A Judge’s Role in Settlement

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Ellen Deason, Beyond “Managerial Judges”: Appropriate Roles in Settlement

Proposal: Separate judges’ incompatible neutral roles
• neutral in settlement
• neutral in adjudication

Background: Judicial Settlement History

• Stage 1 – Judicial restraint
• Stage 2 – Judges become active in settlement conferences
• Stage 3 – Court-sponsored ADR programs create new managerial roles
• Stage 4 – Mediation influences judicial settlement practices
Judicial Officer as Settlement Neutral

- Advantage: Judicial officers bring value to settlement
  - Expertise in legal analysis; credibility of judges’ predictions
  - Psychological benefits of judicial gravitas & “day in court”
- Risks when the settlement judicial officer is the adjudicator
  - Coercion
  - Partiality

Coercion

- Frequent objection to judicial settlement
- Interference with party self-determination
- In the eyes of the parties & attorneys
  - Judicial behavior during settlement
  - Pretrial decisions and management
- Potential is heightened when the settlement judge is the adjudicative judge

Risk to Impartiality

- Preliminary judgment based on case evaluation
- Facilitative mediation – parties share information with the judicial officer
  - Inadmissible
  - Sensitive
  - Personal
  - Assessment of case value
- Avoid the risk with reticence
Cognitive Illusions & Defenses

Options for Limits on the Judicial Role
- Ethical Codes
- Defining acceptable judicial behavior
- Structural separation of settling and deciding
  - Court-sponsored ADR programs
  - ADR confidentiality rules

Potential Exceptions?
- Party Request
- Jury Trials
Ohio Code of Judicial Conduct

RULE 2.6 Ensuring the Right to Be Heard

(B) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

Rules of Practice of the Court of Common Pleas, Franklin County, Ohio

105.02 A reference to mediation shall be by “Notice of Conference” which shall set the time and place of the conference. A mediation conference may be set immediately prior to a schedule hearing on a preliminary motion. If the preliminary motion is referred to a Magistrate, the mediation conference need not be set before the same Magistrate to whom the motion has been referred.

Ohio Code of Judicial Conduct

RULE 3.9 Service as Arbitrator or Mediator

A judge shall not act as an arbitrator or a mediator or perform other judicial functions apart from the judge’s official duties unless expressly authorized by law.

Comment

This rule does not prohibit a judge from participating in arbitration, mediation, or settlement conferences performed as part of assigned judicial duties. Rendering dispute resolution services apart from those duties, whether or not for economic gain, is prohibited unless it is expressly authorized by law.
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Beyond “Managerial Judges”: Appropriate Roles in Settlement

ELLEN E. DEASON*

Settlement is prevalent, and crucial to the functioning of the U.S. judicial system. But the pretrial regulatory framework in the courts is largely discretionary, and its emphasis on management does not fully take into account all the consequences of combining settlement with adjudication. The label “managerial judge” does not differentiate between the functions involved in managing a settlement process and the very different role of serving as a settlement neutral. By introducing this distinction, this Article provides a framework for analyzing settlement that focuses on the conflicts between a judge’s role as a neutral in settlement and as a neutral in adjudication.

This Article argues for reform that would prevent judges assigned to a case for pretrial management and trial from serving as the neutral at a settlement conference or judicial mediation. The proposal to separate these roles structurally would address the problems of coercion and partiality that can result from a dual-neutral role, while retaining the contributions of settlement judges. The proposal is informed by the history of judges’ involvement in settlement, and by their increasing reliance on mediation techniques. It draws on principles that are already recognized in some local and state ADR rules and rests on modern understandings of cognitive functioning and decisionmaking that should be incorporated into our thinking about frameworks for settlement.

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I. INTRODUCTION

In U.S. courts, judicial efforts to aid settlement are usually thought of as an element of pretrial management. This conception dates back to the identification of a “managerial” role for judges, though its roots reach even

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1 See Robert F. Peckham, The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition, 69 CALIF. L. REV. 770 (1981) (approving the
earlier, to the inclusion of settlement in pretrial conferences. In her influential 1982 article, *Managerial Judges*, Professor Judith Resnik contrasted the judge’s traditional role in adjudication—making decisions based on information presented by the parties in motions and at trials, with justifications in the form of reasoned explanations— with that of the “judge- overseer.”

Pretrial, a managerial judge is engaged in supervising discovery, managing case development, and encouraging settlement. Professor Resnik famously questioned the wisdom of the increase in judicial authority associated with these “judge initiated, invisible, and unreviewable” roles due to the absence of procedural safeguards to protect parties from abuse of that authority. Her critique of the emergence of managerial judging, and of the shift in judicial focus from trial to pretrial proceedings, ushered in an era of debate about the role of judges among both academic observers and judges themselves.

This Article builds on insights from that debate, but proposes a different analytical structure for examining judicial settlement activities and the rules that govern them. This framework is based on the insight that judges perform two very different functions in settlement. Their first role is truly managerial: helping the parties plan for alternative dispute resolution (ADR) and select an appropriate process. Their second role is that of a neutral: helping to resolve the dispute by direct involvement as a third party who leads a settlement process. Rule 16 of the Federal Rules of Civil Procedure currently contemplates both roles and blends them in its authorization, and many local and state rules follow the same pattern.

The debate spawned by Professor Resnik’s article similarly treats all of settlement as an aspect of management. Yet, although both settlement and management take place pretrial, acting as a settlement neutral is conceptually and functionally distinct from managing the settlement of a case and the other pretrial managerial duties authorized by Rule 16.

Recognizing this distinction enables a fresh consideration of the issue of judges who act as settlement neutrals in cases in which they are the assigned judicial officer. A dual judicial role that encompasses both attempting to settle cases and adjudication has been condemned (and defended) before, in the context of criticisms of pretrial managerial judging. Unlike these earlier

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3 *Id.* at 379.
4 Resnik also examined the managerial judge’s posttrial role in monitoring remedies, especially in public law litigation, but concluded that pretrial supervision represents the sharper break from the norms of American adjudication. *Id.* at 414.
5 *Id.*
6 *Id.* at 380.
7 See *infra* text accompanying notes 67–68.
8 See, e.g., Resnik, *supra* note 1, at 435 (suggesting that the judge who will preside at trial should not try to settle the case).
criticisms, however, I do not object either to judicial pretrial management or to judicial involvement with settlement in general. Pretrial judicial management by the judge assigned for trial is a deeply ingrained (and, in many ways, effective) aspect of procedure. And judges often serve effectively as settlement neutrals—traditionally in judicial settlement conferences and more recently as mediators—and can make significant contributions in this role.

Judges’ truly managerial functions related to settlement—encouraging parties to settle and helping them plan a process—are consistent with the primary thrust of Rule 16 to improve the efficiency and quality of litigation as a case moves toward a disposition. However, a problem arises when a judge who is assigned to preside as adjudication neutral also serves as a neutral to facilitate settlement. These two roles are not only distinct, but incompatible. The problems become clearer when the roles are conceptualized as two neutral roles—settlement and decisionmaking—rather than as merely adding a managerial function to the judge’s traditional role of adjudication.

Some judges refuse this dual role based on their personal convictions. Yet in most jurisdictions this is a matter of discretion, not prohibited by rule, and there is ample evidence that it is not uncommon for judges to assume both roles in the same case. This Article demonstrates how new understandings of decisionmaking processes reinforce longstanding doubts about combining these roles. It argues that the practice raises such troubling implications for party self-determination in settlement, and for the integrity of the adjudicatory process, that the rules should be amended to prohibit the practice.

In Part II, this Article draws on contemporary judicial writing and empirical studies to trace judicial involvement in settlement conferences through four developmental stages. These stages were accompanied by amendments to Rule 16 that endorsed expanded judicial roles and discretion. Although today the federal rules impose few limits on judicial roles related to settlement, this history reveals that the concerns underlying the separation proposed in this Article have deep, historical roots.

Part III explores the benefits of judicial settlement, and the conflicts that result from mixing the role of settlement neutral with the judicial role of adjudication (both pretrial and as the presiding judge at trial) as currently permitted by Rule 16, the majority of local federal rules, and many state rules. The conflicts in neutral roles stem from two primary sources. One is the potential for coercion that undermines the important value of party self-determination in settlement. The other is the dilemma that requires attorneys to make a choice between guarding information that would improve the prospects for settlement or sharing it with the judge and potentially undermining the integrity of the adjudication process. These concerns are strengthened by modern understandings of cognitive processes, which suggest multiple flaws.

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in a structure that allows settlement neutrals to be decisionmaking neutrals. In a day when the limitations of human decisionmaking processes are common knowledge, these concepts should be reflected in the way we organize our settlement processes.

Part IV examines possibilities for limiting the effects of these conflicting neutral roles. It draws examples from local federal court rules and state law and identifies ways in which some jurisdictions apply principles that draw a distinction between managing settlement in the context of court-connected ADR programs and serving as a neutral in settlement. This Article argues that procedural rules should use these same principles to structure the permissible roles of judges in all settlement processes, including settlement conferences. Limiting judicial discretion is necessary to avoid the problems that occur when a judicial officer who is assigned the adjudicative role also takes an active role as settlement neutral.

Granted, coercion is to some degree inherent in judicial encouragement of settlement, and concerns about bias run through the litigation process. There are two reasons, however, why it is important to attack these problems in the settlement context. First, these problems are especially acute when an adjudicatory/managerial judge serves as settlement judge. In terms of coercion, the potential is heightened when parties who do not settle will return to the settlement judge for trial. In terms of impartiality, judges gain far more information that can affect their judgments in settlement than they do in the ordinary course of management and adjudication. Significantly, this information is different in kind from that which judges learn in the context of motions and evidentiary rulings.

Second, there is a manageable solution. This Article proposes that Rule 16, local federal rules, and state rules should prohibit assigned judges from serving as settlement judges and limit the information that the settlement neutral may provide to the adjudicatory/managing neutral about the settlement process. If the rules recognize that serving as a settlement neutral is distinct from management and needs to be structurally isolated from adjudication, then settlement, management, and adjudication all will benefit from parties’ increased confidence in the judicial system.

II. THE CO-EVOLUTION OF JUDICIAL SETTLEMENT AND RULE 16

The evolution of judicial pretrial settlement practices in the federal district courts is a story of expansion: both in the roles of individual judges and in the operational roles of courts as institutions. The authorization for this activity in Rule 16 of the Federal Rules of Civil Procedure has generally followed, rather than led, the developments in settlement practices. Overall, amendments to

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10 See, e.g., Fed. R. Civ. P. 16(c) advisory committee’s note on 1983 amend. (stating that the amendment “recognizes that it has become commonplace to discuss settlement at pretrial conferences”); Daisy Hurst Floyd, Can the Judge Do That?—The Need for a Clearer Judicial Role in Settlement, 26 Ariz. St. L.J. 45, 52 (1994) (stating the 1993
Rule 16 have recognized the expanding reality of judicial pretrial practices, endorsing and making more explicit the district courts’ pretrial management powers. This has been especially true of the amendments concerning settlement, which have pragmatically codified judicial trends and court innovations. These amendments have reflected the increasing attention paid to judicial settlement since the inception of the Federal Rules in 1938 and the changes in legal culture that have, in many districts, institutionalized court-sponsored settlement processes as a normal element of litigation.

Pretrial proceedings are largely committed to judges’ discretion; Rule 16’s current regulatory structure for settlement is primarily permissive, not limiting. The Rule not only grants judges great discretion in how they approach settlement in a particular case, but also accepts significant diversity in the local structures within which that discretion is exercised.\footnote{This diversity is consistent with the Alternative Dispute Resolution Act of 1998: while that Act requires district courts to provide some form of ADR process, it also gives them extensive leeway to select and structure the processes they offer to suit local conditions. As a result, court-sponsored settlement varies greatly among the districts and, inevitably, some courts have surpassed others in terms of the scope and quality of their dispute resolution program.}

This Part draws on judicial writings and contemporary studies to identify four stages in the evolution of judicial settlement practices. Part II.A describes the period immediately following the 1938 adoption of the Federal Rules, when Rule 16 did not recognize settlement as a pretrial judicial activity. Judges who held pretrial conferences tended to restrain themselves in discussing settlement with attorneys and, under the prevailing case assignment systems, those judges who were active in settlement rarely tried the case. This general restraint gave way during the 1960s and especially the 1970s to a second stage of development, outlined in Part II.B. It was marked by the growth of managerial judging and increasing judicial enthusiasm for promoting settlement. Pretrial settlement conferences became widespread, and they were eventually endorsed in the 1983 amendments to Rule 16. Stage three, which is detailed in Part II.C, was characterized by the establishment of court-sponsored ADR programs. Judges continued to hold settlement conferences, but options for settlement processes broadened and judges assumed additional managerial roles in settlement, which varied greatly due to the local nature of ADR programs. These changes were recognized in 1993 with further amendments to Rule 16. Part II.D presents evidence of a fourth, ongoing stage in which mediation has become an increasingly important part of judicial settlement. Judges have begun to mediate, and mediation techniques have influenced how many judges conduct their settlement conferences.

\footnote{amendment “again provides explicit authorization in the rules for what many judges are already doing”).}
\footnote{11 See infra notes 84–92 and accompanying text; see also infra note 157.}
\footnote{12 28 U.S.C. § 652(a) (2012).}
For the most part, the discretion allowed to each judge to determine his or her preferred role in settlement has expanded through these evolutionary stages. Today, litigants may experience a wide range of court-connected settlement activity, which includes both judges performing managerial functions and judges presiding as neutrals. Rule 16 currently authorizes both these roles with little limitation. It is noteworthy, however, that even as discretion with regard to settlement has expanded over the decades, concerns with one potential consequence—conflicting judicial roles—have echoed repeatedly through each stage of the evolution of judicially-led settlement.

A. Stage 1: General Judicial Restraint in Settlement and Rule 16
Silence

The inaugural version of the Federal Rules of Civil Procedure that merged law and equity in 1938 did not mention settlement. The Rules contributed major innovations in the form of liberal rules of pleading and joinder and provisions for information exchange through discovery to develop cases prior to trial that, along with a decline in the rate of trials, made the pretrial phase the “main event” in litigation. The rulemakers, inspired by the practice of some state court judges, also added Rule 16 to authorize pretrial conferences.


The Circuit Court of Wayne County, Michigan (where Detroit is located) is credited as the first to institutionalize the pretrial format in the United States. Alexander Holtzoff, *Pretrial Procedure: Report of the Committee to the Judicial Conference for the District of Columbia*, 1 F.R.D. 759, 759 (1941). The court was initially motivated to relieve congestion in its docket of lien cases that resulted from a building boom in the 1920s but, based on its success, it expanded the practice to the law side of the docket and made it compulsory in all cases. Ira W. Jayne, *Foreword*, 17 OHIO ST. L.J. 160, 161–62 (1956). This pretrial “preview” of cases resulted in “the reduction of issues, settlements, limitations of proofs, and early decisions on such issues as required proofs.” *Id.* at 162 (quoting George E. Brand, “Mighty Oaks”—*Pretrial*, 26 JUDICATURE 36, 37 (1942)). Similar procedures were instituted in Cleveland, Milwaukee, and Boston, and also served as
Consistent with the overall emphasis on the flexibility of equity traditions in the Federal Rules, Rule 16 gave district judges discretion to decide on a case-by-case basis whether to hold a conference and how to shape it. It thus encouraged, but did not require, judges to participate in discussion and exchange with the parties as a more informal way of narrowing issues for trial than reliance on formal pleadings.

There was concern among the drafters, however, with the potential for coercion of the parties. This was reflected in their reluctance to include settlement as an appropriate topic for discussion at pretrial conferences. Years later, Charles Clark, the influential reporter for the Supreme Court’s Advisory Committee on Rules of Civil Procedure, explained that the omission was purposeful and stemmed directly from concerns about coercion: “It is dangerous to the whole purpose of pre-trial to force settlement upon unwilling models for the federal rulemakers. Galanter, supra, at 258; Holtzoff, supra, at 760; Will Shafroth, Pre-Trial Techniques of Federal Judges, 21 Dicta 244, 244 (1944).

In creating Rule 16, there had been drafting disagreements over whether conferences would be limited to jury trials and whether judges would be obliged to hold a conference at the request of the parties. These limitations on judicial discretion were rejected. Resnik, supra note 16, at 935–36; Shapiro, supra note 16, at 1979.

Shapiro, supra note 16, at 1978–79, 1981. As adopted in 1938, Rule 16 provided:

Rule 16. Pre-Trial Procedure; Formulating Issues.
In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider
(1) The simplification of the issues;
(2) The necessity or desirability of amendments to the pleadings;
(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
(4) The limitation of the number of expert witnesses;
(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
(6) Such other matters as may aid in the disposition of the action.
The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.


Shapiro, supra note 16, at 1979–80 (citing concerns about judges coercing parties by eliminating issues from the case and compelling settlement).
Despite the absence of settlement authorization from the language of the Rule, judges certainly did settle cases in pretrial conferences in the decades immediately following the adoption of the Federal Rules. But tradition imposed informal constraints on pretrial activity in general, and two factors appear to have restrained judicial behavior specifically in terms of settlement during the 1940s, 1950s, and 1960s. First, the dominant view in the federal courts (at least as reflected in the rhetoric of the day) was that settlement was a “by-product” of pretrial conferences, not their primary purpose. Second, under the prevalent system for assigning cases, the judge conducting the conference was typically not the judge assigned for trial.

The by-product theory was articulated in recommendations submitted by the Pre-Trial Committee of the Judicial Conference of the United States and approved by the Conference in 1944. They stated that the “committee consider[ed] that settlement is a by-product of good pre-trial procedure rather than a primary objective to be actively pursued by the judge.” Settlement at pretrial conferences was accepted, however, as “often the logical result of pre-
trial." Judge Alfred P. Murrah, then-chair of the Pre-Trial Committee, expressed the relationship between pretrial and settlement as follows: “By narrowing the area of disagreement and pointing out the pitfalls of going to trial, the pre-trial judge can thus attempt to clear the way for a settlement advantageous to the interests of both parties.”

In terms of judicial behavior, contemporary judicial commentary suggests widespread consensus that it was appropriate to ask the attorneys whether they had considered settlement, thereby initiating discussions that attorneys might hesitate to start for fear of signaling weakness. Some judges thought suggesting that attorneys discuss settlement should be the limit of their involvement, while other judges thought they could go somewhat further without overstepping. But the by-product theory was inconsistent with judges aggressively promoting settlement at the pretrial conference and empirical evidence from the time suggests that this attitude seems to have encouraged restraint.

The by-product view was not universally accepted, however, and there were disagreements during this period about the appropriate degree of

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26 Murrah, supra note 25, at 420. The settlement rate could be substantial. In the first nine months of conducting pretrial conferences in the District Court for the District of Columbia, almost 60% of the cases settled at or after the conferences, which were conducted shortly before trial. Holtzoff, supra note 16, at 761.

27 Murrah, supra note 25, at 420; see also Holtzoff, supra note 23, at 29 (stating that at pretrial, counsel “begins to discern the weaknesses of his own side, and to perceive the strong points of his adversary’s case,” likely becoming “more amenable and more desirous of settlement”).

28 See Shafroth, supra note 16, at 250; Wright, supra note 23, at 398. State appellate courts also accepted the practice. E.g., Madrigale v. Corrone, 258 A.2d 102, 106 (Conn. App. Ct. 1968) (urging both counsel to settle was not inappropriate in case in which judge did not participate in negotiations); Washington v. Sterling, 91 A.2d 844, 845 (D.C. 1952) (stating trial court may suggest the advisability of settlement).


30 See Grover M. Moscowitz, Glimpses of Federal Trials and Procedure, 4 F.R.D. 216, 218 (1946) (“If the judge merely suggests to the attorneys that they discuss the possibilities of settlement, that should be sufficient impetus from the Court.”).

31 See, e.g., Murrah, supra note 25, at 420 (advocating that a judge could “make discreet suggestions as to the possible outcome of a trial”).

32 See, e.g., William F. Smith, Pretrial Conference—A Study of Methods (noting that “judicially supervised ‘haggling’ and efforts to exert pressure are to be cautiously avoided” in settlement discussions, which “should not be regarded as a primary objective of the pretrial conference”), in Seminar on Effective Judicial Administration, supra note 21, at 348, 352–53; Wright, supra note 23, at 393 (“It is suggested that pre-trial is a means by which a judge coerces lawyers into settlement and thereby avoids the necessity for trial. I say to you such is not pre-trial, but a prostitution of the process.”).

33 John W. Delehant, The Pre-Trial Conference in Practical Employment: Its Scope and Technique, 28 Neb. L. Rev. 1, 23–24 (1948) (reporting that 80% of federal trial judges responding to an ABA survey limited their settlement involvement to inquiring if the attorneys had initiated settlement and if they thought it would be appropriate).
emphasis on settlement\textsuperscript{34} with some judges taking an activist stance, particularly in state courts.\textsuperscript{35} This group of judges saw settlement as the “primary objective” of pretrial conferences,\textsuperscript{36} and expressed great enthusiasm for the effect of settlement in pretrial conferences in reducing dockets and waiting times to trial.\textsuperscript{37} Among such judges, settlement techniques included assessing the value of the case, pointing out strong and weak aspects of the claim or defense, and attempting to persuade the parties to settle.\textsuperscript{38}

\textsuperscript{34}See Fisher, supra note 23, at 212 (noting two schools of thought, one of which “attaches much higher importance to [the pretrial conference] as a means of bringing about settlements”); Stanley M. Ryan & John C. Wickhem, Pre-Trial Practice in Wisconsin Courts, 1954 Wis. L. Rev. 5, 15–23 (finding several schools of thought on settlement in a survey of Wisconsin judges on pretrial conferences); Sunderland, supra note 29, at 203 (advocating a secondary role for settlement at pretrial conferences but acknowledging a “considerable difference of opinion” in its importance); Melvin Belli, Book Review, 76 Yale L.J. 857, 858 (1967) (reviewing MAURICE ROSENBERG, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE (1964)) (noting the divergent views of New Jersey judges).

\textsuperscript{35}Galanter, supra note 16, at 259–60.

