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STANDING ORDER FOR SETTLEMENT CONFERENCES

The Parties should fully explore and consider settlement at the earliest opportunity. Early consideration of settlement can prevent unnecessary litigation. This allows the Parties to avoid the substantial cost, expenditure of time and stress that are typically part of the litigation process. Even for those cases that cannot be resolved through settlement, early consideration of settlement can allow the Parties to understand better the factual and legal nature of their dispute and streamline the issues to be litigated.

Consideration of settlement is a serious matter that requires thorough preparation prior to any settlement conference. Set forth below are the procedures Judge Fuentes will require the Parties to follow and the procedures Judge Fuentes typically will employ in conducting the settlement conference. Counsel are directed to provide a copy of this Standing Order to their clients and discuss the procedures with them before the settlement conference.

INITIAL PRE-SETTLEMENT TELEPHONIC CONFERENCE

Upon a referral for settlement, when the parties have indicated that they are prepared to participate in a settlement conference with the magistrate judge, the Court usually will schedule a telephonic pre-settlement conference. At this relatively brief initial conference, which is about

settlement only and is off the record, the Court will have counsel for the parties contact the Court jointly at the Court's official number provided to them by the courtroom deputy. That number is not a call-in bridge, as counsel are asked to call each other and then merge in the Court. At this initial pre-settlement telephonic conference, the Court generally will confirm whether the parties genuinely are prepared to negotiate at a settlement conference. This means confirmation that the parties have enough information to put concrete settlement proposals in written mediation statements. If counsel represents that the parties are ready to do so, the Court will outline its mediation procedures and set a mediation schedule. If they are not, the conference is an opportunity to discuss what else might need to be discussed before a settlement conference can be set, or whether either of the parties is simply unwilling to negotiate at that time. A party entering a mediation with an intention to stand on an initial settlement proposal, or with a plan to refuse to negotiate, does not have the requisite commitment to the settlement process. In some cases, the Court may schedule a further pre-settlement telephonic conference or may order mediation statements to be submitted, all before the Court schedules a mediation.

The Court also will inquire as to whether the conference should be in person or remote. The Court's current strong preference is for in-person settlement conferences, with remote participation allowed only in hardship cases or other exceptional circumstances. If remote conference participation is permitted, the Court generally will commit counsel to commit the parties to full, active, and attentive participation in the remote mediation, as if the parties were physically present at the courthouse.

MEDIATION STATEMENTS

If a mediation schedule is to be set, usually it will include the settlement conference as well as dates for an exchange of mediation statements, generally with plaintiff's proposal due 21 days before the date chosen for the settlement conference, and with the defendant's proposal due 10 days before. The Court is flexible about these dates. The parties' mediation statements must contain a concrete monetary proposal, where settlement is likely to turn in whole or in part on financial matters, as most settlements do. Non-monetary aspects of a settlement proposal should also be included where relevant and material. All mediation statements are confidential and are submitted to the Court's settlement correspondence email box, as well as to each party's opposing counsel.

Counsel for plaintiffs and defendants should keep in mind, in preparing and submitting their mediation statements, the following:

- The mediation statement is not a legal brief. While few lawyers will write anything without attempting to persuade their audience, the audience here is more the adversary and his or her counsel than it is the Court. For its part, the Court will not resolve legal or factual disputes in the settlement conference. The purpose of the settlement conference is to avoid the costs and risks associated with getting those issues resolved by a judge or jury. An effective mediation statement is directed at the Parties' respective risks, and at identifying the issues on which the dispute will ultimately turn, if the Parties proceed to

roll the dice by litigating further. The mediator prefers to identify what outcomes or determinations are unknown so that the parties can discuss risk; the mediator will not usually provide answers about what the outcomes will be. An effective mediation statement also explores thoroughly the issue of damages, and what the Parties' respective exposures could be. A mediation statement from a defendant (or the party submitting second in time) must respond to the opening settlement proposal with a specific counter-proposal.

- Mediation statements should be limited to five pages before exhibits (single spacing and 12-point type; the Court frowns upon gaming the page limit issue by manipulating fonts, margins, and so on). Exhibits are limited to a total of 25 pages. Counsel should be aware that submitting more than 25 pages of exhibits, or voluminous collections of evidence or supporting documentation, is more in the nature of trying to persuade the mediator of some position. But the mediator will avoid being persuaded of any position and will seek to discuss risks instead. The mediator is not resolving the dispute but is facilitating the parties' efforts to resolve it themselves.

