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Real Lawyers Settle: A Successful Post-Trial Settlement Program in the California Court of Appeal

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REAL LAWYERS SETTLE: A SUCCESSFUL POST-TRIAL SETTLEMENT PROGRAM IN THE CALIFORNIA COURT OF APPEAL

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I. INTRODUCTION

Litigators have long been admired as the knights of the legal profession. Whether perceived in black or white, trial lawyers are respected for doing battle for their clients. Nevertheless, something has been forgotten.

The purpose of the litigation war is to win. But winning should be defined as achieving the best results, all things considered. Chances of retaining the victory, the net costs—financial and emotional—and the tax consequences, are just some of the issues to ponder. Indeed, when all is said and done, real lawyers litigate as a last resort: Real lawyers settle.

Many "tough" lawyers have difficulty accepting this concept at any stage of the litigation. Imbued with the idea that even to broach settlement implies weakness in their case or, worse yet, themselves, these lawyers sharpen their spears and head directly to the combat zone. And once trial proceedings are complete and a notice of appeal has been filed, mighty lawyers are interested only in pushing their claims forward. Only losers settle while on appeal, they would say. Well, I can assure you that Division Three of the Fourth Appellate District of the California Court of Appeal knows better.

II. FOURTH APPELLATE DISTRICT, DIVISION THREE

A. Settlement Program

We have been busy since our court's inception in 1983. Indeed, when we opened for business, 353 cases were awaiting decision.

Then the number of appeals filed far exceeded original projections. To complicate matters, our annual writ filings were far greater than those of other divisions.[1] Furthermore, we were the only division in the state

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1. We averaged 124 writ applications per justice, compared to a statewide average of 88.

whose civil appeals and civil writ filings outnumbered their criminal counterparts.[2]

We tried hard to reduce the backlog and make timely decisions. During fiscal years 1983 through 1988, we issued just short of 2000 opinions, reviewed 2027 writs and wrote 271 writ opinions. But the bottom of the barrel eluded us. As of January 1, 1988, there were 169 pending appeals per authorized justice, the highest in the state.

By the spring of 1988, it was apparent that the demand for justice was more than we could supply. In response, we instituted a unique and aggressive settlement program. Originally, approximately one-third of our civil cases participated in settlement conferences; some were voluntary, others were mandatory. As the program continued, only one aspect changed significantly: More cases were ordered to settlement conferences. As the program's success became apparent, the guidelines were expanded to accept more unilateral requests for conferences. We also increased the number of post-briefing mandatory conferences. Eventually, nearly 95% of the civil cases participated in a settlement conference.

The results were startling.[3] In the program's first three years, we settled 40% of the cases (approximately 400) that participated in a settlement conference.

B. Bench and Bar Attitudes

The program was not an easy sell. Neither lawyers nor my colleagues nor the superior court judges who participated as pro tem settlement judges thought it would work. Some felt it inappropriate that the court of appeal was entering the settlement business. Others thought the

2. This is still true. Indeed, approximately 70% of our caseload is civil. These cases generally take longer to review.

3. The number of pending appeals decreased significantly:

APPEALS PENDING (ALL PER AUTHORIZED JUSTICE) FISCAL YEAR BASIS	NUMBER PENDING	CASES SETTLED
June 30, 1988	170	
September 30, 1988 [in state next highest number was 130; lowest was 83]	169	
December 31, 1988	165	
March 31, 1989	163	104
March 31, 1990	125	1989-90 130
July 1990	109	1990-91 109
July 1991	113	1991-Oct. 31 45

concept laudable but unworkable. Why would people settle when success was already theirs? Why would anyone compromise a summary judgment or a multimillion dollar jury verdict? And how could a settlement take place before briefing, without the record in place—or after the briefs were paid for and the positions cast in concrete?

