

The Trial Judge as Mediator: A Rejoinder to Judge Cratsley

by Dan Aaron Polster

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In a recent issue of the *Ohio State Journal on Dispute Resolution*, Justice John C. Cratsley of the Massachusetts Superior Court argues forcefully for the promulgation by the American Bar Association of an ethical rule that would bar any judge who undertakes settlement or mediation activity in a case from ultimately trying that case should settlement not be reached.^[1] While I have the utmost respect for Justice Cratsley—he is a distinguished jurist, and he had already established a sterling reputation when he taught me at Harvard Law School 30 years ago—I disagree with his conclusion, as applied to cases that would be tried to a jury.^[2] I fear that if this rule were adopted, trial judges would be much less likely than they are today to assist the parties in resolving their cases.



The experience I have gained mediating several hundred of my civil cases during eight years on the federal bench has convinced me that a trial judge may be the best mediator of her cases, particularly when the judge follows Justice Cratsley's other recommendations, which he also proposes be the subject of ABA rule making: obtaining the express consent of the parties prior to the mediation; disclosing to the attorneys and parties the judge's settlement technique, and receiving mediation training.^[3] My central premise is that a judge who has the time, temperament, training, and interest can be an extraordinarily effective mediator, and still preside over a jury trial of the matter if the mediation proves unsuccessful.^[4] There are clear dangers and risks in this process, but these dangers and risks can be managed and controlled. Mediation by the trial judge is a very powerful tool, and if used skillfully and correctly, can produce results that have great benefit to counsel, the parties, and our system of justice.

The initial impetus for me to play an active role in settlement came from my wife, Deborah Coleman, an experienced commercial litigator. Over the years before I became a judge, she would frequently comment to me that if the trial judge had just spent one or two hours with the attorneys and/or parties, a given case would have settled. I know what attorneys in private practice bill, I knew how many hours my wife was working, and I could safely assume that there was an equally conscientious team of attorneys on the other side. Hundreds of thousands of dollars were being spent over months and years, for want of a couple of hours of judicial input. When I became a judge, I resolved to see if I could do something about this expenditure of time and resources.

I recall coming home one evening in my first months as a judge, bursting with pride at having facilitated a settlement. My wife calmly replied, "the case would have settled anyway." Not to be outdone, I responded, "but I settled it sooner." And therein lies the

essence of what a skilled trial judge can do: help the parties reach a fair resolution of their dispute at a fraction of the time, monetary cost, and emotional toll that the full-blown litigation process will take. I do not think there is any better use of a judge's time than to help the parties resolve their controversy. After all, what should be the role of a judge in our system, if not to oversee a process, created by the Constitution, statutes, and common law, that enables citizens to resolve their disputes in a fair, honest, and transparent manner? Ideally, this should be accomplished expeditiously, while keeping transaction costs—time, financial, and emotional—as low as possible.

I have yet to meet a party who truly wanted the multi-year process of discovery, trial, and appeal. Sometimes I bring the parties back into my chambers, point to the rows of Federal 3rd Reporters lining my walls, and suggest to them they don't want to end up in one of those books. Invariably I learn that what they desire is a fair and expeditious resolution which will enable them to move forward with their lives and/or businesses. Litigation is a full-contact sport, and it is the parties, not the attorneys, that get battered and bruised. Unlike what people may expect from watching television, a trial does not end the matter, but is simple a prelude to a protracted appeal, and possibly a retrial. My sense is that the demand, from attorneys and the parties for judicial assistance in resolving cases, is growing each year.

A judge who is able to facilitate prompt settlement of civil cases is better able to grant a firm and prompt trial date for those cases that must be tried. I have learned that what bogs down the process in federal court is summary judgment motions. While I have never kept detailed statistics, I believe that there will be a summary judgment motion filed after the close of discovery in at least 75% of federal cases. Once the summary judgment motion has been filed, it is much harder to settle the case. One party, generally the defendant, has paid its attorney a considerable sum to file the motion, and will often insist upon the judge making a ruling before engaging in settlement discussions. The process of analyzing a summary judgment motion is very time-consuming for the judge and his law clerks, as is the process of writing an opinion that will survive appellate scrutiny. If the case is mediated earlier in the process, resources that would otherwise be spent on summary judgment can be used for settlement, and limited judicial resources are preserved.

