

A Judge's Role in Settlement

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Ellen Deason, Beyond "Managerial Judges": Appropriate Roles in Settlement

78 Ohio State Law Journal 73 (2017).

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



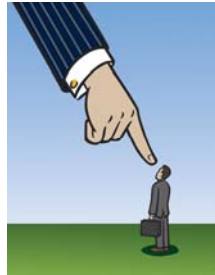
Judicial Officer as Settlement Neutral

- 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

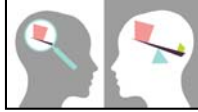


Risk to Impartiality

- 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



Washington State
Judicial Branch
CONFERENCE

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

Washington State
Judicial Branch
CONFERENCE

Potential Exceptions?

- Party Request
- Jury Trials



Washington State
Judicial Branch
CONFERENCE

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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Appropriate Roles in Settlement**

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**Public Law and Legal Theory Working
Paper Series
No. 404**

August 23, 2017



This working paper series is co-sponsored by the
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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,¹ although its roots reach even

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 explanations²—with that of the “judge-overseer.”³ Pretrial, a managerial judge is engaged in supervising discovery, managing case development, and encouraging settlement.⁴ Professor Resnik famously questioned the wisdom of the increase in judicial authority associated with these “judge initiated, invisible, and unreviewable” roles⁵ due to the absence of procedural safeguards to protect parties from abuse of that authority.⁶ 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.⁷ 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.⁸ Unlike these earlier

role); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (criticizing the role).

² Resnik, *supra* note 1, at 378 n.13.

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.⁹ 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

⁹ See generally Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669 (2010) (discussing amendments to the Federal Rules of Civil Procedure that validate and encourage active judicial pretrial case management).

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.¹⁰ Overall, amendments to

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.¹¹ This diversity is consistent with the Alternative Dispute Resolution Act of 1998¹²: 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.

amendment "again provides explicit authorization in the rules for what many judges are already doing").

¹¹ See *infra* notes 84–92 and accompanying text; see also *infra* note 157.

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 joinder¹³ and provisions for information exchange through discovery to develop cases prior to trial¹⁴ that, along with a decline in the rate of trials, made the pretrial phase the “main event” in litigation.¹⁵ The rulemakers, inspired by the practice of some state court judges, also added Rule 16 to authorize pretrial conferences.¹⁶

¹³The pleading and joinder rules eased access to the courts and permitted lawsuits with a broader scope. *See, e.g.,* Armistead M. Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 267–68, 270–74 (1939); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439–40 (1986); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 521 (1986).

¹⁴*See generally* Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998) (discussing the influence of the 1938 Rules on increased potential for discovery).

¹⁵Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1589 (2003).

¹⁶Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257, 258 (1986); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 490–91 (1986); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 935 (2000); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1973–74 (1989).

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,¹⁷ Rule 16 gave district judges discretion to decide on a case-by-case basis whether to hold a conference and how to shape it.¹⁸ 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.¹⁹

There was concern among the drafters, however, with the potential for coercion of the parties.²⁰ 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: "[I]t 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).

¹⁷ See generally Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 *U. PA. L. REV.* 909 (1987).

¹⁸ 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.

¹⁹ 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.

AM. BAR ASS'N, *RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES* 37–38 (William W. Dawson ed., 1938).

²⁰ Shapiro, *supra* note 16, at 1979–80 (citing concerns about judges coercing parties by eliminating issues from the case and compelling settlement).

parties and to make the conference the recognized instrument of compelled negotiations.”²¹

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,²² 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.²³ Second, under the prevalent system for assigning cases, the judge conducting the conference was typically not the judge assigned for trial.²⁴

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.”²⁵ Settlement at pretrial conferences was accepted, however, as “often the logical result of pre-

²¹ Charles E. Clark, *Objectives of Pre-Trial Procedure*, 17 OHIO ST. L.J. 163, 167 (1956); see also William J. Brennan, Jr., *The Continuing Education of the Judiciary in Improved Procedures* (“[W]e must stand steadfastly against the perversion of the pretrial procedure into a device for forcing settlements.”), in *Proceedings of the Seminar on Practice and Procedure Under the Federal Rules of Civil Procedure*, 28 F.R.D. 37, 42, 50 (1960) [hereinafter *Seminar on Practice and Procedure*]; Charles E. Clark, *To an Understanding Use of Pre-Trial* (“Compelled settlement negotiations are dangerous as bringing in question the impartiality of the tribunal . . .”), in *Proceedings of the Seminar on Procedures for Effective Judicial Administration*, 29 F.R.D. 191, 454, 456 (1961) [hereinafter *Seminar on Effective Judicial Administration*].

²² See Marcus, *supra* note 15, at 1563 (noting that before the 1970s, “district judges’ discretion was constrained by the traditional reticence of the judge during the pretrial period”).

²³ The term “by-product” frequently appears in judicial writing from the time about Rule 16. See, e.g., Harry M. Fisher, *Pre-Trial Conference and Its By-Products*, 1950 U. ILL. L.F. 206, 214; Alexander Holtzoff, *Federal Pretrial Procedure*, 11 AM. U. L. REV. 21, 29 (1962); Irving R. Kaufman, *The Philosophy of Effective Judicial Supervision over Litigation*, in *Seminar on Effective Judicial Administration*, *supra* note 21, at 207, 215; Shafroth, *supra* note 16, at 252; J. Skelly Wright, *Pre-Trial on Trial*, 14 LA. L. REV. 391, 399 (1954); see also *Handbook for Effective Pretrial Procedure*, 37 F.R.D. 255, 271 (1964) (statement on pretrial procedure adopted by the Judicial Conference of the United States); Harry D. Nims, *Some By-Products of Pre-Trial*, 17 OHIO ST. L.J. 185, 185 (1956).

²⁴ See *infra* notes 39–43 and accompanying text.

²⁵ Alfred P. Murrah, *Pre-Trial Procedure: A Statement of Its Essentials*, 14 F.R.D. 417, 424 (1954). Justice Brennan, addressing the Judicial Conference of the Tenth Circuit in 1960, endorsed this view, asserting that “settlement can never be the reason for the [pretrial] conference, but merely an incidental, although, of course, valuable, result of it.” Brennan, *supra* note 21, at 50.

trial.”²⁶ 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.”²⁷

In terms of judicial behavior, contemporary judicial commentary suggests widespread consensus that it was appropriate to ask the attorneys whether they had considered settlement,²⁸ thereby initiating discussions that attorneys might hesitate to start for fear of signaling weakness.²⁹ Some judges thought suggesting that attorneys discuss settlement should be the limit of their involvement,³⁰ while other judges thought they could go somewhat further without overstepping.³¹ But the by-product theory was inconsistent with judges aggressively promoting settlement at the pretrial conference³² and empirical evidence from the time suggests that this attitude seems to have encouraged restraint.³³

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

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).

²⁹ *See, e.g.*, Murrah, *supra* note 25, at 420; Edson R. Sunderland, *Procedure for Pretrial Conferences in the Federal Courts*, 3 WYO. L.J. 197, 202 (1949).

³⁰ *See* Grover M. Moscovitz, *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 settlement³⁴ with some judges taking an activist stance, particularly in state courts.³⁵ This group of judges saw settlement as the “primary objective” of pretrial conferences,³⁶ and expressed great enthusiasm for the effect of settlement in pretrial conferences in reducing dockets and waiting times to trial.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.³⁸

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).

³⁵ Galanter, *supra* note 16, at 259–60.

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”).

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).

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)); Ruggiero 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 & Wickham, *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.³⁹ 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.⁴⁰

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.”⁴¹ 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.⁴² They also reflected concerns for neutrality and the integrity of trials: “[I]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.”⁴³

\$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.⁴⁴ 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.⁴⁵ These changes were part of the well-documented shift in judicial self-conception from neutral adjudicator to active case manager.⁴⁶ 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.”⁴⁷

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.”⁴⁸ As in the earlier era, settlement as a mode of docket control continued to be an important motivating factor for judicial involvement,⁴⁹ 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”).

