EFFECTIVE SETTLEMENT TECHNIQUES

James T. Giles, Esquire

Pamela Lynn Colon, Esquire

Andrew L. Capdeville, Esquire

SUCCESSFUL MEDIATION STRATEGY

I: CASE INTAKE

Code of Professional Responsibility, Keep Close at Hand and Read It

- Competency, diligence, communications, confidentiality, conflicts of interest
- If unsure, ask, research; resolve issues up front
- Contingent fees
- Managing client expectations
- Understanding client expectations and needs
- Realistic evaluation, preliminary fact investigation and legal assessment
- Communications w/client: outline of prospective attorney's fees and costs
- Comprehensive engagement letter includes settlement possibility
- Fiduciary: always and forever, it's the client's case, not yours
- Escrow accounts - Golden Rules

SUCCESSFUL MEDIATION STRATEGY

II: CASE PREPARATION

Educating Client About Attorney's Simultaneous Duties of Advocate and Counsellor

- Dispelling popular misinformation about lawyers, courts, juries and arbitration
- Prepare client to expect an invitation to mediation by a court or arbitration administrator
- FRCP 16 Discovery Plan; preparation, obligation to appear with binding negotiation and settlement authority
- FRCP 26 (a) Disclosures; duty to show your cards; prelude to meaningful mediation
- Mediation, just damages or liability and damages
- Making, offering and responding to "out of the box" pre-mediation proposals
- Settlement requires being prepared to go to trial and having ability, means and the will to try case to verdict, and through appeal, if necessary
- Know and communicate to client, the actual, and likely future, fees, costs and liens
- Know the weaknesses and strengths of your case and your opponent's
- Assess Humility: true case evaluation lies with jury or arbitrator; no guarantees of outcome, except through settlement

Rule 16. Pretrial Conferences; Scheduling; Management

(a) PURPOSE OF A PRETRIAL CONFERENCE.

In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

(1) expediting disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation; and

(5) facilitating settlement.

(b) SCHEDULING.

(1) Scheduling Order. Except in categories of actions exempted by local rule, the district judge-or a magistrate judge when authorized by local rule-must issue a scheduling order:

(A)after receiving the parties' report under Rule 26(f}; or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference.

(2) Time to Issue. The judge must issue the scheduling order as soon as practicable, but unless the judge finds good cause for delay, the judge must issue it within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared.

(3) Contents of the Order.

(A) Required Contents. The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) Permitted Contents. The scheduling order may:

(i)modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii)modify the extent of discovery;

(iii) provide for disclosure, discovery, or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;

(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;

(vi)set dates for pretrial conferences and for trial; and

(vii)include other appropriate matters.

(4) *Modifying a Schedule.* A schedule may be modified only for good cause and with the judge's consent.

(c)ATTENDANCE AND MATTERS FOR CONSIDERATION AT A PRETRIAL CONFERENCE.

(1) Attendance. A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

(2) Matters for Consideration. At any pretrial conference, the court may consider and take appropriate action on the following matters:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;

(B) amending the pleadings if necessary or desirable;

(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702;

(E) determining the appropriateness and timing of summary adjudication under Rule 56;

(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

(H) referring matters to a magistrate judge or a master;

(I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

(J) determining the form and content of the pretrial order;

(K) disposing of pending motions;

(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third party claim, or particular issue;

(N) ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(O) establishing a reasonable limit on the time allowed to present evidence; and

(P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

(d) PRETRIAL ORDERS. After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

(e) FINAL PRETRAIL CONFERENCE AND ORDERS.

The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.

NOTES OF ADVISORY COMMITTEE ON RULES-1937

(f) SANCTIONS.

(1) In General. On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii}, if a party or its attorney:

(A)fails to appear at a scheduling or other pretrial conference;

(B)is substantially unprepared to participate-or does not participate in good faith-in the conference; or

(C)fails to obey a scheduling or other pretrial order.

(2) Imposing Fees and Costs. Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses-including attorney's fees-incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

NOTES

(As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 29, 2015, eff. Dec. 1, 2015.)

