CHIEF JUSTICE CHASE T. ROGERS
REMARKS FOR CTLA, APRIL 11, 2014
"MEDIATION/SETTLEMENT: NEW STRATEGIES, NEW OPPORTUNITIES"

Good morning. I want to thank you for inviting me to address you because we have some exciting things going on in the Judicial Branch regarding civil matters. So the timing of your seminar is perfect in that we have just completed a major effort to begin re-engineering the civil justice system in Connecticut.

First, however, some background is required to provide context. When I became Chief Justice in 2007, I quickly realized the Judicial Branch needed a strategic plan moving forward. The initial strategic planning process – with its scope and focus on the needs of the people who interact with the Branch – broke new ground. Moreover, over the past five years, judges, administrators, supervisors and staff have implemented hundreds of changes, some big and some small, that support the long-term outcome goals of the strategic plan. Those outcome goals are: increasing access to justice; responding to changing demographics; improving the delivery of services; collaborating with others; and being accountable to all.

With the first phase of the strategic plan, the Branch embarked on an ongoing process of re-engineering – from the planning to the implementation of the first phase, the Branch has set about improving itself. Some improvements involved greater utilization of technology; some involved streamlining of processes to make them more efficient.

We're now in the second phase of the strategic plan and have recognized the importance of reviewing the entire process of dispute resolution. As such, I have determined that re-engineering must become a defined component of the plan. So I've directed that the analysis of existing processes in civil, family, criminal and juvenile matters be undertaken, with the goal of better meeting the needs of the people we serve.

We have started this process by taking a long, hard look at the civil litigation system.

I think we can all agree that the past 10 years have seen remarkable changes for our courts, particularly in the area of civil litigation. For example, the implementation of electronic filing has completely changed the way civil files are initiated, processed and accessed. These technological changes have resulted in greater access to files and more rapid processing of pleadings and motions. But technological changes alone cannot resolve all issues that affect the Judicial Branch's ability to provide relevant, affordable and accessible dispute resolution. Rather, these issues include the ever-increasing costs of discovery, the greater complexity of substantive issues in cases before the courts, the growing number of self-represented parties, and the challenges of providing the appropriate type of dispute resolution – be it court trial, non-binding arbitration, mediation or a jury trial.

We also knew that any future success depended on input from the bar. So, since last year, we have conducted five focus groups, comprising over 75 attorneys with diverse civil litigation experience. We asked, "What is working?" "What is not working?" and "How can we work together to better serve the people of Connecticut?"

The comments, criticisms and suggestions from each of the five focus groups were then presented to a workgroup composed of appellate and trial court judges and civil litigators for discussion. And as a result of those discussions, we identified four general areas upon which to focus our re-engineering efforts over the next several years. They are: 1) improving litigation management; 2) confronting current discovery issues; 3) enhancing alternative dispute resolution options; and 4) addressing the needs and impact of self-represented parties.

I am going to touch on all of these areas, although my main focus will be on ADR, especially mediation – which is why we're all here.

Let's start with Number One, improving litigation management. Effective management of litigation throughout the process is a key factor in the accessible, affordable and impartial resolution of disputes. And what we learned from the focus

groups was this: It is not just a “timely resolution” that is important. Instead, it is essential to examine the *entire* process of reaching that timely resolution. The process itself gives rise to frustration, uncertainty, increased costs and a lack of confidence in the efficacy and fairness of dispute resolution. In particular, the focus groups identified needs in several related areas, including greater uniformity of policies and procedures, greater consistency and predictability in the litigation process, enhanced oversight by judicial administration and ongoing education for all participants in the civil litigation process.