⁴⁴ 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 ascendancy, 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 . . .”).

⁴⁵ 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).

⁴⁶ *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.

⁴⁷ 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 . . .”).

⁴⁸ *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).

⁴⁹ *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.⁵⁰ However, unlike the judicial writing on Rule 16 in the earlier decades (which emphasized almost exclusively the docket benefits of settlement),⁵¹ for some the enthusiasm for settlement during this era had an additional grounding: a conviction that settlement produced superior outcomes.⁵² 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.”⁵³

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,⁵⁴ 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).

⁵⁰ *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.”).

⁵¹ *See supra* note 37 and accompanying text.

⁵² Galanter, *supra* note 16, at 261; *see also* Dep’t of Pub. Advocate v. N.J. Bd. of Pub. Utils., 503 A.2d 331, 333 (N.J. Super. Ct. App. Div. 1985) (stating that the policy encouraging settlement is not to relieve dockets, but because “parties to a dispute are in the best position to determine how to resolve a contested matter in a way which is least disadvantageous to everyone”).

⁵³ Hubert L. Will et al., *The Role of the Judge in the Settlement Process, in Proceedings of Seminar for Newly Appointed United States District Court Judges*, 75 F.R.D. 89, 203, 203 (1976). Judge Will was not alone. Chief Judge Fox of the Western District Court of Michigan described settlement as at least coequal to adjudicated decisions: “We accept settlement as a preferred means of disposition. We believe that encouragement of settlement is an important use of pretrial and is consistent with the overriding goal ‘to further the disposition of cases according to right and justice on the merits.’” Fox, *supra* note 47, at 134–35 (footnote omitted) (quoting William J. Brennan, Jr., *Pretrial Proceedings in New Jersey — A Demonstration*, 28 N.Y. ST. B. BULL. 442, 449 (1956)); *see also id.* at 142 (stating that settlement can be expected to “reflect the parties’ evaluation of the actual merits of the case” thus producing “results which are probably as close to the ideal of justice as we are capable of producing”).

⁵⁴ *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.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.⁵⁶ Of these, approximately 10% reported taking an aggressive role “through the use of direct pressure.”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.⁵⁸ In contrast, a separate survey of lawyers in the early 1980s portrayed judges as far less likely to participate in settlement,⁵⁹ but reported that this

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).

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. *Id.* Thus these authors concluded that the primary issue was “not whether but *how* a judge will intervene in pre-trial conference.” *Id.* at 177.

⁵⁷ *Id.* at 177 tbl.8-2. The study found that the type of calendar system was significantly related to the style of intervention. *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. *Id.*

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. *Id.* Seventy-five percent of federal judges and 56% of state court judges reported initiating settlement discussions in jury cases. *Id.* Forty-one percent of the federal judges and 56% of the state judges reported suggesting terms for settlement. *Id.* For bench trials, fewer judges reported these activities. *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. *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).

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). *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

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.

⁶⁷ FED. R. CIV. P. 16(a)(5) (1983).

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.”⁶⁸

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 16.⁶⁹ The Advisory Committee notes did express a caution that echoed the reasoning behind the drafters’ original decision to omit settlement from the 1938 rule.⁷⁰ 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.”⁷¹ Further, the drafters seem to have contemplated that, ideally, someone other than the assigned judge should lead the settlement process.⁷² 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.⁷³ While it is important to note that both the

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,⁷⁴ 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.⁷⁵

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.⁷⁶ Innovative federal districts began offering mediation programs and court-annexed nonbinding arbitration in the late 1970s.⁷⁷ 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 evaluation⁷⁸ and the summary jury trial.⁷⁹ 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,⁸⁰ many courts—both federal and state—eventually established programs that provided (or required) dispute resolution processes other than judicial settlement conferences.⁸¹

F.R.D. 79, 231, 232 (1976) [hereinafter *Pound Conference*]; Morris E. Lasker, *The Court Crunch: A View from the Bench*, 76 F.R.D. 245, 245–46 (1978); Maria L. Marcus, *Judicial Overload: The Reasons and the Remedies*, 28 BUFF. L. REV. 111, 111 (1979); Harry Phillips, *The Expansion of Federal Jurisdiction and the Crisis in the Courts*, 31 VAND. L. REV. 17, 17 (1978).

⁷⁴ See, e.g., Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1907–09 (1989) (citing studies).

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).

⁷⁸ See generally Wayne D. Brazil et al., *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 279 (1986).

⁷⁹ See generally James J. Alfani, *Summary Jury Trials in State and Federal Courts: A Comparative Analysis of the Perceptions of Participating Lawyers*, 4 OHIO ST. J. ON DISP. RESOL. 213 (1989); Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution: A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461 (1984).

⁸⁰ See, e.g., Gladys Kessler & Linda J. Finkelstein, *The Evolution of a Multi-Door Courthouse*, 37 CATH. U. L. REV. 577, 580–85 (1988); Kenneth K. Stuart & Cynthia A. Savage, *The Multi-Door Courthouse: How It's Working*, COLO. LAW., Oct. 1997, at 13.

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).⁸² 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.⁸³ The local nature of the plans, which were developed with input from advisory committees in each district, led to great variation,⁸⁴ but many districts included some form of ADR as an element of their plan.⁸⁵ By 1996, mediation had become the most common ADR process offered by the federal courts; it was available in over half the districts.⁸⁶ During the same time period, many state courts also instituted mediation programs.⁸⁷

The authority of the CJRA expired in 1997, but the Judicial Conference urged local districts to continue to develop ADR programs.⁸⁸ 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)

hybrid system of justice” that combines adjudicative and mediative processes at every level of the court system).

⁸² Judicial Improvements Act of 1990, Pub. L. No. 101-650, tit. I, 104 Stat. 5089 (codified as amended at 28 U.S.C. §§ 471–482 (2012)); see Peter W. Agnes, Jr., *Some Observations and Suggestions Regarding the Settlement Activities of Massachusetts Trial Judges*, 31 SUFFOLK U. L. REV. 263, 279 (1997) (“Under the [CJRA], numerous federal district courts have gone much further than Federal Rule 16 in developing the concept of early court intervention and early utilization of the most appropriate dispute resolution method in each case.” (footnote omitted)); Thomas P. Griesa, *Comment: One Court’s Experience with the CJRA*, 49 ALA. L. REV. 261, 262–63 (1997) (noting that while the CJRA plan in the S.D.N.Y. was mostly a “codification” of case management policies the district had been using for many years, its innovation was the addition of a mediation program).

⁸³ 104 Stat. at 5089–93 (codified as amended at 28 U.S.C. §§ 471–473).

⁸⁴ Lauren K. Robel, *Grass Roots Procedure: Local Advisory Groups and the Civil Justice Reform Act of 1990*, 59 BROOK. L. REV. 879, 884 (1993); see also Edward D. Cavanagh, *The Civil Justice Reform Act of 1990 and the 1993 Amendments to the Federal Rules of Civil Procedure: Can Systemic Ills Afflicting the Federal Courts be Remedied by Local Rules?*, 67 ST. JOHN’S L. REV. 721, 728 (1993) (arguing that the collision of the local and national rulemaking processes created confusion and inconsistencies); Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1447 (1994) (arguing that the broad exercise of local rulemaking powers that spawned the variation was based on a misreading of the legislation).

⁸⁵ STIENSTRA, *supra* note 77, at 1.

⁸⁶ ELIZABETH PLAPINGER & DONNA STEINSTRAS, *ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS* 4 (1996). In addition, the federal courts of appeals developed active mediation programs under the authority of Federal Rule of Appellate Procedure 33, which authorizes settlement conferences. See generally ROBERT J. NIEMIC, *MEDIATION AND CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS* (1997).

