

VIRGINIA'S JUDICIAL SETTLEMENT CONFERENCE PROGRAM

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This article describes the background and development of Virginia's Judicial Settlement Conference program, including court-referred mediation. Court-referred mediation had grown in family and pro se cases, but litigants with attorneys in complex cases tended to use private mediation providers, such as retired judges and attorneys, in lieu of mediators, who were mostly not attorneys. Given the circuit courts' limited referrals to mediation and counsels' expressed need to have experienced neutrals, the Virginia judicial system has explored expanding and redesigning the judicial settlement conference as another dispute resolution option. A group of retired circuit court judges was trained in mediation and settlement-conference techniques and conducts settlement conferences statewide at no cost to the parties. This article also discusses confidentiality and reporting aspects of the program and the reactions of lawyers, parties, and judges to the program.

In an effort to expand dispute resolution options for litigants, the Virginia judicial system has developed a Judicial Settlement Conference program that combines aspects of mediation and the traditional settlement conference. The pretrial settlement conference has been available to circuit courts, the state's trial courts of general jurisdiction, for many years pursuant to Virginia Supreme Court Rule 1:19, but many courts have not used it because of insufficient time and resources, as well as ethical concerns about judges providing settlement services in cases assigned to them for adjudication. The new Judicial Settlement Conference program addresses these issues by using retired circuit court judges who conduct the conference under the referring court's auspices but have no trial authority over the case. Virginia began the program in November 2003 by training fourteen retired circuit court judges in mediation and settlement techniques and then making them available statewide to provide settlement-conference services at no cost to litigants. Over 450 settlement conferences have been conducted through September 2005. This has resulted in a 61 percent settlement rate and high level of attorney satisfaction. This article provides an overview of court-connected mediation in Virginia and discusses the observed need for a more-evaluative dispute-resolution process and the recent development of the Judicial Settlement Conference program.

BACKGROUND

In 1987 Chief Justice of Virginia Harry L. Carrico, created the Commission on the Future of Virginia's Judicial System (the Futures Commission). He charged the commission with two major responsibilities: to look twenty years into Virginia's future to

foresee the needs of the citizens of Virginia and to develop strategies to prepare the court system today to meet those changing needs.

In its spring 1989 report, the Futures Commission acknowledged that the essential mission of the judicial system is to assist citizens in resolving their disputes in a peaceful manner and then articulated ten major “visions” for achieving this mission. “Vision Three” concluded that the judicial system must be able to offer alternative-dispute-resolution programs along with adjudication.

The Futures Commission stated that, while preserving the right to trial, dispute-resolution programs should:

- offer a range of options for resolving disputes, so that the parties might fit the process to their dispute rather than having to fit their dispute to the framework of the adversary system;
- achieve a greater sense of justice in the individual case, by offering the parties opportunities to deal with the underlying issues in their dispute, reduce hostility, regain a sense of control, and experience better acceptance of the outcome;
- encourage parties to take responsibility for their own disputes without immediately or instinctively turning to the courts for relief through adjudication;
- broaden access to dispute resolution services;
- encourage innovation and create new methods of dispute resolution to meet society’s future needs; and
- educate the citizens of Virginia about dispute resolution procedures.

The Futures Commission envisioned that a justice system that pursued these goals would fulfill its obligation to provide the citizens with effective, responsive, and appropriate methods for resolving disputes peacefully.

The Futures Commission recommended that an office be established within the administrative arm of the court system to facilitate the development of alternative methods for resolving disputes. As a result, the Department of Dispute Resolution Services was created within the Office of the Executive Secretary of the Supreme Court of Virginia (OES), which is the administrative office of the courts. Consistent with the recommendations of the Futures Commission, the department is a centralized ADR resource office, which provides education and training on dispute resolution processes to the bench, bar, and public; supports court-connected ADR program development; administers court-referred mediator certification, recertification, and grievance procedures; allocates and monitors court-annexed ADR program funding; and provides court-connected ADR program oversight and evaluation.

