Settlement Strategies for Federal District Judges

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SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES

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Federal Judicial Center
1986

Cite as D. M. Provine, Settlement Strategies for Federal District Judges (Federal Judicial Center 1986).

FJC-R-86-1

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FOREWORD

Trial judges are making greater efforts to promote settlements than ever before. These efforts, one aspect of increased involvement in the pretrial process, reflect judicial concern over the growing number of lawsuits, escalating costs, and increasingly complex claims and defenses.

Scheduling a firm date for trial has long been viewed as one of the most effective techniques for promoting settlements. Scheduling to establish a deadline for completion of discovery is important in making a trial date credible. Together, these procedures go far toward assuring a measure of both dispatch and economy, and to some extent they have been cast as requirements by recent amendments to the federal rules. These same amendments explicitly invite more direct judicial involvement in the settlement process. Neither the rules nor the notes of the Advisory Committee provide detailed guidance concerning what steps judges should take to encourage settlement, nor could they; what is appropriate in one situation may be totally inappropriate in another. More basically, there is less information and more controversy about the steps judges should take to facilitate settlement. That is the subject of this report, prepared by Marie Provine during her tenure as a judicial fellow in the Research Division of the Federal Judicial Center.

Judicial intervention to promote settlement casts the trial judge in a delicate role. Many lawyers desire more assistance from judges in removing psychological and informational barriers that stand in the way of settlement, but they do not want to lose control over their lawsuits or forgo their rights to proceed to trial. To serve the interests of the parties effectively, the judge must alter the relationship between the disputants so as to encourage—but not coerce—an early settlement. To serve the interests of the court, and indirectly the interests of the public, the judge must not spend more of the court's time than is warranted by the savings in trial time and litigation costs.

Trial judges across the United States are exploring and developing a variety of approaches to settlement. Judges are selecting cases for summary jury trial, for mediation, and in some situations for court-annexed arbitration, and they are hosting settlement conferences where they try out other ideas designed to encourage set-

tlement. Most judges do not embrace a single approach to be applied in all circumstances—rather, there is a variation in methods selected depending on the judge's assessment of the critical elements of the case, the prior and continuing relationships of the parties, and the roles of the lawyers.

Professor Provine's report is based on insights provided by the burgeoning literature in this field, interviews with many of the leading judicial exponents of giving settlement effort a more central role in case processing, and, ultimately, a conference at which twenty of these leaders discussed the subject in terms ranging from abstract values to concrete hypothetical cases. Drawing on all these sources, she sorts through the settlement-oriented options available to judges, describing their premises, methods, and applications. Consideration is given to the timing of intervention and its intensity, to the degree of client participation, and to formality.

The author's objective has been to provide judges with a framework in which to consider alternative techniques for settlement and to identify those they find both congenial and appropriate so that, if they so choose, they may organize and plan comprehensive, cost-effective, and satisfying settlement strategies.

A. Leo Levin

I. INTRODUCTION

Civil justice, in the opinion of many, costs too much and takes too long. The problem is not simply that cases proceed to trial when they should have settled, but also that settlements often occur much later than they should, sometimes on the courthouse steps the day of a scheduled trial or during a trial. Delayed settlements create needless legal expenses for litigants and waste court resources. Pressure to make the settlement process more timely and more rational has grown acute in the last decade as caseloads have swollen and the process of litigating has grown more costly and complex.[1]

Settlements are desirable, not just because trials are costly to litigants and court systems, but because settlements allow parties to "manage their own disputes" and avoid the uncertainties and limitations of the winner-take-all, imposed decisions that courts make in fully litigated cases.[2] Settlement also offers privacy to liti-

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1. For a general discussion of court congestion and the measure and effects of resulting delay, see Rosenberg, *Court Congestion: Status, Causes, and Proposed Remedies*, in H. Jones, The Courts, the Public and the Law Explosion 29-59 (Prentice-Hall 1965); Miller, *The Adversary System: Dinosaur or Phoenix?*, 69 Minn. L. Rev. 1, 1-12 (1984); Levin & Colliers, *Containing the Cost of Litigation*, 37 Rutgers L. Rev. 219 (1985); ABA Action Commission to Reduce Court Costs and Delay, Attacking Litigation Costs and Delay (1984); Connolly & Smith, *The Litigant's Perspective on Delay: Waiting for the Dough*, 8 Just. Sys. J. 271 (1983).

2. Trial, it has been observed, has a number of disadvantages:

> Unfortunately, not all disputes that end up in court are best resolved by judicial means. First, the courts tend to focus on procedural considerations, often failing to address substantive matters that lie at the heart of many disputes. Second, our court system often precludes direct participation by the principal parties to a dispute, relegating the tasks of communication and negotiation to lawyers and other advocates. Third, access to the courts is sometimes difficult for unorganized parties with few resources. Fourth, the adversary nature of litigation tends to polarize disputants, discouraging open communication, the sharing of information, and joint problem-solving. As a result, the relationships between the contending parties often deteriorate in the course of the judicial process. Finally, judicial outcomes are not consensual—instead, the court's judgment is imposed on the adversaries through the designation of a winner and a loser. Legitimate compromises are often overlooked.

Susskind & Madigan, *New Approaches to Resolving Disputes in the Public Sector*, 9 Just. Sys. J. 179, 179-80 (1984).

gants and enables them to consider opportunities for resolutions that would not be available in a trial judgment.

Almost no one argues for fewer voluntary settlements.[3] To the contrary, the trend is to experiment with ways of encouraging more of them: Business leaders are calling for an increased emphasis on mediation and arbitration of commercial disputes; law schools and business schools are beginning to teach negotiation skills applicable to a broad range of disputes; public and private dispute-resolution centers and organizations are springing up to satisfy the demand for mediation, minitrials, and other alternatives to traditional patterns of litigation.

Courts are participating in this movement to enrich opportunities for avoiding the expense and uncertainty of trial. Some refer cases to neighborhood justice centers and other institutions designed to mediate disputes. Others channel cases to court-sponsored arbitration or mediation by practicing lawyers. Many judges have institutionalized voluntary or mandatory settlement conferences, and judges often preside at these meetings.

The judges, other court personnel, and practitioners involved appear enthusiastic about the efficacy and desirability of the efforts they are making to promote civil settlement. Judicial willingness to become involved in the settlement process and to experiment with approaches designed to enhance the settlement rate may, in fact, be at an all-time high. The specter of rising caseloads, increasing case complexity, and evermore costly and extensive pretrial proceedings adds to the call for active, settlement-oriented judicial management. The 1983 changes in rule 16 of the Federal Rules of Civil Procedure, which for the first time list settlement as a subject for pretrial conferences, implicitly endorse greater judicial sensitivity to settlement possibilities.[4]

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3. For most observers the crucial question is whether a settlement is indeed voluntary, or, more generally, when the conditions that promote settlement are coercive. An exception is Professor Owen M. Fiss, who argues that often "settlement is a poor substitute for judgment." Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1089 (1984).

As settlement efforts become more coercive, more controversy emerges. Professor Peter Edelman suggests that we know little about the relative cost-effectiveness of court-annexed techniques in particular types of cases, and that there are questions about the effect these techniques have on poor and less powerful disputants. Edelman, *Institutionalizing Dispute Resolution Alternatives*, 9 Just. Sys. J. 134, 137–39, 140 (1984). He argues for an incremental approach to obviate some of the potential problems and to allow for an expanding information base on which to implement alternatives. *Id.* at 141.

4. *See* A. Miller, The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility (Federal Judicial Center 1984); Comment, *Recent Changes in the Federal Rules of Civil Procedure: Prescriptions to Ease the Pain?*, 15 Texas Tech. L. Rev. 887, 892–95, 904–08 (1984).

Much, however, remains to be known about how courts can most effectively promote civil settlements. The information available to interested judges, magistrates, and other court personnel has lagged behind their desire to explore new settlement options. Most of the burgeoning literature and teaching on negotiation, mediation, and other alternatives to litigation has been directed at disputants and their attorneys,[5] not toward judges and other court officers, who work within different institutional constraints.

This report considers civil settlement from the perspective of the trial judge. The options discussed here are those that members of the federal bench believe to be effective, based on their own experience. The Federal Judicial Center has used this experience-based approach in its educational seminars, inviting distinguished members of the bench to address new judges and other groups about their settlement-oriented practices. Some of these options are familiar and time-tested. Judges, after all, have always had opportunities to encourage litigants to settle prior to trial, and many judges have taken advantage of these opportunities. Other means of promoting settlement, like court-annexed arbitration, are less familiar because they are new.

This report describes both the older and the newer techniques that judges are using to move civil cases toward resolution short of trial, and places each technique within a framework that highlights the fundamental choices judges make in developing a settlement strategy. Judges interested in expanding or revising their own case-management practices to promote settlements can use this report to analyze and compare the alternative strategies available to them. Practitioners, scholars, and court personnel may also find this report helpful in organizing their own ideas about civil settlements.

To prepare this document, I began by interviewing twenty-five district judges who have spoken out on the matter of settlement,

5. Much of the literature, for example, is aimed at teaching practitioners to negotiate on behalf of their clients or otherwise describing their role. *See, e.g.*, G. Williams, Legal Negotiation and Settlement (1983); Phillips & Piazza, *Mediation Is a Tool for Managing Litigation*, 32 Fed. Bar News & J. 240 (1985); R. Fisher & W. Ury, Getting to Yes: Negotiating Agreement Without Giving In (Penguin 1981); H. Edwards & J. White, The Lawyer as a Negotiator (West 1977); Gifford, *A Context Based Theory of Strategy Selection in Legal Negotiation*, 46 Ohio St. L.J. 41 (1985); Stier & Hamilton, *Teaching Divorce Mediation: Creating a Better Fit Between Family Systems and the Legal System*, 48 Albany L. Rev. 693 (1984); Riskin, *Mediation and Lawyers*, 43 Ohio St. L.J. 29 (1982); Moberly, *A Pedagogy for Negotiation*, 34 J. Legal Educ. 315 (1984). An interesting study of the details of evaluation, negotiation, and settlement of bodily injury claims is found in H. Ross, Settled Out of Court (Aldine 1970). There are also directories and other indexes of resources available for private dispute resolution. *See, e.g.*, CUNY Law School Alternative Dispute Resolution Project, Resource Directory in Dispute Resolution.

either in print or in speeches or remarks available to the Federal Judicial Center staff. Members of the Center's Research Division and I then organized a conference on the judicial role in settlement, which we held on September 8–9, 1985, in Kansas City, Missouri.[6] This report presents and discusses the ideas derived from these contacts with the federal bench and from the scholarly literature relevant to the judicial role in the settlement process.

Where information about the efficacy of any particular technique is available, it is included here. This report does not, however, rank settlement options according to relative efficiency or desirability. We are at an early stage in efforts to assess the strengths and weaknesses of particular techniques, and broad-based comparisons have barely begun. The objective here is not to promote particular settlement options or discourage resort to others, but to assist judges in developing a coherent approach to settlement that takes appropriate account of differences among civil cases.

In relying on judges who have spoken out about civil settlement, we have inevitably chosen a nonrepresentative sample of the federal trial bench. One should not draw conclusions about how frequently any given practice occurs from the discussion that follows, nor should the list of settlement options presented here be regarded as complete. A reliable inventory of all settlement techniques in the district courts would require a survey of the entire bench, and even such a survey would soon be out of date, given the changes occurring in many district courts.

The premise that has guided preparation of this report is that in this period of exploration of alternative dispute resolution techniques, judges need to know as much as possible about the range of available options and their applicability. Such information may enable judges to develop settlement resources that address the barriers to settlement they perceive in their cases and that respond to the needs of litigants.

The Federal Judicial Center is in a good position to gather and transmit the ideas that are "in the air" to those interested in enhancing settlement possibilities in their own courts. This information-sharing role is a continuing one, which suggests that this report should not be regarded as the Center's last word on settlement. It is, instead, a working document that may be revised as our knowledge about the judicial role in the settlement process develops. We invite readers of this report, particularly those who rely on case-management strategies not covered here, to share these

6. Attending this conference with me were William B. Eldridge and Thomas Willging of the Research Division and Wendy Jennis of the Clerks Division of the Administrative Office of the U.S. Courts.

strategies with the Federal Judicial Center. Such information may provoke useful dialogue between bench and bar and should encourage further innovations designed to produce quality settlements.

II. JUDICIAL EFFORTS TO PROMOTE CIVIL SETTLEMENTS: PRELIMINARY ISSUES

The vast majority of disputes that reach American courthouses are resolved before they come to trial by "bargaining in the shadow of the law" between the parties.[7] Settlements have always been the predominant means of resolving civil suits in the United States, but in recent years the proportion of cases settled appears to have grown even larger. Only 5 percent of the civil cases terminated in federal district courts in the 1983–1984 reporting period reached trial, according to the Administrative Office of the U.S. Courts.[8]

The predominance of settlement may cause a judge to wonder whether it is worthwhile for judges to become more involved in the process. Can judges develop more reliable means of differentiating cases that will settle, no matter what the judge does, from those that will not settle without help? Can the assistance a judge offers be made more responsive to the particular obstacles that stand in the way of settlement? Should more court resources be devoted to enhancing settlement prospects? Should efforts be made to encourage earlier settlements? At what point in the pretrial process will settlement efforts mean most and cost least?

These are practical questions every judge confronts in designing a strategy for managing civil cases prior to trial. Definitive answers, it appears, are elusive. Judges vary enormously in the methods they use to encourage "the just, speedy, and inexpensive determination of every action."[9]

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7. Professors Robert H. Mnookin and Lewis Kornhauser introduced this term in a 1979 article, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950 (1979). For a helpful discussion of the predominance of settlement in U.S. courts, see Galanter, *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), especially 26–32.

8. Administrative Office of the U.S. Courts, 1984 Annual Report of the Director at 284, table C4. The proportion of completed trials was even less. See note 14 *infra* for the broad definition of "trial" employed by the Administrative Office.

9. Fed. R. Civ. P. 1.

It is important, however, to distinguish between judicial practices designed specifically to bring about fair, early, and cost-effective settlements, such as assignment to court-annexed arbitration or a settlement conference, and practices directed toward the seemingly contradictory goal of facilitating trials, such as videotaping testimony, limiting and refining the discovery process, and using calendaring techniques that enable judges to set trial dates early and firmly.[10] Management innovations that bring the reality of an upcoming trial to the attention of litigants are undoubtedly important incentives to settlement; nearly every judge interviewed for this study cited the importance of a firm trial date in producing settlements. Rule 68 of the Federal Rules of Civil Procedure represents another indirect approach to the problem of unnecessary trials, one that encourages settlements by making failure to settle more costly.[11] Important as such indirect incentives are, detailed discussion of how they work is beyond the scope of this report, which focuses on techniques designed specifically to encourage settlement through the intervention of a judge or other third party or parties.

To Intervene or Not: Options Available to Judges and Dilemmas They Face

The 1983 amendments to the Federal Rules of Civil Procedure encourage judges to take an active role in the settlement of civil suits. Section (a) of rule 16 now includes "facilitating the settlement of the case" in the list of objectives of pretrial conferences, and section (c) has been revised to include "the possibility of settlement" as one of the items participants at the conference may take action to effectuate. That section also authorizes judges to "consider and take action with respect to . . . extrajudicial procedures to resolve the dispute."

10. For suggestions on streamlining and limiting discovery, see McMillan & Siegel, *Creating a Fast-Track Alternative Under the Federal Rules of Civil Procedure*, 60 N.D.L. Rev. 431 (1985), and Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 Rutgers L. Rev. 253 (1985). On managing to achieve firm trial dates, see Stienstra, Joint Trial Calendars in the Western District of Missouri (Federal Judicial Center 1985).

11. For a summary of the current rule and suggestions for its improvement, see Note, *Rule 68: An Offer You Can't Refuse*, 37 Rutgers L. Rev. 373 (1985); on the premises that underlie this approach to promoting settlement, see J. Shapard, The Influence of Rules Respecting Recovery of Attorneys' Fees on Settlement of Civil Cases (Federal Judicial Center 1984).

These changes can be interpreted both as an endorsement of what some judges were already doing and as a call to future action.[12] The Advisory Committee notes accompanying rule 16 reflect this dual objective. The committee "recognizes that it has become commonplace to discuss settlement at pretrial conferences," and then goes on to suggest that those judges who are not already holding settlement conferences should do so because "it is believed that providing a neutral forum for discussing the subject might foster it."

Other 1983 changes in the rules also support judicial intervention to promote settlements, but less directly. Section (b) of rule 16 requires the judge to consult with the attorneys and issue a scheduling order within 120 days of filing in every case not exempted by local rule. This requirement is clearly intended to encourage judges to be more sensitive to the pretrial progress of their cases. Rules 11 and 26 have been rewritten to encourage judges to take a more active role in supervising pleading and discovery.

All of these rule changes point in the same direction: toward increasing responsibilities for lawyers and judges in the pretrial phase of civil litigation. The trial judge may well feel encouraged to go further and become not just a manager, but a promoter of dispute resolution before trial, a role that may even include moving a dispute toward settlement outside regular court channels. Enthusiasm for alternatives to litigation must not, of course, obscure the fact that intervention inevitably consumes precious court time and resources. Judicial intervention should have a positive effect on the number of settlements, their timing, their quality, or some combination of these. A judge must also be alert to the dangers of bias or coercion that accompany some forms of intervention.

The techniques judges use to effect settlements are difficult to assess in the abstract because individual approaches vary widely, and because the impact of many techniques seems to depend both on the personal qualities a judge brings to the task and on the local legal environment within which the judge works. Success in promoting settlements thus depends on a marriage of technique with personal and institutional resources, a dynamic that tends to confound cross-court comparisons. The unavoidable linkage of judicial settlement initiatives with personal and institutional capacities

12. *See* A. Miller, The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility (Federal Judicial Center 1984); Comment, *Recent Changes in the Federal Rules of Civil Procedure: Prescriptions to Ease the Pain?*, 15 Texas Tech L. Rev. 887, 892-95, 904-08 (1984).

suggests that judges must rely heavily on their own assessments in deciding how to enhance settlement possibilities.

The question of how judges can most effectively promote settlements may be complicated by the significance of context, but at least the basic choices to be made are relatively unambiguous. Judges must resolve the following three, somewhat interdependent, questions in designing any strategy to encourage pretrial settlements:

1. Will the judge treat all cases the same way, or attempt to distinguish cases that need court assistance from those that do not?
2. Will the judge rely on more than one type of procedure to encourage settlement?
3. When in the pretrial process will the judge take action to promote settlement?

The remainder of this chapter discusses these three basic issues of organization and design.

Distinguishing Cases That Need Assistance from Those That Do Not

Judges have three choices in deciding whether or not to exercise settlement authority: A judge can forsake any effort to differentiate between cases for settlement purposes, developing a policy of intervention or nonintervention that applies to all cases across the board; a judge can let the request of one or both parties determine whether or not the court will become involved; or a judge can intervene selectively when he or she (but not necessarily the litigants) believes assistance is warranted.

Judges decide whether to invoke procedures across the board, upon request, or after screening in the face of considerable uncertainty about how much negotiation between the parties would occur absent judicial intervention. Lawyers are ordinarily free to negotiate or not to negotiate without informing the court. From the judge's perspective, the only certainty is that many lawyers tend to delay talk of settlement as long as possible, in part because introducing the subject may be taken by the other side as a sign of weakness. The advantage seems to lie with the side that does not raise—but has the opportunity to respond to—a settlement overture. It should not be surprising that lawyers favor judicially man-

dated settlement conferences, for judicial intervention neutralizes an inherently volatile situation.[13]

The likelihood that the lawyers will eventually work out a settlement without judicial intervention seems to depend in part on the type of issues in dispute. Certainly there are differences in the rate at which various types of cases go to trial; they are evident in the statistics published each year by the Administrative Office of the U.S. Courts. Such differences suggest that some types of cases are more "settleable" than others. In 1983–1984, for example, the Administrative Office reported that more than 10 percent of most types of personal injury actions, civil rights employment cases, and Fair Labor Standards Act cases reached trial, while less than 2 percent of the prisoner petitions, Social Security Act cases, and real property actions terminated in that period went as far as trial.[14]

Across-the-Board Policies

The judges who follow an across-the-board policy regarding settlement intervention are overwhelmingly in favor of intervention; no one interviewed for this report would refuse to become involved in settlement under all circumstances. For judges who are determined to do something to promote settlement in every case, the problem is how to do so effectively, without exhausting court resources. For some, part of the answer lies in delegating settlement conferencing to others (e.g., a magistrate or group of volunteer lawyers). Judges also find ways to limit the amount of time they spend in each case. Judge John Grady (N.D. Ill.), for example, raises and discusses settlement during the scheduling conference in every case, but he tries to keep discussion time to fifteen minutes per case. Others limit the time they spend by turning the matter over to litigants, admonishing them to discuss settlement early, perhaps requiring that they certify their efforts to the court.[15] And others postpone their settlement efforts until just before trial, relying on attrition to reduce the number of cases requiring attention.

Across-the-board intervention to promote settlement does not necessarily imply identical judicial action in every case. Criteria on

13. The most compelling evidence of this attitude is a survey conducted by Wayne D. Brazil, currently a federal magistrate in the Northern District of California, Settling Civil Suits: Litigators' Views About Appropriate Roles and Effective Techniques for Federal Judges (American Bar Association 1985).

14. The Administrative Office, it should be noted, employs an expansive definition of "trial" in compiling these figures. A trial is defined as "a contested proceeding in which evidence is introduced." 11 Administrative Office of the U.S. Courts, Guide to Judiciary Policies and Procedures, Statistical Analysis Manual II-21.

15. A court can impose this requirement courtwide by local rule, or an individual judge can accomplish the same result with a standing order.

which a judge might allocate cases to settlement "treatments" are developed in the next section. Should litigants have a voice in this allocation decision? In Judge Richard Enslen's (W.D. Mich.) cases, litigants choose a settlement procedure from a menu of available options. (Appendix A sets forth this form.) Some judges who require mediation or court-annexed arbitration let litigants select the person or panel that will perform this function.

Some judges reject the coerciveness involved in mandatory settlement procedures, particularly procedures that involve the court directly in the negotiation process. Their theory is that the litigants are in the best position to determine whether their case needs the court's help. The judge may play a supportive role, as Judge H. Dale Cook (N.D. Okla.) does in urging litigants to participate in a conference with the court's settlement magistrate; he stops short, however, of mandating the procedure.

Interviews suggest that judges who make no effort to acquaint litigants with court-sponsored settlement procedures rarely get requests for assistance. The infrequency of such requests is of no particular concern to these judges, because they believe in the sufficiency of firm pretrial management for promoting settlements. The Federal Rules of Civil Procedure, it should be noted, impose no affirmative obligation on judges in this regard beyond willingness to discuss settlement. Thus, according to the Advisory Committee on Rules, "Requests for a conference from a party indicating a willingness to talk settlement normally should be honored, unless thought to be frivolous or dilatory."[16]

Selective Intervention

Many judges occupy a middle ground concerning judge-initiated settlement discussions. They believe that unsolicited intervention is appropriate under some, but not all, circumstances. These judges have developed rules of thumb for the allocation of settlement resources. Such rules take into account the likelihood of settlement absent intervention, and the cost of nonintervention should the case go to trial. The types of cases that almost always settle or that require little time to try would ordinarily call for no special investment of judicial resources.

Judge Robert Keeton (D. Mass.) argues that a judge can calculate the point at which judicial intervention makes sense from past ex-

16. Notes of the Advisory Committee on Rules, commentary on Fed. R. Civ. P. 16(c). Others have also noted that when procedures designed to expedite case processing and encourage settlement are voluntary, they are seldom invoked by counsel. ABA Action Commission to Reduce Court Costs and Delay, Attacking Litigation Costs and Delay 16–17 (1984).

perience with various types of cases. By multiplying the frequency with which that type of case goes to trial, absent intervention, by the average length of trial in that type of case, the judge can calculate the rough "judge-time quotient for trial" associated with a "hands-off" approach. Say, for example, that the judge estimates a given type of case goes to trial only one time in five, but when it does, it takes about fifty hours to try; the judge-time quotient is ten. Using this figure as a baseline, the judge can then estimate the degree to which intervention will enhance the likelihood of settlement. If the time conserved is to justify judicial intervention, the new judge-time quotient must shrink, or at least stay the same:

> For illustration, suppose you estimate that by holding a one-hour settlement conference you can raise the settlement probability from .80 to .82; thus, by using one hour of judge time immediately, you reduce the probability of trial time to .18 x 50, or 9 hours rather than 10. You have exactly broken even. The judge-time quotient for the case is still 10 hours (1 + 9).[17]

The intervention calculus can be institutionalized at the court level, so that certain types of cases move automatically to a special settlement track, or the decision to intervene can be left to the discretion of the individual judge. The choice has obvious implications for the flexibility with which the court administers its settlement efforts. Of course, the judges in a district can also take both approaches at once, channelling some types of cases automatically to a settlement track by local rule, but allowing individual judges to order other cases to undergo the procedure on an ad hoc basis. Judges often use this strategy when they set up court-annexed arbitration programs.

The rules of thumb become somewhat more complicated when a judge (or group of judges) wants to offer more than one procedure for encouraging settlements. Judges must determine not just whether court assistance is or is not appropriate, but what type of procedure should be required.

Should More Than One Court-Sponsored Settlement Procedure Be Available?

