessary expertise to facilitate a settlement process. Some cases may require specialized expertise that a judge lacks. If you initiate a lawsuit and your judge is not able to assist in the settlement process, you may find yourself retaining a private mediator and thereby bearing the additional expense of a lawsuit.

Second, you may not want the judge who ultimately will decide your case to be engaged in settlement efforts. There are different points of view on this. The issue can be addressed by assigning the settlement function to a different judge. Magistrate judges regularly perform this role in the federal system.

Third, you may believe that expressing an interest in settlement is a sign of weakness. This is the view of many lawyers. On the other hand, others understand that a willingness to discuss settlement can be seen as a sign of strength because the party is willing to explain the strengths of its position.

Fourth, an opponent may respond negatively to the idea. A defendant may believe the plaintiff is engaged in gamesmanship by both filing suit and asking to talk settlement. This creates a risk of getting off on the wrong foot with the other side.

Fifth, once a lawsuit is filed, the fact of a dispute is no longer confidential, and the basic facts of the dispute are made public by means

of the pleadings. Confidentiality can be important, and this is lost once the complaint is filed. Loss of confidentiality may eliminate an impetus for one side or the other to settle.

Sixth, private mediators generally have more time than judges have to devote to a particular dispute. Private mediators do not manage the hundreds of cases on most judges' dockets. A judge may not be able to devote more than several hours or a day to a settlement conference. Private mediators are better able to set aside multiple days if needed. Also, there is likely to be a greater degree of flexibility in scheduling a private mediation, with less risk of having a conflict arise by means of another case emergency.

A lawyer therefore must consider the practical and tactical advantages and disadvantages of initiating an action in court that seeks mediation or a settlement conference as part of the prayer for relief. Once the lawyer and client reach the decision to do this, the next issue is how to initiate the process.

A party may request a court mediation as part of the prayer for relief. Rule 8 of the Federal Rules of Civil Procedure sets forth the general rules of pleading and claims for relief. Although a pleading must contain a demand for judgment for the relief the pleader seeks, Rule 8 authorizes that "relief in the alternative or different types of relief." Thus, Rule 8 should authorize relief by means of a court mediation as an alternative to a judgment, without the need for any additional amendments.

Logistically, a request should be expressly made at the end of the complaint in the prayer for relief. The Appendix of Forms in the Federal Rules of Civil Procedure provides several model forms for various types of claims

and the recommended language for each, including the language of the prayer for relief. A party seeking relief by means of a court mediation could amend the prayer for relief in Form 3 (complaint on a promissory note), for example, as follows:

Wherefore Plaintiff(1) hereby requests the Court to conduct a mediated settlement conference or to refer the case to its court-annexed mediation program in order to assist the parties to bring about a settlement of this case; or in the alternative, (2) Plaintiff hereby demands judgment against Defendant for the sum of _____ dollars.

Likewise, a defendant choosing to make this a request may do so at the end of its answer. Where a defendant merely answers a complaint without asserting any counter-claims, the defendant can make an express request at the end of its answer as follows:

Wherefore Defendant prays that the Court deny Plaintiff's claim and award Defendant its costs and expenses incurred in the defense of this action and such other relief as the Court deems proper. Further answering, in the alternative, Defendant hereby requests the Court to conduct a mediated settlement conference or to refer the case to its court-annexed mediation program in order to assist the parties to bring about a settlement of this case.

Similarly, where a defendant asserts a counterclaim, a request for the court to conduct mediation can appear as an alternative to the demand sought.

Rather than waiting for a strategic point in the litigation to raise the issue, a party wishing to pursue an early settlement should be able to do so expressly in its complaint. Typically, settlement discussions do not occur until the litigation is already underway, and often at the encouragement of the judge presiding over the case. Some parties do request discussions early in the case, although their complaints usually only anticipate resolving their case by means of an adjudicated outcome. Requesting a court mediation in the complaint as a means to resolve a party's dispute is thus a non-traditional remedy.

Although they have yet to address this particular remedy, courts have demonstrated their willingness to recognize other non-traditional remedies. In addition, Congress has repeatedly encouraged the use of settlement as a means to resolve litigation disputes, and has potentially granted an implied right to request mediation through the Alternative Dispute Resolution Act of 1988, 28 U.S.C. § 651 *et seq.* (ADR Act). Various states also strongly encourage the use of settlement. Other non-traditional remedies, such as declaratory judgments and class action settlements in federal court, however, have raised questions about the case or controversy requirements under Article III of the U.S. Constitution. With requests for court mediation, because the parties seek mediation to resolve an otherwise justiciable claim, the relief of mediation does comply with Article III requirements.