⁸⁷ For a sampling, see generally COURT-ANNEXED MEDIATION: CRITICAL PERSPECTIVES ON SELECTED STATE AND FEDERAL PROGRAMS (Edward J. Bergman & John G. Bickerman eds., 1998).

⁸⁸ STIENSTRA, *supra* note 77, at 2.

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.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.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.⁹¹ Slightly more than one-third authorize multiple forms of ADR.⁹²

Along with these new programs, judges have continued to conduct settlement conferences.⁹³ A few districts placed settlement conferences in their ADR programs.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.⁹⁵

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. *Id.*

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. *Id.* at 5 & tbl.1. The indication that mediation is authorized in two-thirds of the districts, *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. *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. *Id.*

⁹¹ *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. *Id.* No district relies solely on court-annexed arbitration as its ADR process. *Id.* at 6.

⁹² *Id.* at 4–5, 5 tbl.1. Fourteen districts authorize three or more processes. *Id.* at 5.

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).

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.

⁹⁵ *See* Donna Stienstra, *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.”)

⁹⁶STIENSTRA, *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”).

⁹⁷Many 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.⁹⁸ 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.⁹⁹

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,¹⁰⁰ in the timing of the process,¹⁰¹ or in setting the fees for a neutral.¹⁰² 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.¹⁰³ While a few districts

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(e); E.D. WIS. CIV. R. 16(d) (ADR evaluation conference).

make their ADR programs strictly voluntary by rule,¹⁰⁴ many more districts grant judges authority to select a process and refer the parties, with or without their consent.¹⁰⁵ 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.¹⁰⁶

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 information¹⁰⁷ and presumptive limits on the number of depositions and interrogatories.¹⁰⁸ 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

¹⁰⁴ See, e.g., E.D. CAL. R. 271 (voluntary program); S.D. GA. CIV. R. 16.7.5 (court-annexed mediation by election of the parties); C.D. ILL. R. 16.4(E) (referral to mediation only by parties’ agreement); E.D. LA. CIV. R. 16.3.1 (referral to private mediation, minitrial, or summary jury trial with parties’ consent); W.D. LA. CIV. R. 16.3.1 (same). Some courts require party consent for only selected forms of dispute resolution. See, e.g., E.D. TENN. R. 16.3(a), 16.5(a). These are typically court-annexed arbitration, summary jury trial, or summary bench trial. Occasionally districts offer parties the opportunity to make a dispute resolution process binding, which requires party consent. See, e.g., N.D. GA. CIV. R. 16.7(B)(1) (binding arbitration, summary jury trial, or bench trial).

¹⁰⁵ See, e.g., N.D. FLA. R. 16.3; E.D.N.Y. R. 83.8; M.D. TENN. R. 16.04(b); W.D. VA. R. 83(b); S.D. W. VA. CIV. R. 16.6(a). It is common for rules to couple a provision that the judge will discuss ADR options with the parties with an authorization for the judge to select a process if the parties are unable to agree on one. See C.D. CAL. R. 16-15.3; N.D. CAL. ADR R. 3-2; W.D. PA. CIV. R. 16.2(d). Typical language allows a judge to order a dispute resolution process on the request of a party, by the agreement of the parties, or in the judge’s discretion (or on the court’s own motion). See, e.g., D. ALASKA CIV. R. 16.2(c); D. COLO. CIV. R. 16.6(a); D. HAW. R. 88.1(d); D. IDAHO CIV. R. 16.4(b)(2); N.D. & S.D. MISS. R. 83.7(c), (e)(1); N.D. OHIO CIV. R. 16.5(b), 16.6(b); D. OR. R. 16-4(e); S.D. TEX. CIV. R. 16.4.C. Other districts simply grant the judge authority to order parties to use a dispute resolution process without elaborating on the role of party consent. See, e.g., N.D. ALA. CIV. R. 16.1; M.D. FLA. R. 9.03; N.D. GA. CIV. R. 16.7(B)(1); S.D. ILL. R. 16.3; D. MASS. R. 16.4; D. MINN. R. 16.5(b); D. MONT. R. 16.5; D. WYO. CIV. R. 16.3(b).

¹⁰⁶ Alternatively, when judges are not involved in an initial process choice, they may play a role in exempting parties from dispute resolution as a check on an administrative determination. In districts that refer all cases with certain characteristics to a particular dispute resolution procedure, or in which an administrator selects and diverts cases, judges are often given the role of considering objections to the assigned process and deciding whether a specific case should be exempted from the referral. See, e.g., N.D. CAL. ADR R. 3-3(c); E.D.N.C. CIV. R. 101.1(a); W.D.N.C. CIV. R. 16.2(B); N.D. OHIO CIV. R. 16.7; E.D. PA. CIV. R. 53.2(3)(C)(3); W.D. TEX. CIV. R. 88(g).

¹⁰⁷ FED. R. CIV. P. 26(a)(1) (1993).

¹⁰⁸ *Id.* R. 30, 33(a).

settlement conferences,¹⁰⁹ and the advisory committee notes stressed the new judicial planning roles that accompanied these expanded settlement opportunities.¹¹⁰

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.¹¹¹ In this way the amendment could be seen as a mild limitation on judicial discretion.¹¹² 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.¹¹³ Although procedural rules can limit courts’ authority to use their inherent power,¹¹⁴ 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.¹¹⁵ 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.”¹¹⁶ And significantly, the Rule’s endorsement of a broad scope of judicial discretion

¹⁰⁹The 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).

¹¹⁰FED. 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 . . .”).

¹¹¹FED. R. CIV. P. 16(c)(9) (1993).

¹¹²See *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).

¹¹⁴See, e.g., *Bank of N.S. v. United States*, 487 U.S. 250, 254 (1988) (holding that a court cannot rely on its supervisory power in contradiction of a procedural rule); *United States v. ONE 1987 BMW 325*, 985 F.2d 655, 661 (1st Cir. 1993); *G. Heileman Brewing Co.*, 871 F.2d at 652; *Landau & Cleary, Ltd. v. Hribar Trucking, Inc.*, 867 F.2d 996, 1002 (7th Cir. 1989); cf. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991) (allowing use of inherent powers when the Civil Rules did not limit the nature of the sanction); *Atl. Pipe*, 304 F.3d at 143.

¹¹⁵FED. 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,¹¹⁷ 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,”¹¹⁸ creating what James Alfini described at the turn of the century as a “settlement culture” in the courts.¹¹⁹ 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.”¹²⁰ 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.¹²¹

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 judges¹²² and articles for judges explaining how to mediate.¹²³

¹¹⁷ See, e.g., John C. Cratsley, *Judges and Settlement: So Little Regulation with So Much at Stake*, DISP. RESOL. MAG., Spring 2011, at 4, 4. See generally Deborah Hensler, *A Research Agenda: What We Need to Know About Court-Connected ADR*, DISP. RESOL. MAG., Fall 1999, at 15.

¹¹⁸ Janet Cooper Alexander, *Judges’ Self-Interest and Procedural Rules: Comment on Macey*, 23 J. LEGAL STUD. 647, 649 (1994).

¹¹⁹ James J. Alfini, *Risk of Coercion Too Great: Judges Should Not Mediate Cases Assigned to Them for Trial*, DISP. RESOL. MAG., Fall 1999, at 11, 11; see also J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1723 (2012) (“[S]ettlement . . . has become the dominant mode of civil dispute resolution.”); Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991) (“A trial is a failure.”).