The answer to this question, according to many of the judges interviewed, is clearly yes. Obstacles to settlement, these judges are convinced, vary from case to case. The trial judge, they believe, is

17. R. Keeton, Making Wise Choices About Techniques of Judicial Involvement in Dispute Resolution (unpublished manuscript on file at the Federal Judicial Center).

in a good position to assess the obstacle(s) present in a particular case and to respond with a pretrial plan that will enhance settlement opportunities. The expectation is that by tailoring assistance, a judge can promote more and better settlements than can be achieved through any other approach.

This view seems to be gaining ground. Judges who address the issue of civil settlement now often discuss a variety of avenues for encouraging settlements, some more suitable for certain types of cases than others. The literature on alternative dispute resolution, which is large and growing, also describes a variety of approaches, each of which is believed to be more suitable for the resolution of some problems than others.[18] A decade ago, discussion of the judicial role in settlement tended to focus almost exclusively on the judge-hosted settlement conference.[19]

As courts make more settlement-oriented procedures available, judges are necessarily cast in a new role. The judge becomes a diagnostician of litigation pathology who has at hand several procedures that can be applied to enhance settlement prospects in cases where some form of intervention appears to be worthwhile. This matching can be designed to occur automatically, through a local rule or standing order, or the judge can act on a case-by-case basis. By either route, the alternative the judge selects involves both an assessment of the obstacles that lie in the path of settlement and an analysis of the type of information or other assistance that each available settlement option provides. This evaluation might occur once in the life of a case, or a judge might "nest" alternatives, sending cases that fail to settle after one procedure—say mediation by volunteer lawyers—to a second procedure, perhaps a judge-hosted settlement conference.

The judges who attended the Center's September 1985 Conference on the Judicial Role in Settlement found this approach congenial. They had no difficulty in picking out probable obstacles to settlement from a bare outline of case facts. This assessment gave them the basis for suggesting an appropriate case-management program that might or might not involve assignment to a settlement procedure. Although participants did not always agree in their assessments of obstacles or appropriate treatments, they did agree that it is important to preserve the most resource-intensive settle-

18. *See, e.g.*, P. Ebener, Court Efforts to Reduce Delay 70 (Rand Publication Series 1981); Moukad, *Working Taxonomy of Alternative Legal Processes: Part IV*, 1 Alternatives to the High Cost of Litigation 5 (December 1983).

19. *See, e.g.*, H. Will, R. Merhige & A. Rubin, The Role of the Judge in the Settlement Process (Federal Judicial Center 1977); F. Lacey, The Judge's Role in the Settlement of Civil Suits (Federal Judicial Center 1977).

ment techniques for the cases that seem likely to demand the most judge time and effort to try. Most participants agreed, for example, that summary jury trial should be reserved for cases that are likely to take more than a few days to try.[20]

To illustrate how this process of diagnosing obstacles to settlement and prescribing settlement remedies might work, consider an employment discrimination case where the plaintiff, a civil-service employee still with the defendant's organization, complains of failure to get a promotion. The theory of liability is weak and the plaintiff will probably lose on the merits. The plaintiff might be encouraged to settle by an arbitration proceeding or other technique for arriving at a more or less authoritative estimate of the likelihood of success. A more informal, mediation-like approach, however, might be more likely to foster a good long-term solution for these litigants, who must continue to coexist in the same organization.

Saving court time was an important consideration for the conferees in deciding whether and how to intervene to promote settlement, but it was not their sole concern. Certain cases, everyone agreed, call for intervention, even if the effort to promote settlement is not likely to be cost-effective. Cases, like the one described above, that involve parties enmeshed in a long-term relationship may call for intervention even if settlement at some point before trial is likely. Cases in which a disparity in bargaining power makes it difficult for the plaintiff to press for an adequate settlement and cases in which a lawyer seems unable or unwilling to put the client's interests first are also good candidates for intervention, without reference to the court's own cost-benefit calculation.

In the types of cases where the relationship between lawyer and client is likely to be problematic, the conferees agreed that the court's settlement initiative should involve the clients directly. This might mean requiring their presence at a settlement confer-

20. It is difficult to know just how precisely a judge can calculate the likely savings in court resources to be had by assigning a case to a particular settlement procedure. Judge Keeton, using the methodology described in the previous section, derived the following rules of thumb. He suggests that cases estimated to require 10 to 20 hours of trial time would benefit from a one-half-hour settlement conference and from efforts to use stipulations to structure and shorten the trial. Arbitration, summary jury trial, and the Northern District of California's program of early neutral evaluation should be reserved for cases that would take 20 hours or more to try. A master should only be appointed for cases that will consume 50 hours or more of trial time; and conditional summary trial, a minitrial in which the judge participates, would be reserved for cases taking 150 hours or more to try. At the conference, Judge Keeton illustrated his approach with a products liability case estimated to require two weeks of trial time; a copy of the analytic grid he used in making his calculations is included as appendix B.

ence, or, in a complex case, participation by clients in a minitrial or similar proceeding.[21] Many of the conferees would go further, however, requiring clients to attend any settlement proceeding, even absent signs that one of the lawyers involved was unreasonably reluctant to talk settlement. Clients, it was felt, need to be exposed to the strength of the other side's position without filtering by their own counsel, and they need to consider the costs of going forward with the litigation. Participation in settlement negotiations sensitizes clients to these problems, provides an opportunity for catharsis, and encourages clients to impose "economic discipline" on their lawyers. The presence of clients at a settlement proceeding also helps ensure better preparation by counsel.[22]

The capacity of the parties to absorb the additional costs a settlement-oriented procedure imposes also figures into the intervention decision. Several conferees reported that they strive to avoid imposing reporting or other requirements that litigants view as onerous and of uncertain impact, even though they cost the court itself little time and effort. But judges also see a positive aspect in the burdens they impose on litigants in the name of settlement. Preparation for a settlement procedure, the available evidence suggests, increases the likelihood of settlement significantly. Approximately half of the cases scheduled for court-annexed arbitration, for example, settle before the hearing.[23] Judges learn to anticipate attrition before the onset of a demanding settlement procedure and plan accordingly. Court-imposed requirements like arbitration, summary jury trial, and pretrial conferencing inevitably serve two functions at once: They provide a forum for sounding out and evaluating the case, and at the same time they force litigants to a level of self-examination and preparation that encourages private settlement discussions.

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21. Heileman Brewing Co. v. Joseph Oat Corp., No. 83-C-765-C, slip op. (W.D. Wis. Aug. 9, 1985), examines the question of whether federal judges and magistrates have authority to require the presence of the parties. *See also In re* LaMarre, 494 F.2d 753 (6th Cir. 1974).

22. Participation may also enhance the client's sense that a proposed settlement is fair. *See* Walker, Lind & Thibaut, *The Relation Between Procedural and Distributive Justice*, 65 Va. L. Rev. 1401 (1979). *See generally* D. Rosenthal, Lawyer and Client: Who's in Charge? (Sage 1974).

23. A. Lind & J. Shapard, Evaluation of Court-Annexed Arbitration in Three Federal District Courts (Federal Judicial Center rev. ed. 1983).

When Should a Judge or Court Take Action to Promote Settlement?

Many judges defer settlement proceedings until late in the pretrial process, at or near the close of discovery, so as to give litigants ample time to undertake their own settlement efforts, and to ensure that each side will be well acquainted with the other's case. This policy reflects the theory that pretrial acquaintance with the arguments the other side intends to use will encourage voluntary settlements. As Judge Alfred P. Murrah has stated: "It is only after learning of his adversary's case that a lawyer can fairly evaluate his own case in terms of money and properly advise his client as to settlement or other disposition."[24] The statistics the Administrative Office publishes each year on case terminations provide some support for this hypothesis. In the twelve-month period that ended June 30, 1984, 12.4 percent of cases were concluded after the filing of an answer, without court action.[25]

Increasingly, however, judges are challenging the view that ample time for discovery is a necessary prelude to court-sponsored settlement talks. Some of the judges interviewed for this report are convinced that most lawyers already have enough information to settle their cases when they file suit. These lawyers delay settling until just before trial for a variety of reasons. Procrastination and the desire to use delay to soften the other side play a role. For lawyers who work on an hourly fee, the discovery period offers a chance to earn fees, a time for "working the file," in the words of one judge.

The conviction appears to be growing that, through early intervention, judges can limit unnecessary discovery and, at the same time, promote settlement. This requires a pretrial plan that takes account of the fact that most cases do not proceed to trial, but settle. Judge Robert Peckham (N.D. Cal.) suggests that pretrial planning involves more than scheduling a cutoff date for discovery and dates for pretrial and trial. A judge should think in terms of two-stage discovery planning:

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24. Murrah, *Pre-Trial Procedure*, 328 The Annals 70, 74 (1960).

25. The number of terminations that occur even before answer is filed, however, is even more impressive. In the same twelve-month period, 31.6 percent of the civil cases terminated were disposed of before answer had been filed, with no action by a judge or magistrate. The high proportion of civil cases concluded quickly, without significant action by the court, helps keep the median time to disposition low: It averaged seven months for all cases in this period.

> One of the most significant pretrial activities is the judge's and the parties' effort to agree on two stages of discovery. They seek to establish, first, the minimal discovery, if any, needed before a realistic assessment of the strengths and weaknesses of the case can be made, and, second, the additional discovery needed for trial.[26]

The proceedings in Kansas City suggest that a judge has enough information to engage in the type of pretrial planning Judge Peckham envisions, even at the scheduling conference. The conferees were able to identify probable obstacles to settlement with only a bare outline of case facts before them, a factual basis not unlike that available to a judge from reading a complaint and answer. Discussion with the litigants at the scheduling conference can yield the additional information necessary to assess how much discovery, if any, will be required to put litigants in a good position to talk settlement. Taking up the issue of settlement at this stage has the additional advantage of allowing time for the judge to schedule a special settlement procedure, such as summary jury trial or arbitration, without pushing back the trial date.

Summary

This discussion has emphasized the many options available to judges who want to promote settlement in their courts. As judges explore these options, devoting more thought and planning to the question of settlement than ever before, at least one trend is discernible: Judges are moving toward a more managerial conception of their role in the settlement process. The judge, as case manager, relies on settlement-enhancing procedures to help contain the costs of litigation and to keep cases moving forward. The judge's role is to determine what assistance is needed, not necessarily to conduct the settlement proceedings. Clients are potential allies in the effort to arrive at dispositions that are economically rational and that occur as early in the life of the case as possible. This requires sensitivity to the needs of the particular case and a willingness to tailor settlement efforts to fit those needs.

Innovative judges have responded to the need for case-specific techniques by developing a diverse mix of settlement-enhancing procedures. As they gain experience with these procedures, judges are becoming more self-conscious about the impact of their efforts and more selective in the application of court resources to promote settlement.

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26. Peckham, *supra* note 10, at 255.

These developments are occurring in the absence of clear evidence of the effectiveness of any particular approach; given the variety of case types, negotiating styles, and courthouse environments, unequivocal evidence of the impact of particular modes of intervention may never become available. The absence of a firm empirical basis is unlikely, however, to slow the trend toward a more active, and more sophisticated, judicial role in encouraging settlement. The sections that follow describe the specific techniques judges have developed as they shoulder more responsibility for promoting settlement over trial.

III. THE TRIAL JUDGE AS SETTLEMENT JUDGE

The options described in much of this report involve delegations of judicial authority to others to encourage settlements. Judge-hosted settlement conferences, the subject of this part of the report, may or may not involve delegation. Some judges exchange cases with colleagues in order to avoid the possibility that the settlement judge will also try the case. Others do not regard this as a serious problem. The analysis that follows looks beyond these arrangements to the techniques judges use when they conduct settlement conferences.

Discussion begins with an analysis of the settlement techniques judges rely upon, and goes on to consider judicial authority to promote settlement and the views of litigators about judicial involvement in the settlement process. A final topic considered here is the impact of judge-hosted settlement conferences on the number, timing, and quality of settlements.

Judicial Mediation

Judicial mediation is not a new idea; judges were holding settlement conferences even before the adoption of the Federal Rules of Civil Procedure in 1938. Some judges viewed the pretrial conference requirement established by the new rules as an endorsement of judge-hosted settlement conferences, though the predominant view at that time seems to have been that the function of the pretrial conference was to prepare cases for trial, with settlement being a useful "by-product" of the meeting. As Edson Sunderland wrote in a 1944 article: "It would seem . . . that the maximum benefit from the pretrial conference would be obtained if it were administered primarily for the purpose of designating and eliminating issues, facilitating proof and disposing of preliminary matters, with settlements playing a secondary role." Believing that any other arrangement might jeopardize the trial-preparation function of the conference, Sunderland recommended delaying any mention

of settlement until the very end of the period scheduled for discussion.[27]

The view that the primary purpose of the pretrial conference is trial preparation, and that settlement negotiations, if given equal prominence, might conflict with that purpose, remained prevalent in the literature until the early 1970s, but has lost ground since then.[28] The 1983 revision of rule 16, which puts settlement on a par with trial preparation as an objective of pretrial conferencing, exemplifies the change. With the growing acceptance of settlement as a legitimate goal of a pretrial conference has come a shift in the tenor of discussion concerning specific techniques. The issue most often discussed in the literature is no longer whether a judge should broach the issue of settlement in the course of the final pretrial conference, as it was for Sunderland and many other writers of an earlier period,[29] but how far the judge should go in negotiating settlements throughout the pretrial process.

Judges have developed many techniques to encourage settlements; a recent survey of practitioners listed seventy-one separate procedures a judge might employ in the course of a conference.[30] At one end of the spectrum are judicial remarks designed primarily to "break the ice" that prevents litigants from addressing the issue on their own. Examples are raising the subject at a pretrial conference convened for other purposes, or offering to make oneself available for settlement discussions.[31] Judge Robert L. Taylor (E.D. Tenn.) illustrated this approach in a recent interview in *The Third Branch;* he notes there that he does all he can to settle every case, telling lawyers that society favors compromise and that they

> can settle this case better than the court can. And I want you to try. Now if you can't, then I will try it. I'm here to try these cases and I'll try them. But I want to urge you to exercise every effort toward an amicable settlement.[32]

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27. Sunderland, *Procedure for Pretrial Conferences in Federal Courts,* 28 J. Am. Judicature Soc'y 46, 49 (1944). *See* M. Galanter, The Emergence of the Judge as a Mediator in Civil Cases 2 (Working Papers, Dispute Processing Research Program, University of Wisconsin—Madison Law School 1984).

28. *See* Murrah, *Pretrial Procedures—Statement of Essentials,* 14 F.R.D. 417, 420; 6 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1522 (1971).

29. *See* Sunderland, *supra* note 27; Shaffroth, *Pre-Trial Techniques of Federal Judges,* 21 Den. L.J. 244 (1944).

30. *See* Schiller & Wall, *Judicial Settlement Techniques,* 5 Am. J. Trial Advoc. 39 (1981).

31. A judge can deal with the reluctance of litigants to openly request a conference for fear of showing weakness to the other side by arranging, as one judge in the Western District of Pennsylvania does, to call the conference as if the idea were his own.

32. *Judge Robert L. Taylor Recalls School Integration Cases, Efforts to Reduce Huge Docket Backlog,* The Third Branch, August 1985, at 6.

At the other end of the spectrum are techniques designed to involve clients in the negotiation process, whether their lawyers desire this or not. A judge might require, for example, that the lawyers bring their clients to a pretrial conference, or order that the parties talk with each other, without counsel present.[33] Some judges speak privately with clients about settlement.

Trial judges appear to be sharply split not just on the effectiveness of particular judicial settlement techniques, but on the desirability of judicial involvement in the settlement process.[34] The weight of opinion, however, decidedly favors intervention. As the authors of a 1980 Massachusetts survey of eighty-five state and federal trial judges wrote:

> If there is one conclusion that can be drawn with certainty about the role Massachusetts judges play in the settlement process, it is that it varies from judge to judge and from case to case. A few judges continue to cling to the view that as formal adjudicators they should play a minimal role in settlement proceedings. Others, burdened by ever-increasing caseloads and desirous of achieving more equitable and speedy results, are actively engaged in efforts to design new settlement structures. In between these two groups is the vast majority of Massachusetts Federal and State judges, whose involvement ranges from passive invitation of settlement talks to active mediation between the parties.[35]

Evidence from four recent surveys of state and federal judges and practitioners corroborates this picture.[36] These analyses suggest that most judges encourage lawyers to settle civil cases, that they use a variety of techniques to do so, and that the techniques used vary somewhat from judge to judge and from case to case, but that most are mild rather than intrusive forms of intervention.[37]

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33. *See* Heileman Brewing Co. v. Joseph Oat Corp., No. 83-C-765-C, slip op. (W.D. Wis. Aug. 9, 1985).

34. *See, e.g.*, Franklin N. Flaschner Judicial Institute, Inc., The Judicial Role in Case Settlement: A Massachusetts Survey (1980) [hereinafter cited as Flaschner Institute]; Wall & Schiller, *Judicial Involvement in Pre-Trial Settlement: A Judge Is Not a Bump on a Log*, 6 Am. J. Trial Advoc. 27 (1982); R. McKay, Judicial Council of the Second Circuit, Advisory Committee on Planning for the District Courts, Subcommittee II: The Role of the Judiciary, Preliminary Report on Settlement 4 (1980); Neubauer, *Judicial Role and Case Management*, 4 Just. Sys. J. 224, 227–28 (1978).

35. Flaschner Institute, *supra* note 34, at 2.

36. *See* J. Ryan, A. Ashman, B. Sales & S. Shane-DuBow, American Trial Judges (1980) [hereinafter cited as J. Ryan]; Wall & Schiller, *supra* note 34; Wall, Rude & Schiller, *Judicial Participation in Settlement*, 1984 Mo. J. Dispute Resolution 25; Kritzer, *The Judge's Role in Pretrial Case Processing: Assessing the Need for Change*, 66 Judicature 28 (1982).

37. For example, J. Ryan, *supra* note 36, found that most respondents to a 1977 survey of state judges in courts of general jurisdiction described themselves as playing a role in settlement negotiations, albeit a subtle one: 67.9 percent surveyed de-

How a judge intervenes bears no relationship to judicial background, experience, or education, or to the fact that a judge has more nonjury than jury cases.

Regional variations were significant in all of these studies. Sites vary both in the frequency with which lawyers report judicial settlement efforts and in the self-reports of judges. Judges in larger courts use more settlement techniques and are more likely to describe themselves as aggressive intervenors, a difference that may be attributable to the tendency for large-court judges to feel under more pressure from caseloads, to view lawyers as more contentious, and to perceive trials as longer.

A judge-hosted settlement conference may occur as early as the initial scheduling conference or as late as the final pretrial conference, which in some courts occurs only a few days before trial.[38] Early intervention, as noted in the first part of this report, allows a judge to explore with the litigants the information they need to settle the case and to shape the discovery process and motion practice accordingly. Litigants incur the additional expense of full discovery and trial preparation only if the case fails to settle during the initial settlement-oriented phase. Some judges, however, are too burdened with pending cases to intervene early, or are reluctant to become involved in shaping the discovery process to contain litigation costs. For these judges, a settlement conference close to trial may be the most productive method of intervening.

Whether it occurs early or late, a settlement conference can serve two important functions: It can help break down the psychological and strategic barriers that lie in the path of settlement negotiations; and, if this is not sufficient to produce results, the conference can provide the additional information the litigants need to settle the case. Judges cite both functions in describing the role a judge-hosted conference can play in promoting settlement.[39]

A judge knows that psychological or strategic considerations are delaying settlement when litigants have failed to explore settlement with each other before the judge raises the issue at a pretrial conference. As Judge William O. Bertelsman observes, "If parties have not discussed settlement by the time of the preliminary pre-

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scribed their style as subtle ("intervene subtly—through the use of cues/suggestions"). Only 10.3 percent reported that they "intervene aggressively—through the use of direct pressure." The remaining 21.8 percent stated that they do not intervene at all.

38. In the two surveys that addressed this question, judicial practices were split. For the pattern in the Second Circuit, see R. McKay, *supra* note 34, at 3; in Massachusetts, see Flaschner Institute, *supra* note 34.

39. For example, 64 percent of the respondents in the Massachusetts survey describe themselves as "catalysts." *See* Flaschner Institute, *supra* note 34, at 2.

trial, it is usually because neither one wanted to take any action that might be interpreted as a confession of weakness."[40]

A judge may avoid this problem by suggesting or requiring that discussions occur before the conference.[41] One of the judges interviewed for this report does this at the scheduling conference by asking both lawyers, "Have you had a chance to talk settlement? No? Well, you can do so right now." Or the judge can proceed indirectly, reminding the litigants of the possible adverse consequences of not settling. One interviewee reported that he sometimes encourages litigants to talk settlement at the final pretrial conference by belittling the case with an observation like "You don't want to go to trial with this!" Others suggest the possibility that defendant might invoke rule 68 and submit an offer of judgment, which could expose plaintiff to paying the costs of continuing the litigation.[42] The formula the judge uses for making settlement an issue for discussion may be less important than the fact that the judge's first step makes it possible for the lawyers to begin negotiations without prejudicing their clients' positions.

Judges typically go further in a settlement conference, attempting to supply the information needed to provoke a settlement. This usually involves "throwing cold water" on the case, a reference to the fact that the information the judge imparts tends to inspire doubts about one's chances of prevailing at reasonable expense and within a reasonable time frame, or prevailing at all.[43] The negative tenor of the information judges impart in settlement conferences is obvious in this list of frequently mentioned judicial contributions compiled by the researchers who conducted a survey of Massachusetts judges:

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40. Bertelsman, *Pretrial and Settlement Conferences, Part II*, 10 Ky. Bench & Bar 43, 43 (1984).

41. Judge Bertelsman's technique is to require the parties to exchange reasonable offers. The attorneys can then tell their clients that the judge is to blame for the necessity of making such an offer. Bertelsman, *supra* note 10, at 13.

42. A magistrate who serves as a settlement officer has reported using the same technique. *See* A. Burnett, Practical Innovative and Progressive Utilization of United States Magistrates to Improve the Administrative of Justice in United States District Courts (unpublished paper distributed at Rules of Civil Procedure Conference, National Lawyers' Club, Washington, D.C., Apr. 19, 1985). The U.S. Supreme Court's recent decision in Marek v. Chesney, 105 S. Ct. 3012 (1985), may encourage more trial judges to use this technique in cases involving statutory fee shifting. *Marek* holds that in some circumstances an offer of judgment can preclude further liability for attorneys' fees.

43. The "throwing cold water" technique receives theoretical support from Richard Posner's analysis of settlement barriers resulting from overoptimism of parties. *See* Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. Legal Stud. 399, 417-27 (1973).

1. Pointing out general problems of proof
2. Reminding counsel that the case could go either way
3. Discussing the probable length of trial, the costs each party can expect to incur if the case goes to trial
4. Emphasizing that "skilled lawyers ought not to let unskilled jurors decide their fate"
5. Asking defendants to outline their defenses
6. Sharing their own views of the case and of defendant's exposure to liability based on recent jury verdicts in similar cases
7. Asking parties for "offers of proof" to expose weaknesses in their cases.[44]

If the judge decides to offer an estimate of what the plaintiff's claim is worth, he or she must understand the strengths and weaknesses of the evidence and the arguments on either side. Getting such information may require conferring with each side separately and keeping confidences. The alternative is to rely on the estimates each side is willing to make in the presence of the other, a process that is likely to produce unrealistically optimistic estimates of probable success on the merits.

There is some disagreement in the literature and among judges interviewed for this report as to whether the judge who is assigned to try the case can get an honest appraisal from the litigants, even with shuttling and the promise that disclosures on each side will remain private.[45] In the opinion of some, litigants will not disclose their true positions unless they can be sure that their settlement positions will not be disclosed to the trial judge.[46] Others believe that the assigned judge's willingness to allow the case to go to someone else for trial is sufficient protection to enable litigants to be frank in settlement negotiations with the judge.[47]

Judges have developed various techniques for turning each side's estimate of the likelihood and extent of victory at trial into a settlement figure. The so-called Lloyd's of London method is popular

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44. *See* Flaschner Institute, *supra* note 34, at 10-11.

45. Almost no one thinks it easy to establish the true "bottom line" on either side, even under the best of circumstances. For an analysis of the strategies parties use to promote their "bottom line" and the capacity of judges to cope with them, see Kelner, *Settlement Techniques*, 16 Trial 30 (1980).

46. *See* O. Skopil, Jr., Settling the "Blockbuster" Case (Mar. 18, 1977) (unpublished paper on file at the Federal Judicial Center).

47. Lawyers, it appears, rarely request a new trial judge in these circumstances. *See, e.g.*, Flaschner Institute, *supra* note 34, at 1.

with some judges. This involves: (a) requesting that the plaintiff's lawyer estimate the likelihood of success on the merits, possibly by asking "If you tried this same case ten times, how many times would you win?" (b) asking for an estimate of the average jury verdict in those ten trials, and (c) multiplying the estimated probability of success against the average jury verdict, thus establishing an "insurance value" for the case. The judge can follow the same process with defense counsel to establish a settlement range. The principal virtue of this method, several interviewees pointed out, is that it gives the lawyers a rationale for departing from an earlier position, and provides lawyers with "something to take back to their clients."[48]

Other judges reject the Lloyd's method as "phony" or "simplistic." These judges do not use a single formula to arrive at a settlement figure, except perhaps when the two sides are close enough to "split the difference."[49] They may or may not outline to litigants how they arrive at their settlement figures. Two of the judges interviewed, for example, listen to the arguments and evidence on either side, decide on an appropriate figure to provoke discussion, then ask "If defendant gave you $XX, would you take it to settle this suit?"