\textsuperscript{36}Ryan & Wickhem, supra note 34, at 15 (emphasis omitted); see also Ross W. Shumaker, Appraisal of Pre-Trial in Ohio, 17 Ohio St. L.J. 192, 205 (1956) (stating that settlement at pretrial is a controversial subject, but “in Ohio the majority of judges and lawyers feel that settlement is not merely a by-product, but one of the most desirable objectives, of pre-trial”).

\textsuperscript{37}E.g., Harry M. Fisher, Judicial Mediation: How It Works Through Pre-Trial Conference, 10 U. Chi. L. Rev. 453, 454 (1943) (“The number of cases disposed of under the guidance of the pre-trial judge without trial has exceeded the fondest hopes of the advocates of the system.”); John W. McIlvaine, The Value of an Effective Pretrial (“[W]ith the congested condition of the docket . . . I feel it is incumbent on every judge to use the pretrial as an aid in effectuating settlement.”), in Seminar on Practice and Procedure, supra note 21, at 158, 162; Ryan & Wickhem, supra note 34, at 15 (reporting that many judges “emphasize that unless a large percentage of cases is disposed of by settlement at pre-trials, their calendars would become hopelessly backlogged”); Shafroth, supra note 16, at 244 (noting that in Detroit and Boston pretrial conferences “succeeded in clearing up very bad congestion of the trial calendars”). In contrast, a book from this era on the problem of congestion in the courts, AM. ASSEMBLY, THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION (Harry W. Jones ed., 1965), did not even mention the potential efficacy of a pretrial conference convened for the purpose of settlement. See James B. Little, Book Review, 18 Hastings L.J. 237, 238 (1966).

\textsuperscript{38}See, e.g., HARRY D. NIMS, PRE-TRIAL 28 (1950) (“After a frank discussion by counsel as to the value of the case, I give expression as to what, in my judgement, the case should be settled for.” (quoting Judge Cornelius J. Harrington)); id. at 34 (“[T]he Court frequently points out the strong points and the weak points of either the plaintiff’s claim, or of the defense, as the case may be, in endeavoring to bring the parties to an agreement.” (quoting Judge Alexander Holtzoff)); Ruggero J. Aldisert, A Metropolitan Court Conquers Its Backlog, 51 Judicature 247, 248 (1968) (noting that he makes “a realistic appraisal of both sides” of a case); Ryan & Wickhem, supra note 34, at 16 (“I offer suggestions, intimate to the attorneys and clients the possibility and extent of liability, suggest the range of what I believe to be a fair settlement, and then also attempt to persuade the parties and their attorneys to accept a settlement within that range.” (quoting Judge Herman W. Sachtjen)); J. Skelly Wright, The Pretrial Conference (“I tell them, ‘This case is worth
The system for assigning cases, however, served as a second source of restraint on behavior, especially in state courts where judges tended to be more active in settlement. Many courts used a master calendar system that placed cases in central pools and assigned judges particular functions such as motions, pretrial conferences, or trial, often in rotation. This meant that a single case would be handled by multiple judges and, if a case did not settle at a pretrial conference, a different judge would be assigned to preside at trial.

At least some judicial advocates of using pretrial conferences to encourage settlement considered this separate trial assignment to be a crucial design feature. In the words of Harry M. Fisher, a pretrial conference judge of the Circuit Court of Cook County, Illinois, “We regard it as of the utmost importance that the conference be held by a judge other than the one who will be assigned to hear the case in the event a formal trial becomes necessary.”

The reasons were partly functional: lawyers would be willing to make disclosures, and judges would feel free to participate in a discussion of the merits of the case as part of the settlement process. They also reflected concerns for neutrality and the integrity of trials: “[l]awyers would feel, rightfully so, that no judge could successfully detach himself from the information absorbed during the conference or escape forming views on the merits of the case which might unconsciously color his rulings at the trial.”

$20,000 for the settlement,’ and I tell them why; and I tell them further to go tell their clients that I said so.”), in Seminar on Practice and Procedure, supra note 21, at 141, 145.

39 See generally MAUREEN SOLOMON, CASEFLOW MANAGEMENT IN THE TRIAL COURT 10–13 (1973) (suggesting standards and guidelines for planning, developing, and operating an effective case management system).

40 This separation was especially prevalent under state court master calendar systems. See NIMS, supra note 38, at 22 (describing pretrial conferences as used in New York County, New York (Manhattan) and noting “[t]he chance that the pre-trial judge will try the case, if it is not ended in the conference, is very, very small”); id. at 28 (“[I]f counsel cannot agree [on a settlement] then the case is reassigned to the head of the assignment division for an immediate jury trial.” (quoting Judge Cornelius J. Harrington)); see also Ryan & Wickham, supra note 34, at 23–24 (describing a program in Milwaukee with separate, voluntary assignment to a judge for conciliation).

The early practice regarding settlement judges in federal courts was more variable. Some federal courts assigned separate judges for pretrial and trial functions. See George L. Hart, Jr., The Operation of the Master Calendar System in the United States District Court for the District of Columbia (describing separate processes for assigning cases to judges in the Pre-Trial and Ready for Trial Calendars), in Seminar on Effective Judicial Administration, supra note 21, at 265, 266–67; Holtzoff, supra note 23, at 23 (describing a system in which a pretrial examiner was devoted to conducting pretrial hearings, freeing judges for trial work). In other federal courts, pretrial conferences were held shortly before trial and were often conducted by the trial judge regardless of the type of calendaring system. See Shafroth, supra note 16, at 250 (“[F]ederal districts where the pre-trial judge does not try the case are very few . . . [.].”)

41 Fisher, supra note 23, at 220.

42 Id.; Holtzoff, supra note 16, at 762.

43 Fisher, supra note 37, at 455; see also Maurice Rosenberg, Mastering the Calendar (“[T]he central calendar avoids the unseemly situation of having the same judge—who at
B. Stage 2: Active Judicial Participation in Settlement Leading to Rule 16 Authorization

In the 1970s, a “forthright and ardent embrace of active participation” displaced the by-product framework as the dominant approach to settlement in federal pretrial conferences. At the same time, a movement toward individual calendar systems in the federal courts meant that more judges had responsibility for cases from their inception. These changes were part of the well-documented shift in judicial self-conception from neutral adjudicator to active case manager. Effectiveness in settlement was regarded as a crucial aspect of the pretrial management role. As expressed by Chief Judge Noel P. Fox of the Western District of Michigan, “judge-mediator participation in pretrial settlement negotiations is an essential part of imaginative, active administration of the court calendar.”

The high level of enthusiasm for settlement is indicated by the statement, described in a mid-1980s judicial opinion as a “familiar axiom,” that “a bad settlement is almost always better than a good trial.” As in the earlier era, settlement as a mode of docket control continued to be an important motivating factor for judicial involvement, and now the compilation of pretrial hears the lawyers frankly admit specific weaknesses in their case—later preside at trial of the case.”), in Seminar on Effective Judicial Administration, supra note 21, at 271, 279; E.J. Dimock, Book Review, 36 A.B.A. J. 837, 837 (1950) (reviewing NIMS, supra note 38) (noting the general custom of keeping the settlement conference judge away from the trial and opining that “[a] party who has stuck to his settlement figure in the face of pressure from a judge has a right to have his case tried before another whom he has not antagonized”).

Galanter, supra note 16, at 261; see also Frederick B. Lacey, The Judge’s Role in the Settlement of Civil Suits 3 (1977) (“The nonactivists had their day. The activists are now in the ascendency, as times change and case loads become increasingly burdensome both in number and complexity of suits.”); Peckham, supra note 1, at 774 (“[M]ost judges routinely consider prospects for settlement at the pretrial conference and consider settlement promotion to be one of the chief purposes of pretrial . . .”).

Robert F. Peckham, A Judicial Response to the Costs of Litigation: Case Management, Two-Stage Discovery Planning, and Alternative Dispute Resolution, 37 Rutgers L. Rev. 253, 257 (1985) (describing the switch in the late 1960s to a single-assignment model in metropolitan federal districts). With the individual calendar system, a case is typically assigned to an individual judge when it is filed and that judge has responsibility for the case throughout its life. Steven Flanders, Case Management and Court Management in United States District Courts 13–15 (1977).

See generally E. Donald Elliott, Managerial Judging and the Evolution of Procedure, 53 U. Chi. L. Rev. 306 (1986); Peckham, supra note 1; Resnik, supra note 1.

Noel P. Fox, Settlement: Helping the Lawyers to Fulfill Their Responsibility, 53 F.R.D. 129, 132 (1972); see also Lacey, supra note 44, at 5 (“The more efficient the judge and the more talented he is as an administrator the more cases he will settle . . .”).

In re Warner Commc’ns Sec. Litig., 618 F. Supp. 735, 740 (S.D.N.Y. 1985), aff’d, 798 F.2d 35 (2d Cir. 1986).

See, e.g., Elwood M. Rich, An Experiment with Judicial Mediation, 66 A.B.A. J. 530, 530 (1980) (expressing enthusiasm about institutionalizing settlement conferences,
Docket statistics gave a ready measure of accountability that increased the pressure for quicker settlements and dispositions. However, unlike the judicial writing on Rule 16 in the earlier decades (which emphasized almost exclusively the docket benefits of settlement), for some the enthusiasm for settlement during this era had an additional grounding: a conviction that settlement produced superior outcomes. Thus, Judge Hubert L. Will of the Northern District of Illinois proclaimed “in most cases, the absolute result of a trial is not as high a quality of justice as is the freely negotiated, give a little, take a little settlement.”

This enthusiasm translated into widespread judicial involvement with settlement at pretrial conferences, although more conservative attitudes also persisted. Contemporary observations suggest that the extent and intensity of judicial intervention varied greatly, an impression supported by the research which eliminated a chronic backlog in a California Superior Court in ten months. See generally Peckham, supra note 45, at 253 (identifying pretrial judicial case management as the “prevailing response” to high costs of litigation).

See, e.g., Resnik, supra note 1, at 404. In addition, settlement activity received encouragement from favorable publicity among the judiciary. Leroy J. Tornquist, The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry, 25 WILLAMETTE L. REV. 743, 750 (1989) (noting attention given to judges active in settlement: “They are invited to give seminars to new judges. Their views are published in Federal Rules Decisions and disseminated in booklets by the Federal Judicial Center.”).

See supra note 37 and accompanying text.

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See, e.g., ROBERT MCC. FIGG ET AL., CIVIL TRIAL MANUAL 315 (1974) (stating that the role of the pretrial conference “may vary from one in which the conference is used to force settlement to one in which the mere mention of the word settlement is taboo”); Menkel-Meadow, supra note 16, at 506–07 (observing a variety of conceptions of judicial settlement roles and associated techniques); Perspectives from the Federal Trial and Appellate Bench: Judge Cornelia G. Kennedy, THIRD BRANCH, Apr. 1984, at 1, 9 [hereinafter Kennedy] (“[S]ome judges participate a great deal, . . . and others don’t participate at all.”).
work from the era.\textsuperscript{55} According to a nationwide survey of state trial judges published in 1980, many judges were involved in settlement; over three-quarters described themselves as intervening at least occasionally to promote settlement discussions.\textsuperscript{56} Of these, approximately 10\% reported taking an aggressive role “through the use of direct pressure.”\textsuperscript{57} A second survey published in 1980 also conveys a sense of activism in settlement, finding that it was common for judges to initiate settlement discussions, especially in jury cases, and that substantial numbers of judges reported suggesting settlement terms.\textsuperscript{58} In contrast, a separate survey of lawyers in the early 1980s portrayed judges as far less likely to participate in settlement,\textsuperscript{59} but reported that this

\textsuperscript{55} See FRANKLIN N. FLASCHNER JUDICIAL INSTITUTE, INC., THE JUDICIAL ROLE IN CASE SETTLEMENT 2 (1980) (reporting differences of opinion among Massachusetts state and federal judges on the appropriateness of an active role in settlement proceedings); David Neubauer, Judicial Role and Case Management, 4 JUST. SYS. J. 223, 227–28 (1978) (reporting both activist and abstentionist federal judges based on interviews in three federal districts).

\textsuperscript{56} JOHN PAUL RYAN ET AL., AMERICAN TRIAL JUDGES: THEIR WORK STYLES AND PERFORMANCES 177 tbl.8-2 (1980). Only 21.8\% of the judges surveyed stated that they typically did not participate in settlement discussions. \textit{Id.} Thus these authors concluded that the primary issue was “not whether but \textit{how} a judge will intervene in pre-trial conference.” \textit{Id.} at 177.

\textsuperscript{57} \textit{Id.} at 177 tbl.8-2. The study found that the type of calendar system was significantly related to the style of intervention. \textit{Id.} at 182. Where the court used a master calendar, 20\% of the judges reported intervening aggressively in pretrial negotiations, whereas this was reported by only 9\% of judges in courts with individual calendaring systems. \textit{Id.}

\textsuperscript{58} See MARC GALANTER, “... A Settlement Judge, Not a Trial Judge:” Judicial Mediation in the United States, 12 J.L. & SOC’Y 1, 7, 17 n.42 (1985) (describing a survey conducted by the Civil Litigation Research Project). The survey polled state and federal judges in five judicial districts about their typical settlement practices. \textit{Id.} Seventy-five percent of federal judges and 56\% of state court judges reported initiating settlement discussions in jury cases. \textit{Id.} Forty-one percent of the federal judges and 56\% of the state judges reported suggesting terms for settlement. \textit{Id.} For bench trials, fewer judges reported these activities. \textit{Id.}

When the self-reports from judges in this survey were combined with the views of lawyers who appeared before them, there was further support for a conclusion that judges assigned to a case for trial were frequently involved in settlement discussions. Herbert M. Kritzer, The Judge’s Role in Pretrial Case Processing: Assessing the Need for Change, 66 JUDICATURE 28, 30–34, 34 n.12 (1982). Judicial settlement activities ranged from initiating settlement discussions to more intensive, less frequent, activities such as meeting separately with each side and suggesting settlement figures. \textit{Id.} at 31; see also Eugene F. Lynch, Settlement of Civil Cases: A View from the Bench, LITIGATION, Fall 1978, at 8, 57–58 (describing his typical evaluation of the case with the plaintiff).

\textsuperscript{59} James A. Wall, Jr. & LAWRENCE F. SCHILLER, JUDICIAL INVOLVEMENT IN PRE-TRIAL SETTLEMENT: A JUDGE IS NOT A BUMP ON A LOG 6 AM. J. TRIAL ADVOC. 27, 35 (1982) (concluding that judges participated “significantly” in only 34\% of settlement proceedings). \textit{But see WAYNE D. BRAZIL, SETTLING CIVIL SUITS: LITIGATORS’ VIEWS ABOUT APPROPRIATE ROLES AND EFFECTIVE TECHNIQUES FOR FEDERAL JUDGES} 12 (1985) (criticizing the question that led to this conclusion as “ambiguous”).
participation included practices, such as perceived coercion to settle, that were considered unethical by many of the lawyers.60

How did litigants react to the more prevalent involvement of judges in settlement? While I can find no studies of clients at the time, attorneys in four different federal districts were very enthusiastic. In response to a survey of lawyers by Wayne Brazil in the early 1980s, an amazing 85% of the respondents agreed that “involvement by federal judges in settlement discussions [is] likely to improve significantly the prospects for achieving settlement.”61 The survey indicated that a majority of lawyers preferred a judge to participate “actively” in settlement by offering suggestions and observations.62 There was, however, one major exception to the enthusiasm: lawyers were far less comfortable with judicial involvement in settlement when the settlement judge was also the judge assigned for trial.63

In 1983, Rule 16 (which, it should be recalled, originally did not even mention settlement)64 was amended to be consistent with the existing practice of widespread judicial involvement in settlement. The amendment’s expansion of authority for settlement activity during pretrial proceedings was consistent with the other 1983 changes to Rule 16, which overall “shift[ed] the emphasis away from a conference focused solely on the trial and toward a process of judicial management that embraces the entire pretrial phase.”65 But the Advisory Committee acknowledged that the changes regarding settlement merely conformed the rule to existing practice, stating that the new rule “explicitly recognize[d] that it ha[d] become commonplace to discuss settlement at pretrial conferences.”66

The language of the new Rule established a judicial role for settlement with a broad scope. The Rule’s new list of purposes for pretrial conferences officially recognized judicial authority for “facilitating the settlement of the case.”67 The scope of “facilitating” is undefined but, given prevailing practices at the time, it can be understood as authorizing judges to intervene directly as

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60 The lawyers’ reports of judicial behaviors included “[c]oerces lawyers to settle” (reported by 54% of lawyers surveyed; considered unethical by 51%); “[p]oints out to the client the strengths and weaknesses of his case” (reported by 52%; considered unethical by 29%); “[d]elays rulings to the disadvantage of the stronger side” (reported by 48%; considered unethical by 65%); and “[d]owngrades the merit of the stronger case and/or the demerits of the weaker” (reported by 45%; considered unethical by 20%). Wall & Schiller, supra note 59, at 35–36, app. at 43 tbl.2, 44 tbl.3.

61 BRAZIL, supra note 59, at 1, 39 (alteration in original). Professor Kritzer’s survey also indicates that lawyers believed judicial participation had an important influence on the settlement process. See Kritzer, supra note 58, at 35–36.

62 BRAZIL, supra note 59, at 46; see also Menkel-Meadow, supra note 16, at 497 (“[L]awyers overwhelmingly seem to favor judicial intervention.”).

63 BRAZIL, supra note 59, at 84; see infra notes 260–66 and accompanying text.

64 See supra note 19.

65 Fed. R. Civ. P. 16(a) advisory committee’s note on 1983 amend.

66 Id. R. 16(c) advisory committee’s note on 1983 amend.

settlement neutrals in order to lead negotiations between the parties. The new Rule 16 also contemplated a planning function distinct from direct participation in negotiations. It granted judges authority to “consider and take action with respect to . . . the possibility of settlement or the use of extrajudicial procedures to resolve the dispute.”

Thus the concept of judicial settlement activity embedded in Rule 16 included both serving as a settlement neutral and planning for a resolution procedure that would be conducted extrajudicially by someone else. Moreover, the provisions in the 1983 rule endorsed these settlement roles for judges within a framework of abundant pretrial judicial discretion carried over from the original Rule 16. The Advisory Committee notes did express a caution that echoed the reasoning behind the drafters’ original decision to omit settlement from the 1938 rule. While noting that “providing a neutral forum” to discuss settlement “might foster it,” the Advisory Committee emphasized that it was not the purpose of the rule “to impose settlement negotiations on unwilling litigants.”

Further, the drafters seem to have contemplated that, ideally, someone other than the assigned judge should lead the settlement process. Yet, by failing to distinguish a judge’s planning and neutral functions, the rule conflated them in a way that misleadingly identified them both with “management,” eliding an important distinction and obscuring thinking about the boundaries of the appropriate role of judges in settlement.

C. Stage 3: Expansion of Court-Sponsored “Alternative” Dispute Resolution, with New Managerial Roles for Judges

The third phase of development in settlement practices—court-sponsored settlement programs—broadened the focus from conferences convened at the discretion of individual judges to processes offered on an institutional basis. The programs were often motivated by the same concerns about cost and delay in civil litigation that had been associated with the rise of managerial judging, but those concerns now grew to a conviction that a litigation explosion was causing a full-blown crisis of congestion in the courts that was severe enough to impair access to justice. While it is important to note that both the

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68 Id. R. 16(c)(7).
69 If there were any doubt about judicial discretion, the rule included an open-ended authorization for conferences to include “such other matters as may aid in the disposition of the action.” Id. R. 16(c)(11).
70 See supra notes 20–21 and accompanying text.
71 FED. R. CIV. P. 16(c) advisory committee’s note on 1983 amend.
72 Id. (suggesting that “a judge to whom a case has been assigned may arrange . . . to have settlement conferences handled by another member of the court or by a magistrate”).
73 This viewpoint was influentially expressed by Chief Justice Burger. Warren E. Burger, Isn’t There a Better Way?, 68 A.B.A. J. 274, 275 (1982); see also Robert H. Bork, Dealing with the Overload in Article III Courts (describing “an overload so serious that the integrity of the federal system is threatened”), in Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70
explosion and ensuing crisis were contested, the perception of a crisis generated proposals to deal with it: chiefly reforms to discovery procedures and increased attention to settlement as a means to remove cases from court dockets.

Chronologically, the development of court programs overlapped with the growing enthusiasm for judicial settlement conferences that took place in Stage 2. Professor Frank Sander’s speech describing a vision of a multi-door courthouse at the 1976 Roscoe Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice is often cited as a key event in the association between ADR programs and U.S. courts. Innovative federal districts began offering mediation programs and court-annexed nonbinding arbitration in the late 1970s. This was also a time when experimentation with new forms of ADR flourished, and districts began to offer processes that judges invented especially for use in the courts, including early neutral evaluation and the summary jury trial. While only a few courts developed full-fledged multi-door programs in which litigants could choose the process best suited to their case from a large menu, many courts—both federal and state—eventually established programs that provided (or required) dispute resolution processes other than judicial settlement conferences.


75 Burger, supra note 73, at 276; see also Griffin B. Bell, Crisis in the Courts: Proposals for Change, 31 VAND. L. REV. 3, 12–13 (1978).

76 Frank E.A. Sander, Varieties of Dispute Processing, in Pound Conference, supra note 73, at 111, 130–32.

77 DONNA STIENSTRA, ADR IN THE FEDERAL DISTRICT COURTS: AN INITIAL REPORT 1 (Nov. 2011).


81 This development was not limited to the United States. See, e.g., Louise Otis & Eric H. Reiter, Mediation by Judges: A New Phenomenon in the Transformation of Justice, 6 PEPP. DISP. RESOL. L.J. 351, 353 (2006) (describing Quebec’s “unified and integrated
A significant spur to the growth of federal court ADR came with the enactment of the Civil Justice Reform Act of 1990 (CJRA). It required district courts to consider six case management principles, one of which was referral to ADR programs, and to adopt expense and delay reduction plans. The local nature of the plans, which were developed with input from advisory committees in each district, led to great variation, but many districts included some form of ADR as an element of their plan. By 1996, mediation had become the most common ADR process offered by the federal courts; it was available in over half the districts. During the same time period, many state courts also instituted mediation programs.

