INTER ALIA
the Newsletter of the
Northern District of Ohio Chapter of the Federal Bar Association

Trial Judge as Mediator

A Rejoinder to Judge Cratsley

by Hon. Dan Aaron Polster

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 his or 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.

I have yet to meet a party who truly wanted the multi-year process of discovery, trial and appeal.

***Dan Aaron Polster**, United States District Judge, Northern District of Ohio (1998 – present); Assistant United States Attorney, Northern District of Ohio (1982 – 1998); trial attorney, U.S. Department of Justice, Antitrust Division (1976 – 1982); J.D. Harvard (1976); A.B. Harvard (1972).*

The author wishes to thank U.S. Magistrate Judge Wayne Brazil (N.D. Cal.) for his detailed and thoughtful comments on an earlier draft of this article.

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 do not 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

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Spring 2008

Chapter Members "Answer the Call"

by Carter E. Strang

In her *American Bar Association Litigation Magazine* (Fall 2007) article "I Know My Rights," U.S. 3rd Circuit Court of Appeals Judge Marjorie O. Rendell addressed the rather sorry state of citizen knowledge about and interest in the U.S. Constitution and our government. Consider the following polls she cites:

1) Only one-third of adults could identify all three branches of government and one-third could not name any.
2) More teens could name all Three Stooges than the three branches of government.
3) Only 9 percent of teens could name their two U.S. Senators.
4) Twenty-two percent of adults believe that the U.S. Supreme Court cannot declare an act of Congress unconstitutional.
5) Forty-eight percent of adults said it is essential or very important to be able to impeach or remove a judge from office if the judge makes an unpopular ruling.
6) Only 50 percent of teens believe that voting is important, and 46 percent think they can make a difference in solving community problems.

Her article is a "call to arms" to address this lack of knowledge and interest, particularly by doing more to reach young students in schools. Many of our chapter members have been "answering the call" by participating in the Cleveland Bar Association's (nka the Cleveland Metropolitan Bar Association) award-winning 3Rs program. Now in its second year, it places attorney volunteers in 10th grade history classes in the Cleveland Municipal and East Cleveland Public Schools. More than 3,000 students are served per year by some 500 attorneys (average per year). Monthly lessons focus on the U.S. Constitution and incorporate personal and career counseling. There is, quite simply, no program of its scope and magnitude in the United States.

I am proud to serve as 3Rs Committee Chair and a 3Rs volunteer teacher at three schools, and I am extremely proud to take this opportunity to thank and recognize the 36 other chapter members who are serving as 3Rs volunteer teachers this school year:

Hon. Patricia Gaughan
Hon. Patricia Hemann
Hon. Kenneth McHargh
Hon. Dave Perelman
Hon. Dan Polster
Hon. Nancy Vecchiarelli
Scott Austin
Karl Bekeny
Rebecca Bennett
Allen Bohnert
Kenneth Bravo
Aaron Bulloff
Diane Citrino
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George Rooney
James Satola
Michele Smolin
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Christopher Williams
Dean Williams

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Special thanks as well to the Hon. Patricia Hemann, Alan Bohnert and Hugh McKay (originator of the 3Rs program) for their work as members of the 3Rs Committee.

If you would like to join the 3Rs effort and make a difference in the lives of Cleveland and E. Cleveland public school children, please contact me at (216) 696-3956 or cstrang@tuckerellis.com.

3Rs Committee Chair Carter Strang meets with Cleveland Public School children to discuss the Constitution.

***Carter Strang** is Vice President of the Northern District of Ohio Chapter of the FBA. He is a partner in the Cleveland office of Tucker Ellis & West LLP. He is a trial lawyer who focuses on environmental, mass tort, product liability and real estate litigation. He has handled a broad range of matters in both state and federal court. He is a frequent lecturer and author regarding legal issues.*

Inside This Issue

Welcome New Chapter Members

Diane Citrino, Cooper & Walinski LPA

Daniel Messeloff, Ogleetree Deakins Nash Smoak & Stewart PC

Michael Mumford, Baker & Hostetler LLP

Aaron Plasco, Law Office of Cassandra Collier-Williams

Write An Article!

