

1984

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Recommended Citation

James A. Wall, Dale E. Rude, and Lawrence F. Schiller, *Judicial Participation in Settlement*, 1984 J. Disp. Resol. (1984)

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Judicial Participation in Settlement*

JAMES A. WALL, JR.,† DALE E. RUDE†† & LAWRENCE F. SCHILLER†††

I. INTRODUCTION

Settlement has long been utilized as an alternative dispute resolution process in our civil court system. It currently accounts for the resolution of 90% of court cases.¹ Most state and federal judges not only oversee this process, they intervene to facilitate it. The extent of their intervention will no doubt increase with the recent Supreme Court change in Rule 16 of the Federal Rules of Civil Procedure.² Thus, it is worthwhile to examine the judge's role

* The authors wish to thank the National Bar Foundation and the University of Missouri-Columbia Graduate School and the School of Business and Public Administration for supporting this work. Portions of this work were previously reported in Schiller & Wall, *Judicial Settlement Techniques*, 5 AM. J. TRIAL ADVOC. 39 (1981), and Wall & Schiller, *Judicial Involvement in Pre-Trial Settlement: A Judge is Not a Bump on a Log*, 6 AM. J. TRIAL ADVOC. 27 (1982). They are used with permission.

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1. For the year ending June 30, 1982, only 6.1% of all civil cases filed in federal district courts reached trial. 1982 ADMIN. OFF. U.S. COURTS ANN. REP. 117 [hereinafter cited as REPORT].

2. On April 28, 1983, effective August 1, 1983, the United States Supreme Court approved an amendment to Rule 16 of the Federal Rules of Civil Procedure to specifically include the discussion of settlement possibilities among those items which could be discussed at a pretrial conference. 51 U.S.L.W. 4501 (U.S. April 28, 1983). Prior to amendment, Rule 16 stated, "In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider . . . (6) Such other matters as may aid in the disposition of the action." FED. R. CIV. P. 16(a), 28 U.S.C. app. at 417 (1976). Nowhere did the rule mention the discussion of settlement, but some courts considered this section to authorize such discussions as might be deemed appropriate by the judge.

As amended, Rule 16(c) provides: "The participants at any conferences under this rule may consider and take action with respect to . . . (7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute. . . ." Although subsection (c) apparently only relates to discussions between the attorneys, Rule 16 also lists settlement of the case as a purpose for calling a conference. "In any action, the court may in its discretion direct the attorneys for the parties . . . to appear before it for a conference or conferences before trial for such purposes as . . . (5) facilitating the settlement of case." FED. R. CIV. P. 16(a).

within this arena.

In the following pages, we will briefly delineate the settlement process, enumerate the techniques currently utilized by judges to facilitate settlement, and discuss the perceived ethics of these techniques. Finally, we will consider the circumstances under which judges typically participate in settlement.

II. SETTLEMENT

Settlement is a negotiation process in which the plaintiff and defendant, or their attorneys, attempt to reach an agreement regarding their dispute. Generally, it starts with the prospective plaintiff contacting an attorney about a dispute. After some discussion, they decide whether a complaint should be filed. If they decide to file, the plaintiff's attorney may negotiate directly with the defendant or the defendant's attorney before filing the complaint. If no agreement is reached, the complaint is filed. The plaintiff's and defendant's attorney may still conduct negotiations in an attempt to settle out of court. When they fail to reach an agreement, the case is scheduled for a pretrial conference with the judge. He reviews the case with the attorneys, facilitates simplification and stipulation of issues, discusses discovery, schedules the case for trial, and perhaps attempts to facilitate a settlement.

Settlement negotiations may continue in the intervening period before the case goes to trial and during the trial. Such efforts can continue even after the jury brings in a verdict. If the case is appealed, the attorneys may continue settlement negotiations. In many situations, a person appointed by the court will meet with the attorneys prior to argument and attempt to facilitate such a settlement.³

III. BENEFITS OF SETTLEMENT

The settlement process and agreement benefit the clients, the court, and society. "One of the fundamental principles of judicial administration is that the absolute result of a trial usually is not as high a quality of justice as is the freely negotiated, give a little, take a little settlement."⁴ The settlement saves

The Advisory Committee Notes relating to the 1983 amendment indicate that one reason for including clause 7 in subsection (c) was because settlement discussion at the pretrial conference "eases crowded court dockets and results in savings to the litigants and the judicial system." FED. R. CIV. P. 16 advisory committee note, *reprinted in* 1983 U.S. CODE CONG. & AD. NEWS G421, G442. The committee also noted that although settlement should be facilitated at the early stages of litigation, it is appropriately discussed in a settlement conference called at any time. *Id.*, *reprinted in* 1983 U.S. CODE CONG. & AD. NEWS G442.

3. See, e.g., Mack, *Settlement Procedures in the U.S. Court of Appeals: A Proposal*, 1 JUST. SYS. J. 17 (1975).

4. Will, Merhige & Rubin, *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203 (1978) [hereinafter cited as Will].

money for both sides because the costs of trials and appeals are avoided. The parties also avoid the heartache of losing in a trial.