What can the trial judge do that no private mediator can do? Only the trial judge can provide the party with a true "day in court" that is far more participatory and satisfying than a trial ever could be. The actors in a trial are the attorneys. The parties themselves are spectators, except for the brief time on the witness stand. And even then, they are not permitted to tell their story or express their deepest emotions. They must answer the questions that are posed, no more and no less. They never get to ask questions. The key to any mediation I conduct is the interchange I have with each party, be it an individual or a corporate representative. When I am at my best, I do much more listening than talking. Invariably, I am asked: "Judge, may I say something?" I reply, "By all means, since that is why I insisted you be present." People cry, they express anger and the full range of human emotions. The parties are incredibly appreciative that a busy judge is doing nothing but

spending time on their case. I constantly need to remind myself that while I may have seen scores of cases very similar to this one, to these parties, this is the most important case in the county.

I would never have intuited how effective a judge can be in getting parties to focus on resolving a dispute, rather than on winning a fight. The process can be transformative. People who were unwilling to consider settlement, or who were taking most extreme positions, become willing to consider, and sometimes propose themselves, reasonable alternatives. Clients who had been unwilling to listen to the sound advice of their attorney become willing to accept the same information from me. Maybe it shouldn't happen, but it does, time and time again. When I explain to individuals the psychological toll prolonged litigation is likely to have upon them, and how they will constantly be pulled backward in time to a very unpleasant incident, they tend to listen. In fact, the investment of time and emotional energy in the mediation is a learning experience for many people, and it gives them a taste of the pressures of the litigating process.

There are some firm rules I believe should apply to a trial judge who wishes to undertake settlement or mediation, and Justice Cratsley has articulated a number of them. Perhaps the most important is that the judge should only get involved in settlement or mediation after ascertaining that both parties want her to do so. When I broach the subject of mediation, usually at the first case management conference (at which I require the parties' attendance, along with counsel), I explain that there are three ways for the parties to mediate their case. The first is to hire a private mediator, the second is to use our court ADR program, ^[5] and the third is to use me as the mediator. (The attorneys are aware of the assigned Magistrate Judge on the case, and they sometimes inquire whether he could mediate the case.) I tell them that there are advantages and disadvantages to each method, and the only thing that matters is that the parties come to an agreement. I will only undertake mediation if both parties clearly wish me to do so, and I never press anyone to give an explanation for their choice. Under no circumstances should any attorney or party feel pressured into having the trial judge serve as mediator.

After eight years, most attorneys are familiar with my methods, but if they are not, I explain that we start together in one room. I will generally have asked the parties to submit short position papers in advance, and occasionally transcripts of key depositions. I may have some factual questions at the outset. Sometimes, I have the attorneys make brief opening statements. We then break into caucuses, and I go back and forth between rooms, relaying offers and demands, trying to move the parties closer. I will keep going as long as I feel it is productive. Sometimes, more than one session is required.

Second, I emphasize at the outset, and repeat throughout the mediation, that neither side should feel any pressure from me to settle the case. My objective in conducting the mediation is to see if the parties can reach a resolution. If they cannot, the time has not been wasted, since then the parties know that they need a trial to resolve their dispute, and I can set a firm date for it. It is important not to let one's own ego as a mediator, coupled

with the power that comes with the robe, push the judge over the line. Strong, evaluative mediation is often necessary to resolve difficult cases, but judicial intimidation is counterproductive, and breeds disrespect for the system and the rule of law. A settlement mediated by a judge needs to be as voluntary as one resolved by a private mediator. Not only must the judge be fair and impartial throughout the mediation, but the judge must emphasize to the attorneys and parties that the only effect on the judge of the parties' not settling the case is the necessity to preside at trial and decide related motions. I always allow plenty of time for each party to confer privately with counsel before responding to the other party's offer or demand. Not only does this permit the attorney to perform her role, but it minimizes the likelihood that a party is responding to perceived pressure from the judge, rather than to the merits of the other side's position.

Third, I try not to predict what the outcome of a trial will be, or how a jury will resolve disputed issues. I emphasize that I have not seen or heard the witnesses, and that I am not making any assessment of witness credibility. I generally suggest that the parties view the trial as a 50/50 proposition. I do try to inject a healthy dose of reality into the mediation, however, since my experience is that parties are good at seeing the strengths of their position, but have blind spots for the weaknesses. I share information from the other side (if they have given me approval to do so), and I also offer my own insight gained from other cases as to how a jury might look at the facts, or what factors a jury might consider in determining damages.

Fourth, I never tell the attorneys or parties how I am going to rule on a threshold legal issue, such as summary judgment, qualified immunity, etc. I will certainly try to explain to the attorneys and parties that the issue may not be as one-sided (in their favor) as they have viewed it, or that there are particular appellate rulings that I am bound to follow with which they will have to contend. I explain to the plaintiff in a civil rights case that qualified immunity is one of those rare issues that can generate an interlocutory appeal, so that even if I were to rule in plaintiff's favor on that issue, the case is likely to sit for 18-24 months while the Court of Appeals takes up this issue.