Members of the Northern District of Ohio Chapter of the Federal Bar Association are invited to submit an article for an upcoming issue.

If you are interested in writing an article, please contact me at (216) 706-3874 or sjett@taftlaw.com. The deadline to receive articles for the Summer 2008 issue is May 30, 2008.

Stephen H. Jett
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2007-08 Newsletter Editor

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Clerk's Corner

by Geri M. Smith

Magistrate Judge Greg White joins bench

Magistrate Judge Greg White entered on duty effective March 1, 2008, filling the vacancy in Cleveland created by the retirement of Magistrate Judge Patricia A. Hemannn. Magistrate Judge White had served as the U.S. attorney for the Northern District of Ohio since 2003 and had previously been the prosecutor in Lorain County for 22 years. Magistrate Judge White is located in Chambers 11B of the Carl B. Stokes Court House. The magistrate judge's chambers telephone number is (216) 357-7135. His courtroom deputy is Stacey Swonger and can be reached at (216) 357- 7136. Please refer to the court's Web site for additional information regarding Magistrate Judge White.

Magistrate Judge James S. Gallas to retire and continue service in recalled status

Magistrate Judge James S. Gallas announced that he would retire at the end of June, 2008 creating a magistrate judge vacancy in Akron. The Akron magistrate judge position opening has been advertised, and the deadline for applications has now closed. A merit selection panel of attorneys and members of the public has been appointed and is expected to recommend five individuals for the court's consideration in mid-April. Once the court makes its selection, and the mandatory background investigation has been completed, the new magistrate judge will be sworn in, most likely in mid-summer. We are pleased to advise that Magistrate Judge Gallas' request to continue his service as a magistrate judge in Cleveland in retired-recalled status once the new magistrate judge in Akron enters on duty, was approved. Magistrate Judge Gallas was appointed to his position in 1991. He previously served as the District's Clerk of Court for 14 years.

Court reporter transcripts

The federal judiciary continues its work toward making court reporter transcripts available electronically through the PACER and CM/ECF systems. I am pleased to advise that The Northern District of Ohio will implement the new feature late this Spring.

Among the issues that are being addressed is compliance with the Judicial Conference's privacy policy that requires partial redaction of certain personal information from court filings that are electronically available to the public. The items to be redacted include Social Security numbers, financial account numbers, dates of birth, names of minor children, and, in criminal cases only, home addresses. The new national procedures place responsibility on the attorneys to review transcripts within a brief period of time and notify the court if redactions are necessary.

The Judicial Conference has adopted redaction procedures to clarify which portions of the transcript should be reviewed and by whom. The provisions also address the Criminal Justice Act (CJA) panel attorney eligibility for compensation for the time spent in complying with the redaction procedures, and for reimbursement of related expenses. The procedures state that they were not intended to create any private right of action.

The system will work as follows. Once a party has purchased a transcript, the court reporter will file an electronic copy that will be available at the Clerk's Office public access terminal, but that may not be copied or reproduced by the Clerk's Office for 90 days. The attorneys will have the responsibility to notify the court if redactions need to be made. Once the 90-day period expires, and any necessary redactions are made, the transcript will become publicly available for downloading and printing from PACER at 8 cents per page or from the Clerk's Office public access terminal at 10 cents page. During the initial 90 day period, those wishing to purchase a copy of a transcript, in either paper or electronic form, must do so through the court reporter. Once an attorney on the case has purchased a transcript, the court reporter will notify the Clerk's Office and the attorney will be provided electronic access to the transcript through the CM/ECF system.