NOTES OF ADVISORY COMMITTEE ON RULES-1937

Federal Rules of Civil Procedure TITLE V. DISCLOSURES AND DISCOVERY

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) REQUIRED DISCLOSURES.

(1) Initial Disclosure.

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information-along with the subjects of that information-that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy-or a description by category and location-of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party-who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) Proceedings Exempt from Initial Disclosure. The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v)an action to enforce or quash an administrative summons or subpoena;

(vi)an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii)a proceeding ancillary to a proceeding in another court; and

(ix)an action to enforce an arbitration award.

(C) Time for Initial Disclosures-In General. A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) Time for Initial Disclosures-For Parties Served or Joined Later. A party that is first served or otherwise joined after the Rule 26(f} conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) Basis for Initial Disclosure; Unacceptable Excuses. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of Expert Testimony.*

(A) In General. In addition to the disclosures required by Rule 26(a)(1}, a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report-prepared and signed by the witness-if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii)any exhibits that will be used to summarize or support them;

(iv)the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi)a statement of the compensation to be paid for the study and testimony in the case.

(C) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i)at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

(3) *Pretrial Disclosures.*

(A) In General. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness-separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence-separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made-except for one under Federal Rule of Evidence 402 or 403-is waived unless excused by the court for good cause.

(4) *Form of Disclosures.* Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) DISCOVERY SCOPE AND LIMITS.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) Limitations on Frequency and Extent.

(A) When Permitted. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

(3) *Trial Preparation: Materials.*

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i)they are otherwise discoverable under Rule 26(b)(1); and

(ii)the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) Previous Statement. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(S) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording-or a transcription of it-that recites substantially verbatim the person's oral statement.

(4) *Trial Preparation: Experts.*

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(8) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (8) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (8) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(8), regardless of the form

of the communications, except to the extent that the communications:

(i)relate to compensation for the expert's study or testimony;

(ii)identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii)identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

as provided in Rule 35(b); or on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must

(i)expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed-and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(C) PROTECTIVE ORDERS.

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending-or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.

The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) Ordering Discovery. If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) Awarding Expenses. Rule 37(a)(5) applies to the award of expenses.

(d) TIMING AND SEQUENCE OF DISCOVERY.

(1) Timing. A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) Early Rule 34 Requests.

(A) Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) When Considered Served. The request is considered to have been served at the first Rule 26(f) conference.

(3) *Sequence.* Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(8) discovery by one party does not require any other party to delay its discovery.

(e) SUPPLEMENTING DISCLOSURES AND RESPONSES.

(1) In General. A party who has made a disclosure under Rule 26(a)-or who has responded to an interrogatory, request for production, or request for admission-must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) Expert Witness. For an expert whose report must be disclosed under Rule 26(a)(2)(B}, the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) CONFERENCE OF THE PARTIES; PLANNING FOR DISCOVERY.

(1) Conference Timing. Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(8) or when the court orders otherwise, the parties must confer as soon as practicable-and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) Conference Content; Parties' Responsibilities. In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3)Discovery Plan. A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a}, including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including-if the parties agree on a procedure to assert these claims after production whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502:

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F)any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and

(c).

(4) *Expedited Schedule.* If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) SIGNING DISCLOSURES AND DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS.

(1) Signature Required; Effect of Signature. Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name-or by the party personally, if unrepresented-and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) Failure to Sign. Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) Sanction for Improper Certification. If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an

order to pay the reasonable expenses, including attorney's fees, caused by the violation.

NOTES

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 30, 1970, *eff.* July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Apr. 28, 1983, *eff.* Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 28, 2010, eff.Dec. 1, 201O; Apr. 29, 2015, eff. Dec. 1, 2015.)

