

SETTLING LAWSUITS: THE JUDGE'S ROLE

Chief Justice Frank G. Evans
Court of Appeals for the First District
Houston, Texas

Trial lawyers must reckon with the competing expectations of a variety of forces. They must satisfy the expectations of their clients, who hope to recover full compensation at a minimum cost. They must deal with the opposition, who hope to give up little and gain much in return. Finally, they must heed the canons of professional conduct imposed by courts, the bar, and by public opinion.

Today's trial lawyer faces a real dilemma in meeting those competing expectations. On the one hand, the lawyer is expected to be a hard-nosed courtroom brawler, a television-type gladiator, who gives no quarter and battles relentlessly through long, drawn-out trials. On the other hand, the lawyer is expected to save his client time and money, moving the case diligently and with dispatch to a successful and inexpensive resolution. No wonder trial lawyers sometimes feel battered by all sides.

Overlaid on this dilemma is the lawyer's need to make a decent living. Somehow, while dealing with all these forces, the lawyer must strive to maintain, if not enhance, his or her income-producing capability. Indeed, the lawyer's family, law associates, and creditors demand as much.

As a general rule, lawyers will make more money and satisfy their clients by disposing of cases, not hanging on to them. The "system," however, seems to work against such expeditious case disposition. Trial lawyers frequently find themselves bogged down in excessive discovery and plagued by incessant court delays in getting their cases to trial. This "litigation syndrome" tends to increase the overall cost of lawsuits, resulting in dissatisfied clients and lawyer frustration.

Of course, these problems are not new to lawyers, and some contend there will always be such problems as long as there is so much litigation. Perhaps so, but perhaps not.

I suggest one partial solution, which requires only a change in the way we look at our cases. This suggestion is premised on the notion that if we could settle more cases faster and earlier, we could make (or save) our clients (and ourselves) time and money. We could also help the courts reduce their crowded trial dockets.

Well and good, you say, but lawyers already settle most of their cases, and they would settle more if they could get firm trial settings.

True, most cases, about 90% of them, do settle before a full trial on merits! But statistics indicate that settlements do not usually occur until extensive discovery has been completed and a trial is imminent. Where trial dockets are crowded, these "last minute" settlements create "bottlenecks" in the court system, keeping other cases from going to trial. This, in turn, causes a backlog of cases awaiting disposition and the inevitable difficulty in getting firm trial settings. The ultimate result is increased

litigants' cost.²

Accordingly, by settling our cases at an earlier time, we should be able to:

- (1) Alleviate crowded dockets
- (2) Reduce trial expenses
- (3) Improve client satisfaction
- (4) Enhance lawyer's public image

Again, you say, well and good, but how can we settle cases any earlier than we have been? Until essential discovery has been completed and a firm trial setting obtained, lawyers cannot (or will not) engage in serious settlement negotiations; experience has shown that a solid trial date is the one thing that triggers serious settlement discussions.

However, a firm trial setting is not the only way to focus the parties' attention on settlement. There is a new resource in the litigation process: the responsibility of the courts under the Texas Alternative Dispute Resolution Procedures Act. This 1987 statute, which I will call the "ADR Act," provides a procedural framework for lawyers and courts to use in effecting earlier settlements.³

All right, you say, but how will this ADR Act help us settle more cases at an earlier date? Is this one of those "alternative" gimmicks, requiring litigants to go through some administrative process and give up their right to a jury trial?

Absolutely not. The ADR Act does not compel litigants to give up anything." Texas, unlike some other states, purposely avoided mandatory, arbitrary dispute resolution procedures. The Texas ADR Act simply encourages litigants and their counsel to engage in early settlement negotiations. In my opinion, the Texas legislature made a wise decision in leaving the actual settlement process in the hands of the lawyers,

But what does the ADR Act actually do? How does it encourage litigants to settle?

First, the ADR Act declares the State's policy to encourage early *settlements*, and mandates the courts to carry out that policy.⁵ Next, it authorizes the courts to refer cases to ADR procedures, and to appoint third-party neutrals to conduct those procedures.⁶ Finally, it assures confidentiality in all things said and materials used in ADR procedures.⁷ That, essentially, is all the Act does.

How can the ADR Act get more cases settled if everything is voluntary and there are no sanctions? Why will lawyers settle their cases any faster than they are accustomed?*

I recognize this is a problem, and perhaps it is the greatest obstacle to widespread use of the Texas ADR Act. The solution, however, lies in judicial and legal education, not in sanctions or other coercive action.