- Because a settlement is a business resolution and not a legal decision, counsel and clients need to be reasonable in formulating their respective proposals. A proposal that seeks the other party's maximum exposure in litigation, or that declines to offer any relief at all, is not reasonable.

- The Court must insist on strict compliance with the settlement conference and mediation statement exchange schedule, as this schedule has been set with the needs of other litigants and the Court's limited resources in mind. Once the Parties commit to a schedule, that schedule will become part of a Court order, and relief from that order – including amending the mediation statement due dates or postponing the conference itself – must come through a request and an order from the Court. If such changes (or even withdrawal from a settlement conference) should become necessary as a result of exigent circumstances, the Parties should contact the Court promptly about rescheduling the conference.

The audience for these statements is your adversary, not the Court. A copy should be sent simultaneously to the Court at Settlement_Correspondence_Fuentes@ilnd.uscourts.gov. These statements are confidential and subject to Federal Rule of Evidence 408, and they are not to be filed on the public docket.

The Parties may wish to conduct negotiations even before the conference, once each side reviews the other's proposal. Nothing in this Standing Order prevents them from doing so. They should notify the Court immediately if they reach an agreement before the settlement conference.

SECOND PRE-SETTLEMENT TELEPHONIC CONFERENCE

The second pre-settlement telephonic conference will generally take place after all mediation statements are in but before the settlement conference. The Court will seek to confirm everyone's participation, confirm the bringing of full authority, and discuss any issues counsel wishes to discuss in the wake of submission of the mediation statements.

What is full authority? The Court wants to be very clear that it means all sides in the negotiation will arrive at the settlement conference with authority to settle the matter up to the amount of the other side's initial proposals, respectively, in the mediation statements. Full authority is required at all settlement conferences except with leave of Court. Full authority is not "the authority up to the amount the client is prepared to pay (or accept) in settlement." If, for example, a plaintiff's opening demand is $500,000, and a defendant's opening offer is $10,000, the defendant must bring a person who has $500,000 in authority, and the plaintiff must have authority (and usually bringing the plaintiff to the conference meets this requirement) to accept as little as $10,000 to settle. The full authority requirement does not require any party to settle at any number, or to settle at all. It does not require any party to *spend* anything, let alone the full amount of the authority. For whatever reason, some clients or their counsel believe wrongly that if they *bring* full authority, they are committing to pay that amount or something close to it. They are not. No one is reading full authority this way, and the Court will ensure as much. Bringing full authority prevents settlement conferences from running aground when negotiations place settlement pricing at a level between the opening proposal and the authority a party brought to the conference. That is the point at which a case should settle, and not a point at which one side must telephone some absent persons and plead for more authority when those absent persons know almost nothing of what has happened at the settlement conference because they were not there. If for some reason full settlement authority is not possible, the party need only tell, in advance, the magistrate judge, who will then determine whether and how the negotiations might proceed with the consent of the other party. In some cases, such as those involving government agencies whose settlement authority is capped or subject to approval of a deliberative body, the defense will never have full authority. But all need to know this fact in advance of the conference itself.

Having a non-participating client representative with authority available by telephone is *not* an acceptable alternative. Settlement conferences often involve a give-and-take discussion that lasts for several hours, or sometimes extends over multiple mediation sessions. In the Court's experience, it is impossible for a person who is not present for the actual and full discussion to have a proper appreciation for why a given settlement position may or may not be reasonable or acceptable, or for the reasons why a party might have changed a position it staked out earlier in the negotiation process.

If a party is insured, the party should either secure the required amount of authority or bring the insurer's authorized representative to the settlement conference. Insurer representatives are reminded that despite their critical role of funding any settlement, the insureds themselves are the litigants and will face various adverse consequences if settlement does not occur and if litigation ultimately yields an unfavorable outcome.