NOTES OF ADVISORY COMMITTEE ON RULES-1937

Note to Subdivision (a). This rule freely authorizes the taking of depositions under the same circumstances and by the same methods whether for the purpose of discovery or for the purpose of obtaining evidence. Many states have adopted this practice on account of its simplicity and effectiveness, safeguarding it by imposing such restrictions upon the subsequent use of the deposition at the trial or hearing as are deemed advisable. See Ark.Civ.Code (Crawford, 1934) §§606-607; Calif.Code Civ.Proc. (Deering, 1937) §2021; 1 Colo.Stat.Ann. (1935) Code Civ.Proc. §376; Idaho Code Ann. (1932) §16-906; Ill. Rules of Pract., Rule 19 (Ill.Rev.Stat. (1937) ch. 110, §259.19); Ill.Rev.Stat. (1937) ch. 51, §24; 2 Ind.Stat.Ann. (Burns, 1933) §§2-1501,2-1506; Ky.Codes (Carroll, 1932) Civ.Pract. §557; 1 Mo.Rev.Stat. (1929) §1753; 4 Mont. Rev.Codes Ann. (1935) §10645; Neb.Comp.Stat. (1929) ch. 20, §§1246-7; 4 Nev.Comp.Laws (Hillyer, 1929) §9001; 2 N.H.Pub.Laws (1926) ch. 337, §1; N.C.Code Ann. (1935) §1809; 2 N.D.Comp.Laws Ann.(1913) §§7889-7897; 2 Ohio Gen.Code Ann. (Page, 1926) §§11525-6; 1 Ore.Code Ann. (1930) Title 9, §1503; 1 S.D.Comp.Laws (1929) §§2713-16; Tex.Stat. (Vernon, 1928) arts. 3738, 3752, 3769; Utah Rev.Stat.Ann. (1933) §104-51-7; Wash. Rules of Practice adopted by the Supreme Ct., Rule 8, 2 Wash.Rev.Stat.Ann. (Remington, 1932) §308-8; W.Va.Code (1931) ch. 57, art. 4, §1. Compare [former] Equity Rules 47 (Depositions-To be Taken in Exceptional Instances); 54 (Depositions Under Revised Statutes, Sections 863, 865, 866, 867-Cross-Examination); 58 (Discovery-Interrogatories-Inspection and Production of Documents-Admission of Execution or Genuineness).

This and subsequent rules incorporate, modify, and broaden the provisions for depositions under U.S.C., Title 28, [former] §§639 (Depositions *de bene esse;* when and where taken; notice), 640 (Same; mode of taking), 641 (Same; transmission to court), 644 (Depositions under *dedimus potestatem* and *in perpetuam),* 646 (Deposition under *dedimus potestatem;* how taken). These statutes are superseded insofar as they differ from this and subsequent rules. U.S.C., Title 28, [former] §643 (Depositions; taken in mode prescribed by State laws) is superseded by the third sentence of Subdivision (a).

While a number of states permit discovery only from parties or their agents, others either make no distinction between parties or agents of parties and ordinary witnesses, or authorize the taking of ordinary depositions, without restriction, from any persons who have knowledge of relevant facts. See Ark.Civ.Code (Crawford, 1934) §§606-607; 1 Idaho Code Ann. (1932) §16- 906; Ill. Rules of Pract., Rule 19 (Ill.Rev.Stat. (1937) ch. 110, §259.19); Ill.Rev.Stat. (1937) ch. 51,§24; 2 Ind.Stat.Ann. (Burns, 1933) §2-1501; Ky.Codes (Carroll, 1932) Civ.Pract. §§554-558; 2

District Court Rules Civ. Proc., Rule 3.2. ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution (ADR) refers to a number of processes that can be used to resolve a dispute. Common forms of ADR include mediation, settlement conference, arbitration, early neutral evaluation and summary or mini trial. These processes are alternatives to having a judge or jury decide the dispute in a trial. While the procedures for mediation are set forth herein, the Court may adopt detailed procedures for other forms of ADR in the future.

Procedures for mediation:

(a) Mediation is a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and non-adversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decision making authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem-solving and exploring settlement alternatives.
(b) Except as hereinafter provided, the Court may order any contested civil matter or selected
issue to be referred to mediation.

