THE LITIGATION COMMITTEE

OF THE

ASSOCIATION OF THE BAR OF THE CITY OF NEWYORK

November 2006

REPORT ON THE CAMP SURVEY

A special subcommittee of the Litigation Committee of the Association of the Bar of the City of New York has completed a survey of lawyers' views of the Civil Appeals Management Program ("CAMP") of the Second Circuit Court of Appeals. This report describes the survey and its results and concludes with the Litigation Committee's recommendations flowing from the survey's results.

The Litigation Committee asked the Second Circuit, which fully cooperated in the survey, to review and respond to the report. The Second Circuit's response, which discusses certain changes being made to CAMP, is appended.

The CAMP survey, which was developed with the expert assistance of PricewaterhouseCoopers, is an important gauge of the utility of the CAMP program as perceived by the attorneys who experience it. It is also important because it is the only empirically-based study of the CAMP program and indeed of any appellate mediation program in New York's state and federal courts. The CAMP survey not only provides important data as to the perceived utility of the CAMP program in the Second Circuit, but it also serves as a model of a quantitative study to which the academic community and others interested in judicial administration can refer in reviewing the effectiveness of appellate mediation programs in other jurisdictions.

What Is CAMP?

CAMP, instituted in 1974, is a mandatory mediation process required for all civil appeals filed in the Second Circuit except for pro se cases and habeas corpus petitions. The Office of Staff Counsel, presently staffed with three attorneys, conferences each such appeal, meeting with counsel for the parties and sometimes also with the parties. The primary purpose of the CAMP conference is settlement, but it also functions as the mechanism for resolving scheduling and other procedural matters.

At the outset of the appeal, the Office of Staff Counsel issues an order scheduling the CAMP conference (referred to as a pre-argument conference) as well as a Scheduling Order setting forth the briefing schedule and date for oral argument of the appeal. The CAMP conferences generally take approximately one hour, and there may be follow-up

conferences or telephone communications with Staff Counsel. The lawyers are required to appear in person at the Second Circuit's Office of Staff Counsel prepared to discuss the merits of the case and with the client's authority to make commitments regarding settlement. Staff Counsel at their discretion may permit the conference to be conducted by telephone or video.

Who Benefits From CAMP?

The Second Circuit affords oral argument on every civil appeal. As the appeals docket grows, the burden on the appellate bench to prepare for, hear, decide and write an opinion (or at least a summary order) for every appeal on the docket grows with it. In 1997, the purpose of the CAMP program was described as follows:

> "The focus of the program is on settling cases, but CAMP conferences also are intended to narrow issues, eliminate patently meritless arguments, weed out meritless appeals, and resolve procedural problems."

R. Niemic, Mediation & Conference Programs in the Federal Courts of Appeals (Federal Judicial Center 1997), at 24.

Thus, the primary beneficiary of the CAMP program is the Court itself. In addition, the public and all litigants benefit generally from a decrease in docket congestion at the Second Circuit. Of course, any parties that actually reach a settlement through the CAMP mediation also enjoy a direct benefit from the CAMP program.

Some lawyers, however, consider the CAMP conference to be unnecessary for them to bring about a settlement if their client wants a settlement. Such lawyers view the CAMP conference as a waste of billable time.

Why Was the Survey Conducted?

The Litigation Committee was interested to know the success rate of the CAMP program and discovered that there had been no statistical evaluations of the program since its inception. The Federal Judicial Center had evaluated a pilot study of the Second Circuit program in 1974-75 and an experimental expansion a few years later, but no current evaluation was available. In recent years the Second Circuit has been developing an electronic database with statistics relevant to the appeals processed through the CAMP program.

While statistics on numbers of appeals docketed and numbers of appeals settled or withdrawn before oral argument reveal the caseload of the Second Circuit, they do not reflect whether any appeals were settled or withdrawn as a result of the CAMP program, as opposed to other factors, such as the independent efforts of the parties and their counsel.