The authority of the CJRA expired in 1997, but the Judicial Conference urged local districts to continue to develop ADR programs. And the following year, Congress turned the CJRA’s encouragement of court ADR into a mandate. The Alternative Dispute Resolution Act of 1998 (ADR Act)
required each federal district court to offer at least one ADR process—
including, but not limited to, mediation, early neutral evaluation, minitrial, and
(when specially authorized) arbitration—and to adopt local rules requiring
civil litigants to consider its use.\textsuperscript{89} These ADR programs have become a
common feature of the settlement landscape in many federal district courts. A
2011 Federal Judicial Center review of district court ADR reveals that
mediation remains the most common court-connected process; two-thirds of
the ninety-four district courts have authorized it as a distinct ADR process.\textsuperscript{90}
Almost one-quarter of the districts authorize early neutral evaluation, with
smaller numbers including rules for summary jury or bench trials, mini-trials,
or settlement weeks.\textsuperscript{91} Slightly more than one-third authorize multiple forms
of ADR.\textsuperscript{92}

Along with these new programs, judges have continued to conduct
settlement conferences.\textsuperscript{93} A few districts placed settlement conferences in their
ADR programs.\textsuperscript{94} However, most courts did not integrate their provisions
governing Rule 16 settlement conferences with the new rules they adopted for
their ADR programs pursuant to the CJRA and the ADR Act. This is perhaps
understandable as a historical accident: courts incorporated settlement
conferences and ADR programs into their procedures at different times and
under distinct authorizations. Moreover, conceptually, ADR meant alternatives
to traditional processes, while settlement conferences were, by this time,
solidly traditional.\textsuperscript{95}

\textsuperscript{89} 28 U.S.C. § 652(a) (2012). In the case of mediation and early neutral evaluation,
the Act also authorized the courts to require parties to use these ADR processes. \textit{Id.}
\textsuperscript{90} STIENSTRA, supra note 77, at 6, 7 tbl.2. According to the local rules and other
written sources, in more than one-quarter of these district courts, mediation is the only
specifically-authorized process. \textit{Id.} at 5 & tbl.1. The indication that mediation is authorized
in two-thirds of the districts, \textit{id.} at 7 tbl.2, is likely a conservative estimate. It reflects only
specifically authorized mediation programs in districts that provide guidance for their use,
while additional districts have a general authorization for ADR or establish an “open” or
“general” management track allowing cases to use ADR. \textit{Id.} at 5 tbl.1, 6. Although these
more general authorizations may mention mediation or another form of ADR, Stienstra
does not count them because the lack of detail casts doubt on the existence of an active
court-administered ADR program. \textit{Id.}

\textsuperscript{91} \textit{Id.} at 6, 7 tbl.2. Court-annexed arbitration, while still authorized by a significant
number of courts, plays a smaller role today than it did during earlier decades. \textit{Id.} No
district relies solely on court-annexed arbitration as its ADR process. \textit{Id.} at 6.

\textsuperscript{92} \textit{Id.} at 4–5, 5 tbl.1. Fourteen districts authorize three or more processes. \textit{Id.} at 5.

\textsuperscript{93} See, e.g., DAVID RAUMA & DONNA STIENSTRA, THE CIVIL JUSTICE REFORM ACT
EXPENSE AND DELAY REDUCTION PLANS: A SOURCEBOOK 253 tbl.11 (1995) (compiling
provisions on settlement conferences from local CJRA plans and rules).

\textsuperscript{94} As of 2011, ten districts satisfied the ADR Act’s mandate by designating settlement
conferences as the sole type of ADR process they authorize by local rule. STIENSTRA,
supra note 77, at 5 tbl.1, 6.

\textsuperscript{95} See Donna Stienstra, \textit{ADR in the Federal Trial Courts}, FJC DIRECTIONS, Dec. 1994,
at 4, 7 n.1 (“Because ADR is defined in contrast to ‘traditional’ litigation, the judge-hosted
Even today, local federal rules typically do not cover settlement in a single coherent set of rules. The rules governing district court ADR programs often define “ADR” in a way that does not include either settlement conferences or judicial mediation, and only one-third of the local ADR rules even mention the settlement conferences authorized by Rule 16.96 Procedures for settlement conferences tend to be covered, if at all, in a section of the local rules that is separate from the ADR provisions.97 This continuing lack of integration seems strange given the common focus on settlement. And it has had practical consequences in that a judge’s role as a settlement neutral is often treated differently in the two contexts.

Regardless of the structure of the local rules, the expansion of court-sponsored dispute resolution processes has led to changes in the roles judges play in managing settlement (as distinct from the roles associated with presiding as settlement neutral). When the only court-connected settlement option was a judicial settlement conference, a judge’s management functions consisted primarily of initiating the conference process by encouraging (or

settlement conference—a long-standing component of the traditional process—is often not considered a form of ADR.

96 STIENSTRA, supra note 77, at 6 (commenting, however, that “[w]e can be certain that a greater number of districts use settlement conferences, but many very likely do not mention this procedure in their ADR provisions”).

97 Many federal district courts provide comprehensive ADR provisions without including procedures for settlement conferences. See, e.g., D.D.C. CIV. R. 84–84.10; M.D. FLA. R. 9.01–07; S.D. IND. LOCAL ADR RULES; W.D. MO. MEDIATION & ASSESSMENT PROGRAM; D. NEB. MEDIATION PLAN; D.N.H. CIV. R. 53.1; D.N.H. GUIDELINES FOR MEDIATION PROGRAM; E.D.N.Y. R. 83.7 (arbitration); id. R. 83.8 (mediation); N.D.N.Y. MANDATORY MEDIATION PROGRAM (General Order 47); W.D.N.Y. ADR PLAN; M.D.N.C. CIV. R. 83.9a–9g; N.D. OHIO CIV. R. 16.4–7; S.D. OHIO CIV. R. 16.3; S.D. OHIO CIV. R. SUPP. PROCEDURES FOR ADR; E.D. TEX. COURT-ANNEXED MEDIATION PLAN (General Order 14-6). Similarly, local rules on pretrial procedures often include specific provisions on mediation, or ADR more generally, without mentioning settlement conferences. See, e.g., C.D. CAL. R. 16-15; D. COLO. CIV. R. 16.6; N.D. FLA. R. 16.3; S.D. FLA. R. 16.2; N.D. GA. CIV. R. 16.7; S.D. GA. CIV. R. 16.7.5; D. KAN. R. 16.3; D. MASS. R. 16.4; E.D. MO. R. 16.01–05; D.S.C. CIV. R. 16.03–12; D. UTAH CIV. R. 16.2; D. VT. R. 16.1; N.D. W. VA. CIV. R. 16.06. Rules on pretrial do sometimes mention settlement likelihood or prospects as a topic for discussion at pretrial conferences, but without providing procedures for settlement conferences. See, e.g., D. DEL. R. 16.1; M.D. FLA. R. 3.06(b); S.D. FLA. R. 16.1; D. MASS. R. 16.3(a); D.N.H. CIV. R. 16.3(c); N.D.N.Y. R. 16.1(d); M.D.N.C. CIV. R. 16.1(b). Or, they may contain detailed provisions that are limited to procedures for managing the settlement process. See, e.g., D.D.C. CIV. R. 16.3. When there is a rule that specifically authorizes or governs settlement conferences, it is typically separate from the rule on ADR processes. See, e.g., E.D. CAL. R. 270, 271; D. Haw. R. 16.5, 88.1; C.D. ILL. R. 16.1, 16.4; N.D. IND. R 16.1, 16.6; N.D. MISS. R. 16(g), 83.7; D.N.J. CIV. R. 16.2(a), 201.1, 301.1. There are exceptions. Some courts specify procedures for settlement conferences and ADR under the umbrella of the same rule. See, e.g., D. ALASKA CIV. R. 16.2(c); N.D. CAL. ADR R. 3.4(c), 7.1–5; D. CONN. CIV. R. 16(c), (h); D. IDAHO CIV. R. 16.4; W.D. MICH. CIV. R. 16; E.D.N.C. ADR R. 101.2; W.D.N.C. CIV. R. 16.3(D); W.D. OKLA. CIV. R. 16.2–3; M.D. PA. CIV. R. 16.7–9.5; D.R.I. ADR PLAN.
requiring) parties to participate and considering what timing would be productive for settlement discussions. With multiple ADR options available, management functions expanded. In many courts, judges became involved in pretrial settlement planning by assessing cases for the ADR program and, in courts with multiple processes, matching them with a specific ADR process.

An analysis of the current local federal rules reveals that judges are assigned multiple management functions for the settlement processes that courts offer through their ADR programs. In some districts, they play a role in selecting a neutral, in the timing of the process, or in setting the fees for a neutral. The most common judicial management function, however, is selecting an appropriate dispute resolution process. Many districts emphasize consultation with the judge at a case management conference as a means to encourage settlement efforts or to help the parties decide on the most appropriate dispute resolution process for their case.

98 Professor Carrie Menkel-Meadow identified three new management functions associated with the new ADR programs: “selecting cases for ADR, providing ADR neutrals, and managing cases that have been referred to ADR.” Carrie J. Menkel-Meadow, Judicial Referral to ADR: Issues and Problems Faced by Judges, FJC DIRECTIONS, Dec. 1994, at 8, 8. Each district had to decide whether to address these issues with a court-wide policy, assign them to staff, or include them as part of individual judges’ pretrial functions. Id.; see also SECTION OF DISPUTE RESOLUTION, AM. BAR ASS’N & INT’L CTR. FOR DISPUTE RESOLUTION, PRESENTING DISPUTE RESOLUTION TO JUDGES: A GUIDE FOR DEVELOPING JUDICIAL TRAINING ON ALTERNATIVE DISPUTE RESOLUTION 31 (1996) (listing the roles of judges in ADR as “[p]rogram planning & implementation, [n]eutral selection, [c]ase assessment, ADR referral, [c]oordination between ADR and litigation ([c]ase monitoring, [j]udicial action, [and] [e]nsuring compliance), [and] [f]eedback on neutral and program effectiveness”).

99 See J. Daniel Breen, Mediation and the Magistrate Judge, 26 U. MEM. L. REV. 1007, 1012–13 (1996) (reporting that in the Western District of Tennessee, the local rule required discussions about settlement processes at the initial Rule 16(b) conference, with a determination of what ADR process would be most effective); Menkel-Meadow, supra note 98, at 8–9 (discussing factors relevant to the selection of cases for ADR processes by judges); id. at 11 (discussing the educational function of judges in assisting attorneys and parties to choose an appropriate process); see also NAT’L ADR INST. FOR FED. JUDGES, JUDGE’S DESKBOOK ON COURT ADR pt. C, at 53–60 (Elizabeth Plapinger et al. eds., 1993) (materials prepared for an educational institute on ADR for federal judges).

100 See, e.g., D. ALASKA CIV. R. 16.2(e); N.D. GA. CIV. R. 16.7(F)(1); S.D. GA. CIV. R. 16.7.4; D. HAW. R. 88.1(d); D. IDAHO CIV. R. 16.4(b)(3)(D); D. KAN. R. 16.3(c)(1); W.D. LA. CIV. R. 16.3.1; E.D. TEX. COURT-ANNEXED MEDIATION PLAN pt. VI (General Order 14-6); E.D. WASH. R. 16.2(g); S.D. W. VA. CIV. R. 16.6.2; E.D. WIS. CIV. R. 16(d)(4)(D).

101 See, e.g., N.D. CAL. ADR R. 5-5, 6-5; E.D. TEX. COURT-ANNEXED MEDIATION PLAN pt. VI (General Order 14-6).

102 See, e.g., S.D. TEX. CIV. R. 16.4.G.

103 See, e.g., D. DEL. R. 16.1; D. HAW. R. 16.2(a)(11); C.D. ILL. R. 16.4(D); D. KAN. R. 16.3(c); D. ME. R. 16.3(b)–(c), 83.11; D. MASS. R. 16.4(b); D.N.H. CIV. R. 53.1(a); N.D.N.Y. R. 16.1(d)(10), (14), (15); S.D.N.Y. R. 83.9; W.D.N.Y. CIV. R. 16.2(b)–(c); N.D. OHIO CIV. R. 16.3(b); S.D. OHIO CIV. R. 16.3(a); W.D. TENN. CIV. R. 16.3; D. UTAH CIV. R. 16-2(c); E.D. WIS. CIV. R. 16(d) (ADR evaluation conference).
make their ADR programs strictly voluntary by rule, many more districts grant judges authority to select a process and refer the parties, with or without their consent. Hence, judges are often expected to participate in the decision to use dispute resolution, and they are frequently assigned responsibility for referring the parties to a particular process.

Again, rather than leading change, Rule 16 was revised in a way that merely responded to these developments. The 1993 amendments to the Federal Rules of Civil Procedure reacted boldly to concerns about expense and delay with controversial new discovery provisions: initial disclosures of information and presumptive limits on the number of depositions and interrogatories. The settlement amendments to Rule 16, however, did no more than refine the authorization for judges’ involvement in planning in a way that recognized the widespread adoption of court dispute resolution programs in the wake of the CJRA. A change in language emphasized the availability of court settlement procedures beyond the traditional judicial procedures.
settlement conferences, and the advisory committee notes stressed the new judicial planning roles that accompanied these expanded settlement opportunities.

Further, this amendment to Rule 16 reflected the institutionalization of ADR programs at the district court level through the local expense and delay plans. The Rule contained a new reference to procedures “authorized by statute or local rule,” which signified a shift from experimentation by individual judges to more predictable procedures adopted by each district. In this way the amendment could be seen as a mild limitation on judicial discretion. The overall message, however, emphasized the great degree of discretion associated with settlement. The Seventh Circuit had recently upheld the exercise of judicial discretion to order a party to attend a Rule 16 settlement conference as grounded in the court’s inherent power. Although procedural rules can limit courts’ authority to use their inherent power, the drafters of the 1993 amendments did not seek to restrict this exercise of discretion. Instead, the advisory committee notes contain multiple references recognizing the inherent powers of courts in the context of settlement and disavowing any intent to limit reasonable judicial exercise of those powers. Thus the amendments were consistent with the views of judges who rejected the proposition that Rule 16 was “designed as a device to restrict or limit the authority of the district judge in the conduct of pretrial conferences.” And significantly, the Rule’s endorsement of a broad scope of judicial discretion

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109 The new rule replaced the reference to “extrajudicial” settlement procedures, FED. R. CIV. P. 16(c)(7) (1983), with language authorizing judges to consider and “take appropriate action, with respect to . . . settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule.” FED. R. CIV. P. 16(c)(9) (1993).

110 FED. R. CIV. P. 16(c) advisory committee’s note on 1993 amend. (“[T]he judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration . . . .”).


112 See In re Atl. Pipe Corp., 304 F.3d 135, 142 (1st Cir. 2002) (“[T]he words ‘when authorized by statute or local rule’ are a frank limitation on the district courts’ authority to order mediation [under Rule 16] . . . .” (quoting FED. R. CIV. P. 16(c)(9) (1993))).

113 G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 650 (7th Cir. 1989) (en banc).


115 FED. R. CIV. P. 16(c) advisory committee’s note on 1993 amend. (acknowledging inherent judicial authority to require disputants to engage in settlement procedures without their agreement and to require party participation).

116 G. Heileman Brewing Co., 871 F.2d at 652.
continued to blend the (now expanded) pretrial roles of promoting, organizing, and planning for settlement with authorization for judges to act as the settlement neutrals.

D. Stage 4: Influence of Mediation on Judicial Settlement Practices

In a fourth phase of development that overlaps chronologically with the growth of ADR programs in courts, the nature of judicial involvement in settlement has continued to evolve. Although there is a dearth of information on how judges actually behave in settlement, there is some evidence that in recent decades mediation has exerted an increasing influence on judicial settlement activity. Mediation practices and norms appear to have had a discernable effect on how many judges conceive their role—and on what they actually do—when they act as settlement neutrals. These developments in the way judges exercise this role make separating it from their adjudicatory and management functions all the more important.

By the mid-1990s, commentators were reporting that “most federal judges favor and actively promote settlement,” creating what James Alfini described at the turn of the century as a “settlement culture” in the courts. In this culture, judges not only encourage settlement by referring parties to ADR processes, but they also frequently intervene directly in a role that Alfini tellingly labeled as “a mediator or case evaluator.” Alfini’s phrase reflects many judges’ expanded conception of their settlement roles to include facilitative mediation, but at the same time signals the ongoing vitality of more traditional settlement styles focused on evaluation.

In recent decades, judges have seen the growth in popularity of private mediation and the establishment of court-annexed mediation programs. They have had opportunities to learn to mediate: there are mediation training programs for judges and articles for judges explaining how to mediate.

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120 Alfini, supra note 119, at 11.

121 See infra notes 137–53 and accompanying text.

122 Organizations focused on judicial administration and the education of state and federal judges, such as the National Center for State Courts, Institute for Court Management, Federal Judicial Center, and the National Judicial College, have included
Judicial writing is replete with enthusiastic stories about the benefits of mediation and what Professor Jennifer Reynolds has called “conversion narratives” that focus on the “substantive justice benefits” of mediation’s alternative perspective. Some courts have established mediation programs in which judges officially serve as mediators. More generally, many individual judges now incorporate aspects of mediation when they serve as a settlement neutral. In this context there are judges who conduct what they


The influence of these programs is indicated by the number of judicial authors writing about settlement who describe receiving mediation training tailored for judges. See, e.g., Harold Baer, Jr., History, Process, and a Role for Judges in Mediating Their Own Cases, 58 N.Y.U. Ann. Surv. Am. L. 131, 147 (2001); Stephen G. Crane, Judge Settlements Versus Mediated Settlements, Disp. Resol. Mag., Spring 2011, at 20, 21; Dan Aaron Polster, The Trial Judge as Mediator: A Rejoinder to Judge Cratsley, Mayhew-Hite Rep. on Disp. Resol. & Cts. n.3 (2006), http://moritzlaw.osu.edu/epub/mayhew-hite/vol5iss1/lead.html [https://perma.cc/5A6B-2JK2]. The educational trend is not limited to the United States. See Otis & Reiter, supra note 81, at 367 n.68 (stating that in Canada, the National Judicial Institute offers training programs in judicial mediation). But see John C. Cratsley, Judicial Ethics and Judicial Settlement Practices: Time for Two Strangers to Meet, 21 Ohio St. J. on Disp. Resol. 569, 576 (2006) (claiming that many judges have no formal mediation training and tend to rely on “procedures borrowed from ADR” combined with “personal settlement techniques”).


127 See, e.g., Cratsley, supra note 122, at 573–74 (listing mediation techniques borrowed by settlement judges).
explicitly label as “mediation,”128 and other judges who advocate techniques for what they call “settlement conferences” that closely resemble methods associated with facilitative mediation.129 When set alongside more traditional judicial roles in settlement, the result is a melange of many different approaches.

The labels “mediation” and “settlement conference” are not very helpful for informing parties what to expect in a settlement process. As a starting point, although local court rules frequently authorize the two processes separately,130 creating an implication that they are distinct processes with separate identities, there is no precise understanding of the differences between them.131 The labels encompass widely varying and overlapping practices, making their use problematic.132 As might be expected from a process that is considered part of managing cases, a judge hosting a conference might issue orders and limit issues, or alternatively conduct a process that appears identical to a mediation session.133 To confuse matters even more, although the type of process can have important legal consequences for confidentiality protections,134 participants and observers often make no distinction at all

128 Karen K. Klein, A Judicial Mediator’s Perspective: The Impact of Gender on Dispute Resolution: Mediation as a Different Voice, 81 N.D. L. REV. 771, 785 (2005); Kristena A. LaMar, I Think I Blew It, DISP. RESOL. MAG., Spring 2011, at 12, 13; Steven J. Miller, Judicial Mediation: Two Judges’ Philosophies, LITIGATION, Spring 2012, at 31, 38 (interview of Judge Polster).

129 Morton Denlow, Settlement Conference Techniques: Caucus Dos and Don’ts, JUDGES’ J., Spring 2010, at 21, 23 (advocating principles identified with mediation such as “client control of the outcome,” “confidentiality,” “creative resolution possibility,” and “preserving a continuing relationship”); Michael R. Hogan, Judicial Settlement Conferences: Empowering the Parties to Decide Through Negotiation, 27 WILLAMETTE L. REV. 429, 441 (1991) (describing the judge’s role as a “communication link[] between the parties”); id. at 443–44 (characterizing the settlement process as “reorient[ing] the parties away from competitive posturing” toward problem solving); id. at 445 (placing emphasis on exploring “underlying interests”); id. at 445–46 (emphasizing the need to listen and attend to feelings); see also Welsh, supra note 126, at 1019–21 (discussing the blurring of lines between settlement conferences and mediation).

130 See supra notes 94–97 and accompanying text. But see D.N.D. R. 16.2 (authorizing “mediation in the form of court-sponsored settlement conferences held by judicial officers”).

131 Stienstra, supra note 95, at 7 n.1 (arguing that categorizing settlement conferences as distinct from ADR is problematic due to a lack of firm definitions of the processes).


133 UNIF. MEDIATION ACT § 3(b)(3) cmt. (UNIF. LAW COMM’N 2003).

134 For example, in California the protection for confidentiality of communications in mediation does not apply to judicial settlement conferences. CAL. EVID. CODE § 1117(b)(2) (West 2009); see also Foxgate Homeowners’ Ass’n v. Bramalea Cal., Inc., 25 P.3d 1117, 1124 n.8 (Cal. 2001) (finding that confidentiality was required when a judge’s role was
between settlement conferences and mediation, treating them as equivalent.\textsuperscript{135} Others simply label them based on the position of the neutral, calling any settlement procedure conducted by a judge a “conference.”\textsuperscript{136} This lack of clarity in terminology illustrates the difficulty of distinguishing the processes based on their characteristics.

Along with confusion about designations, the distinction, in actual practice, between judicial behaviors in settlement conferences and mediations is not particularly clear. Even when comparing settlement conferences conducted by judges with mediations conducted by private neutrals, the contrasts are based, at best, on loose generalizations about the processes. In characterizing mediation and settlement conferences, Roselle Wissler notes a greater tendency in mediation to emphasize party involvement and to give prominence to the importance of parties’ views and interests.\textsuperscript{137} As a corollary to this, mediators are likely to spend more time “eliciting information from the

defined by party agreement as “act[ing] as [a] mediator for settlement conferences”). In contrast, the coverage of the Uniform Mediation Act, which establishes a privilege for mediation communications, does not rest on a distinction between mediation and settlement conferences. Instead, mediations “conducted by a judge who might make a ruling on the case” are excluded from coverage by the Act. UNIF. MEDIATION ACT § 3(b)(3).