In 1991, the Virginia State Bar-Virginia Bar Association Joint Committee on Alternative Dispute Resolution also began exploring the possibility of introducing legislation to enable the courts to refer matters to alternative dispute resolution and to provide dispute resolution mechanisms in court-connected settings. Originally

introduced in 1992, the new provision (Va. Code Sections 8.01-576.4 *et seq.*) passed overwhelmingly in the 1993 session and became effective on July 1, 1993. This statute makes it clear that judges have the authority to order appropriate civil cases to a dispute-resolution orientation session. This is a no-cost information session at which parties explore with a trained neutral the benefits of ADR and assess whether their case is appropriate for ADR. Following the orientation session, parties may voluntarily agree to proceed with a dispute resolution proceeding such as mediation. The statute also provides comprehensive language on qualifications for court-referred mediators, confidentiality of mediation proceedings, mediators' ethical responsibilities, the effect of mediated agreements, and the reasons for which mediated agreements could be vacated.

DEVELOPMENT OF THE FACILITATIVE MODEL OF MEDIATION IN VIRGINIA

Over the last fourteen years, the Department of Dispute Resolution Services has focused primarily on developing mediation as a viable alternative to litigation because unlike other dispute resolution processes, it allows the *parties* to a dispute to determine the best resolution for their conflict. It is also a process in which the neutral mediator has no authority or power to impose a decision on the disputants; this makes it clearly distinct from arbitration and adjudication.

Mediation is defined in the statute as a process in which a neutral individual facilitates communication between parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and reach a mutually agreeable resolution to their dispute. Early in mediator-certification discussions, it was decided that, as mediation is a *facilitative* process in which the mediator has no decision-making authority, it would not be necessary to require that court-connected mediators have a law degree. Furthermore, being a purely facilitative process, mediation training should focus not on substantive information but on process skills, which would enable a mediator to assist parties in the resolution of a dispute, regardless of its subject matter. In the subject-matter-free nature of the training process, there is an exception for family cases, because it was recognized that they are different from general disputes and that an understanding of the best interests of a child, domestic violence, child support, spousal support, equitable distribution, and the dynamics involved in family issues are necessary to assist parties effectively in the resolution of such disputes. Family-mediation training includes much substantive information on these matters, provided not to enable family mediators to make decisions for parties or to provide legal advice but to enable the mediators to better identify important issues in a family dispute, ask key questions, and encourage the parties to seek additional information so they may make informed decisions.

The inappropriateness of mediators giving legal advice in family or other cases is addressed in the statute, which explicitly states that a mediated agreement can be vacated if there is misconduct by the neutral. Misconduct includes failure of the neutral to inform the parties in writing at the beginning of the mediation that

(i) the neutral does not provide legal advice, (ii) any mediated agreement may affect the rights of the parties, (iii) each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so, and (iv) each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement or should waive his opportunity to do so.

The statute reinforces the philosophy that the role of the mediator is that of facilitator, not of advisor or counselor.

As the Office of the Executive Secretary is responsible for developing and implementing dispute resolution options for the state courts, it also bears the responsibility of developing clear rules, standards, ethical norms, and well-defined uniform processes. Meaningful program evaluation by OES, clear definition for the courts, and consistency for users of the court system requires uniformity. As a result, OES concluded that mediation should be clearly defined for both the consumer and the provider as a facilitative process and that choices apart from mediation should also be developed.

Thus, court-connected mediation in Virginia originated as a facilitative process and *Guidelines for the Training and Certification of Mediators* were established based on that approach. The guidelines require that individuals seeking certification attend a certified training session in mediation skills, which is followed by a mentorship that includes observations and co-mediations. A bachelor's degree, which may be waived for relevant life and work experience, is required, but there is no formal education requirement for certification, as the department recognizes that people from a variety of backgrounds have a great deal to offer to the mediation process, and, as it is a facilitative process, there is no need for any particular substantive background.