The emphasis many judges place on arriving at a settlement figure raises an interesting question about the role of uncertainty in the settlement process. It is unclear whether enhancing certainty or uncertainty about the likely outcome at trial more effectively settles cases. At the Kansas City conference, for example,

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48. A lawyer, as Judge Alvin Rubin (5th Cir.) explained,

> is usually engaged in a two-fold settlement process. He is engaged in negotiating with the other side. In addition, he is engaged in modifying his client's expectations. In most litigation, for example, the defendant has made an offer, either in advance or at the outset of the litigation, to settle the case for a modest amount. The defendant is convinced that it shouldn't pay more. The plaintiff has made a large demand. (And I don't confine this to personal injury cases!) The defendant's lawyer is engaged in reducing the plaintiff's demand to an amount he can recommend to his client. Yet, at the same time, he must alter his client's expectations concerning what is a reasonable amount to pay. The plaintiff's lawyer is also engaged simultaneously in attempting to reduce his client's target and to increase his opponent's offer. Intervention of an authority figure – preferably the judge who will try the case or whose views will be respected – gives the lawyer the ability to say: "The judge thinks . . . ."

Letter from Judge Rubin to author, Sept. 16, 1985.

49. Judge Robert Zampano (D. Conn.) states that the "split the difference" approach, "or one similarly inflexible and passive, does not foster effective and efficient settlement conferences." R. Zampano, Judicial Trends in Alternative Dispute Resolutions for Commercial Disputes 3 (Oct. 11, 1984) (unpublished address to Center for Public Resources).

Judge Robert Merhige (E.D. Va.) suggested that scheduling cases for trial before a visiting judge—an "unknown devil" to local litigants—settles many cases. Professors Priest and Klein, on the other hand, argue that the likelihood of settlement is increased by increasing the certainty about outcomes. Priest and Klein's model and research imply that those cases that go to trial should be the ones closest to the "decisional standard" in a particular court and that there should therefore be a tendency toward a fifty-fifty split of decisions for plaintiff or defendant. This would indicate that the more parties know about the likelihood of outcomes, the more likely they are to settle.[50]

There is general agreement on one point: Once a judge has arrived at a settlement figure, it should not be altered at the behest of either side; to do so appears to involve the judge in unseemly bargaining.[51] Judges also tend to agree that circumstances can develop during a settlement conference that make further bargaining fruitless. The development cited most often is unwillingness on one side or the other to offer a settlement figure that is "within the ballpark."

The judges interviewed for this report also tend to agree that certain considerations are relevant to the question of whether a judge should discuss settlement figures at all. Judges cited the following three factors:

1. Whether the case is triable by jury
2. Whether the litigants ask the judge for a settlement figure
3. The judge's assessment of the competence and experience of counsel.

Most of the judges interviewed for this report drew a sharp distinction between the steps they would take in jury and nonjury cases. Some reported that they do not discuss dollar amounts in nonjury cases; a few will not talk settlement at all unless both parties ask for their assistance, and even then they are reluctant to discuss settlement figures.[52] The Massachusetts respondents were similar; over half stated that they are more cautious in nonjury cases, and feel less free to discuss the merits and share their own views on appropriate settlement figures.[53]

50. *See* G. Priest & B. Klein, *The Selection of Disputes for Litigation*, 13 J. Legal Stud. 1 (1984).
51. *See* O. Skopil, *supra* note 46 at 4.
52. *See* Kelner, *supra* note 45, at 36-37.
53. *See* Flaschner Institute, *supra* note 34, at 2-3.

Judges interviewed for this report also appear to be sensitive to whether litigants want them to go as far as suggesting a settlement figure in negotiations. One announces to the litigants that he will not discuss settlement figures unless both sides agree out of his presence and one side asks on behalf of both; others mentioned that they always ask before offering a figure. Many of the judges surveyed in the Second Circuit and Massachusetts also noted the significance of such a request.

Judicial assessments of competence of attorneys also appear to play an important role. Young, inexperienced, or incompetent attorneys call for more forceful settlement efforts because they do not know "what their cases are worth." Judges often feel confident that they can assist inexperienced defendants in assessing their liability from a neutral perspective and can help inexperienced plaintiffs in appraising their claims.

For some judges the problem is not simply the occasional lawyer with too little experience or skill to represent a client adequately, but the prevailing attitude of the bar as a whole toward litigation. Lawyers, these judges believe, tend to be insufficiently attuned to the advantages of limited discovery, compromise, and early settlement. The presence of clients at a settlement conference, they feel, encourages a more realistic assessment of the cost of going forward with the lawsuit. Some judges even negotiate directly with clients upon occasion, bypassing counsel in negotiating a settlement. Judge Martin Feldman (E.D. La.), for example, reports that when a case is complicated and litigation costs are high, he sometimes confers directly with clients, even in a bench trial. Most lawyers are not opposed to bringing clients into settlement conferences, according to a recent survey.[54] It is unclear, however, whether lawyers would be as enthusiastic about a conference between judge and clients that does not include lawyers.

Will lawyers and their clients feel coerced to settle by this level of judicial involvement in settlement negotiations? The problem of perceived coercion was a concern for participants at the Kansas City conference, as it has been for practitioners and legal academics. One solution suggested at the conference is to keep the functions of settlement negotiation and trial separate. In the Northern District of California and the Western and Northern Districts of Oklahoma, for example, the judge assigned to try a case never hosts a settlement conference; another judge or magistrate performs this function.[55] A judge can also avoid the appearance of im-

54. W. Brazil, Settling Civil Suits: Litigators' Views About Appropriate Techniques for Federal Judges (American Bar Association 1985).

55. In the Northern District of Oklahoma, at the first scheduling conference the parties are encouraged to have a "settlement master" (another judge) assigned to

propriety by keeping all settlement discussions on the record. Or the trial judge can offer to assign the case to another judge, without allowing litigants to get the impression that this election might be held against them. Not every judge, however, is convinced that judicial efforts to settle a case, no matter how active, risk coercing litigants into settlements they would not elect. As one participant at the Center's Kansas City conference observed, "[J]udges don't coerce settlements with good lawyers. . . . No judge in the world ever settled a case; only the litigants and the lawyers can."

The Limits of Judicial Settlement Authority

How far does applicable law allow a judge to go in pursuit of settlement? Rule 16(a) gives federal judges the power to require lawyers and unrepresented parties to appear at a settlement conference, and section (f) of that rule provides for sanctions for failure to appear, failure to prepare, and failure "to participate in good faith."[56] Cases have interpreted the judge's power to compel attendance to extend to the clients themselves, even when represented by counsel.[57] It seems clear that a judge has the power to

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the case. The settlement judge conducts settlement negotiations after some discovery, using a five-page memo from each of the parties for background. These sessions, which typically include shuttling between the parties and advice from the judge about the probable outcome of a trial, last from forty-five minutes to nearly five hours. Additional conferences are held if necessary, but the case stays with the assignment judge for purposes of motion practice. That judge resumes control of the case if it fails to settle, conducting the final pretrial conference, which ordinarily does not include detailed settlement discussions.

56. Sanctions may include "reasonable expenses incurred" due to noncompliance, including attorneys' fees, contempt for violation of an order, and dismissal of all or part of the action. *See* Fed. R. Civ. P. 37(b)(2)(B), (C), and (D). Judicial authority to require participation in a settlement conference and to sanction nonparticipation can also be derived from the court's inherent authority to exercise the powers necessary to the fulfillment of the judiciary's institutional mission. For a discussion, see Rayner, *Judicial Authority in the Settlement of Civil Cases*, 42 Wash. & Lee L. Rev. 145, 179 (1985), and Eash v. Riggins Trucking Co., 757 F.2d 557 (1985), which suggests that the doctrine includes not just powers implied from strict functional necessity but also "powers necessary only in the practical sense of being useful." *Id.* at 563. On the court's inherent authority to levy sanctions, including dismissal, for abusive litigation practices, see Link v. Wabash, 370 U.S. 626 (1962), and Roadway Express, Inc. v. Piper, 447 U.S. 752, 765 (1980).

57. In *In re* LaMarre, 494 F.2d 753 (6th Cir. 1974), decided before the recent amendments to Fed. R. Civ. P. 16, the Sixth Circuit made clear its belief that a judge has the authority to order such an appearance. For a recent case to the same effect, see Heileman Brewing Co. v. Joseph Oat Corp., No. 83-C-765, slip op. (W.D. Wis. Aug. 9, 1985).

compel participation in settlement discussions by lawyers and their clients.

Legal and ethical difficulties can arise, however, when a judge attempts to ensure that the required participation in settlement negotiations is conducted in good faith. The Second Circuit held recently, for example, that a trial judge does not have the authority to sanction a litigant for failing to settle before trial at a figure the trial judge determined to be reasonable at the settlement conference, even when the eventual settlement was for the very figure the trial judge had originally proposed.[58] The judge's role in ordinary cases, available precedents suggest, is to facilitate the process of settlement, but not to become involved in the terms of settlement. As the Fifth Circuit stated in *United States v. City of Miami:*

> In what can be termed "ordinary litigation," that is, lawsuits brought by one private party that will not affect the rights of any other persons, settlement of the dispute is solely in the hands of the parties. If the parties can agree to terms, they are free to settle the litigation at any time, and the court need not and should not get involved. . . .
>
> Moreover, procedurally it would seem to be impossible for the judge to become involved in overseeing a settlement, because the parties are free at any time to agree to a resolution of the dispute by private contractual agreement, and to dismiss the lawsuit by stipulation. In this situation, then, the trial court plays no role in overseeing or approving any settlement proposals.[59]

There are types of cases, as the quotation from *City of Miami* implies, where federal law puts the trial judge under a special obligation to examine and approve a settlement. Class actions, shareholder derivative suits, cases involving minors, proposed compromises of bankruptcy claims, and consent decrees in antitrust suits brought by the United States require judicial approval of settlements as "not unlawful, unreasonable or inequitable."[60] Judicial approval is required to help ensure that unrepresented or incompetent interests who may be affected by the settlement are taken into account. Courts have also begun to take a special interest in some types of insurance litigation, implying a duty on the part of insur-

58. Kothe v. Smith, 771 F.2d 667 (2d Cir. 1985). A recent Illinois appellate court decision suggests that a judge must also not overstate the difficulties associated with going to trial. That court set aside a settlement as unconscionable upon finding that the trial judge seriously misled the plaintiff about her rights and her likelihood of prevailing at trial. *In re* Marriage of Moran, 136 Ill. App. 3d 331, 483 N.E.2d 580 (Ill. Ct. App. 1985).

59. 614 F.2d 1322, 1330 (5th Cir. 1980).

60. For a discussion of these rules, see United States v. City of Miami, 614 F.2d at 1331.

ance companies defending claims against an insured to settle "in good faith."[61] A court may not, however, convert a private settlement agreement into a consent decree, even in a case with some of the characteristics of a class action or other type of dispute calling for judicial approval of settlement terms.[62]

A judge must also avoid making preparation for settlement discussions overly burdensome. Appellate courts have not as yet, however, articulated a clear standard as to how much a court can require of litigants in the name of settlement. In *McCargo v. Hedrick*,[63] a Fourth Circuit case that predates the revision of rule 16, the court upset a local rule where "the burden put upon litigants and their counsel by a pretrial procedure . . . appears to have become an end in itself."[64] The fact that court-annexed arbitration and other demanding pretrial procedures have so far been upheld suggests that appellate courts will take a liberal view of the requirements judges impose on counsel in connection with settlement conferences.[65]

Appellate courts are bound to become more involved in elucidating the powers of trial judges to conduct settlement conferences and to mandate other settlement procedures as trial-level settlement efforts grow more widespread. Case law, however, will never fully define the standards trial judges seek to maintain in settlement conferencing. Ethical considerations also play an important role in limiting the actions judges take to promote settlement. The ethical component of judicial conferencing technique, not surprisingly, was a major topic for discussion at the Kansas City Conference on the Judicial Role in Settlement. Three questions were of particular concern to the participants:

61. The concern of the courts is that an insurer can afford to take a risk at trial that an insured cannot because the liability of the insurer is limited by the policy coverage. In such cases, the failure to accept a reasonable settlement gives rise to a separate claim by the insured for breach of contract. *See* Feeley, *When Is Refusal to Settle Bad Faith?*, Brief, May 1984, at 26.

62. In Gardiner v. A. H. Robins Co., 747 F.2d 1180 (8th Cir. 1984), the court of appeals held invalid the notation "So Ordered" on the settlement agreement, stating "Courts not only frown on interference by the trial judge in parties' settlement negotiations, but also renounce the practice of approving parties' settlement agreements." *Id.* at 1189.

63. 545 F.2d 393 (4th Cir. 1976).

64. *Id.* at 396.

65. It must be emphasized, however, that the question of judicial authority to impose requirements designed to settle litigation has received only limited appellate scrutiny. For example, only one court has examined the authority under which federal judges may sanction failure to better an arbitration or mediation award at trial, and no appellate court has considered judicial authority to assign regular jurors to summary jury trial. For fuller discussion, see Levin & Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. Fla. L. Rev. (forthcoming).

- Should a judge remain silent when the plaintiff appears prepared to accept what the judge regards as a grossly inadequate settlement offer?

- Is it ever appropriate for a judge to delay ruling on a motion in order to encourage a settlement?

- Should a judge acquiesce in a request to seal a proposed settlement or the material on which it is based if sealing appears necessary to achieve the settlement?

In considering the first question, the consensus among participants was that a judge has an obligation to object if the plaintiff appears ready to accept a settlement the judge regards as grossly inadequate, if this occurs in the course of a settlement conference. This obligation arises from participation in a court-sponsored conference, where the judge cannot simply be a neutral party without responsibility to consider the justice of an agreement. Litigants expect the judge to offer opinions on the fairness of proposed settlements, even to offer an appropriate settlement figure upon request. A judge's willingness to endorse a settlement he or she does regard as fair seems to demand that the judge speak out if the proposed settlement seems unfair.[66] The case for an honest appraisal seems particularly strong when counsel ask the judge to endorse a figure in order to help persuade a reluctant client to settle.

Outside the conference context, however, the obligation to evaluate the fairness of settlements brought to the judge's attention is much less, unless the case is one where a statute requires judicial approval of the settlement. This means, as Judge Grady pointed out, that the settlement a seventeen-year-old plaintiff reaches gets judicial scrutiny because plaintiff is a minor, while the settlement an eighteen-year-old accepts in a similar situation does not. It is difficult to know, however, how judges could assume responsibility for all, or even most, of the settlements that occur in their cases. Lacking familiarity with the facts of these cases, the judge could not offer a thoughtful assessment.

The second question—whether a judge should ever delay a ruling to promote a settlement—also provoked a lively exchange of views. Several judges at the conference noted that settlement possibilities can sometimes be enhanced if the judge delays ruling on a dispositive motion, but rejected the idea that intentional delay could be a

66. The conferees were not in agreement as to the reference point from which a judge should evaluate the fairness of a settlement. For many of the conferees, the probable outcome on the merits is the appropriate criterion, but others rejected this standard.

legitimate settlement tool. Further discussion established that delay might be justified to avoid disturbing an emerging agreement between litigants; the conferees agreed, however, that delay should not be used coercively. The exchange suggests an important point about the judicial role in settlement: It is not necessarily confined to settlement conferencing. Judges who shape other aspects of the pretrial process to enhance settlement prospects must, however, remain sensitive to preserving the integrity of the judicial process when they do so.

The third question, the ethics of sealing records to promote a settlement, caused the conferees more difficulty. The question arises when the nature of the suit makes secrecy a significant benefit to one or both sides. In this situation, agreement not to disclose discovery products or the settlement figure may well become part of the bargaining process, and the litigants may join in requesting that the court seal the records connected with the settlement. A seal order ensures that the private agreement not to disclose will be honored, and, where a public agency is involved, helps protect against disclosure requests filed under the Freedom of Information Act.[67]

Judges tend to be reluctant to accede to requests to seal settlements or the discovery documents that accompany them because a seal makes it more difficult for someone else with a claim to sue, and because our system favors openness in judicial proceedings.[68] The Kansas Supreme Court, for example, recently adopted a policy requiring disclosure of pretrial settlements in tort actions involving multiple defendants.[69] Several conferees noted, however, that the

67. *In re* Franklin Nat'l Bank Sec. Litig., 92 F.R.D. 468 (1981), discusses the conflict between Freedom of Information Act disclosure requirements and a judicial seal order. Judge Weinstein held that material under seal is not subject to Freedom of Information Act requirements because "the act was intended to circumscribe the discretion of agency rather than of courts." *Id.* at 471. The issue arose when a consumer group moved to intervene to set aside a seal order entered two years earlier. Judge Weinstein permitted the intervention but found that the balance of interests, including the interest in settling this complex, costly suit, weighed against setting aside the seal order.

68. The mandate of Fed. R. Civ. P. 1 offers an additional reason for access in an appropriate case, according to Carter-Wallace v. Hartz Mountain Indus., 92 F.R.D. 67 (1981). In that case, the court ordered defendant to produce all sealed depositions taken by its opponent in an earlier case that had settled, so as to speed disposition of the second case. Wilson v. American Motors Corp., 759 F.2d 1568 (1985), adopts a strong anti-seal policy where transcripts and other trial materials are concerned. In that case settlement occurred during trial, and the trial judge sealed the record, a decision that may have been necessary to achieve settlement. *Id.* at 1569. Where the material in question is not a court record, but documents that represent the work product of attorneys, a seal order may be upheld. Crystal Grower's Corp. v. Dobbins, 616 F.2d 458 (1980).

69. Ratterree v. Bartlett, 707 P.2d 1063 (Kan. 1985).

pressure to seal can be great in a complex case that will be highly burdensome to try.

Lawyers' Views on Judge-Hosted Settlement Conferences

There is a reservoir of support for judge-hosted settlement conferences among practitioners. According to the most comprehensive study to date, a 1984 survey sponsored by the Judicial Administration Division of the American Bar Association, lawyers overwhelmingly support judicial involvement in settlement discussions as likely to improve significantly the prospects of settlement.[70] Most lawyers surveyed would make such settlement conferences mandatory. Wayne D. Brazil, currently a magistrate in the Northern District of California, conducted this research, which is consistent with earlier, less extensive survey data on lawyers' attitudes toward judicial efforts to facilitate settlement.[71] Brazil surveyed lawyers in four districts: Northern Florida, Western Texas, Western Missouri, and Northern California; he received 1,886 responses to his sixty-item questionnaire, a response rate of at least 48 percent in each of the four districts.[72]

Many of these lawyers, Brazil found, favor settlement conferences held by a judge other than the one scheduled to try the case. Fifty-eight percent of respondents think it "improper for the judge slated to preside at trial to become involved in settlement discussions" in a nonjury case. In a jury case, the number disapproving drops to 33 percent.[73] The survey did not probe lawyers' attitudes toward settlement conferences held by magistrates, practitioners, or other available third parties.

Lawyers also appear to have clear preferences as to how the settlement judge should conduct the conference. Over 50 percent of

70. Brazil, *supra* note 54, at 102. Eighty-five percent of the respondents agreed that "involvement by federal judges in settlement discussions is likely to improve significantly the prospects for achieving settlement." *Id.* at 39. *See also* Brazil, *Settling Civil Cases: What Lawyers Want from Judges*, Judges' Journal, Summer 1984, at 15; Brazil, *Settling Civil Cases: Where Attorneys Disagree About Judicial Roles*, *id.* at 21.

71. The Third Circuit Judicial Conference, for example, surveyed its lawyer members in 1984. Among the lawyers responding, 88 percent favored active judicial participation in settlement conferences. Forty-seventh Annual Third Circuit Judicial Conference, Problems in the Administration of Justice in Courts of the Third Judicial Circuit as Perceived by 1984 Conference Members 71 (preliminary draft 1984).

72. The rates of response by district were: W.D. Mo., 57 percent; W.D. Tex., 53 percent; N.D. Fla., 49 percent; N.D. Cal., 48 percent. W. Brazil, *supra* note 54, at 24.

73. *Id.* at 85.

the respondents in each of the four districts "prefer a judge who actively offers suggestions and observations" to "one who simply facilitates communication between parties."[74] For example, most lawyers want the settlement judge to point out, in a jury case, evidence or law that attorneys are misunderstanding or overlooking. The best time for a conference, according to most of the lawyers surveyed, is between the first major discovery event and the final pretrial conference.[75]

Lawyers perceive some techniques to be effective but improper, Brazil found. This pattern is particularly clear in the context of conferences held by the judge assigned to try a nonjury case. Fifty-four percent found it improper for such a judge to announce the dollar range of a reasonable settlement to the lawyers, though 85 percent found this an effective settlement technique.[76] Another striking conflict emerges when attorneys are asked to rate the effectiveness and propriety of the judge's giving the lawyer's client an opinion as to the dollar range of a reasonable settlement. While 65 percent think this is "improper," 78 percent believe it to be "effective," or "very effective."[77]

Other evidence about judicial settlement techniques regarded by lawyers as inappropriate comes from a nationwide survey of lawyers conducted by Wall and Schiller in 1981.[78] The techniques lawyers encounter most frequently, these researchers found, are considered ethical by most lawyers. These include: mandating settlement talks, suggesting that the litigants split the difference, suggesting a settlement figure, shuttling between the two sides, requiring that the lawyer call the client for a response, and warning the litigants about the costs of going to trial. Some fairly widespread techniques are regarded as inappropriate by many lawyers, however. Techniques observed by at least half the lawyers surveyed that are regarded as unethical by at least a third of respondents include: "Coerces lawyers to settle" and "Sets inexorable trial date to raise pressure to settle."

In another survey, these researchers explored the views of lawyers and judges on the effectiveness of various settlement techniques.[79] They found, as Brazil did, that lawyers regard judge-

74. *Id.* at 39, 46-48.
75. *Id.* at 64-69.
76. *Id.* at 152.
77. *Id.* at 153.
78. *See* Wall & Schiller, *supra* note 34.
79. *See* Wall, Schiller & Ebert, *Should Judges Grease the Slow Wheels of Justice? A Survey on the Effectiveness of Judicial Mediary Techniques*, 8 Am. J. Trial Advoc. 83 (1984).

hosted settlement conferences, including mandatory settlement conferences, as effective. They also found, again consistently with Brazil, that lawyers regard active judicial participation in settlement negotiations as helpful in promoting settlement. Lawyers and judges tended to be quite similar in their views as to the effectiveness of particular settlement techniques.

A survey of lawyers and judges in five federal districts tends to support these findings.[80] Judicial participation in settlement discussion is regarded as the most effective settlement technique; suggesting a settlement figure is regarded as almost as effective. Threatening to hold the parties responsible for costs, or simply setting a firm trial date early in the litigation, on the other hand, was not regarded as an effective settlement technique by these respondents.

The finding that most lawyers view judge-hosted settlement conferences as effective and desirable should not be allowed to obscure the fact that there are significant variations in opinion among various categories of lawyers. Regional variations are significant.[81] Brazil also found that less experienced lawyers were more likely to support more active judicial intervention, even "hard-boiled" techniques. Plaintiff and defense attorneys also differed on many items, with defense attorneys more concerned about negative aspects of judicial intervention than plaintiff lawyers and less likely to see judicial intervention as effective. Public interest and poverty lawyers and those who work as house counsel for corporations also differed from other lawyers; they supported more managerial judicial approaches, such as calling an early settlement conference. Company lawyers in the survey, more than other lawyers, favored the most active settlement techniques, such as suggesting privately to attorneys the concessions their clients should make.[82]

Brazil attributed some of the variation he found among attorneys to difference in their relative bargaining position in settlement negotiations:

> [S]mall firm, plaintiffs', and legal aid attorneys are more likely than lawyers who are in big firms and on the defense side to feel a need for the assistance of a powerful neutral and are more likely to view a judge as an ally in settlement negotiations.[83]

The overall message seems to be that most lawyers feel that judge-hosted settlement conferences are beneficial, and that many

80. *See* Kritzer, *supra* note 36.
81. Brazil, *supra* note 54, at 85–88.
82. *Id.* at 107–17.
83. *Id.* at 63.

prefer that judges take a more active role in suggesting alternatives and giving opinions. There are, however, considerable differences of opinion over the propriety and effectiveness of various techniques. Opinion seems to vary in accordance with the local "legal culture" and the typical cases and clients of the attorneys. These findings led Brazil to conclude that "[j]udges might be able to use the patterns of attorneys' feelings . . . to begin identifying the kinds of involvement in the settlement process, as well as the kinds of specific facilitation techniques, that are most likely to be well received in different kinds of cases."[84]

The Impact of Judicial Mediation

Judicial writings and speeches recommending that judges conduct settlement conferences have sparked a lively debate over the impact of these conferences. The arguments pro and con tend to center on two types of concerns:

Efficiency; that is, do judicial energies devoted to settlement conferences pay off in terms of greater numbers of settlements or earlier settlements that demand less traditional pretrial processing?

Quality; that is, are the settlements reached through judge-hosted settlement conferences better than those arrived at privately or after trial, and are broader public interests served?