Settlement also gives the parties control of the case: they can settle before the case goes to trial; or before the verdict; they can settle inconsistently with the verdict that is returned; or they can appeal and settle prior to, during, or after the appellate process. Settlement yields certainty because it cannot be appealed. It offers confidentiality and is expedient.

For the judicial system, settlement proffers many advantages. A settlement marks the final disposition of a case. It saves time for the judges because only unsettled cases come to trial. Determination by settlement also results in efficient calendar control and reduced time between filing and disposition.⁵ This last advantage, in addition to aiding the court, improves the public's evaluation of the efficiency of judicial administration.⁶

IV. THE JUDGE'S ROLE IN SETTLEMENT

It seems logical to conclude that judges would actively promote the settlement process because of the potential benefits to all parties. Our initial conversations with judges and attorneys and our review of the literature partially supported this conclusion, but left us uncertain as to the specific steps judges were taking.

Our first research endeavor addressed this deficiency. We personally interviewed fifty attorneys and judges to determine what types of settlement techniques they had observed and utilized in civil cases. These interviews, along with a more thorough literature review, revealed that judges utilize approximately seventy techniques, which are targeted upon four leverage points: (a) the interlawyer relationship; (b) the lawyers themselves; (c) the lawyer-client relationship; and (d) clients.⁷ As can be seen in Table 1, the majority are applied to the interlawyer relationship.

Table 1

JUDICIAL TECHNIQUES

Interlawyer Relationships

Meets with the lawyers in his chambers for a settlement conference.

Talks with both lawyers together about the settlement.

Raises the settlement issue but no more.

Sets a settlement conference upon request.

5. Avakian, *How One Trial Judge Settles Cases*, 35 GUILD PRACT. 15, 16 (1978).

6. Fox, *Settlement: Helping the Lawyers to Fulfill their Responsibility*, 53 F.R.D. 129, 140 (1972).

7. *Id.* at 150.

- Requires a pretrial conference even though not mandated by court rules.
 - Requires settlement talks.
- Requires settlement conference even though not mandated by court rules.
- Schedules tight time constraints on settlement conference in order to enhance settlement.
 - Informs the attorneys as to how similar cases have been settled.
 - Tells attorneys not to stall.
 - Tells attorneys to concentrate on the relevant issues.
 - Tells attorneys not to use sham arguments.
- Channels discussion to areas which have highest probability of settlement.
 - Talks to each lawyer separately about settlement.
 - Leaves the lawyers together and exits himself.
 - Has each lawyer paraphrase the other.
- Convinces a lawyer that he has a distorted view of the case.
 - Notes, to the lawyer, the high *risk* of going to trial.
 - Notes, to the lawyer, the high *cost* of going to trial.
 - Informs an attorney that he has ignored important facts.
- Tells one lawyer that the other can't sell a particular settlement to his client.
- Downgrades the merit of the stronger case and/or the demerits of the weaker.
 - Comments on the credibility of some testimony.
 - Gives information to the lawyer with weaker case.
 - Gives favorable rulings to the lawyer with the weaker case.
 - Delays ruling to the disadvantage of the stronger side.
 - Gives advice to the lawyer with the weaker case.
 - Sides with the stronger party in order to force agreement.
 - Asks both lawyers to compromise.
- Asks amount each would concede, going back and forth to break settlement into small steps.
 - Suggests settlement figure without asking for lawyers' inputs.
 - Suggests a settlement figure *after* asking for lawyer's inputs.
 - Offers alternative proposal not thought of by the lawyers.
 - Delays the trial date in order to enhance settlement.
 - Says "split the difference".
 - Continues to bring up settlement during trial recesses.
- Threatens to declare a mistrial if a decision is not returned by a certain time during the time the jury is deliberating.
- Transfers the case to another district on the day of the trial, in order to force settlement rather than to have the trial far away.

Lawyers

- Coerces lawyers to settle.
- Offers advice to a lawyer.
- Analyzes the case for a lawyer.
- Lets attorneys set trial date.
- Pressures the ill-prepared attorney.
- Subtly approves lawyers' concessions.
- Argues one attorney's case to the other.
- Evaluates one or both cases for the attorneys.
- Sets inexorable trial date to raise pressure to settle.

- Interprets the issues for the lawyers.
- Shoulders responsibility for the settlement even though the figure was not suggested by him.
- Argues logically for concessions.
- Penalizes a lawyer for not settling (e.g., with dismissal, mistrial, etc.).
- Threatens lawyers for not settling (e.g., threatens dismissal or mistrial).
- Discusses an attorney's recalcitrance with a senior member of the attorney's firm.
- Threatens to discuss an attorney's recalcitrance with a senior member of the attorney's firm.

Lawyer-Client Relationship

- Calls a certain figure reasonable.
- Convinces the client that his lawyer is strongly defending his case.
- Has the lawyer immediately call his client to get his responses.
- Brings client to the conference.

