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The Represented Client in a Settlement Conference: The Lessons of G. Heileman Brewing Co. v. Joseph Oat Corp.

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ARTICLES

THE REPRESENTED CLIENT IN A SETTLEMENT CONFERENCE: THE LESSONS OF *G. HEILEMAN BREWING CO. V. JOSEPH OAT CORP.*

LEONARD L. RISKIN*

TABLE OF CONTENTS

I. A HISTORY OF THE CASE WITH EMPHASIS ON THE PERSPECTIVES OF THE PARTICIPANTS 1066
   A. The Dispute 1068
   B. Perspectives on Settlement Conferences 1075
      1. Lawyer-Client Relationships: Traditional and Participatory 1076
      2. Negotiation: Adversarial and Problem-Solving 1078
         a. Adversarial Negotiation 1078
         b. Problem-Solving Negotiation 1078
      3. The Role of the Judicial Host 1081
         a. Facilitating Adversarial or Problem-Solving Negotiation 1081
         b. Raising a Fist or Extending a Hand 1083
      4. Relations Among the Perspectives 1085
   C. The District Court Revisited 1087
   D. In the Court of Appeals 1089
      1. The Majority 1090
      2. The Dissents 1091
         a. The Coffey, Ripple, and Manion Dissents 1092

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Washington University Open Scholarship

b. The Posner and Easterbrook Dissents 1095
II. THE REPRESENTED CLIENT IN THE SETTLEMENT CONFERENCE 1097
A. Advantages and Disadvantages of Client Attendance in Settlement Conferences 1098
1. "Client-Centered" Arguments 1099
2. Lawyers' and Judges' Perspectives 1103
B. When Should a Judge Mandate or Otherwise Encourage a Represented Client to Attend a Settlement Conference? 1105
C. A "Representative with Full Authority to Settle the Case" 1108
D. The Obligations of the Represented Client in the Settlement Conference 1112
III. CONCLUSION 1114

Several years ago, I mediated two personal injury insurance claims on the same day.[1] In the first case, the clients participated along with their lawyers; in the second, they did not. The clients' presence made for vast differences in the content and style of the mediation and in my own experience.

The first case involved an automobile accident in which the victim (I will call her "Alice May") suffered serious injuries and her automobile sustained great damage. Ms. May sat beside her lawyer. For the defense, the claims adjuster (I will call her "Grace Green") assumed the client role,[2] and a local attorney hired by the insurance company represented the insured.

The room crackled with emotion as we discussed the case. In earlier negotiations Grace Green had demanded documentation of Ms. May's damage claims. Alice May was hurt and angry because she felt that Grace Green had "called [her] a liar." Ms. Green also was entangled emotionally. She feared being duped, and although she did not express this until late in the session, she did not want Alice to dislike her.

A highly charged exchange between the clients consumed a major por-

1. Mediation is a voluntary process in which a neutral third party helps others resolve a dispute or plan a transaction, ordinarily by facilitating negotiations between the participants. Unlike a judge or arbitrator, a mediator lacks authority to decide the case. *See* LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 196-249 (1987).

2. I say "client role" because the claims adjuster was not a party to the underlying dispute in the same sense as was the insured.

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tion of the mediation; raw feelings spilled over the mahogany conference table. The clients' conduct in the mediation, and their comments afterward, suggest that this conversation was essential to the settlement. Each client felt she had earned the other's respect, and each seemed to think that achieving this kind of "balance" was valuable in itself. Moreover, participation helped them conclude that the resulting monetary agreement was fair. Stated simply, the presence and direct participation of both clients focused attention on the parties' relationship. Achieving mutual respect became an important goal of the mediation.

The clients' conversation could not have taken place unless lawyers and the mediator—the "professionals"—allowed it. During this conversation, the professionals did almost nothing, and I felt extremely tense and uncertain about my role. I had relinquished control, and had little idea where the conversation would lead. Worse, I was a professional mediator and a lawyer; I was being paid for this. Surely there was *something* I should do. I think the lawyers may have had similar reactions.

The second mediation arose out of a claim of police brutality in connection with an allegedly invalid arrest. Only lawyers attended.[3] The defendant's lawyer, a local practitioner, had been hired by the defendant's out-of-state insurance company.

This session felt drastically different from the other. Although the claimant alleged intentional, racially motivated, abusive police conduct, the session was entirely cordial. Each participant wore a "professional mask,"[4] which limited the personal aspects of our involvement. A clubby cordiality replaced the tension and uncertainty of the other mediation, and this polite interaction continued even after it became clear that settlement was impossible.

As it turned out, the mediation was premature; the insurance company had authorized its lawyer to settle only for nuisance value because she had not had time to take certain depositions. We all realized that the culprit was the claims adjuster, who had insisted that his lawyer try mediation even though he was not ready make a significant offer.[5]

3. The plaintiff's lawyer said that the organization that arranged the mediation informed him that his client's presence was not necessary. The normal practice of that organization is to encourage the plaintiff, but not the defendant, to attend personally.

4. THOMAS L. SHAFFER & JAMES R. ELKINS, LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL 46 (1987).

5. If he had been scheduled to attend the mediation personally, I imagine he would have postponed it until he was ready to talk.

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Although the plaintiff's lawyer was enormously upset at wasting half a day at this mediation, he contained his emotion. The other lawyer and I validated his feelings, and the three of us went on to discuss legal education, mutual friends, and the like.

As I drove to my office after these two mediations, I was startled to realize that, on that day at least, I was much more comfortable without the clients.[6] The events of that day have nagged at my conscience. As a mediator I had no authority to compel the parties themselves to attend. I normally encouraged them to do so, however, because I believed that client attendance *usually* brings quicker, more satisfying settlements for the client. What stunned me was the realization that I sometimes hope that the clients will not show up, because *I* will have an easier time mediating without them. If I had the power to compel the parties to attend these mediation sessions, I wondered, when, why, and how would I use it?

This question prompted my interest in *G. Heileman Brewing Co. v. Joseph Oat Corp.*[7] The relevant part of *G. Heileman Brewing Co.* began in 1984, when a U.S. magistrate in Madison, Wisconsin issued an order that befuddled some of the parties and their lawyers and, on appeal, sharply divided the judges on the Seventh Circuit. The magistrate directed each party and their insurance carriers to send to a settlement conference, in addition to their lawyers, "a representative having full authority to settle the case or to make decisions and grant authority to counsel with respect to all matters that may be reasonably anticipated to come before the conference."[8] National Union Fire Insurance Company of Pittsburgh, the carrier for defendant Joseph Oat Corporation, sent no representative to the key conference. Joseph Oat Corporation, however, did send a representative along with the lawyer the insurance company retained to defend it. The representative was a lawyer, a member of the law firm that generally represented the corporation. He indicated that he had authority to state the position of the corporation: it would make no offer because it believed that if any offer were to be made the insurance

6. I do not assert that the presence or absence of clients ordinarily will correlate with the kinds of events that occurred in these two cases. For further discussion of these two cases, see *infra* notes 151-52, 162, and accompanying text.

For discussions of the use of stories in legal writing, see Symposium, *Pedagogy of Narrative*, 40 J. LEGAL EDUC. 1 (1990).

7. 107 F.R.D. 275 (W.D. Wis. 1985) (*Heileman I*), *aff'd*, 871 F.2d 648 (7th Cir. 1989) (en banc).

8. 107 F.R.D. at 279.

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carrier was obligated to make it. Interpreting this as a violation of his order, the magistrate sanctioned Joseph Oat Corporation and National, requiring them to pay the expenses, including attorneys' fees, the other litigants incurred in attending the conference.[9]

The chief judge of the district court declined to reconsider the order,[10] but a divided three judge panel of the U.S. Court of Appeals for the Seventh Circuit reversed.[11] The full court subsequently withdrew the panel's opinion and upheld the magistrate's order, concluding that a district court, under Federal Rule of Civil Procedure 16 and the court's inherent authority, may order a represented litigant to attend a settlement conference along with his lawyer, and that the magistrate did not abuse his discretion by ordering Oat to send a representative armed with "full authority to settle the case" or by imposing sanctions on the parties that failed to comply with that order.[12] The six to five vote included five dissenting opinions.[13]

I will not quarrel with either the majority or the dissenters.[14] The

9. *Id.* at 282-83.

10. *Id.* at 277.