Those who encourage judges to hold settlement conferences typically couch their recommendation in terms of the burden of increasing caseloads. Judge-hosted settlement conferences are believed to increase the number of settlements and their timeliness by involving a neutral third party in the negotiation process. The theory is that conferencing will reduce the number of trials and late settlements enough to make the effort worthwhile. This theory, so far at least, has only limited empirical support.

Four studies have sought to assess the impact of judicial conferences on settlement. The earliest study, a controlled experiment conducted in 1960–1962 by Professor Maurice Rosenberg on personal injury cases filed in the New Jersey state courts, found that pretrial conferencing had no impact on the settlement rate.[85] The analysis did not differentiate between pretrial conferences where settlement was actively sought and conferences conducted for the traditional purpose of trial preparation. Studies conducted under

84. *Id.* at 106.

85. *See* M. Rosenberg, The Pretrial Conference and Effective Justice (Columbia University Press 1964).

the auspices of the Federal Judicial Center[86] and the National Center for State Courts[87] also failed to find a positive relationship between judicial efforts to promote settlement in pretrial conferences and the settlement rate or other measures of enhanced judicial efficiency. In the National Center for State Courts study, in fact, the relationship was inverse: The most settlement-intensive courts were slowest.[88] Neither the National Center study, which included twenty-one courts, nor the Federal Judicial Center study, which included six courts, examined individual judges or the techniques judges used in conducting settlement conferences. The analysis was conducted at the level of the court, the researchers assessing the overall tendency of each court toward active efforts to promote settlement through judicial conferences.

A more focused study, a controlled comparison of 621 civil cases filed in the Ontario Supreme Court,[89] has produced data that support the theory that judge-hosted conferences enhance settlement rates and produce earlier settlements. That study compared settlement rates and disposition time in cases that had undergone a conference before a settlement judge (not the trial judge) with similar cases that had not. Pretrial conferences increased the settlement rate by slightly more than 10 percent, resulting in an estimated savings of 304 hours of judge time in the 312 cases that went through the conference. The researchers estimated that the conferences increased the court's disposition rate by 15 percent.[90]

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86. *See* S. Flanders, Case Management and Court Management in United States District Courts (Federal Judicial Center 1977). This study was not designed, it should be noted, to measure the effectiveness of judicial settlement conferencing. Only one question, in fact, concerned this aspect of the court's pretrial procedures.

87. *See* T. Church, Justice Delayed (National Center for State Courts 1978). This study, like the Flanders study after which it was modeled, did not investigate judicial settlement efforts in any detail. It employed no objective standards for measuring the amount and intensity of intervention, nor did it employ controls for types of cases processed.

88. *Id.* at 31–33. A soon-to-be published study of Wisconsin trial judges also fails to support the hypothesis that judicial intervention settles cases. This study began with a survey of the judges that enabled the researcher to classify respondents by the intensity of their settlement efforts. He then checked state records on the number and rate of terminations for each respondent and found no relationship between level of intervention and productivity. Brown, *Bargaining in the Shadow of the Law: The Judicial Silhouette*, Wis. L. Rev. (forthcoming).

89. *See* Stevenson, Watson & Weissman, *The Impact of Pretrial Conferences: An Interim Report on the Ontario Pretrial Conference Experiment*, 15 Osgoode Hall L.J. 591 (1977). For the more up-to-date statistics on this experiment quoted above, see Watson, Judicial Mediation: The Results of a Controlled Experiment in the Use of Settlement Oriented Pretrial Procedures, paper prepared for the annual meeting of the Law and Society Ass'n, June 7–10, 1984.

90. Watson, *supra* note 89, at 7, 14–15.

These contradictory indications of conference effectiveness may be attributable to differences in research design—only the Canadian study, for example, involved conferences specifically designed to promote settlements. At this point, however, the only reasonable conclusion is that the evidence regarding efficacy is mixed. More studies will be necessary to determine whether settlement can be effectively promoted through judge-hosted settlement conferences, and under what conditions.

The impact of judicial mediation on the quality of dispositions reached and on the integrity of our system of adjudication is even more controversial. The arguments on either side tend to be bound up with particular conceptions of the judicial role and assumptions about judicial behavior in the conference. Some advocates of conferencing start from Judge Hubert Will's proposition that "it's the rare case in which the all-or-nothing, black or white result of a trial is really the highest quality of justice. It's just the best we can do to resolve a controversy when it can't be resolved any other way."[91] Or, in the words of one judge at the Kansas City conference: "A trial is a failed settlement." Others see judicial settlement conferences as a threat to fundamental values of the adversary system, as one aspect of what Professor Judith Resnik calls "the erosion of traditional due process standards."[92] These critics fear

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91. Will, *Judicial Responsibility for the Disposition of Litigation*, 75 F.R.D. 89, 123 (1976). *See also* H. Will, R. Merhige & A. Rubin, The Role of the Judge in the Settlement Process 203 (Federal Judicial Center 1977); Remarks of Chief Judge Robert F. Peckham, Ninth Circuit Judicial Conference, July 18, 1983, at 10-12; Peckham, *The Federal Judge as Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 Calif. L. Rev. 770 (1981); Connolly, *Why We Do Need Managerial Judges*, The Judges' Journal, Fall 1984, at 34; Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982); Flanders, *Blind Umpires—A Response to Professor Resnik*, 35 Hastings L.J. 506 (1984); Menkel-Meadow, *Judges and Settlement: What Part Should Judges Play?*, Trial, October 1985, at 24; Rubin, *The Managerial Calendar: Some Pragmatic Suggestions for Achieving the Just, Speedy, and Inexpensive Determination of Civil Cases in the Federal Courts*, 4 Just. Sys. J. 135 (1978); Flanders, *Case Management in the United States: Some Controversies and Some Results*, 4 Just. Sys. J. 147 (1978); Nelson, *Alternative Dispute Resolution: A Supermart for Law Reform*, 14 N.M.L. Rev. 467 (1984).

92. Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374, 424 (1982). *See also* Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984); Oesterle, *Trial Judges in Settlement Discussion: Mediators or Hagglers?*, Cornell L.F., June 1982, at 7; Oesterle, *Dangers of Judge-Imposed Settlements*, Litigation, Spring 1983, at 29; Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts*, 29 Buffalo L. Rev. 487 (1980); Holland, *The Twilight of Adversariness: Trends in Civil Justice*, in P. Dubois, The Analysis of Judicial Reform 18 (Heath 1982); Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. Cal. L. Rev. 65 (1981); Fiss, *The Bureaucratization of the Judiciary*, 92 Yale L.J. 1442 (1983); Miller, *The Adversary System: Dinosaur or Phoenix?*, 69 Minn. L. Rev. 1, 30-35 (1984).

that settlements will be coerced in the low-visibility system of settlement conferencing.

Debate over impacts is thus fueled in part by concern over the methods judges are using to encourage settlements. Much remains to be learned about both settlement techniques and their impact, however. As Professor Carrie Menkel-Meadow warns, "Those who criticize the settlement function have, I fear, enshrined the adjudicative function in an unproven, undemonstrated glow of successful performance, as the efficiency experts have done with settlement conferences."[93] A more fruitful approach, Menkel-Meadow asserts, is to consider what court activities are appropriate under what circumstances, or in her words, "when settlement?"[94]

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93. Menkel-Meadow, For and Against Settlement: For What Purpose the Mandatory Settlement Conference?, paper presented at the Annual Chief Justice Earl Warren Conference on Advocacy in the United States, Charlottesville, Va., June 26–30, 1985, at 14.

94. *Id.* The question of "when settlement" has recently been the subject of detailed analytical treatment by Robert A. Baruch Bush. Professor Bush has attempted to match the goals of civil justice and the costs of failing to achieve them with dispute resolution "forums" to create "jurisdictional principles" for making choices among the forums. *See* Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 Wis. L. Rev. 893. While the work deserves more attention than can be given to it in the limited scope of this report, it should be noted that Professor Bush suggests that the goals of civil justice are often, but not always, better met by noncourt resolution than by adjudication. *Id.* at 978–86.

IV. ALTERNATIVE METHODS FOR PROMOTING SETTLEMENTS

The judge who decides to play an active role in promoting civil settlements must select the occasions, the methods, and the timing of intervention in the face of considerable uncertainty about the impact of those choices. Earlier sections of this report provide an overview of these issues and discuss their ramifications in the context of the judge-hosted settlement conference. This part of the report develops an inventory of settlement procedures that involve the trial judge less directly in the settlement process. These techniques rely on members of the bar, jurors, clients, and other nonjudges to promote settlement. The purpose of this inventory is to stimulate consideration of the range of alternatives available to courts and their applicability to different types of problems.

Court-Annexed Arbitration, Mediation, and Other Procedures That Authorize Practitioners to Evaluate Cases

One familiar approach to settlement is to call upon practicing lawyers to evaluate cases and recommend appropriate dispositions. Procedures vary in formality and impact, depending on the goals sought to be fostered. When, for example, the objective is to provide litigants with a preview of trial, the processes for hearing and evaluating evidence tend to resemble those used in trials. If, on the other hand, the objective is conceived to be providing litigants a forum for determining the settlement value of their case, formality tends to be eschewed in favor of processes designed to encourage a frank exchange of views.[95]

95. A number of legal and ethical issues with respect to the confidentiality of the process and the settlement agreements it produces may be raised in the context of the more informal neutral-hosted settlement procedures. For a general discussion, see Hay, Carnevale & Sinicropi, *Professionalization: Selected Ethical Issues in Dispute Resolution*, 9 Just. Sys. J. 228 (1984).

Federal judges draft lawyers for service as settlement officers because they bring the expertise and experience thought necessary to persuade litigants to reevaluate their cases and move toward settlement, and because they offer their services at a relatively low cost. Except in court-annexed arbitration, where the court pays arbiters from money set aside for that purpose, litigants pay the fees settlement lawyers charge. The court bears only the costs of setting up and overseeing the procedures for referring cases and for hearing appeals. The court, in short, plays a primarily supportive role, lending lawyers some of the court's authority in return for assistance with the time-consuming work of trying to settle cases.

Lawyer-hosted settlement procedures tend to fall into one of three groups, where lawyers:

1. Function like judges in a bench trial, hearing evidence and rendering decisions that become binding absent rejection by one side
2. Evaluate cases informally, typically with no power to bind the parties
3. Assist judges as masters in the pretrial management of complex litigation, taking steps to encourage settlement whenever possible.

This section discusses each of these types of settlement assistance in turn.

Court-Annexed Arbitration

The goals of court-annexed arbitration vary from court to court. In some, the objective is to provide lawyers and their clients with an informed, quick, and cost-effective estimate of the settlement value of their case. In others the objective is termination of the litigation; arbitration is conceived as a substitute for trial. Local practitioners, either alone or on a panel of three, issue awards after hearing evidence and oral argument. The award becomes the judgment of the court, absent an appeal for trial de novo before a judge.

The term "court-annexed arbitration" may be somewhat confusing because this procedure bears only a faint resemblance to the tradition of private arbitration that has grown up in the fields of labor and contracts. Private arbitration is usually voluntary and binding upon the parties; the obligations, duties, and procedures involved tend to be a specialized outgrowth of previous bargaining. Court-annexed arbitration, on the other hand, is typically manda-

tory and nonbinding; decisions reached in the course of court-annexed arbitration are based on the same legal rules and principles that apply in ordinary litigation.[96]

Court-annexed arbitration programs are in place in sixteen states; eight more states and the District of Columbia are contemplating implementation.[97] In the federal system, ten districts have developed or are in the process of developing programs. Court-annexed arbitration has achieved fairly widespread acceptance quickly in the federal courts. Although the Pennsylvania state court system has had an arbitration program since 1952,[98] the concept was unknown in the federal system before the late 1970s, when the Justice Department began to work on proposals to relieve congestion in the federal trial courts.[99] In 1978, Congress, at the urging of the Department of Justice, provided funds for an experimental program in three districts. Two courts, the Eastern District of Pennsylvania and the Northern District of California, have continued with this experiment; the third, the District of Connecticut, dropped out in 1981.[100] Congress has recently appropriated money to include eight additional sites.[101]

The experimental basis of the original court-annexed arbitration programs, the absence of relevant federal legislation, and the tradition of independent program development in the federal courts have had their impact on the structure of the programs now in place. Each program is distinctive in some of its details, though most of the newer programs are modeled fairly closely on the East-

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96. Although "court-annexed arbitration" ordinarily refers to a program the court develops and supervises itself, the terms could logically be applied to a private program that accepts mandatory referrals. Recently, several judges in the Southern District of New York have begun ordering selected cases to the American Arbitration Association for evaluation of settlement prospects. At the evaluation session, litigants are made aware of the availability of arbitration and other forms of alternative dispute resolution, such as minitrial and mediation. At this time the evaluation session is free, but litigants pay a fee for the dispute-resolution procedure they select. Litigants have the option, however, of returning to the court without going through any of the procedures the AAA makes available. (Materials concerning this program are on file at the Federal Judicial Center.) For a discussion of the history of court-annexed arbitration, see Nejelski & Zeldin, *Court Annexed Arbitration in the Federal Courts: The Philadelphia Story*, 42 Md. L. Rev. 787, 787–800 (1983).

97. P. Ebener & D. Betancourt, Court Annexed Arbitration: The National Picture 2, 4 (Rand Publication Series 1985).

98. In 1952, the Pennsylvania state legislature adopted an arbitration act that compelled arbitration in cases where the amount in controversy was valued at less than $1,000. *See* Nejelski & Zeldin, *supra* note 96, at 793–96. *See also* Doty, *Philadelphia Compulsory Arbitration Program*, 29 Vill. L. Rev. 1449 (1984).

99. *See* Nejelski & Zeldin, *supra* note 96, at 787 n.2.

100. *Id.* at 799 n.77 and accompanying text.

101. Pub. L. No. 98-411 (1984). The additional districts are M.D. Fla., M.D.N.C., E.D.N.Y., W.D. Tex., W.D. Mo., W.D. Okla., D.N.J., and W.D. Mich. *See* Ebener & Betancourt, *supra* note 97, at 3, 14.

ern District of Pennsylvania model. Features common to all of the programs will be emphasized here.

Court-annexed arbitration programs are designed so that certain types of cases come to them automatically, because the case qualifies under jurisdictional criteria set forth in a local rule. Generally, the relevant local rule specifies that personal injury, property damage, and commercial cases qualify for arbitration, provided that the suit is for damages only and that the amount claimed does not exceed a certain dollar ceiling, most commonly $100,000.[102]

A guiding assumption in each of these programs is that the types of cases most likely to benefit from court-annexed arbitration can be specified in advance by rules that focus on the amount in controversy and the subject matter in dispute. This approach virtually guarantees that an adequate number of cases will flow into the program without the necessity of active judicial oversight, but at a cost: The criteria specified in the rule are bound to be both overinclusive and underinclusive. This suggests a tension between institutionalized rules that relieve judges of the burden of making treatment decisions on an ad hoc basis and the need to allocate cases to treatments with sensitivity.

The upper ceiling on arbitration eligibility is not as inflexible as it may appear. A lawyer may overvalue a case to avoid arbitration, although such an action runs the risk that a judge or magistrate will order the case back into arbitration. Under most local rules, cases not eligible for mandatory referral may go to arbitration by consent of the parties or on the order of the assigned judge.[103] The proportion of the civil caseload sent to arbitration varies somewhat from court to court, but generally ranges from 15 to 30 percent.[104]

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102. Unless excluded by local rule, cases involving the United States as a party are eligible for court-annexed arbitration, according to a recently adopted Department of Justice policy. The department's policy of participation does not extend, however, to acquiescence in the imposition of penalties or sanctions for failure to accept an arbitration award. 50 Fed. Reg. 40,524 (1985) (amending 28 C.F.R. § 50.20).

103. *See, e.g.*, E.D. Pa. R. Civ. P. 803(b): "The parties may by written stipulation agree that the clerk of court shall designate and process for compulsory arbitration any civil case wherein money damages only are being sought in an amount in excess of $75,000, exclusive of interest and costs." In some courts, e.g., the Northern District of California, judicial approval is necessary: "Notwithstanding the provisions of Rule 500, the parties to any action or proceeding may stipulate to its referral to arbitration upon such terms as they may agree to, subject to approval by order of the assigned judge." N.D. Cal. R. Civ. P. 505.

104. *See, e.g.*, Nejelski & Zeldin, *supra* note 96, at 809; A. Lind & J. Shapard, Evaluation of Court-Annexed Arbitration in Three Federal District Courts 31 (Federal Judicial Center rev. ed. 1983); Creekmore, *Court-Annexed Arbitration*, The Fourth Circuit Newsletter, Spring 1985, at 102. The Eastern District of Pennsylvania appears to have the highest proportion of arbitration eligible cases. From January to June 1985, 32.4 percent of the docket was eligible for arbitration. This rise comes after a rule change broadening eligibility.

Cases enter arbitration after a set period for discovery, but the local rules vary in how quickly and how automatically the referral occurs. In general, however, the discovery period is short: It is 120 days in the Eastern District of Pennsylvania, for example. Additional discovery may be permitted if the case fails to settle after the arbitration hearing. The trial judge may or may not schedule a settlement conference in such cases.

Local rules also vary concerning qualifications for arbitrators and their training.[105] Selection of arbitrators takes place in one of three ways: by random assignment in the clerk's office; through an agreement between the clerk and the parties, under a formula that permits the parties to exercise some veto power over initial selections made by the clerk; or through selection by the litigants themselves from a list provided by the court. Those selected serve alone or on a panel of three, depending on the court, and, in some districts, the preference of the litigants. Courts make these arrangements with an eye to reassuring the lawyers whose cases are subject to arbitration that the procedure is fair. The method a court chooses may in addition affect the time required to arrange a hearing.

The hearing process is abbreviated, adversarial, and informal. In the Eastern District of Pennsylvania hearings average about three hours; hearings are about two hours longer in the two other federal districts that have been studied so far.[106] This is less than half the time normally allotted to trial in these types of cases.[107]

In the course of the hearing the lawyers for each side present documentary evidence and may present witnesses, but the rules of evidence tend to be relaxed enough to ensure that proceedings move quickly.[108] No program requires transcription of the proceed-

105. The issue of the training of arbitrators and mediators deserves more study. There is some sentiment that the skills of mediation and arbitration are quite different from those of litigation, and that effective dispute resolution requires special training. *See, e.g.*, Phillips & Piazza, *Mediation Is a Tool for Managing Litigation*, 32 Fed. Bar News & J. 240, 241 (1985); Riskin, *Mediation and Lawyers*, 43 Ohio St. L.J. 29, 43-51 (1982). A few district courts now require a brief training course for arbitrators. The Middle District of North Carolina is unusual in referring all arbitration cases to the Private Adjudication Center at Duke Law School, which takes responsibility for the training of arbitrators.

106. A. Lind & J. Shapard, *supra* note 104, at 53.

107. *Id.*

108. Some programs, for example, require notice of intent to cross-examine. *See* P. Connolly & S. Smith, Description of Major Characteristics of the Rules for Selected Court-Annexed Mediation/Arbitration Programs 10 (ABA Action Commission to Reduce Court Costs and Delay 1982).

ings, and limits are often placed on the use of transcripts the parties arrange to have made. The understanding that procedures should be dignified—but somewhat less formal than a trial—is also reflected in the rules regarding the location of the hearing: Most districts specify the courthouse, but only a few mention the courtroom as an appropriate site within the building. Clients are expected to attend, though only a few courts require their presence.[109]

Procedures regarding arbitration awards tend to be quite similar from district to district. Arbitrators can announce their decision at the close of the hearing or by mail for some period of days (usually ten or twenty) afterward. If the members of a panel are not in agreement regarding liability or damages, the majority prevails. An award, once made, is deemed accepted and becomes a final judgment absent explicit rejection by one or both of the parties within a specified time period, usually twenty to thirty days.

In reaching their decision, an arbitration panel analyzes the case as a judge would, determining liability, then damages. This procedure ensures that some decisions will favor defendants.[110] Were the procedures designed to place a settlement value on a case, on the other hand, it would be reasonable to expect that *all* plaintiffs would be awarded something.

Litigants dissatisfied with the outcome of this procedure have the right to trial de novo. Those who take their cases to trial, however, must move quickly if they are to preserve their rights. Six courts require an appeal within thirty days, and in the remainder the limit is twenty days.

Litigants who ask for trial de novo in general also risk paying for the arbitration proceeding, unless they better that result at trial. Such provisions may have an equalizing effect, discouraging litigants who could afford to press on to trial from taking that route absent good reason to believe they could better the arbitration award. Just how often the fee is actually assessed, however, is unclear in most districts. Courts have held that arrangements like these adequately preserve the right of the parties to jury trial, and that they do not impinge on other constitutionally or statutorily protected interests.[111]

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109. *See, e.g.*, W.D. Okla. R. Civ. P. 43 I(4). Judge Enslen (W.D. Mich.) achieves the same end by court order.

110. The Federal Judicial Center, in a 1984 study of court-annexed arbitration awards, found that 72 percent of the awards analyzed favored plaintiffs. A. Lind & J. Shapard, *supra* note 104, at 40.

111. *See* Nejelski & Zeldin, *supra* note 96, at 804-07; Kimbrough v. Holiday Inn, 478 F. Supp. 566 (E.D. Pa. 1979); *cf.* Mattos v. Thomson, 491 Pa. 385, 421 A.2d 190 (1980). For an analysis of these legal issues, see Levin & Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. Fla. L. Rev. (forthcoming).

The Federal Judicial Center has assessed the impact of court-annexed arbitration in three courts—the Northern District of California, the District of Connecticut, and the Eastern District of Pennsylvania.[112] Lind and Shapard evaluated these three programs in light of the following claims proponents make for court-annexed arbitration:

1. Speedier disposition of claims
2. Fewer cases going to trial
3. Less expense to the parties.

Lind and Shapard also attempted to determine the extent to which the programs enjoy the confidence and respect of persons using the arbitration system.

The average time from filing to disposition, these researchers found, can be reduced with court-annexed arbitration if hearings are scheduled promptly. Court-annexed arbitration speeds dispositions in part because it can be scheduled to occur earlier than a trial would, particularly in a court with a large caseload. Confronted with the prospect of an arbitration hearing, many litigants apparently find it worthwhile to settle their cases just before the scheduled date of the hearing. The most recent statistics for the Northern District of California, for example, indicate that 1,083 of the 2,878 cases that have been scheduled for arbitration so far have settled before the hearing.[113] The hearing date also acts as a docket-cleaning device, helping the court discover cases that have already settled or have been abandoned.

Lind and Shapard also report that the procedure reduces the proportion of cases that go on to trial, in some instances by as much as 50 percent.[114] This is true even though over half of those who go through an arbitration hearing demand trial de novo in some courts.[115] The explanation, suggests Judge Raymond Broderick (E.D. Pa.), is that "many parties have filed demands during the mandated twenty-day period in order to protect the record while

112. *See* A. Lind & J. Shapard, *supra* note 101. Barbara Meierhoefer and Carroll Seron of the Center are currently engaged in revising and expanding this study.

113. These figures were supplied by Chief Judge Robert Peckham (N.D. Cal.) at the Sept. 9-10 Conference on the Judicial Role in Settlement.

114. *See* A. Lind & J. Shapard, *supra* note 101, at 140.

115. *Id.* at 136. Of the cases filed in the Northern District of California before Jan. 1, 1980, for example, 138 reached an arbitration hearing, and 72 of these resulted in a demand for trial de novo. *Id.*

they discuss the award with their clients. The practice also has been used as a tool to effectuate a settlement."[116]

Satisfaction with the fairness of the arbitration procedure among lawyers appears to be quite high. Lind and Shapard found that 82 percent of those with eligible cases deemed the procedure as they experienced it to be "fair to all involved," and most were satisfied that the awards they received were fair in light of what they could have expected to receive at trial.[117] Given the small and unrepresentative proportion of arbitration awards taken to trial, it is impossible to determine just how closely awards really do parallel trial verdicts.[118]

We know little about the perceptions of the parties themselves as to the fairness of the process or the cost savings it offers. Lind and Shapard were not able to include them in their study of the federal programs. The only published study that does report findings gathered directly from the disputants themselves is an evaluation of court-annexed arbitration in the Pittsburgh Court of Common Pleas, which considers much smaller cases than any of the federal programs.[119] The Pittsburgh results suggest a relatively high level of satisfaction among the parties, particularly those represented by counsel. Pro se litigants, however, were less likely to be satisfied, possibly because they tended to win less often and to win less money than comparable litigants represented by counsel.[120]

Available evidence suggests a role for court-annexed arbitration in courts whose dockets are crowded with the type of cases in which a brief, triallike hearing before a panel of lawyers is likely to enhance settlement prospects.[121] Such cases must not be too factually or legally complex for a truncated procedure; nor should they involve legal issues so uncertain that their resolution by a nonjudge would be considered unpersuasive by most practitioners. Cases where emotions on either side run high would also seem poor candidates for arbitration, which is not designed to provide for emotional catharsis or for the full exploration of the underlying

116. Broderick, *Compulsory Arbitration: One Better Way*, A.B.A. J., January 1983, at 64, 65.

117. A. Lind & J. Shapard, *supra* note 104, at 59.

118. Of the small number of cases later taken to trial in Philadelphia, Nejelski and Zeldin reported that in 34 percent a different party prevailed at trial from that in arbitration. Nejelski & Zeldin, *supra* note 96, at 816.

119. Adler, Hensler & Nelson, Simple Justice: How Litigants Fare in the Pittsburgh Court Arbitration Program (Rand Publication Series 1983). One other study reports a high degree of "user satisfaction" with various forms of alternatives to formal adjudication. *See* Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 Just. Sys. J. 420, 431-33 (1982).