Lawyers know their cases better than anyone, and they know their clients. Logically, lawyers are in the best position to decide how and when their clients will most ben-

efit from a reasonable settlement. The ADR Act simply provides a mechanism for drawing the lawyers' attention to their particular case and offers a forum in which they may conduct settlement negotiations.

The role of the court in this process is simply that of a catalyst.⁹ The judge, either in response to a party's motion, or on the court's own motion, must consult with counsel about the potential for an ADR referral.¹⁰ This conference may be conducted in a number of different ways: in person, by telephone, or through correspondence." At the end of that conference, the court decides whether the case should be referred, and if so, to which ADR procedure. If either party objects to the proposed referral, they may file written objections, which, if found reasonable, prevent the proposed referral!* 'When the court does make an ADR referral, it *will ordinarily* issue a written order, which contains provisions such as those in the attached form.¹³

Trial lawyers usually have little or no formal training in the art of negotiation, and many trial counsel are reluctant to initiate an ADR referral process. This reluctance is probably based on the age-old concern that by suggesting settlement, a lawyer demonstrates lack of confidence in the client's position. Whether fact or myth, this concern seems to be prevalent among many lawyers, and it probably accounts for the failure of many lawyers to take full advantage of the ADR Act.

Lawyers often ask what will happen if they go with their clients to a settlement procedure, and the other counsel, or their client, does not attend? Or what happens if the other side does attend, but refuses to participate?

If a party refuses even to attend the conference, I think the court might compel attendance by contempt, in the same manner as if a party refuses to attend any pretrial conference.¹⁴ If a party does attend, but refuses to participate in the proceeding, court action probably is inappropriate.¹⁵ Because the Act contemplates **voluntary** settlement negotiations, courts should ordinarily refrain from taking action to compel such negotiations. In any event, experience has shown such concerns to be more academic than practical. Most counsel and their clients readily perceive the benefits of a non-binding settlement forum and willingly participate in the ADR process. Because ADR procedures are confidential and non-binding, the only *real* downside to attending an unsuccessful settlement conference is the cost and time expended. An ADR procedure usually requires only a few hours of time, and even if a settlement is not reached, it usually results in improved trial preparation.

All right, when lawyers and their clients attend the settlement conference, what happens? What do the third-party neutrals do? What do the lawyers need to know about presenting their case? How does the conference help the lawyers settle?

The sole function of the third-party neutrals is to help the parties in their settlement negotiations. The neutrals merely render a non-binding advisory opinion, which the parties use in further settlement negotiations. The neutrals do not decide anything unless the parties agree, in advance, that the decision will be binding. These neutrals fall into two general categories: (1) "issue" evaluators, and (2) "mediators." For example, a moderated

evaluate the controlling issues in the case and, with the co-moderators, to render a non-binding, advisory opinion regarding those issues. The neutrals in arbitration, mini-trials, and summary jury trials also fall within the issue evaluation category. A mediator, on the other hand, tries to take a deeper look at the parties' relationship, focusing not only on the issues in dispute, but also on the parties' special needs. Thus, a mediator will try to fathom the disputants' underlying interests and motivations. Actually, mediation plays some part in all ADR procedures, but issue evaluation is also an ingredient in the mediation process. Because there is such overlap in ADR procedures, counsel may confidently select any ADR process that seems best suited for the particular dispute.

It is sometimes difficult for lawyers to understand the simplicity of making a presentation at an ADR procedure. An ADR *conference* is just a forum for an informal exchange of "open" information between the parties. This does not mean that the procedure is non-adversarial, or that the lawyers need not use their best advocacy skills. Indeed, good "settlement advocacy" is most important. Because of the abbreviated nature of the proceeding, the settlement advocate must quickly hone in on the dispositive issues and present his client's best case in a compelling manner. The advocate's presentation will be his or her perception of the "evidence," based on depositions, interrogatories, and other discovered proof. The advocate need not, as a general rule, try to impeach or otherwise discredit the opposing party. Those challenges will ordinarily be "saved" for a possible trial on the merits. In preparing for the conference, counsel should bear in mind that the "audience" will not only consist of the third-party neutrals, but also the opposing lawyer and his client, as well as counsel's own client. Thus, even though counsel's main objective is to persuade the conference neutrals and the opposition of the merits of his client's position, he will also improve his relationship with his client by having the client educated in the cost and risks of further litigation. To further enhance the attorney-client relationship, counsel should make periodic re-evaluations of the client's case and maintain continuing discussions with the client and opposing counsel about settlement prospects.

