Book Review

Wayne D. Brazil,* Effective Approaches to Settlement: A Handbook for Lawyers and Judges (Clifton, N.J.: Prentice Hall Law & Business 1988).**

Reviewed by David I. Levine.***

Litigators know that the vast majority of their cases will settle. For the most part, their uncertainty is not in whether the case will settle; rather it is in when will the case settle, how settlement will be broached, will a third party help in the process, and what will be the terms of the settlement. However, despite its enormous practical importance to the litigation process, most litigators have honed their settlement techniques haphazardly. The prevailing assumption is that they cannot be learned systematically: only experience and experimentation are effective teachers.

From the judicial perspective, settlement has been a somewhat enigmatic process. Judges have always been delighted to have cases settle because of the savings of scarce public resources—including, but not limited to, their own time. Nevertheless, until recently, the settlement process was not a major concern of many judges. Settlements "happened"; cases disappeared from the docket without judicial intervention. Moreover, judges were not supposed to be involved in the business of achieving settlements, which was solely the province of the lawyers. It was unseemly for the judges to participate in the haggling. They were to stay above the fray.

This view of the judiciary's role in settlement, however, has changed dramatically. It seems that all trial judges (certainly on the federal bench) are now self-styled "case managers." Taking their cues from the 1983 amendments to the Federal Rules of Civil Procedure, they have become actively involved in the litigation process. They routinely issue scheduling orders (Rule 16), closely supervise discovery (Rule 26), and unhesitatingly sanction improper conduct (Rule 11). Not surprisingly, they are also deeply involved in settling cases. The 1983 amendments to Rule 16 expressly told judges that they ought to discuss settlement with litigants. Judges who did not know it already quickly realized that facilitating settlement was in their own interest. They want to move

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** Chapter 10 of this book was previously published in the Ohio State Journal on Dispute Resolution. *See* Brazil, *Hosting Settlement Conferences: Effectiveness in the Judicial Role*, 3 OHIO ST. J. DIS. RES. 1 (1987).

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their dockets along and nothing is more effective in promoting case management than settlements.

Nevertheless, judges, too, must learn how to participate in the settlement process if they want to be effective. Like the lawyers who appear before them, judges have been forced to hone their settlement skills by trial and error. Orientation at a judge's college or the Federal Judicial Center is no substitute for experience and, unfortunately, experience takes time.

In his book, *Effective Approaches to Settlement: A Handbook for Lawyers and Judges*, Magistrate Wayne D. Brazil has provided lawyers and judges who want to enhance their settlement skills with a way to shortcut the learning curve. Magistrate Brazil has a unique vantage point to discuss these matters. As a federal magistrate in the Northern District of California, he has personally hosted hundreds of settlement conferences. In the process, he has had the opportunity to learn from skilled settlors on his court, which is a leader in promoting various case management techniques. Brazil has also been a litigator in a private law firm and spent several years on the faculty of three law schools before going on the bench. As a professor, Brazil did not confine his research to the dusty tomes of the law library; instead, he conducted important empirical research on many topics, including discovery[1] and the appropriate role of judges in the settlement process.[2] In *Effective Approaches to Settlement*, Brazil draws upon all of these experiences and sources so as to create an extraordinarily useful book for lawyers and judges.

Throughout the book, Brazil returns to two basic premises: (1) clients and lawyers settle lawsuits, not judges (or other third parties); and (2) reason is power. Because clients and lawyers settle lawsuits, the settlement process must include all the actors and must respect their needs. Because reason is power, the lawyers must be prepared to negotiate a settlement on the basis of a firm grasp of the law and facts of the case and a rational strategy for the settlement process. Most importantly, they must convey these matters to the judge and the other participants in a clear, rational and candid manner.

Brazil opens the book with a discussion of the advantages of the settlement process over the trial process. Among these benefits, he attaches special importance to the element of control in settlement.

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1. *E.g.*, Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978); Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 217 (both cited by the Advisory Committee in its 1983 amendments to the Federal Rules of Civil Procedure).

2. W. BRAZIL, SETTLING CIVIL SUITS: LITIGATOR'S VIEWS ABOUT APPROPRIATE ROLES AND EFFECTIVE TECHNIQUES FOR FEDERAL JUDGES (1985).

Negotiators obtain control over costs, the timetable of the final verdict, the procedures used in seeking resolution, a client's privacy interests and a range of results that adjudication cannot achieve. Although most litigators are probably familiar with these ideas, Brazil's clear discussion might be used to good advantage with a client who is initially reluctant to consider any settlement or an unconventional approach to the settlement process.