The Second Circuit CAMP Subcommittee was formed and charged with the task of determining the feasibility of, and then designing and conducting, a current evaluation of lawyers' views on the CAMP program. The Second Circuit welcomed the opportunity to learn the Bar's perception of the program. While not sponsoring the survey, the Second Circuit's Office of Staff Counsel fully cooperated with the CAMP Subcommittee by meeting to discuss the program and providing docket information on filed appeals. The Office of Staff Counsel also provided input on the survey questionnaire when it was in draft form. The CAMP Subcommittee also worked with members of the ADR Committee of the Association in developing the questionnaire.

PricewaterhouseCoopers, as a pro bono service to the Bar, volunteered the time and expertise of its Advisory Services Group in developing and implementing the survey, and it received and analyzed the results.

The Survey

The survey, in the form of an electronic questionnaire, was directed by e-mail to 1,034 attorneys who had been listed on the Second Circuit's 2001 docket as having represented parties in civil appeals that had been subject to the CAMP program. The lawyers' names and addresses of record were provided to the CAMP Subcommittee by the Second Circuit's Office of Staff Counsel, along with the case names and docket numbers. The Subcommittee ascertained the e-mail addresses of the attorneys. Respondents to the survey responded by e-mail anonymously; that is, the identity of the respondent was automatically shielded and was separated from the response so that it became impossible to trace the identity of the case or the respondent as to any response.

The survey was distributed in two waves. It was distributed to the first group of attorneys on March 9, 2004, and to the second group of attorneys on December 21, 2004. The identities of the respondents were captured in a table, separate from the responses themselves, so that PricewaterhouseCoopers could keep track of who had not yet responded while keeping the responses themselves anonymous. After each of the two initial distributions of the survey, follow-up e-mails were sent to attorneys who had not yet responded to the survey, and additional responses were received. The CAMP survey was closed on March 25, 2005.

A total of 268 responses was received. According to PricewaterhouseCoopers, this number of responses is sufficient to infer, with a certain level of confidence, the attributes of the population as they relate to the CAMP process.

The questionnaire elicited the views of the attorneys on whether the CAMP process facilitated settlement, whether it helped the attorneys and clients better understand the strengths and weaknesses of the case and whether it helped narrow or eliminate issues. It asked whether the lawyers thought the CAMP process should be required for all civil cases, and it invited narrative explanations of the answers to these questions. The

questionnaire also requested information about the type of case on appeal, the type of client represented, the amount of damages (if any) involved and the nature of issues on appeal. In addition, it inquired into the extent of client participation in the CAMP conference and the lawyers' views as to the utility of client participation in the conference.

A copy of the questionnaire is appended to this report, along with the response results.

How Does the Bar View the CAMP Program?

Did CAMP facilitate settlement?

The questionnaire asked lawyers whose cases settled on appeal[1] whether the settlement was reached during the CAMP conference or otherwise (Question 17). Fourteen percent (14%) [10/71] of the lawyers whose cases settled on appeal stated that the case settled during the CAMP conference. This fact alone suggests that the CAMP process facilitated the settlement reached in those cases.

However, most of the settling lawyers (83%) [59/71] said that their cases settled after the CAMP conference, and three percent (3%) [2/71] said that the case settled before the conference. These responses do not permit an inference as to whether or not the CAMP process facilitated the settlement reached in these cases.

The questionnaire specifically asked, "Did the CAMP process facilitate the settlement?" (Question 16). Thirty percent (30%) [35/118] of lawyers responding answered YES, and sixty-five percent (65%) [77/118] answered NO. The number of lawyers responding to this question (118) is greater than the number of lawyers who reported that their appeal had settled (71). This suggests that some respondents may have read the question as asking generally whether the process facilitates settlement in general and not limited to whether an actual settlement achieved was facilitated by the CAMP process.

Lawyers with individual clients apparently fared better with settlement than other respondents in that seventy-one percent (71%) [25/35] of the lawyers who reported that their cases settled (Question 15) had individuals as clients. This group, however, was consistent with the universe of respondents in its view as to whether the CAMP process facilitated the settlement (Question 16), with twenty-nine percent (29%) [10/34] responding YES and sixty-seven percent (67%) [23/34] responding NO.