120. Adler, Hensler & Nelson, *supra* note 119, at 63-76.

121. *See* A. Lind & J. Shapard, *supra* note 104, at 11.

tensions that may propel a lawsuit. Relatively straightforward compensation cases that could benefit from a valuation in dollar terms would seem better suited to this procedure.

Lawyer Mediation and Related Activities

Many federal courts ask lawyers to conduct proceedings that are less formal than court-annexed arbitration and more routine than those performed by a special master. The applicable local rules often refer to these proceedings as settlement conferences and to the lawyers who host them as mediators. Twenty-nine districts currently have rules authorizing lawyers to conduct settlement conferences. In sixteen of these districts, the parties have sole discretion over whether or not to invoke the procedure. Elsewhere, lawyer-hosted settlement conferences are compulsory in certain types of cases or may be required at the discretion of the trial judge. Courts that mandate participation for some types of litigants typically allow others to elect the procedure voluntarily.

The local rules relating to lawyer mediation are generally much less specific than those authorizing court-annexed arbitration. Most do not specify detailed case eligibility criteria or set forth penalty provisions. Their brevity and generality suggest that in many courts, lawyer-hosted settlement conferences are regarded as a matter to be handled at the level of the individual judge, not the court, as is characteristic of mandatory arbitration programs.

Lack of specificity in the local rules does not, however, mean that we have no detailed information about how these programs work. The Federal Judicial Center has produced reports on lawyer-hosted mediation procedures in the Eastern District of Michigan and the Western District of Washington.[122] From interviews, documentary material, and news articles, we have some information on three others: the early neutral evaluation procedure recently instituted in the Northern District of California,[123] the mandatory settlement conference procedure used by Judge Patrick Kelly in the District of Kansas,[124] and the practice of selective referral to medi-

122. K. Shuart, The Wayne County Mediation Program in the Eastern District of Michigan (Federal Judicial Center 1985); K. Tegland, Mediation in the Western District of Washington (Federal Judicial Center 1984). The Western District of Michigan has adopted the Eastern District of Michigan program, with some changes in the details of the court rule, and Eastern Washington has recently adopted the Western Washington program.

123. Brazil, Kahn, Newman & Gold, *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 Judicature (1986) (forthcoming); *see also* Arthurs, *Neutral Litigators Tapped to Help Settle Actions*, Legal Times, Feb. 4, 1985, at 2, col. 1.

124. Judge Kelly has made available his scheduling order, a letter he sends to litigants in cases scheduled for mediation, a memorandum order, guidelines for law-

ation by Judge Richard Enslen in the Western District of Michigan.[125] These programs are of interest here because they suggest certain key differences in the way courts have opted to use lawyer mediators to encourage settlements. These differences in procedure are related to differences in the goals each program seeks to foster.

The method and criteria for referring cases to lawyer-hosted settlement conferences determine the volume of cases mediators will handle. Automatic, across-the-board referrals could be expected to yield the largest number of cases, but no court has taken this approach. The Northern District of California comes closest, exempting by court rule certain classes of cases that almost never proceed to trial, and including all others on a representative basis in order to test the efficacy of the program.[126]

In the other courts discussed here, referrals occur on an ad hoc basis: by stipulation of the parties, on motion of one party, or on the court's own motion. Available information suggests that judicial referrals predominate, and that the propensity to make these referrals varies significantly from judge to judge. In the Western District of Washington, for example, one judge reportedly refers nearly every civil case to mediation, while others report that they rarely refer cases. Judges in the Eastern and Western Districts of Michigan also vary significantly in their propensity to use mediation, although in those courts the local rules do impose some limits on referrals: the Western District eliminates constitutional cases from consideration for mediation, and the Eastern District limits its program to diversity cases.[127]

The rules of thumb judges apply in targeting cases for mediation differ somewhat from judge to judge, but there does appear to be a common core of agreement as to what types of cases are prime candidates for mediation programs. Personal injury, products liability, and routine diversity cases are often mentioned as good candidates, provided they are relatively small and simple. Civil rights cases and other disputes involving long-term relationships may also be good candidates for lawyer mediation, if the program allows time for participation by clients and full exploration of the issues. Some

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yers, and the result of a survey he and an executive committee administered to assess the impact of the new procedure. (They are on file at the Federal Judicial Center.)

125. *SJT, "Mediation," and Mini-Trials in Federal Court: An Interview with Judge Richard A. Enslen*, Alternatives to the High Cost of Litigation (a publication of the Center for Public Resources), October 1984, at 4 [hereinafter cited as Enslen interview].

126. General Order No. 26 Regarding Early Neutral Evaluation. Only a handful of cases have gone through the program thus far.

127. Enslen interview, *supra* note 125, at 5; *and see* K. Shuart, *supra* note 122, at 8.

judges also favor mediation when one or both of the attorneys involved are inexperienced, on the theory that discussion with experienced litigators will encourage a more realistic assessment of settlement prospects than might occur otherwise. Cases that involve multiple parties or esoteric legal issues are widely regarded as inappropriate candidates,[128] as are cases that almost always settle without court intervention, such as those involving student loan defaults, forfeitures, and bankruptcy.[129]

Judges also tend to agree on the timing of lawyer-hosted conferences. In four of the five programs discussed here, they take place near the end of discovery or shortly after its completion, on the assumption that litigators must know their own and each other's case thoroughly before they can realistically be expected to talk settlement. In several of these courts, this point of intervention was arrived at after some experimentation with earlier intervention and at the urging of the local bar association.[130] The Northern District of California is the exception; conferences there occur within three to four months of filing, even before joinder of issue in some cases.[131]

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128. This is not to suggest that complex disputes that have not reached the stage of litigation are poor candidates for mediation. Lawrence Susskind and Denise Madigan of the Harvard Law School Program on Negotiation, for example, describe a procedure they call "mediated negotiation" for handling precisely the kinds of cases most judges feel are inappropriate for mediation in a court-annexed setting:

> 1. Parties are numerous, diverse and hard to identify.
> 2. Access to traditional decision-making or dispute resolution arenas is difficult for some affected parties.
> 3. The outcome is dependent on controversial value judgments (where a community mandate or consensus might be useful).
> 4. The community at large clearly cares about the outcome.
> 5. The parties will interact in the future on related or unrelated issues (where improved relationships might be desirable).
> 6. Implementation of the outcome can be adversely affected by dissatisfied parties.
> 7. Multiple, complex issues are involved (where the potential for joint problem-solving and joint gain is great).

Susskind & Madigan, *New Approaches to Resolving Disputes in the Public Sector*, 9 Just. Sys. J. 179, 200 (1984).

129. *See* K. Tegland, *supra* note 122, at 12–14; K. Shuart, *supra* note 122, at 8–9; Enslen interview, *supra* note 125, at 5–6.

130. Shuart notes the need for full information about the case as well as two other reasons for intervention at this point: Since preparation for trial is complete or nearly so, no additional preparation is required for mediation; in addition, the closeness of the trial date "encourages serious settlement discussions." K. Shuart, *supra* note 122, at 7–8.

131. Brazil, Kahn, Newman & Gold, *supra* note 123; Arthurs, *supra* note 123, at 2.

Courts vary in how they recruit lawyer mediators and finance their services, though all require significant federal trial court experience.[132] In the Western District of Washington the bar proposed a list of lawyers and the court approved it; all have volunteered to serve for free.[133] Litigants can agree to select a particular lawyer from the court's list or leave this matter to the court. Judge Kelly follows roughly the same procedure, but bills litigants $100 an hour for the mediator's services, for an average fee of $250. He also permits litigants to opt for a "free" conference before the court's part-time magistrate or the trial judge assigned to the case. The Eastern District of Michigan entrusts the selection of mediators to the Mediation Tribunal Association, a private, nonprofit organization designed to handle cases referred by both the state and federal trial courts. That association assigns a panel of three lawyers to a day of hearings (about fourteen cases), paying each lawyer on the panel $600 for the day, and charging a $75 fee to litigants for each case heard.[134] In the Western District of Michigan, each side pays $150 for a hearing before three lawyers. The Northern District of California is asking lawyers to volunteer their services for the first year, but may pay them in subsequent years if the case evaluation experiment proves successful.

All but one of these programs require litigants to prepare short memoranda (generally not exceeding ten pages) outlining key contentions as to liability and damages. The Western District of Washington and Judge Kelly require a preconference meeting between litigants. Courts tend to be less specific about the procedure to be followed at the hearing itself, suggesting that mediators are free to follow their own instincts. Clearly the object is to create an opportunity for experienced lawyers to offer a candid evaluation of the case and its likely success at trial.

Unanimity as to this broad objective should not, however, obscure important differences in the ways courts use lawyers to advance the possibilities of settlement. At one extreme are the Eastern and Western Districts of Michigan, which have developed a "quick-look" procedure for evaluating cases. The sessions in these districts are "mediation" in name only. Sessions there are short, fifteen to thirty minutes per side, and little effort is made to negotiate differences between the parties. In fact, in the Eastern Dis-

132. *See supra* note 105.

133. By September 1984 the number of volunteers had reached 187, and Clerk Bruce Rifkin believes it is even higher at this point.

134. This arrangement is made possible in part by the large number of state cases for which mediators are provided by the Mediation Tribunal Association. *See* K. Shuart, *supra* note 122, at 405. The fee may be increased soon to $800.

trict the parties themselves are not even permitted to attend. In both Michigan districts, the three-lawyer panel simply sets a settlement value on the case, which becomes the final award absent rejection by one side. No case, reportedly, is ever evaluated at $0, though in some the valuation is set very low to reflect the low probability of victory at trial. Those who reject the panel's valuation awards and proceed through trial de novo risk paying the fees and costs that the other side accrues in preparing for trial, a penalty that is seldom imposed in practice.[135]

The Northern District of California stands at the other extreme. Their program is geared to containing the costs and delay of litigation as well as providing a realistic assessment of settlement prospects. Clients are required to attend to ensure that these goals are met. The lawyer mediators resemble pretrial masters in some respects: They are chosen on the basis of their expertise in the subject area; they intervene early in the case, probing strengths and weaknesses in the contentions of the parties, suggesting possible stipulations to reduce the scope of the dispute, and urging economy in discovery and motion practice. The Northern District's "master-mediators" differ from traditional pretrial masters, however, in the time they devote to these activities—a few hours—and in their lack of authority to make recommendations to the trial judge.[136] Mediation in Judge Kelly's court and in the Western District of Washington is more akin to the California model than the Michigan model.[137]

We know relatively little about the impact of lawyer mediation on courts and litigants. We have no systematic analyses of any of the federal programs now in existence, although some suggestive fragments of information about a few programs are available. Judge Enslen reports, for example, that for the first half of 1984 approximately 75 percent of the cases he and his colleagues sent to

135. *See, e.g.*, K. Shuart, *supra* note 122, at 9-10. The penalty provision has never been tested, although, Judge Enslen reports, a case is currently pending before the Sixth Circuit. Note, however, that the United States has already taken the position that it will not be bound by these penalty provisions. Failure to accept the award has another ramification, even for government litigants. The trial judge, who is apprised of the valuation in jury cases, may use it as a bargaining tool in the pretrial conference.

136. For a discussion of the program, see Brazil, Kahn, Newman & Gold, *supra* note 123.

137. Rules in the Western District of Washington contain provisions under which, should mediation fail, the case may be referred to a special master or to arbitration by stipulation of the parties. *See* K. Tegland, *supra* note 122, at 8-9; W.D. Wash. Local Civ. R. 39.1(d)(5). These provisions have rarely been used, according to Clerk Bruce Rifkin and Tegland. K. Tegland, *supra* note 122, at 8-9.

mediation settled at the hearing or within the twenty days following it.[138]

We know more about the Eastern District of Michigan, where researcher Kathy Shuart analyzed the outcome of cases set for mediation in 1982. Shuart found that among the 288 federal cases set for mediation that year, 28 were resolved before a hearing occurred, 76 accepted the panel's valuation, and 184 rejected the decision and were eventually resolved at either a judge-hosted settlement conference or trial. This suggests a much lower mediation-induced settlement rate than in the Western District of Michigan, though one would need to know the respective trial rates to be certain.[139]

Shuart's study and the material we have on other lawyer mediation programs indicate that many of the judges and practitioners involved are enthusiastic about the fairness and effectiveness of their programs. Shuart found that most Eastern District of Michigan judges believed that the mediation program reduced the number of trials by encouraging settlements. Lawyers also favor the Eastern District of Michigan program, though nearly half had suggestions on how the panel selection process could be improved. Three-fourths agreed that the mediation hearing is useful, and almost 90 percent found the short written summary and the thirty-minute hearing period sufficient for case valuation.[140] A recent poll of the attorneys who have been through Judge Kelly's mediation procedure reveals that 92 percent approve of the process, though only half are convinced that it contributed to the resolution of their particular case.[141] Lawyers in the Western District of

138. Enslen interview, *supra* note 125, at 5. The Northern California program is undergoing evaluation by a local law professor, but no results are yet available.

139. K. Shuart, *supra* note 122, at 11. Reporting on the results in state cases in an earlier paper, Shuart stated that "Circuit Court statistics indicated that only seven percent of the rejected mediation cases went to trial, while the overwhelming number of these cases ultimately settled. It seems plausible to expect that the panel valuations, though rejected, play some role in subsequent settlement negotiations." Shuart, Smith & Planet, *Settling Cases in Detroit: An Examination of Wayne County's "Mediation" Program,* 8 Just. Sys. J. 307, 315 (1983). Shuart also assessed the relationship between mediated and tried outcomes in a sample of state cases that had undergone both procedures. Among these cases, which are only roughly analogous to the federal cases in the same program, she found that 35 percent of the mediation awards fell within 25 percent of the eventual trial award. K. Shuart, *supra* note 122, at 12. This pattern suggests that lawyers are not reluctant to use the option of going to trial to "correct" awards that are not consistent with those achievable at trial.

140. K. Shuart, *supra* note 122, at 16.

141. Sept. 4, 1985, letter from attorney Richard Hite to Judge Kelly outlining results of a survey of lawyers who have participated in a conference. The survey included sixty-two respondents who had participated in forty-three conferences, some of which were held by the court's part-time "settlement" magistrate.

Washington are also favorably disposed toward their mediation program, judging from their willingness to volunteer to serve as mediators and the enthusiasm with which bar officials have endorsed the program. Although a decline in the number of referrals during 1984 suggested that some of the judges there might have become less enthusiastic about the program, this trend seems to have been reversed in 1985.

We have no direct information at all on the satisfaction of the parties in mediation-targeted cases, nor do we know whether these procedures actually save clients money. We cannot even be certain how often parties attend and participate in the mediation hearings in some districts. It is thus unclear how many of the programs discussed in this section approach a true mediation model, which emphasizes the elucidation of the underlying interests of the parties and the development of a settlement package that satisfies those interests.

All of these programs do, however, have three important features in common:

1. They provide a neutral means of getting settlement negotiations under way
2. They require enough preparation to get some attorneys to begin negotiating on their own, in advance of the conference/hearing
3. They offer, at a minimum, an unbiased estimate of the settlement value of a case.

In the first two respects, mandatory lawyer-hosted mediation programs resemble mandatory court-annexed arbitration, except that the mediation programs tend to be more informal. It is in the type of decision rendered that arbitration and mediation programs differ sharply. Whereas arbitration procedures are designed to examine the merits of a controversy as a court would, in terms of liability and damages, mediation (except in Michigan) tends to be more flexible. It can be used as a mechanism for affixing a settlement value to a case, or for litigation planning, or as a forum for exploring a broad range of settlement alternatives in a nonconfrontational atmosphere.[143]

142. For the 1984 statistics, see K. Tegland, *supra* note 122, at 23. Clerk Bruce Rifkin, although unable to provide specific numbers, believes that there is renewed enthusiasm in both bench and bar partly as a result of rule changes, which increased the number of mediators available.

143. Mediation by lawyers in an appellate context is beyond the scope of this report. There are, nevertheless, similarities between trial-level and appellate-level

Pretrial/Settlement Masters

The settlement-enhancing role of the lawyer mediator extends beyond the ordinary two-party cases of relatively modest proportions that dominate federal court dockets. Lawyers also assist in resolving some of the complex, burdensome lawsuits that threaten to consume inordinate amounts of court time as they move toward trial. To be effective in this type of case, the lawyer mediator must be both case manager and settlement negotiator, for these cases demand sustained supervision directed toward the containment of issues and the control of discovery, as well as a push toward settlement or a credible trial date. A judge can get this type of assistance by appointing a special master.

Appointed by the court to assist in resolving particularly burdensome litigation, the special master is a familiar figure in the federal court system. The "modern" version of this office originated in England, where the position was established in 1837 through the Superior Courts Officers Act.[144] In the contemporary American system, masters hear evidence, issue findings of fact, and perform other services associated with the trial of particularly complex cases. A special master might also be charged with supervising the implementation of a court decree.[145]

Increasingly, special masters are assisting courts in the pretrial phase of complex litigation. Judges are asking masters to resolve discovery disputes, supervise the production of documents, and help them narrow issues in dispute.[146] Such work puts the master in an

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programs. For a description of programs in place and an effort to evaluate their effectiveness in settling appeals, see J. Goldman, An Evaluation of the Civil Appeals Management Plan: An Experiment in Judicial Administration (Federal Judicial Center 1977); Rack, *Pre-argument Conferences in the Sixth Circuit Court of Appeals*, 15 Tol. L. Rev. 921 (1984); J. Goldman, The Seventh Circuit Preappeal Program: An Evaluation (Federal Judicial Center 1982); T. Church, Ninth Circuit Prebriefing Conference Program: Preliminary Evaluation (Nov. 22, 1982) (unpublished paper); Note, *The Minnesota Supreme Court Prehearing Conference—An Empirical Evaluation*, 63 Minn. L. Rev. 1221 (1979).

144. 7 Will. 4 & 1 Vict., ch. 30. For a discussion of the history of the use of masters, see Silberman, *Masters and Magistrates Part I: The English Model*, 50 N.Y.U. L. Rev. 1070, 1078 (1975); Cooley, *Query: Could Settlement Masters Help Reduce the Cost of Litigation and the Workload of Federal Courts?*, 68 Judicature 59 (1984).

145. *See generally* V. Nathan, The Use of Masters in Institutional Reform Litigation (Federal Judicial Center 1979), *reprinted from* 10 U. Tol. L. Rev. 419 (1979); Galligan, *Masters to Administer Court Ordered Settlements*, in materials for the National Institute on New Techniques for Resolving Complex Litigation, sponsored by the Section on Litigation of the American Bar Association, San Francisco, June 20-21, 1983.

146. *See generally* W. Brazil, G. Hazard & P. Rice, Managing Complex Litigation: A Practical Guide to the Use of Special Masters (American Bar Foundation 1983).

ideal position to initiate and pursue settlement discussions while discovery proceeds—a fact that has not been lost on the judiciary. Some federal judges are experimenting with the concept of a master appointed to pursue settlement and simultaneously to prepare a case for trial.

These judges have had some notable successes. Masters Kenneth Feinberg, David Shapiro, and Leonard Garment assisted Chief Judge Jack Weinstein (E.D.N.Y.) in settling the massive lawsuit veterans filed against the manufacturers of Agent Orange.[147] Judge Robert Merhige relied heavily on settlement master William Spong in arriving at a settlement in a massive contract dispute between fourteen utilities and Westinghouse Corporation.[148] Judge Richard Enslen's November 1984 decision to name Francis McGovern settlement master in a fifteen-year-old fishing rights case was a key to its successful resolution six months later. McGovern, according to one litigant, "just cut through this Gordian knot, not without pain, but in an incredibly short space of time."[149]

Federal judges have broad, but not unlimited, authority to appoint pretrial masters. They have three sources of authority for making appointments: the consent of the parties, their inherent power over the administration of justice, and the Federal Rules of Civil Procedure.[150] The relevant case law suggests that either the consent of the parties or the judge's inherent power is adequate to support the appointment, given a sufficiently burdensome case.[151]

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147. *See In re* Agent Orange Prod. Liab. Litig., 94 F.R.D. 173 (E.D.N.Y. 1982). The settlement involved the creation of a $180 million fund to satisfy outstanding claims. *See* J. D. Pavluk, Masters as Mediators: The Role of Special Masters in Resolving Legal Disputes 23–24 (report prepared for the Seminar in Judicial Administration, Feb. 15, 1985); Moore, *Master Says Mass Torts Don't Belong in Courts*, Legal Times, Oct. 15, 1984, at 5, col. 1.

148. *In re* Westinghouse Elec. Corp. Uranium Utils. Contracts Litig. (E.D. Va. 1977).

149. *See* Arthurs, *Master Lands Settlement That Almost Got Away*, Legal Times, Apr. 22, 1985, at 1, col. 2; Strasser, *Special Master: A Stormy Role*, Nat'l L.J., Nov. 26, 1984, at 1, col. 3. Regarding McGovern's role in a 9,000-plaintiff suit against a manufacturer of DDT in the Northern District of Alabama, see *On Settling Toxic Tort Cases—The Role of Special Masters: An Interview with Francis E. McGovern*, Alternatives to the High Cost of Litigation, September 1984, at 3. Regarding his role in the asbestos cases in the Northern District of Ohio, see J. D. Pavluk, *supra* note 147, at 22–23. *See also* T. Lambros, E. Green & F. McGovern, Ohio Asbestos Litigation: Case Management Plan and Case Evaluation and Apportionment Process (1983) (privately published).

150. Fed. R. Civ. P. 16(c)(6) and 53. *See generally* Kaufman, *Masters in the Federal Courts: Rule 53*, 58 Colum. L. Rev. 452 (1958).

151. *See* Brazil, *Authority to Refer Discovery Tasks to Special Masters: Limitations on Existing Sources and the Need for a New Federal Rule*, in W. Brazil, G. Hazard & P. Rice, *supra* note 146, at 305; Kaufman, *supra* note 150. *See also Ex parte* Peterson, 253 U.S. 300, 312 (1920) (courts have inherent power to appoint persons to aid in specific judicial tasks).

The Federal Rules of Civil Procedure, surprisingly, contain little guidance as to when it is appropriate to appoint a special master to assist in the pretrial phase of a complex case. Rule 16 seems to encourage such appointments during the pretrial process. Section (c)(6) of that rule urges the parties and the trial judge to consider "the advisability of referring matters to a magistrate or master," and section (c)(10) urges judges and litigants to consider "special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems." These provisions suggest a role for a pretrial master in complex or potentially protracted actions.

Rule 53, however, makes it clear that judges should not be too quick to appoint a master:

> A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when issues are complicated; in actions to be tried without a jury . . . a reference shall be made only upon a showing that some exceptional condition requires it.

The tension between rule 16 and rule 53 may be less significant than it looks. Rule 53 was designed to discourage judges from referring a significant portion of their caseload to masters for findings of fact after the commencement of trial, a practice that threatened to undermine the right of litigants to trial before a duly selected, Article III judge.[152] Masters were not ordinarily appointed to assist with the pretrial phase of litigation in 1938, when rule 53 was adopted. Some scholars have concluded that rule 53, virtually unchanged since its 1938 adoption, may not even apply to masters appointed to handle matters occurring before trial.[153] Whether or not the courts ultimately agree with this interpretation of the coverage of rule 53, it seems clear that rule 16, as amended in 1983, is intended to encourage the practice of appointing pretrial masters in particularly demanding cases.

Rule 53 imposes no other important qualifications on the appointment of special masters. A judge might, for example, appoint a scientist to investigate and report on a technical issue that stands

152. *See* LaBuy v. Howes Leather Co., 352 U.S. 249, 256 (1956). On the importance of Art. III status, see Resnik, *The Mythic Meaning of Article III Courts*, 56 U. Colo. L. Rev. 501 (1985).

153. *See* Brazil, *supra* note 151; Kaufman, *supra* note 150, at 162–63. In 1983, Fed. R. Civ. P. 53 was amended to delete authorization for appointment of a standing master. According to the Advisory Committee note, "The creation of full-time magistrates who serve at government expense and have no nonjudicial duties competing for their time, eliminates the need to appoint standing masters."

in the way of settlement; there is no requirement that the special master be a lawyer. The rule leaves to the court the question of how much the master should be compensated and the payment of this fee to the parties. It even leaves open the possibility that the master might serve in a voluntary capacity, to assist in cases where the parties cannot afford to pay a master.[154]

The limitation to complicated cases in rule 53 suggests, however, that the term "master" should not be used loosely to refer to lawyers appointed to hold settlement conferences in ordinary litigation. If reference to a master is involuntary and not "exceptional" or "complicated," as rule 53 requires when references are nonconsensual, then the appointment must fall within the inherent powers of judicial office. The problem is that the courts "have neither defined the concept of inherent judicial power with precision nor developed clear criteria for measuring its reach."[155]

The ambiguity of this source of judicial authority has not prevented courts from relying on it to justify the appointment of a master—on occasion even over the objections of the parties. No appellate court, however, has yet endorsed the view that a judge's inherent powers extend this far or passed on the validity of local rules that outline procedures for mandatory referrals to masters.[156] In the absence of clear law on this issue, judges might consider mitigating the potential conflict with rule 53 by avoiding the term "master" in local rules or standing orders that mandate lawyer mediation in ordinary litigation.