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 mediation¹²⁴ and what Professor Jennifer Reynolds has called “conversion narratives” that focus on the “substantive justice benefits” of mediation’s alternative perspective.¹²⁵ Some courts have established mediation programs in which judges officially serve as mediators.¹²⁶ More generally, many individual judges now incorporate aspects of mediation when they serve as a settlement neutral.¹²⁷ In this context there are judges who conduct what they

ADR in their training programs. Robert B. McKay, *Rule 16 and Alternative Dispute Resolution*, 63 NOTRE DAME L. REV. 818, 825 (1988); *see also* Alfini, *supra* note 119, at 14; Steve Gizzi, *Judging Meditation*, 10 JOHN F. KENNEDY U. L. REV. 135, 136 (2004); Peter Robinson, *Adding Judicial Mediation to the Debate About Judges Attempting to Settle Cases Assigned to Them for Trial*, 2006 J. DISP. RESOL. 335, 350.

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”).

¹²³ Charles B. Craver, *When Parties Can’t Settle: Mediation Techniques Every Judge Needs to Master*, JUDGES’ J., Winter 1987, at 4, 6–7 (emphasizing techniques for facilitative mediation as well as a role for evaluative skills).

¹²⁴ *See, e.g.*, Robert M. Levy, *ADR in Federal Court: The View from Brooklyn*, 26 JUST. SYS. J. 343, 343 (2005) (noting that mediation “offers parties the opportunity to take control of their destiny”); Rich, *supra* note 49, at 530 (“More, more, and more mediation is the answer.”); Lisa Sullivan, *ADR Offers What the Bench Cannot*, MICH. B.J., Feb. 2006, at 16, 16 (describing the “obvious benefits” of mediation).

¹²⁵ Jennifer W. Reynolds, *Judicial Reviews: What Judges Write When They Write About Mediation*, 5 Y.B. ON ARB. & MEDIATION 111, 130 (2013).

¹²⁶ *See infra* text accompanying notes 358–59. In the federal courts, magistrate judges are often the judicial officers who serve as mediators in court mediation programs. *See, e.g.*, Breen, *supra* note 99, at 1008; Beth Deere, *Federal Court Mediation*, ARK. LAW., Fall 2008, at 22, 22; Judith Gail Dein, *Wearing Two Hats: Being a Mediator and a Trial Judge*, BOS. B.J., Winter 2013; Morton Denlow, *Magistrate Judges’ Important Role in Settling Cases*, FED. LAW., May/June 2014, at 101, 103; Patrick E. Longan, *Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators*, 73 NEB. L. REV. 712, 739–45 (1994); Nancy A. Welsh, *Magistrate Judges, Settlement, and Procedural Justice*, 16 NEV. L.J. 983, 1003–05 (2016). Judges are also active mediators in state court mediation programs. *See, e.g.*, Robinson, *supra* note 122, at 347–52 (describing state judicial mediation programs in California and Delaware).

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).

¹³² *See, e.g.*, Susan Nauss Exon, *Foreword*, 33 U. LA VERNE L. REV. 1, 2 (2011) (“[M]any now proclaim to mediate when, in fact, they are convening a settlement conference”); Carol M. Rice, *The Civil Justice Reform Act Conference: A Reporter’s View*, 49 ALA. L. REV. 265, 277 (1997) (noting difficulties in communication due to “inaccurate terminology” with the same label applied to varying court 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.¹³⁵ Others simply label them based on the position of the neutral, calling any settlement procedure conducted by a judge a “conference.”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.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).

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”).

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.”).

¹³⁷ Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 OHIO ST. J. ON DISP. RESOL. 271, 291 (2011); see also Baer, *supra* note 122, at 146 (characterizing mediation as more likely to involve “the presence and participation of the parties”); Gregory D. Brown, *The Judicially Hosted Settlement Conference—My Case in the Balance: Musings of a Trial Attorney*, DISP. RESOL. MAG., Spring 2011, at 8, 9–10 (criticizing settlement conferences as suffering from relatively little client involvement); Charles R. Pyle, *Mediation and Judicial Settlement Conferences: Different Rides on the Road to Resolution*, ARIZ. ATT’Y, Nov. 1996, at 20, 54 (describing settlement conferences as involving less client involvement and deference to clients than mediation). But see Robert C. Zampano, *From the Bench: Settlement Strategies for Trial Judges*, LITIGATION, Fall 1995, at 3, 69–70 (advocating personal participation of clients in settlement conferences).

parties than providing information to them.”¹³⁸ Their orientation toward facilitating party self-determination¹³⁹ makes mediators less likely to use “strong-arm tactics” than judges in settlement conferences.¹⁴⁰ And mediators are thought to be more likely to adopt a problem-solving approach than the predictive or evaluative methods typically associated with judges.¹⁴¹

Wissler stresses, however, that these differences between judicial settlement conferences and private mediations are “more a matter of degree than kind.”¹⁴² Difficulties in separating the processes stem in part from the wide range of approaches that mediators employ, which can encompass both facilitation and evaluation.¹⁴³ 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).

¹⁴³ *See* Leonard L. Riskin, Commentary, *Mediator Orientations, Strategies, and Techniques*, 12 ALTERNATIVES TO HIGH COST LITIG. 111 (1994) (contrasting facilitative and evaluative approaches, and broad and narrow problem definitions); *see also* Brazil, *supra* note 138, at 230–31 (characterizing court-connected mediations as “stylistically nonlinear events” that include both facilitative and evaluative elements); Dwight Golann, *Variations in Mediation: How—And Why—Legal Mediators Change Styles in the Course of a Case*, 2000 J. DISP. RESOL. 41, 42 (reporting that mediators flexibly move among styles during the course of a mediation). Mediation has also been described in terms of other contrasting characteristics. *See* DEBORAH M. KOLB, *THE MEDIATORS* 23–45 (1983) (contrasting dealmakers and orchestrators); Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 30–33 (2003) (contrasting elicitive and directive approaches); Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL’Y 7, 19–25 (1986) (contrasting bargaining and therapeutic styles).

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.¹⁴⁴

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.¹⁴⁵ 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.¹⁴⁶ 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.¹⁴⁷

The picture that emerges from recent accounts of judges' approaches to settlement in these two contexts is one of some convergence between the

& Lela P. Love, "Evaluative" Mediation Is an Oxymoron, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996), and Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997), with John Bickerman, *Evaluative Mediator Responds*, 14 ALTERNATIVES TO HIGH COST LITIG. 70 (1996), and Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949 (1997).

¹⁴⁴ See James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 69 (1991).

In an observational study comparing settlement proceedings conducted by sitting and retired judges, Stacy Lee Burns concluded that their practices were "much more similar than different," BURNS, *supra* note 135, at 210, and she labeled both processes as "judicial mediation." Burns found that these processes, whether conducted by sitting or retired judges, are characterized by "active and directive intervention" with judges drawing on their "substantive legal expertise and persuasiveness." *Id.*

The differences Burns did observe between settlement conferences conducted by sitting judges and mediation conducted privately by retired judges stemmed primarily from differences between the public court and private institutional settings. For example, private judicial mediators were able to devote more time to the process and were overall more cordial and patient, while judicial time and resources were limited in the public system and judges could not spend time with cases that were not likely to settle. *Id.* at 211.

¹⁴⁵ Edward J. Brunet, *Judicial Mediation and Signaling*, 3 NEV. L.J. 232, 238 (2002/2003) (observing that there is little difference between judicial mediation and a settlement conference); see also Baer, *supra* note 122, at 146 (stating that both mediation and settlement conferences "involve the judge's recommendation as to an appropriate resolution").

¹⁴⁶ They overwhelmingly reported that they call their settlement activity a "settlement conference" rather than "mediation." Robinson, *supra* note 122, at 358.

