

# A View From the Bench: What to Expect When You Agree To A Mediation

## ***Moderator:***

***Judge Ruben Castillo**, Akerman Partner, Chair of Akerman Bench and former Chief Judge of the U.S. District Court for the Northern District of Illinois*

## ***Panelists:***

***Hon. James F. Holderman (Ret.)**, Former Chief Judge of the U.S. District Court for the Northern District of Illinois and current mediator with JAMS*

***Hon. Young B. Kim**, U.S. Magistrate Judge for the Northern District of Illinois*

***Julie Govreau**, General Counsel, GreatBanc Trust Company*



January 21, 2020

# Featured Speakers

## Moderator

[Ruben Castillo](#)

Akerman Partner and Chair of Akerman Bench

## Panelists

[Hon. James F. Holderman \(Ret.\)](#)

Former Chief Judge of the U.S. District Court for the Northern District of Illinois and current mediator with JAMS  
Chicago, IL

[Hon. Young B. Kim](#)

U.S. Magistrate Judge for the Northern District of Illinois

[Julie Govreau](#)

Senior Vice President and General Counsel of GreatBanc Trust Company  
Lisle, IL

# Program Agenda

Topics to be covered include:

- best time for mediation
- value of pre-mediation conferences and calls
- value of information exchange
- value of opening statements
- the need to inform the mediator of all relevant information
- realistic party expectations—understanding the mediation ground rules
- the importance of a collaborative format to build trust
- the importance of candor
- what the significant guideposts are toward resolution
- effective post-mediation behavior

# What Is The Best Time For Mediation?

- After discovery is closed?
- Prior to rulings on dispositive motions or after?
- What can we learn from approaches used in other jurisdictions?

# Pre-Mediation

- Are pre-mediation calls or conferences valuable?
- If so, what information needs to be communicated?
- How important is the settlement history of the dispute?

# The Value Of Information Exchange

- Is there value to information or letter exchange?
  - Are these premeditation statements confidential?
  - Can these statements be released to the parties by consent?

# The Value Of Opening Statements

- Are opening statements of value or are they sometimes counterproductive?
- If used, is the opening statement directed to your adversary or the mediator - or both?

# From A Mediator's Perspective

- What is your overall mediation approach?
- Do you ever evaluate or make specific settlement proposals?
  - If so, are these effective or counterproductive?
- Who do you require be present for the mediation session?
- Do you ever report the results to an assigned judge or any else?



# Specific Questions For In-House Counsel to Consider

- What have been your expectations heading into various mediations?
- Have those expectations been met?
- What have been your best mediation experiences?
- What about negative mediation experiences?
- Is it effective to bring employees from the business side of the company?

# Questions For Mediators

- What really happens during private caucuses?
- Are these private settings where vital information is communicated?

# Mediation Format

- What are the best mediation format(s) to build trust and collaboration?
- How important is confidentiality?
- What are some of the ethical issues you have confronted in mediation sessions?

# What Are Significant Guideposts Toward Resolution?

- How does a mediator come to realize a resolution is in sight?
- What are some creative ways to overcome settlement obstacles?

# Mediation Behavior For A Party

- What is effective mediation behavior for a party?
- What is effective communication?
- What are examples of harmful behavior by mediation clients?

# Post-Mediation Behavior

- What is effective post-mediation behavior for a party and the mediator?

# Moderator

## **Ruben Castillo, Moderator**

Akerman Partner and Chair of Akerman Bench

Ruben Castillo, a first chair litigator, focuses his practice on corporate investigations, white collar criminal defense, private arbitration, and mediation work for litigants. In addition, he serves as chair of Akerman Bench, one of the nation's largest panels of former appellate and trial court judges, seasoned appellate lawyers, and former state and federal law clerks who provide guidance and feedback for optimal trial and appellate court presentations.

Prior to joining Akerman, Ruben served as Chief Judge of the U.S. District Court for the Northern District of Illinois, becoming the first Latino to hold this position in the district. He is known as a pioneer jurist who was pivotal in bringing diversity to the federal court system and the Chicago legal community. He has presided over high-profile and precedent-setting cases that continue to shape our legal system, and has advocated for clients from all walks of life, from Fortune 100 organizations to those underserved by our legal system. Before serving on the bench, Castillo was regional counsel to the Mexican American Legal Defense and Education Fund. He also served as Assistant United States Attorney in the Special Criminal Prosecutions Division for the United States Attorney's Office for the Northern District of Illinois.