From the perspective of the Bar and self-represented parties, a lack of uniformity in how cases are managed, scheduled, processed and tried, both within a judicial district and among districts, can lead to frustration, inconsistency and an unfair advantage to local counsel. Achieving and maintaining uniformity is a continuous effort that should begin with a review process. Thus, the office of the chief court administrator will undertake a review of the case management and calendaring practices for short calendar matters, special proceedings, foreclosure calendars, conferences and trials in each JD, as a means of identifying best practices that can be implemented statewide. An analysis on how to best manage the short calendar should also be undertaken to minimize the amount of time attorneys and litigants wait for cases to be heard.

Focus groups additionally noted a lack of uniformity in the voir dire process. There also seemed to be agreement that the prescreening of jurors would significantly impact the amount of time spent in jury selection. To address this, I believe consideration should be given to the recommendations by the Public Service and Trust Commission’s Jury Committee regarding prescreening of jurors and the presence of a judge during the voir dire process. Both of these options could result in a shorter and more efficient voir dire process, before not only counsel and litigants, but potential jurors.

Not surprisingly, focus group participants directed many of their comments to the high cost of litigation. What also became evident is that the cost of litigation, in and of itself, is not the real issue. Rather, costs are a by-product of other issues, and it is only by addressing these other issues that the branch and bar can reduce the overall cost of

litigation. In other words, we need greater consistency and predictability with regard to litigation management.

As one of the first steps in addressing many of these issues, the Judicial Branch began implementing individual calendaring, first in Waterbury and subsequently in New Britain. We intend to expand the program to the Stamford-Norwalk Judicial District this spring, and we hope to have it statewide in one-and-a-half years. I can also assure you that as we roll out the program to other locations, judicial administration will make maintaining uniformity of procedures a priority. In addition, our administration will use performance measures to track the program's success in addressing issues raised by the focus groups.

I have no doubt that individual calendaring will enhance the consistency and predictability of rulings on motions and discovery disputes and increase the possibility for settlement, thereby reducing the cost of litigation. Moreover, instead of filing and arguing motions, the parties will be able to resolve disputes on pleading and discovery through status conferences by phone, video or in person with a judge who is familiar with the law and procedural history of the cases and parties. Needless to say, a judge who has this familiarity will need less time to prepare for arguments, discussions or to enter orders. I should also note that an important element of individual calendaring is a firm trial date. Counsel and parties who know that a trial will proceed on the scheduled date, absent highly unusual circumstances, will conduct their preparations in a timely manner.

The individual calendaring program will be implemented in each court location for cases filed after a certain date, not for existing cases. Furthermore, once individual calendaring is introduced to a particular location, there will be three tracks for civil cases. The first will incorporate any existing civil cases and cases excluded from individual calendaring. The second track is for complex litigation cases, and the third will encompass cases in the individual calendaring program.

Just a quick addendum regarding complex litigation cases – as individual calendaring expands statewide, consideration may be given to adjusting the focus of the

complex litigation docket, perhaps morphing it into a complex commercial docket, specifically intended to handle business and commercial disputes. Another suggestion was to dedicate a complex litigation judge to handle probate matters, analogous to the existing land use docket, in order to ensure consistency and predictability in the management and resolution of probate appeals.

I've spoken long enough about re-engineering litigation management; let's turn now to confronting current discovery issues.

In virtually every focus group, attorneys voiced their frustration with the current discovery rules and practice. Yet the focus groups had many solutions to consider as well. For example, as a means of eliminating unwarranted objections to discovery requests, standardized discovery could be expanded to additional types of cases, such as employment and medical malpractice. This concept could be extended further by implementing "automatic disclosure orders" based upon case types and requiring compliance with the orders within a set period of time by the plaintiff and defendant. Focus group participants also suggested the possibility of imposing restrictions on discovery, such as limiting the number of interrogatories.

All of these proposals and others will be referred to the Civil Commission, which includes representatives from the plaintiff and defense bars, small and large law firms, and municipal and corporate attorneys.

Before I address enhancing ADR options, I want to focus on a topic that is extremely important to me and the Branch: self-represented parties.