The basic-mediation-skills training certified in Virginia reflects the traditional model in which the mediator learns how to promote communication between the parties, identify the parties' underlying needs and interests, and encourage collaborative problem solving. The mediator is instructed to be a facilitator and not to interject her views, values, or opinions into the process or the agreement. The mediator has an influence on the mediation by her role in defining the problem, engaging in reality testing, and encouraging the parties to consider options for their solution, but it is not the mediator's role to make recommendations or predict the probable outcome in a court should the matter be adjudicated. To date, there are 1,000 certified mediators in Virginia, approximately 25 percent of whom are attorneys or former judges. A searchable directory of court-referred mediators can be found on the Supreme Court of Virginia's home page at www.courts.state.va.us.

The facilitative model of mediation in Virginia is supported by two other important documents. First, in 1999, following a case in which a mediator was enjoined from engaging in the unauthorized practice of law (*Steinburg v. Commonwealth of Virginia*, 1996), the Department of Dispute Resolution Services, through a grant from the State Justice Institute, developed *Guidelines on Mediation and the Unauthorized*

Practice of Law. Based on the definition of the practice of law in Virginia, these guidelines try to identify the line between legal information and legal advice in mediator activities. The guidelines state,

At a minimum, a mediator provides legal advice whenever, in the mediation context, he or she applies legal principles to facts in a manner that (1) in effect predicts a specific resolution of a legal issue or (2) directs, counsels, urges or recommends a course of action by a disputant or disputants as a means of resolving a legal issue (p. 7).

Examples of mediator activities that may constitute impermissible legal advice are provided. The guidelines caution that mediators whose style and practice lean more toward the evaluative end of the spectrum may need to consider whether the questions they ask or the statements they make are permissible legal information or impermissible legal advice. Furthermore, if mediators choose to provide legal information, they should do so only if they are confident that they have the necessary training and experience and that the information is complete and will not be viewed as coercive, directive, or biased in favor of one of the parties. The guidelines also provide agreement-writing suggestions to assist mediators in developing agreements that are not construed as legal instruments.

Second, based on the recognition that mediation is a law-related service, the Virginia Rules of Professional Conduct for attorneys were amended in 2000 to include language on the role of lawyer as mediator (Rule 2.11) and as third-party neutral (Rule 2.10). Rule 2.11 (d) states,

The lawyer-mediator may offer evaluation of, for example, strengths and weaknesses of positions, assess the value and cost of alternatives to settlement, or assess the barriers to settlement (collectively referred to as evaluation), *only if such evaluation is incidental to the facilitative role and does not interfere with the lawyer-mediator's impartiality or the self-determination of the parties* (emphasis added).

A comment to the rule states that the lawyer-mediator shall not make decisions for any party to the mediation process nor shall the lawyer-mediator use a neutral evaluation to coerce or influence the parties to settle their dispute or to accept a particular solution to their dispute. The use of evaluative techniques is limited to situations where the parties have given their informed consent to the use of such techniques and where neutral evaluation will assist rather than interfere with the parties' ability to reach a mutually agreeable solution.

One other document should be mentioned. To maintain the integrity of certified mediators and the mediation process, *Standards of Ethics and Professional Responsibility* have been adopted and apply to all certified mediators. In an effort to maintain quality control, all certified mediators must provide their court-referred clients a client evaluation form to complete at the conclusion of each mediation.

These forms must be submitted to the Department of Dispute Resolution Services and are reviewed. Over the last eight years, approximately 40,000 evaluations have been received. Data from these exit surveys indicate that over 90 percent of the disputants who have used mediation found it helpful, would use it again, and would recommend it to others. A complaint process has also been developed in the event disputants have concerns regarding the ethical conduct of their certified mediator. Over the last nine years, less than ten formal complaints have been processed against certified mediators, and to date, no mediator has lost his certification as a result of a complaint.

COURT-CONNECTED MEDIATION IN VIRGINIA

On average, 10,000 court-referred mediations are conducted each year at no cost to the parties. This figure, which stood at 1,000 just seven years ago and at 5,000 five years ago, is particularly striking given that referral of matters to a dispute resolution process is within the court's discretion and participation in mediation by the parties is voluntary. The steady growth in the use of mediation has come with increased education of the bench, bar, and public as to its benefits. Information is provided to all newly elected judges on mediation during their pre-bench orientation, as well as to all judges at various judicial conferences. OES has cosponsored with Virginia CLE an Advocacy in Mediation course for the past ten years. A Comment to Rule 1.2 of the Virginia Rules of Professional Conduct now states that attorneys should consider the advantages and disadvantages of ADR with their clients in every case.