The answers are as follows. First, we found it does not matter whether the case has been fully briefed,[4] or whether it is a pre- or post-trial judgment.[5] The type of case is also of little significance.[6] What does matter is the individual conducting the conference. There is a direct relationship between the judicial officer serving as the settlement judge and the chances for success.

The majority of the conferences result from mandatory orders rather than party stipulations. But statistically, the difference is meaningless because the success rate is relatively the same. What is important is that the lawyers somehow do get together. A study of trial settlements indicates that lawyers and judges alike believed the best way to settle a case is to involve a judge and to "require a settlement conference."[7]

The concern over the inappropriateness of our court becoming involved in settlement conferences all but vanished as the results became known. If litigants, the people for whom the profession exists,[8] were better served by the program, how could it be wrong? Each and every liti-

4. The vast majority of the conferences resulted from an order to meet post-briefing. For example, of all the settlement conferences involving contract issues, twice as many arose from mandatory post-briefing situations as from pre-briefing one-party requests or stipulations.

5. Note, however, that a majority of the cases, with the exception of family law cases, involved pre-trial appeals. That is, the appeal was from a summary judgment, judgment on the pleadings, or sustaining of a demurrer without leave to amend. While saving hundreds of hours of appellate court time, the settlement program also avoids retrials and even trials in the first instance.

6. The chart in the Appendix is instructive. We have been the least successful in settling cases in which an insurance company is a party. Family law practices are the ones most likely to stipulate to a conference. Conversely, other civil, non-tort litigants, in matters involving dismissals, contracts, attorney fees and sanctions, are least likely to stipulate to a settlement conference.

7. James A. Wall, Jr. & Dale E. Rude, *Judicial Involvement in Settlement: How Judges and Lawyers View It*, 72 JUDICATURE 175, 177 (1988).

8. The California Supreme Court in Neary v. Regents of the University of California, 3 Cal. 4th 273, 834 P.2d 119, 10 Cal. Rptr. 2d 859 (1992), recognized that our judicial system exists for the litigants. The court validated stipulated reversals, finding that this practice "is not an attempt to erase or rewrite the record." *Id.* at 282, 834 P.2d at 124, 10 Cal. Rptr. 2d at 864. At least one commentator disagrees, arguing that such sentiment indicates lack of judicial self-esteem. *See* Stephen R. Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 LOY. L.A. L. REV. 1033 (1993). Quite the contrary, allowing parties to solve their own problems reflects acceptance of the fact that we as judges are dispensable and are not *sui generis*.

gant became a winner. And, of course, that answers the question of why lawyers settle on appeal.

C. Reasons for Success

There are a myriad of reasons explaining how we were able to conduct an appellate settlement program for 95% of our civil cases which resulted in 40% of those cases settling. Most importantly, we *insisted* that the lawyers meet together with either a justice from our court or a pro tem trial court judge. The lawyers were ordered to file comprehensive statements and the judicial officer conducting the conference *read* the material and the briefs. In other words, everyone was prepared.

We involved the parties. The litigants' attendance was mandatory as was that of insurance carriers, if applicable. We found that in many instances this was the *first* time the litigants felt they had an opportunity to tell their story and actually communicate with a judge.

We were not shy in ordering other relevant persons to a conference. Many times this resulted in settling companion cases not yet filed or matters still pending in the trial court. We went behind the actual appealed judgment to examine the underlying issues. For example, we might scrutinize the chances of success for retaining a summary judgment and then examine the chances for victory if the summary judgment were reversed.

We were mindful not to encourage settlement for settlement's sake. That is, one with a totally unmeritorious claim should not be rewarded because he or she chose to file a notice of appeal. Indeed, many cases settled simply with the *dismissal* of the notice of appeal.

This is indicative of another issue as well. The program served as an educational process. Many lawyers do not realize what is necessary for a successful appeal. We explain the importance of an adequate trial record. The lawyers are surprised to find that 93% percent of the cases on appeal are affirmed. Concepts of substantial evidence and appropriate standards of review, once understood, lead not only to resolution of the pending appeal but perhaps lead to fewer being filed in the future. Once lawyers realize an appeal is not a second trial, they are less apt to push forward.