11. G. Heileman Brewing Co. v. Joseph Oat Corp., 848 F.2d 1415 (7th Cir. 1988) (*Heileman II*).

12. G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 656-57 (7th Cir. 1989) (en banc) (*Heileman III*).

13. Three of the dissenting judges concluded that neither Federal Rule of Civil Procedure 16 nor their inherent authority authorized district courts to order a represented client to attend a settlement conference. *Id.* at 658 (Coffey, J., dissenting); *id.* at 666 (Manion, J., dissenting); *id.* at 665 (Ripple, J., dissenting). The other two took no position on whether the court had such authority, but argued that, if such authority existed, the magistrate had abused it in this case. *Id.* at 657 (Posner, J., dissenting); *id.* at 663 (Easterbrook, J., dissenting).

14. The case has attracted great attention in the literature. *See, e.g.*, *A United States District Court Judge Can Order Litigants, Even Those Represented by Counsel, to Appear Before the Court in Person for a Pretrial Conference*, 1989 TRIAL LAW. GUIDE 104; Paul Reidinger, *Then It's Settled; 7th Circuit Upholds Rule 16 Order*, 75 A.B.A. J., July 1989, at 92; David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1989 (1990); Farol Parco, Note, Strandell v. Jackson County *and* G. Heileman Brewing Co. v. Joseph Oat Corp.: *The Failure of the Seventh Circuit Court of Appeals to Narrow the Interpretation of Rule 16 and Limit the Inherent Power Doctrine*, 4 B.Y.U. J. PUB. L. 157 (1990); Tony J. Masciopinto, Note, *Expanding Rule 16's Scope to Compel Represented Parties with Full Settlement Authority to Attend Pretrial Conferences*, 39 DEPAUL L. REV. 931 (1990); Bradley Adas, Note, *The Seventh Circuit Approves the Exercise of Inherent Authority to Increase a District Judge's Pre-Trial Authority Under Rule 16*, 23 J. MARSHALL L. REV. 517 (1990); Susan Kaye Antalovich, Note, *Defining the Perimeters of Judicial Involvement in the Settlement Process*, 5 OHIO ST. J. ON DISP. RESOL. 115 (1989); Robert J. Keenan, Note, *Rule 16 and Pretrial Conferences: Have We Forgotten the Most Important Ingredient?*, 63 SO. CAL. L. REV. 1449 (1990); Eric D. Bender, Note, *So It's Settled, Then—Rule 16 and Courts' Power to Order Represented Parties to Attend Pretrial Settlement Conferences*, 58 U. CIN. L. REV. 1421 (1990).

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majority's conclusion that federal courts have authority to order represented clients to attend a settlement conference was as supportable, based on "narrowly 'legal' considerations," as the contrary conclusion reached in three of the dissenting opinions.[15] In any event, the majority's conclusion now seems firmly entrenched, especially in light of the Civil Justice Reform Act of 1990.[16] That statute, signed by President Bush on December 1, 1990, requires every federal district court to develop a "Civil Justice Expense and Delay Reduction Plan"[17] and provides that such plan may require that "upon notice by the court, representatives of the parties with authority to bind them in settlement discussion *be present or available by telephone* during any settlement conference."[18]

What interests me, then, is not whether the federal courts have this authority, but when, why, and how they should use it. This question is enormously important. Federal courts are experimenting with alternative dispute resolution at dizzying rates, and new legislation makes increased usage likely.[19] The *Heileman* decision, along with the Civil Justice Reform Act of 1990, is likely to encourage judges to compel cli-

15. *Heileman III*, 871 F.2d at 657 (Posner, J., dissenting) (The narrowly "legal" considerations are equivocal).

16. Pub. L. No. 101-650, 104 Stat. 5089 (1990).

17. Pub. L. No. 101-650, § 103(a), 104 Stat. 5089, 5090, (1990) (to be codified at 28 U.S.C. § 471).

18. *Id.* at 5093 (to be codified at 28 U.S.C. § 473(b)(5)) (emphasis added).

19. Congress recently has boosted a long-developing trend toward alternative dispute resolution in the federal district courts. The Civil Justice Reform Act of 1990, *supra* note 16, establishes that the Civil Justice Expense and Delay Reduction Plan that each federal district court develops may provide that in complex cases a judicial officer explore the possibility of settlement, *id.* at 5092 (to be codified at 28 U.S.C. § 473(a)(3)(A)), and may also provide "authorization to refer appropriate cases to alternative dispute resolution programs that (A) have been designated for use in a district court; or (B) the court may make available, including mediation, minitrial, and summary jury trial." *Id.* (to be codified at 28 U.S.C. § 473(a)(6)).

Congress based this legislation on recommendations in a recent report by the Federal Courts Study Committee that suggested broadening of federal courts' authority to implement alternative dispute resolution programs and funding of "sustained experimentation" with such mechanisms. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 81-87 (1990).

The Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990), requires federal government agencies to develop a policy addressing the use of alternative means of dispute resolution.

A Brookings Institution task force has recommended that backlogged courts experiment with "settlement weeks." BROOKINGS INSTITUTION, JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION 29 (1989).

A committee of the Conference of State Court Administrators has recommended that courts explore the use of alternative processes organized to permit appropriate court supervision and evaluation, and designed and managed to promote faster, less expensive, and better dispute resolution methods. CONFERENCE OF STATE COURT ADMINISTRATORS COMMITTEE ON ALTERNATIVE DIS-

ents and representatives of organizational litigants armed with settlement authority[20] to attend settlement conferences, along with their lawyers.[21] This practice offers vast possibilities for achieving quicker and sometimes better settlements. It carries equally vast risks. The academic and practice literature, however, has paid remarkably little attention to the questions of when and how to involve clients in such conferences. None of the *Heileman* opinions offers any affirmative guidance. Nor do they elaborate sufficiently on the attributes required of the corporate representative with "full authority to settle."

My aim in this Article is to provide background, along with some modest suggestions, that could assist judges, lawyers, and clients in determining when and how clients should participate in settlement discussions.

Part I begins with a history of the case. It then sets out various perspectives that litigants, lawyers and judges commonly bring to settlement conferences, perspectives on lawyer-client relations, negotiation, and the role of the judicial host. Next, it examines the opinions in the *Heileman* case, along with other materials, in an attempt to uncover the underlying assumptions about the settlement conference that informed the behavior of the judges and lawyers in that case. I argue that *Heileman*'s explanation lies in the lawyers' and judges' tendency to embrace one of two radically different visions of the settlement conference.

Part II catalogs the advantages and disadvantages of involving clients

PUTE RESOLUTION, REPORT TO THE MEMBERSHIP 2 (1990). This approach also is reflected in the American Bar Association Standards Relating to Court Organization § 1.12.5 (1990).

20. Unless otherwise noted, discussions of client participation include situations in which organizational litigants authorize individuals other than their attorneys of record to represent them in settlement talks.

21. Current practices on compelling represented clients to attend settlement conferences vary widely. While in some courts the practice is institutionalized (*see, e.g.*, *infra* note 180), other courts routinely exclude clients. E. Allen Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 L. & SOC'Y REV. 953, 963 (1990).

Only nine percent of the litigants in a sample of the settlement conferences in the Seventh Circuit Court in Prince George's County, Maryland attended the settlement conferences. E. ALLAN LIND ET AL., TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES (Rand Inst. For Civ. Just. No. 12-3708-ICJ, 1989). In the three courts studied, litigants who personally attended the settlement conferences tended to perceive the settlement conferences as more dignified than those who did not, leading the authors to conclude that litigants form impressions of dispute resolution procedures even if they do not participate. *Id.*

Almost 80% of Second Circuit federal judges responding to a survey indicated that they "occasionally or never" required a client to attend a settlement conference. STANDING COMMITTEE ON IMPROVEMENT OF CIVIL LITIGATION, SETTLEMENT PRACTICES IN THE SECOND CIRCUIT 16 (1988).

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in settlement conferences and describes the many different ways in which a client can participate. In addition, Part II includes some general suggestions about when and for what purposes a judicial host should require a litigant or a representative of an organizational litigant to accompany the litigant's lawyer to a settlement conference. It then proposes an explanation for the expression "full authority to settle the case" as it applies to an organization. Finally, Part II reviews the obligations of the client or client representative once he or she appears at the settlement conference. Part III sums up and suggests a special benefit flowing from client participation in settlement conferences.