Brazil then presents alternatives to a judicially hosted settlement conference. These options include mediation, mini-trials, summary jury trials, arbitration and the use of neutral experts, as well as less-known techniques such as the Northern District's Early Neutral Evaluation Program.[3] This chapter, which is an up-to-date review of ADR techniques, would be especially useful for lawyers and judges who are interested in alternatives but are unfamiliar with some of the latest variations. It is also one of two chapters that concludes with a brief, intelligently selected, bibliography.

Brazil devotes a chapter to a discussion of offers of settlement under Rule 68 of the Federal Rules of Civil Procedure, including such important (but rarely discussed) matters as res judicata effects and tactical considerations. Brazil persuasively argues that with the decision of the United States Supreme Court in *Marek v. Chesney*,[4] the specter of being unable to recover attorneys' fees presents defendants with a powerful tool that can be used to settle cases.

In another chapter, Brazil thoroughly covers the law of confidentiality in settlement negotiations. He identifies the historical background and policy rationale behind Rule 408 of the Federal Rules of Evidence and analyzes its application by the courts. He argues that there are many circumstances in which "confidential" settlement discussions and communications are discoverable and even admissible. Those who have assumed that the rules of evidence will keep the settlement process

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3. The author of this Review has worked with Magistrate Brazil in connection with an analysis of the effectiveness of the Early Neutral Evaluation Program. Brazil, Kahn, Newman & Gold, *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 279, 280 n.1 (1986); Levine, *Early Neutral Evaluation: A Follow-Up Report*, 70 JUDICATURE 236 (1987); Levine, *Northern District of California Adopts Early Neutral Evalutation to Expedite Dispute Resolution*, 72 JUDICATURE 235 (1989); Levine, *Early Neutral Evaluation: The Second Phase* 1989 J. DIS. RES. ___. The program provides for the court to order the parties to a confidential evaluation session hosted by a well-respected legal expert in the particular area of law. This session is convened shortly after the first status conference in selected civil cases. After each party presents his position, the neutral expert evaluates the relevant strengths and weaknesses of the suit. The neutral expert then may develop into a "shuttle diplomat," encouraging settlement through his development of specific analytical arguments. The attraction of this program is as follows: at best, settlement occurs prior to extensive discovery with little of the expense of litigation; at worst, the evaluation helps the parties to identify which issues are actually in dispute.

4. 475 U.S. 1 (1985).

absolutely confidential should find this material unsettling. For example, although Rule 408 safeguards offers of compromise and statements made in "compromise negotiations," it does not protect claims. There is some risk that a court would view the initial demand of a party as a description of the content and contours of his or her claim rather than as an offer of compromise.

As a way of protecting one's client, Brazil admonishes lawyers to preface an opening demand or offer with a clear statement of intention regarding the proposal. The lawyer should state explicitly that a dispute exists and the proffered proposal is neither a statement of the client's claims nor a full evaluation of their worth. Brazil offers other helpful suggestions on how to maximize the chances that communications will be protected by Rule 408 and presents various strategies on how to add additional layers of protection when the rules of evidence are not sufficient for the needs of a particular case.

The heart of the book is a multi-chapter analysis of the judicially hosted settlement (JHS) conference. Brazil advocates this mechanism because he has found it to be an effective means of settlement. He cites various advantages of the JHS conference. In addition to cost savings, a judge can give the parties an analytical focus and feedback so as to maintain momentum. The judge can further provide counsel and clients with realistic expectations of damage awards if the case goes to trial as well as generally helping to create an atmosphere conducive to decision-making. Although he is a fan of the JHS conference, Brazil does not hesitate to point out substantial drawbacks. For example, facts might be revealed in the JHS conference that would affect the impartiality of a judge who later tried the case or would disclose valuable proprietary information. Brazil further cautions that the JHS conference is not effective in assessing the credibility of witnesses. After presenting a general analysis of the JHS, Brazil turns to setting up the case for settlement negotiations. He emphasizes the need to develop a settlement strategy that takes aim at the pivotal person ("real target"). The real target of persuasion may be opposing counsel, an opposing party, an insurance company or even a client. In each case, Brazil presents suggestions on how discovery can be framed to maximize the opportunity for early and cost-effective settlement negotiations. For example, if a party-opponent is the principle target, Brazil argues that demand letters should be drafted with sensitivity and depositions of the party should be conducted in a way that minimizes unnecessary confrontation. Such an approach attempts to avoid putting the other party on the defensive while informing him or her about the case. If the real target is a client, Brazil suggests advising the client to seek a second opinion from another lawyer as to the settlement value of the case.