(c) Mediation conferences shall take place on a date, and at a time and location, agreed to by the
parties and the mediator, unless otherwise ordered by the Court.

(d) The following actions shall not be referred to mediation:

(1) Criminal actions;

(2) Forfeitures of seized property; or

(3) Habeas corpus and extraordinary writ.

(e) A party may move to dispense with mediation if:

(1) the issue to be considered has been previously mediated between the same parties;

(2) the issue presents a question of law only;

(3) the parties agree to an alternative method of dispute resolution; or

(4) other good cause is shown.

(f) Any person of legal age who, in the opinion of the parties, is deemed qualified by training or experience to mediate all or some of the issues in the particular case may act as a mediator.

(g) If the parties cannot agree upon a mediator, they shall jointly so notify the Court, which shall work with the parties in a manner determined by the Court to identify a mediator.

(h) The mediator shall be compensated by the parties.

(i) Mediators have a duty to define and describe the process of mediation and its costs at the first mediation conference. The mediator may meet and consult with the parties or their counsel, individually or collectively, on any issue pertaining to the subject matter of the mediation.

(j) Mediators have a duty to disclose any fact that would be grounds for disqualification. Mediators have a duty to be impartial and to advise all parties of any circumstances suggesting possible bias, prejudice or lack of impartiality. Persons selected as mediators shall be disqualified for bias, prejudice or partiality, as provided by Title 28 U.S.C. Section 144, and shall disqualify themselves in any action in which they would be required under Title 28 U.S.C. Section 455 to disqualify themselves if they were a judge. Any party may move the Court to enter an order disqualifying a mediator for good cause.

(k) Mediators acting pursuant to these rules shall have judicial immunity in the same manner and to the same extent as a judge.

(l) Each party involved in a mediation conference must attend each mediation conference with full authority to settle without further consultation. If a party to mediation is a public entity, that party shall be deemed to appear at a mediation conference by the physical presence of a representative with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision-making body of the entity. Otherwise, unless stipulated by the parties, a party is deemed to appear at a mediation conference if the following persons are physically present:

(1) Each party or its representative (other than appearing counsel) having full authority to settle without further consultation; and,

(2) Counsel, if any, to each party. By agreement between all parties and the mediator, any of the above-named individuals may appear by telephone or video-conference.

(l) Each party involved in a mediation conference must attend each mediation conference with full authority to settle without further consultation. If a party to mediation is a public entity, that party shall be deemed to appear at a mediation conference by the physical presence of a representative with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision-making body of the entity. Otherwise, unless stipulated by the parties, a party is deemed to appear at a mediation conference if the following persons are physically present:

(1) Each party or its representative (other than appearing counsel) having full authority to settle without further consultation; and,

(2) Counsel, if any, to each party.

By agreement between all parties and the mediator, any of the above-named individuals may appear by telephone or video-conference.

(m) If a party, without good cause, fails to appear at a duly noticed mediation conference or fails to participate in the mediation in good faith, the Court may impose sanctions, including an award of mediator and attorney fees and other costs.

(n) All communications made during a mediation proceeding are presumptively confidential and privileged. Parties, counsel and the mediator shall not disclose any such communications to anyone not participating in the mediation, including the Court, unless all parties consent to waive the privilege or as otherwise ordered by the Court.

(o) Discovery may continue throughout mediation. Such discovery may be delayed or deferred by order of the Court.

(p) Mediators may apply to the Court for interim or emergency relief at any time, at the initiation of the mediator after consultation with the parties, or at the parties' request. Mediation shall continue while such a motion is pending absent a contrary order of the Court or a decision of the mediator to adjourn pending disposition of the motion. Time for completing mediation shall be tolled during any periods where mediation is interrupted pending resolution of such a motion.

(q) If the parties do not reach agreement as to any matter as a result of mediation, or if the mediator determines that no settlement is likely to result from the mediation, the mediator shall report the lack of an agreement to the Court without comment or recommendation. With the consent of the parties, the mediator's report may also identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate the possibility of a settlement.