Mediation is currently used in most of Virginia's district courts, the state's courts of limited jurisdiction. Three sets of courts, Richmond Juvenile and Domestic Relations District Court, Henrico Juvenile and Domestic Relations District Court, and the Prince William County Courts, have an in-house mediation coordinator who screens cases appropriate for an ADR process, conducts the dispute-resolution-orientation session, mediates the case or refers cases to certified mediators, and handles all case management issues. In an effort to encourage the expansion of mediation, the Office of the Executive Secretary (OES), which is the administrative office of the courts, awards contracts to mediators around the state to provide mediation services to litigants free of cost. State funding has made it possible to subcontract with twenty-two community mediation centers and private mediators to serve as ADR coordinators in many courts around the state. Funding provided by the Virginia General Assembly has enabled OES to implement public-private partnerships whereby community mediation centers and private mediation organizations mediate cases referred by the courts and are paid a prenegotiated fee. OES currently has forty-nine contracts with mediation organizations to provide mediation services at all levels of court in almost every circuit and district in the state, and this contract mediation program has provided hundreds of litigants free access to mediation services, which they would otherwise not have been able to afford.

General district court mediators most often handle matters including landlord-tenant, contract, or debt issues and are paid \$90 per case. Circuit court mediators

receive \$200 per case for matters such as personal injury, commercial disputes, and divorce cases. Typical cases referred from the juvenile and domestic relations district court to family mediation involve contested custody, visitation, and support issues. A payment of \$100 per case is authorized by statute for mediators in such family cases; mediators receive \$200 per case in child-dependency, truancy, and restorative-justice cases (these are criminal cases involving juveniles in which the offender acknowledges responsibility for the crime, and the mediator facilitates an agreement between the offender and the victim to repair the harm done to the victim and community). Another program available in two counties in Virginia is neutral case evaluation, which uses volunteer attorneys.

DEVELOPING A DIFFERENT DISPUTE RESOLUTION OPTION

Court-referred mediation has grown in domestic-relations cases and civil cases involving pro se litigants. However, litigants represented by counsel in complex cases, when they choose to use mediation, have tended to select private mediation providers, such as attorneys or retired judges, in lieu of the mediators, most of whom are not attorneys, who contract with the state to provide court-annexed mediation services. Not only do counsel not take advantage of no-cost, court-referred mediation in more complex civil matters, but circuit court judges have not been proactively referring cases to mediation; instead, they rely on counsel to decide when, if, and with whom they would like to use a dispute resolution process such as mediation. The significant level of referrals directly to attorney and retired judge-mediators led the OES to conclude that attorneys in circuit court cases do not work with court-referred mediators because they prefer working with a mediator with a distinguished background whom they know to be competent and trust to be fair.

The need for a more-evaluative dispute-resolution process is most acutely felt in the circuit court. Disputes there involve multifaceted legal arguments. Parties have more of an economic investment in the case because of the amount in controversy, attorneys' fees, and other court costs. A large number of people also are involved in the case; these include experts, claims adjusters, and others who continue to act in an adversarial mode.

In Virginia, there has been a need to balance, on the one hand, the demand for case-evaluation services by attorneys representing clients in circuit court cases and their interest in having lawyer-mediators provide evaluative services, and, on the other, the facilitative model that has been certified and promoted in the courts, with its minimal mediator-certification requirements, potential complaints against mediators who take on a more-evaluative role without the parties' consent, and concerns regarding the unauthorized practice of law by nonlawyer mediators. The Office of the Executive Secretary has recognized that there is need for a dispute resolution process that offers case evaluation with a neutral who is competent, is credible, and has legal and subject-matter expertise but who does not have the ethical, statutory, and practice-of-law limitations on case evaluation that accompany mediation.