In keeping with one of his major themes, "reason is power," Brazil stresses the importance of preparation. Preparation means not just knowing the case intimately, but also having thought about the expectations of the settlement judge, opposing counsel, and especially the clients on both sides. Brazil is particularly compelling in discussing the need to consider how the settlement process can be affected by emotions, even if the nominal parties are institutions, rather than individuals. The book also provides helpful guidance on preparing an effective written conference statement that will earn the confidence of the host of the settlement conference.

In anticipation of the JHS conference, Brazil emphasizes the need to prepare an opening offer that can be explained rationally, but that also signals a willingness to be flexible. His discussion of planned tactical concessions is especially valuable. He debunks the stonewall approach to negotiations; in his view, it is wiser to make early concessions in order to generate momentum for settlement so that when more concessions are needed to bring the parties to agreement, it will be the other side's turn to make them. By planning and implementing tactical "retreats," a shrewd negotiator can protect a client from making late concessions that are most threatening to the overall strategic goals. When negotiations are stymied, Brazil offers suggestions on how to regain momentum, depending on the nature of the problem (*e.g.* a lack of information or trust). Brazil even endorses revealing the client's *real* bottom line figure in certain negotiations. He is, however, careful to explain the antecedent conditions for making this tactical move, which he believes can be very effective if saved for the right moment.

Brazil concludes with a chapter for hosts of settlement conferences. He offers suggestions on matters such as possible ways to structure the conference. While he surveys various arrangements, he concludes that private caucusing between judge and each side's counsel works best. He likes private caucusing because it minimizes contact between opposing counsel and the erection of adversarial walls. In addition, private caucusing allows lawyers to reveal special difficulties they may have with their client while permitting judges to be more candid because they can be less concerned about appearances. During these sessions, he encourages judges to ask counsel to change hats and present the opponent's best case. If the attorneys refuse or weakly comply, he suggests that judges could play the role of opposing counsel and argue the opponent's case.

Brazil emphasizes the importance of place in facilitating negotiations. He recommends that judges conduct most of the serious negotiations in chambers. In his view, the use of judicial chambers helps create an atmosphere of intimacy, informality, and confidentiality. At the same time, he advocates that the other parties wait in the courtroom during

negotiations as a way to remind the parties of the consequences of failing to achieve a settlement. Brazil also offers ideas on how to deal with problem behavior of clients or attorneys. In remedying the abuse of a client by his or her counsel, he stresses that the judge should be careful to avoid even the appearance of interfering with the lawyer-client relationship.

Finally, Brazil analyzes how settlement judges can make mistakes that impede or even destroy the settlement process. For example, judges who prematurely raise the question of damages may communicate the idea that they have already decided the issue of liability. In so doing, they lose the trust and confidence of one of the parties. Likewise, Brazil discourages judges from displaying anger at a settlement proposal that they believe to be outrageous. Such a reaction, however merited, places the judge in an inappropriate role of being perceived as limiting recovery. Brazil's judicious advice follows painful experience for he confesses that he has made, and subsequently tried to avoid, many of these mistakes.

Overall, the book, and in particular the substantial material on the JHS conference, is direct and compelling. Part of the impact comes from Brazil's clear style of writing. In larger measure, it comes from Brazil's extensive experiences and his personality. As a former litigator and a current jurist, Brazil has seen at first hand what works and what does not. As a former law professor, Brazil brings a healthy disinterested perspective to his examination of the settlement process. Moreover, as a professor who appreciates the value of empirical work, Brazil's views have been shaped by his own substantial body of research, including a recent survey of almost 1900 lawyers from four different regions of the United States.[5] Finally, Brazil is not afraid to share his errors with his audience. Time and again, he tells the reader that he knows that the X technique is risky because he has tried it and obtained the negative consequence of Y. This combination of personal experiences, empiricism, and candor makes Brazil's advice extremely compelling.

My only complaint is that the book is a bit repetitious. I believe that this is largely a function of Brazil's decision to divide his advice to lawyers from some of the advice given to judges. As a result, portions of later chapters overlap what was presented earlier and some war stories get retold. The repetition, however, will be only a minor annoyance. It should not distract any lawyer, whether experienced or fresh from the bar examination, or any judge, even one who has sat on the bench for many more years than Brazil has, from absorbing the valuable lessons that are in this book.

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5. *See* W. BRAZIL, *supra* note 2.