I. A HISTORY OF THE CASE WITH EMPHASIS ON THE PERSPECTIVES OF THE PARTICIPANTS

A bit of background will put the case into legal perspective. Rule 16 of the Federal Rules of Civil Procedure gives the court discretion to "direct the attorney for the parties and any *unrepresented* parties to appear before it for a conference . . . before trial" for such purposes as facilitating or discussing settlement and allows the court to impose sanctions for failure "to participate in good faith."[22]

---

22. FED. R. CIV. P. 16(a)(5), (c)(7) (emphasis added).

> (a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any *unrepresented* parties to appear before it for a conference or conferences before trial for such purposes as . . .
>
> (5) facilitating the settlement of the case.
>
> (c) Subjects to be Discussed at Pretrial Conferences. The participants at any conference 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;
>
> (f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just. . . . In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

FED. R. CIV. P. 16 (emphasis added). Some state courts have relatively clear guidance on this issue. A Florida statute provides:

> (1) In any action for damages based on personal injury or wrongful death arising out of medical malpractice, whether in tort or contract, the court shall require a settlement conference at least 3 weeks before the date set for trial;
>
> (2) Attorneys who will conduct the trial, parties, and persons with authority to settle shall attend the settlement conference held before the court unless excused by the court for good cause.

FLA. STAT. ANN. § 766.108 (West. Supp. 1991).

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At the time the magistrate issued the disputed settlement conference order in *Heileman*, it was plain that Rule 16(c)(7), which was added to include settlement discussions among the purposes of pretrial conferences, did not change prior law, which prohibited sanctions for failure to accept a settlement proposal.[23] In addition, several cases had dealt with the authority Rule 16 granted to a federal district court to compel litigants to take part in activities explicitly aimed at fostering settlement. None of these, however, had confronted the precise issue addressed in *Heileman*: whether federal district courts have authority to compel a represented litigant, or a representative of an organizational litigant armed with full settlement authority, to attend a settlement conference along with the litigant's lawyer.[24]

Two courts, though, addressed a similar question and held that a federal district court may compel attendance of a representative of a party's insurance carrier at a settlement conference.[25] However, in these cases the persons who violated the court's orders did so deliberately. In *Heile-*

23. Kothe v. Smith, 771 F.2d 667 (2d Cir. 1985).

24. Federal courts had disagreed about a district court's authority to compel parties to participate in a summary jury trial, a process in which lawyers make abbreviated presentations of their cases to a "jury" that renders a nonbinding verdict. *See* Thomas D. Lambros, *A Summary Jury Trial Primer, in* DONOVAN LEISURE NEWTON & IRVINE ADR PRACTICE BOOK 373 (J. Wilkinson ed., 1989). In Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1988), the court held that Rule 16(c) does not authorize a federal district court to require an unwilling litigant to participate in a summary jury trial, maintaining that the Rule authorizes only *discussion* of alternatives at pretrial conferences and *voluntary* participation in any alternative agreed upon. Two federal district courts in other circuits have held to the contrary, finding that Rule 16 provides authority to compel participation in a summary jury trial. Arabian-American Oil Co. v. Scarfone, 119 F.R.D. 448 (M.D. Fla. 1988); McKay v. Ashland Oil, Inc., 120 F.R.D. 43 (E.D. Ky. 1988).

Several opinions had affirmed the authority of a district court to require litigants to participate in nonbinding court-annexed arbitration. In this process, the attorneys present their cases in an abbreviated fashion to arbitrators. The arbitrators' decision becomes the judgment of the court unless a party requests a trial de novo. Kimbrough v. Holiday Inn, 478 F. Supp. 566 (E.D. Pa. 1979); Gilling v Eastern Airlines, Inc., 680 F. Supp. 169 (D.N.J. 1988). Clients ordinarily choose to attend summary jury trial and court-annexed arbitration proceedings, but are not required to do so.

Today, a federal court's authority to order litigants into alternative dispute resolution seems considerably clearer as a result of the Civil Justice Improvement Act of 1990. *See supra* notes 17-18 and accompanying text.

25. The Sixth Circuit decided *In re LaMarre*, 494 F.2d 753 (6th Cir. 1974), before the *Heileman* orders were issued. In *Lockhart v. Patel*, 115 F.R.D. 44 (E.D. Ky. 1987), the court's order came after and relied on the district court's decision in *Heileman*, but before *Heileman* reached the court of appeals.

A recent 11th Circuit decision is grounded on a different understanding of Rule 16 and the courts' inherent authority. *In re Novak*, 932 F.2d 1397 (11th Cir. 1991) arose out of a medical malpractice claim. The district court ordered Novak, an employee of CNA, the defendant's insurer, to attend a settlement conference (after the court had been advised by defense counsel that Novak had full

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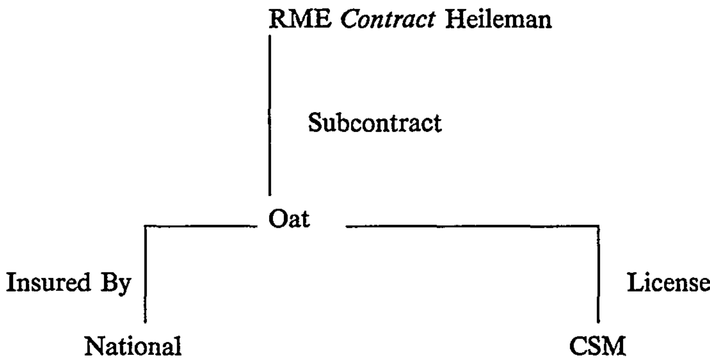
man, the Oat Corporation maintained that it thought it was complying with the court's order.

A. *The Dispute*

In 1980, G. Heileman Brewing Company ("Heileman") of LaCrosse, Wisconsin signed an agreement with a local engineering firm, RME Associates ("RME"), which, it hoped, would solve its long-standing waste water treatment problems. The agreement called for RME to install a waste water treatment system that had been developed by a Dutch firm, Centrale Suicker Maatschappij ("CSM"). The Joseph Oat Corporation of Camden, New Jersey ("Oat") held an exclusive license to distribute the system in the United States. RME subcontracted with Oat to supply the waste treatment system. Oat was insured by the National Fire Insurance Company of Pittsburgh. The relationships are depicted below.



Heileman's hopes were dashed when the system failed to function as well as had the pilot system. A dispute arose concerning the quality of

settlement authority). Novak refused to attend, having concluded that the court's order was invalid. The district court found him in criminal contempt.

The Circuit Court of Appeals, citing neither *In re Lamarre* nor *Lockhart v. Patel,* agreed that the order was invalid; it concluded that neither Rule 16 nor the court's inherent authority provided a basis for a court to order a representative of a nonparty insurance carrier with full settlement authority to attend a settlement conference. The court followed *Heileman III* in recognizing that the court had inherent authority to order such attendance by a representative of a *party*, but it differed from *Heileman III* in stating that Rule 16 provided no such authority. In the view of the court of appeals, in order to secure the participation of a nonparty insurance company representative with full settlement authority, the District Court should order the *party* to produce a representative with full settlement authority.

Nonetheless, the court of appeals affirmed the finding of criminal contempt because Novak had failed to follow the appropriate procedure for challenging the court's order.

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the water that Heileman ran through the system. CSM apparently had designed the system to remove certain elements that deplete water of free oxygen. The designers never intended that the system screen out large objects such as bottle caps and broken bottles, which were in the water Heileman ran through the system. In addition, the system inexplicably generated a noxious odor.[26]

Heileman incurred extra expenses to make the system work as required and withheld some payments that RME expected under the contract. RME in turn refused to make certain payments set forth in its contract with Oat. A flurry of state and federal lawsuits resulted.[27] After various dismissals and settlements, two lawsuits remained unresolved: Heileman's state court suit against RME and CSM, and, the case that gave rise to the events discussed in this Article, RME's action in federal court against Oat and CSM. Thus, the settlement conferences described in this Article concerned only the claims of RME against Joseph Oat Corporation and CSM.[28]

On November 7, 1984, RME filed a motion to postpone the trial, scheduled for January 14, 1985, to permit the parties to continue settlement efforts begun in the state court case. The magistrate granted the motion and verbally ordered a settlement conference for December 14, 1984. The order, reduced to writing on November 19, 1984, stated, *inter alia*, that "[i]n addition to counsel, each party shall be represented at the conference by a representative having full authority to settle the case, excepting only CSM, whose authorized representative in the Netherlands shall be available by telephone throughout the duration of

26. I pieced this together from reading the opinions as well as from telephone interviews with attorneys representing various parties in this case. Telephone Interview with John Possi, Esq., counsel for Joseph Oat Corporation, retained by National (April 19, 1989); Telephone Interview with John Fitzpatrick, Esq., counsel for Joseph Oat Corporation at the key conference (April 19, 1989); Telephone Interview with Richard Florsheim and Thomas L. Shriner, counsel for G. Heileman Brewing Co. (April 18,1989).

