May 8, 2018

# SETTLEMENT CONFERENCE AND MEDIATION PROCEDURES
# MAGISTRATE JUDGE ROBERT W. LEHRBURGER

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**Courtroom**
500 Pearl Street, Room 18D
United States Courthouse
Southern District of New York
New York, New York 10007

The Court believes the parties should fully explore settlement at the earliest practical opportunity. Early settlement allows the parties to avoid the substantial cost, expenditure of time, and uncertainty that typically are part of the litigation process. Even for those cases that cannot be resolved, early consideration of settlement can provide the parties with a better understanding of the factual and legal nature of their dispute and streamline the issues to be litigated.

In most cases, the Court will require the parties to participate in a mediated settlement conference. Even where a settlement conference has not been ordered by the Court, the parties may voluntarily request the Court to hold a mediation conference in an attempt to resolve or narrow the dispute.

Consideration of settlement is a serious matter that requires thorough preparation prior to a settlement conference. It also requires thoughtful consideration of the other side's point of view. Set forth below are the procedures the Court requires the parties and counsel to follow and the procedures the Court typically will employ in conducting settlement conferences.

1. **Confidentiality.** All settlement conferences are "off the record." All communications relating to settlement are strictly confidential and may not be used for any purpose other than settlement. They are not to be used in discovery and will not be admissible at trial.

2. **Magistrate Judge's Role.** The magistrate judge functions as a mediator, attempting to help the parties reach a settlement. Efficient use of this process requires that counsel and their clients be prepared for the conference, candid with the mediator, and genuinely committed to finding a resolution.

3. **Pre-Conference Phone Call.** At a date and time set by the Court, and not later than seven business days before the settlement conference, counsel for all parties must participate in a phone call with the Court to discuss the upcoming settlement conference. Any matter that any party believes may impede settlement should be raised during this call, particularly information that could be but has not yet been provided by another party.

4. **Pre-Conference Submissions.** No later than five business days before the conference, counsel for each party must send the Court (i) a pre-settlement conference letter, and (ii) a completed attendance certification form attached at the end of these procedures. The letter and certification should be emailed to the Court in accordance with the Individual Practices of Judge Lehrburger.[1] Parties proceeding **pro se** need not submit the certification, but must provide a pre-conference letter, which, if not emailed or hand delivered, may be mailed to Chambers at the address identified above and which should be mailed sufficiently in advance so that it arrives at the Court no later than five days before the conference.

   The letter should be marked "Confidential Material for Use Only at Settlement Conference" and should not be provided to opposing parties. The reason the letter is not to be shared with other parties is to ensure that counsel is candid with the Court as to the strengths and weaknesses of their client's case and as to the nature and range of an acceptable settlement.

   The letter must not exceed 5 pages (single spaced), unless permission has been granted by the Court. The letter should include, at a minimum, the following: (a) a concise statement of the issue(s) in dispute; (b) the history of settlement negotiations, including any prior offers or demands; (c) your evaluation of the settlement value of the case and the rationale for it; (d) identification of the strengths and weaknesses of your case to the extent not already included; and (e) any other information that would be helpful to the Court in preparing for the conference.

   If the plaintiff has not already made a settlement demand, such a demand shall be communicated to the opposing party no later than 14 days prior to the conference. If it has not already done so, the opposing party shall respond to any

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[1] If a party cannot send the letter and certification by e-mail, the party may fax or hand-deliver them to the Court, or send them by overnight delivery, so long as they arrive no later than five (5) business days before the conference.

demand no later than 7 days thereafter. The parties should not wait for the settlement conference to commence negotiations of a resolution of their dispute.

**5.** **Attendance of Parties Required.** The parties - not just their attorneys - must attend the settlement conference in person. A party's attendance is essential to the settlement process. It is vital that parties hear the other side's presentation and have the opportunity to speak with the mediator outside the presence of any adversary. If a party resides more than 100 miles from the Courthouse and it would be a great hardship for that party to attend in person, counsel may write to the Court seeking permission for the party to participate by telephone (although permission will be the exception, not the rule). This issue should be raised with the Court in writing as soon as possible. Incarcerated parties may also participate in the conference by telephone.

If an interpreter is needed for any party, each party must supply its own simultaneous interpreter (who need not have any special certification). The Court does not provide interpreters for settlement conferences.

***Corporations, Labor Unions and Insurers.*** Corporate parties or labor unions must send the person with complete decision-making authority to settle. Where liability insurance is involved, a decision-making representative of each carrier must attend in addition to the insured. This includes each excess carrier unless specifically excused by the Court at least one week before the conference. Because it is important that the decision-makers with respect to settlement hear their adversaries' presentations and be available to answer questions from the Court, the person who attends must be the person with responsibility for determining the amount of any ultimate settlement and who has not had limitations placed by another person with respect to his or her authority to settle. **In short, corporate parties, labor unions and insurance companies (or any other party that is not a natural person) must send to the conference the person ultimately responsible for approving any settlement; that is, the person with authority to settle without having to obtain the approval of any other person**.

