

**ADR: MEDIATION AND
SETTLEMENT STRATEGIES AND CONSIDERATIONS FOR FEDERAL COURT**

Alabama Lawyers Association Annual Meeting

**John H. England
United States Magistrate Judge
May 18, 2019**

I. ADR: The Rules

Abele v. Hernando County, 161 F. App'x 809 (11th Cir. Dec. 23, 2005)

"A federal district court may take appropriate action with respect to settlement and the use of special procedures to assist in resolving a dispute when authorized by statute or local rule. FED. R. CIV. P. 16(c)(9). . . . Because the district court was authorized by local rule to refer this civil action to mediation, the court did not abuse its discretion in compelling mediation."

Alternative Dispute Resolution Plan for the Northern District of Alabama

The Plan is found on the Court's website. It was recently revised. It includes information concerning the "Panel of Neutrals," referral of cases to ADR, the procedures, and other matters.

II. ADR: Some Suggestions

A. Timing.

1. Get over a concern that asking for mediation is a sign of weakness.
2. The sooner the better.
3. Counsel must be adequately informed regarding the facts, law and issues.

B. Choose your mediator carefully.

1. Style - evaluative or facilitative.
2. Experience.
3. Prepare
 - a. Identify the legal and factual issues.
 - b. Identify the non-legal issues.
 - c. Locate key documents, depositions, and statements.
 - d. Inform the client about the process, including his or her participation and the risks involved if attempts at settlement fail.
 - e. Do not create false expectations with the client.
 - f. Allow for adequate time.
 - g. Be aware of pending deadlines – discovery or dispositive motions

C. Use of position statements.

1. Summarize the procedural history, including previous negotiations.
2. Summarize key legal and factual issues.

D. Bring the right participants.

1. Discuss this with the mediator beforehand.
2. Parties with ultimate settlement authority **must** be personally present
3. This can be a very sensitive issue for all involved.

E. Skip opening statements but not opening session.

1. The opening session sets the tone for the rest of the day.
2. The mediator should take control in a very professional way.
3. Start looking for areas of agreement.
4. This suggestion is negotiable, but generally should not be discarded.

F. Allow the parties and representatives to participate, particularly in caucus sessions.

G. Think outside the box.

1. Do not only focus on the money.
2. Non-monetary options - apologies, reference letters, placement support, education and training, health and other insurance benefits, provisional consent judgment - **The idea is the defendant pays as agreed or a consent judgment will be entered against the defendant.**

H. Candor.

1. Credibility is so important.
2. If you are not candid, the mediator will figure it out.
3. You should concede issues when appropriate.

I. Listen.

1. You will be amazed what you will learn.
2. Do not tune out the other side.

J. Patience.

1. Work with the mediator.
2. Do not try to streamline the process.
3. Avoid the “negotiation dance?” Sometimes it is necessary.
4. Do not be condescending or overly contentious with the opposition or the mediator.
 - a. Keep emotions under control.
 - b. Watch nonverbal cues.
 - c. A little humor is a good thing.

K. Document the settlement.

1. On paper, via court reporter, or on the record.
2. No matter how ready you are to leave, get this done.
3. The devil is in the detail.
4. Include all material terms and details to ensure it is enforceable.¹

¹The foregoing thoughts are premised on the experiences of the presenter, United States Magistrate Judge John Ott and those articulated in “Tips for Attorneys-Preparing for Mediation” by Eileen Barker at

L. Advantages of Judge led mediation [**Effect of The Black Robe**]

1. Helps with difficult client
2. Familiarity with Judge assigned case [**How Judge may rule in a bench trial or on dispositive motions**]
3. Familiarity with verdicts reached in similar cases

MEMORANDUM OF UNDERSTANDING

Plaintiff(s) v. Defendant(s)

Case Number.