A judge should consider appointing a master whose dual responsibility is pretrial management and settlement when it is clear that the case will be both difficult to try and difficult to settle and that no less burdensome alternative, such as assignment of a magistrate to the case, promises to be workable. To the management-oriented judge, the advantages of such an appointment are obvious. A special master has the time and flexibility to study a complex case and to respond to pretrial disputes quickly. The master is also in a good position to introduce innovative procedures and to offer fresh ideas for resolving the dispute. Travel to negotiate directly with the principals or to view a site may also be easier for a master than a judge. The master, in short, can become involved in the pre-

154. *See* Cooley, *supra* note 144, on problems raised by the appointment of volunteer masters. *See generally* Levine, *The Authority for the Appointment of Remedial Special Masters in Institutional Reform Litigation: The History Reconsidered*, 17 U.C.D. L. Rev. 753 (1984).

155. Brazil, *supra* note 151, at 365.

156. *Id.* at 370.

trial process to a degree that would not be feasible or appropriate in a judge.[157]

The very characteristics that make for a master's success in gaining agreement, however, can threaten the integrity of the judicial process. Informal, rapid-fire resolution of discovery disputes can lead to errors. Off-the-record discussions can cause litigants, and the master, to be more manipulative and less careful than they would otherwise be. A strong interest in reaching agreement may threaten the master's fairness, particularly where one side is weak. Contact with the trial judge, which gives a master leverage in dealing with litigants, may bias the judge and discourage litigants from being open with the master. The obligation to pursue settlement and prepare for trial simultaneously is likely to create hard choices for the master, because these two functions are not necessarily compatible. Even the master's efforts to gain a full, wide-ranging understanding of the case can have an undesirable impact on the neutrality of the special master. In short, sensitivity to the ethical, practical, and legal issues posed by active pretrial management by a nonjudge is essential.[158]

Some of these tensions can be mitigated by the appointment of a master whom both sides trust. Judge Marven Aspen (N.D. Ill.) suggests three methods for selecting a pretrial/sett'ement master:

> a. Let the litigants select someone all respect.
>
> b. Ask each side to submit five names; exchange lists and allow three peremptory strikes (and unlimited strikes for cause). The remaining names go into a hat for a drawing by the clerk. The judge contacts each in the order drawn until one agrees to undertake the task.
>
> c. The judge proposes a name or names and seeks the approval of both sides.[159]

157. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?* Working Paper 38 for the Oct. 3–5, 1985, National Conference on Litigation Management, Yale Law School, at 1–4 (on file at Federal Judicial Center). *See also* Kaufman, *supra* note 150, at 469; W. Brazil, G. Hazard & P. Rice, *supra* note 146.

158. Brazil, *supra* note 157. Brazil analyzes the role special masters played in the Ohio asbestos litigation, *In re* Related Asbestos Cases (pending in N.D. Ohio since 1980); the DDT cases in Alabama, Haygood v. Olin, 83-5021 (N.D. Ala. 1983), and Wilhoite v. Olin, 83-5021 NE (N.D. Ala. 1983); *In re* Agent Orange Prod. Liab. Litig., *supra* note 147; the Indian fishing rights case in W.D. Mich. (no citation available); the U.S. government's massive antitrust suit against AT&T, United States v. AT&T, 461 F. Supp. 1314 (D.D.C. 1978); and a Massachusetts toxic waste dispute, City of Quincy v. Metropolitan Dist. Comm'n, Civ. No. 138,477 (Mass. Super. Ct., Norfolk Co., Dec. 17, 1982). In each instance, he finds strengths and weaknesses in the way the special master defined his role.

159. M. Aspen, Use of Special Master for Intensive Mediation (and/or Arbitration) (unpublished paper on file at the Federal Judicial Center).

If the litigants are able to agree on their selection, they may also be able to agree on a rate of compensation, on a procedure for resolving discovery disputes, and on what matters will be communicated to the judge and when.

In a sufficiently complex and potentially costly case, the parties and their lawyers may well be as enthusiastic as the judge about the appointment of a special master. It was the lawyers involved in a 9,000-plaintiff lawsuit against the manufacturers and distributors of DDT, for example, who sought the assistance of a pretrial master. The decision in that case to entrust discovery to a master's supervision has reportedly saved the litigants an enormous amount of money and enhanced the prospect of settlement.[160] A survey of litigators conducted by Wayne Brazil suggests that most lawyers favor more reliance on pretrial masters in complex litigation.[161]

The Indian fishing rights case mentioned earlier provides a good example of how a master can prepare a case for trial and actively pursue settlement at the same time. The major obstacles to settlement in that case were a deep and long-standing antagonism between the Indians and non-Indians who fish the Great Lakes, and the fact that the case involved five governmental jurisdictions: three Indian tribes, the state of Michigan, and the United States government. Judge Enslen addressed the problem of distrust by allowing each of the parties to nominate candidates for master and to veto candidates proposed by the others. With some encouragement from the judge, the parties selected Francis McGovern, a law professor and skilled negotiator.[162]

McGovern pursued a two-stage strategy. He spent months getting to know the parties, finding out who was willing to negotiate, and who had the power to authorize an agreement. At that point, he established a very demanding discovery schedule, requiring the production of thousands of pages of documents and thirty depositions in just over two months. Having impressed the parties with the difficulties involved in preparing for trial and the unlikelihood that new information would develop at trial, he held a settlement conference. McGovern invited all interested parties and amici to the conference, but divided them into two groups. He charged the group he deemed to have real bargaining authority, a total of six persons, with allocating the resources involved. The remainder were asked to propose a means of implementing an agreement. After an all-night bargaining session, the two groups worked out a fifteen-year agreement that will relieve Judge Enslen of any obliga-

160. *See* On Settling, *supra* note 149, at 4
161. Brazil, *supra* note 151, at 3–4
162. *See* Arthurs; Strasser, *supra* note 149

tion to become, in his words, "the fish master of the Great Lakes."[163]

The success of special masters in cases like this one will undoubtedly encourage others to employ this settlement technique. At present, however, such appointments appear to be quite rare. It is impossible to know for certain how often federal judges appoint special masters, whether for settlement or for any other purpose. Administrative Office data suggest that the number is very small—only thirty-nine special masters were reported appointed in 1983, the last year for which these data were collected.[164] Another indication of the infrequency of such appointments comes from a survey of ninety-four federal judges conducted by Jonathan Pavluk in the fall of 1984. Pavluk wrote all of the current transferee judges in pending MDL (multidistrict litigation) cases, but only thirty-seven of the ninety-four responded. Only five of the judges who responded to Pavluk's survey had ever appointed a master with explicit authority to pursue settlement.[165]

Pavluk also queried the judges about the conditions under which they would consider appointing a master and the type of activities they consider "presumptively proper" for a master to undertake in trying to reach a settlement. In asking these questions, he did not differentiate between masters appointed for settlement-enhancing purposes and masters appointed for other purposes. The most important consideration in appointing a master, Pavluk found, was whether one or both of the litigants requested such an appointment. Next in importance was the expectation that trial would be protracted. Almost all of the respondents considered formal and informal conferences and communications with the parties to be appropriate. Informal, ex parte conferences with only one party, however, were deemed "presumptively improper" by most judges.[166]

In the absence of clear statutory or case law authority on the master's role, such caution should not be surprising. We are clearly at an early stage regarding the appointment of masters with the explicit goal of encouraging settlement. As such appointments become more common, we can expect to see judges work out ways to ensure that masters will have the power they need to mediate cases without threatening the integrity of the pretrial process.

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163. Arthurs, *supra* note 149. *See generally Historic Indian Fishing Rights Case Settled*, Alternatives to the High Cost of Litigation, April 1985, at 1, 16-17.

164. Collection of these data was discontinued by the Administrative Office as of October 1984. Memo from James A. McCafferty, Chief, Statistical Analysis & Reports Division, to District Court Clerks, Oct. 7, 1983.

165. *See* J. D. Pavluk, *supra* note 147, at 2-3, 8-10.

166. *Id.* at 18-19, 31-32.

Issues for Judges Considering Whether to Use Lawyers to Encourage Settlement

All lawyer-hosted settlement procedures are founded on the premise that exposure to the views of practicing lawyers who have no personal stake in a case will encourage some litigants to give up unreasonable demands, begin to negotiate seriously, and ultimately settle when they otherwise might not have. Actual programs, as we have seen, vary enormously.[167] How can judges select from among working and proposed models for involving the bar in the settlement process? The decision may not be terribly difficult if the issue is whether or not to arrange for a settlement master or some other specialized form of settlement assistance in a particular case.

Planning for future intervention in broad categories of cases, including the detailed procedures necessary to make the referral process run smoothly, may be more daunting. The court must first decide how it intends to promote settlement. Will it emphasize case evaluation, or the facilitation of bilateral settlement negotiations, or a mixture of case-management and settlement-oriented goals? Will the parties play an important role in the program, whatever its goals?

Achieving consensus as to the goal(s) sought should help a court decide whether it prefers a process modelled on bench trial, like the Eastern District of Pennsylvania's court-annexed arbitration program; or one like the Eastern District of Michigan's mediation procedure, which is designed to suggest a settlement figure without a detailed exploration of underlying issues; or a procedure that is more wide-ranging and more oriented toward exploring the underlying issues than predicting the outcome at trial. Consensus as to goals should also help judges resolve many of the following implementation issues that confront a court in designing a procedure that employs lawyers as agents of settlement, whether as arbitrators, mediators, or masters:

1. Will the procedure be voluntary or compulsory? If compulsory, will a local rule specify which cases are eligible, or will individual judges retain some or all discretion over which cases go through the procedure?

167. In fact, not all districts require that mediators, arbitrators, or masters actually be lawyers, although legal training and experience is so much the dominant expectation that it has been assumed for purposes of this discussion. *Cf.* D. M. Provine, Judging Credentials: Non-Lawyer Judges and the Politics of Professionalism (University of Chicago Press 1986).

2. What types of cases will be eligible (or ineligible)? Will the amount in controversy be determinative? How will the amount in controversy be determined? Will litigants with otherwise ineligible cases be able to opt into the procedure voluntarily?

3. Where will the procedure fit into these familiar signposts of the pretrial process: joinder, the onset and conclusion of discovery, the final pretrial conference?

4. Will lawyers work alone or in panels? What qualifications will be necessary? Will the court (or judge) compile a list of available persons, and, if so, how will the list be compiled and kept up to date? Will eligible lawyers undergo special training? Will the individual's expertise be taken into account in making assignments?

5. Who will select from among authorized mediators or arbitrators? If this decision is to be made by agreement of the parties, what will occur absent such agreement? If each party has authority to select one member of a panel, will objections be allowed to the person the other side selects? How will multiple-claims parties be handled? How, if at all, will decision makers be compensated?

6. What preparations will be necessary before the hearing? Will legal memoranda be required, and will the parties be required to exchange them? What materials will be made available to the decision maker beforehand? How long beforehand?

7. Who will specify the details of the hearing process: the place, the date, the amount of time for presentations, and so forth?

8. Will the parties be encouraged or required to attend? To participate actively? Will provisions ensure that someone with settlement authority attends or is available? Will the rules of evidence apply in whole or in part? Will the decision maker be authorized to meet with each party separately? Will these procedural matters be left to the discretion of the decision maker?

9. Will sanctions be available for failure to attend or for lack of preparation? Will the decision maker have authority to recommend sanctions for noncompliance with procedures? If penalties are to be part of the process, how stringent will they be?

10. How soon must the decision maker announce a decision, and how quickly must litigants react to it? Will failure to reject result in automatic acceptance of the decision? Will nonunanimous decisions of multimember panels be as binding as unanimous decisions? What measures will be taken to ensure that discussion during the hearing and the amount awarded remain confidential? If the award/decision is rejected, is a trial judge entitled to inquire as to who rejected it?

11. If the primary object of the procedure is to arrive at a case valuation, what steps will be taken to ensure that litigants take the process seriously? Will a penalty be imposed for rejecting the decision and proceeding to trial de novo but failing to improve the result at trial, and, if so, how much improvement at trial should be required to avoid the penalty? How large should that penalty be? Should it be imposed automatically?

Settlement Assistance from Within the Court Structure

The groundswell of enthusiasm for alternative dispute resolution that has encouraged courts to develop court-annexed arbitration and other bar-assisted settlement programs has also spurred courts to develop innovative case-resolution procedures under more direct judicial control. This section discusses three such procedures:

1. Summary jury trial
2. Minitrials in which the trial judge maintains an active role
3. Settlement conferences or other settlement procedures hosted by a magistrate.

Each of these procedures represents a significantly different approach to settlement. Summary jury trial encourages settlement by offering a prediction of the outcome of a trial, based on a triallike proceeding. Minitrial is a compromise-oriented procedure, but one that differs from a settlement conference before a judge or magistrate in that it requires active, structured participation by clients. These procedures are alike, however, in the fact that they occur under close judicial supervision and consume significant court resources. The direct involvement of judges and magistrates that

helps make these procedures effective thus makes them too resource-intensive to use frequently.

Summary Jury Trial

Summary jury trial is an innovation with a single and identifiable founder, Judge Thomas D. Lambros (N.D. Ohio). Judge Lambros developed the summary jury trial in 1980, working out the concept as he presided at two personal injury trials that, in his view, should have settled without trial.[168] The summary jury trial is designed to discourage such unnecessary litigation by providing an abbreviated hearing before an advisory jury, which renders a nonbinding verdict. The proceeding, which almost always lasts less than a day, takes place not long before the real trial is scheduled to occur. Faced with what appears to be a reliable estimate of the probable result before a real jury, it is anticipated that litigants will be more inclined to settle than they otherwise would.

The summary jury trial is designed to be persuasive by being realistic. The court draws upon the same jury pool used in actual trials, jurors are exposed to the same contentions, and they retire and vote much as they would in a conventional jury trial. The procedure costs less and demands less time than regular jury trial, however, because it employs fewer jurors—generally five or six—and because it moves through the evidence quickly, in most courts without live witnesses or cross-examination. The lawyers for each side generally present the evidence themselves, reading from depositions if they choose. Objections are discouraged.

The summary jury idea is popular in the federal courts. Approximately twenty-five federal judges have held them, according to Judge Lambros, who receives frequent inquiries. He reports that he has become a "'clearing house' for the dissemination of information on the SJT."[169] The Judicial Conference has responded to this show of interest, asking its Committee on the Operation of the Jury System to investigate the procedure. In January 1985, the Conference announced that it "endorses an experimental use of summary jury trials as a potentially effective means of promoting the fair and equitable settlement of potentially lengthy civil jury

168. T. Lambros, The Summary Jury Trial and Other Alternative Methods of Dispute Resolution (Committee on the Operation of the Jury System, Judicial Conference of the United States, January 1984), *reprinted in* 103 F.R.D. 461, 463 (1984).

169. *Id.*, revised October 1984, at ii, 30-34. *See also* Judicial Conference of the Sixth Circuit of the United States, The Summary Jury Trial 14-19 (May 16, 1985), and app. A, addendum I.

cases."[170] Chief Justice Burger also endorsed the procedure in his 1984 Year-End Report on the Judiciary.[171]

As judges and magistrates have examined the summary jury concept and implemented it in their own courts, they have adapted it to their own needs. Courts are experimenting with the number of jurors the process employs, their instruction, and the presentation of evidence during the "trial." Judges are also testing the applicability of the concept to settlement-resistant cases not originally envisioned as appropriate for summary jury treatment. Judges are sharing these experiences with each other, creating a reservoir of ideas for those who might try summary jury trial in the future.[172]

Judges are finding that summary jury trial is useful in a broad range of case types. The most obvious application is the original one, the relatively simple personal injury action where liability is likely but the amount of damages a jury might award is difficult to predict. Judge Enslen has found that summary jury trial also works when the plaintiff's case for liability is weak; a "no cause" verdict in such a case may encourage the plaintiff to take stock of the legal strength of the claim and reduce the demand for damages accordingly, making eventual settlement more likely. Success has also been reported in cases involving commercial contracts, products liability, discrimination, defamation, and antitrust. The procedure seems to work even when large amounts of money are involved and when there are multiple plaintiffs or defendants.[173]

Judge Lambros has even applied summary jury trial to a consolidated asbestos case involving over one hundred plaintiffs. On the basis of a case-management plan devised by Special Masters Eric Green and Francis McGovern, he grouped the cases into clusters of ten and began scheduling the clusters for a summary jury proce-

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170. Memorandum to All U.S. District Judges, Summary Jury Trials (Jan. 16, 1985), from William E. Foley, Director, Administrative Office of the U.S. Courts [hereinafter cited as Foley].

171. "Summary jury trials," the Chief Justice noted, "are becoming increasingly useful as judges across the country adapt these approaches to achieve their goals. . . . These judicial pioneers should be commended for their innovative programs. We need more of them in the future." W. Burger, 1984 Year-End Report on the Judiciary.

172. *See* T. Lambros, *supra* note 168, at 30–34; Ranii, *Summary Jury Trials Gain Favor*, Nat'l L.J., June 10, 1985, at 1, col. 4; Memorandum to Judge Richard Enslen (W.D. Mich.) from Magistrate Hugh W. Brenneman, Jr. (W.D. Mich.), Summary Jury Trials (Oct. 18, 1984) (on file at the Federal Judicial Center) [hereinafter cited as Brenneman].

173. A report published by the Federal Judicial Center in 1982 recommended that only single-plaintiff and single-defendant suits be considered for the summary jury trial process. M.-D. Jacoubovitch & C. Moore, Summary Jury Trials in the Northern District of Ohio 32 (Federal Judicial Center 1982). However, reports of experiences to date suggest that this is an unnecessary restriction. *See* Judicial Conference of the Sixth Circuit, *supra* note 169, at apps. A, B, C, and D.

dure modified to take account of common evidence and common defendants. The first cluster of cases settled on the eve of summary jury trial for $1.1 million; the second and third clusters went through the process and settled somewhat later.[174]

Judges differ in their willingness to use summary jury trial when the government is a party to the action. Judge Lambros routinely excludes such cases, on the grounds that government attorneys frequently lack settlement authority. Others have had some success in using summary jury trial to resolve the cases the government litigates. Magistrate Hugh Brenneman, Jr. (W.D. Mich.) overcame the problem of inadequate settlement authority in an employment discrimination case by inviting the whole city council to witness the trial and meet afterwards to discuss the issue of liability and damages.[175]

Varied as the applications for summary jury trial seem to be, certain inherent limits must be kept in mind. Judges Enslen and Lambros report that the procedure does not work well when lawyers are inexperienced or unprepared, when the evidence is too complicated to be susceptible to abbreviated presentation, or when the case turns on the credibility of witnesses. Nor is summary jury trial likely to be effective with lawyers who have a strong vested interest in pursuing the suit or with litigants who are pursuing a case as a matter of principle, though it can encourage settlement when strong emotions block agreement. The opportunity to present one's case to a jurylike assembly, many judges believe, acts as a relief valve for pent-up antagonisms, and the jury's decision lends much-needed realism to settlement negotiations.[176]

If summary jury trial is to be cost-effective, it must be reserved for cases that are unlikely to settle on their own or with less demanding court assistance. Such costs have discouraged some courts from using the process at all. Even those most impressed with the settlement-enhancing potential of summary jury trial try to limit it to "hard-core" cases that would not settle otherwise. Judge Lambros does not use the procedure for trials he expects to last less than three to five days; the judges in the Western District of

174. *See* Judicial Conference of the Sixth Circuit, *supra* note 169, at addendum I. Judge Lambros used two jury panels in the second cluster of asbestos cases. The panels heard the evidence together and deliberated separately, reaching substantially divergent verdicts on liability of individual cases within the cluster. The similarity of their damage assessments nevertheless provoked a settlement, according to Judge Lambros. Judge Enslen has also used multiple panels to evaluate a cluster of cases. In a toxic tort case, where liability was admitted, he asked litigants to pick three cases, one in which the damages were heavy, one at the opposite extreme, and one in the middle. He then scheduled a summary jury trial in each.

175. *See* Brenneman, *supra* note 172.

176. T. Lambros, *supra* note 168, at 35.

Oklahoma use it only on cases expected to consume at least two weeks of trial time. Relying on magistrates to conduct some or all of the summary jury trials saves valuable judge time, but even with the assistance magistrates provide, summary jury trial must inevitably be, in Judge Lambros's words, "only one of the tools on the judicial workbench."[177]

The consensus among judges and magistrates who are experimenting with summary jury trial is that it is likely to be most helpful when the lawyers differ significantly in their assessment of the way the jury will react to the case, and when this disparity is unlikely to disappear without the active intervention of the court. The summary jury verdict helps bring estimates of case value closer together, which facilitates bargaining.

Summary jury trial also encourages settlements indirectly through the demands it places on counsel to prepare a case with care. Preparation for summary jury trial exerts this type of settlement pressure in two ways:

1. By acting as a catalyst to prehearing settlement negotiations, an impact that is obvious from the fact that about a third of the litigants scheduled for hearings settle beforehand

2. By encouraging those who do go through the procedure to settle rather than "retry" the case before a real jury.

The time and effort summary jury trial requires of counsel raises the issue of whether judges should defer to the wishes of the litigants in ordering summary jury trial. Judges Lambros and Enslen have resolved this question in favor of court-imposed summary jury trials, though they work hard to make the litigants enthusiastic about the procedure. Both collect the endorsements of summary jury trial veterans in their efforts to encourage reluctant litigants. As the procedure becomes better known, Judge Enslen reports, lawyers are growing more enthusiastic about it. Some now request summary jury trial.

Several federal courts have introduced the concept of summary jury trial to their local rules concerning pretrial, but none outline procedures to be followed with anything like the detail typical of court-annexed arbitration rules. The Western District of Michigan, for example, describes the process in three sentences and sets no limits on case eligibility.[178] The rules for summary jury trial are

177. *Id.*
178. W.D. Mich. R. Civ. P. 44(b).

set out in a standing order in the District of Montana.[179] The Judicial Conference has produced a two-page memorandum describing one version of the procedure.[180]

The decision on the part of many judges to forgo a detailed presentation of the summary jury option in either court rules or standing orders should not, however, be taken to mean that procedures are typically developed on an ad hoc or case-by-case basis. The judges and magistrates who have spoken out on the process have developed their own standard procedures for summary jury trial, which they follow in all, or nearly all, cases.

The decision to invoke summary jury trial typically occurs at or near the end of the discovery process. In the Western District of Michigan the order is issued about a month before the scheduled trial date, to take place the day before the real trial is due to occur.[181] A few weeks beforehand, Judge Enslen or Magistrate Brenneman convenes a pretrial conference to discuss the procedure that will be followed at the summary jury trial, to dispose of pending motions, to resolve disputes about evidence, and to iron out any other problems that can be anticipated. The objectives, according to Magistrate Brenneman, are two: to ensure that the upcoming summary trial will move smoothly and to satisfy both sides that the verdict will be a reliable one. Each side, Magistrate Brenneman urges at the pretrial, should allow its opponent to "have his best shot" if the procedure is to encourage settlement.

Careful preparation for summary jury trial, observers agree, is essential. The Judicial Conference recommends a prehearing exchange of proposed jury instructions, briefs on novel issues of law, and stipulations as to the use of physical exhibits or exchange of these materials. The lawyers must also decide how to summarize the evidence and how to present their arguments so as to fit within the one to two hours judges usually allot to each side. Judges make this task easier by relaxing the rules of evidence and offering attorneys the opportunity to mix representations of fact and argument in the course of their presentations.[182]

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179. Standing Order No. 6A, D. Mont.

180. *See* Foley, *supra* note 170. The authority under which courts divert jurors from "real" trials nevertheless remains problematical. Judge Lambros avoids the expense of empaneling a summary jury by utilizing "excess" jurors, those left over after a jury is empaneled for an actual trial, and by completing the procedure in one day.

181. Judge Lambros schedules the actual trial thirty to sixty days after the summary jury trial to allow time for settlement.

182. *See* Foley, *supra* note 170.

The procedure itself is, in Judge Enslen's words, "a trial lawyer's dream":

> He doesn't have to worry about responses from witnesses; he is essentially doing a peroration to the jury without any hindrance whatsoever. He can argue in any fashion he wants to. He is not bound by any rules of evidence. There are no objections going on.[183]

Courts vary in the procedure they use to select jurors. Judge John McNaught (D. Mass.) chooses a five-member jury himself, allowing no challenges. Most courts use a six-member jury, allowing lawyers to challenge up to two panelists each.[184]

The jurors are told that the summary jury trial is experimental, but often they are not informed that their decision will be nonbinding. The judges and magistrates who follow this procedure defend it as necessary to achieve a reliable, unbiased verdict. Their theory is that jurors need the illusion of finality to put themselves through the sometimes difficult and exhausting process of untangling complex facts or weighing sympathy for an injured plaintiff against the duty to follow applicable law. Jurors themselves sometimes support this rationale. An informal survey conducted in the Western District of Michigan revealed many jurors were glad they had not been informed that their decision was not binding.[185] Experimental evidence with mock juries suggests, however, that summary jurors might take their responsibilities just as seriously if they knew their decisions were nonbinding.[186]

Some judges and magistrates are stricter than others about the procedure to be followed during the "trial," but all are quite strict about time limits—generally one-half hour to one hour per side. The judges and magistrates who conduct summary jury trials also differ somewhat regarding the kinds of evidence that can legitimately be introduced. There is more agreement concerning the role of the judge or magistrate in conducting the proceedings and the time to be allotted to jury deliberation. In most courts, the judge or

183. Enslen interview, *supra* note 125, at 8.

184. Judge Lucius Bunton (W.D. Tex.) reported using a three person jury in a case that resulted in a settlement. Newsletter of the District Judges Association of the Fifth Circuit, April 1985, at 8.