During the course of the informal presentation, the third-party neutrals may ask questions of counsel and their clients to try to define the central issues in controversy. Therefore, counsel will need to prepare the client for participation in the settlement conference so that the client may readily respond to any questions asked by the neutrals. After such presentations have been completed, the third-party neutrals, when asked to do so, give their non-binding advisory opinion about the probable outcome of the litigation. Counsel should *prepare* the client for the various conclusions that the advisory panel could possibly reach, and should consider with the client the potential impact of a negative advisory opinion on future settlement negotiations. During the course of the conference, either counsel or the neutrals may inject information concerning the risks of further litigation, the probable loss of client time and business opportunities, and the inevitable stress, frustration, and potential

in a more receptive settlement mood.

The ultimate success of any ADR process may well depend on the client's attendance and participation. Accordingly, if a case is deemed appropriate for referral, the court will usually require the attendance of the client, or at least a representative of the client having settlement authority. If the client's attendance is impractical due to cost, distance, or other difficulties, both the court and counsel should reassess the advisability of an ADR conference.

There is a common notion that litigants are primarily interested in winning their lawsuit, and that they have little interest in the process involved. Studies show this is not the case, that clients are mainly concerned about how their problems are being handled.¹⁶ Because ADR procedures allow the clients to become active participants in the resolution process, the clients usually express satisfaction with the process, even if a settlement is not reached.

As we become more familiar with dispute resolution processes, we are finding that settlement procedures can be effective throughout all stages of the trial and appellate process. We are also finding that the key to successful "court-annexed" settlement negotiations may be a combination of two factors: court encouragement and client participation.

In view of the State's policy as declared by the legislature, and the legislative mandate that the courts carry out this policy, Texas judges will likely become more active in encouraging litigants to engage in early settlement conferences. Whether ADR procedures become incorporated in our justice system will depend, to some extent, on how Texas judges view their responsibilities under the statute. I predict that our judges will make good use of the ADR Act, and that, as a result, all Texas lawyers, litigants, and the public in general will benefit.

ENDNOTES

1. *Cost-effective Management of Product Disputes*, Center for Public Resources Legal Program I-18 (1989).
2. See *Costs and Compensation Paid in Tort Litigation*, Rand Corporation Institute for Civil Justice (1986) (R3391-ICJ). The statistical information in this report suggests that the pendency of a lawsuit entails a 15% "overhead" cost, over and above attorney's fees and special expenses.
3. Tex. Civ. Prac. & Rem. Code Ann. secs. 154.001-073 (Vernon Supp. 1989) (Senate Bill 1436, ch. 1121, sec. 1 Tex. Gen. Laws 7725). A one-page outline of the ADR Act is attached as Appendix 1.
4. The ADR Act does not provide an "alternative way" to try a lawsuit. It merely offers a settlement forum for lawyers and their clients to use in evaluating the controlling issues in the case and in finding solutions to their dispute. See Spivey, *Alternative Dispute Resolution*, The Advocate, (State Bar Litigation Section Report), Dec. 1988, at 7.
5. Tex. Civ. Prac. & Rem. Code Ann. SECS. 154.002-03.
6. *Id.* at secs. 154.021 (referral authorization); 154.023-27 (procedures described). The Act leaves considerable discretion to court and counsel in selecting appropriate ADR procedures. The Act briefly describes the five most commonly used procedures, but does not specify exact rules for implementing those procedures. Therefore, court and counsel may creatively select one or more of such procedures to fit the circumstances of the particular dispute. Sec. 154.051 (appointment of third-party neutrals). The Act provides minimum training requirements for court-appointed neutrals, but it allows the court to appoint a person lacking such minimal training, if the court determines that the party is qualified because of legal or other dispute resolution experience. The ADR Act also sets forth the qualifications and duties of the third-party neutrals. Secs. 154.052-053. Under the express provisions of the Act, the third-party neutrals have the duty to encourage and assist the parties in reaching a settlement, but are enjoined from trying to compel or coerce the parties to make a settlement. Sec. 154.073. The Act specifically provides for the confidential treatment of all communications and materials used in the dispute resolution conference, and assures the parties that the referring court will never be apprised of any matter related to the settlement conference, including information about the conduct and demeanor of the parties and their counsel. Therefore, the Act tends to discourage the use of the settlement procedure as a discovery weapon or for harassment.
8. The ADR Act is not without its critics, who point to the apparent contradiction between the provisions assuring "voluntary" settlements, and the provisions giving the court discretionary power to refer a case to an ADR procedure. Say the critics, if a party is involuntarily required to use ADR, all parties waste time and money because there is little chance of settlement between reluctant disputants. The critics also dislike the fact that the Act has no enforcement mechanisms or penalties, predicting widespread misuse of the Act by judges, litigants, and third-party neutrals. Brewster, Fink & Palmer, *An Overview of the Texas Bar Foundation Symposium on Cost Control & the Courthouse*, 19 St. Mary's L. J. 507, 529-35 (1987). Fortunately, there have been no reports of "widespread" misuse.
9. State Bar & Texas Young Lawyers' Association, *Handbook on Alternative Dispute Resolution: New Horizons for the Texas Justice System* ch. 2 (1987).
10. Tex. Civ. Prac. & Rem. Code Ann. sec. 154.021(6).
11. In the First Court of Appeals (Houston), for example, the judges conduct a telephone conference with the lawyers to consider whether a case is appropriate for an ADR procedure. The conference is informal, and usually lasts about 10 minutes.
12. Tex. Civ. Prac. & Rem. Code Ann. sec. 154.022.
13. See Order of Referral, Appendix 2.

