

Tips from the Bench Three Ways to Kill a Good Settlement

By Judge Jerome LaBarre,
Multnomah County Circuit Court.



Not every case settles. But most of them do. In civil litigation, time is money. So the longer you go before settling - the more expensive it becomes. Not long ago I presided over a series of big dollar civil jury cases that reminded me of Benjamin Franklin's tired aphorism "A stitch in time saves nine," i.e. settle early or pay more. In every one of these cases it was obvious to me that if the parties had conferred early and done full and frank settlement exchanges, each case could have settled quickly for a reasonable amount. But once full-scale war erupted it was too late. Soon positions hardened and settlement economics disappeared.

Why is it that some cases just cannot settle until they get to the courthouse steps? Or why do some actually go to a trial that early settlement could have avoided? There are of course myriad reasons. In my experience there are three things which almost always kill early settlements.

1. Don't Give Legal Advice to the Client

Most would consider it strange if an oncologist failed to give a patient medical advice about whether to undergo surgery. A decision on the settlement value of a case - plaintiff's opening demand and defendant's opening offer in a negotiation - also requires sound advice from a lawyer. The plaintiff in a tort case has no more of an idea about what to do than a patient facing a serious medical decision. Yet sometimes attorneys just leave the whole matter of settlement numbers up to the client. Of course the client must make the ultimate decision, but he or she needs good legal advice first. If you abdicate this role, you should expect settlement prospects to disappear.

2. Don't Give Damages Documentation to the Other Side

The courts have heavy dockets of personal injury cases. At

trial without a stipulation the plaintiff will need to prove the reasonable and necessary amount of medical expenses incurred. When the client first comes into the office it will take time for the plaintiff's attorney to collect all of the medical documentation. However, as a case reaches the settlement stage it is essential to obtain all relevant medical records and billings. Perhaps the claimed medical expenses are totally accurate. Yet when the plaintiff's attorney simply expects an insurance company to accept an amount of economic damages on the attorney's word alone, then settlement possibilities quickly vanish.

3. Don't Treat the Other Side with Respect and Professionalism

The bottom line is that all people want to be respected. A good settlement requires meaningful and sincere communication. There are many reasons why professionalism is important. Not the least of which is that it lays the groundwork for a relationship which can ultimately lead to a good settlement. Treating your opponent disrespectfully lets bad emotions dominate the process and kills settlement prospects. Settlement is part art and part science. From what I have seen, the process needs to move forward accentuating the positives and minimizing the negatives. Avoiding these three traps can have a significant impact on obtaining a settlement that will make you smile.



Children at the CourtCare child center



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

Presiding Court Report

Judge Maurer discussed the changes to the filing fee provisions that will go into effect in May as a result of the amendment to ORS 21.110 passed by the legislature's special session. The changes are located in sections 17-48, enrolled HB 3696 (2010). The main change was to ORS 21.110, but there were also amendments to several other fee provisions. These amendments are only technical corrections to chapter 159 Oregon Laws 2009 (HB 2287) and leave in place the current fee amounts and applications that became effective on October 1, 2009.

Judge Maurer discussed latest developments in regard to the east county courthouse:

1. The 1st step, a space program design is completed.
2. The Board of County Commissioners are scheduled to be given a briefing on the space plan and estimated construction cost on April 22. At that time, the board will be asked to approve funding and construction of the new courthouse to serve east county.
3. If approved by the board in April, the current estimated available date for the new facility is February 2012.

Judge Maurer explained to the committee that there is some confusion between the pre-assigning of cases for trial to a judge and designating a case as complex and assigning it to a judge for all matters. Judge Maurer explained that the determination of whether a case is a "complex case" is made at a case scheduling conference with all lawyers in the action attending. These conferences are conducted by her in her chambers. If a case is designated as "complex," a judge is assigned to handle all aspects of the case.

Cases not deemed complex proceed through the normal call calendar procedure. If one of those cases is expected to take more than a week to try, the parties may notify the presiding judge, in writing, of that fact

so that the case can be pre-assigned to a judge. That written notification should come four weeks in advance of the call date. When such a request is received, the chief calendaring clerk will then contact all the parties, by phone, with the name of the judge to be assigned the case. At the time the parties are reached by phone, they need to be prepared to inform the chief calendaring clerk of any challenges to the judge. If they do not indicate that an affidavit is to be filed when called with the assignment, they will not be able to challenge that judge later. Any party that challenges a judge at the time of the phone call must then submit the motion and affidavit within 24 hours.

A judge that is pre-assigned to a case on the call calendar under the "written notice of one-week or more trial" procedure will only rule on trial motions, including motions in limine. All other pre-trial motions must be calendared in the usual manner for pre-trial motions. Judge Maurer explained that this last requirement, concerning pre-trial motions, had an exception in that the parties

were free to try and convince her that the case, or major aspects thereof, was unique enough that, for uniformity of rulings, it was more appropriate to have the trial judge rule on all pre-trial motions presented during period from judge assignment to the trial date, as well as the trial motions. This procedure will be discussed as part of the May 7 judicial brownbag, "Time is of the Essence."

Dana Scheele congratulated Judge Maurer on being awarded the Classroom Law Project's "Legal Citizen of the Year" award at a dinner on April 21 at The Governor Hotel.

The MBA met recently with county commissioners Deborah Kafoury and Jeff Cogen to urge them to support the construction of a new east county court facility and to bring to their attention the structural deficiencies of the downtown courthouse, particularly the fact that it is built with non-reinforced masonry walls, which is similar to the Haiti buildings that collapsed as a result of the recent earthquake. The OSB has formed a task force to study the new filing fees.