First, under the plan, each party's attorney will be required to review a transcript for information that should be redacted under the Judicial Conference's privacy policy: Social Security numbers should be redacted to show only the last four digits; birth dates should contain only the year of birth; individuals known to be minors should be referred to with initials; and financial account numbers should be redacted to the last four digits. Additionally, in criminal case files, home addresses should reveal only the city and state of residence.

Second, within five business days of a court reporter's delivery of the transcript to the clerk of

court, an attorney must file a notice with the court of his or her intent to request redaction of such information from the transcript. An attorney is responsible for reviewing the opening and closing statements made on behalf of the party he or she represents, any statements made by the party, and the testimony of any witnesses called by the party. If no notice is filed during this five-day period, the court may assume that redaction of personal data is not necessary, and may make the transcript electronically available to the public. An attorney serving as "standby counsel" to assist a pro se defendant in his or her defense has the same responsibilities as if he or she were the pro se party"s attorney of record in the case.

Third, once an attorney has filed a notice of intent to request redaction, he or she has 21 days to review the transcript and submit to the court reporter or transcriber a list of the places in the transcript where the personal data to be redacted appears. A court may order this time extended, for good cause shown. The court reporter or transcriber must redact the identifiers, as directed by the party. Also during this time period, an attorney could, by motion, request that additional information be redacted. No remote electronic public access to the transcript is to be allowed until the court has ruled on any such motion.

Fourth, attorneys appointed under the CJA are eligible for compensation for reasonable time spent complying with the redaction procedures and for reimbursement of related expenses. Examples of activities related to the procedures that could be covered include: the cost of obtaining the transcript; travel expenses to gain access to the transcript; time spent reviewing the transcript to determine the need for redaction; time spent and expenses incurred filing a notice of redaction; time spent on preparing and filing a redaction request; and/or time spent on motion practice relating to the transcript's redaction.

Fifth, in the event that a case involving a CJA representation has already been closed, and the original attorney (or standby counsel) is no longer available, new counsel may be appointed under the CJA and compensated as outlined above. In the event that the original appointed counsel is still available, but has filed a final voucher for the underlying case, the attorney shall be permitted to file a supplemental voucher for compensation.

Although the redaction procedures are sound, the predominate view within the judiciary is that the best method of preventing harmful disclosure of personal data identifiers through transcripts is to alter courtroom behavior so that the unnecessary information is simply not elicited in the proceeding. To that end, everyone is encouraged to keep personal information covered by the privacy policy out of the court record unless necessary to prove an element of the case.

Retroactive application of crack cocaine sentencing guidelines

It has been estimated that more than 700 defendants sentenced in the Northern District of Ohio may be eligible for a reduction in sentence due to the U.S. Sentencing Commission's decision to apply changes in the crack cocaine sentencing guidelines retroactively. The Pretrial Services and Probation Office, the Office of the Federal Public Defender and the U.S. Attorney's Office have been working cooperatively together to identify which inmates are potentially eligible for a reduction in sentence. The court has issued General Order 2008-09 appointing the Office of the Federal Public Defender to represent those inmates unless and until previously appointed CJA counsel or retained counsel wish to enter an appearance on behalf of a particular inmate, or the court deems it more appropriate for prior counsel to represent the inmate, in which case the attorney will file a notice of appearance and the federal public defender will then seek to withdraw. As of March 10, nearly 200 motions to reduce sentences had been filed and 76 related orders had been entered, with nearly all resulting in reduced sentences.

2008 6th Circuit Judicial Conference

Attorneys are invited to attend the 2008 6th Circuit Judicial Conference May 7-10, 2008, in Chattanooga, Tenn. The conference is open to all attorneys admitted to federal practice in the 6th Circuit. All attorneys who attend will receive credit toward life membership in the 6th Circuit Judicial Conference. If you are interested in attending the 2008 6th Circuit Judicial Conference, please contact the Office of the Circuit Executive, U.S. Court of Appeals for the 6th Circuit, at 503 Potter Stewart United States Courthouse, Cincinnati, Ohio 45202-3988; Telephone (513) 564-7200; Fax (513) 564-7210. You can request the registration materials on the 6th Circuit Web site at www.ca6.uscourts.gov.