The following are the terms of the settlement in the above-captioned matter, including all claims, costs, and attorney's fees:

1. Defendant agrees to pay the plaintiff _____ in settlement of this action within _____ days.
2. Upon payment of the aforementioned sum(s), the plaintiff will execute a release of any and all claims against Defendant.
3. Upon payment of the aforementioned sum, the parties will file a joint stipulation of dismissal (with prejudice) and the action will be dismissed.
4. The terms of this agreement will remain confidential to the extent allowed by law.
5. It is understood that costs will be taxed as paid.

It is understood that the parties will reduce the foregoing terms to a fuller, final settlement agreement. If any disputes arise, the parties are to return to the court for assistance.

Plaintiff's Name
Plaintiff

Defendant's Name
Defendant

Dated: [Click here to enter a date.](#)

SETTLEMENT CONFERENCE PREPARATION

Experience shows that in negotiations the party who is best prepared usually obtains the best result. Settlement conferences can be held more efficiently if all parties and counsel are prepared. The following are some areas to consider in order to aid in the effectiveness of this settlement conference.

A. FORMAT

1. Parties with ultimate settlement authority must be personally present.
2. The court will use a mediation format, and private caucusing with each side; the judge may address your client directly.
3. Do you want a summary jury trial, arbitration, mini-trial or other procedure instead of/after this conference? If so, or if you want to know more about these processes, please contact the court so a conference call to discuss options can be arranged. Have you discussed these options with your client?

B. ISSUES

1. What issues (in and outside of this lawsuit) need to be resolved? What are the strengths and weaknesses of each issue? What is your most persuasive argument?
2. What remedies are available resulting from this litigation or otherwise?
3. Is there any ancillary litigation pending planned which affects case value?
4. Do you have enough information to value the case? If not, how are you going to get more information before the conference?
5. Do attorneys fees or other expenses affect settlement? Have you communicated this to the other side?

C. AUTHORITY

1. Are there outstanding liens? Have you verified amounts and whether they are negotiable? Do we need to include a representative of the lien holder? If so, contact the court immediately.
2. Is there valid insurance coverage? In what amount? If coverage is at issue, or the amount/type affects settlement value, have you notified the other side? Do we need to include the representative from more than one company/carrier? If so, notify the court immediately.

D. NEGOTIATIONS

1. Where have your last discussions ended? Are you sure?
2. Can you have any discussions before the settlement conference to make it proceed more efficiently?

3. What value do you want to start with? Why? Have you discussed this with your client?
4. What value do you want to end with? Why? Have you discussed this with your client? Is it significantly different from values you have placed on this case at other times?
5. Is there confidential information which affects case value? Why can't/won't/shouldn't it be disclosed? How can the other side be persuaded to change value if it doesn't have this information?
6. What happens if you don't settle the case at the conference? What is your best alternative to a negotiated settlement? Why?

E. CLOSING

1. If settlement is reached, do you want it on the record?
2. Have you discussed settlement formats with your client? Does the client understand structured settlements, annuities, Rule 68 offers to compromise?
3. How soon could checks closing documents be received?
4. If settlement is not reached and further discovery is needed, what is your plan for continued settlement discussions? Do you want court involvement in these talks?
5. If settlement is not reached, be prepared to discuss it again at the Final Pretrial Conference.

Choose an item. **DIVISION**

Case No.: Case Number.

ORDER

This matter is SET for mediation on **Date**, at **Time** in the chambers of the undersigned magistrate judge at the Hugo L. Black Federal Courthouse, Birmingham, Alabama. Each party as well as counsel for each party must attend. If a party is a corporate or other business entity, an appropriate representative with settlement authority must attend. Each party must submit a confidential position statement including (1) a brief summary of the facts and background of the dispute, (2) a statement of the claims and remaining issues, including the key issues from its perspective that have prevented settlement, (3) the relevant governing law, (4) status of negotiations, and (5) an estimate of the costs it has expended in pursuing or defending this action, an estimate of the future costs of pursuing or defending this action through trial, and its estimated value of Plaintiffs' claim(s). Parties are welcome to submit other materials that may assist the court in becoming better-acquainted with the issues in this case. The position statement and any other materials must be marked "CONFIDENTIAL" and must be submitted to chambers by **Date**.