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[1] Approximately 28% [71/251] of lawyers responding reported that their case on appeal settled (Question 15). Due to the anonymity of the responses, it is not possible to know from the survey results which cases were settled and, consequently, it is not possible to know whether the responses as to settlement include responses of multiple lawyers on the same case.

Did CAMP Help the Parties Narrow or Better Understand the Issues?

A substantial majority of the lawyers responding gave a resounding NO to the question whether the CAMP process helped narrow or eliminate issues (Question 27): a full eighty-one percent (81%) [203/251] of respondents stated that it did not. Similarly, seventy-one percent (71%) [177/250] of respondents stated that the CAMP process was not useful in helping the parties and counsel better understand the strengths and weaknesses of their case (Question 26).

Counsel for appellants and counsel for appellees agreed on this point. Eighty percent (80%) [83/104] of appellants' lawyers and eighty-three percent (83%) [119/144] of appellees' lawyers said that CAMP did not help narrow or eliminate issues (Question 27); sixty-nine percent (69%) [72/104] of appellants' lawyers and seventy-two percent (72%) [104/144] of appellees' lawyers said it did not help the parties better understand the issues (Question 26).

Lawyers whose clients were individuals had a slightly more positive reaction to the CAMP program than did lawyers whose clients were companies. About 19% [12/65] of the lawyers with individuals as clients said that CAMP helped narrow or eliminate the issues (Question 27); whereas only 12% [11/95] of the lawyers with companies as clients reported that view.

The respondents explained why they held these views. In general it appears that most lawyers agreed that by the time their dispute reached the appeal stage, the "issues" were well understood and narrowed, even if their opinions of those issues remained far apart. The following responses are typical:

Negative:

"The appeal followed a trial. Both sides understood the case."

"The issues had already been narrowed to mootness."

"The issues were self-evident."

"Parties well versed on the issues and dug in."

"We already knew the strengths and weaknesses of our case."

"The parties were entrenched in their positions."

"The case was too complicated and the CAMP person was the person in the room who was least familiar with the issues."

Positive:

"The conference helped opposing counsel convince her client of the reasonable strategy in dropping a claim."

"Staff counsel are extremely well versed in the issues in the cases before them and many immigration appeals are resolved [at] CAMP conferences."

"Points voiced by the staff attorney carried greater weight than anything I could have said to my adversary."

What Types of Cases Are Most Likely to Benefit from CAMP?

The respondents were asked to state their views as to which types of civil cases they think are most likely to benefit from the CAMP process (Question 29) and which are the least likely to benefit from the CAMP process (Question 30). The narrative responses are not quantifiable, but one general theme appears to be that CAMP is believed to work best to help achieve settlement when the case is simply about money.

Many responses to Question 29 identified commercial disputes, tort cases, and matters where the parties are insured as the type of civil cases most likely to benefit from CAMP. The flip-side of this is seen in the answers to Question 30, where cases least likely to benefit are identified as those where there is a principle at stake in the minds of the litigants, or an unresolved legal, constitutional or governmental issue, or a demand for injunctive relief. This is corroborated further by a number of the responses to Question 32, where similar cases are identified as among those that should be exempt from CAMP.

Typical responses identifying cases most likely and least likely to benefit from CAMP include:

Cases Most Likely to Benefit from CAMP:

"Cases involving strictly money damages."

"Commercial cases."

"Virtually any commercial case after judgment on the merits."

"Damages and procedural issues."

"Cases in which monetary damages are a major issue."

Cases Least Likely to Benefit from CAMP:

"Cases involving core constitutional issues or other significant issues of principle."

"Injunction cases."

"Declaratory judgment, extraordinary remedy cases."

"CAMP is not an appropriate forum for resolution of government policy disputes."

"Substantive legal issues."

As to particular subject matters of cases, the responses are divergent. Some lawyers singled out particular subject matters that they thought were more likely to benefit from CAMP, while other lawyers identified the very same subject matters as least likely to benefit from CAMP. In this regard, immigration cases and employment cases appeared with some frequency on both sides of the point of view.

Some lawyers expressed the view that all cases can benefit from CAMP. Typical of these comments include:

"All cases can benefit if the process is handled correctly."

