Settling Civil Cases:
The Quest For Fairness

Many lawyers believe that to be successful as settlement facilitators judges must be "fair," i.e., they must be seen as impartial, open-minded, not identified with one side, or class of litigants, or with one perspective on debatable matters.

Two of the questions from our survey were designed to explore the fairness issue. The first attacked the central issue frontally by asking: "Does involvement by federal judges in the settlement process significantly increase the likelihood that settlements will be fair to all concerned?" While only 23 percent of the responding lawyers answer "no," the percentage answering "yes" is just 46 percent. A sizeable 30 percent are "not sure" whether judicial involvement affects the fairness of settlements.

One goal of the survey was to see whether a significant percentage of attorneys would think that a question about settlement "fairness" is answerable. More than two-thirds of our respondents seem to think so. These lawyers say that they can make rough assessments of how well negotiated solutions conform to the merits of litigants' underlying positions. They also say that they can compare the quality of settlements that emerge from purely private negotiations to the quality of those that emerge from processes in which

By Wayne D. Brazil
judicial officers play significant roles. Two-thirds of the lawyers who feel capable of making such comparisons believe that involvement by a federal judge significantly increases the likelihood that a settlement will be fair to all concerned.

Lawyers who practice in the Northern District of California are substantially more likely than lawyers who practice in the other study districts to believe that judicial involvement significantly increases the likelihood that settlements will be fair. The contrast in views on this matter is greatest between the Floridians and the Californians. Thirty-seven percent of those responding from Florida answer this question in the affirmative; in comparison, 54 percent of those from northern California hold this view. Moreover, the percentage of attorneys who deny that judges are likely to improve the justness of settlements is almost twice as high in Florida (29 percent) as it is in California (15 percent).

These differences of opinion apparently are not attributable to differences in characteristics of lawyers' practices. Instead, we suspect that the source of these differences is the fact that judicial involvement in the settlement arena is more active and assertive in both state and federal courts in northern California than in the other three regions. Moreover, the percentage of attorneys who want federal judges to be active and openly evaluative in settlement discussions is highest in northern California. At least some of these lawyers believe there is a connection between how active and expressive a judge is in settlement negotiations and how much he or she is likely to contribute to the fairness of settlement agreements. The consensus seems to be that the judges who are the most involved in the process, who are the most analytically active, most improve the quality of the product that emerges from it.

We posed one additional question that explored lawyers' views on this subject. We asked: "Should a judge who believes that a party is about to accept a settlement that clearly is unreasonable take some step to encourage that party to reconsider its position?" The responses to this question are among the most revealing we received. They suggest that most lawyers believe there is a boundary that protects the center of the adversary system that even well-meaning judges should not cross. In other words, there is a limit on the kind of judicial activism in settlement that is acceptable to most litigators. Only 29 percent of the responding lawyers from the four districts believe that a judge should take any action that might induce that party to reconsider a clearly unreasonable offer. While 16 percent are not sure what a judge should do in this situation, 54 percent say he or she should do nothing. Presumably this majority would object to the propriety of a judge even subtly indicating his or her views about the foolishness or unfairness of the proposed agreement.

Lawyers possibly object to intervention in this situation in part because they fear that judges often would not adequately understand the case or the parties' situations outside the litigation to form a reliable opinion about the overall reasonableness of a proposed settlement. Lawyers also might fear that judges with incomplete information would perceive unreasonableness where there is none and would abort, without real justification, decent agreements. Some of our data lend some support to this hypothesis. If fear of judicial misperception contributes to our respondents' objections to this form of judicial activism, one would expect to find more resistance to it among lawyers who practice in larger firms and tend to handle bigger and more complex cases.

As it happens, our data show just that. For example, of the lawyers whose cases involve typically less than $50,000, 34 percent believe judges should encourage a party to reconsider its position if a settlement appears unreasonable to the judge. Among lawyers who normally handle matters worth more than $1,000,000 the comparable figure is only 24 percent. The differences are even more pronounced when we compare the opinions of lawyers grouped according to the size of the firm in which they practice. There also is a different and dramatic correlation between firm size and level of resistance to a judge intervening in this situation: the bigger the firm, the more likely the lawyer is to object.