¹⁴⁷ *Id.* at 373-78. These findings were limited by the sample size, 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. See *supra* notes 137-41 and accompanying text.

processes,¹⁴⁸ but with significant variation¹⁴⁹ that seems to depend largely on individual style and training.¹⁵⁰ Notwithstanding the judges who identify themselves as facilitators, many judges believe that lawyers and parties want an evaluation.¹⁵¹ And certainly judges’ adjudicatory experience can predispose them to an evaluative role.¹⁵² 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.¹⁵³

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

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).

¹⁵³ Morton Denlow, *Breaking Impasses in Settlement Conferences: Five Techniques for Resolution*, JUDGES’ J., Fall 2000, at 4, 6; *Judicial Mediation of Cases Assigned to the Judge for Trial: Magistrate Judges Celeste F. Bremer and Karen K. Klein Interviewed by Wayne D. Brazil*, DISP. RESOL. MAG., Spring 2011, at 24, 25 [hereinafter *Brazil Interview*] (interview of Judge Bremer); Klein, *supra* note 128, at 785.

involvement in mediation and settlement conferences separately, as is now typically done in local federal rules.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.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.¹⁵⁶ As a consequence, the increased popularity of mediation makes settlement by adjudicative judges more problematic.

The current version of Rule 16¹⁵⁷ 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.

¹⁵⁴ See *supra* note 97 and accompanying text.

¹⁵⁵ See *supra* text accompanying note 138; *infra* text accompanying notes 230–32.

¹⁵⁶ See *supra* text accompanying note 137.

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:

....
 (5) facilitating settlement.

....
 (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:

....
 (I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule

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,¹⁵⁸ 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.¹⁵⁹ Other advantages stem from the legal acumen and experience that a judge brings to a settlement process.¹⁶⁰ These factors do not compensate for lack of skill,¹⁶¹ but

¹⁵⁸ Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 356–57 (1986) (describing the importance of respect for and confidence in the judge in the negotiation of settlement in the Agent Orange case).

¹⁵⁹ See, e.g., Brunet, *supra* note 145, at 237; Candy Wagahoff Dale, *Judicially Supervised Alternative Dispute Resolution: Perspectives from a Magistrate Judge*, FED. LAW., May 2009, at 47, 59; Katz, *supra* note 135, at 3; Jarrod B. Martin, *A User’s Guide to Bankruptcy Mediation and Settlement Conferences*, 11 TRANSACTIONS: TENN. J. BUS. L. 185, 192 (2009); Miller, *supra* note 128, at 33 (quoting Judge Polster); Otis & Reiter, *supra* note 81, at 365; Zampano, *supra* note 137, at 4.

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.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.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."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."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.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.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.¹⁶⁸ A judge's current, direct

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.").

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).

¹⁶⁴ BRAZIL, *supra* note 59, at 45.

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).

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).

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).

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.

¹⁷⁴ Elliott, *supra* note 46, at 325. But see Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 92 (2003) (questioning whether judicial intervention promotes fair settlement or merely promotes settlement).

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).

judge.¹⁷⁸ 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.¹⁷⁹

The more significant advantage of settlement by an assigned judge, and the strongest argument against referral to another judicial officer, is probably informational.¹⁸⁰ 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.¹⁸¹ This familiarity increases the efficiency of settlement¹⁸² and may make the assigned judge more accurate in evaluating the strengths and weaknesses of the case.¹⁸³ The informational argument loses force, however, if settlement occurs early in the case before extensive pretrial activity.¹⁸⁴ 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

¹⁷⁸ *Brazil Interview*, *supra* note 153, at 27 (quoting Judge Klein); Polster, *supra* note 122.

¹⁷⁹ 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)).

¹⁸⁰ *See* Brunet, *supra* note 145, at 257.

¹⁸¹ *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").

¹⁸² 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).

¹⁸³ 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.

¹⁸⁴ *See generally* JOHN LANDE, *LAWYERING WITH PLANNED EARLY NEGOTIATION* (2d ed. 2015).

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’

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 Alfani, *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.¹⁹² 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.¹⁹³ 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.¹⁹⁴ 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.¹⁹⁵ 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.¹⁹⁶ 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.¹⁹⁷ 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.¹⁹⁸

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.¹⁹⁹

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.”).

¹⁹⁷ Alfini, *supra* note 119, at 13; Brian J. Shoot & Christopher T. McGrath, “Don’t Come Back Without a Reasonable Offer:” *Surprisingly Little Direct Authority Guides How Judges Can Move Parties*, N.Y. ST. B. ASS’N J., May 2004, at 28, 34.

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.”²⁰⁰ Or the judge who threatened contempt and warned that he would take defendant’s refusal to settle into account in considering any fee application.²⁰¹ Then there was the judge who allegedly threatened to report a party to the ethics committee if the mediation did not succeed.²⁰² Even less explicit threats, such as an admonition to settle “because I can guarantee you much pain,”²⁰³ or a judge’s antagonistic reaction to counsel’s statement that mediation would not “work out right now,”²⁰⁴ 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.²⁰⁵

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.²⁰⁶ Tight scheduling timetables or the timing of decisions on pretrial motions are often interpreted as ways to increase pressure to settle.²⁰⁷ 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.

²⁰² *In re Estate of Romero*, No. CA2006-06-015, 2007 WL 1310192, *8 (Ohio Ct. App. May 7, 2007).

²⁰³ *Cont’l Ins. Co. v. First Wyo. Bank*, 771 P.2d 374, 376 (Wyo. 1989) (order vacating judgment and redirecting reassignment of case) (quoting the district court).

²⁰⁴ *Trahan v. Lone Star Title Co. of El Paso*, 247 S.W.3d 269, 275 (Tex. App. 2007).

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 Bronstad, *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.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.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.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,²¹¹ and some condemn even the appearance of coercion.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,²¹³ the line at which a judicial practice crosses from (acceptably) encouraging a settlement to (unacceptably) coercing one is certainly not bright.²¹⁴

A second set of problems is procedural.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.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.²¹⁷ Even when a judge's comments are

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).

²⁰⁹ *Id.* at 358–59 (attributing lawyers' cooperation in settlement to “professional norms and strategic concerns”).

²¹⁰ *Id.* at 360–61 (describing attorneys' allegations of improper pressure by Judge Weinstein to achieve settlement in the Agent Orange case).

²¹¹ *See, e.g.*, *Newton v. A.C. & S., Inc.*, 918 F.2d 1121, 1129 (3d Cir. 1990); *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985); *In re LaMarre*, 494 F.2d 753, 756 (6th Cir. 1974); *Wolff v. Laverne, Inc.*, 233 N.Y.S.2d 555, 557 (App. Div. 1962) (*per curiam*).

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

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).

²¹⁴ Floyd, *supra* note 10, at 83; Shoot & McGrath, *supra* note 197, at 34; Tornquist, *supra* note 50, at 752.

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).

²¹⁶ *Liteky v. United States*, 510 U.S. 540, 553–55 (1994).

²¹⁷ *Id.* at 555.

motivated by “settlement fever,” they do not justify disqualification.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.²¹⁹ Finally, there is little opportunity for review of a judge’s settlement activity.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.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.²²² As stated by James Alfini, “The judge *qua* settlement agent may very well have formed opinions or impressions about the case that are inappropriate for the judge *qua* adjudicator.”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.²²⁴ This criticism has support from modern understandings of the effect of tentative opinions on cognitive functioning.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

²¹⁸ Johnson v. Trueblood, 629 F.2d 287, 291 (3d Cir. 1980).

²¹⁹ Floyd, *supra* note 10, at 83.

²²⁰ *Id.* at 82–83.

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. *Id.* at 82. Ironically, when coercion to settle is effective, the case is closed, leaving no avenue to raise an objection. *Id.* at 82–83.

²²² Resnik, *supra* note 1, at 426–31; Tornquist, *supra* note 50, at 771–72; *see also* Elliott, *supra* note 46, at 327.

²²³ Alfini, *supra* note 119, at 13.

