

15 points to consider before a settlement conference

BY HON. BENSON E. LEGG

Special to The Daily Record

In Maryland's federal court, only 1 percent of the civil cases filed each year go to trial. While the court will dismiss some of these cases, most settle, often at a settlement conference.

Because a settlement conference or mediation is an important event in a case, it must be preceded by careful preparation. The scope of preparation depends in part on the philosophy of the mediator. One school of thought teaches that mediators should not express their views about the case. Personally, I am an evaluative mediator. If the settlement talks bog down, I will prod both sides towards a range that is reasonable in light of the litigation risks and costs.

In order to be credible and effective, an evaluative mediator must be fully informed about the merits of the case, the capabilities of the attorneys and the objectives of the parties. What follows is the check list that I personally ask counsel to cover.

■ Describe the dispute and attach the important documents. Particularly helpful are summary judgment briefings and opinions. Be candid about the weaknesses of your case as well as the strengths. It is helpful for me to learn about the weaknesses from you rather than from opposing counsel.

■ Provide citations to the most important cases and statutes. I will read them so that I can discuss the law knowledgeably.

■ Describe any unsuccessful settlement negotiations, including points of agreement and disagreement. It is useful for me to think about the stumbling blocks ahead of time.

■ Provide brief profiles of the parties and corporate representatives.

■ Provide your views on opposing counsel. Have they been reasonable during the litigation? Do they really want to settle; or are they simply going through the motions?

■ Explain your client's objectives and your assessment of the other side's objec-



Hon. Benson E. Legg

tives. If the litigation involves issues other than money, it is helpful to identify and discuss them.

■ Do you need any information or documentation from the other side to be fully prepared for the mediation? If so, I will ask the other side to provide it.

■ Describe the barriers to settlement.

■ Provide your thoughts on the agenda for the mediation. An important topic is whether a lawyer from each side should make a brief opening statement. Except in rancorous cases, where openings might destroy a fragile civility, I favor them. Openings expose the clients to the arguments and evidence that the opposition would advance at trial. They provide the clients with a foretaste of the ordeal that awaits them if the case is not settled. In many cases, the opening can lessen tension by providing an opportunity for expressions of regret or sympathy or a desire that the case can be resolved without resorting to trial.

■ Confirmation that the critical decision-makers will be in attendance or at least available by phone. If the decision-makers

will not be available, I must have a good reason not to call off the mediation.

■ Legal fees and expenses incurred to date, as well as an estimate of the cost of taking the case to trial, including an appeal. It is also important to take into consideration whether a fee shifting statute is involved, and whether counsel has been providing periodic statements as required by local rules.

■ Any insurance coverage, including whether an insurer is providing a defense.

■ What happens if the dispute is not resolved, including the time to trial, the extra time for an appeal, and the discovery burden? Parties, especially in business litigation, often underestimate how much time they will be required to devote to the case.

■ Confirmation that counsel has prepared their client for the mediation. I like to arrive early on the day of the mediation so that I can introduce myself to the parties, explain the confidentiality agreement, and answer any questions.

■ The approaches that counsel would use if they were mediating the case.

Preparation for the mediation need not be an ordeal. Mediation statements typically run five to 10 pages, and the pre-mediation conference calls typically last half an hour. Running through the checklist, however, prepares counsel for the mediation and provides the mediator with the tools needed to maximize the chances that the dispute will be resolved.

Hon. Benson E. Legg (Ret.), the former Chief Judge of the U.S. District Court for the District of Maryland, brings deep experience to his JAMS practice. As a federal trial judge for 21 years, he presided over every type of complex civil case that comes before the federal courts. After taking senior status, Judge Legg conducted settlement conferences for the district court in a variety of matters. He can be reached at blegg@jamsadr.com.