

**Southeastern Regional Office**

**Feasibility of  
Preargument Settlement Conferences  
for the  
Kansas Court of Appeals**

A Technical Assistance Report  
June 1988

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# National Center for State Courts

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Regional Director

June 14, 1988

Hon. Mary Beck Briscoe  
Kansas Court of Appeals  
301 West Tenth  
Topeka, KS 66612

Dear Judge Briscoe:

Thank you for inviting Dave Steelman and me to visit with you, Judges Elliott and Six, and Ms. Carole Green last month. We enjoyed the opportunity to spend some time with all of you to discuss the feasibility of introducing a settlement conference program in your court.

After discussion and deliberation, we have some conclusions and recommendations to offer. They are set out in a brief technical assistance report entitled, Feasibility of Preargument Settlement Conferences for the Kansas Court of Appeals, a copy of which is enclosed.

Yours very truly,



James R. James  
Regional Director

JRJ/DCS/d  
Enclosure

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FEASIBILITY OF  
PREARGUMENT SETTLEMENT CONFERENCES  
FOR THE  
KANSAS COURT OF APPEALS

Technical Assistance Report  
(June 10, 1988)

I. Introduction

Before consideration is given to the conclusions and recommendations offered by the National Center technical assistance team, it is valuable to give some of the background for this report. This involves not only a general description of the Kansas Court of Appeals, but also a brief summary of the immediate circumstances under which this report was prepared.

A. The Court. The Court of Appeals is the intermediate appellate court of Kansas. After July 1, 1987 (when three additional judgeships were authorized), it has had a chief judge and nine judges. Retired judges may serve the court by assignment.

The court has statewide jurisdiction of appeals in civil and criminal matters from the District Court (the state's trial court of general jurisdiction), except where the Supreme Court has exclusive jurisdiction. The court may review administrative actions as provided by statute, and it may issue all writs necessary to the exercise of its jurisdiction. Appeals to the Supreme Court are a matter of right in any case where a constitutional issue has arisen for the first time as a result of a Court of Appeals decision. Cases filed in either court may be transferred to the other by order of the Supreme Court.

At the discretion of the chief judge, the court may sit in panels of three judges. It sits in Topeka or anywhere else in the state as required.

B. Consideration of Settlement Conferences. In 1988, a committee consisting of three judges and the director of central staff attorneys was formed to consider whether the court should introduce a preargument settlement conference program. The key question posed by the committee was whether such a program would dispose of more cases than already result from natural attrition. One of the judges on the committee investigated the percentage of the court's recent pending cases that were disposed by settlement in the absence of any intervention by the court. The director of central staff attorneys surveyed several other appellate courts to determine their experience with settlement conferences.

In April 1988, the committee chair communicated with representatives of the National Center for State Courts, which had earlier completed an evaluation of settlement conference programs.<sup>1</sup> In May 1988, Messrs. James R. James and David C. Steelman of the National Center attended a meeting of the committee in Topeka. This report presents their conclusions and recommendations to the committee.

## II. Conclusions

Several factors have been identified that might bear on a decision whether to implement a settlement conference program. In

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1. See David C. Steelman and Jerry Goldman, "Preargument Settlement Conferences in State Appellate Courts" [hereinafter, Steelman and Goldman], 10 State Ct. J. (No. 4, Fall 1986) 4.

the court's current situation, some of these factors support an argument that such a program would yield positive results, while others support a contrary position.

A. Percentage of Cases Settled. One important consideration is the percentage of cases before the court that would be settled by the parties even without any efforts by the court to encourage settlement. In order for a settlement program to be worthwhile, the number of settlements achieved as a result of the program should be sufficiently higher than the number that would otherwise result to justify the amount of court resources devoted to the program's operation.<sup>2</sup>

When Judge Elliot examined recent court dispositions for the committee, he concentrated on the most recent three-month period.<sup>3</sup> He found that settlements (including voluntary dismissals and stipulated dismissals) constituted 19.1% of the dispositions for civil and workers' compensation cases (the case types considered most appropriate candidates for settlement conferences). When settlements among the cases investigated by Judge Elliot are combined with dismissals, there is a residue of 67% (two-thirds of the total) that were argued or otherwise submitted to

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2. While "court resources devoted to the program's operation" would include new resources over and above those already available, it should also include the application of any pre-existing resources to the program (e.g., the time of a judge, a law clerk or staff attorney, or a secretary, as well as the space, equipment and supplies for conferences and storage of program records), since these would be unavailable for other purposes.