Judges Providing Settlement-Conference Services. For the past several years, the Norfolk Circuit Court has brought in retired circuit court judges to conduct settlement conferences in complex cases. The Norfolk Circuit Court Civil Case Management Administrative Plan states specifically that, upon filing, certain types of cases will be assigned to a settlement judge. These are actions filed under the Federal Employees Liability Act or the Jones Act; those alleging professional malpractice, products liability, or defamation; and cases expected to require more than two trial days. To date, Norfolk Circuit Court has referred approximately 400 cases to a settlement conference, and the Norfolk program has been very successful in reducing the court's docket by settling cases that would take multiple days to try.

The concept of judges conducting settlement conferences is not novel. For instance, in 2000, the Edmonton, Canada, Family and Youth Court launched a pilot program to determine if judicial dispute resolution (JDR) would help in resolving child-welfare and family matters before the court (Goss, 2004). JDR is a pretrial settlement process in which a judge meets with parties embroiled in litigation and their counsel to discuss the issues and evidence and to discuss settlement. If no settlement is reached, the parties receive the judge's nonbonding, nonrecorded opinion as to the likely result of the case at trial; this opinion is based on summary presentations of evidence. The JDR is without prejudice to later court action and is confidential. The JDR judge will not hear the trial. Evaluation results from the project were very positive, and JDR became a permanent program within the Edmonton Provisional Court in 2001.

Another example is a recently developed program in Delaware, which passed a law in spring 2003 (see Delaware Code, Title 10, Ch. 3, §§ 346-347) expanding the jurisdiction of the chancery court to allow its sitting judges to hear technology disputes and act as mediators in negotiations closed to the public (Milford, 2003). Both sides in such mediations must agree to bring the matter to chancery court. At least one of the parties has to be incorporated in Delaware or have its principal place of business there, and the amount in dispute has to be at least \$1 million. The law permits parties to file a request that there be only mediation in a technology dispute, with a later lawsuit not precluded. Currently, a chancery judge not assigned to a case acts as the mediator. For the mediation services, companies pay a filing fee of \$15,000 and \$3,000 per day for the judge's time.

In both the Delaware and Edmonton programs, a sitting judge may serve as settlement judge and will not be assigned the case for adjudication should it not settle. There are a number of ethical issues raised when judges provide settlement services in cases assigned to them. One concern is that the potential for coercion is too great if the judge's goal is to remove the case from his docket (Alfini, 1999). The parties and their lawyers may feel undue pressure to settle because the judge has the authority of his judicial office. In addition, in a pretrial mediation or settlement conference, a judge using a more-evaluative approach may form impressions of the case, which could later preclude him from being a neutral adjudicator should the matter not set-

tle. There is a strong likelihood of role conflict when a judge has to serve in the role of adjudicator, which requires that a decision is rendered solely based on evidence presented at trial, if the same judge has previously served in the role of settlement judge and was unsuccessful in reaching settlement.

To be effective, a settlement process must promote open communication by both parties (Sander, 1999). This is unlikely to happen if the settlement judge can later become the trial judge and render a decision, possibly based on confidential information that was shared during the settlement discussions. In addition, even if a judge is not mediating a case that the judge will later try, there may be still be an appearance of impropriety due to ex parte communications that judge may have had with parties, the judge's close relationship with the trial judge, and impressions the judge may have formed with respect to the parties and counsel involved in the case, which could be used against them later in a different matter (Sander, 1999).

As the role of judge and the role of mediator require very different skills sets, judges serving in the role of mediator should receive necessary mediation training (Alfini, 1999; Sander, 1999). In considering solutions to the ethics issues raised by judges mediating or presiding over pretrial settlement conferences in matters assigned to them, Alfini (1999) suggests that courts establish a "buddy system," which would enable one judge to handle the pretrial settlement conference and the other judge the actual trial in the event the case does not settle, similar to the Edmonton and Delaware programs. Another suggestion is that courts should have publicly paid, well-trained, full-time mediators functioning separately but alongside the judges (Sander, 1999).