Geri M. Smith *was appointed the Clerk of Court for the U.S. District Court Northern District of Ohio on July 1, 1991, having joined the court in 1982. She serves as the chief administrative officer of the court as well as the administrative assistant to the Chief Judge.*

New Law Amends FMLA to Provide Leave for Military Service

by David Peck

On Jan. 28, President Bush signed the National Defense Authorization Act for fiscal year 2008. The act amends the Family and Medical Leave Act (FMLA) by adding two types of leave that employees can take to care for and assist family members serving in the Armed Forces.

Qualifying exigency leave

First, eligible employees may take up to 12 weeks of unpaid FMLA leave because of a "qualifying exigency" relating to a spouse, child or parent serving on active duty, or being notified of a pending call to active duty, in the U.S. Armed Forces. The act does not define "qualifying exigency" but directs the secretary of labor to issue regulations defining the term. Conceivably, employees might be able to take leave to make preparations for a service member's departure for overseas duty, such as arranging for childcare and obtaining power of attorney forms or other legal documents. It might also include leave to spend time with a service member who is home on temporary leave from active duty in a combat zone.

Qualifying exigency leave only applies if the military service involves, or may involve, action against an enemy of the United States or an opposing military force. It also includes national emergencies declared by the President in which armed services members are called to, or retained in, active duty. Because of how the act defines "active duty," it is not clear whether this type of leave applies only to those service members who are called to active duty from, for example, the National Guard, or whether it also applies to "full-time" soldiers who are ordered into operations against a hostile force (e.g. transferred to service in Iraq from an assignment in the States). We anticipate that the regulations will provide further guidance on this issue.

Servicemember family leave

Second, the FMLA will now provide what is referred to as "Servicemember Family Leave." Eligible employees who are the spouse, child, parent or next of kin (the nearest blood relative of an individual) of a "Covered Servicemember" may take up to 26 weeks of unpaid leave to care for the servicemember. A covered servicemember is a member of the Armed Forces who is "undergoing medical treatment, recuperation, or therapy, or in outpatient status, or on the temporary disability retired list, for a serious injury or illness." The injury or illness must be incurred in the line of duty and must be of such a nature that it may render the individual unfit to perform his or her military duties.

An eligible employee may not take more than a total of 26 workweeks of leave during a 12-month period for Servicemember Family Leave and any other type of FMLA leave. Spouses that are employed by the same employer are limited to a combined total of 26 weeks of FMLA leave in a 12-month period when Servicemember Family Leave is used.

Provisions applicable to both types of leave

Employees must provide employers with "reasonable and practicable" notice of their need for leave and may take leave on an intermittent or reduced leave schedule. If the need for Servicemember Family Leave is foreseeable based on planned medical treatment an employee can be temporarily transferred to an alternative position that better accommodates the employee's absences. The alternative position must provide equivalent pay and benefits.

Employers may require certification from employees requesting "qualifying exigency" leave, although the precise nature of this certification is yet to be determined. When Servicemember Family Leave is used, the employer may require medical certification for the ill or injured servicemember, in the same manner as medical certification can be required for serious health conditions under the FMLA.

Employees may choose to use (or employers may require employees to use) accrued paid vacation, personal or family leave in lieu of unpaid leave due to a qualifying exigency. When Servicemember Family Leave is taken, employees may choose to use (or employers may require that employees use) accrued paid vacation, personal, family, medical or sick leave. Employees may not insist on using paid medical or sick leave in situations in which the employer would not normally provide those types of leave.