Other aspects of our data, however, indicate that attitudes on this sensitive issue are informed by more subtle forces and reflect feelings about broader matters. We suspect that how attorneys respond to this question is affected by their feelings about the value of an unadulterated adversary system, the importance of rewarding the more skillful competitor, and the belief that each person is responsible for (and must live with) his or her own decisions.

Our data suggest that different subcultures within the litigation bar have quite different attitudes toward these fundamental issues. Even though the Florida group includes higher percentages of small case and small firm lawyers than the California group, the percentage of litigators who object to this form of judicial activism is appreciably higher in northern Florida (63 percent) than it is in northern California (48 percent). This result contradicts the "case size/firm size" hypothesis and sug-
suggests that there is some other, more powerful factor influencing lawyers’ feelings on this issue.

Among the four study districts, the lawyers least comfortable, in general, with an activist judicial role in settlement are the northern Floridians, and the lawyers most comfortable with that role are the northern Californians. The inter-district differences of opinion on this matter seem to reflect basic differences in lawyer acculturation in the two regions. In northern Florida the subcultural norm apparently remains the traditional adversary system in which the judge plays an essentially passive role.

We find additional support for this “acculturation” thesis when we compare views of plaintiffs’ attorneys and defense counsel about the propriety of judicial intervention on behalf of a party about to accept an unreasonable settlement. We find another direct and dramatic correlation when we examine the relationship between lawyers’ opinions on this issue and the percentage of their time lawyers devote to representing defendants. The more time attorneys devote to defense work the greater the likelihood that they will object to a judge taking action to protect a litigant from what the judge perceives as the litigant’s bad judgment. While only 36 percent of the lawyers who work primarily for plaintiffs think a judge should take no action in such situations, the figure climbs to 69 percent among attorneys who spend virtually all of their time on the defense side.

Given this pattern, one would expect to find more sympathy for judicial intervention in this situation in those districts where the responding attorneys, as a group, spend relatively more of their time on the plaintiffs’ side. Again, however, cultural forces seem stronger than other situational variables. Even though the percentage of attorneys who spend virtually all of their time representing defendants is smaller among the Floridians than among the Californians, there is appreciably less support for this kind of judicial intervention in the former group than there is in the latter.

Comparably striking differences of opinion emerge when we compare the views of two other subgroups: (1) lawyers who work in legal aid or public interest settings (not for government, per se) and (2) lawyers employed directly by private companies, e.g., as corporate or house counsel or within the legal department of an insurance carrier. While the numbers of attorneys who placed themselves in these two categories are too few to support firm conclusions, the thrust of these two groups’ views on some issues is too clear and too suggestive to ignore. For example, among the legal aid/public interest lawyers only 18 percent believe that a judge should not encourage a party to reconsider if, in the judge’s view, the offer the party is about to accept clearly is unreasonable. In sharp contrast, 69 percent of the company lawyers object to a judge taking action in this situation.

There are similar but somewhat less extreme differences of opinion between these two subgroups with respect to the other question that explores the relationship between judicial roles and fairness in settlement. Sixty-four percent of the legal aid/public interest attorneys believe that “involvement by federal judges in the settlement process significantly increase[s] the likelihood that settlements will be fair to all concerned.” Among the company lawyers only 46 percent share this view. It also is noteworthy that on this question opinions diverge along the same lines between plaintiffs’ lawyers and defense counsel. Fifty-four percent of the predominantly plaintiffs’ group feel that judicial involvement appreciably improves the odds that a settlement will be fair. Among lawyers who find themselves on the defense side in the great majority of their cases, the comparable figure is only 43 percent.

We can only speculate about why the small firm/plaintiffs’ people seem more likely to believe that active judicial involvement in the settlement process works to their advantage. Perhaps they feel that they often confront opponents with greater resources and that an active judicial officer functions as something of a resource equalizer. Perhaps they feel that defendants often enjoy situational advantages in settlement negotiations, controlling more of the relevant evidence and all of the relevant purse strings, and that an active judicial officer functions as something of a leverage equalizer. Perhaps they are less confident about their lawyering skills and sophistication and more afraid of erring, so look to an active judge as something of a safety net. Perhaps they simply are more likely to believe in the righteousness of their clients’ cause and that a neutral will take their side.

