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In Search of Peaceful Settlements:

An Idaho Judge Looks at Litigation and Its Alternatives

By
Judge Don Burnett
Idaho Court of Appeals

[Editor's Note: The Idaho Human Rights Commission, Idaho Law Foundation and other agencies recently sponsored an interdisciplinary symposium entitled "Peaceful Settlements," featuring Roger Fisher, Director of the Harvard Negotiation Project. The symposium focused upon conflict resolution and alternatives to litigation. During the keynote session, Eugene Thomas, President-elect of the American Bar Association, and Thomas H. Gonser, Executive Director of the ABA, spoke on "The Multi-door Courthouse and Other Alternatives." Judge Burnett responded with observations from an Idaho judicial perspective. Upon request by *The Advocate* Editorial Advisory Board, Judge Burnett has prepared a written summary of his remarks for publication.]

I have been asked to comment upon the dispute resolution alternatives so capably outlined by Gene Thomas and Tom Gonser. In the legal profession, responsive comments often carry an adversarial edge. My remarks today will not be adversarial in tone, but I hope that you will find them challenging in content. I intend to explore critically the assumption, made by some observers of our legal system, that litigation is an impediment to "peaceful settlements."

We should begin by acknowledging that litigation is itself a form of peaceful settlement. It is an alternative to violence. Concededly, it is highly structured, it may be expensive, and it often is stressful; but it remains, in the last analysis, a means of peacefully settling disputes. Nevertheless, as the previous speakers have indicated, our society now is engaged in a broadened search for other peaceful alternatives — a search for alternatives to litigation. As an Idaho judge, I hear many reasons for avoiding litigation. Some are good but others are not.

One reason often stated is that litigation is undesirable — that there is simply too much of it. Last week, while hearing cases at the College of Law in Moscow, I saw a nationally syndicated article in *The Idahonian* entitled "Why Is America So Lawsuit Happy?" The article included an interview with an individual connected with a conservative "Think tank" in Washington, D.C. He suggested that litigation is a social disease in need of a cure. He was distressed that so many Americans are asserting rights and claims in our judicial system. He was asked, "What can be done to solve this problem?" His answer was thoughtful; it included references to mediation and arbitration as alternatives to litigation. But I was more intrigued with the question than with the answer. Is litigation really a "problem"? Is it even symptomatic of a problem?

Quantitatively, the supposed problem of exploding litigation is less real and urgent than many people believe. As Gene Thomas just mentioned, national surveys indicate that less than fifty percent — indeed, a recent study showed that as few as twelve perent — of civil disputes discussed between lawyers and their clients ultimately go to court. Gene also mentioned that, among those civil cases which find their way to court, nearly ninety percent are settled. The ninety percent figure also appears in studies I have read. Taken together, these numbers tell us that judges and juries actually resolve a remarkably small fraction of disputes brought to the attention of the American legal profession.

Of course, percentages do not show the entire picture. Might not the absolute numbers still show a disturbing level of litigation? I think an Idaho perspective is useful here. Despite the national media's concern about lawsuits flooding the courts, we are not inundated in this state. To be sure, we do have courts with heavy case loads. I work for one of them. But the backlogs are being reduced and the recent trends are not ominous. For example, in 1979 the total number of civil case filings in the Idaho judicial system was about 46,000 cases. That's a large number, but please bear in mind that it includes everything from small claims to product liability suits. Five years later, in 1984, the total was about 50,000. In other words, we experienced less than ten percent growth over a five-year period. Interestingly, this rate of growth was far lower than the increase in the number of Idaho lawyers during the same period. Attorneys often are accused of fomenting civil litigation to feed their growing numbers. The recent Idaho data simply do not support that view.

There is also a qualitative side to the supposed litigation problem. Some observers have contended that litigation is disruptive to the community. They say it breaks down the social fabric. An interesting essay written by Marc Galanter, delivered in 1982 to the "National Conference on the Lawyer's Changing Role in Resolving Disputes" at Harvard Law School,[1] challenged this contention:

> Is more and more visible litigation the sign and agent of the demise of the community? This view of litigation as a destructive force, undermining other social institutions, strikes me as misleadingly one-sided. If litigation marks the assertion of individual will, it is also a reaching out for communal help and affirmation. If some litigation challenges accepted practice, it is an instrument for testing the quality of present consensus. It provides a forum for moving issues from the realm of unilateral power into a realm of public accountability.

I agree with Galanter. Litigation is a dynamic force in a free society. It tests and retests the rules by which we all agree to live. It marks the difference between an open, growing community on one hand, and a closed, static community on the other.

> *". . . litigation is itself a form of peaceful settlement."*

Misperceptions about litigation often are created by media coverage. Some time ago, I spoke to the Idaho Press Club about this problem. I noted that civil disputes between individual citizens and business entities do not attract the media attention accorded to disputes between the government and individuals in the criminal process. For that reason, perhaps, the media tend to underreport the civil work of the courts and of lawyers. Although approximately sixty to sixty-five percent of the work of the Idaho Court of Appeals is civil in nature, we find that the media devote more time and space to our criminal cases.