Constitutional concerns aside, a claim for mediation conforms with the goals Congress set forth in various statutes. Congress has encouraged courts to use mediation as a means for resolving claims. It has mandated that federal courts allow alternative dispute resolution (ADR) to be used in all civil actions,

giving a possible implied right to request mediation. In addition, the Federal Rules of Civil Procedure, as well as various federal and state statutes, encourage the use of mediation to resolve claimants' disputes, demonstrating a movement toward accepting mediation as a common procedure in court proceedings.

The ADR Act promotes the use of mediation and other forms of ADR by courts and seems to possibly provide an implied right to seek mediation. It defines an ADR process to include "any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy." Examples of ADR processes in the act include early neutral evaluation, mediation, minitrial, and arbitration as provided in sections 654 through 658. 28 U.S.C. § 651(a). The act also provides broad authority for courts to develop their ADR programs, requiring that each U.S. district court "devise and implement its own alternative dispute resolution program, by local rule adopted under section 2071(a), to encourage and promote the use of alternative dispute resolution in its district." The act requires that each district court shall provide litigants in all civil cases with at least one alternative dispute resolution process. By requiring courts to allow claimants to use mediation as a means to resolve their disputes, and by requiring that courts have such programs in place, Congress appears to give claimants an implied right to seek mediation as a remedy to resolve their disputes.

Congress made clear in its findings for this act its goals of promoting ADR in the courts, stating:

Congress finds that—
(1) alternative dispute resolution, when

supported by the bench and bar, and utilizing properly trained neutrals in a program adequately administered by the court, has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements;

(2) certain forms of alternative dispute resolution, including mediation, early neutral evaluation, minitrials, and voluntary arbitration, may have potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States, thereby allowing the courts to process their remaining cases more efficiently; and

(3) the continued growth of Federal appellate court-annexed mediation programs suggests that this form of alternative dispute resolution can be equally effective in resolving disputes in the Federal trial courts; therefore, the district courts should consider including mediation in their local alternative dispute resolution programs.

28 U.S.C. § 651, Historical and Statutory Notes (quoting Pub. L. No. 105-315, § 2, Oct. 30, 1998, 112 Stat. 2993).

In addition, Representative Howard Coble, chair of the House Committee on the Judiciary, stated in the Congressional Record that the act “will provide the Federal courts with the tools necessary to present quality alternatives to intensive Federal litigation . . . while at the same time still guaranteeing their right to have their day in court.” Furthermore, Congress

requires courts to enact local rules requiring litigants to consider the use of ADR at appropriate stages of the proceeding. Thus, given Congress’ strong promotion of the use of ADR, and mediation specifically, it logically follows that the act would also support claimants seeking mediation initially when filing their complaint, rather than requiring them to wait until some point during the litigation to seek mediation.

In addition to the ADR Act, the U.S. Supreme Court and Congress also promote mediation in various court rules and statutes. For example, Rule 16 of the Federal Rules of Civil Procedure authorizes the court to order claimants’ attorneys to appear for one or more pretrial conferences, partially for the purposes of facilitating settlement. Rule 16 also allows the court to require a party or its representative to “be present or reasonably available by other means to consider possible settlement.” The rule also authorizes the court to consider and take action in “facilitating in other ways the just, speedy, and inexpensive disposition of the action.” Thus, the Federal Rules clearly contemplate that courts will discuss the possibility of settlement with the parties prior to trial.

Moreover, the Advisory Committee Notes for Rule 16 further encourage mediation, stating that:

Clause (7) explicitly recognizes that it has become commonplace to discuss settlement at pretrial conferences. Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible. Although it is not the purpose

of Rule 16(b)(7) to impose settlement negotiations on unwilling litigants, it is believed that providing a neutral forum for discussing the subject might foster it. . . . The rule does not make settlement conferences mandatory because they would be a waste of time in many cases. . . . Requests for a conference from a party indicating a willingness to talk settlement normally should be honored, unless thought to be frivolous or dilatory.

Thus, the Federal Rules not only authorize courts to conduct conferences to consider the possibility of settlement, but they also encourage courts to intervene and promote settlement. As stated in the Advisory Committee Notes introducing the 1983 amendments to Rule 16, “when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices.”