For more than 20 years, Ruben has taught trial advocacy at Northwestern University School of Law, with law students recognizing him with five teaching awards.

# Panelist

## **Hon. James F. Holderman (Ret.)**

Former Chief Judge of the U.S. District Court for the Northern District of Illinois and current mediator with JAMS

Former U.S. District Court Chief Judge James Holderman joined JAMS in June 2015 after serving for 30 years on the federal bench in Chicago. During his judicial career, Judge Holderman resolved more than 10,000 cases in all areas of federal jurisdiction. After joining JAMS, he quickly became a highly sought-after mediator among lawyers across the country. Plaintiffs' counsel, defense counsel, and in-house counsel who have mediated with him have repeatedly sought to retain him again.

Before joining the judiciary in 1985, Judge Holderman was a successful trial and appellate lawyer specializing in federal litigation as a partner with a predecessor to the law firm now known as Dentons, and served as an assistant U.S. attorney where he received multiple awards for distinguished service.

Judge Holderman is widely respected for his work ethic, his legal knowledge, his wealth of experience, especially in intellectual property, class action, and complex cases, and the practical way he approaches resolving disputes in the best interests of all concerned.



# Panelist

## **Hon. Young B. Kim**

U.S. Magistrate Judge for the Northern District of Illinois

The Honorable Young B. Kim is a U.S. Magistrate Judge for the Northern District of Illinois. He presides over both civil and criminal matters. Judge Kim began his legal career as an Assistant Cook County Public Defender. He then served as a judicial clerk for the U.S. District Judge Charles R. Norgle of the Northern District of Illinois. In 1995, Judge Kim joined the U.S. Attorney's Office in Chicago where he litigated both civil and criminal cases. During his seven years as a federal prosecutor, Judge Kim focused on investigating and prosecuting healthcare fraud cases. In 2001, the U.S. Equal Employment Opportunity Commission appointed Judge Kim to serve as an Administrative Judge. Nine years later, in January 2010, the Northern District of Illinois appointed Judge Kim to the federal bench.

# Panelist

## **Julie Govreau**

Senior Vice President and General Counsel of GreatBanc Trust Company

Julie Govreau currently serves as Senior Vice President and General Counsel of GreatBanc Trust Company. She manages all legal and compliance matters for GreatBancTrust.

Ms. Govreau joined GreatBanc in 2016. Prior to joining GreatBanc, Ms. Govreau served clients with employee stock ownership plans (ESOPs) and other benefit needs at Drinker, Biddle & Reath, LLP and Morgan Lewis & Bockius, LLP. Ms. Govreau began her legal career in 2004 as an Investigator for the U.S. Department of Labor. Ms. Govreau's experience encompasses traditional employee benefits, labor and employment, corporate finance, institutional lending and ERISA and general litigation. She has been a senior associate on precedent-setting ERISA litigation, publishes frequently, and is widely sought as a public speaker.

Ms. Govreau earned a bachelor of arts from the University of Wisconsin, a master of public services management from DePaul University, a LL.M (master of laws) degree with honors and a juris doctor, magna cum laude and the Order of John Marshall, from The John Marshall Law School. Ms. Govreau's many affiliations include the Illinois and Federal Bar Associations, and serving as Immediate Past President of the Illinois Chapter of the ESOP Association and editor of the National ESOP Association's monthly Legal Update column. Apart from her career at GreatBanc, Ms. Govreau helps support her local community with pro bono services for veterans and is a trustee of Cornerstone Methodist Church and its Stepping Stones preschool.

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700+ Lawyers  
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**Hon. James Holderman**

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**Case Manager, Deborah Stewart  
Email: [dstewart@jamsadr.com](mailto:dstewart@jamsadr.com)  
Phone: 312-655-9192**

**JUDGE JAMES HOLDERMAN'S MEDIATION PROCEDURES**

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

Consideration of settlement is a serious matter that requires thorough preparation prior to the Mediation Conference. Set forth below are the procedures Judge Holderman will require the Parties to follow and the procedures Judge Holderman typically will employ in conducting the Mediation Conference.

**A. FORMAT**

**1. PRESETTLEMENT CONFERENCE EXCHANGE OF DEMAND AND OFFER.**

A Mediation Conference is more likely to be productive if, before the Conference, the Parties exchange written settlement proposals.