3. See Memorandum, March 1, 1988, from Judge Elliot to Judges Briscoe and Six and Ms. Green, re: Settlement Figures.

the court for adjudication.<sup>4</sup>

These percentages are very different from comparable figures in the three appellate courts whose settlement programs were evaluated by the National Center. Among cases in these courts that were not randomly assigned to settlement conferences, the percentage of cases settled or dismissed without court intervention was much higher than the figures from Judge Elliot's investigation, and the percentage of cases submitted for adjudication was correspondingly lower.<sup>5</sup> If the figures from Judge Elliot's inspection are representative, this suggests that the Kansas Court of Appeals might be able to dispose of a higher percentage of cases without having them argued or submitted on briefs. The court thus might be able to get as many or more dispositions with a settlement program, without having formal decisions on so high a percentage.

This potential conclusion is based on two problematic assumptions, however. First, it is not clear how representative the results of Judge Elliot's investigation are of either past or future disposition results for the court. Simply because of seasonal or other variations, the percentage of cases that the judge found to have been settled might not be representative of what one might otherwise expect. On the other hand, it might be a consequence of the court's having added three new judges: with more judges

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4. The court has a summary calendar for cases (identified after appellee's brief is filed) to be decided without oral argument.

5. While 67% of the cases in the Kansas Court of Appeals investigation appear to have been submitted for adjudication, the National Center study found only 56% of the Connecticut "control group" cases, 48% of such Pennsylvania cases, and 36% of such Rhode Island cases. See Steelman and Goldman, Table 2, State Ct.J. at 8.

available, parties or counsel might be more inclined to want their cases argued or submitted on briefs.

A second problematic assumption is that the court actually wants to have fewer cases argued or otherwise submitted for formal adjudication. In fact, the court might want as a matter of policy or philosophy to have as many cases as possible argued or submitted on briefs, in order to give more parties "their day in court", or to give more explicit guidance (in the form of court decisions) to the legal community in order to promote the development of the law.

In other words, the Court of Appeals judges might not want to have a lower percentage of their cases actually adjudicated by the court, rather than being settled or dismissed. Whether one considers the percentage of settlements to be a measure of "successful" appellate case management thus depends on the court's philosophical commitment to settlement, as opposed to other purposes that might be served by preargument conferences.<sup>6</sup>

B. Participant Satisfaction with Programs in Other Jurisdictions. In February 1988, Ms. Carol Green (staff director for central staff attorneys) made a telephone survey of selected appellate courts in other jurisdictions to learn about their experience with settlement conference programs.<sup>7</sup> She reported to

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6. National Center evaluators concluded that one of the reasons for the mixed results found in the Rhode Island Supreme Court's settlement program was the fact that there were differences of opinion among the justices about the purposes to be served by preargument conferences. See Steelman and Goldman, State Ct.J. at 7.

7. See Memorandum, February 26, 1988, from Carol Green to Judges Briscoe, Six and Elliot, re: Prehearing Settlement Conference Committee.



the committee that several courts felt they had been well served by their respective programs.

The members of the committee also had an opportunity to learn about the settlement conference program operated by the Missouri Court of Appeals, Western District. That court is very satisfied with the results of its settlement conferences, and the committee members with impressed with the program.

As part of its evaluation of settlement conference programs in three states, the National Center asked participants about their satisfaction with their state's program. In each state, there was a high level of positive response from attorneys, and court leaders in each state were sufficiently pleased with program results to continue their programs after they passed an experimental stage.<sup>8</sup>

Yet not all courts considering or experimenting with settlement conference programs had positive feelings about them, as Ms. Green learned from her survey. Those who were satisfied with settlement rates could not confirm that conferences led to more settlements or earlier settlements than would have occurred anyway. And satisfaction with settlement programs in the National Center's study was not necessarily consistent with the findings of the evaluators: only one of three programs was a clear success under the evaluation criteria, and that program (in the Pennsylvania Superior Court) has since been discontinued.