In addition, the Civil Justice Reform Act (CJRA) requires each federal district court to consider the use of ADR to reduce civil litigation costs and delays. Expanding and enhancing the use of ADR is one of the six essential bases upon which the CJRA was created. Michael A. Perino, “Drafting Mediation Privileges: Lessons from the Civil Justice Reform Act,” 26 *Seton Hall L. Rev.* 1, 4 (1995). The Americans with Disabilities Act (ADA) encourages the use of settlement to resolve disputes arising out of the ADA. Title V of the ADA, 42 U.S.C. § 12212, states that “[w]here appropriate and to the extent authorized by law, the use of alternative means

of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.” The Equal Employment Opportunity Commission (EEOC) has also created a mediation program in which most parties, after an employment discrimination suit has been filed, participate. Since its inception in 1996, the EEOC mediation program has become the largest provider of ADR services for employment discrimination in the world. Robert E. Talbot, “A Practical Guide to Representing Parties in EEOC Mediations,” 37 *U.S.F. L. Rev.* 627, 628 (Symposium: Work in the 21st Century—A Look at the Contemporary Labor Movement) (2003). These are just a few of the many authorizations that Congress has given federal agencies to incorporate mediation into their resolution procedures.

Several states also strongly encourage parties to utilize ADR methods. For example, Virginia state courts can require parties to undergo an ADR orientation session. *See* Code of Virginia § 8.01-576.5. Texas has a codified ADR system that encourages “the early settlement of pending litigation through voluntary settlement procedures.” *See* Texas Civil Practice & Remedies Code § 154.002. Under the Texas Code, a court may, “on its own motion or the motion of a party,” refer a pending dispute for resolution by ADR. *See* Texas Code § 154.021. In addition, the more populated counties in Texas (over 150,000 residents) must conduct two settlement weeks each year, during which time the courts “will facilitate the voluntary settlement of civil and family law cases.” *See* Texas Code § 155.001.

Although courts have not yet addressed a particular remedy of resolution through court

mediation, courts have recognized other non-traditional remedies, such as declaratory judgments and class action settlements. These non-traditional remedies have raised constitutional questions, particularly the issue of whether the remedies comply with the case or controversy requirement of Article III, mandating that an actual, concrete controversy exist for a claim to be justiciable. Despite these constitutional challenges, however, courts have repeatedly held these remedies do meet the Article III requirements. For example, declaratory judgments are now a widely recognized and established form of relief.

Unlike coercive relief, where a party seeks damages to compensate for a loss, or an injunction to stop the defendant from doing something, a declaratory judgment sets forth the parties' legal rights and warns what the parties can and cannot do. Although such a form of relief is provided now as a statutory right, it was first recognized as an appropriate remedy by the U.S. Supreme Court. See *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249 (1933); *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227 (1937); 28 U.S.C. §§ 2201-02. In *Nashville, C. & St. L. Ry. v. Wallace*, the Court acknowledged there is technically no requirement in Article III that cases are tried in a particular format, so long as a case or controversy exists at the time the lawsuit is filed.

Class action settlements are another non-traditional remedy the courts have recognized. Generally in these cases, the parties have already agreed upon a settlement when they file their lawsuit, and they simply ask the court to approve the agreement under Rule 23 of the Federal Rules of Civil Procedure. Because the parties do not come before the court until they have reached a settlement, some courts have

questioned whether such cases present a case or controversy for Article III purposes. Particularly, these cases are often challenged as being collusive or moot. Despite challenges, however, courts have held that a lawsuit is not necessarily collusive if the complaint and proposed settlement are simultaneously filed. Although the parties no longer dispute the remedy, they still remain true adversaries who have merely compromised a genuine dispute. Moreover, courts have emphasized that when a proposed settlement is contingent upon the court's approval, as is required for class action settlements under Federal Rule of Civil Procedure 23, a live case or controversy remains. Courts have also held that class action settlements are not necessarily moot. Although a case does become moot once the parties reach a settlement, a proposed settlement that is contingent upon the court's approval does not render a case moot.

The non-traditional remedy of resolution through court mediation also complies with Article III because the parties merely seek court mediation as a means to resolve an otherwise justiciable claim. Similar to declaratory judgments, such a case meets the Article III case or controversy requirements because at the time of filing, a genuine dispute exists. Furthermore, assuming the underlying claim is otherwise justiciable, a claim requesting a remedy of court mediation would certainly not offend the collusion or mootness doctrines raised in the class action settlement context. Unlike class action settlements, a claim for court mediation arises with parties who do not have an agreement at the time the lawsuit is filed. Rather, the parties merely agree on the means to which a possible resolution will result, and will not be rendered moot until such a resolution is reached.

There is no better role for our judiciary than to be an active participant in helping parties reach a peaceful resolution of their disputes. Whether this resolution is reached through a trial or a settlement conference, the judiciary performs its important function by being a neutral participant in the process. Encouraging parties to come to court to first seek a settlement of their dispute through a court-assisted process,

and if that fails, to litigate the case, is the appropriate role for our judiciary. Encouraging parties to express their desire for settlement in their pleadings is a step toward accomplishing this goal. Courts must then develop the trained cadre of judges or others to accomplish this objective.