"All benefit if for no other reason that it forces the parties to have some discussion of resolving the case."

"It is impossible to generalize. I would not exclude any category of case a priori."

Should CAMP Continue To Be Mandatory?

The questionnaire asked the lawyers to state their view as to whether the CAMP process should be required for all civil cases (Question 31). The lawyers responding to this question were about evenly split between YES and NO. Forty-three percent (43%) [109/253] said it should be required for all civil cases, and forty-one percent (41%) [104/253] said it should not. The remaining sixteen percent (16%) [40/253] responded that they did not know.

Not surprisingly, appellants' counsel were more in favor of a mandatory process than were appellees' counsel. Fifty-three percent (53%) [56/105] of all appellants' lawyers said that CAMP should be required for all civil cases, whereas only thirty-six percent (36%) [52/146] of all appellees' lawyers expressed that same view. This presumably reflects the fact that appellees, having won below, perceive that they have little or nothing to gain in a settlement, whereas appellants may see the mandatory process as one last possibility of salvaging something of their lost causes with a settlement.

Twenty-seven lawyers responding to the survey volunteered the suggestion that the program should be voluntary or modified to permit an opt-out mechanism. While these comments were made by only ten percent (10%) [27/268] of the lawyers completing the survey, their comments are significant because these individuals volunteered the

suggestion, without being asked a question soliciting a view on that topic. Suggestions to make the program optional include:

> **CAMP Should Be Optional**:
>
> "In its present for[m] CAMP participation should be voluntary for all cases."
>
> "[Cases should be exempt from CAMP] [w]here the parties affirm that they have explored settlement and that the parties wish a judicial decision."
>
> "There should be an opt out letter sent to counsel of record because they know whether it would be helpful if both sides 'opt out' then there should be no conference."
>
> "Where the defendant is a governmental entity you might consider sending a preliminary inquiry to the parties requesting input whether a CAMP conference would be useful."
>
> "[Cases should be exempt from CAMP] [w]here one of the parties opts out or where both parties opt out."
>
> "It should be up to the parties to decide whether to participate . . . ."
>
> "Process should be optional at option of any party."
>
> "Each party should be able to evaluate his or her case and determine based on all the facts whether there is a realistic chance that a CAMP conference will result in a settlement."

The questionnaire also asked the lawyers to identify any types of cases that they believed should be exempt from the CAMP process (Question 32). The responses here paralleled the responses to Question 30 as to which types of cases the lawyers thought are least likely to benefit from CAMP.

What Do Lawyers Think of the CAMP Conference Itself?

Client Participation: Client participation in the CAMP conferences is not generally required. The questionnaire solicited lawyers' opinions as to whether they think client participation in the CAMP conferences would be helpful. Client participation in the CAMP conferences is reportedly low. Only ten percent (10%) [24/245] of respondents reported that the client participated in the conference (Question 22), and eighty-two percent (82%) [176/214] of the lawyers responding believed that client participation would not have been helpful (Question 25).

Staff Counsel: The survey did not solicit comments or opinions on the Staff Counsel, but many respondents volunteered comments, expressing the opinion that the effectiveness of the CAMP conference depended a great deal on the effectiveness of the Staff Counsel conducting the particular conference. (The responses appended to this Report have been redacted so as not to disclose the identities of the Staff Counsel discussed by the respondents in their volunteered comments.)

Many respondents who volunteered comments pinpointed the Staff Counsel's knowledge of the case as a key factor in the effectiveness of the mediation. These comments include:

> **Staff Counsel Knowledge**:
>
> "The more they know, the better the conference."
>
> "The quality of the Staff Attorney is important."
>
> "It is frustrating when the legal issues and/or facts are complicated and the mediator facilitator isn't familiar with the litigation."
>
> "I find the conferences most useful when the staff counsel is well prepared, i.e., has read at least the opinion below and has given some thought to the issues. In those situations the staff counsel has more credibility with the parties when pointing out strengths and weaknesses and making suggestions re settlement."