The re-engineering of the civil justice system cannot be accomplished without addressing the needs and impact of the ever-increasing number of self-represented parties in civil cases. Some people are forced to represent themselves because the cost of legal representation is too high. Others choose to represent themselves, believing that they can navigate the court system effectively on their own, without the assistance of an attorney. Regardless of the reasons behind the choice, undoubtedly the self-represented population is increasing, and their presence is impacting judges, court staff, attorneys and entire civil justice system in critical ways.

The adversary system, with two legally-trained opponents presenting evidence and making arguments in front of a neutral judge, is the cornerstone of the court system in Connecticut and elsewhere. However, when one side is represented by counsel and the other side is not, there is no longer equal representation. This inequality is particularly evident in collections and foreclosure matters, where so many defendants are trying to navigate the unfamiliar world of the civil non-family courts. The rules of practice can be confusing for attorneys, who have had years of legal education. How much more confusing must concepts like “return date” or “special defenses” be for a self-represented party?

To address the needs of self-represented parties, for many years, the Judicial Branch has been committed to a variety of programs and services. Court Service Centers and Public Information Desks have been established in almost every judicial district; volunteer attorney programs in the areas of foreclosure and family law have been implemented in five locations and the Judicial Branch has partnered with the CBA to implement two additional volunteer attorney programs in Small Claims in the Hartford and Middletown Judicial Districts. With the continued generous cooperation of the bar, such programs will be expanded further. In addition, materials and forms on the Judicial Branch website are being revised and simplified on an ongoing basis; and tutorials and guides to assist self-represented parties in defending lawsuits and filing appearances, for example, are continuously being developed by the law librarians; and the Branch has established close ties with the Legal Services Community, partnering in making videos to assist self-represented parties and address their needs in other ways.

The Branch is also in the process of planning a second Pro Bono Summit, to bring both the needs and the opportunities available to meet those needs to the attention of the entire legal community.

However, pro bono alone is not sufficient to address the needs of the self-represented parties; help for people with moderate means is also necessary. Too many people are in the position of having too much money to qualify for free legal services, but not having enough to retain private legal counsel. The Connecticut Bar Association

and its Young Lawyers Section are working on the development of a modest/moderate means program, sometimes referred to as “low bono,” to assist those people who cannot get help from traditional Legal Services organizations. The Judicial Branch is participating in this effort as part of a work group formed under the auspices of the Access to Justice Commission, to assist in appropriate ways with the implementation and fostering of such a program.

So suffice it to say that the Judicial Branch is well aware of the issues arising from the influx of self-represented parties and is working diligently through a variety of programs and services to address their needs and impact. We may also want to consider training specifically geared toward judges as they preside over cases involved self-represented parties.

Now, it’s time to turn our attention to enhancing alternative dispute options. There’s been exciting developments in this area, and I’m pleased to share them with you.

Work in this critically important area really got under way in 2010, when I appointed the Commission on Civil Court Alternative Dispute Resolution. Its charge was to assess existing civil ADR programs and make recommendations to improve the utilization and effectiveness of court-sponsored ADR. The Hon. Linda K. Lager, chief administrative judge for civil matters, chaired the commission, which included members from the bench, bar, academia and the business community.

The commission prepared a very thorough report, which is available on the Branch’s website, at www.jud.ct.gov. Among the areas covered is background on the role of alternative dispute resolution in Connecticut’s overall civil dispute resolution structure. As many of us know, although the traditional focus of the civil justice system has been to resolve disputes through jury or bench trials, the Branch for many years has provided several other options for resolving disputes.

The commission’s report also includes a clear statement of the goals and objectives of civil ADR programs. Stated simply, the goals of ADR programs are to allow parties to achieve an acceptable resolution of their case or a portion of their case,

through an efficient process for parties and the Branch. Such a process must be procedurally and substantively fair, and involve skilled neutrals with appropriate education, experience, process skills and knowledge of the subject matter, and who succeed in identifying and addressing underlying issues in the case.

