The Mediator as a Post-Conference Continuing Resource

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The conclusion of a mediated settlement conference ("MSC") does not necessarily signal an end to the mediator's duties. Indeed, opportunities abound for mediators to continue assisting the parties even after an MSC concludes.[1] In some situations, the parties may have agreed to settle during the MSC, but the settlement cannot be effectuated without court approval or other conditions that can only be satisfied after the conference. On the other hand, when parties are not able to resolve their differences at the MSC, further mediated negotiations might prove fruitful even as their dispute is being litigated. In both instances the mediator *can* - and often *should* - and occasionally *must* - be a continuing resource to the parties and their counsel. This essay summarizes a number of opportunities for mediators to continue their service after the MSC, whether or not an impasse has been declared.[2]

A. *What happens when the parties have resolved their dispute at the mediated settlement conference?*

In a garden variety settlement not requiring court review or approval, the mediator's engagement typically terminates when the MSC concludes with a fully executed written mediated settlement agreement.[3] Beyond that every-day scenario, however, a mediator should not ordinarily conclude her service in the following situations, even where the parties have

executed a settlement memorandum at the MSC.[4]

First, when parties and their counsel agree at the MSC to resolve a class or collective action,[5] a number of subsequent conditions typically must be fulfilled before the case can be deemed settled. The parties may, for example, have to seek conditional or final class certification, if that has not already been accomplished. Also, the settlement will likely have to be approved tentatively by the trial court and preliminary notice be given to prospective members of the class.[6] Moreover, some kind of claims proceeding may be necessary, with opportunities to opt in to collective actions (and some forms of class actions) and opportunities to opt out of common forms of class actions. At least until the court has signed off on the protocol for all these steps, the parties may need the mediator's assistance in resolving differences about effectuating their settlement. The better practice, therefore, is for the mediator to retain her "jurisdiction" to act as a continuing resource, if needed. Judges and lawyers alike will appreciate her doing so.

Second, when a settlement is subject to judicial approval because of minor parties or inchoate beneficiaries, a mediator's work might involve participation in post-conference negotiations over documentation and court approval. Again, the better course in such cases is for the mediator to retain jurisdiction and let counsel know that she is available to assist if the parties' negotiations over effectuation of the settlement get sticky before final court approval. Of course, if the parties insist that they do not need or want any further help, the mediator's report should indicate that the agreement to settle is subject to further conditions.

Third, cases involving governmental parties are often troublesome for mediators, as there

is rarely an opportunity at the MSC for an authoritative decision to spend public funds in excess of a nominal amount or to take some atypical administrative or regulatory action to resolve a case. Instead, many settlements of these cases require post-conference approvals by city councils, county boards and similar governmental bodies. Mediators are well-advised, therefore, not to conclude their engagements until such approvals are obtained.

Fourth, disputes that are resolved on the basis of pending or impending legislation or administrative regulation are prime candidates for retention of mediator jurisdiction. In an antitrust class action brought by tobacco farmers against the largest tobacco companies, for example, the mediated settlement involved not only typical monetary relief, but was also affected by a Congressional change in the farm support program that triggered other forms of relief. In that case, the Court encouraged the parties to use the mediator as a continuing resource pending final approval of a class settlement.[7] On a smaller scale, disputes are often resolved with cities and towns by means of a regulatory change or some other governmental action after the MSC. In those situations, too, the mediator should (and sometimes must, if the Court insists) retain authority to act as a go-between for the parties or their counsel during the period when the governmental action is being formulated and executed.