Accordingly, on a date set by agreement during the initial conference call, Plaintiff's Counsel shall submit a written Itemization of Damages, Settlement Proposal and brief Mediation Statement to Defendant's Counsel and Judge Holderman explaining why such a settlement is appropriate.

Also, on a date set by agreement during the initial conference call, Defendant's Counsel shall submit a written Settlement Proposal and brief Mediation Statement to Plaintiff's Counsel and Judge Holderman to explain why such a settlement is appropriate.

On occasion, this process will lead directly to a settlement.

For materials 15 pages or less, they can be emailed to Judge Holderman at [dstewart@jamsadr.com](mailto:dstewart@jamsadr.com). For materials over 15 pages, please deliver the materials to: JAMS, Inc., 71 S. Wacker Dr., Suite 3090, Chicago IL 60606, phone for delivery purposes: 312-655-0555.

**2. ATTENDANCE OF PARTIES REQUIRED. Parties with full and complete settlement authority are required to personally attend the Conference.**

An insured Party shall appear by a representative of the insurer who is authorized to negotiate, and who has *authority to settle the matter up to the limits of the opposing Parties' existing settlement demand*.

An uninsured corporate Party shall appear by a representative authorized to negotiate, and who has *authority to settle the matter up to the amount of the opposing Parties' existing settlement demand or offer*.

Having a Client with authority available by telephone is *not* an acceptable alternative, except under the most extenuating circumstances.\* Because Judge Holderman generally sets aside at least eight hours for each Mediation Conference, it is impossible for a Party who is not present to appreciate the process and the reasons which may justify a change in one's perspective towards settlement.

**3. MEDIATION FORMAT.** Judge Holderman will generally use a mediation format: that is, Judge Holderman meets with each Party and their Counsel in a caucus session, followed by a joint session with an opening presentation by Judge Holderman regarding the Mediation process and a discussion among those attending the Mediation of the issues to be resolved. After the joint session, the shuttle-diplomacy process proceeds with Judge Holderman taking proposals from one caucus room to the other, back and forth, until settlement is reached. Counsel and Party Representatives are expected to be fully prepared to participate. All Parties are encouraged to keep an open mind in order to re-assess their previous positions and to discover creative means for resolving the dispute.

**4. STATEMENTS INADMISSIBLE.** The Parties are requested to address each other with courtesy and respect. Parties are encouraged to be frank and open in their discussions. As a result, statements made by any Party during the Mediation Conference are not to be used in discovery and will not be admissible at trial.

**B. ISSUES TO BE DISCUSSED**

Parties should be prepared to discuss the following at the Mediation Conference:

1. What are your goals in the litigation and what problems would you like to address?

What do you understand are the opposing side's goals?

2. What issues (in and outside of this dispute) need to be resolved?

What are the strengths and weaknesses of your case?

\*The purchase of an airplane ticket is not an extenuating circumstance.

3. Do you understand the opposing side's view of the case?  
  
What is wrong with their perception?  
  
What is right with their perception?
4. What are the points of agreement and disagreement between the Parties?  
  
Factual? Legal? Financial?
5. What are the impediments to settlement?  
  
Financial? Emotional? Legal?
6. Does settlement or further litigation better enable you to accomplish your goals?
7. Are there possibilities for a creative resolution of the dispute?
8. Do you have adequate information to discuss settlement?  
  
If not, how will you obtain sufficient information to make a meaningful settlement discussion possible?
9. Are there outstanding lien holders or third parties who should be invited to participate in the Mediation Conference?

#### **C. INVOLVEMENT OF CLIENTS**

Parties and their lead Counsel are expected to appear at the Mediation Conference on the date and time set. For many Clients this will be the first time they will participate in a Mediation Conference. Therefore, prior to the Mediation Conference, Counsel shall provide a copy of these Mediation Procedures to the Client and shall discuss the points contained herein with the Client.

#### **D. PREPARE FOR SUCCESS**

In anticipation of a settlement, the Parties should review and be prepared to complete Judge Holderman's Settlement Checklist/Term Sheet at the conclusion of the Mediation Conference. Attached please find the Settlement Checklist/Term Sheet for review.