Clients

- Speaks personally with the client to persuade him to accept.
- Emphasizes the fairness of the figure when talking with client.
- Points out, to the client, the strengths and weaknesses of his case.
- Notes, for the client, the rewards of a pretrial settlement.
- Emphasizes, for the client, the risks of a jury trial.
- Relays information to and from the client.
- Suggests a settlement figure to the client.
- States what the case is worth to the client.
- Penalizes the client for his attorney's actions.
- Forces client to explain to him why he won't accept the settlement figure.
- Has one client pay the other client's attorney fees and expenses.
- Order the defendant to pay the settlement figure to charity instead of to the plaintiff.

A. Interlawyer Relationships

One of the judge's goals and expectations in a pretrial conference is ultimate agreement between the two lawyers. In seeking these goals, the judge clarifies the negotiation context, establishes or enforces the protocol for settlement and controls the interlawyer relationship.

The judge can meet with the attorneys for pretrial conferences and hearings in chambers or another relaxed setting to clarify the cases and issues. After narrowing the issues, making an applicable law clear to counsel, and ensuring that the attorneys have authority to settle,⁸ the judge may raise the

8. Cf. *Johnson v. Tesky*, 57 Or. App. 133, 643 P.2d 1344 (1982) (distinguishes between attorney's actual and apparent authority to settle).

settlement issue.⁹ One of several approaches may be pursued: raising the settlement question but not discussing concrete processes or negotiating points;¹⁰ setting a settlement conference;¹¹ setting a settlement conference on request;¹² suggesting a settlement conference; or requiring settlement talks.¹³

After entering the settlement arena, the judge can lay out his perceptions of the issues involved (for example, by stating, "Someone is liable here.")¹⁴ clarify or interpret the complexity of the issues, review the prior efforts by the litigants to reach a compromise,¹⁵ inform the lawyers as to how similar cases have been settled; and determine how far apart the parties are in their negotiation.

The judge can also suggest basic principles, procedures and mechanisms through which the settlement process is to be conducted. He or she may require the parties not to stall;¹⁶ to concentrate upon the relevant issues;¹⁷ and to avoid sham arguments.¹⁸ Following these preparations, the judge can channel the initial discussion toward the areas which seem to promise the highest probability of settlement¹⁹ in hopes that discussion of and agreement upon the initial issues will reinforce the attorneys' and clients' conciliatory behavior.

While the above techniques represent important judicial inputs, the judge's more potent influence springs from techniques that modify the attorneys' communications, perceptions, and power. Since poor communication impedes settlement, the judge may seek to improve it by occasionally separating the lawyers and talking to each individually.²⁰ Separation allows severing, relaying, or modifying communications for the sake of productive negotiations.

To complement the structuring of the attorneys' communication, the judge also can influence the input of each. A judge could, for example, request that each lawyer paraphrase the other's position or argue the other's case.²¹

9. 53 F.R.D. at 146.

10. R. FIGG, R. McCULLOUGH & J. UNDERWOOD, CIVIL TRIAL MANUAL 315 (stud. ed. 1974) [hereinafter cited as R. FIGG].

11. Will, *supra* note 4, at 210.

12. *Id.*

13. *Id.*

14. H. NIMS, PRETRIAL 239 (1950).

15. See *A Model Institute on Judicial Administration Consisting of Demonstrations of the Pretrial Conference*, 11 F.R.D. 1, 25-26 (1952) [hereinafter cited as *Demonstrations*].

16. Fox, *supra* note 6, at 152.

17. Pollack, *Pretrial Conferences*, 50 F.R.D. 451, 455 (1971) (quoting Address by Judge J. Skelly Wright, Tenth Circuit Judicial Conference, 1960).

18. Fox, *supra* note 6, at 152.

19. *Id.* at 151.

20. H. NIMS, *supra* note 14, at 238. *But cf.* MODEL CODE OF PROFESSIONAL CONDUCT Rule 3.5(b) (1979) (forbids ex parte contact of judge by attorney except where permitted by law).

21. Will, *supra* note 4, at 230.

Such procedures allow each lawyer to understand the benefits and costs that each proposal has for his counterparts as well as the nature of the benefits which the opposing attorneys seek.

The judge who modifies the lawyers' communication must remember that their relationship is in part a perceived one that only they can describe or explain. The judge talks with the lawyers and observes their interaction in order to obtain information about their positions and perceptions. He then attempts to modify these perceptions or convey selected bits of information back to the attorney's counterpart. For example, the judge can discuss the case with the lawyers and then pointedly inform one lawyer that some of his perceptions and facts are incorrect; that there is a higher cost and risk of going to trial than he perceives;²² that some of these costs have been ignored (e.g., the adverse publicity of going to trial);²³ or that the other lawyer cannot sell a certain settlement to his client.