14. See *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 653-56 (7th Cir. 1987) (party sanctioned for failing to send corporate representative with settlement authority to attend settlement conference as ordered); see *also* Tex. R. Civ. P. 166.
15. See *Strandell v. Jackson County, Ill.*, 838 F.2d 884 (7th Cir. 1987) (party may not be compelled to participate in summary jury trial proceeding); *Downey v. Gregory* 757 S.W.2d 524 (Tex. App. -Houston [1st Dist.] 1988, no writ) (court has discretionary authority to refer a case to an ADR procedure at any stage of trial or the appellate process).
16. *Client Perceptions of Litigation*, Trial Magazine, July 1988, at 40-43.

OUTLINE OF 1987 TEXAS ALTERNATIVE DISPUTE RESOLUTION PROCEDURES CHAPTER 1121 S.B. No. 1436

SECTION 1. The Civil Practice and Remedies Code is amended by adding Title 7 to read as follows: TITLE 7. ALTERNATIVE METHODS OF DISPUTE RESOLUTION CHAPTER 154. ALTERNATIVE DISPUTE RESOLUTION (ADR) PROCEDURES,

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 154.001. DEFINITIONS. (1) "Court" jurisdictions include appellate, district, constitutional and statutory county, family law, probate, *municipal*, or justice of the peace. (2) "Dispute resolution organization" means a private profit or nonprofit organization, political subdivision, or public corporation, or a combination of these, that offers ADR services to the public.

Sec. 154.002. POLICY. To encourage the peaceable resolution of disputes, (special consideration to disputes involving the parent-child relationship), and the early settlement of pending litigation through voluntary settlement procedures.

Sec. 154.003. RESPONSIBILITY of trial and appellate courts and their court administrators to carry out the policy.

SUBCHAPTER B. ADR PROCEDURES

Sec. 154.021. REFERRAL OF PENDING DISPUTES. (a) A court may, on its own motion or the motion of a party, refer a pending dispute to: (1) an ADR system established under Chapter 26, (Article 2372aa, Vernon's Texas Civil Statutes); (2) a dispute resolution organization; (3) a non-judicial and informally conducted forum through the intervention of an impartial third party, including those ADR procedures described under this subchapter. (b) The court shall confer with the parties in the determination of the most appropriate ADR procedure.

Sec. 154.022. NOTIFICATION AND OBJECTION. (a) If a court determines that a pending dispute is appropriate for referral, the court shall notify the parties of its determination. (b) Any party may, within 10 days after receiving the notice may file a written objection to the referral. (c) If the court finds that there is a reasonable basis for an objection, the court may not refer the dispute.