27. Oat brought an action against Heileman and RME in federal district court in New Jersey, and RME counterclaimed. The case was transferred to the Western District of Wisconsin; RME joined CSM as a third-party defendant. Heileman next commenced action in a state court against Oat and RME, in response to which RME cross-claimed against Oat, counterclaimed against Heileman, and later joined CSM. At an early stage, Heileman and Oat settled and withdrew all claims against each other; the district court dismissed Heileman. Subsequently, Oat dismissed its claim against RME in the federal court. The remaining federal proceedings were RME's claims against Oat and CSM. Also, Heileman still maintained its state court action against RME. *Heileman II*, 848 F.2d at 1417-19.

28. *Heileman I*, 107 F.R.D. at 277. Subsequently, RME and CSM settled with each other. Heileman intervened in the case and was substituted for RME against Oat. *Id.* at 277 n.1.

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the conference."[29]

RME and CSM complied with this order, sending both principals and attorneys.[30] The problems concerned Joseph Oat Corporation and its insurer, National Fire Insurance Company of Pittsburgh. Both John Possi, an attorney National hired to represent Oat, and John Fitzpatrick, Oat's personal attorney, interpreted the language quoted above to require the presence of a representative of Oat's insurance company, not a representative of the corporation itself.[31] Accordingly, only John Possi appeared as counsel for Oat, and Possi had no settlement authority. Joseph McMahon, an independent adjuster, represented National.[32] He maintained that National "was not interested in making any payment."[33] From that point on, the magistrate had no further discussions with McMahon or Possi.[34]

---

29. *Id.* at 278. Though not subject to the court's jurisdiction, G. Heileman Brewing Co. was represented at the conference by its attorney, Richard Florsheim, and its general counsel, a Mr. Smith. *Id.* at 278.

30. *Id.*

31. John M. Fitzpatrick stated:

> I did not read this as requiring the presence of a principal of Joseph Oat Corp. at the conference scheduled for December 14, 1984 at 2 p.m. I read that requirement as referring to a representative of the insurance carrier with authority to discuss settlement of this matter, and in my conversations with Mr. Kaplan of the Joseph Oat Corp. conveyed to him my interpretation of that portion of the Order and advised him that it was not necessary for anyone from Joseph Oat to appear at that conference.
>
> Both Mr. Kaplan and I at the time of this conversation believed that Oat's insurance company would appear at the conference with authority to discuss the possibility of settlement. It was decided at that time between Mr. Kaplan and myself that I would attend the conference for the sole purpose of urging the insurance company to enter into serious negotiations and to protect Oat's interest.

Affidavit of John M. Fitzpatrick, Esq. in Opposition to the Imposition of Sanctions Against Joseph Oat Corp. at 1-2, G. Heileman Brewing Co. v. Joseph Oat Corp., 107 F.R.D. 275 (W.D. Wis. 1985).

Later, according to the affidavit, Fitzpatrick learned from McMahon, National's adjustor, that he had not received authority from National to make an offer at the conference. At that point, Fitzpatrick concluded there would be no purpose in his traveling to Madison for the conference. Kaplan concurred, and Fitzpatrick did not attend. *Id.* at 3.

32. The magistrate referred to Mr. McMahon as an independent adjuster. *Heileman I*, 107 F.R.D. at 279. The attorney for Oat Corporation has taken issue with this characterization, stating that McMahon worked for the American International Adjustment Company, which was a wholly owned subsidiary of American International, as was National. In other words, McMahon reported "regularly to claims managers for National Union." Letter to the author from John Possi (Feb. 1, 1991).

33. *Heileman I*, 107 F.R.D. at 279.

34. John Possi explained in an interview that the settlement conference consisted primarily of a series of private meetings between the magistrate, the parties, and their representatives. After the conversation between the magistrate, Possi, and McMahon, the magistrate asked them to wait in the hall. He then held meetings with other parties and did not meet again privately with Possi or McMahon. Telephone Interview with John Possi, counsel for Joseph Oat Corp. (Apr. 19, 1989).

https://openscholarship.wustl.edu/law_lawreview/vol69/iss4/4

At the conclusion of this conference, Magistrate Groh entered an oral order, in the presence of all parties, continuing the conference until December 19, 1984. The order, as reduced to writing on December 18, 1984, stated that the absence of duly authorized corporate representatives "impaired" progress of the earlier conference. It provided:

> In addition to counsel, each party and the insurance carriers of plaintiff Oat and defendant RME, shall be represented at the conference in person by a representative having full authority to settle the case or to make decisions and grant authority to counsel with respect to all matters that may be reasonably anticipated to come before the conference.[35]

Still, the attorneys for Joseph Oat apparently had trouble understanding the magistrate's command. About December 17, John Possi telephoned the magistrate's clerk, explained that Oat was not in a position to make a settlement offer, and asked for confirmation of the magistrate's intent. According to Possi, the clerk told him, " 'The magistrate stands by his order. He expects someone from Oat to be there.' "[36] Possi then called Fitzpatrick, Oat's outside counsel for the matter, and told him that the magistrate wanted Fitzpatrick *or* one of the principals of Oat to attend the December 19 conference.[37] Fitzpatrick then contacted McMahon, National's independent claims adjuster. McMahon told him that he would not attend the December 19 conference because he had received no authority to make an offer. Furthermore, according to Fitzpatrick, McMahon indicated for the first time that National might "deny coverage and attempt to avoid its obligation to defend in this litigation and might file an action for declaratory judgment."[38] After Fitzpatrick discussed this development with Maurice Holtz, Vice President of Oat, the two agreed that Fitzpatrick should attend the conference and "convey to the Court Joseph Oat's position that they will not at this time make an offer to settle the case."[39]

Fitzpatrick appeared at the December 19 conference. National's claims adjuster was not present. Attorney John Possi appeared for Oat; he said he did not represent National but that National had told him that it believed it was not subject to the order in question because it was not a

35. *Heileman I*, 107 F.R.D. at 279.

36. Affidavit of John C. Possi, Esq., G. Heileman Brewing Co. v. Joseph Oat Corp., 107 F.R.D. 275 (W.D. Wis. 1985).

37. *See* Fitzpatrick Affidavit, *supra* note 31, at 5.

38. *Id.* at 4.

39. *Id.* at 5.

Washington University Open Scholarship

party to the suit. Here is an excerpt from the transcript of that conference:

MR. FITZPATRICK: I am John Fitzpatrick, personal attorney for Joseph Oat.

* * *

THE COURT: Is there no representative of the party Joseph Oat present?

MR. FITZPATRICK: I represent Joseph Oat.

THE COURT: You are an attorney, are you not?

MR. FITZPATRICK: Yes, sir.

THE COURT: You are not a principal?

MR. FITZPATRICK: That is correct.

THE COURT: You have authority to settle the case?

MR. FITZPATRICK: I have authority from Joseph Oat. I have discussed it with him. They gave me authority to speak for him today. The authority is to make no offer.

THE COURT: You haven't answered my question. The order I issued, and I made it clear on December 14th, that for purposes of this conference, with the exception of CSM whose client is in the Netherlands, that each party in addition to be [sic] represented by counsel would have present the party itself for purposes of authorizing or discussing settlement in this case, speaking specifically about the order which is dated December 18th but was entered I think clearly enough on the 14th. That in addition to counsel, each party and the insurance carriers of Plaintiff Oat and Defendant RME shall be represented at the conference in person by a representative having full authority to settle the case or make decisions relevant to all matters reasonably anticipated to come before the conference. Then an exception for CSM because of them being out of the country. I think that is fairly clear.

As a matter of fact, Mr. Possi called yesterday to find out from my secretary if that is what I really meant; and I would like to have your explanation as to why no one from Joseph Oat is here from [sic] that authority.

MR. FITZPATRICK: I am here as a representative of Joseph Oat which I understood your order to be. I have discussed this thing thoroughly with the principals of Joseph Oat. They directed me to come to the conference. They directed me that I could speak for them, with authority to speak for them. Their direction was I should make no offer to settle the case. That is their position. That is the position they chose to take and they designated me as their representative to communicate that to the court.

https://openscholarship.wustl.edu/law_lawreview/vol69/iss4/4

THE COURT: And that is, of course, the function of a lawyer—to speak for a client and say we are not going to make an offer.