**Should you have any questions, please contact the Case Manager, Deb Stewart, at 312-655-9192 or [dstewart@jamsadr.com](mailto:dstewart@jamsadr.com).**

**We look forward to a complete resolution of this case. Thank you.**

**Judge James Holderman (Ret.)**

**SETTLEMENT CHECKLIST/TERM SHEET**

CASE NAME: \_\_\_\_\_ vs. \_\_\_\_\_

JAMS CASE NO. \_\_\_\_\_ DATE: \_\_\_\_\_

COURT CASE NO. (if any) \_\_\_\_\_

**A. PAYMENT OF MONEY**

1. To: \_\_\_\_\_ From: \_\_\_\_\_

2. Total amount to be paid: \$ \_\_\_\_\_

3. When: \_\_\_\_\_

4. Payment terms (e.g., to whom checks will be written, number of payments, payment schedule, etc.):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

5. Are parties responsible for their own attorney's fees and cost? Yes or No

a. If no, explain: \_\_\_\_\_

6. Any third party liens to be paid from proceeds? Yes or No

a. If yes, to whom: \_\_\_\_\_

7. Tax Treatment (e.g., W-2, 1099): \_\_\_\_\_

**B. SELECT A RELEASE OPTION**

☐ Release (relinquishment of a right)

OR

☐ Covenant Not to Sue (agreement not to sue)

Choose one of the following:

- a. One Way From Plaintiff(s) to Defendant(s), or
- b. Mutual

Scope of Release:

a. General Release:

- 1. All claims raised in the litigation, or
- 2. All existing claims, whether or not raised in litigation.

OR

b. Limited Release:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Scope of Covenant Not To Sue:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Expectations of Covenant Not to Sue:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Other Covenant Not to Sue Terms:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

### C. CONFIDENTIALITY

1. Settlement agreement to be confidential: Yes or No

2. Mutual Confidentiality: Yes or No

3. What can be said about litigation or dispute?

a. Dispute amicably resolved, or

b. Other: \_\_\_\_\_

4. Exceptions to confidentiality? Circle exceptions that apply:

a. Attorneys

b. Tax advisors

c. Immediate family

d. As otherwise required by law

e. Other: \_\_\_\_\_

5. [Optional] Liquidated damages in event of breach of confidentiality agreement: Yes or No

a. Amount (Not too large to avoid being a penalty, e.g., no more than 5-10% of total settlement): \$ \_\_\_\_\_

### D. OTHER SETTLEMENT TERMS

1. No admission of liability.

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**E. EMPLOYMENT CASES ONLY**

1. Ability to reapply: Yes or No

2. Type of reference:

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**F. EFFECTIVE DATE OF SETTLEMENT**

1. A binding agreement today; or

2. No binding agreement until the typed settlement agreement is signed.

(Select in instances where parties need to negotiate additional material terms or obtain further approval.)

**G. CONFIRMING AND DOCUMENTING SETTLEMENT**

1. Settlement terms to be incorporated in a typed written agreement? Yes or No

a. Typed agreement to be prepared by \_\_\_\_\_

and sent to other parties on or before \_\_\_\_\_

b. Other parties to respond with changes, if any, by \_\_\_\_\_

2. Typed settlement agreement to be executed on or before \_\_\_\_\_

3. Will settlement agreement be filed in court? Yes or No

4. Other terms regarding documenting settlement:

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**H. DISMISSAL OF LITIGATION AND ENFORCEMENT OF AGREEMENT (Choose one):**

1. Immediate dismissal without prejudice that automatically converts to a dismissal with prejudice unless on or before (select date): \_\_\_\_ / \_\_\_\_ / \_\_\_\_ a party files a motion to reinstate, a motion to enforce the settlement agreement, or a motion for additional time to file a motion to reinstate or a motion to enforce the settlement agreement.

*(This form of dismissal is recommended for federal cases in the Seventh Circuit where parties want the Court to retain jurisdiction until all settlement terms are fulfilled before dismissing the case with prejudice. Consult with your counsel regarding 3 Seventh Circuit case law on this issue.)*

2. Dismissal with prejudice to be entered (circle one): (a) immediately, or (b) on [\_\_\_/\_\_\_/\_\_\_] or (c) only after settlement agreement is signed and payment is made, or (d) promptly after the following conditions are satisfied: -

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3. Dismissal with prejudice and parties agree in the dismissal order that the Court shall retain jurisdiction for the purpose of enforcing the terms of the settlement agreement.