(r) If an agreement is reached, it shall be reduced to writing and signed by the parties and their counsel, if any. The agreement shall be filed when required by law, court order, or with the parties' consent. If the agreement is not filed, a joint stipulation of dismissal shall be filed. By stipulation of the parties, the agreement may be electronically recorded, and any transcript may be filed with the Court.

District Court Rules Civ. Proc., Rule 5.1.
GENERAL FORMAT OF PAPERS PRESENTED FOR FILING

(a) All pleadings, motions, and other papers presented for filing shall be double-spaced, except for quoted material. Each page shall be numbered consecutively. All documents shall be prepared in an 8-½ x11-inch format and shall be plainly typewritten or printed in at least 12-point font, on a white background, or prepared by a clearly legible duplication process. Footnotes shall be in at least 10-point
font and may be single-spaced.

(b) This rule does not apply to:

(1) exhibits submitted for filing;

(2) documents filed in actions prior to removal from Superior Court; or

(3) pro se parties.

District Court Rules Civ. Proc., Rule 5.2.
APPEARANCES; WITHDRAWAL AS COUNSEL

(a) Appearances. The attorney for each party in any cause shall promptly file an appearance, giving the address where all notices and papers may be served upon the attorney. Only members of the Bar of this Court may appear as counsel in civil cases. Only individuals who are parties in civil cases may represent themselves. Other than in the case of an individual proceeding *pro se*, non-attorneys are not permitted to represent a party before this Court.

(b) Withdrawal. No attorney may withdraw an appearance except (1) with leave of Court after notice to the attorney's client, or (2) as part of a formal substitution of new counsel for the withdrawing attorney.

SUCCESSFUL MEDIATION STRATEGY

III. STATE OF MIND ESSENTIALS

Civility and Rapport

- Officer of court at all times
- Respect your opponent; respect yourself
- It's client's case but it's your reputation
- Imitate diplomacy, not posturing
- Patience
- Persistence
- Open-mindedness
- Thinking creatively for resolutions
- Learning to listen all over again
- In short, be professional

SUCCESSFUL MEDIATION STRATEGY

IV: STATE OF MIND PREPARATION

Educating Client About the Mediation Process

- Role and limitations of mediator; not your client's lawyer or coercer-in-chief
- Sow seeds of patience and need for open-mindedness
- Only client decides whether to settle and for what
- Selection of private mediator; assignment to U.S. Magistrate or settlement master
- Pre-mediation conferencing; agreeing on ground rules
- Objectives of mediation memos
- Advantages of mediation confidentiality and non-use of statements as evidence
- Opportunity to speak directly to opposing client; assessment of story-telling ability
- Honesty is an attorney's duty to a tribunal and to an adversary, whether in trial or mediation
- Expect the unexpected

SUCCESSFUL MEDIATION STRATEGY

V: EXECUTING ON THE MEDIATION PLAN

The Mediation Plan

- Identifying mutual interests
- Establishing through mediator “rules of engagement”
- Pre-mediation conferencing
- Coherent and consistent explanations for positions, offers and demands
- Trusting mediator with “best number”
- Obtain client’s consent in caucus before every demand or offer
- Acceptance or rejection is client’s call
- “a bird in the hand is usually worth two in the bush”
- “Can you live with the result being proposed?”
- Beware of point of diminishing returns

SUCCESSFUL MEDIATION STRATEGY

VI. STAYING FOCUSED

What’s Thine Is Thine, What’s Mine Is Mine

- Keeping prospective attorney’s fees out of attorney’s settlement motivation
- Even before mediation, a worksheet that shows client the distribution of any and all funds
- Settlement rarely happens when offer tells client she has nothing to lose by going to trial
- Mediator’s credo: “no impasse is forever”

SUCCESSFUL MEDIATION STRATEGY

VII. FINISHING THE RACE

Settlement Documents

- Prepare possible settlement agreement in advance, where possible
- Do not end mediation without a signed agreement as all material terms; court enforcement by judgment may be necessary
- Before signing off, “see the money”; ask court to retain jurisdiction