Moreover, it is often the unusual case — the multi-million dollar lawsuit, or the bizarre claim — that receives media coverage. Listeners to Paul Harvey's radio program are familiar with a feature called "The Suers," in which unusual claims are featured. I fear that a substantial segment of the public has come to believe that greedy or outrageous claims are the "norm" in our legal system. This not only encourages disrespect for litigation as a dispute-resolving mechanism, but it may develop into a self-fulfilling prophecy — encouraging the very greed we condemn. Of course, we cannot blame the news media for reporting claims as they occur. But I do wish that after bizarre or unusual claims have been made, the sensible disposition of most such claims would be reported with equal prominence. To use Paul Harvey's terminology, I wish the public would learn "the rest of the story."

When public misperceptions about litigation are set aside, the search for alternatives to litigation cannot be justified upon a bare fear of litigation itself. Litigation is not evil. The notion that litigation is a monster, threatening to consume us, is a myth.

Another reason frequently given for avoiding litigation is that the cost of mediation or arbitration is less than the expense of a lawsuit. But I am not sure that this is universally true. Attorneys, whose services represent a major component in the cost of resolving disputes, play prominent roles in arbitration and in many forms of mediation. Last year, the Idaho Law Review carried an interesting article on the use of mediation in domestic disputes.[2] The authors envisioned a prominent role for attorneys in mediation proceedings. At the Idaho Human Rights Commis-

sion, one of the sponsors of this symposium, lawyers play important roles in dispute mediation. It is not clear — at least, I would suggest that the case has not been made empirically — that the monetary cost of litigation invariably is greater than the cost of other mechanisms for resolving disputes of similar complexity and diversity.

However, there are some good reasons for diverting cases from the courts. One is that not everyone or every case is well suited to adversarial dispute resolution. Confrontation and advocacy often impose a psychic cost upon litigants. One of the purposes served by our adversarial system is to find the truth where facts are controverted. But the quest for truth embodies an assumption. The assumption is that if the facts underlying a dispute can be ascertained, then the dispute can be resolved by applying a body of rules to the facts found. That, I think, is contrary to what some people seek in dispute resolution. They are not looking for a conjunction of fact and rule, yielding a result. They are looking for reconciliation, and end to conflict, or — in some instances — simple recognition of their dignity.

In these cases, it is not so important what happened to produce a dispute; it is more important how the people involved feel about what happened. For example, in a divorce case it may not be legally significant that Uncle Herman likes to go bowling every night with the rest of the boys. But it may be an important element in determining how the rest of the family feels about Uncle Herman and whether Herman's wife wants to continue living with him. The distinction here is between focusing on events and focusing on reactions to events. Mediation, in my view,

". . . it is often the unusual case . . . that receives media coverage

plays an important, and probably indispensable, role in dealing with those cases where the issues turn primarily not upon rules or disputed facts but upon the accommodation of disputatious feelings.

Another good reason for resolving controversies outside the judicial system is court delay. In Idaho, backlogs are diminishing but delay still exists. Unfortunately, even as actual delay is reduced, the public perception of delay seems to increase. Last year, Chief Justice Charles Donaldson candidly told the state's administrative judges and trial court administrators:

> There is a growing dissatisfaction with delays in the courts on the part of citizens and private businesses which have almost written off the courts as a timely remedy for disputes. The viability of the courts as an institution to resolve disputes and remedy injuries depends upon public acceptance of the courts, and unnecessary delays are eroding public confidence.

It is not customary in Idaho to find the extraordinary delays encountered, for instance, in Cook County, Illinois. Indeed, Idaho recently became the first state to adopt trial court time guidelines. But we still have delays long enough to discourage many disputes from being submitted to the court system.

Consequently, when time is particularly of the essence, or when the issues turn on feelings rather than on facts and rules, litigation may not be the preferred way to resolve a dispute. These cases well could be diverted to alternative dispute resolution processes — that is, to another "room" in a "multi-door courthouse."

But would such diversion cause litigation to lose its place as the dominant feature of our dispute resolution system? I think not. Here I will suggest a thesis that may sound contradictory. In my view, litigation is both fundamentally different from, and interrelated with, other forms of dispute resolution.

The interrelationship exists because without legal standards developed in litigation, and without the discipline of possible adjudication if mediation or arbitration become "stalled," these alternative forms of dispute resolution would slowly unravel. After all, no one encounters a dispute with a totally blank mind. All of us are programmed, through family upbringing and societal contacts, with a certain sense of personal entitlements. We believe that we are entitled to act in certain ways and we expect others to respond accordingly. Based upon these perceived entitlements, we make claims and we expect them to be satisfied. When they are not, disputes arise.