In coordination with these alterations of the lawyers' communications and perceptions, the judge manages the power relationship between the opponents. He or she typically attempts to balance the lawyers' power positions by downgrading the merits of the stronger lawyer's case and the demerits of the weaker. The judge may take the weaker side's case in the argument²⁴ and endorse a figure or proposal presented by the weaker side. Power underpinnings can be provided to the weaker side such as information, advice, or favorable rulings. If the power relationship cannot be balanced, the judge can bargain with or influence the strong lawyer to constrain the exercise of power. Finally, the judge can choose not to balance or restrain the use of superior power, and can side with the stronger lawyer, to force agreement upon the weaker.²⁵

The judge's proposal or defense of specific agreement points provides the most substantial leverage upon the lawyers' behavior. The judge may act as a mediator and try to persuade each lawyer to compromise toward the other's position.²⁶ Such a call for compromise can be defended by interpreting the strengths and weaknesses of each party's case and by maintaining that a compromise is reasonable in view of these considerations.

The judge may become more involved and suggest a possible settlement figure²⁷ or state what the case is worth to one or both sides.²⁸ The judge may rely entirely upon experience when tendering these proposals, or may seek the lawyers' inputs. In either case, he attempts to win the attorneys' approval by

22. M. ROSENBERG, *THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE* 206 (1964).

23. *Id.*

24. H. NIMS, *supra* note 14, at 245.

25. M. ROSENBERG, *supra* note 22 at 98.

26. P. KEETON, *TRIAL TACTICS AND METHODS* 438 (2d ed. 1973).

27. R. FIGG, *supra* note 10, at 315.

28. H. NIMS, *supra* note 14, at 240.

accentuating the benefits of the proposals and by downplaying the costs.²⁹ Instead of proffering a compromise figure, the judge can unearth alternatives not considered by either lawyer or call upon the lawyers to split the difference.³⁰

B. Lawyers

While judges invest considerable time in managing the interlawyer relationship, they also focus upon the individual lawyers. They reward conciliatory behavior by subtly approving attorney concessions, supplying skills an attorney lacks, analyzing a case,³¹ educating a lawyer,³² providing him with face before the client,³³ evaluating a negotiating strategy,³⁴ or offering advice and information. The judge can serve as a sounding board for a lawyer's case,³⁵ and shoulder some or all of the responsibility for a settlement agreement. Instead of rewarding acceptable behavior and assisting the attorneys, the judge can argue logically for concessions, referring to the time and money to be saved through settlement.

C. Lawyer-Client Relationships

The exercise of influence by judges is not limited to the attorney-attorney relationship. The lawyer-client relationship and direct interactions with the clients also are open to their tactics. On occasion, the judge enhances the lawyer's relationship with a client by claiming responsibility for a proposal and the analysis of the case,³⁶ or by calling a settlement figure reasonable.³⁷ Such actions give face to the lawyer by convincing the client that his attorney is strongly representing his interests and not yielding to pressure from the opposing side. For example, the judge can state what the case is worth and ask the lawyer to pass this figure along to the client. The attorney is protected in doing so since he can tell the client that he thinks the case is worth more, and he will fight for the higher amount, but that the judge thinks differently.

In addition to proposing a figure, the judge may provide supporting logic for a proposal or may convince the lawyer to modify the client's preferences. A judge who chooses to be more aggressive can require that the lawyer keep the client available for discussion or require that the lawyer immediately discuss the other attorney's offers over the phone with the client. The judge can re-

29. Will, *supra* note 4, at 208.

30. Fox, *supra* note 6, at 152-53.

31. Will, *supra* note 4, at 210.

32. *Id.* at 228.

33. *Id.* at 210.

34. Fox, *supra* note 6, at 150.

35. Vetter, *Pre-Trial: Objectives, Procedures, Approach, Utility*, PRAC. LAW., Jan. 1964 at 23, 37.

36. Will, *supra* note 4, at 208, 223.

37. *Demonstrations, supra* note 15, at 28.

quest that the lawyer bring the client to the conference³⁸ or order the attendance of an unreasonable client. Such attendance not only subjects the client to the judge's ploys, it also provides edification in that the client learns, first hand, the strengths and weaknesses of the case.³⁹

D. Clients

Discussion of these techniques indicates that judges can also deal directly with clients. Some judges choose to speak with them personally. After seeking the attorney's permission, the judge attempts to persuade the client to accept a figure agreed to by counsel.⁴⁰ The judge can emphasize the fairness of the figure, point out the strengths and weaknesses of the client's case, note the benefits of settlement short of trial,⁴¹ and stress that a jury trial is a calculated risk.⁴² To complement a discussion with one client, the judge can speak with the opposing client, relay information, seek to win approval, or bring both clients together for a discussion.⁴³

Many judges feel that actively involving clients in the settlement process not only facilitates settlement, it convinces the client of his fair treatment: he has had his day in court and has not been sold out behind closed legal doors. Some judges, lawyers, and clients dispute this conclusion.