\textsuperscript{135} See, e.g., Cratsley, supra note 122, at 571 (combining judicial mediation and settlement conferences under the label “settlement activity”); Hogan, supra note 129, at 445, 453 (referring to a judge conducting a settlement conference as a “judge mediator”); Robert A. Holtzman & Jeff Kichaven, Recent Developments in Alternative Dispute Resolution, 39 TORT TRIAL & INS. PRAC. L.J. 195, 213 (2004) (describing a court settlement process that was variously referred to as “mediation” and “settlement conference” despite the difference in applicable confidentiality rules and statutes); David A. Katz, Mediation—A Judge’s Views on Judicially Monitored Settlement Conferences, LITIGATION, Summer 2009, at 3, 3 (using terms interchangeably); Menkel-Meadow, supra note 16, at 510 (noting that some judges conducting settlement conferences call themselves mediators and are referred to as mediators); Rich, supra note 49, at 530 (identifying a settlement conference procedure as “mediation”); see also STACY LEE BURNS, MAKING SETTLEMENT WORK: AN EXAMINATION OF THE WORK OF JUDICIAL MEDIATORS (2000) (referring to active judges conducting settlement conferences in court and retired judges conducting private mediations using the single term “judicial mediator”).

\textsuperscript{136} Martin A. Frey, Does ADR Offer Second Class Justice?, 36 TULSA L.J. 727, 733 (2001) (“If the mediator is a judge, . . . the process is called a settlement conference.”).

parties than providing information to them.”

Their orientation toward facilitating party self-determination makes mediators less likely to use “strong-arm tactics” than judges in settlement conferences. And mediators are thought to be more likely to adopt a problem-solving approach than the predictive or evaluative methods typically associated with judges.

Wissler stresses, however, that these differences between judicial settlement conferences and private mediations are “more a matter of degree than kind.”

Difficulties in separating the processes stem in part from the wide range of approaches that mediators employ, which can encompass both facilitation and evaluation. Moreover, the plethora of retired judges who

138 Wissler, supra note 137, at 291; see also Wayne D. Brazil, Hosting Mediations as a Representative of the System of Civil Justice, 22 OHIO ST. J. ON DISP. RESOL. 227, 233 n.9 (2007) (observing that, as a magistrate judge conducting settlement conferences, he talked more than court-trained mediators).

139 Brown, supra note 137, at 8 (describing judges as “widely perceived” to be “less interested than many mediators in . . . enhancing your client’s sense of personal empowerment over the resolution of the case”); Wissler, supra note 137, at 291–92.

140 Wissler, supra note 137, at 291–92.

141 Id. at 292; see also Craig A. McEwen, Pursuing Problem-Solving or Predictive Settlement, 19 FLA. ST. U. L. REV. 77, 78–79 (1991); Carrie Menkel-Meadow, Judges and Settlement: What Part Should Judges Play?, TRIAL, Oct. 1985, at 24, 27–28 (arguing that judges often act as arbitrators or adjudicators during settlement conferences); Pyle, supra note 137, at 21 (“[J]udges are ‘evaluators’ while . . . mediators are ‘facilitators.’” (quoting Charles B. Wiggins, professor and mediator)). Settlement conferences are also characterized as taking less time than mediation and as cheaper because there is no need to compensate a private neutral. Baer, supra note 122, at 146; Brown, supra note 137, at 8–9; Pyle, supra note 137, at 22.

142 Wissler, supra note 137, at 291 n.82; see also Hensler, supra note 117, at 17 (suggesting that settlement conferences are much like mediation, which is often evaluative and distributive); Nancy A. Welsh, The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?, 6 HARV. NEGOT. L. REV. 1, 25–26 (2001) (noting “uncanny resemblance” between settlement conferences and court-connected mediations, which often emphasize legal issues).


The lack of agreement on what constitutes “mediation” is reflected in a debate on what should be appropriately included in a mediator’s role. Compare, e.g., Kimberlee K. Kovach
have developed second careers as private mediators has further muddied the
distinction, as some of them have transferred stereotypical settlement
conference techniques to mediation.\footnote{144}{See James J. Alfini, \textit{Trashing, Bashing, and Hashing It Out: Is This the End of “Good Mediation”?}, 19 FLA. ST. U. L. REV. 47, 69 (1991).}

If it is difficult to separate judges’ behaviors in court settlement
conferences from those of private mediators, it is even more difficult to
distinguish between behaviors in “settlement conferences” and “mediation”
when both are court processes conducted by judicial officers.\footnote{145}{Edward J. Brunet, \textit{Judicial Mediation and Signaling}, 3 \textit{NEV. L.J.} 232, 238 (2002/2003) (observing that there is little difference between judicial mediation and a settlement conference); \textit{see also} Baer, \textit{supra} note 122, at 146 (stating that both mediation and settlement conferences “involve the judge’s recommendation as to an appropriate resolution”).} Professor Peter Robinson, who surveyed judges for a study of settlement practices in California, found that the judges did draw a distinction between the two processes, at least in terms of labels.\footnote{146}{They overwhelmingly reported that they call their settlement activity a “settlement conference” rather than “mediation.” Robinson, \textit{supra} note 122, at 358.} Questions designed to elucidate the
differences, however, revealed that judges who engaged in both settlement
conferences and mediation described a substantial overlap in the techniques
they used in the two settings.\footnote{147}{Id. at 373–78. These findings were limited by the sample size, \textit{see id.}, and when judges did report differences in their approaches to the two processes, they were consistent with Wissler’s characterizations of mediation versus settlement conferences. \textit{See supra} notes 137–41 and accompanying text.}

The picture that emerges from recent accounts of judges’ approaches to
settlement in these two contexts is one of some convergence between the
processes, but with significant variation that seems to depend largely on individual style and training. Notwithstanding the judges who identify themselves as facilitators, many judges believe that lawyers and parties want an evaluation. And certainly judges’ adjudicatory experience can predispose them to an evaluative role. A judge’s approach may also reflect the stage of the settlement talks. Several judges, for example, describe beginning a conference with a facilitative approach and moving toward a more evaluative mode.

It appears that facilitative mediation has become a more important part of the mix of approaches that parties encounter in judicial settlement processes, but it coexists with a more traditional conception of an evaluative, and even directive, settlement judge. This coexistence has two consequences for the regulation of these processes. First, it does not make sense to regulate judicial

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148 Professor Robinson concluded that California general civil trial court judges were less directive and had a broader focus during settlement conferences than generally expected. Peter Robinson, Settlement Conference Judge—Legal Lion or Problem Solving Lamb: An Empirical Documentation of Judicial Settlement Conference Practices and Techniques, 33 AM. J. TRIAL ADVOC. 113, 124–39 (2009).

149 Judge Cratsley’s interviews with superior court judges in Massachusetts revealed dramatically different approaches to settlement. Cratsley, supra note 117, at 5–6; see also Agnes, supra note 82, at 265, 282 (describing variations in number of settlements, timing of settlements, and quality of settlement processes); Jonathan M. Hyman & Milton Heumann, Minitrials and Matchmakers: Styles of Conducting Settlement Conferences, 80 JUDICATURE 123 (1996) (contrasting approaches to settlement used by New Jersey judges).

150 Moreover, judicial styles are not necessarily static; some judges report that they have changed their approach over time. See, e.g., LaMar, supra note 128, at 14 (describing the evolution of her settlement process to involve clients, joint sessions, and expression of emotions).

151 Compare, for example, Judge Polster’s description of himself as “a facilitator” in mediation, Miller, supra note 128, at 38 (quoting Judge Polster), with Professor Brunet’s observation that most judges who mediate use primarily an evaluative style, Brunet, supra note 145, at 235.

152 Klein, supra note 128, at 784–85; see also Aldisert, supra note 38, at 248 (observing that many cases involve a disagreement on value, not facts, and “I am usually asked my suggestion of value and I have no hesitation in offering my ideas”); Baer, supra note 122, at 136 (describing how caucuses can provide a judge with a view of the appropriate resolution of the case, the “hallmark” of evaluative mediation); Brown, supra note 137, at 9 (asserting that many judges and lawyers believe evaluative techniques contribute to settling as many cases as possible); Crane, supra note 122, at 21 (retired judge observing that parties who hired him as a mediator expected an opinion on the merits). But see Dein, supra note 126 (expressing hesitancy to predict outcomes based on the limited information available to her in mediation); Otis & Reiter, supra note 81, at 369 (urging that in Canada a judge-mediator should refrain from expressing any opinion on the legal merits).

involvement in mediation and settlement conferences separately, as is now typically done in local federal rules.\textsuperscript{154} Second, any form of regulation must take into account the great variation in styles and approaches that judges deploy as neutrals in these processes. While evaluative techniques emphasize predictions and suggestions that flow from the neutral to the attorneys and parties, use of facilitative techniques mean that information flows in the opposite direction.\textsuperscript{155} This information is different in kind from the knowledge about a case that a judge ordinarily gains as part of pretrial management, in deciding pretrial motions, and at trial. And it can come from an additional source—the parties—as well as the attorneys.\textsuperscript{156} As a consequence, the increased popularity of mediation makes settlement by adjudicative judges more problematic.

The current version of Rule 16\textsuperscript{157} accommodates this variety of judicial approaches and settlement styles by its silence on this matter, which translates into granting judges nearly complete discretion for conducting settlement proceedings. The Rule 16 framework continues to blend authorizations for disparate judicial functions related to settlement. This extends the discretion associated with pretrial management to the role of settlement neutral, allowing judicial officers to host a settlement conference or mediate even when assigned to the case.

\textsuperscript{154} See supra note 97 and accompanying text.
\textsuperscript{155} See supra text accompanying note 138; infra text accompanying notes 230–32.
\textsuperscript{156} See supra text accompanying note 137.
\textsuperscript{157} After stylistic revisions in 2007, the pertinent part of Rule 16 now reads:

Rule 16. Pretrial Conferences; Scheduling; Management

(a) PURPOSES OF A PRETRIAL CONFERENCE. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

\begin{itemize}
  \item (5) facilitating settlement.
\end{itemize}

(c) ATTENDANCE AND MATTERS FOR CONSIDERATION AT A PRETRIAL CONFERENCE.

(1) Attendance. A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

(2) Matters for Consideration. At any pretrial conference, the court may consider and take appropriate action on the following matters:

\begin{itemize}
  \item (l) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule . . . .
\end{itemize}

FED. R. CIV. P. 16.
III. NEUTRAL ROLES: WHEN A DECIDER BECOMES A SETTLER

The following section starts in Part III.A by examining the benefits of judicially-led settlement, but then distinguishes settlements led by an assigned judge from those led by other judicial officers. In Part III.B, it explains why the blending of adjudicatory and settlement functions is problematic for two reasons: the potential for coercion in settlement and the dangers of undermining the impartiality at the heart of our adjudicatory values. These risks are exacerbated by the trend toward the use of facilitative mediation techniques by judges. The concerns are expressed by attorneys with experience in judicial settlement and by some judges, as well as by academics. Crucially, they are supported by modern scientific understandings of cognition and decisionmaking processes, which are outlined in Part III.C.

A. The Advantages of Judicially-Led Settlement

There can be distinct advantages to settlement conducted by a judicial officer. An individual judge may have a reputation for wisdom and fairness, and these traits also tend to be imputed in general terms from the “gravitas” of the judge’s position and respect for the moral authority and integrity associated with the impartiality and independence of their office. Other advantages stem from the legal acumen and experience that a judge brings to a settlement process. These factors do not compensate for lack of skill, but


160 See, e.g., BURNS, supra note 135, at 208–10 (describing legal content in mediations conducted by judges: legal reasoning; argumentation; precedent; knowledge of local juries, judges, court procedures, and outcomes in similar cases); Dein, supra note 126 (describing advantages of experience in the courtroom for her role as a mediator); Marcus, supra note 15, at 1592 (noting that settlement conferences provide the parties with the “insights of an experienced outsider about the strengths and weaknesses of a case”).

161 Claudia L. Bernard, Is a Robe Ever Enough? Judicial Authority and Mediation Skill on Appeal, DISP. RESOL. MAG., Spring 2011, at 16, 17 (arguing that a judge’s status and authority do not trump skill and experience as a mediator); Stephen B. Goldberg et al., What Difference Does a Robe Make? Comparing Mediators With and Without Prior Judicial Experience, NEGOT. J., July 2009, at 277, 277 (finding that the capacity of a mediator to gain the confidence of the disputants was the most important factor in attorneys’ judgments about why a mediator is successful).
judges who combine skill with the attributes of their position can be particularly effective settlement neutrals.\textsuperscript{162}

Judges carry special credibility for functions that draw on legal analysis and expertise: evaluating the value of a case, analyzing parties’ positions, and predicting outcomes.\textsuperscript{163} Significantly, many lawyers see these activities as an important contribution toward settlement. Based on his survey of lawyers, Wayne Brazil characterized the strength of judges’ contribution as “skill in judging.”\textsuperscript{164} He concluded that “[l]awyers value penetrating, analytical exposition and thoughtful, objective, knowledgeable assessment. They want the judges’ opinions. They want the judges’ suggestions. They want the perspective of the experienced neutral.”\textsuperscript{165} Lawyers cite the benefits of a judge who provides a “reality check” for a client who has an inflated view of the strength of her case.\textsuperscript{166} Judges may also provide insights about the litigation process that a client may not have fully accepted even if he previously heard the same information from counsel.\textsuperscript{167} While any mediator may (and some routinely do) provide such information, explanations about the hurdles involved in proving a case or sobering assessments of its strength can be particularly effective coming from a sitting judge.\textsuperscript{168} A judge’s current, direct

\textsuperscript{162} Alexander, supra note 118, at 652 (noting that the “primary reason why settlement conferences are so effective is the authority and expertise of the judge who conducts them”); Cratsley, supra note 122, at 574 (“[N]o one can dispute that a judge has the greatest standing and resources to promote settlement.”).

\textsuperscript{163} In Professor Wissler’s study of attorneys’ views of settlement neutrals, judges were seen as having more “credibility regarding settlement considerations” than court staff mediators, private mediators, or volunteer mediators. Wissler, supra note 137, at 292, 293 tbl.7; see also Brunet, supra note 145, at 239 (noting the “evaluative legitimacy” of judges); Pyle, supra note 137, at 21 (stressing the advantage of a “credible evaluator” in a settlement conference). But see Dein, supra note 126 (judge noting that when she serves as a mediator she has limited information and no sense of the witnesses, and is therefore loath to make predictions).

\textsuperscript{164} BRANZIL, supra note 59, at 45.

\textsuperscript{165} Id. Judges also consider these activities as important for encouraging settlement. See Hogan, supra note 129, at 450; Zampano, supra note 137, at 69. There is some empirical evidence to support these views. See Bobbi McAdoo et al., Institutionalization: What Do Empirical Studies Tell Us About Court Mediation?, DISP. RESOL. MAG., Winter 2003, at 8, 9 (reporting that cases are more likely to settle and litigants are more likely to assess mediation as fair when mediators disclose their view on the merits or value of a case).

\textsuperscript{166} See, e.g., Martin, supra note 159, at 192; see also Hogan, supra note 129, at 449 (opining that judges can ensure a realistic view of liability and damage issues).

\textsuperscript{167} Dale, supra note 159, at 59 (citing example of providing information about burden of proof); Polster, supra note 122 (judge noting that clients will accept information from him when they were unwilling to listen to their attorney).

\textsuperscript{168} Crane, supra note 122, at 20–21; Dale, supra note 159, at 47; Martin, supra note 159, at 192; see also Goldberg et al., supra note 161, at 288 (finding that lawyers rate evaluation skills as more important to the success of former-judge mediators than nonjudge mediators).
experience with local juries and motions outcomes heightens confidence in her predictions.169

In addition to the advantages of their informed legal analysis, the participation of a judge also offers the possibility of some psychological benefits. Many judges believe that, for some clients, an ADR session with a sitting judge can provide a satisfactory substitute for having a day in court.170 Observers also credit the participation of a sitting judge with beneficial effects on litigants’ behavior.171 Attorneys may act more constructively when there is a chance that they will appear before the judge in the future.172

Finally, a judge’s participation as a settlement neutral can promote the interests of justice. Support for court settlement programs is consistent with a vision of courts as public institutions that provide services to help parties resolve their disputes in a holistic manner.173 ADR programs that rely on referrals to outside mediators or other neutrals impose costs that litigants do not incur when a court provides the settlement process. Furthermore, when settlement neutrals are judicial officers, at least some observers credit them with using their skills and powers to achieve substantive outcomes in settlement that promote the interest of justice,174 that the parties think are fairer than an imposed decision,175 and that may serve the parties’ needs and interests better than adjudication.176

Many of these real advantages of judicial settlement or mediation can be achieved with a separate settlement judge—one who is not assigned for pretrial development or to preside at trial. Some do argue that a judge’s contribution is stronger if the settlement effort is led by the assigned judge.177

For example, there are judges who believe that parties are more likely to feel they have had a true “day in court” when they can tell their story to “their”

169 For example, with a jury trial, a sitting judge has credibility in predicting how a local jury will react to a case, or in highlighting the unpredictability of jury deliberations. Campbell Killefer, Wrestling with the Judge Who Wants You to Settle, LITIGATION, Spring 2009, at 17, 19. Some commentators believe that current local knowledge gives sitting judges credibility that even retired judges lack. See, e.g., Brown, supra note 137, at 8; Dale, supra note 159, at 47. But see BURNS, supra note 135, at 209 (citing use of “experience-based local knowledge” by both sitting and retired judge-mediators).

170 Crane, supra note 122, at 22; Dale, supra note 159, at 47; Lynch, supra note 58, at 58; Miller, supra note 128, at 33 (quoting Judge Polster).

171 See, e.g., Martin, supra note 159, at 192–93.

172 Id. at 193.

173 See Brazil, supra note 138, at 240–41.


175 Hogan, supra note 129, at 436.

176 Menkel-Meadow, supra note 16, at 504.

177 See, e.g., Craver, supra note 123, at 42 (noting the argument that settlement participants are more conciliatory and less likely to exaggerate the strength of their case with the judge assigned for trial because they don’t want to appear obstinate before the future decisionmaker).
However the parties’ perception that they have been heard is likely enhanced only incrementally when the assigned judge serves as the settlement judge, especially if the alternative is a judicial officer from the same court.\footnote{Brazil Interview, supra note 153, at 27 (quoting Judge Klein); Polster, supra note 122.}

The more significant advantage of settlement by an assigned judge, and the strongest argument against referral to another judicial officer, is probably informational.\footnote{Moreover, while “being heard” is an important element of a sense of procedural justice, it is probably related more to the behavior of a neutral than to her judicial status. See, e.g., Goldberg et al., supra note 161, at 298 (“The authority of the robe was sometimes a substitute for keen listening and creativeness and former judges therefore may not have developed these skills as well because they haven’t had to when they had the authority of the robe . . . .” (omission in original) (quoting survey respondent)).}

A judge who has ruled on pretrial motions and discovery issues has personal knowledge of the facts, the parties, and counsel that a colleague on the court cannot possess at the start of a settlement process.\footnote{See Brunet, supra note 145, at 257.}

This familiarity increases the efficiency of settlement\footnote{See, e.g., Menkel-Meadow, supra note 16, at 512 (attributing some of a judge’s settlement authority to the judge’s “power, control, or knowledge of the specific case”).} and may make the assigned judge more accurate in evaluating the strengths and weaknesses of the case.\footnote{Polster, supra note 122 (emphasizing the judge’s understanding of a case obtained from the case management conference and the limited time available to prepare for settlement of a case on another judge’s docket); see also Miller, supra note 128, at 35 (“There’s a lot of work that goes into a successful mediation . . . .” (quoting Judge McCarthy)); Polster, supra note 122 (emphasizing the importance of preparation for credibility); Zampano, supra note 137, at 4 (stressing need for the judge to be familiar with the case).}

The informational argument loses force, however, if settlement occurs early in the case before extensive pretrial activity.\footnote{Evaluation and prediction by an assigned judge has been endorsed as providing a signaling function that can inform parties’ assessment of their prospects at trial. Brunet, supra note 145, at 234.}

Moreover, the possible gains in efficiency when an assigned judge serves as settlement judge must be weighed against the very substantial risks.

**B. Risks of Judicially-Led Settlement**

There are risks to judicially-led settlement. And those risks are exacerbated when the settlement judge is also the managerial/adjudicatory judge. This Part presents arguments that these roles are in conflict and should be separated. First, the potential for coercion due to the behavior of the settlement neutral is greatly heightened when the parties will return to that neutral for pretrial and trial decisions. Second, there are dangers for both the settlement and decisionmaking processes. Either a party must forgo

\begin{footnotes}
\item[178]See generally John Lande, Lawyering with Planned Early Negotiation (2d ed. 2015).
\item[179]Polster, supra note 122 (emphasizing the importance of preparation for credibility). \end{footnotes}
participating fully in settlement by revealing information that could be instrumental, or it must accept the risk of impaired neutrality in adjudication if the case does not settle.

1. The Potential for Coercion

The potential for coercion was the original source of hesitation about a judicial role in settlement,¹⁸⁵ and it continues to be a frequent objection today.¹⁸⁶ A sense of being coerced into settling is in the eye of the parties and their attorneys, and there are two potential sources: judicial behaviors during settlement and pretrial decisions and management designed to encourage settlement.