MR. FITZPATRICK: I am speaking—

THE COURT: Please don't interrupt. It is not the function of the lawyer to say "we will settle the case at a certain amount." The purpose for the order was clearly to have present at the conference the parties themselves so that they could make decisions with respect to proposals that were advanced.

The position that Oat is now taking and indeed took on December 14th . . . I take to be in direct violation of the Court's order. I treat that as being obstructive of the pretrial process under Rule 16, and I will now enter an order to show cause why Joseph Oat ought not be subjected to sanctions including attorneys' fees and expenses of the other parties who are present and such other relief including contempt of Court that may be appropriate under the circumstances.

* * *

I infer from the position that Oat has taken this morning and put on the record that they refuse to even appear to discuss settlement. Is that a fair statement?

MR. FITZPATRICK: Your Honor, if you would like me to elaborate, I can tell you what our position is. It is that we are fully insured and it is the obligation of our insurance company to make any adjustment or to make any offer in this case. The insurance company has never denied coverage to us. They have been providing us a defense over the years. They have never indicated to us in any way that they were denying coverage or were trying to step out of this case. We have been depending on them for over a year now to take charge of this case, which they have, and to settle the case.

I was told last week for the first time by the representative of the insurance carrier that they had not yet arrived at any kind of a conclusion. He told me they had no offer to make on Friday, but he did not even at that late date tell me that they were going to deny coverage or not. . . .

THE COURT: Obviously this is part of the argument to be given on the order to show cause. In order to spare you writing very much about the obvious, Joseph Oat and Company is the defendant in this case and it is against Joseph and Company a judgment, if any, will be entered. Any rights of indemnity you may have from someone else is not before the Court and so I must disagree with the suggestion that Oat's position with regard to the payment of money is not a proper subject for consideration at a settlement conference . . .

I suppose this does raise a second question that I neglected to take up with respect to Oat and that is the aspect of the order that directed a repre-

Washington University Open Scholarship

sentative of the insurance carrier having authority to settle the case to be present and perhaps, Mr. Possi, you would care to address that inasmuch as it does not appear that anyone from the insurance company is present; but you have previously indicated that you had been engaged by the insurance company to defend the defendant, is that correct?

MR. POSSI: . . . We have been engaged to represent Joseph Oat. . . . As to the explanation why no one from National Union is here, I don't know . . . but I can tell you Mr. McMahon told me it is National Union's position since they are not a party to the suit, they are not subject to an order requiring them to be here.

THE COURT: Did you inform the National union [sic] of the order?

MR. POSSI: I informed Mr. McMahon. He informed me he talked to somebody from National Union.

THE COURT: The order to show cause will be extended to . . . National Union Fire Insurance Company of Pittsburgh.[40]

Six months later, Magistrate Groh sanctioned Oat and its insurer, National, for failing to comply with his order of December 18. He ordered them to pay RME, CSM, and Heileman expenses and costs, including attorneys' fees, incurred in connection with attending the December 19 settlement conference.

In his order imposing sanctions, Magistrate Groh concluded that he had ample authority under Rule 16 to require the presence of represented litigants at a settlement conference.[41] In addition, the magistrate refused to exempt National from the order, relying on *In re LaMarre*[42] for the proposition that a defendant's insurer may be subject to such orders because of its obligations to the insured.

Chief Judge Barbara Crabb declined to reconsider the order, agreeing that Rule 16 provided authority for a court to order a represented client to attend a settlement conference.[43]

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40. Transcript of Continued Pretrial Conference before the Honorable James Groh, Dec. 19, 1984, at 3-5, 10-12, G. Heileman Brewing Co. v. Joseph Oat Corp., 107 F.R.D. 275 (W.D. Wis. 1985).

41. *Heileman I*, 107 F.R.D. at 280-82.

42. 494 F.2d 753 (6th Cir. 1974).

43. G. Heileman Brewing Co. v. Joseph Oat Corp., 107 F.R.D. 275 (W.D. Wis. 1985). Oat and National had sought reconsideration of the magistrate's sanctioning order, pursuant to 28 U.S.C. § 636(b)(1)(A) (Supp. 1991), arguing that his action was clearly erroneous and contrary to law in that he had no authority under Rule 16 to order a represented party to be present for a settlement conference. *Id.* Judge Crabb found the motion untimely. Because Oat had received advance notice, it should have requested a district judge to modify or vacate the order. *Id.* at 277. For further discussions of the opinions of Magistrate Groh and Judge Crabb, see *infra* Section I.C.

https://openscholarship.wustl.edu/law_lawreview/vol69/iss4/4

Why did the lawyers for Oat, John Possi and John Fitzpatrick, have so much trouble understanding or complying with the magistrate's order? The explanation I proffer, in Section I.D., below, is that they pictured a settlement conference that differed markedly from the settlement conference that the magistrate and the chief judge had envisioned.[44] In Section I.E., I further argue that a similar difference in vision also separated the majority and dissenting judges on the Seventh Circuit. In order to set the backdrop for both those arguments, I will describe in the next section different ways of looking at what occurs in a settlement conference.

B. *Perspectives on Settlement Conferences*

A person's expectations about what will happen in a settlement conference depend on his or her assumptions about lawyer-client relations, negotiation, and the role of the judicial host. These assumptions are loosely related to two different perspectives about human relations that now enjoy great currency. One of these stresses independence and autonomy; it operates primarily through rational processes and relies heavily on rules. The other is grounded in relationships, emphasizing interdependence.[45] Although all people have both perspectives, one or the other tends to dominate in each of us.[46]

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44. Attorney John Possi disagrees:

> The explanation I offer is that there was no order to understand. The magistrate's settlement conference of December 14, 1984 started at 2:00 on Friday afternoon. It lasted until approximately 9:00 in the evening. When it ended there was no court reporter present. The magistrate did express his unhappiness at the position taken by Oat's insurance company to the effect that its insured was not negligent and no offer would be made. Perhaps because of this he expressed a desire that "someone" from Joseph Oat should actually be in attendance at the subsequent settlement.
>
> The following Monday. . .[n]one of us were quite sure what it was that the magistrate wanted and consequently, that led to my attempt to clarify what it was that the magistrate desired. While it certainly was appropriate for the magistrate not to talk to me directly my conversation with his clerk did not lead to any clarification. He wanted "someone" from Joseph Oat. . .
>
> The magistrate's desires were not reduced to a written order until December 18th. The written [sic] was not mailed until that day, however, and it was not received in our offices until after the December 19th settlement conference had been convened. . . . [T]here was simply no opportunity to appeal, clarify, or object to any order requiring attendance at the subsequent settlement conference.

Letter from John Possi to the author (February 1, 1991).

45. CAROL GILLIGAN, IN A DIFFERENT VOICE (1982).

46. *See id.* at 24-63.

Gilligan maintains that although both voices are present in all persons, the voice of interdependence ("caring" as she calls it) tends to be stronger in women, while the rights voice ("autonomy") tends to predominate in men. *Id.* at 2. Gilligan's conclusions have been controversial. *See, e.g.*, Owen Flanagan & Kathryn Jackson, *Justice, Care and Gender: The Kohlberg-Gilligan Debate Revis-*

Washington University Open Scholarship

This section uses similar dichotomies to describe different views on lawyer-client relations, negotiation, and the role of the judge in the settlement conference.[47]

1. Lawyer-Client Relationships: Traditional and Participatory

Scholars have identified two models of professional-client relationships. Douglas Rosenthal has called these "traditional" and "participatory."[48] The traditional model is based on the belief that both client and professional will be better off if the professional, exercising professional autonomy, makes most of the decisions. The participatory model assumes, conversely, that shared decisionmaking will produce more benefits.[49]

The traditional approach pictures a relatively passive client, seeking not to understand but rather to follow instructions. The picture makes sense, given the model's other assumptions: that professionals generally render effective service because they have high standards and have no conflicts of interest with their clients, and that professionals deal routinely with technical problems, the solutions to which are beyond the understanding of their clients.[50] In contrast, the participatory client is skeptical, actively tries to understand the situation, and helps to make

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ited, 97 ETHICS 622 (1987). For discussions relating to the implications of such views for legal education and lawyering, see Symposium, *Women in Legal Education—Pedagogy, Law, Theory and Practice*, 38 J. LEGAL EDUC. 1 (1988).

Conley and O'Barr have discerned a comparable dichotomy in the orientations of litigants in informal courts and have described a continuum between attitudes based upon "rules" and those based upon "relationships." JOHN W. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE (1990).

