

PROCEDURES FOR CASES REFERRED FOR SETTLEMENT TO MAGISTRATE JUDGE SARAH NETBURN

The Court believes the parties should fully explore settlement at the earliest opportunity. Early consideration of settlement allows the parties to avoid the substantial cost, expenditure of time, and uncertainty that are inherent in most litigation. Even in a case that cannot be resolved, early consideration of settlement often provides the parties with a clearer understanding of the factual and legal merits of their dispute and may make the litigation more efficient.

Consideration of settlement is a serious matter that requires thorough preparation before the settlement conference. Set forth below are the procedures the Court will require the parties and counsel to follow, and the manner in which the Court will typically conduct the conference.

1. Confidential Nature of Conference. All settlement conferences are “off the record.” All communications relating to settlement are strictly confidential and may not be used for any purpose. They are not to be used in discovery and will not be admissible at trial.

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

3. Ex Parte Settlement Letter. No later than one week before the conference, counsel for each party must send the Court a letter, marked “Confidential Material for Use Only at Settlement Conference,” which should not be served on the other parties. The letter should be e-mailed to the Court in accordance with the Individual Practices of Judge Netburn. This *ex parte* letter must not exceed five (5) pages, unless permission to do so has been sought and granted by the Court. The letter should include (a) the history of settlement negotiations, including any prior offers or demands, which are strongly encouraged before the conference; (b) your evaluation of the settlement value of the case and the rationale for it; and (c) any other facts that would be helpful to the mediator in preparation for the conference.

The reason the letter is to be submitted *ex parte* is to ensure that counsel are candid with the Court as to the strengths and weaknesses of their case and to provide a realistic assessment of the litigation risks each party faces were the case to be resolved on the merits.

4. Attendance Acknowledgment Form. Counsel shall complete the Attendance Acknowledgment Form that appears following this Standing Order. This form must be submitted together with the *ex parte* settlement letter and may be sent to the Court by e-mail in accordance with the Individual Practices of Judge Netburn.

5. Attendance of Parties Required. The parties—not just the attorneys—must attend in person. A party’s attendance is essential to the settlement process. It is vital that parties

hear the other side's presentation and have the opportunity to speak with the mediator outside the presence of any adversary. If a party is in prison, or the party resides more than 100 miles from the Courthouse and it would be a great hardship to attend in person, counsel may write to the Court seeking permission to participate by telephone. This issue should be raised with the Court in writing as soon as possible after the Settlement Conference Order is issued. If needed, each party must supply its own simultaneous interpreter (who need not have any special certification).

Corporate parties or labor unions must send the person with decision-making authority who gives directions to counsel of record (not someone who has received settlement authority from someone else). Where liability insurance is involved, a decision maker from each carrier must attend in addition to the insured. This includes each excess carrier unless specifically excused by the Court at least one week before the conference. Because it is important that the decision makers with respect to settlement hear their adversaries' presentations and be available to answer questions from the Court, the person who attends must be the person with responsibility for determining the amount of any ultimate settlement and whose settlement authority has not been limited by another person. That is, corporate parties, labor unions, and insurance companies (or any other party that is not a natural person) must send to the conference a person with the actual authority to resolve the case, not someone who has received authority from someone else.

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

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

7. Conference Procedures. Unless advised otherwise by the Court, the conference will take place in **Courtroom 219 at the Thurgood Marshall Courthouse, 40 Foley Square, New York, NY 10007**. At the outset of the mediation, each attorney should be prepared to make a brief presentation in the presence of opposing counsel and the parties, summarizing not merely a party's positions, but the party's interests in resolving the litigation. Written remarks read aloud are usually ineffective. The purpose of the presentation is to persuade the opposing party, not the Court. Thus, it is usually unnecessary to recount in full the background of the dispute, and opening remarks that are the equivalent of a jury address are rarely productive in the context of

settlement negotiations. Additionally, although the merits of the case are obviously relevant to the value of a potential settlement, settlement conferences are not the place to make legal arguments. Discussion, if any, of legal issues should be offered solely in the context of settlement, not litigation.

Following the presentations, the Court will allow counsel to respond to points made by opposing counsel and, if appropriate, to pose constructive questions. Clients may speak too if that is desired. The Court encourages all parties to keep an open mind in order to re-assess their previous positions and to discover creative means for resolving the dispute.

After the parties have made their brief presentations the Court will ordinarily meet separately with each party. In these private meetings, the parties and their counsel should be prepared to discuss their position on settlement, the reasons for their position, the amount of attorneys' fees and litigation expenses incurred to date, and an estimate of the remaining cost of litigating the case to judgment, including any appeal.

8. Adjournments of Settlement Conferences. Requests for adjournment shall conform to the Individual Practices of Judge Netburn, with the following modification: requests submitted more than 14 days before the scheduled conference date will ordinarily be granted without a showing of good cause; requests submitted within 14 days of the date of the scheduled conference must set forth the reasons for seeking the change in date. Ordinarily good cause will be found where (a) an adjournment would permit necessary discovery or exchange of information that would make the conference more fruitful, or (b) a client who would otherwise be permitted to participate by telephone would be available to attend the conference were it held on another date. The conference date is not changed until ordered by the Court.

9. No Effect on Other Deadlines. Unless otherwise ordered, the scheduling of a settlement conference has no effect on any deadlines or other pending obligations in the case.

ATTENDANCE ACKNOWLEDGMENT FORM

CASE NAME: _____

DOCKET NUMBER: _____

I represent the Plaintiff Defendant

I acknowledge that I am attending a settlement conference in **Courtroom 219 at the Thurgood Marshall Courthouse, 40 Foley Square, New York, NY 10007** on _____
at _____.

Please provide the name of any co-counsel who will attend the conference with you.

I acknowledge that my client, and any other relevant decision makers, will attend the settlement conference.

Please provide the name and title, if applicable, of the individuals who will attend:

I have obtained permission from the Court to allow the following individual(s) who live(s) more than 100 miles from New York City to participate in the conference by telephone.

Name and title:

Signature

Date

Name (print)

Firm Name