***Government Agencies.*** Where any government agency is a party, counsel of record must be accompanied by a knowledgeable representative from the agency (or, if the agency official with knowledge is more than 100 miles from the Courthouse, the official must be available to participate by telephone). In addition, in cases where the Comptroller of the City of New York has authority over settlement, the Assistant Corporation Counsel must make arrangements in advance of the conference for a representative of the Comptroller either to attend the conference or to be available by telephone to approve any proposed settlement.

6. **Consequences of Non-Compliance with Attendance Requirements.** If a party fails to come to the settlement conference with all the required persons (attorney, plus a decision-making employee from the client, plus a decision-making representative from each insurance carrier), that party may be required to reimburse all the other parties for their time and travel expenses, and may face other sanctions.

7. **Conference Procedures.** Unless advised otherwise by the Court, the conference will take place in Courtroom 18D at 500 Pearl Street. At the outset of the conference, each attorney should be prepared to make a brief presentation in the presence of each other and the parties, summarizing not merely a party's positions, but the party's interests as well. Written remarks read aloud are usually ineffective. Counsel are also reminded not to treat their opening remarks as if they were a jury address. While there is no formula for the most effective presentation, counsel should consider addressing (a) the most important issues of fact and law, (b) the most recent offer or demand communicated to opposing counsel, and (c) any other matters that may help to advance settlement. In some cases, the Court may dispense with opening presentations if the parties and Court agree that they would not be useful.

   Following the presentations, the Court will, in some circumstances, allow counsel to respond to points made by opposing counsel and, if appropriate, to pose constructive questions. Clients may speak too if they so desire. After the parties have made their brief presentations, the Court ordinarily will spend the rest of the time meeting separately with each side. In these private meetings, the parties and their counsel should be prepared to discuss their position on, and ideas for, settlement; the reasons for their position; the amount of attorneys' fees and litigation expenses incurred to date; and an estimate of the remaining cost of litigating the case to judgment, including any appeal.

   The Court encourages all parties to keep an open mind in order to re-assess their previous positions and to discover creative means for resolving the dispute.

8. **Adjournments of Settlement Conferences.** Requests for adjournment shall conform to the Individual Practices of Judge Lehrburger, with the following modification: requests submitted more than 14 days before the scheduled conference date ordinarily will be granted without a showing of good cause; requests submitted within 14 days of the date of the scheduled conference must demonstrate good cause. Ordinarily, good cause will be found where (a) an adjournment would permit necessary discovery or exchange of information that would make the conference more fruitful, or (b) a client who would otherwise be permitted to participate by telephone would be available to attend the conference in person were it held on another date. All requests should provide alternative

dates when all the parties are available. The conference date is not changed unless and until ordered by the Court.

**9.** **Settlement in Advance of Mediation.** If all parties advise the Court in writing that the case has settled prior to the scheduled conference, the Court ordinarily will adjourn the conference with no future designated date. In these circumstances, the parties should file a letter-motion on ECF requesting an adjournment of the settlement conference *sine die*, and the Court will then issue a text-only order.

**10.** **No Effect on other Deadlines.** The scheduling of a settlement conference has no effect on any deadlines or other pending obligations in the case.

**11.** **FLSA Settlements.** Parties may not dismiss a Fair Labor Standards Act ("FLSA") action with prejudice unless the settlement agreement receives approval by either the Court or the Department of Labor. Accordingly, the Court will not approve an FLSA settlement without a sufficient explanation from counsel as to why the terms of the proposed settlement are fair and reasonable. Such explanation may be provided immediately following a settlement conference that results in agreement between the parties. Alternatively, the parties seeking judicial approval of an FLSA settlement shall submit a letter to the Court (1) explaining why the terms of the proposed settlement reflect a reasonable compromise of disputed issues, rather than a mere waiver of statutory rights, and (2) presenting the Court with sufficient evidence to determine whether the settlement terms represent a fair and reasonable resolution of the dispute.

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**ATTENDANCE ACKNOWLEDGMENT FORM**
**FOR APPEARANCE AT SETTLEMENT CONFERENCE**
**BEFORE MAGISTRATE JUDGE ROBERT W. LEHRBURGER**

**CASE NAME:**_____

**DOCKET #:** _____

I represent the: ☐ Plaintiff ☐ Defendant ☐ Other:_____

☐ I certify that I am attending a settlement conference at __:__ __.m. on _____, 20__, in Courtroom 18D, United States Courthouse, 500 Pearl Street, New York, NY.

My name and the name of any co-counsel who will attend the conference with me are:

_____
_____
_____

☐ I certify that my client is, or will be accompanied (in person, or by telephone if applicable) by, the person for my client with ultimate responsibility for approving any settlement; that is, the person with authority to settle without having to obtain the approval of any other person.

The name and title, if applicable, of the individuals from my client are:

_____
_____
_____

☐ I certify that I have obtained the Court's permission for the following individual(s) who live(s) more than 100 miles from New York City to participate in the conference by telephone:

_____
_____
_____

☐ I certify that I have read both the Court's order scheduling this conference and the Settlement Procedures for Magistrate Judge Lehrburger.

Dated:_____ _____ _____
Attorney Signature Print Attorney's Name