47. Although systems of categorization help us understand reality, they also distort it. I am mindful of Robert Benchly's pronouncement that "[t]here may be said to be two classes of people in the world: those who constantly divide the people of the world into two classes, and those who do not." Paul Dickson, *The Official Rules*, THE WASHINGTONIAN, Nov. 1978, at 152.

48. DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 13 (1974). Shaffer and Elkins recognize a comparable dichotomy. SHAFFER & ELKINS, *supra* note 4, at 46-69. So does Donald Schon, who distinguishes between what he calls "traditional" or "Model I" and "reflective" or "Model II" professional practice. DONALD A. SCHON, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION 21-76 (1983). Schon points out that while the professional may have certain technical competencies in problem solving (e.g., dealing with "convergent" problems, i.e., ones for which there is a rational solution), the professional often is less able than the client to do the task of "problem-setting"—determining what the client wishes to achieve.

49. In his study of personal injury cases in New York City, Rosenthal found that plaintiffs actively involved in the preparation of their cases tended to get larger settlements. Rosenthal, *supra* note 48, at 29-61.

50. *Id.* at 18-20.

https://openscholarship.wustl.edu/law_lawreview/vol69/iss4/4

decisions.[51] The participatory model assumes that professional service often is ineffective; that the problems presented frequently include open, unique choices that a layman can understand, not a "single best answer;"[52] that it is almost impossible for a professional to render disinterested service; and that standards of practice are neither clear nor regularly enforced.[53]

It is the client's responsibility, not the lawyer's, to make the important substantive decisions in a negotiation, including whether to make, accept, or reject a settlement proposal.[54] However, the decisionmaking process and the content of particular settlement proposals depend significantly on the character of the lawyer-client relationship. Two principal tasks dominate professional-client decisionmaking: defining and solving the problems.[55] In a participatory relationship, the client has an important role in both. In an extremely traditional relationship, the professional dominates both.

An overdrawn example illustrates the difference. Assume a supplier is sued for breach of contract for allegedly failing to perform its obligations fully. From the legalistic point of view of a stereotypical "traditional" lawyer, the problem is how best to defend a breach of contract lawsuit and avoid a judgment for damages. From the client's perspective, additional problems may include preserving the possibility of future sales to the plaintiff or others in the industry, problems that a "participatory" lawyer-client relationship would recognize more easily. In practice, most professional-client relations include elements of both models, although one or the other model tends to dominate.

The traditional model of lawyer-client relations resonates with the rule-oriented voice of autonomy[56] because it emphasizes the professional's autonomy from the client. The participatory model, on the other hand, is more congruent with the voice of interconnection in emphasizing their interdependence.

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51. *Id.*

52. *Id.*

53. *Id.*

54. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1980).

55. SCHON, *supra* note 48, at 18.

56. *See* GILLIGAN, *supra* note 45.

Washington University Open Scholarship

2. *Negotiation: Adversarial and Problem-Solving*

Commentators recognize a dichotomy between two different approaches to negotiation: adversarial and problem-solving or interest-based.[57] In fact, every thoughtful negotiator uses both approaches and feels the tension between them.[58] Still, I discuss them separately for the sake of clarity.

a. *Adversarial Negotiation*

The adversarial orientation usually assumes that there is a limited resource such as money, golf balls, or lima beans, and that the parties must decide whether and how to divide it. In such a situation, the parties' interests conflict; what one gains, the other must lose. An adversarial orientation, of course, fosters strategies designed to maximize the client's position with respect to the resource in question. The usual tactics are designed to help the negotiator uncover as much as possible about the other side's situation while misleading the other side as to his or her own situation.[59] Normally negotiations conducted with an adversarial orientation result in a "zero-sum" or "win-lose" outcome.

b. *Problem-Solving Negotiation*

In the problem-solving approach to negotiation, the parties seek to un-

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57. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754 (1984). Some commentators have divided negotiation in other ways. For example, Fisher and Ury see "hard," "soft," and "principled" negotiation. ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981). Gifford identifies three types of negotiation strategies: "cooperative," "competitive," and "integrative." DONALD G. GIFFORD, LEGAL NEGOTIATION (1989). Lowenthal distinguishes between "competition" and "collaboration." Gary T. Lowenthal, *A General Theory of Negotiation Process, Strategy and Behavior*, 31 U. KAN. L. REV. 69 (1982). Raiffa describes "distributive" and "integrative" bargaining. HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982). Lax and Sebenius distinguish between negotiating to "create value" and to "claim value." DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN (1986). *See generally* RISKIN & WESTBROOK, *supra* note 1, at 127-138 (1987).

58. LAX & SEBENIUS, *supra* note 57. *See infra* notes 65-68 and accompanying text.

59. Common adversarial strategies include:

1. A high initial demand;
2. limited disclosure of information regarding facts and one's own preferences;
3. few and small concessions;
4. threats and arguments; and
5. apparent commitment to positions during the negotiation process.

Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 48-49 (1985).

https://openscholarship.wustl.edu/law_lawreview/vol69/iss4/4

cover the interests underlying each party's position and to develop solutions that "create wealth" or exploit complementary interests.[60]

A position is what someone says he wants; e.g., "I demand $500." An interest is a need underlying the position. One may demand money, for instance, to satisfy needs for shelter, food, transportation, respect, or recognition. Participants who can recognize underlying needs often can develop options to satisfy these needs.

Imagine a seven-year-old boy, about to leave with his parents for dinner in an almost-elegant restaurant. He announces that he intends to take with him ten Teenage Mutant Ninja Turtle figures. His outraged father declares, "You can't take any." The two assert these positions repeatedly, each time raising their voices. This is classic, adversarial negotiation, and the conflict escalates. But then the mother intervenes (as a mediator), imploring the father to "listen to why he wants to bring the characters." In response to the father's question, the son replies that he wants the figures in order to play basketball. The father asks whether two players on each team would be adequate. When the child says yes, they have a deal. By learning the child's interest—avoiding boredom—the father could propose a solution that accommodated that interest as well as his own interest in having a relatively peaceful meal.

Because it seeks complementary interests, a problem-solving approach has the potential to change *some* dispute negotiations into planning for future relations or transactions. In one mediation, for instance, a dispute over a bank's obligation to reimburse the expenses of a computer services supplier turned into a joint venture to market the supplier's services to other financial institutions.

Clearly, the adversarial approach is grounded in a vision wholly congruent with the voice of autonomy, with a "rights" orientation.[61] It

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60. The most popular articulation of a problem-solving orientation is FISHER & URY, *supra* note 57. The authors set out four guidelines for what they call "principled negotiation:"

1. Separate the people from the problem.
2. Focus on interests, not positions.
3. Invent options for mutual gain.
4. Insist on objective criteria.

Id. at 15. *See also* Menkel-Meadow, *supra* note 57, at 794-829.

Professors Deborah Kolb and Gloria Coolidge have suggested a third approach to negotiation, one conducted "in a woman's voice." Deborah M. Kolb & Gloria G. Coolidge, *Her Place at the Table: A Consideration of Gender Issues in Negotiation*, *in* NEGOTIATION THEORY AND PRACTICE 261 (J. William Breslin & Jeffery Z. Rubin eds., 1991).

61. *See* Lloyd Burton et al., *Feminist Jurisprudence, Professional Ethics, and Gender-Related Differences in Attorney Negotiating Styles*, 1992 J. Disp. Resol. —.

Washington University Open Scholarship

tends to arise in traditional lawyer-client relationships because often lawyers operate using what I have called the "lawyer's standard philosophical map."[62] This orientation emphasizes rights, rules, and autonomy, often at the expense of interests and interconnections. Thus, the autonomy perspective on human relationships and the traditional perspective in lawyer-client relations tend to foster adversarial negotiation[63] for several reasons. First, the traditional model permits the professional's view of the problem and its solution to dominate. Second, the attorney often lacks the detailed and nuanced understanding of the client's situation necessary for problem-solving. Third, the strength of the traditional model rests partly on the lawyer's claim to expertise, which permits him to keep control and distance, to wear a kind of professional mask.[64] To the extent that the lawyer engages in problem-solving, he loses some of his claim to expertise.

The problem-solving approach to negotiation, on the other hand, is more congruent with the voice of interconnection in human relationships; both seek to deal with underlying interests rather than rules. Problem-solving negotiation more often arises in a participatory lawyer-client relationship because the client, who may know more about what he or she needs than does the lawyer, has a greater opportunity to contribute to the definition and solution of the problem.