Fifth, some cases are ultimately disposed of by means of an agreed post-mediation arbitration, neutral evaluation or claims procedure - all of which will require the services of a neutral provider. If the mediator is asked to act as the neutral to conduct or preside over the post-conference procedure, the better course may be to refrain from doing so, tempting though it may be to change roles. Although the Standards of Professional Conduct may tolerate

procedures such as "med-arb" (where the mediator subsequently acts as the arbitrator),[8] the better course may be (and the author's own practice certainly is) to limit the original engagement to one form of dispute resolution in order to preserve the reality and appearance of impartiality, enhance one's ability to establish trust and rapport with counsel and the parties, minimize opportunities for inadvertent disclosure or use of confidential information and (selfishly, of course) protect the neutral against the prospect of claims by the litigants or lawyers. Without assuming any conflicting role, however, the mediator may (with the parties' permission) want to retain jurisdiction during the post-conference process in case the parties need to negotiate over the terms of that process or even make a further attempt at negotiating a resolution of the underlying dispute.

Finally, the *sixth* opportunity for being a post-settlement continuing resource stems from the "agreement to agree," a commonplace in the commercial world. Some business disputes, for example, may resolve at the MSC with a further business arrangement, say, an agreement for one party to purchase assets or equity from the other party (or even to purchase the other party's business outright.) In those cases the better practice may be for the mediator to offer to retain jurisdiction so that the new business arrangement can be negotiated and effectuated under the aegis of the mediation rules. In most cases the parties will not bear any additional mediation expense because they have a shared incentive to work together to resolve any differences over the post-MSC agreement. But where there are bumps in that road, the mediator who has already established trust and rapport with the parties at the MSC in arriving at their underlying agreement to settle is well-suited to continue as a useful resource in easing the parties'

remaining steps to final resolution.

B. *What happens when the parties have not resolved their dispute at the mediated settlement conference*?

The ways in which a mediator can serve as a continuing resource after the MSC depends on how the MSC concludes. In some situations the MSC ends with the parties' agreeing to consider a final proposal (or even the mediator's own settlement proposal[9]) over the course of several days. In those cases, the mediator obviously continues to serve as a resource for the parties until they have responded to the proposal. Most mediations, however, end with the participants advising the mediator - sometimes quite pointedly - that they no longer wish to continue the process.

But, must a mediator declare an impasse at the MSC when the parties tell her that they do not wish to make any further offers and demands? Not necessarily. Whether and when to declare an impasse is beyond the scope of this essay, but this much can be said here: While declaring an impasse is typically in the sole discretion of the mediator,[10] exercise of that discretion should never be a function of a mediator's personal inclination. It must, instead, be an application of her informed judgment based on what she has learned from the parties and their counsel. Deciding whether to declare an impasse or a recess following a breakdown in negotiations at the MSC is thus a more delicate task than one might think.[11]

If the mediator does declare an impasse, that must ordinarily be reported to the Court. But, what if the mediator also believes that post-conference negotiations might resume after

disposition of pending motions or following some other change of circumstance? She might then consider, with the parties' permission, indicating in her report that the mediation should stand in recess even with the parties at an impasse in their negotiations. Neither the mediation rules nor the current reporting forms seem to contemplate this somewhat ambivalent circumstance. But, because the mediator is in charge of the process,[12] leaving the mediation open, while calling an impasse, may be regarded as part of a mediator's tool-kit.

A more common circumstance involves the mediator's simply calling a recess when negotiations break down at the MSC. As noted above, however, recessing should not be regarded as a unilateral decision to be made by the mediator, no matter how strongly it may be urged by one side or the other. Instead, it is a decision the mediator can make only after consultation with all sides at the MSC. Once a recess is declared, the mediator can continue to act as a resource for the parties in a multitude of ways.

First and most obviously, the mediator can attempt to continue (or resurrect) negotiations by *ex parte* telephone or video conferences with counsel. This technique is particularly effective when the mediator has established a significant measure of trust and personal rapport with the MSC participants on all sides. Additionally, this technique may be enhanced by letting the participants know at the outset of the MSC that if the dispute is not resolved at the settlement conference, the mediator would expect to be able to contact counsel on an *ex parte* and confidential basis if the mediation is recessed.