Award recipients

*Awards will be presented May 11
at the MBA Annual Dinner*

MBA Professionalism Award
Garry Kahn

MBA Award of Merit
Mark Fucile
Mary Pool

YLS Award of Merit
Collin McKean
Joshua Ross
Slone Pearson

YLS Rookie of the Year Award
Jennifer Woodhouse

Pro Bono Award
Matthew Sorensen
Anne Steiner
Evans Van Buren

Profile – Judge Trish Brown, US Bankruptcy Court

By John C. Rothermich, Garvey Schubert Barer and Court Liaison Committee member.



Judge Patricia Madi "Trish" Brown

Judge Patricia Madi "Trish" Brown has been a federal bankruptcy judge for the District of Oregon for slightly over a decade, but remains the most junior of the five judges on the court.

Judge Brown was born and raised in Great Falls, Montana. Thanks in part to the efforts of a local Episcopal priest who happened to be a major University of Pennsylvania recruiter, Judge

Brown moved to Philadelphia after high school to attend college. She graduated from Penn in 1978 with a bachelor of science in economics. She subsequently attended the Washington and Lee University School of Law, graduating with a JD in 1981.

After law school, she clerked for Judge Glenn Williams of the US District Court for the Western District of Virginia. Looking to return to her native west to begin her legal career in earnest, Judge Brown moved to Portland in 1982 to take a position as an associate with Spears Lubersky (now Lane Powell). She moved to Farleigh Wada Witt in early 1998, where she practiced until being appointed to the bench. Her private practice focused on bankruptcy work from the beginning, primarily involving representation of institutional creditors and litigation of bankruptcy adversary proceedings. Judge Brown enjoyed bankruptcy practice, preferring arguments over money to arguments over intimate details of litigants' personal lives.

Judge Brown applied for a seat on the bankruptcy court bench in 1994 and again in 1996. She made the short list both times but was not appointed. On her third attempt, in 1999, she succeeded. She was appointed to the bankruptcy court bench by Chief Judge Procter Hug Jr. of the Ninth Circuit Court of Appeals in December 1999.

Judge Brown was active in professional and community service before her appointment to the bench and has remained active. As an attorney, she served as chair of both the Debtor-Creditor Section and the Alternative Dispute Resolution Section of the OSB. She also sat on the board of directors of the National Association of Credit Management, Oregon chapter. She remains an active member of the Executive Committee for the Debtor-Creditor Section of the bar and is an active member of the National Conference of Bankruptcy Judges. She is also a long-term member of the US District Court of Oregon Historical Society and the budget committee of a local

rural fire district. She is an editor of the OSB's two-volume publication *Bankruptcy Law*.

But Judge Brown is not all about the law and public service. She enjoys numerous extracurricular activities. She has been a member of a handbell choir at the First Unitarian Church since 1986, which performs publicly several times a year (and not just at the holidays). She took up fencing about three years ago, inspired by her daughter's embrace of the sport. She is nationally ranked in her age category for foil and epee and attends fencing competitions around the country, sometimes with her daughter, who is a varsity fencer at Brown University. She also finds the time to help care for the four family horses and two hounds.

Judge Brown loves her work as a bankruptcy judge, especially the close collegial relationship she has with the four other Oregon bankruptcy judges. She also appreciates the collegiality and

competence of the relatively small Oregon bankruptcy bar. As far as favorite aspects of the job, she reports that settlement conferences are a rewarding part of her duties. While they can be challenging, they provide a refreshing forum for talking directly with litigants about real problems.

Judge Brown's tips for an aspiring bankruptcy lawyer are simple: if you are trying a disputed matter, think carefully about what elements you need to prove, and make a checklist of all of the evidence you will need admitted to prove each element. Then think carefully *before* the proceeding to map out how you will prove all those necessary elements of your client's case. This process can help the lawyers and the court by keeping the focus on the core issues and by preventing digressions into marginal issues of limited or no relevance.

WinterSmash Raises \$16,000 for CourtCare

By Kathy Maloney, MBA Director, Events and Programs.

What better way to raise money for a good cause than with a night of family fun, bowling competition, raffle prizes and a best bowling shirt competition? On Saturday, February 20, about 350 MBA members and their families participated in the MBA's 8th Annual WinterSmash fundraiser at AMF 20th Century Lanes in Portland.

In the spirit of fun, teams gathered to vie for prizes based on their scores and outfits.

Best team score and the coveted bowling trophy went to Ater Wynne, with their top three

individual scores combined at 534. Bodyfelt Mount won the prize for best shirt, with their "Out of the Gutter Into the Alley" bowling shirts.

The prize winner for best individual score went to Sam Sandmire from Ater Wynne, with a score of 218.

The team with the most players again this year was Harrang Long et al, with 34 bowlers signed up. Barran Liebman also had over 30 bowlers. Ater Wynne, Bodyfelt Mount, Buchanan Angeli, Gevurtz Menashe, Markowitz Herbold Glade & Hehlhaf, Mutnomah

County District Attorneys, National Lawyers Guild and Stoel Rives all had over 20 bowlers each.

WinterSmash benefits CourtCare, the free drop-in childcare for children of parents who have no other alternative than to take their children to court with them.

Thank you to our sponsors and all who participated. Thank you to the Fun Committee for planning WinterSmash: Hwa Go and Eric Meyer, Co-Chairs; David Malcolm and Jeff Matthews. Thank you, Sylvia Stevens and Leslie Kay, for selling raffle tickets at the event.

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See WinterSmash photos at www.mbar.org/gallerywintersmash10.htm.



The Ater Wynne team with their trophy for high team score



The Bodyfelt Mount team showing off their winning bowling shirts



Harrang Long Gary Rudnick bowlers