V. TECHNIQUE UTILIZATION

Our discussions with the judges and attorneys raised questions as to the extent to which these techniques are utilized by judges. We surveyed 1500 legal practitioners nationwide. Five hundred attorneys were selected randomly from the current membership lists of the Association of Trial Lawyers of America and the Defense Research Institute, 500 state judges were selected randomly from a list provided by the National Judicial College, and 500 federal trial judges were randomly selected. Each attorney was asked to note, by checking "yes" or "no" spaces, whether he or she had ever observed each technique. The judges were asked whether they had ever used each technique.

Of the 1500 judges and attorneys, 963 (64%) responded.⁴⁴ In general, the judges' and attorneys' responses were consistent with each other; the lawyers' reports of observed techniques corresponded roughly with the judges' reports of usage. Given this correlation, we combined the judge and attorney data in

38. H. NIMS, *supra* note 14, at 218.

39. Fox, *supra* note 6, at 154.

40. M. ROSENBERG, *supra* note 22, at 206.

41. Fox, *supra* note 6, at 152.

42. Fisher, *Judicial Mediation: How it Works Through Pre-Trial Conference*, 10 U. CHI. L. REV. 453, 464 (1943).

43. Will, *supra* note 4, at 213.

44. Seventy percent of the attorneys, 69% of the state judges and 54% of the federal judges responded.

Table 2.⁴⁵ This table offers some interesting conclusions: (a) the interlawyer and lawyer-oriented techniques are used more frequently than are those directed toward the client and his relationship with his attorney; (b) the aggressive techniques are utilized rather infrequently; (c) there are large differences between the percentages, that is, some techniques are heavily utilized and others are not; (d) finally comes an observation not salient from the format of Table 2, some of the attorneys and judges reported observing and using *none* of the techniques.

Table 2

UTILIZATION AND ETHICAL EVALUATION OF THE JUDICIAL TECHNIQUES

<i>Techniques</i>	<i>Percent of Lawyers and Judges Observing and Using the Technique</i>	<i>Percent of Lawyers Judging This Technique as Unethical</i>
1. Talks with both lawyers together about the settlement.	93	3
2. Asks both lawyers to compromise.	89	3
3. Meets with the lawyers in his chambers for a settlement conference.	88	19
4. Sets a settlement conference upon request.	85	2
5. Calls a certain figure reasonable.	83	8
6. Channels discussion to areas which have highest probability of settlement.	82	3
7. Tells the attorney to concentrate on the relevant issues.	81	2
8. Notes, to the lawyer, the high risk of going to trial.	78	7
9. Argues logically for concessions.	78	4
10. Requires settlement talks.	77	3
11. Requires pretrial conference even though not mandated by court rules.	75	1
12. Leaves the lawyers together and exits himself.	73	7
13. Has the lawyer immediately call his client to get his response.	73	7

45. Since lawyers practice before more than one judge, they did report observing more techniques than the judges reported using. The data indicate that federal judges made heavier use of the techniques than the state judges; however, the difference in usage is not significant.

Table 2 continued

<i>Techniques</i>	<i>Percent of Lawyers and Judges Observing and Using the Technique</i>	<i>Percent of Lawyers Judging This Technique as Unethical</i>
14. Evaluates one or both cases for the attorneys.	72	7
15. Raises the settlement issue but no more.	72	1
16. Suggests a settlement figure <i>after</i> asking for lawyer's inputs.	71	6
17. Notes, to the lawyer, the high cost of going to trial.	71	7
18. Offers alternative proposal not thought of by the lawyers	71	13
19. Says "split the difference".	69	13
20. Analyzes the case for a lawyer.	69	17
21. Informs the attorneys as to how similar cases have been settled.	68	4
22. Interprets the issues for the lawyers.	68	3
23. Subtly approves lawyers' concessions.	67	3
24. Continues to bring up settlement during trial recesses.	67	7
25. Requires settlement conference even though not mandated by court rules.	64	1
26. Informs an attorney that he has ignored important facts.	62	12
27. Brings client to the conference.	62	15
28. Offers advice to a lawyer.	61	26
29. Comments on the credibility of some testimony.	60	25
30. Asks amount each would concede, going back and forth to break settlement into small steps.	59	6
31. Convinces a lawyer that he has a distorted view of the case.	59	8
32. Tells attorneys not to stall.	58	3
33. Notes, for the client, the rewards of a pretrial settlement.	57	16
34. Sets inexorable trial date to raise pressure to settle.	57	40
35. Emphasizes, for the client, the risks of a jury trial.	56	18

