JUDICIAL SETTLEMENT CONFERENCES

THE HIGH COURT GUIDELINES

(A document to assist those participating in a judicial settlement conference)

Issued April 2012

1. INTRODUCTION

1.1. The High Court's jurisdiction in relation to judicial settlement conferences is provided by r 7.79.

1.2. Rule 7.79 provides:

> **7.79 Court may assist in negotiating for settlement**
>
> (1) A Judge may, at any time before the hearing of a proceeding, convene a conference of the parties in chambers for the purpose of negotiating for a settlement of the proceeding or of any issue, and may assist in those negotiations.
>
> (2) A Judge who presides at a conference under subclause (1) may not preside at the hearing of the proceeding unless—
>
> (a) all parties taking part in the conference consent; and
>
> (b) the Judge is satisfied there are no circumstances that would make it inappropriate for the Judge to do so.
>
> (3) A Judge may, at any time during the hearing of a proceeding, with the consent of the parties, convene a conference of the parties for the purpose of negotiating for a settlement of the proceeding or of any issue.
>
> (4) A Judge who convenes a conference under subclause (3) may not assist in the negotiations, but must arrange for an Associate Judge or another Judge to do so unless—
>
> (a) the parties agree that the Judge should assist and continue to preside at the hearing; and
>
> (b) the Judge is satisfied there are no circumstances that would make it inappropriate for the Judge to do so.
>
> (5) A Judge may, with the consent of the parties, make an order at any time directing the parties to attempt to settle their dispute by the form of mediation or other alternative dispute resolution (to be specified in the order) agreed to by the parties.
>
> (6) The parties, and a Judge or Associate Judge who presides at a conference or assists in negotiations under this rule, must not disclose any statement made during a conference, either—
>
> (a) in court; or
>
> (b) otherwise.
>
> (7) This rule must be read with subpart 8 of Part 2 of the Evidence Act 2006 (privilege).

1.3. The rule contemplates judicial involvement in the settlement process at two stages. The first occurs in the case management conference process and in the lead up to trial. The second occurs during the trial, but is reserved for cases where the parties consent.

1.4. The rule contemplates, as well, reference to mediation. Where the question of settlement is raised in the course of case management the practice is usually to inquire of the parties as to whether they wish to attend a private mediation. If they do not, consideration will be given to allocating a judicial settlement conference.

1.5. The case management pilots in the High Court which were first introduced in the Auckland and Napier Registries in May 1994 signalled a change in approach by the Judiciary. Judicial supervision of cases from the time of filing was introduced in the High Court for the first time. Case management was formalised through the High Court Rules when the High Court Amendment Rules 2003 came into force on 24 November 2003.

1.6. The case management conference changes signalled an important focus in the preparation of a case towards its disposal. That requires the parties to focus on the ultimate resolution of the issues raised by a proceeding. That position is emphasised by the current rule 7.4 and the reference to Schedule 5 of the High Court Rules which enjoins the parties to list the essential issues of fact and law in memoranda for case management conferences.

2. THE PURPOSE BEHIND R 7.79

2.1. Rule 7.79 provides that the purpose behind the making of an order for a judicial settlement conference is to assist the parties in their negotiation of a settlement of the proceeding or of any of the issues in the proceeding. The judges' role is expressly provided to be one of the assisting the parties in those negotiations.

2.2. No single mediation technique will be a complete answer. In the majority of cases in the High Court what the parties will require is assistance in evaluating the merits of the dispute. What is of particular importance is evaluation by the parties, not evaluation by the judge. The judge does not provide an evaluation or an opinion of the successful outcome of the litigation. The judge may, however, invite the parties to consider important aspects of the case so that their evaluation is comprehensive. It is often helpful for the judge to ask the question: "Have you considered …". In this way the parties will identify the strength and weakness of their position on the important issues. That evaluation can then lead them to what is an appropriate conclusion to the dispute.

3. PREPARATION FOR A JUDICIAL SETTLEMENT CONFERENCE

3.1. As with any Court event, the object is to ensure, to adopt the case management jargon, that the event is *meaningful*. It will be if it achieves some of the important objectives.