*(Consider for all federal cases in circuits other than the Seventh Circuit. See Kokkonen v. Guardian Life Insurance Company of America, 511 U.S. 375, 381-82 (1994). Consult with your counsel to determine whether the court in your jurisdiction can retain jurisdiction to enforce a settlement after a dismissal with prejudice is entered).*

I. DO PARTY REPRESENTATIVES HAVE FULL AUTHORITY TO ENTER INTO SETTLEMENT AGREEMENT? Yes or No

Print name of party representative, his or her title, and name of party:

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Signatures of party representatives:

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|-------|-------|
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J. NEXT DATE TO REPORT ON SETTLEMENT (if needed): \_\_\_\_\_

**Hon. James Holderman**

**JAMS  
71 South Wacker Drive  
Suite 3090  
Chicago IL 60606  
Phone: 312-655-0555  
Fax: 312-655-0644**

**Case Manager, Deborah Stewart  
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**JUDGE JAMES HOLDERMAN'S CLASS ACTION CHECKLIST**

- I. Class Definition**
  - A. Possible sub-classes**
  - B. Approximate class size**
  
- II. Monetary Relief or Other Consideration**
  - A. Fund Case**
    - 1. Payments to class**
    - 2. Cost of notice**
    - 3. Cost of administration**
    - 4. Attorney's fees**
    - 5. Incentive award**
    - 6. Other**
  - B. Non-Fund Case**
  
- III. Non-Monetary Relief**
  - A. Stop existing practice**
  - B. New practices**
  - C. Agreement to make change**
  - D. Injunctive relief**
  - E. Other**

- IV. Form and Scope of Release**
  - A. Any and all claims**
  - B. Statutory Claims Only**
  - C. Parties to be released**
  - D. Exceptions to release, if any**
  
- V. Claims Process**
  - A. Claims Made**
  - B. No Claim Necessary**
  - C. Pro rata distribution**
  - D. Tax treatment**
  
- VI. Reverter or No Reverter**
  
- VII. Cy Pres**
  
- VIII. Form of Notice**
  - A. Are there lists or other means of identification**
  - B. Mail**
  - C. Internet**
  - D. Publication**
  - E. Costs – Out of Fund or an extra**
  
- IX. Administration**
  - A. Third Party Administrator**
  - B. Party Administrator**
  - C. Costs – Out of Fund or an extra**
  
- X. Opt-Outs**
  - A. Possible blow up provision**
  
- XI. Possible Objectors – Anticipate issues**

- XII. Approval Process**
  - A. Federal**
  - B. State**
  - C. Know Your Judge**
  
- XIII. Attorney's Fees**
  - A. When to discuss**
  - B. Amount – Percentage or Specific Number**
  
- XIV. Incentive Award to Named Plaintiffs**
  - A. When to discuss**
  - B. Amount**
  
- XV. Confirmatory Discovery**
  - A. Is it necessary**
  - B. If so, what is the scope and methods of discovery**
  
- XVI. How to use the mediation to assist in obtaining preliminary approval**

**Judge James Holderman (Ret.)**

## Agenda for Conference Call with Dial-in Instructions

**We have scheduled a Conference Call for the above-referenced matter on:**

**Please dial \_\_\_\_\_ and when the Operator answers, please request to be connected with the Judge Holderman Conference.**

The Agenda for the Call is:

- 1) Mediator's disclosure—Any questions regarding Judge Holderman's professional background or prior involvement with Counsel or Parties;
- 2) Brief, objective overview of the facts by each Party;
- 3) Status of the litigation (fact discovery, expert discovery, dispositive motions, trial date);
- 4) Prior settlement negotiations, if any;
- 5) Issues to be resolved (payment terms, confidentiality, scope of release, etc.)  
*See Judge Holderman's Settlement Checklist/Term Sheet (attached);*
- 6) Impediments to settlement (inability to pay, personalities, necessity for other parties such as insurance carriers or lien holders, etc.);
- 7) Explanation of Mediation process and procedures and questions, if any  
*See Judge Holderman's Mediation Procedures (attached);*
- 8) Set due dates of Party Mediation statements, settlement proposals and other background information to be exchanged by the Parties with copies delivered to Judge Holderman;
- 9) Date(s), start time and location of Mediation Session:
- 10) Identification of Participants at the Mediation Session with sufficient authority to resolve the Matter; and
- 11) Any other items the Parties wish to discuss.

JAMS Call Provider#