Please note that the substance of these goals and many of the commission's recommendations were echoed in the comments and suggestions from the civil re-engineering focus groups. Many of them commented on the Judicial mediation program, saying that it was good but hampered by the difficulty in finding mediators with appropriate expertise and sufficient time to mediate. And without that essential ingredient, we cannot achieve success in this area, particularly since the skill set needed for mediation is quite different from that needed for adjudication of a dispute.

We also know that in the Judicial mediation program, people have selected the same mediators over and over, some of whom have now left the bench. It is, therefore, important that judicial administration take the necessary steps to identify more judges and judge trial referees with the talent and interest to serve as effective mediators. Once these individuals are identified, special training and educational opportunities should be made regularly available, and in some instances, required.

Along the lines of the skill required for mediation, the focus groups also discussed the idea of creating a mediation docket. There was great interest in exploring the concept, since a mediation docket would ensure that effective and skilled mediation is widely available for all parties, not just those who can afford private mediation.

Thus, based on the report and commission's recommendations, I am pleased to tell you today that the Judicial Branch intends to have a pilot mediation docket up and running by the end of this calendar year.

As a first step, however, the chief court administrator should solicit input from focus groups of judges and judge trial referees to determine whether there are judges and JTRs who are willing to serve a lengthy period as a mediator. These focus groups could provide feedback on whether the mediation docket would be another type of assignment or whether judges and JTRs would prefer to do mediation one or two days

per week or one week per month. Meanwhile, feedback could also be obtained on another suggestion that the Branch have a dual system for mediation: that is, maintaining the flexibility of the existing Judicial mediation program, which allows parties to select any judge in the state, along with the mediation docket.

From my perspective, I see only positives to implementing a pilot mediation docket program. At a minimum, a mediation docket could have two or three highly skilled and trained judges and judge trial referees dedicated to providing mediation services for cases – and who would be assigned to the docket only after completing a basic training curriculum. The docket could be in any court facility in the state, and a provision could be made for extended hours, allowing mediation to continue beyond the traditional work day or into the weekend. The possibility of creating comfortable break-out rooms, which would be more conducive to communication, will also be considered.

A mediation docket would also address the concerns of the bar about finding a mediator with sufficient time to mediate a case. Additionally, a mediation docket would ensure that judges who serve as mediators are recognized and valued for their expertise. And whether judges and JTRs are serving as mediators specifically assigned to a docket or providing mediation under the auspices of the existing Judicial mediation program, it would be helpful for parties and attorneys to have additional information about their experience and practices. Providing this type of information was a recommendation of the ADR Commission, as well as a need expressed by re-engineering focus group participants.

The focus group participants also suggested having attorneys serve as mediators. These attorneys would be hired by the Branch on a per-diem basis, like an attorney trial referee. For example, attorneys with particular expertise in construction law, commercial disputes or probate law could be an invaluable asset in resolving those kinds of case, where the substantive expertise in a specialized area is essential to understanding the issues of the case. Also, these attorneys would be provided the same training and educational opportunities that are provided to judges and JTRs.

In short, it is incumbent upon judicial administration to develop uniform criteria to identify judges, JTRs and members of the bar with the skills, expertise and interest to serve as effective mediators, arbitrators, special masters or other ADR resources. Moreover, we must provide the necessary training and educational opportunities and ensure that ongoing monitoring and evaluation of ADR programs and providers is accomplished.

I have talked way longer than I usually do, and I want to wrap up. It's clear that we have a lot of work ahead of us, but I hope you share the excitement that I have regarding these ideas. Individuals, small businesses and large corporations all need a strong, flexible and responsive Judicial Branch to which they can turn for impartial, affordable and timely dispute resolution. And now, we have a roadmap before us -- with new strategies and new opportunities -- that I predict will yield tremendous progress.

Thank you again for allowing me the opportunity to address you.

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