3.2. Bearing in mind that counsel know that the Court will raise, at a case management conference, what is proposed or is already underway to explore and promote settlement, counsel must be ready at a case management conference to deal with the following matters:

3.2.1. What information should be exchanged prior to a settlement conference;

3.2.2. Who should be at the settlement conference;

3.2.3. What is the best time in the lead up to trial to hold a settlement conference;

3.2.4. What is the estimate of time required for the settlement conference;

3.2.5. Is there a need for any special aids for the settlement conference, eg equipment, video links for parties overseas, etc;

3.2.6. Who has the burden of proof on specific issues – is there a need to reverse the normal order for the exchange of memoranda for the settlement conference (the burden of proof is sometimes referred to as the right to begin);

3.2.7. If a mediation is the preferred option, then who is the suggested mediator, what time constraints are involved in setting up the mediation and what review date should follow the proposed mediation as far as the Court is concerned.

3.3. When analysing what information should be exchanged ahead of the conference, the starting point is the summary of the issues which are required to be resolved by the case. If care is not taken in this area the result will be unsatisfactory to the parties. The issues establish what is required both in terms of the evidence to be led and the principles of law that are to be advanced. If documents are important, the essential part of the document must be identified. If a particular expert is required to address an issue a short will-say statement from the expert and, possibly, the expert's attendance should be arranged.

3.4. When addressing the question of who should be present at the conference it is important to cover two specific aspects. The first is to have the appropriate information to advance, in a summary and direct way, the interests of the

litigant. The second is to ensure that a person who has authority to complete a contract of settlement is, in fact, present. If such a person is not present, then the settlement conference runs the risk of being turned into nothing short of a fishing exercise. Problems can arise, particularly where there is a need to defer to an indemnifier. If that is the case, the indemnifier's representative should be present. Sometimes that, however, is not enough because it is necessary to ensure that the person present is the person who actually makes the decision. That is important because that person should be privy to the discussions which go on in the settlement conference and can then make his or her own assessment on why a particular result is appropriate and should be enshrined in a settlement agreement. The last thing that anyone at the settlement conference wants to see is a delay whilst a party reports to someone not present at the settlement conference before a decision is made.

3.5. When considering the timing of a settlement conference, it is important to explore whatever impediment there might be to a successful outcome at the settlement conference. Some of the problems that arise here are:

3.5.1. Whether there has been a sufficient exchange of material ahead of the settlement conference so that no room is left for the excuse that is sometimes offered that a decision cannot be made until certain material is provided;

3.5.2. If ability to settle is a real issue, evidence as to the inability should be available. An affidavit of assets and liabilities may be appropriate;

3.5.3. Is a party's approach to settlement likely to be affected by seeing the colour of the other party's cards, ie the full briefs. Sometimes that is important. On the other hand, both sides may well be attracted to the spending of resources in the settlement result rather than with their legal advisers and the sorting out of information. This is something which is very much case specific and is something which must be discussed with the litigants and counsel carefully before the settlement forum is agreed and the time set.

3.6. It is desirable for the Court to determine what time is required for the conference. If the exchange of information requires more than a day before the hard talking on the issues begins, that should be signalled at an early stage. Planning of the amount of the time for the conference and how it is to be split, in terms of sessions, is an important aspect to a successful outcome.

3.7. In cases where the real issue is the affirmative defence it is important that that becomes the principal focus for discussion at the settlement conference. The objectives of a settlement conference is to give the parties an overview of the case that they are involved in, where their particular exposure to an adverse result may occur, and what solutions are, after such analysis, appropriate.

4. JUDICIAL SETTLEMENT CONFERENCE DIRECTIONS

4.1. In the High Court, directions for a Judicial settlement conference in the course of the case management conference programme are usually made at the second conference and in conjunction with the fixing of the date for trial and the trial directions.

4.2. Attached are standard settlement conference directions marked as Schedule A.

4.3. It is desirable to fix the actual date for the exchange of memoranda. A sequential exchange rather than a contemporaneous exchange of memoranda is usually beneficial. This assists the parties to address each issue in a short and succinct way.

4.4. It is important that, at the conference which sets the settlement conference directions and a date for the settlement conference, the Judge be given sufficient information to make appropriate directions dealing with the range of matters listed in paragraph 3.2.

4.5. Normally, at the second case management conference, there will be established a precise set of trial issues. If there is an issue of law the principal authority should be ascertained. In addition, a short and succinct summary of the principle involved should be articulated. If this material is provided to the parties and the judge at the conference when the settlement conference is established and directions made, the prospects of a successful conclusion is enhanced.