²²⁴ *See, e.g.*, Cratsley, *supra* note 122, at 581; *cf.* Lon L. Fuller, *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.”), in TALKS ON AMERICAN LAW 34, 44 (Harold J. Berman ed., rev. ed. 1971).

²²⁵ *See infra* text accompanying notes 305–07.

question that judge's impartiality.²²⁶ 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.²²⁷

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.²²⁸ 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.²²⁹ 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.²³⁰ Moreover, many mediators have conversations with the parties separately in caucuses and take on the role of an intermediary between them.²³¹ This intermediary role depends entirely on information gained in those private conversations.²³² The danger to impartiality is the extensive

²²⁶ See *Kearny v. Milwaukee County*, No. 05-C-834, 2007 WL 3171395, at *2 (E.D. Wis. Oct. 26, 2007) (order of recusal) (magistrate judge recusing himself from presiding in a case he previously mediated).

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).

²³⁰ See generally DOUGLAS N. FRENKEL & JAMES H. STARK, *THE PRACTICE OF MEDIATION* 165–206 (2d ed. 2012) (exploring the importance of expanding information during mediation and discussing techniques for doing so).

²³¹ See, e.g., Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 325–28 (1994).

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.²³³ 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.²³⁴

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.²³⁵ They hear both admissible and inadmissible information when they decide pretrial motions, make evidentiary rulings, and dispose of posttrial motions.²³⁶ The general presumption is that judges can be trusted to maintain impartiality by separating what they may appropriately consider from what they may not,²³⁷ and this presumption extends to what judges learn in settlement conferences.²³⁸ Evidence that judges, like other humans, have difficulty disregarding irrelevant information suggests that this confidence may be misplaced.²³⁹ 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.²⁴⁰

For judges functioning as mediators, information gathering from the parties is central to the process of reaching an agreement.²⁴¹ 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.

²³⁷ See, e.g., *Enter. Leasing Co. v. Jones*, 789 So. 2d 964, 968 (Fla. 2001); *Pizzuto v. State*, 10 P.3d 742, 748 (Idaho 2000); *Hite v. Haase*, 729 N.E.2d 170, 176 (Ind. Ct. App. 2000); see also JUDICIAL CONFERENCE OF THE U.S., Advisory Opinion No. 95 (2009) [hereinafter Advisory Opinion No. 95] (“Judges . . . periodically receive information that is not admissible and exclude it from their deliberations before rendering judgment. It is not unreasonable to credit their ability to be impartial in these circumstances.”), in 2B GUIDE TO JUDICIARY POLICY ch. 2, § 220, at 161, 162, <http://www.uscourts.gov/sites/default/files/vol02b-ch02.pdf> [<https://perma.cc/2BTP-LKKL>] (last revised Apr. 25, 2016).

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.²⁴² 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.”²⁴³ It is commonplace, for example, for parties in meditation 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.²⁴⁴ A mediator is also likely to become privy to parties’ strategies, priorities, and trade-offs as she discusses their bargaining concessions.²⁴⁵ 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.”²⁴⁶ 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.²⁴⁷ 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.”²⁴⁸ 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).

²⁴⁴ JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING* 73 (2012).

²⁴⁵ See *Schauf v. Schauf*, 107 P.3d 1237, 1245 (Kan. Ct. App. 2005) (per curiam) (recognizing need for disclosures of strategic strengths and weaknesses in mediation and the potential to “taint impartiality” of decisionmaker).

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,²⁴⁹ such knowledge does not usually lead to disqualification of the judge.²⁵⁰ 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.²⁵¹ Courts have interpreted the federal statute on disqualification and recusal for bias or prejudice²⁵² in light of the “extrajudicial source” doctrine.²⁵³ The judge’s favorable or unfavorable opinion must be wrongful either because it is “excessive in degree” or based on extrajudicial knowledge.²⁵⁴ 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).

²⁵² 28 U.S.C. § 455(b)(1) (2012).

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.

²⁵⁴ *Williams v. Anderson*, 460 F.3d 789, 814 (6th Cir. 2006) (quoting *Liteky*, 510 U.S. at 550).

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’

²⁵⁵ Johnson v. Trueblood, 629 F.2d 287, 291 (3d Cir. 1980).

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.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.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.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.²⁶⁴ Second, and even more importantly, the lawyers thought judges assigned to the case for trial were much more biased than non-assigned judges.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.²⁶⁶ Thus, lawyers

had reservations about settlement involvement by an assigned judge in cases to be tried by jury: 33% deemed this practice to be improper, while 9% were not sure about its propriety).

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.*

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.*

²⁶³ *Id.* at 298–99, 298 tbl.12, 299 n.110.

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.*

²⁶⁵ *Id.* at 287 & tbl.3 & n.68.

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

92. This was especially true in northern California, where 80% of the respondents held this view. *Id.*

²⁶⁷ BRAZIL, *supra* note 59, at 85.

²⁶⁸ *Id.* at 84.

²⁶⁹ Resnik, *supra* note 1, at 427 & n.197.

²⁷⁰ DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

²⁷¹ Exec. Order No. 13707, 80 Fed. Reg. 56365 (Sept. 18, 2015).

²⁷² Keith E. Stanovich & Richard F. West, *Individual Differences in Reasoning: Implications for the Rationality Debate?*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 421, 436–38 (Thomas Gilovich et al. eds., 2002) [hereinafter HEURISTICS AND BIASES]. Others have proposed two-process models that use different terminology and vary somewhat, but there is agreement on the general characteristics of the two systems. *Id.*

are “spontaneous, intuitive, effortless, and fast.”²⁷³ They operate with “no sense of voluntary control.”²⁷⁴ System 2 processes, in contrast, are “deliberate, rule-governed, effortful, and slow.”²⁷⁵ They are associated with the exercise of “agency, choice, and concentration.”²⁷⁶ 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).²⁷⁷ 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.²⁷⁸

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).”²⁷⁹ 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.²⁸⁰

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.²⁸¹ 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.²⁸²

²⁷³ Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in *HEURISTICS AND BIASES*, *supra* note 272, at 49, 49.

²⁷⁴ KAHNEMAN, *supra* note 270, at 20.

²⁷⁵ Kahneman & Frederick, *supra* note 273, at 49.

²⁷⁶ KAHNEMAN, *supra* note 270, at 21.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 86.

²⁷⁹ Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 8–9 (2007) [hereinafter Guthrie et al., *Blinking*]; *see also* Chris Guthrie et al., *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1480–82 (2009) [hereinafter Guthrie et al., *Hidden*].

²⁸⁰ Guthrie et al., *Blinking*, *supra* note 279, at 9.

²⁸¹ *Id.* at 10–19 (describing results of the Cognitive Reflection Test with judges); *see also* KAHNEMAN, *supra* note 270, at 48 (explaining test).

²⁸² Guthrie et al., *Blinking*, *supra* note 279, at 19–27 (discussing examples of anchoring, representativeness, and hindsight bias); *see also* Guthrie et al., *Hidden*, *supra* note 279, at 1495–520 (discussing research with administrative law judges on anchoring, framing, conjunction, hindsight bias, disregarding, and egocentric bias); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 787–815 (2001) [hereinafter Guthrie et al., *Inside*] (discussing research with federal magistrate judges on anchoring, framing, hindsight bias, the representativeness heuristic, and egocentric biases); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of*

Some of these heuristics, or “cognitive illusions,”²⁸³ 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.²⁸⁴ Even if this anchor is something completely ridiculous, it can alter one’s judgment.²⁸⁵

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.²⁸⁶ 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).²⁸⁷ In both experiments, a control group of judges was not given any demand figure.²⁸⁸ The applicable evidentiary rules required the judges to ignore the amount of the settlement demands, and they were reminded of this in the scenario.²⁸⁹ 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.²⁹⁰ The pull of the anchors was so strong that the judges were

Deliberately Disregarding, 153 U. PA. L. REV. 1251 (2005) (describing assessments of judges’ ability to disregard inadmissible evidence).