Both approaches to negotiation, however, compete with one another in virtually every negotiation.[65] Adversarial negotiation usually is employed to divide even those pies enlarged through interest-based negotiation.[66] Techniques that foster one approach impede the other. Thus, if a negotiator representing a plaintiff in a medical malpractice claim hides one of her client's true interests (e.g., his concern about the hospital's supervision practices), she is less likely to secure a change in these practices as part of the solution. On the other hand, a negotiator who reveals this interest becomes vulnerable to a hospital negotiator who might insist

62. Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43-44 (1982).

63. *See* Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988); Carrie Menkel-Meadow, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, 1985 MO. J. DISP. RESOL. 25, 31-34.

64. SHAFFER & ELKINS, *supra* note 48, at 46-66. This is not to gainsay that sometimes the lawyer, because of an ability to be more objective, may see some aspects of the client's situation more clearly than the client does.

65. LAX & SEBENIUS, *supra* note 57.

66. *See* James J. White, *The Pros and Cons of "Getting to Yes,"* 34 J. LEGAL EDUC. 115, 116 (1984)(reviewing ROGER FISHER & WILLIAM URY, GETTING TO YES (1981)); *but see* Comment by Roger Fisher, 34 J. LEGAL EDUC. 120, 121-23 (1984).

https://openscholarship.wustl.edu/law_lawreview/vol69/iss4/4

that the plaintiff trade off a good portion of his monetary demands.[67]

Any good negotiator must address this tension. Skillful negotiators recognize that successful negotiation requires a mix of the adversarial and problem-solving approaches.[68] Similarly, in a successful lawyer-client relationship, elements of both professional autonomy and shared decision-making will develop. The problem, of course, is that sometimes lawyers who develop a strong adversarial focus in preparing for trial have trouble broadening their visions in the settlement discussion to include underlying interests.[69]

3. *The Role of the Judicial Host*

Two issues infuse most discussions of the role of the judicial host in the settlement conference. The first is the extent to which the judge should encourage the parties to explore opportunities for problem-solving negotiation when the case comes to court in a narrow adversarial posture. The second is the extent to which the judicial host should extend a *hand* to facilitate negotiations or raise a *fist* to threaten the parties with consequences for not settling. Of course, many good settlement judges undertake all of these activities in varying degrees.[70]

a. *Facilitating Adversarial or Problem-Solving Negotiation*

Mediation is facilitated negotiation, and, accordingly, a judicially hosted settlement conference is a form of mediation. Mediators, whether judicial or not, can facilitate negotiations based on adversarial or problem-solving principles, or both.[71] Most of the commentary on nonjudi-

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67. For an elaboration of this notion, see LAX & SEBENIUS, *supra* note 57, at 34-35.

68. RISKIN & WESTBROOK, *supra* note 1, at 175-76.

69. Jonathan M. Hyman, *Trial Advocacy and Methods of Negotiation: Can Good Trial Advocates be Wise Negotiators?*, 34 UCLA L. REV. 863 (1987).

70. *See* Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 348-359 (1986).

71. *See* Leonard L. Riskin, *The Lawyer's Standard Philosophical Map Revisited, in* RISKIN & WESTBROOK, *supra* note 1, at 206-07. Professor Robert A. Baruch Bush has identified three conceptions of the mediator's role: efficiency, protection of rights, and empowerment and recognition. Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 U. FLA. L. REV. 253 (1989). Although the parallels are not precise, the efficiency and protection of rights conceptions assume adversarial negotiations while the empowerment and recognition perspective encourages what I have called problem-solving negotiation. *See* Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL PROB. 1 (1989).

The distinction also is recognized in the recent report, SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION COMMITTEE ON LAW AND PUBLIC POLICY, MANDATED PARTICIPATION AND SET-

Washington University Open Scholarship

cial mediation touts mediation's potential for facilitating problem-solving negotiation.[72] Yet much of the commentary on judicial settlement conferences emphasizes adversarial goals, strategies, and techniques. This literature assumes that the trial process generates just results and therefore that the proper goal of a settlement process is to acheive a similar result.[73]

The basic responsibility of a judicial host in such a negotiation would be to keep the participants focused upon the principal issue, which often is who will pay how much to whom. A principal strategy might be to undermine a party's confidence in his position, so as to encourage compromise. Thus, the judicial host might predict that each party runs a high risk of suffering an undesirable judgment, or the host might ensure that each party understands the strengths and weaknesses of both sides of the case, and the costs of proceeding in litigation.[74]

Although an adversarial perspective dominates the world of litigation, including the conduct of most settlement conferences, judges increasingly

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TLEMENT COERCION: DISPUTE RESOLUTION AS IT RELATES TO THE COURTS 20-21 (1991) [hereinafter SPIDR Report].

72. Much of this literature goes even further, arguing that mediation can foster such goals as empowerment and recognition, and even can heal wounded relationships and improve communities. *See, e.g.*, Bush, *supra* note 71; Riskin, *supra* note 62.

73. *See, e.g.*, Hubert L. Will et al., *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203, 206-207 (1986); Schuck, *supra* note 70.

This ought to surprise no one. The adversarial perspective dominates litigation, and court-based dispute resolution tends to take on the characteristics of the process it replaces. Deborah M. Kolb, *How Existing Procedure Shape Alternatives: The Case of Grievance Mediation*, 1989 J. DISP. RESOL. 59, 68-69; J. Michael Keating, Jr. & Margaret L. Shaw, *"Compared to What?": Defining Terms in Court-Related ADR Programs*, 6 NEGOTIATION J. 217, 218-20 (1990).

Some commentators, expressing an extreme rights orientation akin to adversarialism, suggest that society should not encourage judges to facilitate settlements. *See, e.g.*, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

A number of other methods of dispute resolution—the mini-trial, summary jury trial, and court-annexed arbitration—focus on helping the parties predict what would happen in trial as a way to encourage a negotiated settlement. One of these, the mini-trial, is specifically intended to give the client a more active role in decisionmaking. It ensures the client's heavy exposure to the merits of each side's case, while also placing the client, rather than the lawyer, in the first-line negotiator's position, which turns the settlement question into a business decision. For descriptions of these processes, see DONOVAN LEISURE NEWTON & IRVINE ADR PRACTICE BOOK (J. Wilkinson ed., 1990); RISKIN & WESTBROOK, *supra* note 1; LINDA R. SINGER, SETTLING DISPUTES 15-31 (1990).

These processes also give the litigants a chance to lay out their cases, to have a "day in court." And, although the parties themselves typically are not required to attend such proceedings, they generally do so.

74. Such techniques encourage compromise and may make problem-solving approaches seem more appealing.

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hear the problem-solving voice. The judicial host can help the parties focus on their underlying interests[75] and try to broaden the dispute beyond the narrow legal and factual issues.[76]

b. Raising a Fist or Extending a Hand

The other dichotomy concerns the extent to which the judicial host either raises a fist to pressure the parties to settle or extends a hand to facilitate an educational process that will enable the parties to learn and do what they must in order to reach a settlement decision.

A number of techniques work primarily to pressure parties to settle.[77] Some of these were listed above as ways to promote adversarial negotiation, such as undermining a party's confidence in its own position, for instance, by predicting adverse consequences at trial or threatening to dismiss.[78] Others, such as setting an early and firm trial date, could help induce either adversarial or problem-solving negotiation. Pushing the parties to accept a particular settlement is another technique. In some cases, a judge might require a client to attend a settlement conference in order to impose economic or time pressure to settle.[79]

Techniques available to help parties learn what they need to know to settle are more varied.[80] They include the many methods of facilitating

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75. WAYNE D. BRAZIL, EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES 51, 501-03 (1988).

76. *Id.* at 501-03. *See also* Menkel-Meadow, *supra* note 57.

77. Professor E. Donald Elliott seems completely dominated by an adversarial vision when he writes, from a law and economics perspective: "The essential function of managerial judging is to increase the price of procedure. One can in fact define managerial judging as the selective imposition by judges of costs on lawyers for the purpose of rationing the use of procedures available under the Federal Rules of Civil Procedure." E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 312 (1986). Professor David Shapiro conceptualizes the issue *Heileman* raises as relating "to the authority of judges to nudge, or shove, the parties toward settlement." David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1989 (1989).

78. Professor James Alfini has identified three styles of mediation in civil cases in Florida. Parallels are not precise, but the "trashers" and "bashers" seem to be raising their fists and promoting adversarial negotiation, while the "hashers" are extending their hands and may be open to problem-solving. James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation?"*, 19 FLA. ST. L. REV. 47 (1991). For a catalogue of settlement techniques, see James A. Wall, Jr & Dale E. Rude, *Judicial Mediation: Techniques, Strategies and Situational Effects*, 41 J. SOC. ISSUES 47, 53-5, 58 (1985).