During the caucus, I will often ask the attorney for each side how he has assessed the probable damage range, if the plaintiff prevails. More often than not, my assessment is close to that of the attorney, and I let the party know that. If I think a jury is likely to see things much differently, I may share that assessment. I try to reinforce what the attorney has told the client, if I feel the attorney is prepared and has looked realistically at the case. I emphasize to the party that if what the attorney says differs radically from what I have said, the party should follow her attorney's assessment, not mine.

I generally spend a great deal of time talking to the parties about the emotional toll that protracted litigation will take, as I have found that most people underestimate this factor. In fact, one of the important aspects of mediation is to educate the parties about this process. I have seen individuals start to fall apart during the mediation process, and I remind them that depositions, discovery, and trial make mediation look like a picnic.

While Justice Cratsley does not question the value of a judicial officer conducting mediations, he argues that the danger that the judge will consciously or subconsciously use something from the mediation in making trial rulings justifies the strict ban he proposes. I don't think the strict rule he proposes is necessary. From my experience, the legal community is very effective in disseminating information, particularly about the strengths and weaknesses of particular judges. If a judge, even once, allows his trial rulings and/or demeanor to be affected by what happened in mediation or even create the impression that this has occurred, none of the attorneys in that district will ask that judge to mediate any other cases. In fact, I don't believe lawyers will ask a trial judge to mediate their cases unless the judge is (1) well-qualified by experience and/or training; (2) effective; (3) courteous to the parties; (4) mindful of the fine line between firmness and coercion; and (5) able to try the case fairly if the case does not settle. So long as the process is truly voluntary, the rule proposed by Justice Cratsley should not be necessary.

Justice Cratsley correctly points out that his rule permits judicial mediation, with the consent of the parties, so long as there is another judge available to try the case if mediation proves unsuccessful. While some judges have established such a relationship, formally or informally, there are practical problems with this requirement. First, it is not feasible in a location where there is only one judge. There are many counties with only one trial judge, and many federal judicial districts have single judges in a number of cities. Second, it is axiomatic that one of the best ways to promote settlement is to have firm trial dates. If the rule proposed by Justice Cratsley were enacted, a judge would have to line up another judge in advance of the mediation, and have that judge to set a firm trial date for the case. This practice would make it very difficult for any judge to control his docket.

There are other substantial reasons why having another judge try the case is less effective and efficient. Next to being a good listener, the most important things for the mediator to demonstrate are preparation and perseverance. The more complex the case, the more preparation is necessary. A judge who is not prepared will not have much credibility with the attorneys or parties, and preparation takes time. In a complex case, I will review all the significant pleadings, key depositions and documents, and the mediation submissions of the parties. If it is not an area of law with which I am familiar, I will need to read the key cases. I will also make sure I have a good understanding of the damage calculations. I will try to come up with a reasonable settlement range, based upon the facts of this case and experience gleaned from similar cases, and I will generate strategies to get each side to moderate its position. Of course, I will already have developed a good understanding of the case from the case management conference, and possibly several telephone conferences. If the case were on another judge's docket, I will not have had any prior experience with it, nor am I likely to be able to commit as much time to preparation. In short, I am not likely to be as effective a mediator as I would be for my own cases. By the same token, the knowledge and understanding of the case that the judge gets during the mediation should make her better prepared to try the case, if settlement is not reached. The judge will know the attorneys and parties, get a good sense how long the trial will take,

possibly have figured how the case could be streamlined for trial, etc. This knowledge would be wasted if another judge must try the case.

There is another significant practical problem with the rule Justice Cratsley proposes. I settle many cases at the case management conference, which is held shortly after the defendant files the answer to the Complaint. I always require the parties to attend, both because the parties can answer my factual questions, and because the parties must be present to resolve the case. One of my biggest surprises upon becoming a judge was to learn that even in federal court, the transaction costs in many cases exceed what is in dispute. I believe that in most cases, the parties know when the case is filed 75-80% of what they will ever learn, and that in many cases they know enough to settle the case. When I question the parties, with everyone present, we can sometimes get to the essence of the dispute, and save everyone months of discovery. There are also some cases, particularly Title VII discrimination cases where the plaintiff is still employed by the defendant, that cry out for an immediate resolution. A knock-down, drag-out federal lawsuit in the context of an existing employment relationship becomes a nightmare for everyone. As soon as the employer tries to enforce any rule affecting the plaintiff, or takes even the mildest disciplinary measure, the plaintiff amends his complaint to add a count of retaliation. ^[6] And if the employer, fearful of exacerbating the lawsuit, forbears from any action, the other employees complain that the general rules don't apply to the plaintiff just because the plaintiff has alleged discrimination. I tell the parties at the outset that they need one of two things—either a revised employment relationship or an amicable parting of the ways—and that I will assist them to achieve whichever objective they jointly decide to pursue. If I would be precluded from trying the case if settlement efforts were to prove unsuccessful, I would most likely not be able to take advantage of this early opportunity to resolve the case. The attorneys and parties are present, often having traveled from out-of-town. The resources spent on discovery and reassembling everyone can be spent on settlement, if the judge engages the parties at that time. If I had to tell the parties that I wouldn't be able to try the case, I would be reluctant to even broach the subject of settlement.