²⁸³ Guthrie et al., *Blinking*, *supra* note 279, at 40.

²⁸⁴ 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); ROBBENNOLT & STERNLIGHT, *supra* note 244, at 71–72 (discussing anchoring in the legal context).

²⁸⁵ 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 PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 146 (1993).

²⁸⁶ Wistrich et al., *supra* note 282, at 1288–89.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 1289.

²⁹⁰ 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.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.²⁹² And, while judges tend to be confident about their ability to compartmentalize and ignore inadmissible information,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

791–92; *see also* Birte Englich et al., *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts’ Judicial Decision Making*, 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., *Hidden*, *supra* note 279, at 1501–06 (reporting anchoring by administrative law judges based on an irrelevant damage award from a court TV show).

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, *The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts*, 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.*, HAW. REV. STAT. ANN. § 663-1.3 (West 2008) (prohibiting “ad damnum” clause); 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.*, IDAHO CODE § 10-111 (2010) (grounds for mistrial to reveal amount of general damages sued for); 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). *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). *See generally* Don Rushing et al., *Anchors Away: Attacking Dollar Suggestions for Non-Economic Damages in Closings*, 70 DEF. COUNSEL J. 378 (2003) (citing cases).

²⁹² *See supra* text accompanying notes 241–46.

²⁹³ *See supra* text accompanying notes 235–38. This confidence may result from a tendency toward positive illusions and egocentric bias. *See infra* text accompanying notes 314–16.

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 HEURISTICS AND BIASES, *supra* note 272, at 185, 185–87.

²⁹⁶ *See* Wistrich et al., *supra* note 282, at 1265–67 (providing examples); *see also* ROBBENOLT & 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 ROBBENOLT & 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

³⁰² ROBBENOLT & STERNLIGHT, *supra* note 244, at 15.

³⁰³ J. Edward Russo et al., *The Distortion of Information During Decisions*, 66 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 102, 102 (1996).

³⁰⁴ ROBBENOLT & STERNLIGHT, *supra* note 244, at 16, 77–83 (discussing “debiasing”).

³⁰⁵ See *supra* notes 151, 163–69 and accompanying text.

³⁰⁶ Eva Jonas et al., *Confirmation Bias in Sequential Information Search After Preliminary Decisions: An Expansion of Dissonance Theoretical Research on Selective Exposure to Information*, 80 J. PERSONALITY & SOC. PSYCHOL. 557, 557–58 (2001).

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.³⁰⁹ 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,³¹⁰ 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.³¹¹ 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.³¹² 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.³¹³

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.³¹⁴ This tendency is increased with access to evidence for only one side of a story.³¹⁵ "Egocentric bias" means we overestimate our abilities and make judgments consistent with our own point of view.³¹⁶ Judges are no different.³¹⁷ Yet despite the cognitive evidence to the contrary, some judges are very confident that they can ignore what happened during settlement in subsequent proceedings.³¹⁸ 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., *Blinking*, *supra* note 279, at 32 (discussing the lack of feedback in litigation and explaining why appellate review is an inadequate mechanism).

³¹⁴ ROBBENOLT & 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 ROBBENOLT & 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,³¹⁹ 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.”³²⁰ 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)).

³¹⁹ 28 U.S.C. § 455(a), (b)(1) (2012); *see also supra* text accompanying notes 216–18, 252–56.

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

³²¹ See JUDICIAL CONFERENCE OF THE U.S., 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-VEEJ] (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).

³²⁴ Andrew J. Lievense & Avern Cohn, *The Federal Judiciary and the ABA Model Code: The Parting of the Ways*, 28 JUST. SYS. J. 271, 280 (2007).

³²⁵ See JOINT COMM'N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, AM. BAR ASS'N, OVERVIEW OF MODEL CODE OF JUDICIAL CONDUCT AS ADOPTED FEBRUARY 12, 2007, at 1 [hereinafter OVERVIEW OF MODEL CODE], http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/overview_gak_030707.authcheckdam.pdf [https://perma.cc/VF9R-9P5S].

the provisions on judicial ethics on settlement.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.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.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.³²⁹ Instead, Rule 2.6, Ensuring the Right to be Heard, merely states:

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.³³⁰

Elsewhere, the Model Code prohibits, as a general matter, ex parte communications concerning pending matters.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.”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

³²⁶ SECTION OF DISPUTE RESOLUTION, AM. BAR ASS’N, PROPOSED ADDITION TO THE ABA MODEL CODE OF JUDICIAL CONDUCT (Feb. 2005), http://www.americanbar.org/content/dam/aba/migrated/judicialethics/resources/comm_rules_aba_dispute_resolution_020405_ddt.authcheckdam.pdf [https://perma.cc/9LHL-8G9X].

³²⁷ *Id.*

³²⁸ *Id.*; see also Molly McDonough, *Meddling in Settling: Pressure to Clear Caseloads Spurs Judges to Coerce Settlements, Critics Say*, ABA J., June 2005, at 14, 14 (describing proposal and citing perception that “plenty of judges coerce settlements or otherwise improperly meddle with the mediation process”). This and similar proposals were supported by numerous commentators. See, e.g., Alfini, *supra* note 119, at 14; Cratsley, *supra* note 122, at 585–94; Floyd, *supra* note 10, at 88–89; Sylvia Shaz Shweder, *Judicial Limitations in ADR: The Role and Ethics of Judges Encouraging Settlements*, 20 GEO. J. LEGAL ETHICS 51, 69–70 (2007).

³²⁹ OVERVIEW OF MODEL CODE, *supra* note 325, at 4.

³³⁰ MODEL CODE OF JUDICIAL CONDUCT r. 2.6(B) (AM BAR ASS’N 2007), http://www.americanbar.org/content/dam/aba/migrated/judicialethics/ABA_MCJC_approved.authcheckdam.pdf [https://perma.cc/68T7-XLYP]. This provision did, however, elevate the caution against coercion from a comment in the prior Model Code into the canon itself, thus emphasizing this important principle.

³³¹ *Id.* r. 2.9(A).

³³² *Id.* r. 2.9(A)(4).

to mediate or settle pending matters.”³³³ 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.”³³⁴

It is interesting that both of these provisions stress preventing coercion in settlement, rather than the usual worry stemming from *ex parte* communication: un rebuttable 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*.³³⁵ 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.”³³⁶ 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,”³³⁷ 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.³³⁸ Local procedural rules that explicitly permit the practice “lend[] support to the propriety of a judge’s actions in this respect.”³³⁹

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.³⁴⁰ 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.³⁴¹ 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”³⁴²

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.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.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.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.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.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,

³⁴³ See Cratsley, *supra* note 117, at 4.

³⁴⁴ See *Judicial Code Panel Gets Close to Releasing Full Draft, Hears More Feedback on Its Work*, 21 ABA/BNA LAW. MANUAL PROF. CONDUCT 317 (2005) (describing negative reactions of judges on the ABA Commission at a public hearing).

³⁴⁵ See Agnes, *supra* note 82, at 265; Alfini, *supra* note 119, at 12.

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).

³⁴⁷ Cratsley, *supra* note 117, at 4.

for example, there has been vigorous debate over the appropriateness of using evaluative techniques.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.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.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.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

³⁴⁸ See *supra* note 143.

³⁴⁹ See, e.g., Golann, *supra* note 143, at 42; Stempel, *supra* note 143, at 970–83.

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).

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.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.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.

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.³⁵⁴ The provisions in local rules that govern who can serve as neutrals in ADR

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).

³⁵³ Floyd, *supra* note 10, at 82–84; see also *supra* text accompanying notes 216–21.