185. This material is available from the Western District of Michigan on request.

186. Several studies have examined the level of emotional involvement of "mock" jurors who are aware of the hypothetical nature of their deliberations. They report that mock jury verdicts may be highly predictive of actual trial verdicts and that mock jurors show a high degree of emotional involvement in their work. *See* Kassin, *Mock Jury Trials*, 7 Trial Dipl. J. 26 (1984); R. Hastie, S. Penrod & W. Pennington, Inside the Jury (Harvard University Press 1983); Kerr, Nevenz & Herrick, *Role Playing and the Study of Jury Behavior*, 7 Soc. Methods & Research 337 (1979).

magistrate conducts summary jury trial in the same manner as a real trial, with exceptions necessitated by the types of differences already described. Jurors are expected to return with a verdict by the end of the business day in which the trial is conducted.

On one point all who have experience with summary trials are in agreement: Clients or other persons with full authority to settle the case must be present if the process is to be effective. Courts have gone to great lengths to secure client participation. Magistrate Brenneman describes one case in which a chief executive officer was flown in from Oslo, Norway, and another in which it was necessary to issue a writ of habeas corpus for a plaintiff confined to a mental hospital. Many also consider it important for the parties and their lawyers to get firsthand exposure to the views of the jury. These judges and magistrates ask jurors to remain a few moments after the trial to share their views, an invitation most accept with enthusiasm. (Judge Enslen excuses himself from these discussions to ensure that they will be candid and relaxed.)

The significance judges attach to the presence of clients at summary jury trial suggests that the procedure serves important purposes for the parties as well as their lawyers. It is not simply a mechanism to allow contending lawyers to inform themselves about the probable reaction of a jury to their case so they can talk settlement more effectively. A summary jury trial is ideally designed to convince a client that the likelihood of prevailing at trial is not as great as the client perceives it to be. A lawyer who is having difficulty persuading a client to consider settlement might be well advised to request a summary jury trial.

There are several views regarding unanimous verdicts. Judge Lambros does not stress unanimity, though he instructs the jury to attempt to reach consensus. If the jurors fail to agree, they are permitted to return a "special report" detailing their findings on liability and damages. In his experience, summary juries split only about 10 percent of the time.[187] Judge McNaught asks for a majority vote on liability; on damages, he asks for an average or "quotient" of each vote. Judge Enslen, on the other hand, requires unanimity on the question of liability, which he often separates from the damage issue. (Were a jury to deadlock, he would allow it to return with a nonunanimous verdict, but this has never happened.) In addition, he asks for votes from all present at the proceeding, including the bailiff, the law clerk, the court reporter, and visitors. Surprisingly, the votes from everyone present are almost

187 See Rann, *supra* note 172, at 30.

invariably the same. Such a result, Enslen believes, sends a strong message to the disputing parties.

A settlement conference for the parties and their lawyers always follows summary jury trial. In the Western District of Michigan the two procedures occur back to back. Judge Enslen's experience is that many cases settle at the posthearing conference. Those that do not settle go on to trial the very next day, making it difficult to differentiate between the impact of summary jury trial and the prospect of trial. Judge Lambros's practice is different. He does not usually hold a settlement conference right after the summary jury trial, and he always leaves a few weeks for negotiations before the actual trial.

The summary jury verdict has no legal impact on the actual trial, of course, nor does it affect the allocation of attorneys' fees or the legal posture of any issue in the case. The procedure is private, unrecorded, and purely advisory unless the parties stipulate otherwise.

We have only limited evidence on the views of lawyers about summary jury trial. The only survey available at this time was conducted by the Federal Judicial Center in the Northern District of Ohio in 1982. It suggests that most lawyers who have been through the process, particularly those representing plaintiffs, regard it as fair, effective, and expeditious.[188] Most respondents reported that they would like to use summary jury trial again, though their answers to open-ended questions indicate that they would prefer to have a say in the decision to send a case to summary jury trial.

Magistrates and judges who have had experience with summary jury trial appear to be uniformly enthusiastic about the capacity of the procedure to increase the number of settlements without prejudicing either side. Those experienced with the procedure also cite its advantages in those cases that do not settle: better prepared lawyers and enhanced judicial familiarity with the case, which may allow the judge to expedite the trial by, for example, reducing the number of witnesses.

Experience to date indicates that about 30 to 40 percent of cases scheduled for summary jury trial settle before the hearing is held. Those cases that go through the process almost always settle before the date of the real trial, according to those who have held summary jury trials.[189] In the rare cases in which full trials are held,

188. M.D. Jacoubovitch & C. Moore, *supra* note 173, at 9–20.

189. Judge West (W.D. Okla.) states that all but four of the thirty-six summary jury trials that he and his Oklahoma City colleagues have conducted have resulted in settlement. Judge Lambros has had similar success: "Recent statistics indicate that over 90% of the 88 cases selected for SJT thus far have settled prior to full

judges report that summary verdicts have emerged as relatively accurate predictors of the final verdict. In four cases that did go to full trial in the Western District of Oklahoma, for example, the advisory and full verdicts were "entirely consistent," according to Judge Lee West.[190]

The capacity of summary jury trial to effect settlements where they would not otherwise occur has obvious cost implications. Judge Lambros estimates that in the course of sixty summary jury trials he has saved $27,950 in jury costs.[191] Judge S. Arthur Spiegel (S.D. Ohio) believes he has saved 135 trial days after eight summary jury trials.[192] Arguably, summary jury trial reduces the demands on a court even when it does not produce a settlement, because it acts as a dress rehearsal for the "real trial." A problem in evaluating the effectiveness of summary jury trial and the costs it saves courts and litigants is that we have at this point no reliable estimate of the proportion of cases that go through summary jury trial that would have settled "on their own" otherwise.

Minitrial in the Federal Trial Courts

In 1977, a headline writer coined the term "minitrial" to describe an innovative procedure designed to settle a hard-fought patent-infringement case. The procedure produced a settlement in that case and has proved helpful in resolving a number of other complex corporate suits. These successful applications, which have been well publicized by enthusiastic backers, have helped establish minitrial as a useful settlement technique for certain types of cases.[193]

Minitrial, unlike other settlement procedures discussed so far, is ordinarily a private, voluntary proceeding. It may occur even before a case is filed. The protocol to be followed, the selection of participants and presiding officers, the timing, and the scope of the proceeding are all matters to be negotiated by opposing parties and their lawyers. The trial judge assigned to the case might urge the parties to try minitrial, or allow time for one to take place, but or-

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trial." T. Lambros, *supra* note 168, at 172; *and see* Judicial Conference of the Sixth Circuit, *supra* note 169, at app. B (speech by Judge Arthur Spiegel at 10-11).

190. *See* Rann, *supra* note 172, at 30. The Western District of Oklahoma has had a total of thirty-six summary jury trials; all but the four noted here settled before the actual trial.

191. T. Lambros, *supra* note 168, at 171.

192. Speech by A. Spiegel, *reprinted in* Judicial Conference of the Sixth Circuit, *supra* note 169, app. B, at 11.

193. *See, e.g.*, E. Green, Mini-Trial Handbook, *reprinted in* Center for Public Resources, Corporate Dispute Management 1982 (1982); Nilsson, *A Litigation Settling Experiment*, 65 A.B.A. J. 1818 (1979); Henry, *Mini-Trials: An Alternative to Litigation*, Negotiation J., January 1985, at 15; Green, Marks & Olson, *Settling Large Case Litigation: An Alternative Approach*, 11 Loy. L. Rev. 493 (1978).

dinarily the judge would play no direct part in negotiating or conducting the proceeding.

A few federal judges have, upon occasion, taken a more active role in arranging and/or officiating at minitrials. As federal judges have become involved in conducting minitrials, they have altered the concept in certain significant respects. This section begins with a brief outline of minitrial in its predominantly private form and concludes with a discussion of the experiences of federal judges who have become actively involved in the procedure.

A settlement procedure that is itself the result of negotiation, minitrial has no fixed or certain form. The only essential characteristics are a summary presentation of the case before the key decision makers for either side, with a third party present to facilitate this process, and an opportunity for the decision makers to retire together privately after the presentation to discuss settlement.[194]

The first minitrial involved a multimillion-dollar patent case between Telecredit, Inc., and TRW, a lawsuit that had already been in litigation over two years in federal court (C.D. Cal.). Several hundred thousand dollars had already been spent for discovery and legal fees on both sides, but the case was still not ready for trial. The lawyers and their clients worked out an agreement providing for six weeks of expedited additional discovery in anticipation of minitrial. The proceeding itself took two days. Half of the first day was devoted to plaintiff's case, with shorter periods allocated for defendant's reply, plaintiff's rebuttal, and questions. The defendant went first on the second day. James F. Davis, a lawyer who had served as a judge in the U.S. Court of Claims, served as "advisor," officiating but giving no indication of his views on the merits. (He was to offer a written opinion assessing each side's case and the likely outcome at trial only if management failed to settle.) When the two senior executives who heard the presentation met alone afterwards, they settled the case within half an hour.[195]

The core concept here—presenting the dispute to the parties themselves and allowing them a chance to discuss what they have seen and heard—remains at the heart of minitrial, but applications of the idea have proven more diverse than its originators could have anticipated.[196] Minitrials have been conducted in litigation

194 *See, e.g.*, Myrick & Ochipinti, *Model Procedures Unveiled to Facilitate Minitrials*, Legal Times, May 27, 1985, at 5, col. 1.

195 *See* E. Green, *supra* note 193, at 12–13.

196 *See* Nilsson, *supra* note 193, at 1819; Green, Marks & Olson, *supra* note 193, at 506. Roger Borovoy, for example, describes binding minitrial, where a single arbiter, rather than a panel of business executives, makes the decision. He finds this concept particularly useful in resolving fast-breaking high-technology disputes. First

involving products liability, government contracts, regulatory agencies, and labor disputes. Amounts in dispute have ranged from $500,000 to $2 million.[197]

Minitrials may also occur earlier than first anticipated, sometimes even before suit has been filed, as noted above. The Center for Public Resources, a private nonprofit group dedicated to avoiding unnecessary costs of litigation, urges companies to pledge that they will use minitrial or another alternative to litigation before filing suit.[198] It maintains a "judicial panel" of persons available to conduct minitrials; the panel includes retired jurists, public figures, and persons with expertise in negotiation or relevant areas of law or business.

Nor is minitrial any longer exclusively a private-sector phenomenon. Some federal judges recommend the procedure to litigants they believe would benefit from it, referring them to other litigants who have used minitrial or to organizations that conduct minitrials. At least three federal judges, Judge Keeton, Judge Richard Zampano (D. Conn.), and Judge Stanley Weigel (N.D. Cal.), have gone further and set up their minitrials.

Judge Keeton would restrict court-sponsored minitrial to cases that can be expected to require a month or more to try. When he gets such a case, his procedure is to hold a pretrial conference, to which each side is asked to bring an executive officer with settlement authority. At this conference, Judge Keeton describes the length of time it takes to get to trial in his court (about four years) and the costs to the litigants of going to trial, which he estimates at about $4,000 a day. This information often surprises the executives and precipitates a settlement, but if it does not, he asks them if they would like to try conditional summary trial, a variant of minitrial.

Judge Keeton makes this option available only if litigants are willing to bind themselves to certain consequences should the minitrial fail to produce a settlement. One agreement stipulated that if the case failed to settle after minitrial, each side would propose what the judgment should be, and Judge Keeton would pick whichever proposal seemed closer to his own view of the proper resolution of the case. Stipulations like this help conserve public and private resources, Judge Keeton feels, because they ensure that "things will not be the same day after tomorrow as it is today when we start this summary trial."

Annual Judicial Conference of the U.S. Court of Appeals for the Federal Circuit, May 20, 1983, 100 F.R.D. 499, 527.

197. Nilsson, *supra* note 193, at 1819.

198. *See* Henry, *supra* note 193, at 16-17.

The proceeding, with Judge Keeton and a chief executive from either side presiding, consumes about two days of court time. Each side gets one-half of the time to use as it wishes; no objections are permitted. The bench confers about settlement on the afternoon of the second day. If the parties still fail to settle, the losing side has thirty days to file a bond to pay the winning side's trial costs and the court costs should the outcome at trial be less favorable to the rejecting party; Judge Keeton estimates these costs to total $5,000 a day. He has gone this far in two of the four cases where he has proposed a conditional summary trial.

Judge Weigel used a more abbreviated minitrial procedure that evolved into a settlement conference in a complex antitrust case. After informing the parties of his view that the case should be settled, not tried, he asked for brief presentations from each side's lawyers on the legal issues in dispute; from the businessmen who were parties to the case, he solicited the business reasons that justified the litigation. This process consumed a morning. When a long lunch hour did not produce a settlement, Judge Weigel put the parties and their lawyers into separate rooms and began shuttling back and forth until settlement was reached in early evening.[199]

Judge Zampano became convinced of the utility of minitrial when he decided to try to resolve a series of construction cases with a panel comprised of three experts in the field: an electrical engineer, a contractor, and a mason. The experts were successful in resolving the whole series of cases, in part because they were able to evaluate the cost estimates of the parties. Since then Judge Zampano has used this variant of minitrial in other types of cases, with experts drawn from other fields.

Experience to date with minitrial, whether private or court sponsored, suggests its particular suitability for large commercial litigation that could, because of the technical complexity of the dispute and the resources of the parties, turn into a "battle of experts" at trial. Minitrial offers business clients the advantage of a quick, relatively inexpensive look at a simplified, streamlined version of each side's "best case," coupled with a clear-cut opportunity to negotiate directly without signaling weakness. Although most experience to date involves disputes between business entities, it is becoming clear that decision makers in government agencies can also benefit from the capacity of minitrial to bring the realities of the dispute to their attention.[200]

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199. *See* E. Green, *supra* note 193, at 36-39.

200. For a discussion of the applicability of minitrial to disputes involving the government, see First Annual Judicial Conference of the U.S. Court of Appeals for

Timing and format are up to the litigants. They might find it useful, for example, to hold the minitrial early in the discovery process.[201] The flexibility of the format allows disputants to select a person whose expertise and sense of fairness both sides respect to oversee the presentation; disputants can also include multiple parties and take any other steps necessary to explore possible grounds for compromise and evaluate the likely outcome at trial. It is easy to see why minitrial might be preferable to a less flexible settlement technique, such as summary jury trial, in a complex, technically demanding case.

Litigants are not ordinarily interested in minitrial in cases that are not particularly costly to pursue and potentially time-consuming to try. The settlement procedure is itself time-consuming, a fact the trial judge must bear in mind in deciding whether to recommend it to litigants. If the judge is to serve as the neutral third party in a minitrial, he or she must also assess the costs and benefits to the court. This is especially true where minitrial is concerned, not just because the procedure is time-consuming, but because litigants can so easily set up and conduct their own minitrials. Private groups like EndDispute and the Center for Public Resources can assist interested litigants. The availability of private alternatives would seem to counsel against active judicial involvement unless the dispute would be truly burdensome to try and the likelihood of settlement promises to be significantly enhanced by judicial participation.[202]

A Note on the Use of Court-Appointed Experts to Promote Settlement

Judge Zampano's reliance on court-appointed experts to conduct minitrials raises the question of whether such appointments might prove helpful in other settlement contexts. Preliminary indications are that court-appointed experts can be valuable agents of settlement outside of the minitrial setting. One major source of information on the additional settlement roles experts can play comes from Judge Zampano himself, but several reported cases also suggest ways experts can assist in settlement.

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the Federal Circuit, May 20, 1983, 100 F.R.D. 499, especially 523 (remarks of Dale H. Oliver).

201. Where there are factual disputes over technical issues, for example, litigants might agree to a "joint testing procedure" conducted by experts for each sides with a neutral expert presiding. *See* Green, Marks & Olson, *supra* note 193, at 510–11.

202. *See generally* Lee, *The American Courts as Public Goods: Who Should Pay the Costs of Litigation?*, 34 Cath. U.L. Rev. 267 (1985).

Federal courts have authority to appoint expert witnesses as an aspect of their inherent powers.[203] Rule 706 of the Federal Rules of Evidence, which regulates such appointments, imposes few, largely procedural, limitations, none of which appears to stand in the way of the selection of an expert or experts to assist in settlement. The appointment of an expert, for example, can be timed to coincide with settlement negotiations.[204] The only important limitations relevant to settlement negotiations concern the expert's duty to submit to deposition and to be subject to cross-examination at trial (Fed. R. Evid. 706(a)). Such exposure is limited, however, by rule 408, which specifies that "evidence of conduct or statements made in compromise negotiations is . . . not admissible."[205]

Judges are using court-appointed experts for three purposes related to civil settlement:

1. To help the parties arrive at areas of agreement and move toward settlement in the discovery phase of litigation
2. To assist the judge in evaluating settlement agreements that are subject to judicial approval under rule 23(e) and other sections of the Federal Rules of Civil Procedure[206]
3. To resolve technical issues that arise in the implementation of a complex private settlement.

A recent school desegregation case before Judge William Orrick in the Northern District of California illustrates the role experts can play in enhancing settlement possibilities.[207] The case was complex, like much desegregation litigation. Discovery had taken four and one-half years; twenty-five pretrial hearings had been held; numerous sets of interrogatories, requests for documents, and other material had been exchanged; and the judge had considered several motions. One of these motions, though unsuccessful, led Judge Orrick to believe that the parties were close enough together on several key issues to make settlement likely. He outlined what

203. *See generally* T. Willging, Court-Appointed Experts (Federal Judicial Center 1986).

204. 3 Weinstein's Evidence 706 12 (1978).

205. Fed. R. Evid. 408; *and see* Advisory Committee notes.

206. Fed. R. Civ. P. 23(e) ("A class action shall not be dismissed or compromised without the approval of the court"). *See, e.g.*, Ohio Pub. Interest Campaign v. Fisher Foods, Inc., 546 F. Supp. 1, 2–11 (N.D. Ohio 1982) (expert who participated in negotiation process evaluates its fairness for the court); Alvarez v. California Processors, Inc., 73 F.R.D. 269, 274 (N.D. Cal. 1976) (two experts reviewed all papers filed and testified on the adequacy of the settlement reached).

207. San Francisco NAACP v. San Francisco Unified School Dist., 576 F. Supp. 31 (N.D. Cal. 1983).

seemed to him the areas of agreement and disagreement and suggested the parties pursue settlement negotiations as they prepared for the upcoming trial.

After a series of settlement conferences with the parties, Judge Orrick suggested making a rule 706 appointment of a "settlement team" of nationally known education specialists, none of whom were lawyers. The team, composed of two nominees from each of the parties and two chosen by the court, met privately, outside the presence of counsel, and prepared a draft consent decree. When this team reached agreement in principle, but could not agree on the wording of a consent decree, the court appointed a Washington, D.C., law firm to assist in drafting the final decree.

Judge Zampano reports using experts occasionally in cases with difficult technical aspects, requesting the parties to agree upon the selection of a neutral advisor or panel of experts to sit in on settlement talks and to assist in developing a settlement plan. The key to success, he believes, is agreement among all the parties as to the selection of the expert(s). Usually, he asks each side to submit names of specialists and allows peremptory challenges, appointing only people acceptable to both sides. The parties stipulate that the experts may confer with each side separately if they wish, make inspections, question the parties and the witnesses they propose to use at trial, and confer privately with the judge. If the case fails to settle, the experts can be called to testify and submit their view of the case to the jury.[208] The party who loses at trial will be taxed the entire expense of the experts as costs.

Such reliance on court-appointed experts appears to be rare. Eric Green, a Boston University law professor who follows trends in alternative dispute resolution, considers the court-appointed expert "the most under-utilized and potentially useful dispute resolution tool that courts have." He believes, however, that this attitude is changing.[209]

The cases where court-appointed experts have been used to encourage settlements are too few to permit confident generalization about when appointments are most appropriate, but it does seem clear that the expert is most likely to be helpful when preparation for trial distracts from the exploration of cooperative bases for settlement. The expert, through specialized learning in a nonlegal

208. The expert's accountability at trial, and the fact that the expert's findings enjoy no presumption in their favor, constitute important arguments in favor of the use of court-appointed experts over special masters in cases that involve factual investigation, according to Wayne Brazil. *See* Brazil, *supra* note 157.

209. Center for Public Resources Legal Program Proceedings, Fifth Annual Meeting, Aspen, Colo., June 24–27, 1984, at 33.

field, may be able to expose litigants to alternatives that are mutually beneficial but not anticipated by either side. Experience to date also suggests that it is important to gain the endorsement of both sides in making appointments designed to encourage settlement.[210]

Magistrates as Agents of Settlement

Up to this point, the discussion of court-centered methods for promoting settlement has stressed techniques, not personnel. Given this emphasis, it would be easy to forget that not all procedures conducted by court personnel are hosted by trial judges. This section considers the role magistrates play in enhancing settlement possibilities in some courts.

The settlement-enhancing roles open to magistrates depend on the manner in which a court uses its magistrates. Courts tend to take one of three approaches, according to Carroll Seron, the author of a Federal Judicial Center study on magistrates.[211] Courts tend to envision them as:

1. Additional judges, hearing and deciding their own civil caseloads. Courts that have selected this model usually take care to select highly regarded members of the legal community, because the success of this approach depends on the willingness of the bar to consent to rulings with finality by magistrates.[212]

2. Specialists, either in a particular area of law, most commonly Social Security and prisoner cases, or in a particular phase of the litigation process, such as discovery disputes in complex cases or posttrial negotiations over attorneys' fees. These appointments may be made as a matter of course, as delegations of arraignment and other pretrial tasks were under the old commissioner system. With the expansion of duties that has accompanied the development of the magistrate system, specialties have expanded to a wider number of areas, but the

210. Obtaining the endorsements of both sides for the appointment of an expert may also help judges to avoid a pitfall described by Professor Stephen Saltzburg that experts may exacerbate conflicts over technical issues rather than end them. Saltzburg, *The Unnecessarily Expanding Role of the American Judge*, 64 Va. L. Rev. 1, 74–80 (1978).

211. C. Seron, The Roles of Magistrates: Nine Case Studies (Federal Judicial Center 1985).

212. *See* 28 U.S.C. § 636(c), which provides that, with consent, a magistrate's power is equivalent to that of an Art. III judge. Table 10 of Seron's report indicates which of the courts she studied follows each of these three approaches. C. Seron, *supra* note 211, at 36.

working relationship between judge and magistrate envisioned in this model has not changed significantly.

3. Team players, in which the magistrate carries the burden of getting the case ready for trial, handling whatever issues come up unless a judge's authority is required. In this model judge and magistrate are peers, whose working relationship in any particular case revolves around the actual processing of the dispute, rather than a preestablished relationship based on status or delegated authority. In this model judge and magistrate are dependent upon each other for the day-to-day management of litigation.

The second and third models are of particular interest here because they accommodate themselves well to the use of magistrates as settlement officers. In this capacity, magistrates conduct settlement conferences or other settlement-oriented pretrial procedures, either routinely or on an ad hoc basis. In making magistrates agents of settlement, judges establish an additional avenue for resolving lawsuits before trial, one that is particularly attractive because it separates the function of settling cases from trial.[213]

The judges interviewed for this report were divided on the wisdom of asking magistrates to assist in settlement. A few turn nothing at all over to magistrates. Some of these judges are under the impression that referrals are inefficient because the bar will not trust a magistrate to make important decisions. Others stated that the magistrates in their courts were fully occupied with Social Security cases or habeas corpus petitions and were unavailable for other work.[214]

Many interviewees, however, do use magistrates to move the parties toward settlement. Among these judges, the split was between those who ask magistrates to develop expertise in the matter of settlement (in keeping with the second model above) and those who ask magistrates to raise and discuss the issue of settlement in the course of the pretrial process (the team-player model above).

The Western District of Oklahoma has perhaps carried the idea of a settlement specialist furthest. There Magistrate Pat Irwin, a former chief justice of the Oklahoma Supreme Court, is "booked solid" with settlement conferences. This is his sole function in that

213. Not everyone agrees that this is an appropriate role for a magistrate. *See* Schwarzer, *Managing Civil Litigation: The Trial Judge's Role*, 61 Judicature 401, 406 (1978).

214. Seron found that some courts divide Social Security cases and habeas corpus petitions among judges as well as magistrates, in order to allow more time for magistrates to hold settlement conferences. *See* C. Seron, *supra* note 211, at 83-92.

court, and he is regarded as an expert. Magistrate Irwin holds conferences when discovery is almost complete, spending, he reports, between two to three hours on a case. The object, as he and Judge Lee West see it, is to hold a settlement conference in every case. To come close to meeting this goal, the judges in that court have taken responsibility for the cases Magistrate Irwin does not have time to handle, conducting settlement conferences for each other.

The magistrates who work with Judges Lambros and Enslen are also considered to be settlement specialists, though that is not their exclusive function. Each judge uses magistrates in his own way. Soon after filing, Judge Lambros turns all simple jury matters over to one of two magistrates, who conducts a settlement conference in each case, followed by a summary jury trial and additional conferences if the case does not settle. Judge Enslen relies on one magistrate, Hugh Brenneman, to conduct summary jury trials in selected cases. Brenneman now conducts most of the summary jury trials Enslen orders. He has, according to one observer, developed "very elaborate" procedures for conducting these proceedings.