When considering judicial behavior, it is helpful to remember that the role of a judge in the adjudication process is by its nature directive.¹⁸⁷ This personal experience, combined with the predilections of some judges, can lead them to be forceful arm twisters.¹⁸⁸ Such behavior on the part of any settlement neutral can threaten the parties’ self-determination, but there is a heightened danger when the behavior comes from a judge: the authority of the office accompanies a judge even in an informal process such as a settlement conference or mediation.¹⁸⁹ The gravitas that can be a positive source of credibility for a judge leading a settlement process can, when misused, turn the judge into a coercive authority figure in the parties’ eyes.¹⁹⁰

The potential for coercion is elevated many fold when the arm twisting, or even less forceful encouragement, comes from a judge who will have decisional power over the case if it does not settle.¹⁹¹ This stems from parties’

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¹⁸⁵ See supra notes 20–21 and accompanying text.
¹⁸⁶ See Brunet, supra note 145, at 248 (stating that the most common criticism of judicial settlement is that judges can be “overly coercive”).
¹⁸⁷ See, e.g., Goldberg et al., supra note 161, at 298 (“Because they’ve been judges, they’re used to being able to tell you what to do and what not to do.” (quoting a survey respondent, describing a retired-judge mediator)).
¹⁸⁸ Alfini, supra note 144, at 68–71 (describing “bashing” mediators, who are often retired judges); Brown, supra note 137, at 9 (acknowledging that judges’ approach can be “rough” and observing that this can have a negative effect on clients’ views of the civil justice system); Brunet, supra note 145, at 248; Marcus, supra note 15, at 1592 (noting instances when judges use “rather firm techniques of persuasion to obtain agreements”).
¹⁸⁹ See Otis & Reiter, supra note 81, at 367 (observing that maintaining party self-determination is a special challenge for judges, “since they will always remain judges in the eyes of the parties,” even in the “informal setting” of mediation).
¹⁹⁰ See Floyd, supra note 10, at 90 (“[T]he judge’s position, as opposed to the particular action of the judge, may have coercive effect.”).
¹⁹¹ Crane, supra note 122, at 22 (noting that the “environment is inherently coercive” when a settlement conference is conducted by the judge who will have power over the case at trial); see also UNIF. MEDIATION ACT § 3(b)(3) cmt. (UNIF. LAW COMM’N 2003) (recognizing “concern that party autonomy in mediation may be constrained either by the direct coercion of a judicial officer who may make a subsequent ruling on the matter, or by
natural fears that the judge’s subsequent rulings might be influenced by their failure to cooperate with the judge. Judges are under great docket pressure, and parties worry that repercussions could follow when the judge knows a party rejected a settlement backed by the judge. Defenders of a dual role for judges as a neutral, both in settlement and at trial, reject this specter of retribution as an unrealistic fear that underestimates judges’ understanding of their role. But even if judges are able to see the parties’ failure to settle in completely benign terms, a party’s perception may be very different. When a judge has urged settlement forcefully, a party may understandably interpret settlement as being important to that judge.

More generally, judges’ perceptions of their behaviors are not always aligned with the reactions of attorneys and parties. Actions that a judge may regard as merely supportive of settlement may nonetheless be perceived as pressure on a party due to the judge’s position of power over the case. For example, a judge’s pride in his “assertive” style, which he believes promotes settlement in difficult cases, can blind him to the risk that he is imposing settlement coercively.

It is impossible to assess accurately the degree to which parties perceive judges as unduly forceful in settlement, but there are too many troubling accounts of behavior that, even if only isolated instances, could be coercive.

the indirect coercive effect that inherently inures from the parties’ knowledge of the ultimate presence of that judge”).

192 Crane, supra note 122, at 22; Welsh, supra note 142, at 67.

193 Brunet, supra note 145, at 247; Frey, supra note 136, at 760; Longan, supra note 126, at 736–37.

194 Hogan, supra note 129, at 439 (“[J]udges who understand and use successful intervention tactics in the negotiation process would [not] blame one particular party for a case not settling.”) (emphasis omitted); see also Baer, supra note 122, at 148 (commenting that it is “demeaning . . . to suggest . . . that the judge cannot be fair regardless of the result of the mediation”).

195 See Molot, supra note 174, at 93 (arguing that a party urged by a judge to settle has an incentive to avoid proceeding before a potentially hostile judge); Schuck, supra note 158, at 359–61 (warning of judicial overreaching and the danger that lawyers will interpret judicial involvement in settlement as coercion).

196 D. MARIE PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES 92 (1986) (“Settlement-oriented judges . . . tend to resist the idea that judicial involvement in the settlement process might be coercive.”).


198 See Dodds v. Comm’n on Judicial Performance, 906 P.2d 1260, 1270 (Cal. 1995) (concluding that judge’s interruptions and unprovoked displays of anger “exceed[ed] his proper role and cast[] disrepute on the judicial office”); see also Peskin v. Peskin, 638 A.2d 849, 858 (N.J. Super. Ct. App. Div. 1994) (finding comments that were likely intended to force a decision on whether or not to settle instead “unquestionably had the effect of coercing defendant into agreeing to settle”).

199 See, e.g., Newton v. A.C. & S., Inc., 918 F.2d 1121, 1126 (3d Cir. 1990) (finding fine levied for reaching settlement after court’s deadline was coercive); Crane, supra note
Consider the judge who reportedly instructed plaintiff’s counsel to “tell his client he’d better settle or there would be ‘reverse interest’ if the damage award was lower.” Or the judge who threatened contempt and warned that he would take defendant’s refusal to settle into account in considering any fee application. Then there was the judge who allegedly threatened to report a party to the ethics committee if the mediation did not succeed. Even less explicit threats, such as an admonition to settle “because I can guarantee you much pain,” or a judge’s antagonistic reaction to counsel’s statement that mediation would not “work out right now,” can be interpreted as coercive. The potential coercion in all these instances, and the interference with the parties’ autonomy and self-determination in settlement, arises because the judge will become the decisionmaker if the case does not settle.

There can also be an important link between actions a judge takes in her pretrial management role—whether for the purpose of encouraging settlement or not—and a perception of coercion to settle. Tight scheduling timetables or the timing of decisions on pretrial motions are often interpreted as ways to increase pressure to settle. Preliminary rulings can increase or decrease

122, at 22 (reporting a judicial settlement technique “that amounts to little more than outright bludgeoning”); Cratsley, supra note 122, at 575 (stating that several state disciplinary counsel reported complaints of judicial coercion and intimidation in settlement conferences); Miller, supra note 128, at 37 (acknowledging that there are judicial officers who “are not thoughtful and principled about the pressure that they exert, both in fact and in perception, when they push for settlement”); Shoot & McGrath, supra note 197, at 33–34 (describing “arm twisting” judges in settlement); see also supra note 60 and accompanying text.

200 Hyman & Heumann, supra note 149, at 125.
201 Peskin, 638 A.2d at 858.
205 When a judge has forcefully or repeatedly urged settlement, comments that seem to attribute the failure to one party can lead to impressions of biased decisions. See, e.g., Davidson v. Lindsey, 104 S.W.3d 483, 488–92 (Tenn. 2003) (rejecting claims of bias when judge denied defendant’s motion for new trial after repeatedly remonstrating attorneys about the failure to settle).
206 See Steven S. Gensler & Lee H. Rosenthal, The Reappearing Judge, 61 KAN. L. REV. 849, 855 (describing the “misconception” that “case management is a process by which judges push reluctant parties to settle”).
207 See, e.g., Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, Inc., 124 F.R.D. 75, 79 (S.D.N.Y. 1989) (upholding order that accelerated the date of an expert’s deposition when one purpose was to facilitate settlement); Amanda Bronstadt, Pelvic Mesh Maker Bets on Trials; Unlike Other Defendants, Ethicon Isn’t Blinking, NAT’L L.J., Jan. 11, 2016, at 1, 1 (describing pressure to settle from judge scheduling a consolidated trial of thirty-seven cases).
uncertainty in ways designed to encourage settlement.\textsuperscript{208} Prospective decisions that rest with the court’s discretion and are of great importance to the lawyers—ranging from class certification to discovery decisions to admissibility of expert testimony—give the judge subtle and implicit leverage over the lawyers, who want the judge to view them as reasonable and cooperative.\textsuperscript{209} Using judicial decisions to create motivation to settle can be abused, or perceived to be abused, by a judge who is enthusiastically promoting settlement.\textsuperscript{210}

Unfortunately, mechanisms to remedy coercive judicial settlement behavior are not effective in practical terms. One problem is definitional. Courts consistently agree that a judge may not coerce or force a settlement,\textsuperscript{211} and some condemn even the appearance of coercion.\textsuperscript{212} Yet judges have abundant discretion in settlement, and the boundaries of appropriate judicial involvement are hazy. While the stricture against coercion in settlement may be clear at the extreme,\textsuperscript{213} the line at which a judicial practice crosses from (acceptably) encouraging a settlement to (unacceptably) coercing one is certainly not bright.\textsuperscript{214}

A second set of problems is procedural.\textsuperscript{215} Critical or even hostile remarks made during judicial proceedings ordinarily do not require recusal unless they stem from an extrajudicial source or are especially extreme.\textsuperscript{216} Standards for recusal are difficult to meet; unless a judge learns information outside of court proceedings, he must display such a “deep-seated favoritism or antagonism” that fair judgment would be impossible.\textsuperscript{217} Even when a judge’s comments are

\textsuperscript{208} Schuck, supra note 158, at 351–53 (discussing how preliminary rulings in the complex Agent Orange case assisted settlement: a decision precluding punitive damages reduced uncertainty about the stakes of the case, while key choice-of-law decisions increased uncertainty about its outcome).

\textsuperscript{209} Id. at 358–59 (attributing lawyers’ cooperation in settlement to “professional norms and strategic concerns”).

\textsuperscript{210} Id. at 360–61 (describing attorneys’ allegations of improper pressure by Judge Weinstein to achieve settlement in the Agent Orange case).


\textsuperscript{212} See, e.g., In re Ashcroft, 888 F.2d 546, 547 (8th Cir. 1989) (per curiam).

\textsuperscript{213} See, e.g., Goss Graphics Sys., Inc. v. DEV Indus., Inc., 267 F.3d 624, 627–28 (7th Cir. 2001) (reversing dismissal of suit imposed as a sanction due to parties’ failure to settle); Kothe, 771 F.2d at 669–70 (condemning coercion and reversing a sanction imposed when a case settled at trial after the insurance carrier agreed to pay the same amount the judge had recommended weeks earlier).

\textsuperscript{214} Floyd, supra note 10, at 83; Shoot & McGrath, supra note 197, at 34; Tornquist, supra note 50, at 752.

\textsuperscript{215} See generally Elliott, supra note 46, at 329–33 (criticizing active case management for lack of procedural safeguards); Resnik, supra note 1, at 424–35 (same).


\textsuperscript{217} Id. at 555.
motivated by “settlement fever,” they do not justify disqualification.\textsuperscript{218} Moreover, the decision to press a disqualification motion is a daunting prospect for a party who will later be appearing before that same judge if the motion fails.\textsuperscript{219} Finally, there is little opportunity for review of a judge’s settlement activity.\textsuperscript{220} It is an informal process that usually takes place off the record, often in the privacy of the judge’s chambers. As with much pretrial judicial activity, there are few procedural paths to an appellate court.\textsuperscript{221}

2. The Dilemma of Risk to Impartiality or Risk of Reticence

Many of the participants in the debate on judicial settlement have also expressed concern about a second danger that arises when the judicial officer leading the settlement will resume or assume a decisionmaking role if settlement is unsuccessful: the effect of the judge’s experience as settlement neutral on the capacity of the judge as adjudicator. The argument has been traditionally framed as one of bias or partiality: that involvement in settlement makes it difficult for a judge to maintain her neutrality about the case.\textsuperscript{222} As stated by James Alfini, “The judge \textit{qua} settlement agent may very well have formed opinions or impressions about the case that are inappropriate for the judge \textit{qua} adjudicator.”\textsuperscript{223}

For a traditional settlement conference that involves an evaluative approach, one of the primary criticisms of a judge presiding in a case she has tried to settle is that, by conveying her assessment of the case or suggestions for settlement options to the parties, she formed a preliminary judgment about the outcome that may trigger a tendency toward making subsequent judgments consistent with her initial views.\textsuperscript{224} This criticism has support from modern understandings of the effect of tentative opinions on cognitive functioning.\textsuperscript{225} Conversely, a decision that is inconsistent with the prior views a judge expressed as a devil’s advocate in caucus may equally cause a party to

\textsuperscript{218} Johnson v. Trueblood, 629 F.2d 287, 291 (3d Cir. 1980).
\textsuperscript{219} Floyd, \textit{supra} note 10, at 83.
\textsuperscript{220} \textit{Id.} at 82–83.
\textsuperscript{221} Either the situation must qualify for mandamus, or there must be an appealable order in the trial court (such as a sanctions order or dismissal) to provide a vehicle to challenge inappropriate settlement behavior. \textit{Id.} at 82. Ironically, when coercion to settle is effective, the case is closed, leaving no avenue to raise an objection. \textit{Id.} at 82–83.
\textsuperscript{222} Resnik, \textit{supra} note 1, at 426–31; Tornquist, \textit{supra} note 50, at 771–72; \textit{see also} Elliott, \textit{supra} note 46, at 327.
\textsuperscript{223} Alfini, \textit{supra} note 119, at 13.
\textsuperscript{224} \textit{See, e.g.,} Cratsley, \textit{supra} note 122, at 581; \textit{cf.} Lon L. Fuller, \textit{The Adversary System} (“An adversary presentation seems the only effective means for combating th[e] natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known.”), \textit{in TALKS ON AMERICAN LAW} 34, 44 (Harold J. Berman ed., rev. ed. 1971).
\textsuperscript{225} \textit{See infra} text accompanying notes 305–07.
question that judge’s impartiality. Yet, courts disagree as to whether taking a position on the merits of a case during an unsuccessful settlement conference creates an appearance of bias, leaving recusal uncertain.

When the criticism is framed, in this way, as a concern with the judge’s formulation of a premature evaluation of the case, one possible solution is that assigned judges should avoid making predictions or suggestions in settlement. Under this view, using facilitative mediation, rather than the evaluative approach associated with traditional settlement conferences, can alleviate the problem of bias because the judge avoids making predictions and providing suggestions for outcomes. From this perspective, the trend toward judges’ increased use of facilitative mediation is good news that reduces the danger to their subsequent neutrality as decisionmakers.

I believe that the opposite is true, and that the growth of judicial mediation poses new dangers for impartiality in subsequent decisionmaking. Although judges who adopt the role of a facilitative mediator are not as likely to evaluate the case for the parties, a facilitative approach to mediation tends to rely heavily on parties sharing information with each other and with the mediator. Moreover, many mediators have conversations with the parties separately in caucuses and take on the role of an intermediary between them. This intermediary role depends entirely on information gained in those private conversations. The danger to impartiality is the extensive

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227 Compare United States v. Pfizer Inc., 560 F.2d 319, 322–23 (8th Cir. 1977) (per curiam) (proposing that a settlement figure creates appearance of bias requiring judge’s recusal for a bench trial), and First Wis. Nat’l Bank of Rice Lake v. Klapmeier, 526 F.2d 77, 80 n.6 (8th Cir. 1975) (same), with Franks v. Nimmo, 796 F.2d 1230, 1233–34 (10th Cir. 1986) (finding no appearance of bias when judge urged plaintiff in ex parte meeting to settle because judge could not rule in his favor), and Smith v. Sentry Ins., 752 F. Supp. 1058, 1061–62 (N.D. Ga. 1990) (denying recusal request based on judge’s comments on the merits of plaintiff’s case during a settlement conference). Moreover, again, there are also procedural barriers to success with a motion to recuse or disqualify. See Floyd, supra note 10, at 83–84.

228 See, e.g., Kearny, 2007 WL 3171395, at *2 (opining that the ethical obligations of a presiding judge “limit[] the judge’s ability to speak candidly”).

229 Robinson, supra note 122, at 372–73; see also Brazil Interview, supra note 153, at 26 (Judge Klein expressing the view that parties are less likely to fear that settlement will color subsequent rulings if a judge uses a facilitative approach, whereas a highly evaluative style raises questions about a judge’s ability to remain neutral).


232 Often a mediator does not convey the information explicitly to the other side, but instead engages in a process of “noisy translations.” Id. at 328.
amount of information—unfiltered by the rules of evidence—that judges obtain during informal mediation proceedings. While an evaluative approach poses problems when a judge communicates conclusions to the parties, the information that flows in the opposite direction in a facilitative process—from the parties to the judge—poses its own risks to adjudicative decisions.

The argument against connecting impaired impartiality with making suggestions and predictions or hearing sensitive information in settlement is that judges can compartmentalize their knowledge and ignore what they should not consider. In the words of one judge, judges are expected to separate their thoughts for separate rulings all the time. They hear both admissible and inadmissible information when they decide pretrial motions, make evidentiary rulings, and dispose of posttrial motions. The general presumption is that judges can be trusted to maintain impartiality by separating what they may appropriately consider from what they may not, and this presumption extends to what judges learn in settlement conferences. Evidence that judges, like other humans, have difficulty disregarding irrelevant information suggests that this confidence may be misplaced. But even if we must accept, as a general matter, the risk that inadmissible information may affect decisions, the type of information conveyed in settlement discussions raises much more acute concerns. Stated simply, it is different in kind.

For judges functioning as mediators, information gathering from the parties is central to the process of reaching an agreement. Mediators do not just hear inadmissible information; they hear personal information, and they

233 Professor Resnik argued that this was a more general problem associated with all pretrial proceedings. Resnik, supra note 1, at 426–27.
234 See infra notes 241–46 and accompanying text.
235 Hogan, supra note 129, at 439–40.
236 Id.; see also Cratsley, supra note 122, at 588 n.69.
238 Cratsley, supra note 122, at 583 n.49 (citing cases). For judicial expressions of confidence in this ability, see infra note 318.
239 See infra notes 293–99 and accompanying text.
240 Brazil Interview, supra note 153, at 25 (quoting Judge Bremer stating that a judge is likely to learn about the parties’ interests, strategies, and the value their counsel places on the case).
241 FRENKEL & STARK, supra note 230, at 169 (“If a resolution is to be achieved in mediation, both the parties and the mediator need far more and different information than a judge would need to decide a case.”).
hear it from parties as well as from their attorneys. To help the parties settle their dispute, it is important for a mediator to learn “about the parties’ feelings, motivations, relationships, values, standards and priorities—topics generally irrelevant to a judge.” It is commonplace, for example, for parties in mediation to describe their personal interests. For example, a mediator may learn why a party needs to settle quickly, or why a party needs a particular sum of money. And this is not dry information; parties often express their personal situation in emotional terms, which makes it especially salient and more accessible in the judge’s memory. A mediator is also likely to become privy to parties’ strategies, priorities, and trade-offs as she discusses their bargaining concessions. Moreover, in the course of these discussions she is bound to gain an impression of each party’s degree of cooperation and willingness to settle. Perhaps most significantly, the discussion is likely to cover extensively the attorneys’ assessments of their cases: their view of the most likely outcome, the litigation cost, and the bottom line for reaching an agreement. Indeed, it “would be difficult . . . to conduct a settlement conference without at some point dealing with the issue of value.” The key point is that exposure during settlement to the parties, to their strategies, and to the settlement value of a case go far beyond what judges usually learn in their adjudicatory and managerial roles.

The potential effect of this knowledge on a judge’s subsequent decisionmaking needs to be taken seriously. As recognized in an American Bar Association (ABA) ethics opinion on settlement, such disclosure to the judge of a client’s settlement position significantly increases the potential for an unsatisfactory disposition of the case. The Judicial Conference’s Committee on Codes of Conduct concurs, concluding that information from settlement that is not likely to be presented at trial “may undermine the judge’s objectivity as a fact finder and give rise to questions about impartiality.” Standards for recusal and disqualification are not, however, tailored for

242 See supra note 137 and accompanying text.
243 FRENKEL & STARK, supra note 230, at 169 (emphasis omitted).
246 Brazil Interview, supra note 153, at 25 (quoting Judge Bremer expressing special concern about settlement disclosures of case valuation).
247 ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 93-370 (1993), http://www.americanbar.org/content/dam/aba/publications/YourABA/93_370.authcheckdam.pdf [https://perma.cc/B2TM-75U8] (discussing judicial participation in pretrial settlement negotiations and concluding that a judge may ask a lawyer to disclose settlement limits authorized by the client and inquire about the lawyer’s advice on settlement terms, but that a lawyer may not reveal that information without informed client consent).
248 Advisory Opinion No. 95, supra note 237, at 162.
settlement and do not provide an effective vehicle for considering the effect of information from settlement on subsequent decisionmaking. While there are court decisions that condemn mediator reports to assigned judges or testimony that reveals information learned in mediation, such knowledge does not usually lead to disqualification of the judge. Even when a judge gains knowledge about what transpired in mediation directly from his role as the settlement neutral, the effect of that knowledge tends to be treated as benign. Courts have interpreted the federal statute on disqualification and recusal for bias or prejudice in light of the “extrajudicial source” doctrine. The judge’s favorable or unfavorable opinion must be wrongful either because it is “excessive in degree” or based on extrajudicial knowledge. This means the bias cannot be “derived from the evidence or conduct of the parties that the judge observes in the course of the

249 E.g., Duininck Bros., Inc. v. Howe Precast, Inc., No. 4:06-cv-441, 2008 WL 4411608, at *2 (E.D. Tex. Sept. 23, 2008) (order granting defendant’s motion to strike) (striking mediator as expert witness and noting that sensitive, highly relevant information was disclosed to the mediator on the understanding that it would facilitate settlement); VJL v. RED, 39 P.3d 1110, 1113 n.3 (Wyo. 2002) (reprimanding mediator for reporting on party’s behavior during mediation). But see Harkrader v. Farrar Oil Co., No. 2004-CA-000114-MR, 2005 WL 1252379, at *2 (Ky. Ct. App. May 27, 2005) (refusing to reverse a court order enforcing a settlement when trial court had considered an affidavit from a mediator).

250 E.g., Enter. Leasing Co. v. Jones, 789 So. 2d 964, 968 (Fla. 2001) (holding that a judge who learned of mediation settlement offers in violation of confidentiality statute was not disqualified); Metz v. Metz, 61 P.3d 383, 389 (Wyo. 2003) (holding that a judge who heard evidence about divorce mediation was not required to recuse).