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Brown Bag Lunch with Magistrate Judge Vecchiarelli

by Donald W. Herbe

On Feb. 5, 2008, the Federal Bar Association's Northern District of Ohio Chapter hosted a Brown Bag Luncheon with U.S. Magistrate Judge Nancy Vecchiarelli. The luncheon was held in Judge Vecchiarelli's courtroom of the Carl B. Stokes Federal Courthouse in Cleveland. The energetic event was attended by approximately 32 of our chapter members.

Judge Vecchiarelli opened the luncheon with a summary of her personal background, starting with a tribute to her Italian immigrant grandparents and her parents, who instilled the work ethic and sense of justice that guide Judge Vecchiarelli to this day. Growing up in Chagrin Falls, Judge Vecchiarelli quickly picked up the golf bug from her caddy and golf pro father, a passion that remains to this day. (Speaking of hobbies, bet you didn't know Judge Vecchiarelli owns a Harley and loves a good road trip or just cruising around her neighborhood!)

After graduating from Miami University in Oxford, Ohio, Judge Vecchiarelli thrived at the University of Cincinnati College of Law, finishing fourth in her class. The Judge reflected on the rapid influx of female law students in the 1970s, noting that upon graduation from college in 1972, women comprised only three percent of law school students, which was quite a contrast to 1974, when women made up approximately thirty percent of her entering law school class. After law school, Judge Vecchiarelli embarked on a diverse practice, which began with a two-year clerkship under Judge Thomas J. Parrino of the Ohio Court of Appeals, 8th Appellate District. Her next stop was with Hahn Loeser + Parks as a litigation associate for six years. The final step before becoming a magistrate judge in 1998 was a 12-year stint as an assistant U.S. attorney here in Cleveland, where she spent most of her years in the criminal division with a focus on computer crimes.

Judge Vecchiarelli then described the role and authority of federal magistrate judges, noting the mechanisms of consent and referral. When the parties consent to the jurisdiction of a magistrate judge, the case is heard as if by an Article III district judge, with appeal to the Circuit court of appeals as the next phase. The judge noted that a consent case may receive more attention in light of a magistrate judge's lighter docket. If the parties do not consent, district judges may refer specific matters or entire cases to magistrate judges, upon which the magistrate judge issues orders on procedural and discovery issues and reports and recommendations on dispositive issues, the latter being objectionable to the district judge.

Finally, the judge provided some insight and general pointers regarding practice in her court (or any court for that matter). First, clients with actual settlement authority should always attend settlement conferences; otherwise, the time spent will likely be a waste. Second, parties always have the right to try their cases instead of settling; but Judge Vecchiarelli will "push" for settlement in some circumstances, including where a party is being unreasonable, a party is clearly wrong in its position, or the parties are close to resolving the dispute. Third, summary judgment motions are not appropriate in every case. If you do file one, Judge Vecchiarelli prefers that the entire deposition transcript be attached, rather than excerpts. Fourth, while pleading in the alternative is understandable and acceptable, presenting alternative arguments at trial is risky business. Fifth, cross-examination is not an exercise in endurance—get in and get out. Sixth, a sustained objection does not necessarily preclude you from getting the information sought; if you cannot go through the door, try to go around it. And finally, always adapt to the judge.

Our chapter's Brown Bag Luncheon series provides a wonderful opportunity for our members to meet in an informal setting with the judges and magistrate judges of our court, as well as with fellow lawyers with an interest in the federal courts. These luncheons are one of the many benefits our chapter offers. We look forward to seeing each of you at our next Brown Bag Luncheon and other fine programs offered by our chapter.

Donald W. Herbe *is an associate at Squire, Sanders and Dempsey L.L.P. He served as a law clerk to Magistrate Judge Vecchiarelli from 2003 to 2005.*

(Trial Judge, continued from page 1)

not end the matter, but is simply 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 a be a summary judgment motion filed after the close of discovery in at least 75 percent 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 stories 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 country.