The ability to craft the result in a fashion to achieve justice for all concerned was soon recognized. Whether it be tax consequences, a structured settlement or promotion of future business, the parties working together can better resolve their differences and devise a more equitable compromise than can the court.

Highly significant is the realization of what *winning* might entail. The result may not be what is intended. Often a party cannot afford to

win on appeal because the cost is prohibitive. A victory may result in a new trial, only to be followed by another appeal. And the award gained in a new trial is often less than the amount spent to achieve what is perceived to be victory. The same factors that motivate a pre-appeal settlement induce parties to settle on appeal. The litigants wish to conclude years of costly litigation. They desire certainty. Indeed, these factors become even more important on appeal.

Contrary to popular belief that appellate settlement conferences are futile, cases may be *easier* to settle at that time than at an earlier stage of the litigation. At the appellate level, the facts have been decided. The attorneys understand their positions better, or more realistically. The records have been reviewed and the precedent researched. The bravado associated with the filing of a notice of appeal or responding thereto has given way to an assessment of the reality of prevailing. As in the trial court, the closer the moment of truth, the better the chance of a realistic compromise.

III. CONCLUSION

There is a time and place for everything. Our appellate courts should not become houses of alternative dispute resolution. However, we should foster settlement as one facet of the process of delivering justice to our litigants. Lawyers, in representing their clients' best interests must appreciate the benefits of settlement and take pride in these results. Real lawyers win; real lawyers settle.

MARCH 1989 THROUGH AUGUST 1991

	SETTLE										NONSETTLE										
		PRE-TRIAL ORDER DISMISS DEMURRER S.J.			JUDGMENT TRIAL NONSUIT JNOV			POST TRIAL RELIEF				PRE-TRIAL ORDER DISMISS DEMURRER S.J.			JUDGMENT TRIAL NONSUIT JNOV			POST TRIAL RELIEF			
ISSUES	SETTLE TOTAL	M	P	S	M	P	S	M	P	S	NON-SETTLE TOTAL	M	P	S	M	P	S	M	P	S	TOTAL
FAMILY LAW	45	0	0	0	7	6	3	19	7	3	22	3	0	0	8	1	0	5	3	2	67
CONTRACTS MISC.	57	10	8	3	18	10	6	2	0	0	107	22	5	2	51	13	8	5	1	0	164
EMPLOYMENT	13	1	2	0	7	2	0	1	0	0	21	6	5	0	9	1	0	0	0	0	34
PROP./PERS.INJ.	38	11	4	4	7	7	5	0	0	0	47	20	3	2	11	6	3	1	1	0	85
MALPRACTICE	14	4	6	0	0	2	2	0	0	0	23	12	3	0	3	2	1	1	0	1	37
TORTS—MISC.	21	5	7	0	6	3	0	0	0	0	41	12	2	2	11	5	6	1	1	1	62
CORP./PART.	1	0	1	0	0	0	0	0	0	0	16	6	1	0	6	2	1	0	0	0	17
INS. DEF/COV.	10	3	0	1	4	1	0	1	0	0	57	22	9	2	22	1	1	0	0	0	67
CIVIL—MISC.	26	3	3	1	10	7	0	1	1	0	46	14	7	1	12	2	2	3	3	2	72
STATUTORY/GOV'T	15	2	2	0	5	3	3	0	0	0	20	7	1	3	5	3	0	0	1	0	35
SANCTIONS COSTS FEES	14	3	2	0	2	4	1	2	0	0	25	5	3	0	13	0	1	2	1	0	39
TOTALS	254	42	35	9	59	45	20	26	8	3	425	129	39	12	151	36	23	18	11	6	679

M = Mandatory—Ordered to Appear

P = Party (one or the other) requested conference

S = Stipulation by both parties for conference