Second, the mediator can ask counsel to keep her advised of material developments in the case, such as rulings on motions, completion of critical discovery, or changes in the personal,

employment or business circumstances of the parties. By maintaining this modicum of contact with counsel, the mediator may be able to spot opportunities for restarting the negotiating dialogue or planting ideas for settlement proposals that counsel can pursue on his or her own. In the rare instance, a mediator might also consider making a proposal of her own based on changes of circumstance since the MSC.[13]

Third, the mediator may act as an impartial resource for bringing legal and factual developments to the attention of counsel on both sides of the case. That task, however, can be a delicate one, for it must be handled in scrupulously neutral and even-handed fashion[14] - a feat that may not be so easy where a court decision heavily favors one side or the other. Nonetheless, making sure that the parties' consideration of the dispute takes account of the most recent and pertinent precedents can give the post-MSC process added value, especially where the mediator has special knowledge of the field of law applicable to the case. Likewise, developments in the marketplace may often have a substantial bearing on the business incentives of parties involved in commercial disputes. A mediator who keeps up with changes in particular markets can provide a valuable service to the parties by conferring with the lawyers, either jointly or separately, to discuss how these changes might impact resolution of their clients' disputes. Again, however, mediators must exercise the greatest caution in carrying out this task in a wholly neutral and impartial manner.

Finally, some keys to being the most valuable resource possible during a recess are for the mediator to stress prior to the MSC's conclusion (a) that she will make herself available to the parties' counsel (and even to the parties themselves) whenever one or both sides think it

may be fruitful to do so; (b) that she will check in with counsel from time to time during any recess to discuss where the case stands and whether she can be helpful in restarting a dialogue between the parties; and (c) that she and counsel should try to bring to each other's attention legal and factual developments during any recess that may bear on how the dispute can be resolved.

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This essay has posited the notion that a mediator can be a continuing resource for the parties, regardless of whether they have agreed to resolve their differences at the MSC or not. While not purporting to be exhaustive, the foregoing summary of opportunities for useful service after the MSC will hopefully remind lawyers, judges and mediators alike that energetic and creative mediators may continue to assist parties to resolve their disputes even after the mediated settlement conference concludes.

* * Endnotes * *

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1. Dispute resolution scholarship has so far paid scant attention to mediator's duties and opportunities following completion of the settlement conference. *But see*, P. Lurie, "Guided Choice: Early Mediated Settlements and/or Customized Arbitrations," 7 *Jour. of the ACCL* 167 at 172-173 (2013), last accessed on March 30, 2014 at *www.consensusdocs.org/News/Download/f900a7b8-6d91-4175-8e7c-a22900e56675?name=Lurie%20Article.pdf*. That is not surprising in light of the apparent lack of mediator follow-up after settlement conferences

(in spite of evidence that continuing mediator attention to an impassed case is regarded by counsel as useful.) See, e.g., D. Batten, M. Boyd, D. Goldberg, D. Mgbeokwere, "North Carolina Dispute Resolution Commission - MPA Student Evaluation (PUBA 711, Spring 2012) (Copy in author's file)

2. References in this essay to North Carolina law will hopefully prove useful for situations in other jurisdictions. Mediation has been mandatory in North Carolina for most civil cases in federal court and Superior Court for the better part of two decades. *See generally*, *Alternative Dispute Resolution in North Carolina: A New Civil Procedure* (Second Edition) (N.C. Bar Ass'n Dispute Resolution Section, 2012) This body of experience enjoyed by both bench and bar has put North Carolina in the forefront of alternative dispute resolution and marks its experience as especially instructive for courts across the country. *See, e.g.,* "Resolutions" (September 2009 at p. 1) (Supreme Court of Virginia, Office of Executive Secretary) last accessed on March 30, 2014 at *www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/resources/resolutions/2009/sept2009.pdf.*

3. Mediation rules in the North Carolina Superior Courts and in the state's three federal district courts all require that the parties' agreement reached in a mediation be reduced to writing and signed by the participants who authorized it. *E.g*., N.C. Rules for Superior Court Mediations ["MSC Rules"] Rule 4(C); L.R. 83.9(d) (M.D.N.C.); L. R. 101.1d(d)(3) (E.D.N.C.); L. Civ. R. 16.3(B)(1) (W.D.N.C.) (incorporating the North Carolina Superior Court Mediation rules.) *See also*, N.C. Gen. Stat. 7A-38.1(l). *But cf. also*, *Chappell v. Roth*, 353 N.C. 690, 548 S.E. 2d 499 (2001) (Enforceability of mediated settlement agreement.)