Table 2 continued

<i>Techniques</i>	<i>Percent of Lawyers and Judges Observing and Using the Technique</i>	<i>Percent of Lawyers Judging This Technique as Unethical</i>
36. Argues one attorney's case to the other.	55	18
37. Talks to each lawyer separately about settlement.	51	25
38. Tells attorneys not to use sham arguments.	51	5
39. Schedules tight time constraints on settlement conference in order to enhance settlement.	50	18
40. Pressures the ill-prepared attorney.	50	18
41. Delays the trial date in order to enhance settlement.	46	36
42. Points out, to the client, the strengths and weaknesses of his case.	46	29
43. Tells one lawyer that the other can't sell a particular settlement to his client.	46	12
44. Gives advice to the lawyer with the weaker case.	44	41
45. Tells lawyers not to bluff.	42	11
46. Shoulders responsibility for the settlement even though the figure was not suggested by him.	40	9
47. Emphasizes the fairness of the figure when talking with client.	39	22
48. Speaks personally with the client to persuade him to accept.	35	43
49. Downgrades the merit of the stronger case and/or demerits of the weaker.	34	19
50. Coerces lawyers to settle.	31	51
51. Convinces the client that his lawyer is strongly defending his case.	31	14
52. Suggests a settlement figure to the client.	31	38
53. Lets attorneys set trial date.	30	3
54. States what the case is worth to the client.	29	32

Table 2 continued

<i>Techniques</i>	<i>Percent of Lawyers and Judges Observing and Using the Technique</i>	<i>Percent of Lawyers Judging This Technique as Unethical</i>
55. Sides with the stronger party in order to force agreement.	28	40
56. Suggests settlement figures without asking for lawyers' inputs.	23	22
57. Requires one client to pay the other client's attorney fees and expenses.	19	36
58. Has each lawyer paraphrase the other.	18	9
59. Penalizes the client for his attorney's actions.	17	47
60. Delays ruling to the disadvantage of the stronger side.	16	65
61. Gives favorable rulings to the lawyer with the weaker case.	15	58
62. Forces client to explain to him why he won't accept the settlement.	13	43
63. Penalizes a lawyer for not settling (e.g., with dismissal, mistrial, etc.)	13	67
64. Relays information to and from the client.	11	48
65. Gives information to lawyer with weaker case.	10	48
66. Threatens lawyer for not settling (e.g., threatens dismissal or mistrial).	10	66
67. Threatens to declare a mistrial if a decision is not returned by a certain time during the time the jury is deliberating.	9	40
68. Discusses an attorney's recalcitrance with a senior member of the attorney's firm.	6	43
69. Transfers the case to another district on the day of the trial, in order to force settlement rather than to have the trial far away.	6	55

Table 2 continued

<i>Techniques</i>	<i>Percent of Lawyers and Judges Observing and Using the Technique</i>	<i>Percent of Lawyers Judging This Technique as Unethical</i>
70. Threatens to discuss an attorney's recalcitrance with a senior member of the attorney's firm.	5	52
71. Orders the defendant to pay the settlement figure to charity instead of to the plaintiff.	3	51

These last two findings spawn a question relevant to the judiciary: what factors affect judicial participation? Comments written on our survey, unsolicited letters from the parties we were surveying, interviews with judges, and comments from legal editors quickly provided one probable answer: ethics. Our clues varied but led us to this conclusion: judges are more apt to use techniques which are considered ethical by the judicial community.⁴⁶ Several judges and attorneys labeled some of the techniques unethical, inappropriate, bad, poor, or awful. In formal letters to us, others stated that in their opinion it was "ethically improper" for a judge to use these techniques in settlement negotiations. A few presented their case more strongly, stating that the techniques we presented to them represented illegal and impeachable offenses.⁴⁷

With these clues in hand, we embarked upon an investigation of the ethics issue, surveying 1000 lawyers nationwide. Each was requested to indicate whether or not the 71 techniques in Table 2 were unethical. Our results, reported in the right column of Table 2, indicate a strong relationship between the usage of the techniques and their perceived ethics. By comparing the ethics ratings to the utilization rates, we noted, with some exceptions, that the top 24 techniques in terms of usage are mostly evaluated as ethical. The techniques judged most often as unethical are those which are less frequently applied in the settlement process. Techniques 25-50 include a significant number which were evaluated as unethical but are rather heavily utilized. Note some interesting examples: 38% of the lawyers felt that suggesting a settlement figure to a client (technique 52) is unethical, yet 31% of the attorneys and judges reported observing or using this technique. Twenty-five percent of the lawyers felt that talking to each lawyer separately about settlement is unethical (technique 37), but 51% of the attorneys and judges observed or used this

46. See generally CODE OF JUDICIAL CONDUCT CANNONS 1, 2, 3(A)(4), 3(A)(5), 3(B)(1) (1972).

47. One judge responded to our survey by writing a letter in which he said that using the techniques "would get ninety percent of (the state's judges) disbarred." He then indicated to the press that using some of the techniques on the questionnaire "would be out of the question." *'Technique' Questions Upset Judge*, St. Joseph (Missouri) News-Press, Feb. ____, 1983. at ____, col. ____.

technique. Finally, 41% felt that giving advice to the lawyer with the weaker case (technique 44) is unethical, but 44% of the attorneys and judges observed or used the technique.

These results generally validated our proposition that the utilization of judicial techniques is governed in part by the ethics of the technique. Two other factors which also appear to affect the utilization of the individual techniques are the perceived effectiveness of the technique and the cost, in terms of time and resources, of its application. It seems reasonable that judges will more frequently utilize those techniques which they deem effective and eschew the ineffective techniques. It also seems logical that judges, *ceteris paribus*, will rely more heavily upon those techniques that consume fewer resources.