5. THE JUDICIAL SETTLEMENT CONFERENCE PROCESS

5.1. This document makes recommendations as to the process to be followed at the judicial settlement conference.

5.2. The object of a judicial settlement conference is to assist the parties to evaluate each issue in the case. The process is designed to allow them, on completion of the evaluation, to look at appropriate solutions.

5.3. Counsel are expected to have fully briefed the parties and those attending the judicial settlement conference on the rules which apply dealing with privilege and confidentiality.

5.4. The parties will be encouraged to make concessions on the clear understanding that concessions cannot be used against them if a settlement is not achieved.

5.5. The lawyers' role at the settlement conference will be emphasised as one that involves the giving of advice of all aspects of the case that arise in the course of the discussion at the conference. The parties will always be given the

opportunity to seek a private consultation with their lawyers should they wish to avail themselves of that opportunity.

5.6. Because the process is designed to enable the parties to self-evaluate their position, the parties can expect that the issues will be examined and each will have the opportunity of testing the other side's position on an issue. The judge, however, will not express a view in the nature of an interim judgment or ruling on the case and will not be involved in caucusing.

6. AT THE CONCLUSION OF THE CONFERENCE

6.1. The process is principally owned by the parties. If a solution is arrived at, it is for the parties, with the assistance of their lawyers, to conclude the settlement agreement. The judge will not be involved in the drafting of the settlement agreement. Sometimes different considerations apply where the particular case involves approval by the court of a settlement. A judge will ensure that the two processes, that is the reaching and recording of the agreement, in the first place, is kept quite separate from the process whereby the judge approves the settlement.

6.2. The judge may properly ask whether, at the conclusion of the settlement, a trial can be vacated and all trial directions rescinded. It is often important to check whether the implementation of the settlement requires time, in which case the file can be adjourned to a chambers list or a duty judge list to check compliance. Good practice will often record a minute to that effect and indicate that if settlement is reached the appropriate joint memorandum or notice of discontinuance can be filed a short time before the adjourned date thus avoiding an appearance at the adjourned date.

6.3. If no settlement is reached at the conference the judge will either:

6.3.1. Attempt a complete identification of all the issues with the parties or give a specific direction for the filing of memoranda by the parties so that this can occur;

6.3.2. Ascertain what further steps are required before the trial of the proceeding; and

6.3.3. Allocate the trial date and make trial directions, if that has not already occurred.

APPENDIX A

Standard Settlement Conference Directions

A settlement conference of [day's] duration is required and shall be held at [time] on [date] . As a pre-condition to the conference proceeding:

a) The plaintiff shall file and serve a memorandum by [date] as set out below;

b) The defendant shall file and serve a memorandum by [date] as set out below.

Such memorandum shall provide the information requested and setting out (and properly answering) each of the questions below. Should any party fail to comply the parties can expect the conference to be cancelled and the defaulting party will be at risk of costs.

INFORMATION

Attach a one page "will-say" statement from each of your key witnesses other than expert witnesses (ie. "Witness A will say the following:.....".) Full briefs need not be completed unless otherwise directed.

Submit any experts' reports that you rely upon in your settlement negotiations or to substantiate your perspective. Highlight and tab those portions that you consider the most probative.

QUESTIONS

1. What are the issues in this litigation?

2. Which one (or more) of these issues is most significantly affecting your inability to settle?

3. Why?

4. Have you and the other party engaged in settlement negotiations? Please describe the nature of those negotiations.

5. What offers of settlement have been exchanged?

6. Upon what criteria was your settlement offer based (if one was made) or on what do you rely to support your present position (e.g. case law, industry standards, experts' report or findings, etc)?

7. What else do you believe that the settlement conference Judge should know about this matter that would enable him or her to work more productively with all parties participating in the conference?

NB: Settlement Conferences and papers filed in connection with them are treated as without prejudice and privileged save as to the recording of whether a settlement was

reached or not. Thus memoranda of the kind required above are not part of the record and (unless it be requested by any party and agreed by all otherwise) will be destroyed, returned to counsel/parties, removed from the file or sealed up (eg. if conference adjourned) at the conclusion of the conference.

This order has been made on the express understanding that the parties who will be in attendance for the plaintiffs and the defendant are parties who have full and unlimited authority to settle the case in the event that agreement is reached.