251 See Blackmon v. Eaton Corp., 587 F. App’x 925, 933–34 (6th Cir. 2014) (holding that a magistrate judge was not disqualified from issuing a report and recommendation in a case he had previously mediated); Zhu v. Countrywide Realty Co., 66 F. App’x 840, 842 (10th Cir. 2003) (rejecting a claim that it was improper for a magistrate judge who served as mediator to recommend that the contested settlement agreement be enforced); Rehkoph v. REMS, Inc., 40 F. App’x 126, 130 (6th Cir. 2002) (finding no error when the trial judge acted as mediator and then decided motion for summary judgment); Garrett v. Delta Queen Steamboat Co., No. 05-1492-CJB-SS, 2007 WL 837177, at *2 (E.D. La. Mar. 14, 2007) (denying motion to recuse the magistrate judge based on argument that her involvement as mediator would cause her to be prejudiced and vested in enforcement of the contested settlement); DeMers v. Lee, 99 Wash. App. 1056 (Ct. App. 2000) (per curiam) (finding no violation of the appearance of fairness doctrine when the judge who presided at a settlement conference enforced the contested agreement). But see In re Disqualification of Unruh, 937 N.E.2d 1030, 1031 (Ohio 2010) (ordering disqualification of trial judge who participated in mediation from evidentiary hearing on disputed settlement agreement because of the likelihood she would be called to testify about the agreement).


253 Liteky v. United States, 510 U.S. 540, 553–55 (1994). The same requirement for an extrajudicial source of bias has been applied in cases refusing to reverse decisions for alleged judicial bias in a decision. Floyd, supra note 10, at 72–74.

proceedings.”255 A judge’s knowledge acquired from participating in a settlement proceeding is not “extrajudicial,” and thus does not necessitate recusal.256

A party may choose to avoid the risk of sharing information that might affect future decisions of the neutral,257 but the cost of reticence can be high. The reason this information is shared is that it is helpful to the settlement process. Withholding it handicaps a mediator and very likely reduces the chances of settlement, or at least the responsiveness of the settlement to the party’s needs.258 Thus a party whose mediator is also the decisionmaker in a case faces a difficult choice: accept the risks to impartiality of sharing sensitive information with a looming trial, or risk a less effective settlement process.259

3. From the Trenches: Attitudes of Attorneys

The risks are also expressed by lawyers with reservations about a dual role for judges. Despite expressing a high degree of approval for a settlement judge’s participation in settlement negotiations, almost 60% of the lawyers who responded to Wayne Brazil’s study in the early 1980s felt it was improper for the judge assigned to conduct a bench trial to preside over a settlement process.260 The assignment for trial also had a strong effect on lawyers’

256 See, e.g., Sec. & Exch. Comm’n v. Sunwest Mgmt., Inc., No. 09-6056-HO, 2009 WL 1065053, at *2 (D. Or. Apr. 20, 2009) (refusing to require recusal of presiding judge who had mediated a similar case with many of the same parties and citing cases), aff’d, 360 F. App’x 826 (9th Cir. 2009); see also Floyd, supra note 10, at 68–72 (discussing cases in which courts rejected arguments that a judge should be disqualified for biased statements made during settlement conferences).
257 Some policies have drawn on the assumption that lawyers and parties are likely to choose reticence. For example, the Uniform Mediation Act excluded from its coverage judicial conferences conducted by a judge who might make a ruling in the case in part because the drafters believed that parties were not likely to be candid with a judge during such a mediation, and thus the confidentiality protections of the Act were unnecessary. See SARAH R. COLE ET AL., MEDIATION: LAW, POLICY AND PRACTICE § 10.16, at 628 (2016–2017 ed.).
258 See supra note 241 and accompanying text.
259 Cf. Ellen E. Deason, Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review, 5 Y.B. ON ARB. & MEDIATION 219, 224–25 (2013). Lawyers may also be tempted to engage in other unproductive strategic behaviors, such as demanding excessive amounts to anchor a judge’s perception, see infra text accompanying notes 284–90, which can reduce the likelihood of reaching a settlement. See CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT § 16.14(2)(a) (8th ed. 2016) (opining that advocates would be “wise” to engage in anchoring when a settlement conference is conducted by a presiding judge, but noting that this will decrease the likelihood that the conference will lead to a settlement).
260 BRAZIL, supra note 59, at 84. Smaller, but substantial, percentages also disapproved in cases scheduled for a jury trial. Id. at 85–86 (reporting that more than 40% of lawyers
acceptance of judicial settlement techniques. For example, while the vast majority (86%) believed that, in general, it was proper for a settlement judge to suggest a dollar range for a reasonable settlement, the approval rate for this technique plummeted (to 30%) if the judge was assigned to the case for trial.\textsuperscript{261}

Brazil’s findings on lawyer preferences are consistent with a more recent study conducted by Roselle Wissler in the Southern District of Ohio that allowed a comparison of attorneys’ attitudes about settlement conferences conducted by judges assigned to try the case, and those who are not.\textsuperscript{262} While the lawyers’ first choice of process was mediation with court staff mediators, they voiced a statistically significant preference for settlement conferences with judges not assigned to the case as compared to conferences with assigned judges.\textsuperscript{263} The data suggest three reasons for this strong preference. First, the lawyers rated judges who were not assigned to the case equivalently or more highly than assigned judges on multiple dimensions, which suggests that they did not see any particular advantage to settlement with an assigned judge.\textsuperscript{264} Second, and even more importantly, the lawyers thought judges assigned to the case for trial were much more biased than non-assigned judges.\textsuperscript{265} Third, they confirmed the problem of reticence; they thought that when settlement conferences were led by judges assigned to the case, parties were less able to discuss the case candidly and fully explore settlement options without possible negative consequences or prejudice to the ongoing litigation.\textsuperscript{266} Thus, lawyers

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\textsuperscript{261} Id. at 85. Brazil found that the greatest antipathy for an assigned judge acting as a settlement neutral was in the district where lawyers had the most pronounced preference for active and assertive judicial involvement in settlement. Id. at 90–94. This led him to suggest that these attitudes were linked. Id. at 94. He speculated that because these lawyers wanted their settlement neutral to dig deeply into the case and express opinions, perhaps they therefore did not think this judge could then try the case with complete impartiality. Id.

\textsuperscript{262} Wissler, supra note 137, at 274–75. The study also compared lawyers’ views on these two forms of settlement conferences with their opinions on three types of mediation: court-connected mediation by court staff mediators, court-connected mediation by volunteer mediators, and mediation with private, paid mediators. Id.

\textsuperscript{263} Id. at 298–99, 298 tbl.12, 299 n.110.

\textsuperscript{264} Judges not assigned were seen as more likely to incorporate clients into the settlement process, to devote a sufficient amount of time to settlement, and to leave clients feeling well served regardless of the outcome. Id. at 310. The two types of judges were rated similarly on providing useful input, helping to manage difficult parties, responding in a timely manner, and making good use of parties’ resources. Id. The only advantage lawyers attributed to judges assigned to the case was more credibility regarding settlement considerations. Id.

\textsuperscript{265} Id. at 287 & tbl.3 & n.68.

\textsuperscript{266} Id. at 284–86, 284 n.57, 285 tbl.1 & n.60, 286 tbl.2. Similarly, in Brazil’s study, nearly two-thirds of the lawyers thought they would be less open in discussing settlement with the trial judge in a non-jury trial than with another judge. BRAZIL, supra note 59, at
experienced in settlement conferences expressed significant concerns about the participation of judges assigned to adjudicate the case.

Similarly, in Brazil’s earlier study in other districts, overall the lawyers preferred facilitation by a separate settlement judge. This preference was based on concerns for propriety, but it was also coupled with a “positive overall assessment” of how much a separate settlement judge could contribute to the process.267 Brazil concluded that lawyers are “confident that courts can delegate responsibility to conduct settlement negotiations to settlement judges (not the assigned judges) without sacrificing the effectiveness of judicial intervention in this important process.”268 Both studies show that, in the lawyers’ eyes, the disadvantages and risks of judges’ participation in settling cases assigned to them for trial outweighed any extra effectiveness conferred by prior exposure to the case.

C. Insights from Modern Science: The Decisionmaking Literature

When Professor Resnik wrote her article, she speculated that pretrial management could lead to bias, but could only note that we still had much to learn about how prior knowledge affects the formation of opinions.269 In contrast, in today’s world a book on cognitive function has popular appeal, and there is widespread familiarity with the distinction between thought processes framed as “thinking fast” (automatic thinking) and “thinking slow” (careful deliberation).270 The concepts are so mainstream that an executive order encourages federal agencies to use behavioral science insights to improve policies and programs.271 These current understandings of the way humans think and make decisions are also relevant to the dynamics that occur when a single judicial officer serves as a neutral for both settlement and adjudicative decisions. They can provide new perspectives on the mental processes at work and shed important light on concerns about maintaining impartiality.

Psychologists theorize that thinking and decisionmaking operate on two levels, which are often labeled System 1 and System 2.272 System 1 processes
are “spontaneous, intuitive, effortless, and fast.” They operate with “no sense of voluntary control.” System 2 processes, in contrast, are “deliberate, rule-governed, effortful, and slow.” They are associated with the exercise of “agency, choice, and concentration.” The two systems act in concert. System 1 (the automatic system) is the main source of impressions and feelings. These impressions and feelings fuel the “beliefs and deliberate choices of System 2” (the effortful system). System 2 can produce careful, systematic thought, but it also endorses many intuitive reactions derived from System 1 impressions, meaning that System 1 influences even careful decisions.

A model of judicial decisionmaking drawn from these insights by Chris Guthrie, Jeffrey Rachlinski, and Andrew Wistrich “posits that judges make initial intuitive judgments (System 1), which they might (or might not) override with deliberation (System 2).” This cognitive conception of legal decisionmaking contemplates a fluid interaction between reasoning and more intuitive thinking: a judge may maintain her initial, quickly proposed solution, or may modify it after careful, systematic consideration.

When Guthrie and his co-authors tested their model on judges, they found that, like the rest of us, many of them make incorrect intuitive judgments about problems when the right conclusion requires deliberative reevaluation. They also asked judges to make decisions based on hypotheticals designed to match situations that judges commonly face. These experiments showed that, in many settings, judges rely on heuristics—mental shortcuts associated with System 1 thinking—that can produce systematic errors in judgment.
Some of these heuristics, or “cognitive illusions,” are especially problematic when a judge has conducted a settlement conference. The most obvious source of potential bias is anchoring, a commonplace cognitive phenomenon that affects people when they make quantitative judgments. Individuals are influenced by the first number available to them, which creates an “anchor” that pulls their estimate up or down. Even if this anchor is something completely ridiculous, it can alter one’s judgment.

Experiments indicate that judges are susceptible to anchors based on settlement demands when making damage awards. Judges were asked to determine damages for pain and suffering in a personal injury suit following an unsuccessful settlement conference with the judge. Those in one experiment were told that the plaintiff had demanded $175,000 in the settlement talks (low anchor), while judges in a second experiment were told the plaintiff asked for $10 million (high anchor). In both experiments, a control group of judges was not given any demand figure. The applicable evidentiary rules required the judges to ignore the amount of the settlement demands, and they were reminded of this in the scenario. Yet the awards by judges who had numerical information about the settlement demand were significantly higher, or lower, than those in the control group, depending on the anchor.


See Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, 185 SCIENCE 1124, 1128–30 (1974) (describing anchoring and showing how providing different starting points influences estimates); see also Kahneman, supra note 270, at 119–28 (discussing mechanisms of anchoring and its effects); Robennolt & Sternlight, supra note 244, at 71–72 (discussing anchoring in the legal context).

For example, when people were asked to estimate the average daytime temperature in San Francisco, they gave higher values if they had first been asked if the average temperature was greater than 558 degrees Fahrenheit. SCOTT PLIOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 146 (1993).

Wistrich et al., supra note 282, at 1288–89.

Id.

Id.

Id. at 1289.

The judges in the low anchor group awarded an average of $612,000 in damages, less than half the average of the control group. Id. at 1289. In the high anchor group, the average damage award was $2.2 million, approaching three times that of the control group. Id. at 1290.

In another experiment demonstrating anchoring, a personal injury scenario with substantial damages, judges awarded significantly less if they were told that the defendants had filed a motion to dismiss the case from federal court on the ground that it did not meet the $75,000 jurisdictional minimum for a diversity case. Guthrie et al., Blinking, supra note 279, at 21; Guthrie et al., Inside, supra note 282, at 790–91. While the motion clearly lacked merit under the facts of the scenario, judges exposed to this anchoring figure awarded nearly 30% less on average than judges who were not told about the motion. Guthrie et al., Blinking, supra note 279, at 21; Guthrie et al., Inside, supra note 282, at
influenced despite the fact that they knew the settlement demands were irrelevant.\textsuperscript{291}

An actual settlement situation will often provide judges with even more anchoring information than the experiments: judges are likely to learn not only demands, but also the parties’ bottom lines. Settlement judges are also routinely exposed to other information that can influence their views.\textsuperscript{292} And, while judges tend to be confident about their ability to compartmentalize and ignore inadmissible information,\textsuperscript{293} intentionally disregarding or forgetting is a difficult mental task. Judges are likely to find it hard to ignore knowledge such as a party’s statements of personal interests, goals, and priorities, or the judge’s impression of a party’s degree of cooperation in the settlement process. These factors would not normally be relevant to the judge’s legal determinations, but such information is likely to have a persistent effect on her judgment. Experiments with judges given a variety of inadmissible

\begin{footnotesize}
791–92; see also Birte Englich et al., \textit{Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts’ Judicial Decision Making}, \textit{32 Personality & Soc. Psychol. Bull.} 188, 196–97 (2006) (reporting effects on length of sentences from sentencing demands that judges knew to be randomly generated); Guthrie et al., \textit{Hidden, supra} note 279, at 1501–06 (reporting anchoring by administrative law judges based on an irrelevant damage award from a court TV show).

\textsuperscript{291} Similar studies have demonstrated analogous anchoring bias with mock jurors; their damage awards are influenced by the amount they are told the plaintiff has requested in the lawsuit. See, e.g., Gretchen B. Chapman & Brian H. Bornstein, \textit{The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts}, \textit{10 Applied Cognitive Psychol.} 519, 525–27 (1996). In the case of juries, the legal system has reacted to this effect of anchoring. Some states have enacted provisions to eliminate this source of bias, either by prohibiting tort plaintiffs from specifying the amount of damages they seek in the complaint, see, e.g., \textit{Haw. Rev. Stat. Ann.} § 663-1.3 (West 2008) (prohibiting “\textit{ad damnum}” clause); \textit{Me. Rev. Stat. Ann. tit. 14, § 52} (2003) (prohibiting dollar amount in demand in any civil case), or by prohibiting disclosure to the jury, see, e.g., \textit{Idaho Code} § 10-111 (2010) (grounds for mistrial to reveal amount of general damages sued for); \textit{Tenn. Code Ann.} § 29-26-117 (2012) (demands for a specific sum may not be disclosed to the jury in a health care liability action). \textit{But see Conn. Gen. Stat. Ann.} § 52-216b (West 2013) (authorizing counsel in personal injury or wrongful death cases to articulate the amount of damages claimed to the jury). Moreover, the practice of using closing argument to suggest a specific award that would compensate for noneconomic damages, such as pain and suffering, has fallen into disfavor in some courts on the ground that it risks “anchor[ing] the jurors’ expectations of a fair award at a place set by counsel, rather than by the evidence.” Consorti v. Armstrong World Indus., Inc., 72 F.3d 1003, 1016 (2d Cir. 1995), vacated on other grounds, 518 U.S. 1031 (1996). \textit{See generally} Don Rushing et al., \textit{Anchors Away: Attacking Dollar Suggestions for Non-Economic Damages in Closings}, \textit{70 Def. Counsel} J. 378 (2003) (citing cases).

\textsuperscript{292} See \textit{supra} text accompanying notes 241–46.

\textsuperscript{293} See \textit{supra} text accompanying notes 235–38. This confidence may result from a tendency toward positive illusions and egocentric bias. \textit{See infra} text accompanying notes 314–16.
\end{footnotesize}
information indicate that, in many cases, they were unable to ignore it in making legal decisions.294

One explanation for why the task of disregarding information is so challenging is that information produces what psychologists call “mental contamination,” which persists even if a person recognizes that the information is misleading or inaccurate.295 The brain stores information in a holistic manner using cognitive organizing principles called schemas that then influence how additional stimuli are processed.296 Thus, the influence of the initial information (for example, something a judge learns during settlement that he knows should be ignored) persists through the schema and affects the ways that later information is interpreted. Disregarding information is also difficult because of the phenomenon of “belief perseverance.” New information is incorporated into a person’s existing knowledge quickly and ideas formed unconsciously can persist, making it hard to eradicate beliefs based on that information.297 Due to these characteristics of memory, “[m]erely ignoring the information itself is not enough.”298 Even if a judge can ignore a specific fact she learned during a settlement conference and prevent it from directly affecting her judgment, the attitudes and inferences that she associates with that information can still influence her decision indirectly.299

In addition to the mental challenges that a judge faces in trying to truly ignore irrelevant information, a prior role as a settlement neutral may also influence later decisionmaking because of a process known as “confirmation bias.”300 When seeking new information, people tend to look for information that confirms existing views and disregard information that challenges those views.301 Moreover, that new information tends to be assessed in ways that are

294 Wistrich et al., supra note 282, at 1286–322 (reporting that judges’ rulings showed they were unable to disregard what they knew about settlement demands, information protected by the attorney-client privilege, sexual history in a sexual assault case, a criminal record in a civil case, and information excluded by a sentencing agreement, but were able to ignore the outcome of a search without probable cause and a criminal confession obtained after a request for counsel); see also Stephan Landsman & Richard F. Rakos, A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation, 12 BEHAV. SCI. & L. 113, 125 (1994) (finding that judges were unable to disregard evidence that a tort defendant had taken subsequent remedial measures).

295 Timothy D. Wilson et al., Mental Contamination and the Debiasing Problem, in HIERISTICS AND BIASES, supra note 272, at 185, 185–87.

296 See Wistrich et al., supra note 282, at 1265–67 (providing examples); see also ROBBENNOLT & STERNLIGHT, supra note 244, at 12–13.

297 Wistrich et al., supra note 282, at 1267–69.

298 Id. at 1269.

299 Id. at 1270.

300 ROBBENNOLT & STERNLIGHT, supra note 244, at 15.

301 Id. at 14–16; Eva Jonas et al., Giving Advice or Making Decisions in Someone Else’s Place: The Influence of Impression, Defense, and Accuracy Motivation on the Search for New Information, 31 PERSONALITY & SOC. PSYCHOL. BULL. 977, 978 (2005) (noting bias “in favor of previously held beliefs, expectations, or desired conclusions”).
consistent with preexisting attitudes or expectations, which is known as “biased assimilation.”302 These effects are particularly strong in decisionmaking settings. In order to reduce cognitive dissonance, a person who previously made a choice tends to prefer information that supports that choice and to deprecate information that opposes it.303

One of the most effective methods for avoiding bias in a decisionmaking process is to deliberately consider opposing viewpoints and arguments.304 This is consistent with the theory of the adversary process in which the decisionmaker hears arguments presented by both sides of a case. There are, however, two ways in which the adversary process might not work ideally as a debiasing mechanism following a settlement conference.

First, it is not uncommon for a settlement neutral to assess a case or suggest that parties settle for a particular amount, particularly in a traditionally evaluative settlement conference.305 Even though a judge may not actually commit to any particular decision based on a preliminary assessment, cognitively this can be enough to trigger bias in subsequent interpretations of evidence. Research suggests that the tendency to seek confirming information operates not only to reinforce firm decisions, but is also triggered by preliminary decisions306 and even by what cognitive scientists call “predecision” thinking.307 Thus, an opinion a judge voices in settlement can influence the judge’s interpretation of additional, more complete information added later at trial through an unconscious tendency to support the preliminary assessment.

Second, judges are privy to private information in settlement when they meet with parties in caucus. This ex parte information is not subject to rebuttal by the other side because it is unknown.308 Thus, while evidence presented at trial may be sufficient to counter earlier impressions gained through traditional pretrial management, it cannot fully address impressions that stem from information conveyed to the judge in confidence during settlement.

There are factors associated with judging that may reduce the effects of System 1 thinking on judges’ decisions. There have been suggestions that decisionmakers who are highly motivated to make accurate decisions may use

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302 ROBBENNOLT & STERNLIGHT, supra note 244, at 15.
304 ROBBENNOLT & STERNLIGHT, supra note 244, at 16, 77–83 (discussing “debiasing”).
305 See supra notes 151, 163–69 and accompanying text.
307 Aaron L. Brownstein, Biased Predecision Processing, 129 PSYCHOL. BULL. 545, 545 (2003). In developing a preference, decisionmakers seem to distort new information so as to favor their leading alternative, Russo et al., supra note 303, at 107, and thus inhibit careful and objective consideration of all alternatives.
308 It may also be irrelevant as an evidentiary matter.
more accurate reasoning. As professional decisionmakers, judges would ideally display this motivation. The transparency of the judicial process may also help. Experimental evidence suggests that anchoring has less influence if people are told that they must explain their estimates so when a decision involves writing a judicial opinion, that may constrain anchoring bias.

More generally, accountability can be seen as an incentive that increases willingness to put more effort into the decisionmaking process by using System 2 thinking. Since judges are accustomed to public scrutiny of their decisions, at the very least by parties and their attorneys, this may reduce the bias introduced by participating in settlement. There is, however, growing evidence that all forms of accountability are not equal. People who know they will have to justify the process behind their judgment display more accurate and unbiased decisionmaking than those who are merely held accountable for the outcome of the process. Judges’ opinions typically justify the outcome of their decisions, not the decisionmaking process. And unfortunately, other key factors that encourage deliberative thinking, such as prompt and accurate feedback, are missing from the judicial decisionmaking environment.

