Tips from the Bench

By Judge Jerome LaBarre, Multnomah County Circuit Court.

Settle Your Case by Preparing for Trial

Favorable Settlements Come From Transparent Trial Preparation

It's a reality today that over 99% of all civil cases filed in Multnomah County Circuit Court will settle. Approximately 15,000 civil cases are filed annually and on average just over 100 of those cases go to a jury trial. The truth is that after you file your case, it will most probably settle. While you can never be certain that any given case will settle, you can be certain that if your trial preparation is good – and the other side knows it – then your trial preparation will earn the most favorable settlement possible for your client.

As a settlement judge I frequently see lawyers on both sides who fail to maximize the settlement potential of their cases because they are obviously unprepared as they get near the trial date. And the other side can see it. With good trial preparation there is no downside. If you go to trial you are ready. If not, it helps you gain a good settlement.

As a trial judge presiding over large complex cases I have found that two documents really help the court and counsel understand what is needed to win at trial. These same documents can convince the other side to finally agree to a settlement.

1. Jury Verdict Form.

This could be the single most important court document in any case. It's what gets returned by the jury and determines whether you win or lose. It boils down your entire case to a small number of questions. It will guide you in trial preparation, help you develop a winning theme, and allow you to separate the wheat from the chaff in terms of witnesses and exhibits. A proposed jury verdict will also really signal to the other side that you are serious about trial.

Prepare the verdict form early and send it off to the other side. Then talk to opposing counsel about stipulating to it. Be transparent and the other side will know that you are ready for trial. Also, discuss with them whether you can enter stipulations on matters that will shorten and simplify the trial. They may include such things as admission of trial exhibits into evidence or at least as to authenticity, admitted facts, telephone testimony of witnesses and other similar matters. Trial judges will love it. Plus, stipulations make everyone's job easier. This also shows that you are ready in a way that promotes settlements.

2. Trial Plan.

Something else that I frequently require is a trial plan. My case management plans set a date for the filing of this document along with the proposed verdict form, proposed jury instructions and other trial documents. The trial plan is a road map through the jury trial. Each side sets out a proposed calendar of all of the events in the trial along with time estimates for how long each phase will take. Trial phases include voir dire, opening statements, witness time estimates with a listing of witnesses by type (but not necessarily by identity, to protect Oregon's unique "trial by ambush" tradition), final arguments and all other parts of the trial.

For scheduling purposes the judge needs to get this kind of detail on long cases in order to effectively oversee the case. This helps everyone prepare for trial and it underscores for the other side that the only alternative to a trial is to get serious about settlement.

There is an old adage that we must hope for peace but prepare for war. Letting the other side know that you are *really* ready for trial may be the single best way to finally settle that tough case.

By Chris Howard, Metro Public Defenders and Court Liaison Committee member.

Judge Maurer reported that three new judges have been appointed to the bench; Judges Rees, Lopez and Immergut, who each began their tenure on the bench conducting arraignments at the Justice Center.

The ramifications of HB 2287, establishing what Judge Maurer calls the "Judicial Stabilization Fund," were discussed. The legislation provides for many new and increased filing and appearance fees, which may be found at www.mbabar.org. Some of the specifics of how, when and where the fees will be paid have not been determined. The law is due to sunset in 2011. FEDs and small claims are not subject to many of the increases or new fees. The details as to whether, as in the case of filing fees for orders, the new fees apply on a per appearance (one fee) or per order signed (multiple fee) basis remain to be announced. Judge Maurer indicated that her review of the legislative intent was that the fees were to be collected on a per order basis. Doug Bray commented that a draft fee schedule would be found on the court Web site, and a final schedule will be posted once the Chief Justice has issued an order on the details of application.

Judge Maurer discussed the impending implementation of "eCourt;" for which Multnomah County is one of the pilot courts. Implementation in the county was set to begin September 23 in small claims and FEDs cases. Mid-December is the target date for civil cases to begin in this process.

Doug Bray explained that the system is "day forward" and as of the start up date for each area of practice, all filings on and after that date would be scanned into the system and then the paper copy destroyed. There will be a new statewide file numbering system. The only access to records will be through onsite kiosks at the courthouse until privacy issues have been resolved. After privacy issues have been addressed, offsite online access may be available.

Judge Maurer extolled the court's Web site, http://courts.oregon.gov/Multnomah, as a "wealth of information" and described some of the more informative pages, including the bio sections on the judges and their practice tips. She also stressed the importance of the publication *Recommended Practice for Civil Jury Trials in Multnomah County Circuit Court* and noted that while it is not binding on the judges, it is a very useful guide.

Judge Maurer would like input from the bar on topics for the judges to write about in the "*Tips from the Bench*" column. To submit a topic, email carol@mbabar.org.

Report from the county liaisons

Washington County Bar Association President Elizabeth Lemoine introduced herself and noted that she would have bar news to report for the next meeting.

Clackamas County liaison Andrea Anderly reported that the new Clackamas County Justice of the Peace position had been filled with the appointment of Karen Brisbin. Andrea agreed to act as Clark County liaison as well.

The MBA Web site Courts page, www.mbabar.org/courts.htm, was discussed. Mark Peterson agreed to review the page periodically and make recommendations for changes. MBA members have free online access to the court practices publication discussed by Judge Maurer; MBA-recorded audio CLEs are now available online for downloading.

Judge Maurer reported that the juror orientation video, narrated by Judge Wilson, was very well received. Each jury orientation is introduced by a member of the bench. The video is available for viewing on the court's Web site.

Eric Dahlin volunteered to head up coordinating the brown bag for fall 2009; having a panel of pro tem summary judgment judges would be appropriate for a future brown bag. That suggestion received strong support from committee members.

Discussion returned to the court and budgetary concerns. All agreed that the retention of the referees was important. Doug Bray pointed out that changes may occur if the tax increases are referred to the ballot and the voters do not approve these enactments and if there are continuing declines in the state's general fund revenue forecast. When the Legislature meets in special session in February, it will have to balance the state's expenditures once again to expected revenue. The court's budget reductions have forced some furloughs and that will have a detrimental effect on court services. Doug stated that if the budget forecast improves, the number of furloughs may decrease. To date, there have been no layoffs, but there has also been no hiring to replace unstaffed positions. Fourteen vacant positions have been lost from the court's administrative operations staff to achieve the $1.2 million reduction imposed on the circuit court so far in the 09-11 biennium.

The Court Liaison Committee formed a subcommittee on court resources to explore ways that the bar can assist the court in dealing with manpower shortages.

Doug also gave an update about the level of support from the current Multnomah County Commissioners for the Gresham/East County Courthouse plan, instituted by the previous commission.

Notice to Judge Pro Tem Applicants

The MBA Judicial Screening Committee reviews applications for pro tem and full-time judicial candidates for Multnomah County. The committee meets the third Tuesday of each month, typically September through June.

Judge pro tem candidates for renewal are asked to submit their applications at least four months in advance of the expiration date of their current appointment. There are two forms for pro tem candidates to complete; both may be obtained by visiting www.mbabar.org/documents.htm or emailing Carol Hawkins at carol@mbabar.org.

The committee must have sufficient time to process the applications, and the Oregon Supreme Court approves the appointments at one of its regular meetings.