

Tips From the Bench

Why Some Cases Just Won't Settle

by Judge Jerome LaBarre
Multnomah County Circuit Court

We know that almost everything settles. In Multnomah County Circuit Court in recent years, we have averaged about 100 civil jury trials and under 80 bench trials per year. This is out of over 23,000 cases filed each year. In 2013 we only had 65 civil jury trials.

Please do not misunderstand me, I believe trials to be a good thing and I am not trying to suggest otherwise. However, one needs to accept the reality of a settlement-oriented legal culture. We all know that some cases do not settle even with the help of the finest mediators or settlement judges. Why is this so? What are some of the reasons?

To help me come up with answers, I sent my colleagues on our bench a query asking for their answers to this question. I was happy to get many helpful responses which are all incorporated into the following very unscientific opinion.

The reasons that civil cases do not settle in my view can be boiled down to either problems that are case-specific or difficulties relating to the people involved. Usually it is not just one thing, but a combination of things that create an impossible roadblock to achieving settlement success.

Settlement Roadblocks From the Case Itself

Settlements can happen when both sides see the case the same way. When the opposite occurs, settlement attempts fail. We know that the first step in solving a problem is to identify the problem. After that, one can start working on solutions. I have seen many hundreds of cases as a circuit court judge. What almost always stands out in the cases that go to trial are the differing perceptions the parties bring to the case. And then sometimes there are the settlement challenges which are tantamount to a "Rubik's Cube." Even the most talented mediators or settlement judges can find such cases impossible to settle. Below is a listing of case specific roadblocks:

1. Case evaluations by the parties and their attorneys which are just too radically different.
2. The money or the issues involved are just too big to settle.
3. Points of principle are too strongly held to be compromised or there are reputations to be protected.
4. There is just an honest disagreement about the facts or the law.
5. Fee-shifting – attorney fee claims exist and large hours and fees incurred by the lawyers equal or exceed the amount in controversy.



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6. There is a need for a jury trial result to test a community viewpoint: "a jury verdict will set a new standard" reasoning.
7. Newly emerging legal claims with little or no track record to use for evaluation.

Settlement Roadblocks From the People Involved

Bad chemistry between people can poison a relationship. For cases to settle, there must be effective communication. Professionalism, civility and a nice human touch are frequent hallmarks of successful settlement negotiations. If the participants are unable or unwilling to even talk to one another, then settlement cannot happen. As a settlement judge, I try to develop trust between the parties. This frequently occurs in the early stages of a mediation. Once trust and good communication are in place, I have seen the logjams quickly start to loosen up and a good settlement can come into view. People-related roadblocks to settlement include:

1. Personality conflicts - the parties or lawyers substitute their own emotional issues and inability to admit mistakes into business decisions.
2. A party has a need "just to be heard" in a public forum.
3. A breakdown in communication rendering the parties unable or unwilling to engage in serious settlement issues.
4. Lawyers who are too inexperienced or unprepared to have prepped the case to adequately counsel the client on a risk/benefit analysis.

For settlement to occur there needs to be incentive for both sides. In my experience, the best way to move parties toward settlement is to effectively communicate the strengths of your case and be realistic about your weaknesses.

Almost everything settles. But when a case is filed we can never be sure if **this is the case** that will actually go to trial. The foregoing examples represent my thoughts and those of some of my colleagues concerning why cases do not settle. There will always be cases that just will not settle. And we need them. Where would we all be as trial lawyers and trial judges without them?



News from the Courthouse

by Ryan Bounds
Court Liaison Committee

Oregon eCourt Implementation Judge Training

Judge Waller delivered the report for the court. She explained that the staff and judges are all occupied with getting ready for the transition from OJIN to the Oregon eCourt system on May 12. The judges of the court began their classroom training exercises in the new system. The judges will be trained on presiding over proceedings with an electronic copy of the case file and, in some courtroom situations, the orders and judgments will be signed electronically and filed online.

Access to Case Data Restricted Initially

Judge Waller reminded that there will be a period of time, from the evening of May 5 to as late as the morning of May 27, approximately three weeks, when "online" information will not be available to the external users of the court system, including access to information from the public terminals in court facilities. OJIN will no longer be updated with new case data starting on the evening of May 5, and the Multnomah County data and documents in the Oregon eCourt Case Information (OECI) system will not be available until approximately May 27; however, scheduled events will be available on the public calendar located on the OJD and MBA's websites during this time.

Mothers' Day Weekend Activity in Court Facilities

On the weekend of May 10-11, Mothers' Day Weekend, Judge Waller pointed out, all of the judges and staff of the court will be working in every court facility to prepare for the first day of operations in the Oregon eCourt system. Back filings from May 6-10 will be entered in the register, documents and entire case files will be scanned, and hearings and trials will be set,

and notices will be sent by the attorneys of record by email at their OSB registered email address. On May 12, the circuit court will open for normal business hours and will serve the public and the bar using the new system.

Fee Structure for Oregon eCourt Case Information

On April 1, Chief Justice Thomas Balmer signed two significant orders which pave the way for bar members to have access to documents over the Oregon eCourt system. Judge Waller said the orders establish the Oregon Judicial Case Information Network (OJCIN), set temporary fees for use, and opened a comment period for the proposed permanent fee structure for OJCIN access. She added that the proposed fee structure is very affordable and designed to encourage all practicing attorneys and their staff to use the system. The fee structure is also a condition precedent for the bar to have access to case documents online. With these two chief justice orders, access to circuit court documents for bar members using the OJCIN system is very close, Judge Waller concluded. OJCIN includes access to both OJIN and OECI for the circuit courts, and also includes the Appellate Case Management System (ACMS). All subscribers to OJIN OnLine became immediate subscribers to OJCIN, and don't need to take any further action to continue service.

Changes to Supplemental Local Rules with Oregon eCourt Implementation

There are some additional Supplemental Local Rules approved to be effective with the implementation of Oregon eCourt for Multnomah County. These approvals are by chief justice order; the orders implement SLR Chapter 24 and make other necessary changes for Oregon eCourt implementation. The new rules are posted on the court's website.

New Multnomah County Courthouse

The new courthouse work is moving forward. Judge Waller said that the existence of the courthouse project owes a great deal to key players in the legislative arena. On the House side, Speaker of the House Representative Tina Kotek, Ways and Means Public Safety Subcommittee Co-Chair Representative Jennifer Williamson, and former Representative/now-Judge Chris Garrett gave strong support for the legislation. Key support on the Senate side came from President of the Senate Senator Peter Courtney and his Chief of Staff Philip Bentley, and Ways and Means Co-Chair Senator Richard Devlin. This state-level support was coupled with strong personal advocacy by then-Commissioner Debra Kafoury, Commissioner Judy Shipprack, and Multnomah County Legislative Liaison Nancy Bennett to make a new courthouse a possibility. The challenge now is to move quickly enough to capitalize on this opportunity. The Multnomah County project plan is moving forward with the due diligence required for such a large undertaking, the creation of a 500,000 square foot courthouse. Other Oregon counties are also advancing their own budget plans for legislative approval.

The National Center for State Courts' (NCSC) Program Plan for the proposed courthouse is in final draft stages. The plan will be distributed to the MBA Court Liaison Committee. The Courthouse Users Group (CHUG), one of the advisory groups on the project, is currently reviewing the draft plan for comments. In addition to Multnomah County agencies, the CHUG has representation from the MBA Courthouse Committee, the office of Public Defense Services, and the office of the state court administrator, as well as the presiding judge and the trial court administrator. The NCSC's plan will be final in April and will form the basis for the next major step, the selection of the site for the new courthouse.

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