In evaluating the cognitive effects of participating in settlement, it is particularly important to be skeptical of judges’ own assessments of their abilities. This is because positive cognitive illusions make it difficult for judges to evaluate their own decisionmaking objectively. “Overconfidence” means we don’t allow sufficiently for uncertainty in the judgments we make. This tendency is increased with access to evidence for only one side of a story. “Egocentric bias” means we overestimate our abilities and make judgments consistent with our own point of view. Judges are no different. Yet despite the cognitive evidence to the contrary, some judges are very confident that they can ignore what happened during settlement in subsequent proceedings. This is likely to be overconfidence, which can exacerbate the

309 Brownstein, supra note 307, at 565.
310 Jennifer S. Lerner & Philip E. Tetlock, Accounting for the Effects of Accountability, 125 PSYCHOL. BULL. 255, 262–63 (1999).
311 See Jonas et al., supra note 301, at 988.
312 Id.
313 See Guthrie et al., Balking, supra note 279, at 32 (discussing the lack of feedback in litigation and explaining why appellate review is an inadequate mechanism).
314 ROBBENNOLT & STERNLIGHT, supra note 244, at 68.
315 KAHNEMAN, supra note 270, at 86–88 (reporting that confidence in judgments is increased by coherence of the story).
316 ROBBENNOLT & STERNLIGHT, supra note 244, at 70.
317 Guthrie et al., Inside, supra note 282, at 813–16; see also Theodore Eisenberg, Differing Perceptions of Attorney Fees in Bankruptcy Cases, 72 WASH. U. L.Q. 979, 983–87 (1994) (reporting a study of bankruptcy judges who overestimated the degree to which lawyers who appeared before them felt they were fair, efficient, and diligent).
318 LACEY, supra note 44, at 23 (“As you become known as one who can conduct [settlement] discussions without coloring your judgment at trial, lawyers will not hesitate to engage in full, frank discussion with you.”); Martin, supra note 159, at 194–95
problem by preventing a judge from recognizing the effects of settlement conferences on her decisionmaking. This lack of recognition is, in turn, likely to reduce the vigilance that might help judges deploy System 2 deliberative thinking to avoid the distortions settlement conferences can introduce. Even under the best of conditions, fighting these tendencies is difficult, for judges just as for the rest of us, because they operate at an unconscious level.

These cognitive insights are in tension with current standards for judicial conduct and settlement practices, which are examined in the following Part. The after-the-fact remedies for bias also provide an illustration of how legal standards fail to reflect modern conceptualizations of bias and its sources. The recusal and disqualification statute, for instance, applies when a judge has an opinion, either favorable or unfavorable, “that is somehow wrongful or inappropriate, either because it rests upon knowledge that the subject ought not possess, or because it is excessive in degree.”

Knowledge that a subject “ought not possess” is limited to extrajudicial sources of information; this limitation reflects a traditional conception of judicial activity that does not contemplate judges’ modern roles in conducting settlement. The alternative prerequisite, that a judge’s opinion must be “excessive” in order to be inappropriate, means that the judge must express a strong identifiable animus or favoritism. This focus on only expressed, pronounced bias reflects an outdated, confident view of rational decisionmaking that does not recognize psychological insights into actual behavior. Information shared in settlement may skew or distort a judge’s subsequent attitudes, and perhaps decisions about a case, even without producing any visible animus or strong favoritism. This modern understanding of the subtle operation of bias supports the view that knowledge gained in settlement raises questions about impartiality. Because judges can avoid this knowledge, it should be regarded as “inappropriate” even if it is not “extrajudicial.”

IV. LIMITING (APPROPRIATELY) THE JUDICIAL ROLE IN SETTLEMENT

The final Part of this Article evaluates possible mechanisms for avoiding the problems of dual neutral functions in the settlement context. Part IV.A reviews efforts to restrict judges assigned for trial from serving as a settlement

(Describing a judge who conducts his own settlement conferences when he is the trier of fact because, as the judge, “he is able to ‘turn off’ the information he learned as a mediator”); Miller, supra note 128, at 33 (“When I was in private practice, one of my sensitivities about a judge getting actively involved in the settlement process was a concern for whether he or she could put aside what was said in mediation when it came time to decide the case. . . . In my own mind, I’m confident that I can do that . . . .” (quoting Judge McCarthy)).


320 Blackmon v. Eaton Corp., 587 F. App’x 925, 933 (6th Cir. 2014) (emphasis omitted) (quoting Williams v. Anderson, 460 F.3d 789, 814 (6th Cir. 2006)).
neutral as an ethical matter. I conclude, given the failure to incorporate any restrictions on settlement activity into recent revisions of ethical standards, that this is not a promising avenue. Part IV.B considers proposals to better define acceptable judicial behaviors in settlement. I argue that this approach is an incomplete solution that could have deleterious side effects and is likely unworkable. Part IV.C explores the most promising path for reform: separating the roles of settlement and adjudicative neutrals by limiting the authorization for settlement activity in Rule 16 and other procedural rules. This structural solution would be a preventative measure, and hence more effective than after-the-fact evaluations for disqualification based on the circumstances of particular settlements (which are problematic for the reasons described above). There is precedent for this approach in some local district court ADR rules and state confidentiality provisions that apply principles of separation to reduce the risks of both coercion and partiality. This Article closes by urging rulemakers to draw on these local and state rules and to extend their principles to the regulation of settlement conferences.

A. Limiting the Judicial Role in Settlement as an Ethical Principle

In the most recent attempts at reform, the focus on limiting the settlement role of judicial neutrals in assigned cases centered on ethical obligations. For federal judges, judicial ethics are governed by the Code of Conduct for United States Judges.\(^{321}\) State court judges are subject to the code adopted in their state,\(^{322}\) some of which make no mention of settlement.\(^{323}\) Historically, both federal and state codes have been influenced by the ABA Model Code of Judicial Conduct and its predecessors.\(^{324}\)

An opportunity to strengthen the provisions on settlement in the ABA Model Code arose when the ABA undertook a revision beginning in 2003.\(^{325}\) In 2005, the ABA Section of Dispute Resolution presented a proposal to revise the Code of Conduct for United States Judges, in 2A GUIDE TO JUDICIARY POLICY, ch. 2, intro. [hereinafter CODE OF CONDUCT], http://www.uscourts.gov/sites/default/files/vol02a-ch02_0.pdf [https://perma.cc/VN6Q-VECJ] (last revised Mar. 30, 2014).


\(^{322}\) See, e.g., CAL. CODE OF JUDICIAL ETHICS Canon 3(B)(7) (SUPREME COURT OF CAL. 2015); OHIO CODE OF JUDICIAL CONDUCT r. 2.6 (SUPREME COURT OF OHIO 2017); TEX. CODE OF JUDICIAL CONDUCT Canon 3(B)(8)(b) (SUPREME COURT OF TEX. 2002).

\(^{323}\) See, e.g., N.Y. RULES OF THE CHIEF ADMIN. JUDGE r. 100.3 (N.Y. STATE UNIFIED COURT SYS. 2015) (dealing with adjudicatory responsibilities only); PA. CODE OF JUDICIAL CONDUCT Canon 3.1 (JUDICIAL CONDUCT Bd. of PA. 2014).


the provisions on judicial ethics on settlement.\textsuperscript{326} It provided that a judge should not act as a mediator if he or she would also be judging the merits of the case.\textsuperscript{327} In addition, the merits judge would receive very limited information about the mediation: only whether a mediation was held, who attended, and whether a settlement was reached.\textsuperscript{328} This proposal was rejected.

The revision process culminated in the adoption of the 2007 ABA Model Code of Judicial Conduct, which does not even address whether a judge who participates in settlement efforts should be permitted to hear the case if those efforts are unsuccessful.\textsuperscript{329} Instead, Rule 2.6, Ensuring the Right to be Heard, merely states:

\begin{quote}
A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.\textsuperscript{330}
\end{quote}

Elsewhere, the Model Code prohibits, as a general matter, ex parte communications concerning pending matters.\textsuperscript{331} But there is an explicit exception for judges, “with the consent of the parties,” to “confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.”\textsuperscript{332}

The current official Code of Conduct for United States Judges, adopted by the Judicial Conference of the United States, has an almost identical provision. Canon 3 prohibits ex parte communications on the merits in pending matters but has a similar exception, which provides that a judge may “with the consent of the parties, confer separately with the parties and their counsel in an effort..."
to mediate or settle pending matters." The commentary states that "[a] judge may encourage and seek to facilitate settlement but should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts." It is interesting that both of these provisions stress preventing coercion in settlement, rather than the usual worry stemming from ex parte communication: unrebuttable information that can skew decisionmaking. To the extent these settlement exceptions ignore the informational consequences of ex parte communication in settlement, they stand in tension with the general principles of due process in adjudication.

In 2009, the Judicial Conference’s Committee on Codes of Conduct interpreted the official Code of Conduct’s settlement provision in an advisory opinion: Judges Acting in a Settlement Capacity. The Committee determined that a trial judge’s participation in settlement efforts in a case assigned to her for trial is not “inherently improper under the Code.” It relied heavily on the Rules of Civil Procedure and local rules in reaching this conclusion. The opinion stressed the fact that “Rule 16 does not prevent a judge who engaged in settlement discussions from presiding over a trial,” and concluded that, while a judge’s actions could raise concerns in a particular case, there is no per se impropriety in an assigned judge leading settlement discussions or conducting a trial afterwards. Local procedural rules that explicitly permit the practice “lend[] support to the propriety of a judge’s actions in this respect.”

One way to read the canon and its interpretation is that it extends the discretion granted in Rule 16 from procedural rules to ethical rules. The Committee concluded that, in the absence of a local rule prohibiting a dual neutral role, ethical concerns should be evaluated by considering settlement practices on a case-by-case basis. The Committee felt that such concerns are less serious when a judge who has led settlement negotiations presides over a jury trial, or when the parties have consented to the dual role. They also identified the type of information learned in settlement as an important variable, observing that, “The extent to which a judge’s impartiality may be compromised, . . . will depend in part on the nature and degree of the judge’s participation in settlement . . . .”

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333 CODE OF CONDUCT, supra note 321, Canon 3(A)(4)(d).
334 Id. Canon 3(A)(4) cmt.
335 See generally Advisory Opinion No. 95, supra note 237.
336 Id. at 162.
337 Id. at 161.
338 Id. at 162.
339 Id.
340 Id. at 163.
341 Advisory Opinion No. 95, supra note 237, at 162.
342 Id. at 163.
There are those who express discomfort with the discretion that implicitly accompanies this flexibility. They believe the canon is so elastic that it does not provide adequate guidance, instead allowing judges to conclude that a vast number of very different approaches to settlement are ethical.\textsuperscript{343} Certainly the check on discretion prescribed in the judicial ethics opinion—a case-by-case, after-the-fact evaluation of the circumstances to determine their effect on a judge’s impartiality—is not as prophylactic as a bright-line rule. Moreover, such evaluations require uncovering communications in mediation in ways that could either be blocked by confidentiality principles, or violate them. But perhaps the strongest argument against relying on ethical rules to limit dual judicial roles is a practical one: the proposal based on defining the problem as a matter of ethics was not approved. This was, at least in part, due to opposition from judges. They believe settlement is an important function of their job and oppose limiting their discretion to achieve it.\textsuperscript{344}

B. Limiting the Judicial Role in Settlement by Defining Acceptable Judicial Involvement

For some, the concern with judicial activity in settlement is seen as a need to constrain problematic judicial behavior in settlement. This is primarily a concern about coercion. Under the discretionary framework that governs settlement conferences, statutes and court rules provide little guidance on acceptable judicial behavior in settlement.\textsuperscript{345} One suggestion, raised by a number of commentators, is to adopt new ethical or procedural rules to clarify the appropriate limits of judicial settlement behavior.\textsuperscript{346} Judge Cratsley, for example, notes the significant variability in judicial approaches to settlement and maintains that clearer rules will “promote litigants’ confidence in the trustworthiness and fairness” of the judiciary.\textsuperscript{347} These rules would presumably apply to all settlement judges, whether assigned an adjudicatory role or not. While some guidance is appropriate through education, and more work could be done to establish appropriate norms, in my view it would be unduly restrictive (and likely unworkable) to incorporate behavioral limits on judicial settlement into procedural or ethical rules.

First, there is a wide range of acceptable behaviors and roles for neutrals in settlement and little agreement on particular limits. With regard to mediation,

\textsuperscript{343} See Cratsley, supra note 117, at 4.


\textsuperscript{345} See Agnes, supra note 82, at 265; Alfini, supra note 119, at 12.

\textsuperscript{346} See, e.g., Cratsley, supra note 117, at 4; Floyd, supra note 10, at 87–88; Shoot & McGrath, supra note 197, at 34; Tornquist, supra note 50, at 773; William L. Adams, Comment, Let’s Make a Deal: Effective Utilization of Judicial Settlements in State and Federal Courts, 72 OR. L. REV. 427, 455–56 (1993).

\textsuperscript{347} Cratsley, supra note 117, at 4.
for example, there has been vigorous debate over the appropriateness of using evaluative techniques.\textsuperscript{348} There are regional variations in practices such as using joint sessions, and variations based on the type of case, such as whether it is a commercial or family dispute. Thus it would be very difficult to agree on generally applicable, comprehensive guidelines with any meaningful specificity.

Second, there is a real danger that an effort to codify particular behaviors as acceptable for settlement neutrals would impair one of the great strengths of mediation: its flexibility. Good mediators (and good settlement judges) need to be able to tailor their approach to a particular case and to respond to the unique circumstances of the parties.\textsuperscript{349} This means that discretion regarding approach and technique is useful, and excessive regulatory intrusion that introduces rigidity should be avoided.

Third, the proposals aimed at defining acceptable judicial behaviors in settlement address only half of the problem. They primarily react to worries about coercion in the settlement process by forceful judges. The solution (a more detailed settlement code of conduct) would not be particularly effective in reducing the risk of partiality stemming from dual roles in settlement and adjudication. To limit the potential for bias by regulating judicial conduct, a behavioral measure would need to restrict the information available to an assigned judge during settlement. But this would also impair his effectiveness as a settlement neutral.\textsuperscript{350} One federal district court does have a local settlement rule of this nature. It addresses concerns about partiality by precluding judges presiding over settlement from obtaining the type of information that poses the most obvious risk: the parties’ settlement offers and demands.\textsuperscript{351} However, this restriction is remarkable for its rarity, probably because most districts recognize that it would reduce judges’ effectiveness in the settlement context. In contrast, in districts that have adopted a structural solution—substituting a settlement judge for the assigned judge—the rules can

\textsuperscript{348} See supra note 143.
\textsuperscript{349} See, e.g., Golann, supra note 143, at 42; Stempel, supra note 143, at 970–83.
\textsuperscript{350} Despite the potential to diminish their effectiveness, there are nonetheless judges who self-censor their participation in settlement when assigned to trial due to worry about introducing bias. See, e.g., Miller, supra note 128, at 34 (quoting Judge Polster commenting that he limited communications when settling a case scheduled for a bench trial by discussing only business solutions, not the merits); Will et al., supra note 53, at 215 (describing a judge who avoids discussion of settlement numbers even with a jury trial due to concern for bias in deciding potential post-verdict motions); see also CRAVER, supra note 259, § 16.14(2)(a) (suggesting a prohibition on parties stating specific demands as a way to prevent the anchoring effect in settlement conferences conducted by a judge assigned to trial); Deason, supra note 259, at 246–47 (describing a proposal for a no-caucus approach to mediation in order to limit information flow when mediation is combined with international arbitration before the same neutral).
\textsuperscript{351} See, e.g., N.D. TEX. CIV. R. 16.3(b) (judge may not discuss settlement figures in nonjury cases “unless requested to do so by all concerned parties”).
endorse full access to information and encourage active participation by the settlement neutral.\textsuperscript{352}

Finally, it is unlikely that regulating specific judicial behaviors would be effective without reforms to enforcement standards and procedures. As Professor Floyd demonstrated, limitations in the standards for recusal based on actions during settlement and procedural barriers to appeals make enforcement of behavioral guidelines illusory.\textsuperscript{353} Happily, there is a more effective alternative to trying to manage and monitor individual judicial behavior: procedural rules that prevent conflicting neutral roles through structural and informational separation between adjudication and case management on the one hand, and settlement on the other.

\textbf{C. Principles from State and Local Federal Rules: Separating Managing from Settling}

Perhaps the most appropriate (and promising) way to address the problem is to avoid characterizing it as an issue of a particular judge’s ethics or behavior. The incompatible dual neutral roles assigned to judges are at their core a structural issue; it is a side effect of lumping all judicial functions related to settlement into the category of pretrial management. How should the role of adjudicating (with its associated managing) be separated from settling? We can look to the local district court rules and some state provisions for examples to follow.

This Part examines three types of rules for principles that could be applied more generally in Rule 16. Alternatively, if uniformity in the federal courts proves impossible, individual federal courts and states could adopt these principles to harmonize their rules for settlement conferences and ADR programs. First, this Part considers rules that govern court ADR programs.\textsuperscript{354} The provisions in local rules that govern who can serve as neutrals in ADR

\textsuperscript{352}See, e.g., D. IDAHO CIV. R. 16.4(b)(1)(A) (judge’s function in settlement conference is to “facilitate communication between the parties and assist them in their negotiations, e.g., by clarifying underlying interests”); E.D. OKLA. CIV. R. 16.2(a) (discussion to include “every aspect of the case bearing on its settlement value”); id. R. 16.2(g) (participants are “required to be completely candid with the settlement judge so that the judge may properly guide settlement discussions”); N.D. OKLA. CIV. R. 16.2(a), (g) (containing the same language as the Eastern District of Oklahoma); M.D. TENN. R. 16.04(d)(1)(a) (parties provide settlement judge with ex parte settlement conference statement including settlement positions); D. UTAH CIV. R. 16-3(c) (settlement judge may discuss any aspect of the case and make suggestions or recommendations for settlement); see also Kearny v. Milwaukee County, No. 05-C-834, 2007 WL 3171395, at *2–3 (E.D. Wis. Oct. 26, 2007) (order of recusal) (describing benefits to settlement of a judge’s “unencumbered” participation, in contrast to the ethical obligations that constrain a presiding judge).

\textsuperscript{353}Floyd, supra note 10, at 82–84; see also supra text accompanying notes 216–21.

\textsuperscript{354}As described above, see supra text accompanying notes 94–97, most courts currently segregate “ADR” from settlement conferences and provide separate authorizations in their rules.
programs often establish a clear separation between management and neutral functions. Second, this Part explores ADR confidentiality rules. They often go to the heart of the problem of access to information that is inherent in dual roles. Many impose restrictions on the flow of information from the settlement process to the assigned judge, which emphasizes a separation between the role of settlement neutral and the role of decisionmaking neutral. Third, this Part analyzes the problematic rules governing judicial settlement conferences. Here, some federal districts do separate management and neutral roles to avoid role conflicts, but this approach is by no means ubiquitous. This is where courts could improve their procedures by harmonizing their rules for settlement conferences with their ADR and confidentiality rules to limit judges’ discretion in settlement conferences.

1. Rules on Neutral Roles in “ADR” Processes: Programmatic Separation

In federal courts, the local rules that govern court-sponsored ADR programs tend to be both more detailed and more sensitive to conflicting neutral roles than the corresponding rules that govern settlement conferences convened by judges. ADR rules tend to allot settlement management tasks to the assigned judge, but structure programs in ways that limit judges’ discretion to serve as both the assigned judge and the ADR neutral. There are two typical patterns in local ADR rules. Under one common approach, judicial officers do not participate as mediators for the program. Instead, the parties usually agree on a private mediator. This person is often chosen from a court-approved list, although some districts provide a staff mediator. Under a second approach, judicial officers do serve as mediators in the court-sponsored mediation program, which preserves the benefits of having a judicial officer as a mediator. Often magistrate judges shoulder a major responsibility for mediating cases in these programs. Neutral roles are typically kept separate

355 See supra text accompanying notes 100–06.
356 Under this approach, judges similarly do not serve as neutrals for neutral evaluation or court-annexed arbitration if the court sponsors those processes. Summary jury trials or summary bench trials are an exception, often presided over by the same judge who will hear the case if there is no settlement. They are not considered in this Article because they are relatively rare and because the neutral’s role in those processes has so much overlap with the judge’s role at trial.
357 Unfortunately, staff mediators in some districts, such as the Southern District of Ohio, have been eliminated due to budget cuts. E-mail from Terence P. Kemp, Mag., U.S. Dist. Court for the S. Dist. of Ohio, to author (Mar. 11, 2017, 10:44 EST) (on file with author).
by a rule specifying that the judicial officer who is assigned to try the case may not serve as the mediator.\textsuperscript{359} Both of these design structures for ADR programs effectively divide an assigned judge’s extensive pretrial management functions from any role as a settlement neutral, and thus prevent conflicts between adjudicatory and settlement roles.

2. Rules on ADR Confidentiality: Isolating the Assigned Judge from Settlement Information

In addition to imposing a structural separation between the neutral responsible for adjudication and management and the settlement neutral in court ADR programs, many federal courts have confidentiality rules for these programs. These provisions are aimed at the potential for settlement to serve as a source of bias even with separate neutrals. They prevent settlement information from flowing to the adjudicator by explicitly prohibiting mediators from disclosing details about a mediation to the assigned judge.\textsuperscript{360} They demonstrate a sensitivity to the distortions that can be introduced into decisions if a judge learns what happened or what was said in a settlement process, and reflect an understanding that such reports from mediators will undermine confidence in the integrity of the settlement process. Courts also limit information flow to assigned judges by preventing them from seeing the pre-mediation or evaluation statements that parties prepare for the settlement neutral,\textsuperscript{361} or by strictly limiting the information that may be reported to them at the close of the process.\textsuperscript{362}

Some states impose similar restrictions on communications to the court about the settlement process either by court rule or by state statute. For example, in Minnesota, communications to the court are strictly limited during conferences a week); see also Welsh, supra note 126, at 999–1004; supra note 126 (citing articles by magistrate judge mediators).

\textsuperscript{359} See, e.g., D. ALASKA CIV. R. 16.2(e)(2)(A) (court may order parties to mediate before a district, bankruptcy, or magistrate judge who is not assigned to the case); S.D. W. VA. CIV. R. 16.6.2 (“The parties may request that a judicial officer (who is not the presiding judicial officer) conduct the mediation.”).

\textsuperscript{360} See, e.g., N.D. CAL. ADR R. 5-12(a)(2), 6-12(a)(2); N.D. GA. CIV. R. 16.7(F)(3); S.D. GA. CIV. R. 16.7.8; C.D. ILL. R. 16.4(E)(7); D. KAN. R. 16.3(i)(2); E.D.N.Y. R. 83.8(d)(3); N.D. OHIO CIV. R. 16.5(h), 16.6(e)(3); D. OR. R. 16-4(g)(1); M.D. TENN. R. 16.08(a); S.D. TEX. CIV. R. 16.4.1; E.D. WASH. R. 16.2(g). In some districts, there is an exception that allows communication to the assigned judge with the consent of all the parties. See, e.g., C.D. ILL. R. 16.4(E)(7); M.D. TENN. R. 16.05(e).