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,³⁵⁵ 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.³⁵⁶ 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.³⁵⁷ 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.³⁵⁸ 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).

³⁵⁸ See, e.g., *Kearny v. Milwaukee County*, No. 05-C-834, 2007 WL 3171395, at *3 (E.D. Wis. Oct. 26, 2007) (order of recusal) (stating that the court refers cases to magistrate judges for mediation under its ADR policy (citing E.D. Wis. Civ. R. 72.2(b)(20))); *Garrett v. Delta Queen Steamboat Co., Inc.*, No. 05-1492-CJB-SS, 2007 WL 837177, at *2 (E.D. La. Mar. 14, 2007) (stating that magistrate judge schedules about eight settlement

by a rule specifying that the judicial officer who is assigned to try the case may not serve as the mediator.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.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,³⁶¹ or by strictly limiting the information that may be reported to them at the close of the process.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).

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.”).

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.I; 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).

³⁶¹ *See, e.g.*, N.D. CAL. ADR R. 5-8(b).

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.³⁶³ If the parties do not come to an agreement, the neutral may report only that fact, without comment or recommendation.³⁶⁴ 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.”³⁶⁵

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.³⁶⁶ A number of these districts also extend robust confidentiality principles to their settlement conferences.³⁶⁷ Others less comprehensively specify particular mechanisms to insulate assigned judges from learning about

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.³⁶⁸ There are also rules that channel disputes or reports about problems in dispute resolution processes away from the assigned judge,³⁶⁹ 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.³⁷⁰ 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.³⁷¹ 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.³⁷² 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.³⁷³ Numerous

³⁶⁸ These measures include prohibiting communications about information discussed at a settlement conference, *see, e.g.*, D. IDAHO CIV. R. 16.4(b)(2)(F), preventing parties from filing their settlement conference memos with the court, *see, e.g.*, D. WYO. CIV. R. 16.3(c)(2)(A), or limiting reports following the conference to whether or not the parties reached a settlement, *see, e.g.*, D. IDAHO CIV. R. 16.4(b)(2)(E); E.D. OKLA. CIV. R. 16.2(j); N.D. OKLA. CIV. R. 16.2(j); D. UTAH CIV. R. 16-3(d).

³⁶⁹ Some districts appoint a single judge as a compliance judge who handles all allegations that the ADR rules were violated or a process abused. *See, e.g.*, E.D. CAL. R. 271(m)(2)(C)(ii), (p); D.D.C. CIV. R. 84.9(a)(2), 84.10; D. UTAH CIV. R. 16-2(j)(1).

³⁷⁰ For an example of this ambiguity, *see* S.D. W. VA. CIV. R. 16.3, under which the judicial officer to whom the case is assigned convenes pretrial conferences, and *id.* R. 16.7(c), which states that the final settlement conference is to be conducted by “the judicial officer.”

³⁷¹ *See, e.g.*, D. ME. R. 83.11(c); D. MD. CIV. R. 607(1); W.D. MICH. CIV. R. 16.8; D. MINN. R. 16.5(a)(4); N.D. & S.D. MISS. R. 16(g); W.D. VA. R. 83; W.D. WASH. CIV. R. 39.1(a), (c); N.D. W. VA. CIV. R. 16.04(e); E.D. WIS. CIV. R. 16(d).

³⁷² *See, e.g.*, C.D. CAL. R. 16-15.4; S.D. CAL. CIV. R. 16.1(c), 16.3; D. CONN. CIV. R. 16(c); D. HAW. R. 16.5; D. N. MAR. I. CIV. R. 16.2CJ(e)(5)(c); W.D. TENN. CIV. R. 16.1(b); *see also* C.D. ILL. R. 16.3(I)(4)(a) (special provision for prisoner cases); D.N.H. CIV. R. 16.2(a)(8) (requiring parties to include information in their final pretrial statement describing their ADR participation and their final demand or offer, except in bench trials).

³⁷³ *See, e.g.*, Jaclyn Barnao, *In Pursuit of Settlement: Deciphering Judicial Activism*, 18 GEO. J. LEGAL ETHICS 583, 594–95 (2005) (quoting Judge Levy); *Brazil Interview*, *supra* note 153, at 24 (quoting Judge Bremer); Crane, *supra* note 122, at 21; Cratsley, *supra* note 122, at 571; R. Allan Edgar, *A Judge’s View—ADR and the Federal Courts—*

commentators agree.³⁷⁴ As discussed above, lawyers strongly prefer settlement with a judge who is not assigned to try their case.³⁷⁵ Encouragingly, some state and local federal court rules do impose this separation.³⁷⁶ 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.³⁷⁷

Yet many judges do not see a problem.³⁷⁸ A vocal group is on the record defending the practice of settling their assigned cases.³⁷⁹ 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.³⁸⁰ Because the discretion granted to judges for

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); *Alfini*, *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*, 4 OHIO ST. J. ON DISP. RESOL. 81, 91–92 (1988). *But see* *Robert G. Bone*, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1997 (2007).

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.

³⁸³ *See, e.g.*, Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 44 (1995); Resnik, *supra* note 1, at 380; Jay Tidmarsh, *Pound’s Century, and Ours*, 81 NOTRE DAME L. REV. 513, 553 (2006).

³⁸⁴ The appropriate amount of discretion the rules should grant to judges is an important question that requires a delicate balance among many competing policies, among them simplicity, flexibility, uniformity, predictability, and the transsubstantive application of the rules. *See, e.g.*, Bone, *supra* note 374, at 1963–64; Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1936–37 (1989) (criticizing aversion to substance-specific procedures that necessitates heavy reliance on judicial discretion); Gensler, *supra* note 9, at 720–26 (summarizing scholarly criticism and defense of discretion); Richard Marcus, *Confessions of a Federal “Bureaucrat”: The Possibilities of Perfecting Procedural Reform*, 35 W. ST. U. L. REV. 103, 116–19 (2007) (discussing tradeoffs among simplicity, predictability, tailoring, and divergent treatment).

almost always is — to foresee even the most important problems and to determine their wise resolution.”³⁸⁵ 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.³⁸⁶ 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.³⁸⁷

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.³⁸⁸ Separate settlement

³⁸⁵ Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794, 1795 (2002).

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 should not be.” Richard Marcus, *Shoes That Did Not Drop*, 46 U. MICH. J.L. REFORM 637, 637 (2013). Moreover, sometimes a crisis mentality is necessary before procedural reform is undertaken. Richard L. Marcus, *Modes of Procedural Reform*, 31 HASTINGS INT’L & COMP. L. REV. 157, 186 (2008).

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.³⁹⁴ 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.³⁹⁵ 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.³⁹⁶ 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.³⁹⁷ 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.³⁹⁸ Moreover, assigned judges make managerial decisions on discovery issues that might affect the value of a case in both jury and non-jury trials.³⁹⁹

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.⁴⁰⁰ 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.⁴⁰¹ At the extreme, nonverbal judicial conduct has been

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).

⁴⁰⁰ See, e.g., Peter David Blanck et al., Note, *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89, 92 (1985).

⁴⁰¹ Ann Burnett & Diane M. Badzinski, *Judge Nonverbal Communication on Trial: Do Mock Trial Jurors Notice?*, 55 J. COMM. 209, 209 (2005).

found to be reversible error.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.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,⁴⁰⁴ and some judges have also voiced support for this approach.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.⁴⁰⁶

An exception for consent would be consistent with the emphasis in mediation on party self-determination⁴⁰⁷ and with the judicial codes’ permission for ex parte communications in settlement with the consent of the parties.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

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).

⁴⁰³ Advisory Opinion No. 95, *supra* note 237, at 161.

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.

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.

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”).

⁴⁰⁷ See MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard 1 (AM. ARBITRATION ASS’N ET AL. 2005) (self-determination).

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).