The Court is not fond of sanctions litigation. But the Parties should remember that settlement conferences represent a significant expenditure of resources for the Court and for any party,

including attorneys' fees for preparation and attendance. To render a conference unproductive or wasteful by showing up without the necessary authority or by pulling out at the last minute based on considerations of which the withdrawing party knew or should have known earlier is to risk, at least, sanction under Federal Rule of Civil Procedure 16(f)(1)(B) and/or this Standing Order. *See Koehn v. Tobias*, 866 F.3d 750, 753 (7th Cir. 2017) (applying Rule 16(f)(1)(B)'s preparedness requirement to settlement conferences). Appropriate sanctions may include the adversary's fees and costs associated with preparing for and participating in a conference rendered unproductive by the other party's lack of preparation or lack of good faith.

CONFERENCE FORMAT

The format of settlement conferences will be in person at the Dirksen Courthouse unless otherwise ordered. We will begin in one room with the mediator explaining the background and the day's procedures, along with thoughts on what settlement represents and how the mediator plans to help the parties achieve settlement. Presentations by the parties or counsel during this first meeting are not invited. After the initial meeting with all parties and counsel in one room, the parties will break into individual caucus rooms, and any initial presentation or questions they have may be put forth then.

In the individual caucuses, each side is asked to listen carefully, to keep an open mind, and to be open to creative methods for resolving the dispute. Parties who expect to be able to persuade the judge of the rectitude of their positions, or of how a particular position is certain to prevail if the matter were to proceed to litigation, will likely be disappointed. Parties should instead keep in mind the strengths and weaknesses of their respective cases, and the value their clients might derive from a compromise resolution that will bring certainty to the outcome.

The Parties are requested to address each other with courtesy and respect while being frank and open in their discussions. All statements made in the settlement conference, by any party, are not to be used in discovery and will not be admissible at trial, per Federal Rule of Evidence 408. The Parties during the litigation may not reference the settlement conference or statements made in the mediation, and Judge Fuentes will not disclose to the Parties their respective statements made outside each other's presence, except to the extent a party consents to such information being disclosed.

The parties should be prepared to discuss the following at the settlement conference:

- Their goals in the litigation and the problems they seek to address in the litigation.
- Their understanding of their adversary's goals and problems sought to be addressed.
- The issues that need to be resolved, including any issues that may be collateral to the dispute.

- Again, the strengths and weaknesses of their respective cases, and the reasons why settlement may be a more productive path to the satisfaction of their respective goals than would further litigation.

- Their understanding of their adversary's view of the strengths and weaknesses of the adversary's case, and their view of what maybe right and wrong with their adversary's perception.

- Where the parties are in agreement on factual, legal and/or financial issues.

- The impediments to settlement, including emotional, financial and legal considerations.

- Possibilities for creative approaches to resolving their disputes.

- Whether the parties have adequate information to discuss settlement, and if not, how they might obtain sufficient information to make a meaningful settlement discussion or resolution possible.

- The position or disposition of outstanding liens with respect to any financial resolution, whether lien holders should be invited to the conference, or how the parties propose to resolve any issues concerning lien holders.

- **Medicare as Secondary Payor**: In applicable matters, please consider whether your client has received or will be receiving conditional payments from Medicare to pay for treatment related to this case. If so, you must bring a conditional pay letter from Medicare to the settlement conference. Your client may access their payments directly by logging in to his or her MyMedicare.gov account. As a party's attorney, you may request such a letter at https://www.cob.cms.hhs.gov/MSPRP, but you must pre-register to do so by submitting proper proof of representation or consent to release this information. You should expect Medicare to demand at least 60% of its conditional payments to your client to resolve the case.

INVOLVEMENT OF CLIENTS

The parties with authority and their lead counsel must appear for the settlement conference at the date and time set. Counsel should thoroughly prepare the clients for the settlement conference, and should discuss this Standing Order with them, in advance of the conference. For many clients, the settlement conference may be their first exposure to mediation. They may look at the mediation in the same way they view litigation: Another way to "win" the case, or to cause the other side to "lose." But mediation is an *alternative* form of dispute resolution, in which there is no one winner and no one loser. The goal is for all to walk away as winners, having vanquished the risk and uncertainty of litigation and having embraced the certainty of settlement. Counsel

should prepare their clients for this alternative landscape, in which the lawyers are as much business counselors as they are advocates.

SO ORDERED.

ENTER:

GABRIEL A. FUENTES
United States Magistrate Judge

Dated: June 13, 2024