4. The extent to which a mediator can or should participate in drafting a mediated settlement agreement is beyond the scope of this article, but is the subject of vigorous debate in the dispute resolution world. *See, e.g*., S. Ware, *Alternative Dispute Resolution*, sections 4.16(a) at p. 232 and 4.27(c)(2) at pp. 247-250 (West Hornbook Series, 2001); S. Van Soye, "Why Neutrals Shouldn't Draft Settlement Agreements," ADR Times, October 16, 2013, last accessed on November 5, 2013 at *www.adrtimes.com/library/why-neutrals-shouldnt-draft-settlement-agreements.*

5. Class actions are governed by the applicable procedural rules for settlements or judgments that may bind absent members of a group that shares interests and characteristics making it possible to resolve or adjudicate their claims at the same time. *E.g*., F. R. Civ. P. 23. A collective action, on the other hand, is ordinarily a creature of the substantive law under which a suit is brought. Most typically, employee wage and hour claims under the Fair Labor Standards Act of 1938 are considered collective actions, as they ordinarily involve an aggregation of individualized claims into one case under the applicable rules of procedure. *See, e.g*., 29 U.S.C. 216(b).

6. Fed. R. Civ. P. 23(e).

7. *See*, *Deloach v. Philip Morris Companies, Inc*., No. 00-CV-1235 (M.D.N.C.) on transfer from the District of Columbia, 132 F. Supp. 2d 22 (D. D.C. 2000). For a brief description of the settlement, *see also* 321 F. Supp. 2d 707 (M.D.N.C. 2004). *See also*, C. Berk and V. O'Connell, "Philip Morris, Others End Tobacco-Leaf Antitrust Suit," *The Wall Street Journal*, May 19, 2003, last accessed on March 30, 2014 at *http://online.wsj.com/news/articles/SB105310644968919600.*

8. *See, e.g.*, Advisory Opinion No. 10-17, N.C. Dispute Resolution Commission (September 18, 2010)

9. The subject of mediators' proposals, while beyond the scope of this essay, is fodder for debate amongst mediation scholars and merits extensive consideration elsewhere. For a recent compendium of articles about this subject, see P. Young, "Overcoming Impasse in Mediation: A Short Literature Review," (Mediate.com, July 2013) last accessed on November 5, 2013 at *www.mediate.com/articles/young13.cfm?nl=56.*

10. *E.g*., MSC Rule 6(B)(3); Local Rule 83.9 (M.D.N.C.)

11. For instance, parties and their counsel may have compelling strategic reasons for wanting (or not wanting) an impasse to be declared. Additionally, external factors, such as impending authoritative court decisions or even the participants' personal circumstances, can sometimes influence exercise of the mediator's discretion to call a recess instead of an impasse. As noted in the text, the subject of whether and when to declare an impasse or a recess calls for an assessment of issues well beyond the scope of this essay. *See*, MSC Rule 3(D); L. R. 83.9e(f) (M.D.N.C.); L. J. Berman, "Impasse is a Fallacy," (A.I.M., undated), last accessed on November 5, 2013 at *www.americaninstituteofmediation.com/pg70.cfm*.

12. MSC Rule 6(A)(1); Local Rule 83.9e(e) and (f) (M.D.N.C.)

13. *But see*, *supra* at n. 9.

14. *See, e.g*., Standard II(A) of the Revised Standards of Professional Conduct for Mediators (effective April 1, 2014) adopted by the North Carolina Supreme Court by order dated February 5, 2014.

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