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 should not 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 him or 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, and the third is to use me as the mediator.[5] (The attorneys are aware of the assigned Magistrate Judge on the case, and they sometimes inquire whether he or she 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.[6] 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 his or 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 to 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 or she 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 do not 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 do not 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 to 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. Many counties only have 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 hav-

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ing 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 to 80 percent 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.[7] And if the employer, fearful of exacerbating the lawsuit, forbears from any action, the other employees complain that the general rules do not 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.

Last, 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, he or 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 or her 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.

Endnotes

[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.

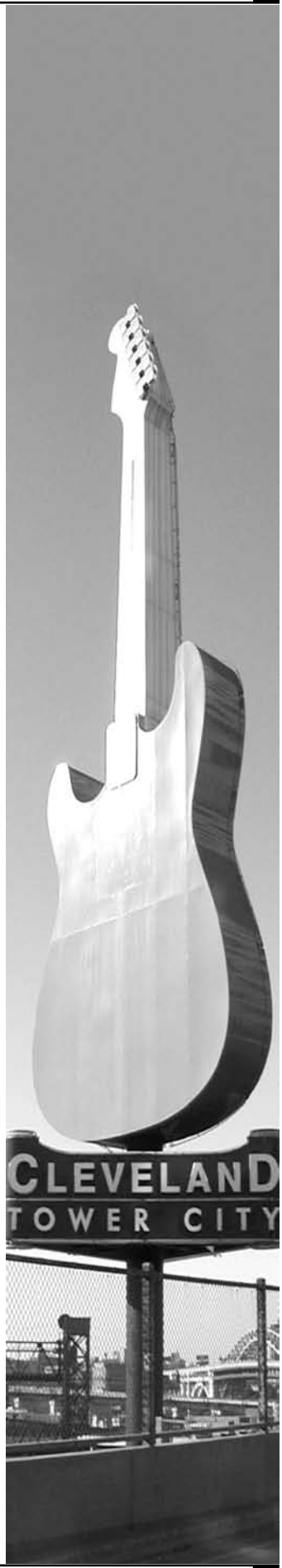
[3]I have attended in recent years two seminars conducted by the Federal Judicial Center on mediation for judges.

[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]More than 10 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]Well in advance of the mediation, I issue a standard order that details what is expected of attorneys and the parties.

[7]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.



(FMLA, continued from page 6)

Different effective dates

These two new forms of leave have different effective dates. Effective immediately employers must grant Servicemember Family Leave to eligible employees, and until additional regulations are issued, employers must "act in good-faith" in providing this type of leave. However, the amendment allowing for 12 weeks of leave due to a qualifying exigency does not take effect until the department of labor issues regulations defining what constitutes a "qualifying exigency."

What should employers do now?

Despite the current lack of regulatory guidance for these amendments to the FMLA, there are some steps that employers can take now to help ensure their leave and attendance policies comply with the FMLA. At a minimum, employers should educate managers, especially those involved with administering attendance policies, regarding the basic provisions relating to Servicemember Family Leave provisions. Although it may be premature to modify handbook policies, employers should also consider modifying their existing FMLA leave notice forms to incorporate the 26 weeks of leave available under Servicemember Family Leave. Another option may be to put in place an additional temporary notice form to address this type of leave.

David H. Peck *is a partner in the Labor and Employment Department of Taft Stettinius & Hollister LLP. He represents management in all aspects of labor and employment law, with an emphasis on the Family and Medical Leave Act (FMLA), Americans with Disabilities Act (ADA), ERISA and COBRA.*

“A Book of Your Own” Program Enjoys Continued Success

The “A Book of Their Own” project was an outstanding success again this year, thanks to the efforts of judges, lawyers, court personnel, law firm staff, teachers, students and other volunteers. Approximately 11,000 books were collected and distributed to students at seven Cleveland elementary schools. The students were thrilled to receive them. The project will continue in 2009, with a goal of collecting even more books for kids who might not have a book of their own.

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