

## Why Not Settle This Outside?

*Honorable Bruce M. Selya*

**A**CCUSTOMED AS WE ARE within the Appellate Judiciary to shroud our mission in the intellectual trappings of opinion writing, we sometimes forget that, at its core, the least dangerous branch's role in our republican form of government is much more basic: we resolve disputes. Those disputes may involve questions of state (such as whether the Executive must submit to an investigating Legislature), or questions of constitutional import (such as the circumstances under which police officers may search and seize), or more mundane matters (such as how much a BMW owner deserves in damages upon learning that his "new" car actually has been repainted). Regardless of the subject matter, however, the Appellate Judiciary – like the Judicial Branch as a whole – is a service institution whose offerings must satisfy the needs of our constituents – the lower courts, the bar, the litigants whose cases come before us, and most of all, a contentious public. The traditional range of our offerings has been narrow and designed only to aid the determined liti-

gant. That is a luxury we can no longer afford. As the needs of our user base change, so too must our product.

In an era in which the cost and frequency of litigation are on the rise, appeals have become a bargain. And as appeals proliferate, the traditional adjudicatory model seems less responsive to the legitimate needs of parties and the Appellate Judiciary alike. It is therefore a matter of universal interest to expedite the process as long as expedition does not hamper the securing and due enforcement of rights and obligations. It is for this reason that most of the federal courts of appeals have responded to spiraling costs and overworked judges by developing alternative dispute resolution programs. Although there is admittedly something counterintuitive about post-trial settlement programs, the First Circuit's experience with such a mechanism has been heartening.

The Civil Appeals Management Program (CAMP) has operated in the First Circuit since 1992. All counseled civil appeals are included in CAMP except prisoner petitions, immigra-

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tion matters, summary enforcement actions of the NLRB, and cases that contain unresolved jurisdictional issues. Once the Clerk of Court identifies an eligible case she routes it to a CAMP Settlement Counsel – positions that historically have been occupied by retired state supreme court justices and senior federal district judges – who then reviews the issues and does a modicum of preparation. The Office of the Settlement Counsel contacts counsel for the parties and arranges for a conference (which occurs prior to full briefing). The parties have the option of attending these conferences, but if they elect not to do so, they must empower their attorneys to come to the table with full settlement authority. Despite the fact that participation in these conferences is mandatory, settlement remains completely voluntary. The conferences are held in complete confidence; there is no communication between the Settlement Counsel and the Judges; and the rules preclude any mention in later proceedings of what allegedly transpired in a failed settlement conference. In short, no ill consequences attend the failure to settle.

At these conferences, the Settlement Counsel attempts to mediate a solution. Typically, after an initial joint session, he meets with the parties separately. His latitude at this stage is broad; he may candidly appraise the case's likely outcome, solicit settlement options, or devise solutions of his own. If the Settlement Counsel's efforts are successful, then the case goes away and the parties are satisfied. If participation in CAMP has not produced a solution, then the Settlement Counsel notifies the Clerk's office, and the appeal proceeds in the usual course. Even a failed settlement conference often serves a useful purpose by narrowing the issues actually briefed and argued before the court.

Since the program's inception, approximately 35% of CAMP-eligible cases settle after the conference. In the cozy confines of the First Circuit, this amounts to around 120 cases

per year – no small potatoes. For a court with only six authorized judges and one vacancy (another topic, another day), this work is invaluable.

Even this cursory review of the CAMP system and its efficacy reveals that it is hardly a *judicial* procedure. I think that this is all to the good. Now, don't get me wrong; I am as fond of judicial procedures as the next judge, but there are times and places where the cost and formality attendant to such procedures impede sensible solutions to burgeoning caseloads. Courts must be open to new approaches. Where streamlined mechanisms can resolve conflicts more effectively than the melee of litigation, courts best fulfil their institutional purpose by providing fora to address those resolvable conflicts. The key to CAMP's success is the Settlement Counsel's freedom to engage the parties with candid assessments of their case. Parties properly value this advice as confidential and as coming from a person of authority and knowledge.

There is a looming danger, and it is my awareness of this danger that prompts me to write today. As programs like CAMP become more common on the appellate level, courts will feel intense pressure to increase the regularity of these systems – to take the "A" out of "ADR." It is imperative that courts assiduously avoid this tendency. The strength of these systems rests in their inexpensiveness, informality, and flexibility. With an emphasis on procedure comes an unavoidable increase in cost and, even more seriously, a loss in the ability to respond and react to the vagaries of the dispute resolution process. Let me illustrate my point by falling prey to the pet foible of judges and lawyers everywhere – telling a war story.

As a district court judge, I presided over a case that I will call *Joe Doe v. Fictional City of Seaside*. (I have changed the names to protect the embarrassed.) Doe, a political malcontent, frequented Seaside's coffee houses and cadged

free meals by performing songs of his own composition, many of which were sharply critical of local government. When not agitating for civic reform, Doe liked to fish. He owned a battered rowboat – valued generously at \$50 – and, in accordance with local custom, left it on a driftway (a deserted stretch of the municipal beach) when not in use. One day, the powers-that-were sent the City's Public Works Department to remove the boat from the beach as a public nuisance and obstruction. The city workers not only removed it but also chopped it into hundreds of very small pieces.

Once he recovered from the shock, Doe filed a § 1983 action against the Mayor and the entire City Council. He alleged that the City had destroyed his boat in an effort to silence him. After three days of trial with no end in sight, it became clear to me that the jury found Doe's tale of intrigue and persecution compelling. I called the attorneys into chambers in an effort to settle the case. Stressing to the City the likelihood of an adverse finding and to the plaintiff his inability to demonstrate any significant damages, I suggested that they agree to settle for \$25,000 plus counsel fees – enough for a new boat and perhaps a vintage Stratocaster.

After much posturing and shuffling of feet, the city solicitor, the other defense lawyers, and the plaintiff's counsel signed on, and the matter seemed destined for amicable resolution. But Joe, as was his wont, dissented. The lawyers asked if I would see him privately, and I agreed. Joe's position came through clearly: he wasn't in it for the money. He wanted *Justice!* He wanted public vindication. This was

all well and good, but if he persisted, the trial would go on, the inevitable barrage of motions would ensue, someone would appeal, and the cost to the parties and the system would mount. The situation cried out for an innovative approach. Joe and I had a little heart-to-heart. I then called the lawyers into chambers, and told them that the case would settle as previously agreed, provided that the Mayor and City Council were in court the next morning to hear the jury dismissed. The defense attorneys shuffled some more, but the unhappy prospect of continued litigation brought them around. I recessed for the day.

The case resumed the next morning with judge, jury, and principals assembled. I asked the Marshals to close the doors of the courtroom and not to permit anyone to enter or exit. I thanked the jury for their attention and announced that the parties had resolved their differences. I then asked everyone to remain in their seats as there was one final matter remaining. I nodded to Joe, who pulled out his guitar and proceeded to serenade a packed courtroom, including his erstwhile tormentors, with a set of his most irreverent favorites.

Although it is unlikely that we will hear the strains of a coffee house troubadour at court in Boston anytime soon, the case is instructive. Flexibility and a willingness to innovate can go a long way toward resolving situations that otherwise promise to get uglier, more protracted, and much more dear. The extent to which appellate courts keep this principle in mind when pressures to "regularize" appellate ADR programs inevitably rear their neatly coiffed heads is likely to dictate the future success of such programs. *GP*