Also, it was suggested that the Staff Counsel should conduct the conferences as mediators do in non-CAMP settings—by talking to parties separately, by not being judgmental about the strength of cases, by generally being conciliatory towards the advocates. These comments include:

> **Mediation Techniques**:
>
> "The experience and practical skills of the Court Attorney are most important."
>
> "Good settlement techniques are establishing a non-coercive atmosphere, talking with each side individually to encourage each side to settle, having a follow-up conference after the initial meeting."
>
> "The CAMP process should be conducted more along the lines of a mediation with the Staff Counsel meeting separately with each side eliciting offers from each and seeking to bridge the gap."

Some of the comments are more pointed, criticizing individual mediation technique in addition to the perceived bias:

> "In the distant past experiences were unpleasant with staff counsel attempting to brow beat counsel for the parties."

"I think the tactic of intimidation should be eliminated from the process as well as the display of arrogance and the demeaning of counsel."

Suggestions for Improvement

The questionnaire invited the lawyers participating in the survey to provide any other comments that they thought would be helpful in evaluating the settlement function of the CAMP program and for further development (Question 33). The themes most prevalent in these volunteered comments are the comments noted above, viz., (1) the suggestion that the CAMP process should be optional and (2) the unsolicited comments about the Staff Counsel.

In addition to those, there were suggestions to make the CAMP conference more substantial in several different ways, including the following:

"Use of experienced mediators and mandatory attendance by sufficiently senior officer or director of client would be helpful."

"Bringing a judge in at the end if progress is made might be helpful."

"Retired judges could also be helpful as mediators."

"To succeed, a CAMP conference requires, like mediation generally, active participation and investment of effort by all participants, staff counsel as well as counsel for and principals of each party. The parties should be required to make preconference ex parte submissions to staff counsel which should include, among other things, a summary of settlement negotiations to date and each party's private settlement position. Principals should be urged if not required to attend the conference so they can hear weaknesses in their positions from adversaries and staff counsel first hand rather than filtered through their own counsel."

Conclusion

The Litigation Committee believes that it is important that the CAMP process be monitored on an ongoing basis to continue to assess its effectiveness and its utility to the Second Circuit as well as to the Bar.

In this regard, the Litigation Committee recommends that the Second Circuit require all participants in the CAMP process to complete, on an anonymous basis, contemporaneous questionnaires directed to the effectiveness of the program in general and as to particular types of cases. These questionnaires might be in the nature of "exit surveys" required to be completed at the conclusion of each conference and, for cases that settle after the CAMP conference but before oral argument, short follow-up questionnaires to the same effect.

In addition, because many survey respondents volunteered comments on the perceived effectiveness or ineffectiveness of the individual Staff Counsel in their CAMP conference, the Litigation Committee believes that, in any future evaluation of the CAMP

program by the Second Circuit, comments should be solicited from the lawyers participating in the CAMP conferences as to the skills and effectiveness of the Staff Counsel involved in their conferences, so that any problems in that regard can be identified and remedied.

Notwithstanding the recent changes instituted by the Second Circuit and others it states that it is considering (see the attached Response of the Second Circuit Court of Appeals to the Report on the CAMP Survey), the survey continues to be an important gauge of the utility of the CAMP program. Its importance transcends the changes that the Second Circuit states it has instituted since the data for the survey were collected (for example, more telephone conferences) and others it is considering.

The Litigation Committee commends the Second Circuit for those changes and its willingness to consider further changes. The survey's core findings, however, remain pertinent and unaddressed by the Second Circuit. In particular, the survey reveals that the CAMP process depends heavily on the skills of the Staff Counsel involved in the conferences and, for that and other reasons, the CAMP process should be monitored on a continuing basis. The Litigation Committee has accordingly recommended that upon completion of a CAMP conference, the Second Circuit ask the participating attorneys to fill-out exit surveys. The purpose would be to provide feedback on the CAMP program generally and on the experience in the case just conferenced, including comments on the skills of the Staff Counsel. The Second Circuit has instituted no changes in this regard.

ATTACHMENTS:

Response of the Second Circuit Court of Appeals to the Report on the CAMP Survey
The CAMP Survey Questionnaire
The CAMP Survey Response Results

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Attachment 1

Attachment 2

Attachment 3a

Attachment 3b