And just as I am able to settle many cases at the case management conference, there are some at the opposite end of the spectrum—one or more mediation sessions held well into the discovery period, followed by several rounds of telephone conferences with the attorneys, spanning weeks and sometimes months. Some settlements can only be achieved with the passage of time, and a good mediator understands this. Sometimes additional discovery is needed, sometimes additional facts need to be researched, and sometimes parties just need time to adjust to the concept of settling. The problem with the rule Justice Cratsley proposes is that in complex cases, one of two unsatisfactory situations may come to pass. Either the case might be in limbo for a substantial period, while the judge was trying to settle it, with everyone knowing that if the efforts proved unsuccessful another judge would have to try it, or the judge will give up trying to mediate the case if it does not settle at the initial settlement conference.

Lastly, my sense is that the attorneys and parties are likely to be more candid with the judge who will be trying their case than with another judge who is serving only as a mediator. Individual plaintiffs in particular are likely to give more weight to the words of the person who will actually be the trial judge than to those of another judge, so long as the trial judge treats the plaintiff with respect and takes the time to respond both to the party's statements and to the emotions behind the words. If the mediating judge is effective, she will earn the respect of the parties during the mediation. The parties are more likely to feel as if they had their day in court if the mediation is with the judge who would actually be trying the case.

Again, not every trial judge has the time, ability, or inclination to engage in mediation. No judge should ever feel compelled to be a mediator, just as no attorney or party should ever feel compelled to submit to judicial mediation. But my experience over the past eight years has taught me that a skilled and trained trial judge has the potential to be the most effective mediator for his civil cases, and then can try those few cases when mediation does not produce a settlement. The rule that Justice Cratsley proposes would, in my view, substantially reduce the amount of judicial mediation. If one accepts my premise that the role of a trial judge is to resolve problems and disputes in a fair and efficient manner, this would be a big loss for our judicial system.

End Notes

1 See Honorable John C. Cratsley, *Judicial Ethics and Judicial Settlement Practices: Time for Two Strangers to Meet*, 21 OHIO ST. J. ON DISP. RESOL. 569 (2006).

2 I have no quarrel with the proposition that a judge who undertakes mediation should not preside over a bench trial of that matter should mediation prove unsuccessful, and I believe that virtually all trial judges who engage in mediation adhere to this practice. While Justice Cratsley does not perceive any significant difference between a jury trial and a bench trial with respect to the rule he proposes, *Id.* at 588-89, I do. In a jury trial, my role is to manage the trial process, to make sure the trial proceeds expeditiously, and to do everything possible to make the case intelligible for the jury, including crafting jury instructions in plain English. The jury decides the merits of the case. In a bench trial, I am the trier of fact, and I must decide which witnesses are credible and which are not. The key witnesses may be the same individuals who participated in the mediation. If statements they made to me regarding the facts of the case conflict with their trial testimony, I would be placed in the untenable position of either ignoring what I knew, or making findings based upon facts outside of the record.

3 I have attended in recent years two seminars conducted by the Federal Judicial Center on mediation for judges.

4 The question of time is a significant one. Many of my colleagues on the federal bench do not have the time to engage in mediation. In some districts, the criminal docket

—primarily drug and immigration cases—is overwhelming, and in other districts, the civil caseload is particularly high.

5 Over ten years ago, ours was one of the first federal courts to create an ADR program. We now have approximately 250 attorneys who volunteer their time. The lawyer's preparation time, and the first four and one half hours of the attorney's time in the mediation is without compensation. If the parties want the mediator to spend more time, there is a charge of \$150 per hour, to be shared equally by the parties.

6 The Supreme Court's recent ruling in *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006) expanded the range of conduct that can form the basis for a claim of retaliation in a Title VII case.

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