A law clerk who has observed many settlement conferences offers another possible reason for the difference in views on these issues between the big firm/defense groups and the small firm/plaintiffs’ groups. He suggests that attorneys who practice in large firms and usually represent defendants are more likely than attorneys in small firms and who normally represent plaintiffs to have ongoing relationships with clients. The big firm/defense lawyers often represent institutional clients (e.g., carriers, banks and other larger corporations) on a continuing basis. Lawyers in such situa-

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tions have an especially acute interest in preserving their credibility with their clients and do not want to lose a stable source of work. They might be concerned that a court would adopt the practice of informing attorneys and clients that settlement proposals deemed acceptable by both sides were, in the court's view, clearly unreasonable. In other words, the lawyers with the greatest interest in preserving continuing relationships with clients have the most "face" to lose if judges are willing to express opinions to clients, which in effect second-guess the recommendations counsel have made. We have no way of determining from our data whether a consideration like this accounts for the difference.

Of the six subgroups discussed in the preceding paragraphs, one breaks ranks too often to be treated as conforming to the patterns just described. The "company lawyers," (house counsel, attorneys in legal departments of carriers, etc.) tend to line up with the big firm and defense groups on the issues of whether judges should encourage a party who is about to settle unwisely to reconsider its position and whether judicial involvement is likely to make settlements fairer, but on many other questions the views of the company lawyers track those of the smaller firm and plaintiffs' people. In fact, the company lawyers as a group are even more enthusiastic than the plaintiffs' lawyers or the small firm attorneys in response to several key questions about active and mandatory judicial involvement.

This group of lawyers, who presumably have considerable resources at their disposal, are even more anxious for most forms of judicial intervention in settlement than the plaintiffs', small firm, or legal aid attorneys.

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cference's Coordinating Committee for Multiple Litigation from 1962-66, he now serves on the Judicial Panel on Multidistrict Litigation and became its chairman in 1980. In 1970, Judge Caffrey worked on the conference's Subcommittee on Judicial Statistics. He was the district judge representative for the First Circuit on the Judicial Conference from 1973-79 and on the conference's Executive Committee from 1975-79.

William M. Hoeveler (S.D., Florida). Judge Hoeveler was appointed to the bench in 1977 after a distinguished career in the Miami bar. He previously served as chairman of the ABA's Section on Tort and Insurance Practice, as well as chairman of the Committee on Products, Professional and General Liability Law.

G. Thomas Eisele (E.D., Arkansas). Judge Eisele has been chief judge of the Eastern District of Arkansas for nine years. Since 1977, he has been a member of the Judicial Conference Ad Hoc Committee on Bankruptcy Legislation. In 1978 he joined the Judicial Conference's Committee on the Administration of the Federal Magistrates System.

Robert E. Maxwell (N.D., West Virginia). Judge Maxwell has been a district judge and his district's chief judge since 1965. Since then, he has been a member of the Judicial Conference's Budget Committee, serving as its chairman from 1978-81. He served on the Federal Judicial Center's Advisory Committee to draft a benchmark for district judges. Since 1981, he has served on the Temporary Emergency Court of Appeals. He was president of the 4th Circuit District Judge's Association.

Delegates of the NCFTJ: To the JAD Council: Aubrey E. Robinson, Jr. (District of Columbia). Judge Robinson entered his duties as district judge at the same time I did—in November 1966. He has served on the Judicial Conference's Ad Hoc Committee on Court Facilities and Design, 1971-75. He now is on the Committee on the Administration of the Criminal Law. In 1978, he was elected to the Board of the Federal Judicial Center. During 1973-74, Judge Robinson was chairman of the NCFTJ.

To the House of Delegates: Robert F. Peckham (N.D., California). In assuming this position from Judge Charles Richey, of the District of Columbia, I follow in the steps of an experienced advocate for federal judges, who conscientiously and faithfully represented our conference for two terms as its first member in the House of Delegates.

A Last Report. This is my last report to you in the Judges' Journal as NCFTJ chairman. My hope is that conference members will engage in a unified, coordinated action to impress on the Quadrennial Commission and on the president and Congress the need for changes in federal judicial compensation and benefits. This coming year, I am confident that under Judge Lacey's leadership the conference will produce solid achievements in these and other areas of concern to federal trial judges.

I have been grateful for the honor of having served as the conference's chairman. I am excited about the opportunity I will have this coming year to serve our organization in the ABA House of Delegates.