Judicial Settlement Conference: Redesign and Expansion. The OES recognized that court-referred mediation at the circuit court level was receiving only limited use; that the ethical concerns discussed above are raised when judges hold settlement conferences in their own cases; and that anecdotal evidence suggests that what attorneys desire is case evaluation with a neutral who is competent, is credible, and has legal and subject-matter expertise. OES thus decided to redesign the Judicial Settlement Conference as another effective dispute resolution option.

The settlement conference is a long-standing dispute resolution process that predates mediation, but it was not used very often in Virginia. A Virginia Supreme Court Rule (Rule 1:19) states that each trial court may, upon request of counsel of record or, at its own discretion, schedule at an appropriate time, before the commencement of trial, a final pretrial conference at which the court and counsel may consider settlement. While it is well-known that settlement conferences often produce mutually beneficial settlements in a timely fashion, the challenge for courts has been insufficient judicial resources. The ethical issues raised by judges serving as settlement judges in matters assigned to them led the few courts interested in using a pretrial settlement conference to use the "buddy system," but the logistics involved in scheduling a buddy system are enormous and, as a result, very few courts have successfully used this process.

OES wanted to eliminate barriers to the use of the settlement conference and make it a more attractive dispute resolution option for circuit court litigants and, thus, considered expanding statewide some aspects of the model already in operation. In studying the dispute resolution market, OES recognized that judges are uniquely experienced and able to provide case-evaluation and case-settlement services. In fact, a general trend over the last several years has been for many prominent retired judges in Virginia and around the country to provide mediation or neutral services privately.

The OES therefore decided to use the Norfolk Settlement Conference model statewide, as it is a successful example of the idea of publicly funded, professionally trained settlement judges who function separately but alongside trial judges. As the Norfolk model demonstrates, circuit court judges are more comfortable with a process that resembles a traditional settlement conference in which a judge is involved than with a nonlawyer neutral with minimal training requirements. A judicial settlement conference also appears to be a more attractive option for attorneys with cases pending in circuit courts, as they would have access to a process involving judges who not only know the legal system, but also have subject-matter expertise and experience in actively assisting at settlement discussions.

In crafting the new Judicial Settlement Conference program, OES decided to use *retired* circuit court judges as settlement judges because they have legal expertise, do not present the same ethical concerns related to coercion and role confusion as active trial judges, and have more free time to offer their services. OES provided comprehensive training in mediation and settlement-conference techniques to a pre-selected group of retired circuit court judges. As facilitating settlement conferences often requires mediation-type skills in addition to the expertise gained as a trial judge, the retired judges who were interested in participating in this project were provided sixteen hours of training in mediation and settlement techniques. In November 2003 fourteen retired circuit court judges were trained in mediation and settlement-conference skills by two U.S. magistrate judges—Karen Klein (D.N.Dak.) and William Cassady (S.D.Ala.). The judges who were trained are available to all circuit courts to provide settlement-conference services.

Parties referred to settlement conferences may select any judge from the list of trained judges to handle their matter. Where parties cannot agree on a settlement judge, the referring court will appoint a judge. There is no charge to the parties for this dispute resolution service. The settlement conference may be used in any civil case filed in court. It may be most useful in cases where the parties have not completely explored settlement options and are unlikely to do so without the assistance of a neutral.

While the retired judges conducting settlement conferences are technically in recalled status and are compensated as if they were, they have no trial authority with regard to a case but merely assist the parties in assessing their case and possibly reaching settlement. In addition, the retired judges maintain strict confidentiality with respect to the settlement-conference proceedings and report to the referring court

only the terms of the agreement, if authorized by the parties, or the fact that no agreement was reached.