We have no direct evidence on the effectiveness of such delegations. Seron, who surveyed lawyers on this issue, found no consensus. In some courts, apparently, a particular magistrate is regarded as a settlement "guru" by judges and counsel alike.[215]

Final Observations on Settlement Assistance from Within the Court Structure

The procedures discussed in this section—summary jury trial, minitrial, and settlement proceedings hosted by court-appointed experts and magistrates—all involve a significant investment of the court's time. They should, therefore, be reserved for cases that would be burdensome to try or that deserve intervention on other grounds. Lawyer mediation and court-annexed arbitration, which might be deemed "external" procedures, impose a smaller burden on courts and thus impose a lower threshold for intervention.

Although the settlement procedures described in this section are alike in imposing significant burdens on courts (and litigants), they differ from each other in the assumptions they make about the relationship between disputants. The success of minitrial and court-appointed experts as agents of settlement depends on the potential for a rational, cooperative relationship between the parties. These

215. *Id.* at 75-76. A 1981 study, however, concluded that "[t]he most dramatic impact magistrates have on expediting cases is their role in settlement." *See* Puro, Goldman & Padawer-Singer, *The Evolving Role of U.S. Magistrates in the District Courts*, 64 Judicature 437 (1981). That study relied on interviews with a total of nine magistrates in two districts.

procedures presume, in fact, that the parties may prove to be better dispute resolvers than their lawyers, who play only supportive roles.

Summary jury trial and magistrate-hosted settlement conferences, on the other hand, do not require cooperative or highly rational litigants. These procedures may be called for even if the parties are vindictive, emotional, or obstinate, for the active participants in each procedure are the lawyers, not their clients. Summary jury trial, in fact, is a powerful tool for disabusing clients of unrealistic notions about their chances of success and for providing emotional clients a forum to vent their feelings. The primary obstacle to settlement these procedures are designed to remedy is lack of information upon which to make an evaluation of the case.

V. CONCLUSION

In organizational settings, sociologist Rosabeth Kanter observes, improvements can often be traced to persons who have "an 'integrative' way of approaching problems," characterized by a "willingness to move beyond received wisdom, combine ideas, embrace change as a way to test limits"; such innovative persons are "change masters" in Kanter's lexicon.[216] The term fits the judges, magistrates, and lawyers who create pretrial procedures designed to enhance settlement prospects. This report documents their success to date.

Innovation in courts, however, tends to be an uneven process involving implementation by a few individuals and critical appraisal by others. This has been the pattern in judicial innovations designed to encourage settlement. Systemwide changes are rare, a pattern that encourages the testing of ideas at the local level, but hampers easy communication about those ideas. Even the vocabulary of alternative dispute resolution can cause confusion, with its profusion of look-alike names (e.g., summary jury trial, conditional summary trial, and minitrial), and its tendency toward multipurpose meanings for key terms like "mediation."

The signs that we are in the midst of a broad and accelerating movement toward more judicial involvement in the settlement process are nevertheless unmistakable. More and more judges are adopting procedures to encourage settlement, and the procedures they use are becoming more sophisticated.

Earlier parts of this report describe the trends toward more comprehensive approaches to settlement, more sensitivity to case-by-case differences, and earlier intervention. This part is concerned with the future of the alternatives movement in the federal courts. The first section considers a question basic to the diffusion of settlement-oriented innovations: Can the settlement technique one judge or court deems successful readily be exported to new settings? The second section discusses issues that call for more thought from judges as they explore the means available to them

216. R. Kanter, The Change Masters: Innovation and Entrepreneurship in the American Corporation (Simon & Schuster 1983).

for encouraging earlier, less expensive, and more satisfying outcomes to litigation.

The Dissemination of Settlement-Oriented Innovations

A procedure designed to enhance the number, quality, or timing of settlements will spread to new courts only if judges are convinced that the procedure will enhance settlement prospects in their own courtrooms. The problem, as readers of this report have undoubtedly noticed, is that we have more information about the structure of particular settlement-oriented procedures than about their impact on civil litigation. Courts and individual judges typically introduce new procedures and techniques without establishing the controls necessary to measure whether changes have occurred in the number and timing of settlements, or the satisfaction of litigants. This means that judgments about effectiveness must be reached informally, a process that risks premature adoption or rejection of any particular innovation.

Judge Richard Posner (7th Cir.) argues against adoption of a procedure without more reliable evidence of its effectiveness: "I am unconvinced by glowing testimonials, a priori assertions, and anecdotal confirmation . . . . If we are to experiment with alternatives to trial, let us really experiment; let us propose testable hypotheses, and test them."[217]

It is often difficult, however, to evaluate the impact of a settlement technique with scientific precision. The major difficulty stems from the fact that judges tend to tailor procedures to their own needs, sometimes varying a procedure on a case-by-case basis. Too few cases go through any individual judge to permit experimentation designed to test efficacy at that level.[218] Yet aggregation across judges to achieve an adequate number of cases is risky because individuals differ in how they select cases for the procedure in question, in how they conduct the procedure, and in the treatment they afford cases in other aspects of the pretrial process. The demands that rigorous evaluation places on a court are another problem. Judges are sometimes reluctant to allow researchers to place some cases in a control group that does not get the settle-

217. R. Posner, The Summary Jury Trial: Some Cautionary Observations, paper presented at the National Conference on Litigation Management, Yale Law School, Oct. 3–5, 1985 (on file at the Federal Judicial Center).

218. *See, e.g.*, J. Fleiss, Statistical Methods for Rates and Proportions (Wiley 2d ed. 1981).

ment "treatment" for fear of dissipating bar enthusiasm for the new procedure. Reliable evidence that those who have tried the new procedure are satisfied with it may be the best evidence available that the innovation is worthwhile.[219]

The transferability problem is not simply a matter of lack of reliable information about the impact of procedures in the courts that tried them first. Even if the procedure were demonstrably effective in one setting, it might not be equally effective elsewhere. The transplantation process is complicated for at least four reasons.

No innovation stands alone. In describing new management techniques, it is easy—even necessary—to drop other aspects of the civil litigation process into the background. Litigants, however, respond to a new program in the context of all of the court's options, incentives, constraints, and implicit understandings. The effect of a decision to require magistrate-conducted settlement conferences, for example, will depend to a large extent on the way the court has integrated its magistrates into the district.

Other characteristics of the court will also affect innovation. Several judges interviewed for this report mentioned the impact of the criminal caseload on civil case processing. The demands of a large criminal docket, they suggest, can frustrate a judge's efforts to keep civil trial dates firm and can prevent a judge from holding lengthy settlement conferences. Other judges reported that an unusually large civil docket has the same effect. The size of the court also has obvious implications for the dissemination of settlement-oriented innovations. An innovation that depends on judicial sensitivity to the capacities of litigators, for example, is likely to be more successful in a small court than in a large one.

Details matter. The success of a procedural reform may depend upon details in its administration. Consider, for example, the recent decision in the Eastern District of Pennsylvania to require payment into escrow before trial of the $250 fee that is imposed after trial upon failure to sufficiently improve an arbitration verdict. In the past, as noted earlier, it was collected (often with difficulty) after trial. The prepayment requirement, although it represents no more than a change in timing, has reportedly had a dramatic impact on the number of demands for trial because it discourages litigants from routinely demanding a new trial. The effect such details can have on outcomes is easy to overlook, especially when a judge or court is attempting to create a program by com-

219. For a fuller discussion of the ethical issues raised by decisions to try new procedures, see Shapard, *The Ethics of Experimentation in Law Enforcement*, in Police Leadership in America 118 (Praeger 1985), *and see* Federal Judicial Center Advisory Committee, Experimentation in the Law (1981).

bining the best characteristics of several similar programs elsewhere.

Personalities count. A report on court-sponsored alternatives to litigation like this one inevitably overemphasizes the difference procedures make in the number and quality of settlements. Facts about personal styles in the settlement context are difficult to communicate, and even more difficult to teach. The problem is evident in the speeches and articles judges prepare to assist each other: Advice on the actual conduct of settlement proceedings tends to be rather vague and general, in contrast to advice concerning the timing, location, and duration of these proceedings, which is almost always precise.

Yet the judge who sets up a settlement procedure without carefully considering the personal resources and reputation mediators bring to the task risks disappointment. If, for example, the primary purpose of the procedure is to provide information about the probable outcome of the case at trial, the mediator must be viewed as knowledgeable, neutral, and competent by the lawyers and their clients. A court can deal with this problem by allowing litigants to select their own mediators, but this arrangement can be costly in terms of court time and court control over the pace of litigation. The important thing, though, is that courts take their personal resources—as well as their institutional resources—into account in planning settlement procedures.

Expectations about the conduct of litigation vary from district to district. Although generalizations about what social scientists have dubbed "local legal culture" are dangerous, it seems clear that beliefs about how litigation should be conducted—especially how rapidly it should be conducted—vary from place to place.[220] In one district, reportedly, most lawyers feel obliged to cooperate regarding discovery before filing suit. Elsewhere, filing is typically the first step in the negotiation process. Such differences are obvious in the data the Administrative Office gathers on civil terminations. These differences persist even after an adjustment to ensure the comparability of case mix across districts. In 1983, for example, one district disposed of 63 percent of its caseload before answer was filed; at the other end of the spectrum was a district that disposed of only 33 percent of its cases at this stage.

State court practices also have a well-recognized impact on the success of federal court innovations. New procedures do best, observers speculate, when a state court has adopted the innovation

220 The social science literature on local legal culture is large, but a useful discussion, with evidence of significant regional differences, can be found in Church, *Who Sets the Pace of Litigation in Urban Trial Courts*, 65 Judicature 76 (1981).

first. In such instances, the state judges have undertaken the necessary bar education and borne the brunt of lawyer resistance to the innovation. In some instances, as in the mediation program in Michigan, the state court system's adoption of the innovation is what renders federal participation feasible.

Of course, judges can and do have an impact on the expectations of the bar regarding the pace of litigation, but judges act within a frame of preexisting relations that helps ensure that most change will occur incrementally. The introduction of techniques designed to promote settlement will thus be facilitated or retarded by the already existing structure of court-bar relations, a fact that should be taken into account in planning and assessing changes.

Adjusting to a New Judicial Role in the Settlement Process

The idea that judges should take more responsibility for the pace and quality and cost of litigation is an attractive—even compelling—idea in a highly interdependent, rights-conscious society with a tradition of responsive government. Judicial facilitation of settlement has emerged as an important means to these ends. Can judges shape this new role to take account of problems that inhere in the informal exercise of government authority? Will they find their new settlement role compatible with their responsibility to help prepare cases for trial? How should judges adapt their own settlement calculus to the growth of private-sector dispute-resolution facilities, which is part of the societywide search for alternatives to litigation? This section considers each of these issues in turn.

Accountability in Informal Judicial Decision Making

Accountability is not a salient issue for the judges who have been most active in introducing settlement-oriented procedures to the federal courts. These judges tend to trust the lawyer's instinct for adversary proceedings and the lawyer's sense of responsibility to clients to counter the possibility that some judges might abuse the broad discretion they enjoy in discussing settlement and mandating settlement procedures. There are sufficient opportunities for appellate review, they believe, to discourage inappropriate judicial initiatives. The dominant view, in short, is that while many lawyers cannot be trusted to see when settlement is in their client's best interest, they can be depended upon to resist an unfair settlement.

Settlement-oriented judges also tend to resist the idea that judicial involvement in the settlement process might be coercive. In articles and speeches, as in interviews and informal discussion, judges emphasize the information these processes provide to the negotiation calculus, and the assistance they offer to litigants in overcoming psychological and practical barriers to settlement. Judges also point out the role that some court-mandated settlement procedures have in enfranchising clients, who may be poorly advised by their own lawyers regarding settlement.

These judges combine optimism about judicial involvement in the settlement process with pessimism about trial, the most formal, reviewable aspect of the litigation process. Trial is widely regarded as the least attractive dispute-resolution alternative available to litigants. A trial, which is almost inevitably more time-consuming and expensive than settlement, may not even end the litigation, a fact that judges sometimes bring to the attention of the parties to encourage them to settle. Judge Zampano suggests that trial also offends the basic sensibilities of most litigants:

> We as human beings are basically congenial, sociable and conciliatory. Almost all aspects of the litigation process are painful and it is natural to seek to avoid them. We abhor verbal assaults as well as physical assaults. We resent attacks on our credibility and we are offended when our assertions and our versions of an occurrence are not accepted as the truth. Throughout our lives we are constantly negotiating and compromising. Hardly an individual plaintiff or defendant can be found who has not "bargained" his or her way through the sale of a car, a house, a piece of furniture, or even a piece of jewelry or a stuffed animal toy on a street corner. Almost all corporate executives are skilled negotiators and fully accustomed to resolving business-oriented conflicts by a compromise, from settling labor relations disputes to deciding the financial parameters of mergers.
>
> Thus, when I conduct settlement conferences I start with the assumption, albeit unspoken, that I am doing exactly what the parties themselves are eager for me to do.[221]

The tendency to be pessimistic about the trial process, for some judges, also extends to the verdict that is the product of trial. At the Kansas City conference one judge argued for an independent criterion of the just result: "I used to think that if it [settlement] didn't equate to . . . [what] you would get in a jury verdict, it was

221. R. Zampano, Judicial Trends in Alternative Dispute Resolutions for Commercial Disputes 4-5 (Oct. 11, 1984) (unpublished address to Center for Public Resources). *Cf.* Silbey & Merry, *What Do Litigants Want? Reexamining the Concept of Dispute*, 9 Justice Sys. J. 151 (1984).

suspect. I really don't believe that anymore. I think that if it's acceptable to the parties, not coerced . . . it's even better than a jury verdict."

The view from some corners of legal academia could hardly be more different. Consider, for example, Professor Owen Fiss's recent tribute to trial:

> Adjudication is more likely to do justice than conversation, mediation, arbitration, settlement, rent-a-judge, mini-trials, community moots or any other contrivance of ADR, precisely because it vests the power of the state in officials who act as trustees for the public, who are highly visible, and who are committed to reason.[222]

Academic critics like Fiss understand the personal and institutional limitations within which trial judges work from a much different perspective than do the trial judges interviewed for this report. Do judges have anything to learn from academics who emphasize the possibility that judges might abuse their discretion in the pursuit of settlement?

The answer, I think, is clearly yes. There are important elements in the concerns skeptical outsiders express to which judges can respond without endangering their fundamental commitment to enhancing settlement opportunities in the federal courts. It should not be difficult, for example, for judges to ensure that mandatory settlement conferences never involve the judge assigned to try the case, unless both sides clearly prefer this arrangement. Judges might also consider whether some conferences, involving either judges or other court personnel, should be held on the record to allay fears of inappropriate pressure to settle.

Local rules offer another avenue for enhancing judicial accountability in settlement. Rule making gives a court the opportunity to reflect collectively on the question of what procedures it wants to make available to judges in the name of settlement, and the uses to which the products of these procedures can be put. Recent changes in rule 83 of the Federal Rules of Civil Procedure make this process more open than ever before.[223]

Settlement in the Context of Trial

This report has emphasized recent changes in the Federal Rules of Civil Procedure, particularly the 1983 addition of "settlement" to

222. Fiss, *Out of Eden*, 94 Yale L.J. 1669, 1673 (1985).

223. Fed. R. Civ. P. 83 was amended in 1985 to require courts to give notice and an opportunity for comment before adopting local rules. Once promulgated, the rules are to be available to the public.

the objectives outlined in rule 16. How easily does this new goal fit with the original purpose of rule 16, which is to facilitate preparation for trial? The answer depends on the means a judge selects to encourage settlement.

The techniques and procedures judges use to encourage settlement tend to be either predictive or exploratory in character. Predictive approaches are designed to provide litigants with a believable estimate of their likely success at trial. Summary jury trial and court-annexed arbitration are examples of predictive procedures; the Lloyd's of London method for arriving at a settlement figure is a predictive technique. The exploratory approach de-emphasizes outcome prediction; the focus of these procedures is on the resolution of differences that stand in the way of settlement, what Professor Carrie Menkel-Meadow calls a "problem-solving" approach to dispute resolution.[224] Minitrials and special masters are examples of procedures that are often used in this manner. Mediation by a judge, lawyer, or magistrate may fit within this rubric, particularly if the clients play an active role in the discussion.

Predictive settlement techniques and procedures need not conflict with the judge's role in getting cases ready for trial. Conflicts can ordinarily be avoided by pursuing these two objectives sequentially, with judicial settlement efforts taking place only after the close of discovery. Many judges handle settlement initiatives this way.

The potential for conflict arises when a judge or court decides to reverse this order and work on settlement before discovery or while it proceeds. Examples discussed in this report are Judge Grady's practice of discussing settlement at the scheduling conference and the Northern District of California's early neutral evaluation program. Unless a court plans carefully, lawyers are likely to complain that judicial settlement efforts are occurring too early, before the lawyers "know" the case. Some courts and judges willingly risk such complaints because they put a premium on making every effort to keep down litigation costs.

The tension between trial preparation and participation in an exploratory settlement procedure like minitrial is different in character. A judge or other decision maker helps prepare a case for trial by assisting litigants in using discovery to develop evidence and by making decisions intended to narrow issues and reduce and limit the matters in dispute. This is lawyers' work, in which a sound

224. Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 U.C.L.A. L. Rev. 754 (1984).

grasp of the federal rules and litigation strategy is essential; the client inevitably plays a subordinate role.

Participation in a settlement process designed to resolve the underlying dispute that provoked the litigation casts both judge and client in a completely different role. The judge, or whoever acts in the place of the judge, becomes a true mediator, a problem solver who must be sensitive to the way the actual disputants, not their lawyers, define the dispute. The problem-solving approach requires time and a willingness to tease out and broaden the discussion to include other aspects of the relationship between the parties. Costs and antagonism between the parties must be kept to a minimum, both to facilitate discussion and to prevent the burden of the settlement process from becoming a new issue in the dispute. The object is to find a more satisfactory resolution than the winner-take-all results trials and triallike processes produce.

It is not difficult to see why federal judges usually opt for the predictive approach to settlement. The predictive approach creates fewer potential conflicts for the judge than mediation in the classic sense. Judges tend to reserve exploratory procedures for large, complex cases, and they tend to delegate to others responsibility for balancing settlement facilitation and trial preparation.[225]

The potential for conflict between the judge's settlement-enhancing and case-management roles deserves more attention from judges. Judges need to consider whether they should opt for a problem-solving approach to settlement more often, particularly in ordinary-sized cases that involve parties engaged in long-term or complex relations. The temptation, of course, is to reserve the more time-consuming settlement procedures for the large cases that are the most burdensome for judges. Judges should consider making the intervention calculus more inclusive.

More attention to the question of when exploratory approaches are appropriate may encourage judges to give more guidance when they ask special masters, magistrates, and mediators to pursue a combined pretrial/settlement strategy. The question of timing also deserves more judicial attention. More and more judges are becoming convinced that early intervention is necessary to keep down litigation costs and relieve plaintiffs of unfair delays, but judges have only begun to explore the ramifications of early intervention.

225. Wayne Brazil discusses these problems from the special master's perspective in *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, Working Paper 38 for Oct. 3–5, 1985, National Conference on Litigation Management, Yale Law School (on file at the Federal Judicial Center).

Courts and the Business of Settlement

The relationship of court-sponsored settlement options to privately sponsored options has received even less attention from judges. Yet it is easy to imagine a time when court-annexed settlement procedures will compete with private dispute-resolution mechanisms. Lawyers, who are growing more sophisticated about settlement techniques, will be in a position to select from an array of settlement possibilities, public and private.

Court-annexed procedures and private settlement options have never been fully independent of each other. Considerable borrowing has already occurred. Courts have borrowed the concept of minitrial and have adapted it to their own purposes. Arbitration and mediation have undergone similar, if more dramatic, metamorphoses. The current flows in the other direction upon occasion, too.

How should judges structure their relationship with private-sector alternatives? Should judges refer cases to private settlement agencies? If judges are going to make mandatory referrals, should they exercise some form of oversight over costs, personnel, and procedures?

The issue of mandatory referrals is bound to grow more complicated, whether judges opt for court-annexed procedures or more referrals. As litigants grow more familiar with dispute-resolution alternatives it will be harder for judges to justify imposing the settlement procedures they prefer over the objections of counsel. Judges may have to confront more directly than they have to date the question of why some lawyers do not find it in their interest to pursue settlement.

APPENDIX A
Sample Menu of Settlement Options*

*This menu of settlement options is provided by Judge Richard Enslen (W.D. Mich.) and is based on the one he uses in his court.

United States District Court
for the Western District of Michigan

v. File No.

Order re: Status Report

Pursuant to Fed. R. Civ. P. 16(b), as amended, the ATTORNEYS AND/OR ANY UNREPRESENTED PARTIES ARE DIRECTED TO MEET AS OUTLINED BELOW, AT A MUTUALLY CONVENIENT TIME AND PLACE, on or before thirty (30) days from the date of this order. To arrange the meeting, plaintiff's counsel and/or any unrepresented plaintiff is asked to call defendant's counsel and/or any unrepresented defendants. The parties should file their *joint* scheduling proposal on a separate sheet of paper signed by all parties or attorneys as follows:

PARTIES' PROPOSED SCHEDULING FOR THE LAWSUIT

A. The anticipated deadline for joinder of parties and amendment of pleadings is .

B. The anticipated deadline for the filing of motions is (no motions shall be filed later than 15 days after the discovery period).

C. Proposed date of discovery completion: .

D. Are there pendent state claims? If so, a proposed hearing date for pendent claims is .

E. A suggested date (month) for pretrial is (see Local Rule 45).

F. A suggested date (month) for trial is (see Local Rule 45).

G. This court favors the use of alternate methods of dispute resolution (see Local Rule 41); therefore, please select the preferred method:

Mediation (see Local Rule 42)
Summary Jury Trial (see Local Rule 44)
Minitrial (see Local Rule 44)
None

(If you selected "none," you must file a brief explaining in detail why you do not believe the case is susceptible to ADR methodology.)

COUNSEL AND/OR PARTIES SHALL FILE A REPORT, joint or separate, within ten (10) days after the meeting, summarizing the discussion on the subjects mentioned above. FAILURE BY COUNSEL AND/OR PARTIES TO MEET AND FILE A REPORT WITHIN THE TIMES SPECIFIED WILL RESULT IN THE DEADLINES INVOLVED ABOVE BEING ARBITRARILY SET BY THE COURT, AS WELL AS OTHER APPROPRIATE SANCTIONS.

IT IS SO ORDERED.

Dated:

/s/
(name)
District Judge

TO:

APPENDIX B
Sample Analytic Grid for Evaluating Techniques of Judicial Involvement in Dispute Resolution

First Draft of an Analytic Grid for Evaluating Techniques of Judicial Involvement in Dispute Resolution

Case Category: 2-week products liability case

Techniques of Judicial Involvement in Dispute Resolution	Judge-Time Quotient for Proceedings Before Trial (in Hours)	Judge Time Estimated for Trial (in Hours)	Judge-Time Quotient for Technique of Intervention (in Hours)	Total Predicted Judge-Time Commitment (in Hours)
A. Hands-off	4	.20 × 50 = 10	0	14
B. Settlement Conference				
1. Just before trial date	4	.18 × 50 = 9	1	14
2. At rule 16 conference	.95 × 4 = 3.8	.19 × 50 = 9.5	1	14.3
3. At both times	.95 × 4 = 3.8	.16 × 50 = 8	2	13.8
C. Summary Jury Trial				
1. Just before trial date	4	.10 × 50 = 5	4	13
2. After limited discovery	.6 × 4 = 2.4	.11 × 50 = 5.5	4	11.9
D. Conditional Summary Trial				
1. Just before trial date	4	.05 × 50 = 2.5	12	18.5
2. After limited discovery	.6 × 4 = 2.4	.06 × 50 = 3	12	17.4
E. Other: _____				

NOTE: This sample analytic grid was provided by Judge Robert Keeton (D. Mass.) and is based on the one he uses in his court. It has been filled in for a hypothetical products liability case estimated to require two weeks of trial time.

GGD : 1986 O - 152-597 : QL 3

THE FEDERAL JUDICIAL CENTER

The Federal Judicial Center is the research, development, and training arm of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620-629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States is chairman of the Center's Board, which also includes the Director of the Administrative Office of the United States Courts and six judges elected by the Judicial Conference.

The Center's **Continuing Education and Training Division** provides educational programs and services for all third branch personnel. These include orientation seminars, regional workshops, on-site training for support personnel, and tuition support.

The **Division of Special Educational Services** is responsible for the production of educational audio and video media, educational publications, and special seminars and workshops, including programs on sentencing.

The **Research Division** undertakes empirical and exploratory research on federal judicial processes, court management, and sentencing and its consequences, usually at the request of the Judicial Conference and its committees, the courts themselves, or other groups in the federal court system.

The **Innovations and Systems Development Division** designs and tests new technologies, especially computer systems, that are useful for case management and court administration. The division also contributes to the training required for the successful implementation of technology in the courts.

The **Division of Inter-Judicial Affairs and Information Services** prepares a monthly bulletin for personnel of the federal judicial system, coordinates revision and production of the *Bench Book for United States District Court Judges*, and maintains liaison with state and foreign judges and related judicial administration organizations. The Center's library, which specializes in judicial administration materials, is located within this division.