Many disputes are the products of conflicting entitlements. In what forum should these conflicting entitlements be resolved? Arbitration is unlikely to succeed where fundamental rights are disputed. Similarly, where the existence of an entitlement is controverted, mediation is not the place to resolve a dispute. Rather, mediation is the place where entitlements are recognized and the personal interests arising from those entitlements are accommodated, if possible. Professor Fisher's phrase, "getting to yes," describes this process of accommodation.[3]

There are times when the parties cannot, or will not, say "yes." Each party vigorously contests the other's asserted entitlement. In these cases, the entitlements must be defined or clarified. This is the stuff of law making. The task of making law is reserved not to mediators or arbitrators but to legislators and judges. Some listeners in the audience may be surprised to hear me refer to judges as lawmakers. But I am reminded of a crusty, conservative judge from New Hampshire who was asked whether the courts in his part of the country made law. With typical Yankee crispness he replied, "Yep. Made some myself."

There are differences, of course, between legislative and judicial law making. Legislatures make the law in broad sweeps; they define entitlements in general. The courts make law through interpretation of legislation and by developing decisional rules outside the scope of legislative action. The courts proceed case by case. Accordingly, it is the judiciary that defines with particularity the entitlements our society is prepared to recognize and to enforce in each dispute.

Economists might argue that this particularized attention to entitlements is unnecessary and inefficient. Professor Coase, in his landmark essay entitled "The Problem of Social Cost," demonstrated that if human beings were all purely rational decisionmakers, individual disputes could be resolved by bargained exchanges after a general scheme of entitlements had been established.[4] But few people are purely rational and not all disputes can be resolved by exchange. Neither are all entitlements fixed and fully understood. We need the courts to define particular entitlements when the parties cannot otherwise agree.

Many people become frustrated with the judicial process of defining entitlements. They think it is too formal and painstaking. Why must it be so? Because when an entitlement is judicially established, it is no longer a creature merely of the case in which it is considered. In a free society, where all men and women are equal under the law, entitlements are for everyone. None of us can have entitlements different from those accorded to others similarly situated. An entitlement, when it is established, must be available to all. Litigation is not, and cannot be, an ad hoc process of negotiation or compromise between two parties. It is a publicly accountable process. Its results are systemic to the entire society. It is a coercive form of dispute resolution embodying the deliberateness, the structure, and the accountability necessary to defining and enforcing entitlements.

Accordingly, litigation differs from, but sustains, the alternative resolution processes. Without the signals emitted by the courts — identifying appropriate and inappropriate expectations, cognizable and noncognizable entitlements — the alternative processes would be cast adrift. The pronouncements of arbitrators and the recommendations of mediators gradually would diverge. The widening gaps between results ultimately would impugn the fairness of these processes.

Thus, litigation and its alternatives play distinct yet complementary roles in the search for peaceful settlements. The need to differentiate between them, and to identify the types of disputes amenable to each process, is illustrated by mediation in the Republic of China. A delegation

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from the ABA recently visited that country. A member of the delegation later reported that mediation in China is not what we know as mediation in the United States. It is not an ad hoc, noncoercive means of resolving private disputes. It is imbued with teachings of community values and it carries sufficient trappings of coercion to serve as a means of social control.[5] In a free society, we take care to identify where accommodation ends and coercion begins. In China that distinction is blurred.

Freedom, equality and growth put heavy burdens on systems for resolving disputes. We limit the use of coercion, we insist upon entitlements available to all, and we engage in seemingly endless reexamination of the rules by which we live. Yet we would have it no other way. By coupling the rigor of the law with the dynamics of litigation we seek to assure — within the constraints of human frailty — that dispute resolution is not only peaceful but just.

[1]The essay has been republished as *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. REV. 4 (1983).
[2]Evarts and Goodwin, *The Mediation and Adjudication of Divorce and Custody: From Contrasting Premises to Complementary Processes*, 20 IDAHO L. REV. 277 (1984).
[3]R. Fisher, *Getting to Yes* (Houghton Mifflin Press (1978).
[4]Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).
[5]Ray, "Mediation in China: Another View," *Dispute Resolution* (ABA Special Committee on Dispute Resolution, Winter, 1984).

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Mr. Mark Nye, a partner in the Pocatello firm of Racine Olson Nye Cooper and Budge, is the new Commissioner representing the Eastern Region. He is a native of Pocatello, and received his J.D. from the University of Idaho in 1974.

He is a past president of the Sixth Judicial Distict Bar Association, and his service to the State Bar includes writing questions and grading in the bar examination, the committee on Attorney Advertising, and investigator.

Nye has served the Law Foundation as Chairman of Continuing Legal Education and a seminar instructor. He is a member of the American Bar Association, Idaho Trial Lawyers Association and Idaho Defense Counsel.

He will take office at the close of the Annual Meeting in McCall, and replaces outgoing President Eugene Bush.

NOTICE

Effective June 10, 1985, the United States District Court for the District of Idaho will staff a part-time deputy clerk in the office of the U.S. District Court in Pocatello. Hours will be from 8:00 a.m. until 12:00 Noon, Monday through Friday. Litigants and counsel may file documents through the Pocatello office during those hours. Documents may also be filed at the Boise office of the U.S. District Court when the Pocatello office is not open. For further information, contact Ms. Diane Hutchinson, Deputy clerk, U.S. District Court, Federal Building, 250 South Fourth Avenue, Pocatello, ID 83201; telephone 236-6912.

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