In the new Judicial Settlement Conference program, parties submit a preconference brief to the settlement judge. There may be a preconference meeting by telephone to discuss logistics and to ensure that all parties have a representative at the conference with final settlement authority. In the settlement conference itself, the parties meet with the settlement judge at the courthouse to explore options for settling their dispute. The process, in which lawyers and parties on all sides are active participants, may include a collaborative session, which is an initial session in which all parties are in the same room. Often the parties segregate immediately after the initial session and do not directly interact. The judge may elect to reconvene the parties later in the process. Or the settlement judge may use a process in which the judge places the parties in separate rooms and moves from room to room and meets privately with each side. Everything said in a private caucus is confidential, except for what the party in the caucus room authorizes the neutral to communicate to a party in the other caucus room. In this separate caucus, which is outside the presence of the other parties and their attorneys, the judge may identify the case's strengths and weaknesses or point out additional problems that the party may not have considered.

The conference is generally informal. The judge may use a variety of mediation and case-evaluation techniques to encourage and shape settlement. The judge may provide an opportunity for both parties to be heard and may use other conflict resolution techniques characteristic of mediation. The judge takes an active role in guiding the parties to a mutually satisfactory resolution or may also suggest solutions or settlement terms or merely provide settlement ranges; beyond that, the judge may provide the parties with opinions regarding the disposition of the case, and may even encourage parties to settle or accept a particular settlement proposal or range. The ultimate decision regarding settlement, however, is left to the parties.

Cases best suited for a settlement conference have certain characteristics. These are that the parties are motivated to settle due to time constraints, expenses, or other factors; they wish to have a neutral evaluation of their case in a private setting; and they are inclined to settle, but need more-aggressive legal and factual "reality testing" by a neutral to facilitate settlement. In addition, they are far apart on damages, indicating that one party has an unrealistic view of the claim or that the parties differ substantially both in their opinions of the value of the case and in their opinions of how a jury would interpret the relevant law or facts. Further, a party cannot negotiate for himself or herself effectively, perhaps because of physical or psychological abuse, which impairs the ability to protect his or her interests, but is represented by counsel.

Use of a settlement conference is thought beneficial in that lawyers often welcome an outside voice echoing their concerns about the adjudicatory process, which they are unable to tell clients if the clients will not listen to the lawyers or if the lawyers do not want their clients to think less of them. The settlement conference may be the first time both sides to the dispute are presented, and attorneys may bene-

fit from a judge's take on the contrasting presentation. In addition, lawyers want to engage in a process that creates movement. They want the judge to be an influence on the process, not merely a message carrier. The attorneys already know their case and the other side's case. What they often need is another perspective to add to this dynamic. Moreover, seasoned lawyers in circuit civil cases are not disempowered by a judge, however forceful or assertive.

Program Results. Since the program began in November 2003, over 450 cases have been referred to a judicial settlement conference. Approximately 40 percent of the cases involve tort/personal-injury matters, 26 percent involve commercial issues, and 20 percent domestic-relations cases. The average length of a conference is 3.86 hours. Counsel for the parties are always present at the conference. Feedback from attorneys has been extremely positive. One hundred percent of attorneys have indicated on exit surveys that they would request a conference again and would recommend it to others. They have said, "While we did not reach a settlement, Judge conducted an excellent process and encouraged every opportunity to accomplish our goals"; that the judge "accomplished something that I did not think was possible prior to the conference"; and that the judge "assessed and understood the case from the outset and moved the parties and counsel towards settlement with skill and dispatch." Another comment was, "In my experience, settlement conferences with retired circuit court judges are a valuable resolution method. This is an excellent program and I hope it will continue."

This program has opened new options for the courts and litigants. Lawyers and parties have appreciated the benefit of having an experienced judge with significant expertise facilitate the settlement of their case. Judges find this an excellent process for reducing docket congestion while ensuring the prospects of a quality outcome. The ethical issues raised by judges conducting settlement conferences in their own cases are removed. Both court-referred mediation and private mediation continue to thrive. In anticipation of continued growth of the Judicial Settlement Conference program, another training was held in March 2005 for an additional six retired circuit court judges. In addition, circuit court judges continue to be provided information at educational conferences on the availability of this new program. The Judicial Settlement Conference appears to be a good, complementary dispute-resolution option for the courts, and the Virginia judicial system looks forward to continuing to track its progress. **jsj**

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