VI. DETERMINATIVE FACTORS

To date we have tested and gleaned support for the "effectiveness" proposition; judges' utilization of the 71 techniques correspond strongly with their evaluations of the technique effectiveness. As we were preparing to test the "resource-use" hypothesis, we reviewed the results of our previous studies as well as the interview notes and letters from many attorneys and judges. One idea surfaced repeatedly: judicial participation in settlement, both the extent of involvement and the choice of techniques, is highly dependent upon the situation. Judges told us that in many circumstances they will avoid any involvement in settlement. On other occasions they become very active. Once involved, they use one set of techniques with certain cases, lawyers, clients, and topics, but with others they opt for an entirely different set. Lawyers, in general, corroborate these reports.

If the judge's participation depends upon the situation, then what are the important facets of the situation? Which factors determine the extent to which the judge will get involved in settlement and the techniques which will be utilized? Our research to date, which is rudimentary, concentrates upon the first question. We informally discussed this topic with several dozen judges in an attempt to isolate the factors that determine judicial involvement in settlement negotiations and to identify the nature of their effects. Of the 17 factors unearthed, the judge's time appears to be the most important.

A. Judge's Time

In a recent address to the Arizona Judicial Conference, Judge Frederick B. Lacey, after his address on the judge's role in the settlement of civil cases,⁴⁸ fielded questions from attending judges. One judge noted that he would like to undertake the steps proposed by Judge Lacey, but that he simply did not have the time. He felt awkward in talking to the lawyers about settlement, calling

48. Address by Frederick B. Lacey, *The Judge's Role in the Settlement of Civil Suits*, Arizona Judicial Conference (Dec. 9, 1983).

figures reasonable, and arguing for concessions because he did not have time to review cases prior to meeting with the attorneys in pretrial conference. Subsequent to Judge Lacey's presentation, other judges informally noted that they on occasion received, or found time for, the case only 30 minutes prior to a pretrial meeting with the attorneys. Under such a circumstance they would not aggressively participate in the settlement process. Rather, they would simply raise the settlement issue.

These judges' comments foster the proposition that the amount of time available to the judge will be inversely related to his settlement efforts. A judge pressed for time is less than able to become familiar with the facts of the case; to oversee discussions between the attorneys; to ask questions; to discuss the case with the attorneys and clients; to develop useful approaches; or to become interested in the case. When a judge does have sufficient time (due to early settlements of other cases, short trials, or a short docket) he or she is afforded the opportunity to pursue settlement aggressively. Not only is there a greater opportunity to apply the techniques listed in Table 1, the judge is less apt to be fatigued and more likely to develop an interest in the case.

B. *Length of Docket*

Overwork and fatigue present a second factor influencing a judges' participation in settlement, backlog on the calendar.⁴⁹ The effect of docket length is somewhat equivocal. Most judges, attorneys, and legal scholars interviewed maintained that judges faced with lengthy dockets will more actively pursue settlement than will those faced with an abbreviated schedule. They do so for two reasons: first, when the backlog is lengthy, say over two and a half years, the judges know that clients waiting for trial will be denied expedient resolution of their dispute. Therefore, the judges aggressively pursue settlement to increase the expediency of conflict resolution.

Second, judges with years of cases awaiting them perceive these cases as a burden which they wish to reduce through settlement. A judge with a short docket, three to four months, does not perceive such a burden and thereby takes few, if any, steps to reduce it.

Thus one argument maintains that judges facing lengthy dockets participate in the settlement process to assist the clients and themselves, but those with short dockets are not motivated to do so and thereby eschew involvement. A minority of judges and attorneys feel that judges' settlement involvement is not influenced by the length of their docket. They contend that judges have been conditioned over the years to expect case overload and are unaffected by it. In addition, most judges perceive a six month as well as a three year docket as extensive and thus do not react differently to these time frames.

While we are uncertain at this time as to which argument is valid, we perceive that docket length and time available grip judges in a "Catch-22." As

49. See, e.g., REPORT, *supra* note 1, at 120 (backlog in federal civil dockets).

their dockets lengthen, judges are more inclined to facilitate settlement, but the increase in docket presses them to spend more time trying cases. Thus they have less time to settle cases which, when unsettled, contribute to the existing backlog.

C. *Amount of Trial Time Required by the Case*

While there is some controversy as to the effect which docket length has upon the judges' involvement in settlement, there is unanimity regarding the effects of time required in trial. Judges report that they are more likely to attempt to facilitate settlement of lengthy cases. Their argument underpinning these reports is pelucid: whenever possible, case delay should be reduced. Therefore, a case which will involve an extensive trial and will delay subsequent cases by a substantial amount of time should be settled in order to avoid extensive delay.