Sec. 154.023 - Sec. 154.027. DEFINES MEDIATION, MINI-TRIAL, MODERATED SETTLEMENT CONFERENCE, SUMMARY JURY TRIAL, ARBITRATION.

SUBCHAPTER C. IMPARTIAL THIRD PARTIES

Sec. 154.051. APPOINTMENT OF IMPARTIAL THIRD PARTIES. (a) If a court refers a pending dispute, the court may appoint an impartial third party to facilitate the procedures. (b) *The court* may appoint a third party who is agreed on by the parties if the person qualifies for appointment under this subchapter. (c) The court may appoint more than one third party under this section.

Sec. 154.052. QUALIFICATIONS OF IMPARTIAL THIRD

PARTY. (a) Except as provided by Subsections (b) and (c), to qualify for an appointment as an impartial third party, a person must have completed a minimum of 40 classroom hours of training in dispute resolution techniques in a course conducted by an ADR system or other dispute resolution organization approved by the court making the appointment. (b) To qualify for an appointment as an impartial third party in a dispute relating to the parent-child relationship, a person must complete the training required by Subsection (a) and an additional 24 hours of training in the fields of family dynamics, child development, and family law. (c) In appropriate circumstances, a court may in its discretion appoint a person as an impartial third party who does not qualify under Subsection (a) or (b) if the court bases its appointment on legal or other professional training or experience in particular dispute resolution processes.

Sec. 154.053. STANDARDS AND DUTIES OF IMPARTIAL THIRD PARTIES. (a) A person appointed to facilitate an ADR procedure shall encourage and assist the parties in reaching a settlement, but may not compel or coerce the parties to enter into a settlement agreement. (b) Unless expressly authorized by the disclosing party, the impartial third party may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute. (c) Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court.

Sec. 154.054. COMPENSATION OF IMPARTIAL THIRD PARTIES. (a) The court may set a reasonable fee for the services of an impartial third party appointed. (b) Unless the parties agree to a method of payment, the court shall tax the fee for the services of an impartial third party as other costs of suit.

SUBCHAPTER D. MISCELLANEOUS PROVISIONS

Sec. 154.071. EFFECT OF WRITTEN SETTLEMENT AGREEMENT. (a) If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract. (b) The court in its discretion may incorporate the terms of the agreement in the court's final decree disposing of the case. (c) A settlement agreement does not affect an outstanding court order unless the terms of the agreement are incorporated into a subsequent decree.

Sec. 154.072. STATISTICAL INFORMATION ON DISPUTES REFERRED. The Texas Supreme Court shall determine the need and method of statistical reporting of disputes referred by the courts to ADR procedures.

Sec. 154.073. CONFIDENTIALITY OF COMMUNICATIONS IN DISPUTE RESOLUTION PROCEDURES. (a) Except as provided by Subsections (c) and (d), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an ADR procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding. (b) Any record made at an ADR procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute. (c) An oral communication or written material used in or made a part of an ADR procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure. (d) If this section conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure.

NO. _____

JONES, BOB.
V.
SMITH, JOHN

IN THE **DISTRICT** COURT
OF HARRIS COUNTY
_____**JUDICIAL** DISTRICT

ORDER OF REFERRAL

Pursuant to Tex. Civ. Prac. & Rem. Code Ann. §154.001 et seq. (Vernon Supp. 1988), the court, after conference with counsel for all parties, has determined that the above-entitled and numbered cause is appropriate for referral to an alternative dispute resolution procedure, and no written objections to such referral having been filed, it is accordingly ordered that said cause be referred to a Moderated Settlement Conference procedure, and that _____, and _____, duty qualified and impartial members of the bar, are appointed as moderators to conduct said procedure in accordance with the provisions of Tex. Civ. Prac. & Rem. Code Ann. §154.053 et seq. (Vernon Supp. 1988), on the ____ day of _____, 1989 at ____ p.m., in the courtroom of this court, or at such other place as the Clerk of this Court shall designate, and that all parties to said cause, or in their stead, a representative with settlement authority, be in attendance during said procedure with their counsel of record.

It is further ORDERED that the court's standard time periods relating to this disposition of this cause will not be delayed or modified by this referral, except upon further order of this Court.

It is further ORDERED that all matters, including the conduct and demeanor of the parties and their counsel during said procedure, shall remain confidential and shall never be disclosed to anyone, including this Court.

ORDER ENTERED _____, 1989.

Judge

District Court