C. Personnel Resources of the Kansas Court of Appeals. There are two personnel factors in the court's current situation that have

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8. See Steelman and Goldman, State Ct.J. at 11.

a direct bearing on whether a settlement conference program should be introduced, at least whether it should be introduced now. One factor is the number of judges now on the bench. The other is the level of demands being placed on the central staff attorneys in relation to their numbers.

As noted above, the number of judgeships authorized for the court was recently increased from seven to ten. This presumably came about as a result of persuasive arguments that the court needed more judges in order to meet its workload. If the court were to introduce a new settlement program now, with the result that fewer cases would be argued or submitted on briefs for court adjudication, there might be expressions of considerable dissatisfaction.

Legislators might be very critical, feeling that the court leaders had been disingenuous with them. Members of the bar might also be critical, indicating that access to the court had been reduced for their clients. The Kansas Supreme Court might refuse to approve experimentation with a settlement program for these same reasons.

Meanwhile, the court might not be able to support the operation of a settlement program with its present complement of central staff attorneys. To provide staff support for a settlement conference program, the court might need at least one more central staff attorney.

D. State of the Court's Docket. Even with three more judges, the court might easily argue for the introduction of a settlement conference program if experience to date were that even with such additional resources it cannot meet its workload. Right now, however, the court is reasonably current with its cases.

E. Summary. As the foregoing discussion indicates, the factors that would support implementation this year of a settlement conference program have shortcomings. While Judge Elliot's investigation results suggest capacity for achievement of more dispositions through settlements, those results should be (a) checked against further data for the ten-judge court, and (b) assessed in light of the judges' philosophical positions. Ms. Green's survey results about participant satisfaction with programs in other jurisdictions are mixed, and National Center evaluations have shown problems with participant satisfaction. Moreover, the court's ten-judge complement is still relatively new, and it might be difficult to garner support for introduction of a program now, especially since the court is current. With its docket current, the court would have difficulty justifying the need at present for a settlement conference program.

### III. Recommendations

Given the considerations discussed above, the Kansas Court of Appeals should not seek to implement a settlement conference program until it has had more experience with its new contingent of ten judges. There is no apparent need or justification for a new program at present.

Yet the prospect of having a settlement conference program should not be dismissed by the court. Results of the National Center's evaluation show that a settlement conference program can be successful. The committee is impressed with the program of the Missouri Court of Appeals, Western District, whose members are

pleased with its operation. The staff director of the central staff attorneys has established communications with the representatives of several courts whose leaders are enthusiastic about their programs; and there is something to be learned by contrasting programs considered satisfactory with those not so considered.

The settlement conference committee should formulate a contingency plan under which it would propose that a settlement conference program be introduced if the court were unable with its ten judges to stay abreast of its workload. Whether conferences were to be held by a sitting judge assigned for a specified period to conduct settlement conferences or by a retired judge in such a role, it would avoid potential problems if the settlement conference judge were one who would not later participate in the adjudication of the case.

The court should also study the rate at which cases are now settled without intervention by the court. It would then have baseline information against which to measure the success of a settlement program. A "before" and "after" comparison of settlement rates, taking into consideration any independent variable that might affect results, is a reasonable quasi-experimental alternative to having cases randomly assigned to an "experimental" group (with cases exposed to conferences) and a "control" group (with cases disposed by more traditional means).

Finally, the court should not overlook the conclusions of the National Center's evaluation:<sup>9</sup>

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9. Ibid., State Ct.J. at 5 and 11.

1. There should be unequivocal court commitment to fostering settlements;
2. Conferences should be conducted by a person with appropriate mediating skills;
3. For eligible cases, participation in conferences should be mandatory for attorneys and parties; and
4. Conferences should be held early in the appellate process.

With such program features as these and others observed in successful programs, the court should increase the likelihood of a successful preargument settlement program if it decides in the future to introduce one.