D. *Case Complexity*

Cases which consume extensive trial time are usually complex, and this complexity in a parallel fashion motivates judicial involvement. Judges tend to conclude that complex cases risk confusing a jury. The judges assertively pursue settlement because they feel the parties with expertise (here the clients and lawyers) should resolve the issues. If the case is simple, judges usually conclude that the jury is capable of weighing the facts. Accordingly, they are less disposed to participate in the settlement process.

A final note on complexity: the above effects appear salient only for cases to be heard by a jury. Whenever the case is to be bench tried, its complexity appears to have minimal effects on judicial involvement in settlement.

E. *Amount in Controversy*

The amount in controversy is one of the major determinants of the judges' participation in settlement negotiations. Judges wish to keep small cases out of court and aggressively push settlement in order to do so. Their reasons for stressing the settlement of small (versus large) cases are two: first, literally millions of small cases are filed each year in the civil courts and bringing these to trial would cripple the legal system; and second, judges realize it is very inefficient to spend more money in trying a case than the case is worth.

Figure 1

INTERACTION OF CASE SIZE AND COMPLEXITY

		Case Size	
		Small	Large
Case Complexity	Simple	High Participation in Settlement	Low Participation in Settlement
	Complex	High Participation in Settlement	High Participation in Settlement

Comparison of this logic with that espoused under the discussion of case complexity sheds some light upon judicial behavior. Judges attempt to settle small cases and complex ones. In Figure 1, we have crossed case size with case complexity to form a 2 x 2 table: cases can be small and simple, small and complex, large and simple or large and complex. Manipulating the factors in this way fosters an interesting conclusion: in three of the four situations in Figure 1, the judge will actively facilitate settlement. Consider that when the case is simple and small, the judge wants to resolve it instead of tying up valuable court time on a minor issue. The small, complex case is strongly targeted for settlement by the judge because he does not wish to tie up court time with a minor case and feels that the complexity would overwhelm the jury. Likewise in a complex, large case, the complexity induces the judge to facilitate settlement of the case.

We only expect the judge to refrain from participating in settlement in large, simple cases. Here the case is simple so the jury can understand it, and it is large enough to merit court resources. When we manipulated the variables case size and case complexity together, we found that they interact with each other; that is, the effects of one frequently alter the effects of the other. Figure 1 illustrates this important point. The reader should bear this phenomenon in mind as he considers the other factors (Table 3) that affect judicial involvement. Included in the table are only the simple effects of the variables. For example, a judge is more apt to become involved in settlement when the attorneys' experience is minimal.

Table 3

**FACTORS INFLUENCING JUDGES' PARTICIPATION IN SETTLEMENT
NEGOTIATIONS**

<i>Factor</i>	<i>Effect on Judges' Involvement in Settlement</i>
Judge's time	Large amount of time = extensive participation Small amount of time = minor participation
Length of docket	Long = extensive participation Short = minor participation
Amount of trial time required by the case	Large = extensive participation Small = minor participation
Case complexity	Complex case = extensive participation Simple case = minor participation
Amount in controversy	Small = extensive participation Large = minor participation
Experience of attorneys in this type of litigation	Minimal = extensive participation Extensive = minor participation
Trier of the case	Jury = extensive participation Judge = minor participation
Number of parties who request the judge's assistance with settlement	Several = extensive participation Few = minor participation
Cooperativeness or reasonableness of the attorneys	Very cooperative = extensive participation Uncooperative = minor participation
Disparity between the attorneys' competence	Large = extensive participation Small = minor participation
Number of parties to the suit	Many = extensive participation Few = minor participation
Expertise of judge	Large = extensive participation Limited = minor participation
Speed at which case is moving to trial	Slowly = extensive participation Rapidly = minor participation
Amount of animosity between parties	Large = extensive participation Small = minor participation
Extent of controversy in the case	Large = extensive participation Small = minor participation
Disparity between the parties' strengths	Large = extensive participation Small = minor participation
Recalcitrance of client	Minor = extensive participation Extensive = minor participation

However, consideration of the interactive possibilities yields some interesting conclusions. Witness, for instance, the probable interaction between the expertise of the judge and the trier of the case. If the judge has limited expertise in the topic under dispute, he will eschew involvement in the settlement process regardless of who is to try the case. If the judge has some expertise he or she will become involved in settlement, but only if the case is to be tried before a jury or another judge. If he will bench-try the case himself, involvement in settlement is unlikely.

Our propositions as to the effects that judge's time, length of docket, case complexity, recalcitrance of the client, etc., have upon the judge's participation are based upon unstructured discussions and interviews. Yet, they represent an important first step toward understanding a complex phenomenon and provide guidance for future investigation of judicial settlement activities.

VII. CONCLUSION

Our current results indicate that judges possess a well-stocked inventory of techniques to facilitate settlement. Many of these techniques are heavily utilized across the country and their usage, for the most part, corresponds with their perceived ethics.

We hope that our research offers new insights into the judge's role in settlement and suggests possible approaches for improving effectiveness. Techniques are available to judges for facilitating settlement, but a fundamental question remains as to whether judges will adopt and utilize them effectively.