\textsuperscript{361} See, e.g., N.D. CAL. ADR R. 5-8(b).

\textsuperscript{362} Reporting restrictions often limit the content of a mediator’s report. See, e.g., D. ALASKA CIV. R. 16.2(e)(3)(A); W.D. MICH. CIV. R. 16.3(f); N.D. OHIO CIV. R. 16.6(h); E.D. TENN. R. 16.4(m); M.D. TENN. R. 16.05(e). A parallel principle is often used with nonbinding arbitration so that the assigned judge may not learn the award until after a final judgment is entered or the case is terminated. See, e.g., N.D. OHIO CIV. R. 16.7.
and following an ADR process. If the parties do not come to an agreement, the neutral may report only that fact, without comment or recommendation. 

The Uniform Mediation Act, now enacted in twelve jurisdictions, prohibits mediators from making reports to judges who may rule on the dispute in order to maintain “confidence in the neutrality of the mediator and in the mediation process.”

3. Rules on Judicial Settlement Conferences: Mostly Silence and Ambiguity

In contrast to the detailed rules and extensive protections in the context of ADR programs and confidentiality rules, federal local rules tend to be relatively silent concerning judicially-sponsored settlement conferences. Many rules refer only to pretrial conferences in general; they do not differentiate settlement conferences from other types of pretrial conferences. When the local rules do mention settlement conferences explicitly, their approach to assigning neutral roles spans the full spectrum. Some protect against threats to impartiality by limiting the judicial discretion of the assigned judge to serve as the neutral and by providing confidentiality protections. Many, however, are silent or ambiguous about the identity of neutrals. Yet others explicitly endorse a dual-neutral role for judges in settlement and adjudication.

A substantial number of districts have adopted the principle of structural separation urged in this Article through rules that explicitly exclude the assigned judge from serving as the presiding neutral at a settlement conference. A number of these districts also extend robust confidentiality principles to their settlement conferences. Others less comprehensively specify particular mechanisms to insulate assigned judges from learning about

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363 MINN. GEN. R. PRAC. 114.10(c), (d).
364 Id. R. 114.10(d). The neutral’s report may also, with the parties consent, identify pending motions, outstanding legal issues, or discovery processes that, if resolved or completed would further the possibility of a settlement. Id.; see also IND. ADR R. 2.7(E)(1).
365 UNIF. MEDIATION ACT § 7(a) & cmt. (UNIF. LAW COMM’N 2003). There are limited exceptions allowing mediators to disclose whether mediation occurred, whether settlement was reached, and attendance. Id. § 7(b)(1).
366 See, e.g., N.D. CAL. ADR R. 7-2; D. IDAHO CIV. R. 16.4(b)(2)(B); C.D. ILL. R. 16.4(B); N.D. ILL. CIV. R. 16.1(5); N.D. & S.D. IOWA CIV. R. 16.2(e); D. MASS. R. 16.4(b) (allowing case referral from a pretrial conference “to another judicial officer for settlement purposes”); E.D.N.C. CIV. R. 101.2(c); W.D.N.C. CIV. R. 16.3(D); D.N.D. R. 16.2(C)(1); E.D. OKLA. CIV. R. 16.2(j); N.D. OKLA. CIV. R. 16.2(c); W.D. OKLA. CIV. R. 16.2(a); D. OR. R. 16-4; M.D. TENN. R. 16.04(a); D. UTAH CIV. R. 16-3(b); see also Dale, supra note 159, at 47 (describing the settlement role of magistrate judges in the District of Idaho). Some limit this exclusion to assigned judges who are scheduled to conduct a bench trial. See, e.g., D. CONN. CIV. R. 16(c)(2); C.D. ILL. R. 16.1(B).
367 See, e.g., N.D. CAL. ADR R. 7-4(a); D.N.D. R. 16.2(C); M.D. TENN. R. 16.04(d)(3).
the content of settlement conferences. There are also rules that channel disputes or reports about problems in dispute resolution processes away from the assigned judge, which helps prevent judicial bias by limiting information that might create a bad impression about participants.

Other rules that mention settlement conferences are silent or ambiguous as to who will conduct the conference and whether the assigned judge is eligible. It may be that the practice in these districts is to assign the facilitation role to separate settlement judges, but the local rules do not impose any firm limitation on judicial discretion. Finally, there are districts that explicitly reject a principle of separation. They specify that the assigned judge will personally conduct settlement conferences or reserve this power for the assigned judge. The districts with rules that are silent on settlement conferences, along with those that are ambiguous or explicitly authorize blending neutral roles, all demonstrate the need for a uniform national rule that does not leave decisions about settlement neutrals to the discretion of local judges.

D. A Proposal for Revised Procedural Rules

Many judges have expressed the personal view that settlement negotiations should not take place before the judge who will later adjudicate the case, or they have proposed separating these functions. Numerous
commentators agree. As discussed above, lawyers strongly prefer settlement with a judge who is not assigned to try their case. Encouragingly, some state and local federal court rules do impose this separation. And, even when they do not, some judges recuse themselves voluntarily after presiding over a settlement conference or mediation out of a concern for public perception and the importance of trust in the court system.

Yet many judges do not see a problem. A vocal group is on the record defending the practice of settling their assigned cases. Empirical evidence about judges’ attitudes is slight, but in a recent study of California state court judges a strong majority felt that they should be allowed to conduct settlement conferences (82%) or mediate (71%) with the consent of the parties in cases assigned to them for trial.

The Eastern District of Tennessee, 26 U. MEM. L. REV. 995, 1000 (1996); Kennedy, supra note 54, at 10; McKay, supra note 122, at 827; Peckham, supra note 1, at 789; Zampano, supra note 137, at 4. For some, this concern is limited to nonjury cases. See Baer, supra note 122, at 150–51; Brazil Interview, supra note 153, at 25 (quoting Judge Klein); Will et al., supra note 53, at 211–12.

374 See, e.g., CRAVER, supra note 259, § 16.14(1); Alfimi, supra note 119, at 11; Randall E. Butler, Ethics in Mediation: Protecting the Integrity of the Mediation Process, HOUS. LAW., Mar./Apr. 2001, at 40, 43–44; Frey, supra note 136, at 760; Killefer, supra note 169, at 21; Longan, supra note 126, at 738; Marcus, supra note 15, at 1593; Menkel-Meadow, supra note 16, at 511; Resnik, supra note 1, at 435; Frank E.A. Sander, A Friendly Amendment, DISP. RESOL. MAG., Fall 1999, at 11, 24; Schuck, supra note 158, at 364; Tornquist, supra note 50, at 760; Susan M. Gabriel, Note, Judicial Participation in Settlement: Pattern, Practice, and Ethics, 40 OHIO ST. J. DISP. RESOL. 81, 91–92 (1988).

375 See supra notes 260–68 and accompanying text.

376 See supra text accompanying notes 356–59.

377 Novak v. Farneman, No. 2:10-CV-768, 2011 WL 4688630, at *4 (S.D. Ohio Sept. 30, 2011) (deciding that continuing to preside over disputes the judge had mediated did not pose a threat to impartiality and that recusal was not required, but nonetheless recusing himself to avoid any taint of suggested bias); Kearny v. Milwaukee County, No. 05-C-834, 2007 WL 3171395, at *3 (E.D. Wis. Oct. 26, 2007) (order of recusal) (magistrate judge recusing himself on his own initiative when assigned to try a case he had mediated); see also Day v. NLO, 864 F. Supp. 40, 41, 43–44 (S.D. Ohio 1994) (order transferring case) (disagreeing with the argument that a judge who participated in settlement is incapable of reviewing that settlement, but recusing himself “out of an abundance of caution”).

378 Brazil Interview, supra note 153, at 24 (noting “considerable disagreement” among federal judges).

379 See, e.g., LACEY, supra note 44, at 23; Baer, supra note 122, at 148; Brazil Interview, supra note 153, at 27 (quoting Judge Klein); Hogan, supra note 129, at 439; Miller, supra note 128, at 33 (quoting Judge McCarthy); Polster, supra note 122; see also Martin, supra note 159, at 194–95 (describing a judge who conducts his own settlement conferences when he is the trier of fact).

380 Robinson, supra note 122, at 344 & tbl.2, 356 & tbl.6. Actual use of the practice was somewhat less prevalent. Practices were almost evenly split at the extremes on the general civil trial bench. About 38% of the judges reported that they were the trial judge in 90% or more of their settlement conference cases, while almost 40% reported that they
pretrial management includes everything related to settlement (unless restricted by local rule), many judges are free to take on dual-neutral roles. And, as shown above, judges’ confidence in their ability to do this is understandable, even if misplaced.381

In the federal court system, the ideal way to reduce the potential for coercion and partiality that can damage perceptions of civil justice—in the context of both settlement and adjudication—would be through amendments to Rule 16 that prevent judges from serving as settlement neutrals in cases assigned to them for management and adjudication. Separating these functions structurally would establish a uniform national approach and establish a norm that state court systems could adopt as well. This is, however, an ambitious proposal. It failed as an ethical reform, and any attempt to amend Rule 16 of the Federal Rules of Civil Procedure will surely face similar challenges.

One headwind the proposal will face is that it would impose limitations on judicial discretion, which was embraced by the Rules’ original drafters and is now particularly strong in the pretrial setting.382 While a general lack of constraint on judicial power has been one of the central criticisms of the discretion associated with judicial management,383 it should be clear by now that I am not urging reform from that perspective or seeking to curtail discretion as a general matter through procedural rules.384 The argument here is limited to settlement conferences. Professor Cooper, the long-serving Reporter for the Advisory Rules Committee, offered a pragmatic justification for discretion as “a useful rulemaking technique when it is difficult — as it

were rarely assigned as the trial judge in their settlement conference cases (10% or less). Id. at 346 & tbl.5. Judges assigned to the family law bench, however, were more likely to conduct settlement conferences in cases to which they were assigned for trial. Id. at 347; see also Ascom Hasler Mailing Sys., Inc. v. U.S. Postal Serv., Nos. 00-1401 (PLF/JMF), 00-2089 (PLF/JMF), 2010 WL 4116858, at *4 (D.D.C. Oct. 19, 2010) (remarking that federal magistrate judges “are often called upon to try a case after they have presided over settlement discussions” in the District of Columbia).

381 See supra notes 314–18 and accompanying text.
382 See Gensler, supra note 9, at 720. See generally Marcus, supra note 15; Subrin, supra note 17.
almost always is — to foresee even the most important problems and to
determine their wise resolution.” The problems with judges settling cases
they manage and adjudicate are not, however, difficult to foresee. A decision
to serve as a settlement neutral is unlike the many pretrial managerial
decisions that require case-by-case tailoring or that benefit from judicial
discretion to make adjustments from default provisions. Instead, policies
governing the extent to which judges should mix conflicting neutral roles can
be determined with reference to overarching principles coupled with practical
considerations.

Perhaps the best hope is that federal rulemakers would regard an
amendment as an opportunity to achieve national uniformity on an important
issue by imposing a structural separation of neutral functions. As with prior
changes to Rule 16’s provisions concerning settlement conferences, an
amendment of this nature would not be breaking new ground. Although it
would do much more than merely confirm the status quo, it would follow the
lead of the districts with similar rules. Failing a uniform national approach,
however, district courts could improve their local rules by coordinating their
provisions for settlement conferences with those that govern their ADR
programs. The framework suggested in this Article defines the issue as one of
eliminating conflicting neutral roles rather than one of restricting judicial
management. This conceptualization could provide a basis for revisions of
local rules to bring provisions for judicial settlement conferences within
accepted principles for ADR processes.

1. Essentials for Separating Neutral Functions

Two key elements need to be incorporated in an amendment. First, the rule
should establish a structural separation by prohibiting judges assigned to
adjudicate and manage a case from presiding at settlement. “Settlement” needs
to encompass both judicial settlement conferences and mediations. This does
not mean relieving judges from presiding over settlement conferences or
serving as mediators, where they have much to offer. Separate settlement

386 As an example, the Federal Rules of Civil Procedure permit judges to vary the
appropriate number and length of depositions depending on the circumstances of the case.
See FED. R. CIV. P. 26(b)(2), 30(a)(2), 30(d)(1).
387 There are also other reasons to avoid undue optimism about the prospects of
addressing the problem of dual-neutral roles via an amendment to Rule 16. In the words of
Professor Marcus, Associate Reporter of the Advisory Committee on Civil Rules,
“Amendments do not and should not happen often. Amending the rules is not easy and
388 See supra notes 158–76 and accompanying text.
judges are not impractical if courts assign this function to magistrate judges or use a “buddy system” in which judges trade cases for settlement. Courts could also use senior or retired judges as settlement judges.389

Objectors sometimes envision a sharing system in which the assigned judge conducts the settlement proceeding and then, if it is not successful, transfers the case to another judge for trial. This could create administrative problems and would make it difficult to set a firm trial date as a method to encourage settlement.390 Reassigning the settlement process rather than the trial would mitigate these administrative barriers. And, given the decisionmaking that is involved in pretrial management, reassigning settlement better serves the goal of separating adjudicatory and settlement roles. Another objection to referring mediations to another judge is that the colleague will not welcome the case, which will consume time but not bolster his disposition statistics or lighten his docket.391 This administrative barrier could be remedied by adjusting the way statistics are gathered to account for settlements, and exchanging cases for settlement should even out the effect on the docket in the long run.

Second, the rule should include a confidentiality provision to ensure that settlement judges and mediators may not report settlement communications to assigned judges.392 Because sometimes judges would like to know what happened during a settlement attempt in their case, it is important to limit disclosures from settlement conferences just as many districts limit such communication from their ADR programs. A provision could be modeled on the Uniform Mediation Act, the local federal court rules, or state rules discussed above.393

2. Potential Exceptions

If the rulemaking bodies do take up the issue of dual-neutral roles, there are two potential exceptions that will likely be urged to modify a bright-line rule. One is to limit the prohibition on dual-neutral roles to bench trials. The second is to allow exceptions when parties consent to the assigned judge serving as the settlement neutral. The first exception should be rejected. The second should be limited to very narrow circumstances.

The Judicial Conference’s Committee on Codes of Conduct thought that ethical concerns about a dual judicial role are lessened when a judge presides

389 One judge has even suggested reciprocal arrangements between federal- and state-court judges. Cratsley, supra note 122, at 589.
390 Polster, supra note 122.
391 Baer, supra note 122, at 149.
392 See Welsh, supra note 126, at 990, 1028–32 (proposing strict confidentiality provisions to separate mediation from adjudication).
393 UNIF. MEDIATION ACT § 7(a) (UNIF. LAW COMM’N 2003); see also supra Part IV.C.2.
over a jury trial. Consistent with this view, there are judges who consider their settlement efforts in cases assigned to them for adjudication as far less problematic in jury trials than in cases they will try from the bench. The reasoning behind this distinction is that, in a bench trial, the judge is the trier of fact and key witnesses may have participated in the mediation. In contrast, in a jury trial the judge’s role is only to manage the process while the jury decides the merits of the case. Thus the potential effect of settlement on decisionmaking is lessened with a jury trial.

The arguments against making an exception for jury trials are twofold. First, while judges in a jury trial do not make the ultimate decision on the merits, they do make other crucial rulings during and after trial, and it is important to avoid any perception that these decisions have been influenced by settlement conversations. Decisions on motions to set aside a verdict or reduce the amount of damages awarded by a jury, for example, could be affected by a party’s concessions or the judge’s access to inadmissible evidence during settlement. Moreover, assigned judges make managerial decisions on discovery issues that might affect the value of a case in both jury and non-jury trials.

Second, a judge conducting a jury trial can influence a jury through her demeanor and nonverbal communication. Nonverbal signals are important in human communication and persuasion, and experimental work suggests that judges indicate their attitudes and respect for trial participants to the jury through facial expressions and body language. Jurors naturally look to judges for guidance during a trial, and studies of mock juries support a conclusion that not only are judges signaling their underlying views to jurors, but jurors are aware of these nonverbal cues from judges, particularly their negative behaviors. At the extreme, nonverbal judicial conduct has been

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394 Advisory Opinion No. 95, supra note 237, at 162.
395 See, e.g., Baer, supra note 122, at 150; Barnao, supra note 373, at 594–95; Brazil Interview, supra note 153, at 25 (quoting Judge Klein); Katz, supra note 135, at 3; Will et al., supra note 53, at 211–12; see also D. CONN. CIV. R. 16(c) (distinguishing assignment of neutral for bench and jury trials); D. HAW. R. 16.5 (same).
396 Polster, supra note 122, at n.2.
397 Cratsley, supra note 122, at 589 (discussing decisions about the jury empanelment process, evidentiary rulings, motions for directed verdict, and jury instructions); Killefer, supra note 169, at 19 (noting important effect of judges’ rulings on “the shape” of jury trial).
398 Barnao, supra note 373, at 595 n.87 (quoting Judge Levy).
399 Brazil Interview, supra note 153, at 24 (quoting Judge Bremer discussing procedures in the District of Iowa to separate settlement from management functions).
found to be reversible error.\textsuperscript{402} Even with more subtle effects, nonverbal signals are a reason to take seriously concerns about a judge who has led a settlement process presiding at a jury trial.

The second potential exception is one that would allow an assigned judge to function as a settlement neutral with the consent of the parties. As with jury trials, party consent is a factor that the Judicial Conference’s Committee on Codes of Conduct thought should mitigate ethical concerns when an assigned judge leads settlement discussions.\textsuperscript{403} The ABA Section on Dispute Resolution ethical proposal would have permitted a trial judge to serve as a mediator with consent of the parties,\textsuperscript{404} and some judges have also voiced support for this approach.\textsuperscript{405} In addition, among the federal districts that generally do not permit an assigned judge to preside at a settlement conference, some permit an exception if the parties all stipulate their consent.\textsuperscript{406}

An exception for consent would be consistent with the emphasis in mediation on party self-determination\textsuperscript{407} and with the judicial codes’ permission for ex parte communications in settlement with the consent of the parties.\textsuperscript{408} Parties and their attorneys may prefer settlement with the judge assigned for management and trial based on that judge’s settlement skill and style, especially if there are few alternatives in a particular jurisdiction. Consent may also, however, implicate the tendency toward overconfidence. An attorney may be so confident that the judge will see her side of the case as stronger that she may undervalue the risks of settlement participation. In any event, consent should not be a matter of agreeing to a judge’s suggestion that she serve as the settlement judge; it should come entirely at the initiative of the parties. This is necessary in order to avoid the dilemma inherent in resisting a judicial request. In addition, if the case does not settle, the parties should have

\textsuperscript{402} See e.g., Andrew Horwitz, Mixed Signals and Subtle Cues: Jury Independence and Judicial Appointment of the Jury Foreperson, 54 CATH. U. L. REV. 829, 850–54 (2005) (discussing cases).
\textsuperscript{403} Advisory Opinion No. 95, supra note 237, at 161.
\textsuperscript{404} See SECTION OF DISPUTE RESOLUTION, supra note 326. It would also have permitted the practice if there is no reasonable alternative, such as when a jurisdiction has only a single judge. Brazil Interview, supra note 153, at 26.
\textsuperscript{405} Brazil Interview, supra note 153, at 25 (quoting Judge Klein emphasizing the importance of the parties’ wishes); Katz, supra note 135, at 3 (describing a judge willing to participate in mediation in cases scheduled for bench trial when parties so request and waive the conflict). The survey of California judges that asked about dual-neutral roles premised the question on party consent. Robinson, supra note 122, at 343; see also supra text accompanying note 380.
\textsuperscript{406} See, e.g., E.D. CAL. R. 240(a)(16), 270(b); N.D. CAL. ADR R. 7-2; D. GUAM R. 16-2(b)(1)(B); D. HAW. R. 16.5(a); D.N.D. R. 16.2(C)(1) (“appropriate jury case[s]” only); see also D. OR. R. 16-4(e)(2) (parties must “jointly initiate a request”); M.D. TENN. R. 16.04(a) (exception when “requested and agreed by the parties” or if the assigned judge deems it appropriate “because of the exigencies of the case”).
\textsuperscript{408} See supra text accompanying notes 331–34.
the option to reevaluate their consent after the settlement attempt, when they will know what information they shared with the judge. At that point, they will be better able to evaluate the risk of partiality on the part of the judge.409

V. CONCLUSION

Concerns about bias and coercion have accompanied judicial settlement from its inception. Both these concerns are greatly heightened when a judge serves as a neutral in a case she is also managing and will adjudicate if settlement is unsuccessful. Forceful encouragement to settle becomes coercion when it comes from a person with decisionmaking power over the case. Impartiality at trial is threatened by the information shared with the judge in settlement or, alternatively, the settlement process is made less effective by withholding that information. The rise of facilitative mediation as a judicial settlement method may help reduce worries about coercion, but it heightens concerns about impartiality because of the types of information that pass from parties to the decisionmaker. And due to advances in cognitive and social psychology, a greater understanding of mental processes and decisionmaking supports and sharpens these concerns.

The perception of these problems by parties and attorneys is as important as the reality. Settlement has become an important judicial function, identified with the courts, and the way it is conducted will influence how the public views the integrity of the judicial system. It is time to move beyond the conception of a managerial judge as someone who handles all the pretrial matters in a case, including settlement. Presiding at settlement is, at its core, a neutral role, not a managerial function. Judges make significant contributions as settlement neutrals, and the risks inherent in dual neutral roles can be avoided by imposing a structural separation between settlement and adjudication. Rules that leave true settlement management in the hands of the assigned judge, while reassigning the settlement neutral function to a judge who is not responsible for adjudication, would enhance the effectiveness of settlement and protect the integrity of courts’ decisionmaking processes.

409 Cf. Welsh, supra note 126, at 990, 1032–33 (proposing that when a single magistrate judge presides over both settlement and adjudication, caucuses should be barred in the settlement session and the parties should be able to elect, after the settlement session, whether or not the magistrate judge will conduct the trial).