79. In informal conversations, judges, lawyers, and scholars often maintain that this is frequently the purpose behind judicial orders commanding a litigant to attend personally.

80. Kenneth Kressel & Dean G. Pruitt, *Themes in the Mediation of Social Conflict*, 41 J. SOC. ISSUES 179 (1985), would call these "contextual" interventions and distinguish them from "substan-

Washington University Open Scholarship

problem-solving negotiation, such as searching for underlying interests and developing options that meet such interests or exploit complementary needs.[81] They also could include allowing the clients to be present to ensure that they understand the strengths and weaknesses of both sides of the case.

The essence of "extending a hand" is expressed in the term "judicial host," used by Magistrate Wayne Brazil to refer to the federal judge or magistrate presiding at a settlement conference.[82] The host analogy suggests an obligation to make the parties comfortable, to help them define and settle their dispute.

The host pays attention to the circumstances of each case and helps the parties overcome barriers to settlement. Often, this is best done by helping the litigants consider alternative methods of dispute resolution.[83] Thus, if the parties cannot settle because of different views of how a jury would decide the case, the judge could make his own prediction or could suggest a summary jury trial (in which a jury renders a non-binding verdict).[84] If a welter of difficult factual and legal questions blocks settlement, the judge could make sure they understand the potential value of a minitrial. If they simply have trouble negotiating and the settlement judge lacks the time or skills required to help them, he could suggest mediation. If a genuine disagreement about the applicable law stymies their negotiations, the judge could suggest summary judgment motions or could make his own prediction. If poor or shallow personal relations are the stumbling block, the host could act as the go-between or could help them improve their relationship.[85]

Frank Scardilli, Senior Staff Counsel for the U.S. Court of Appeals for

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tive" interventions, which are intended to "narrow the gap and precipitate a settlement," and from "reflexive" interventions, which are undertaken to impress the parties with the mediator's expertise. *Id.* at 192.

For a discussion of the "contingencies" that seem to produce certain mediator strategies, see Rodney G. Lim & Peter J.D. Carnevale, *Contingencies in the Mediation of Disputes*, 58 J. PERSONALITY AND SOCIAL PSYCHOL. 259 (1990).

81. *See supra* text accompanying note 59.

82. BRAZIL, *supra* note 75.

83. FED. R. CIV. P. 16(c)(7) authorizes such discussions.

84. *See* Lambros, *supra* note 24, at 373.

85. Judge Robert Merhige must have had this in mind when he held a cocktail and dinner party in his home for the lawyers and clients in a difficult-to-settle matter, a party at which he prohibited them from discussing the case. Will, *supra* note 73, at 212-13.

For discussions of the considerations in choosing methods of dispute resolution, see STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION 545-48 (1985); RISKIN & WESTBROOK, *supra* note 1, at 451-56.

https://openscholarship.wustl.edu/law_lawreview/vol69/iss4/4

the Second Circuit, tells of a case he mediated between two brothers. The legal issue involved partnership law. The case settled and the brothers renewed an old friendship, but only after Scardilli asked them two personal questions: "What was your relationship as children?" and "What would your parents [who were deceased] think if they saw you here in the Court of Appeals?" In asking these questions, Scardilli broadened the dispute. Thus he helped the brothers deal with a major barrier to settlement—the deterioration in their personal relationship.[86]

4. Relations Among the Perspectives

As I have indicated, certain perspectives in one sphere seem congruent with certain perspectives in the other spheres. Thus, there is an apparent logical consistency, or a set of shared assumptions, among the perspectives I call "Model I" on the chart below.[87] Such assumptions include the autonomy perspective on human relations, the traditional perspective on lawyer-client relations, the adversarial perspectives on negotiations and on the role of the judicial host in the settlement conference, and the idea that such a host should raise a fist to promote settlement.[88] Much writing assumes that these perspectives define the world of judicial settlement conferences.[89] Similarly, the remaining perspectives, which I have grouped into "Model II" on the chart, also cluster together naturally. These include the interconnection perspective in human relations, the participatory perspective in lawyer-client relations, the problem-solving perspective in negotiation and in judicial settlement conferences, and the idea that the judicial host should extend a hand, rather than raise a fist, to facilitate settlement.[90] Put simply, the Model I visions ordinarily assume conflicting participant interests, while the Model II visions assume that seeking out complementary interests might prove valuable.

86. Telephone Interview with Frank Scardilli (Jan. 2, 1991).

87. These numbers derive from the Model I and Model II notions developed by Professor Donald Schon. SCHON, *supra* note 48, at 21-76.

88. *See supra* notes 56, 61-64 and accompanying text.

89. *See supra* note 73 and accompanying text.

90. *See supra* notes 64, 80-83 and accompanying text.

Sphere	*Model I*	*Model II*
Human Relations	Autonomy (Rights)	Interconnection
Lawyer-Client Relations	Traditional	Participatory
Negotiation	Adversarial	Problem-Solving
Judicial Settlement	Adversarial (Fist)	Problem-Solving (Hand)

In practice, the perspectives I have grouped into Models are not always found together. Thus, a traditional lawyer-client relationship, for instance, can produce problem-solving negotiation, although it is less likely to do so than is a participatory relationship. In each of these spheres of activity, both perspectives exert competing tugs on the participants. In any lawyer-client relationship a tension develops between the need for the lawyer to dominate some aspects of the relationship and the need for lawyer and client to work collaboratively. A good negotiator must use both adversarial and problem-solving strategies. A judge who attempts to facilitate settlements should allow and encourage both types of settlement strategies, and should extend his hand at least as often as he raises his fist.

Often, however, people lean toward similar perspectives in each sphere of activity. Many people tend toward one or the other model in the same sense that they are likely to choose all lightweight, casual clothes for an August visit to a Caribbean resort. A traveller who hopes for an invitation to a formal dinner party might pack some other clothes. Thus, one's expectations about the events of the vacation govern how one packs. In the same sense, a judge or lawyer who normally envisions a traditional lawyer-client relationship might tend to assume that all negotiations will be adversarial and involve only lawyers.[91] Those who can see other pos-

91. An important caveat is in order: people only *tend* toward consistency in their views. All people have both perspectives, and may decide which is most appropriate in a given situation. Thus, a lawyer or judge who tends toward adversarial approaches may decide that problem-solving is best in a particular case. And a lawyer may tend toward an ethic of caring in his personal morality yet believe that in his role as lawyer he must be adversarial.

Rand Jack and Dana Crowley Jack conducted extensive interviews with 18 female and 18 male lawyers in western Washington state. In their book, RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS (1989), they examine the tension lawyers face in reconciling their personal morality, which—especially for women—is often based on caring, with their professional morality, which some believe must be grounded on rights. Their discussion addresses neither these issues nor the context of negotiations, but rather focuses on situations in which the client's interests conflict strongly with important societal interests. *Id.*

sibilities will be more open. At any rate, a person's expectations about what will happen in a settlement conference depend on his or her assumptions about lawyer-client relationships, about negotiation, and about the role of the judicial host.

C. *The District Court Revisited*

The forgoing helps us begin to understand the difficulty Oat's lawyers had in understanding the magistrate's order. They pictured only one desirable outcome of the settlement conference: National would make a substantial money offer that RME would accept. They envisioned adversarial negotiation and saw no role in this negotiation for the Oat Corporation. Had they seen a possibility of problem-solving negotiation,[92] they might have appreciated the potential value of the participation of an additional corporate representative armed with full settlement authority.[93] Since no insurance company representative would attend the second conference, the Oat lawyers envisioned no feasible, desirable outcome. Fitzpatrick attended only to convey Oat's position, and apparently thought his attendance constituted compliance with the order. In fact, he did have all the authority that the corporation made available. The decision not to send a corporate principal, then, could have been part of a strategy to pressure the insurance carrier to make an offer.[94]

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92. Based on my telephone interviews with John Fitzpatrick (April 19, 1989) and John Possi (April 19, 1989), I believe that the parties at some point explored the possibility that Oat would continue to provide some services to Heileman in connection with the waste water treatment system. Apparently because others employed by Heileman corrected the deficiencies in the system, the parties did not see a future relationship as desirable.

93. *See infra* notes 184-86 and accompanying text.

94. If the settlement conference had proceeded in a more routine fashion, i.e., if McMahon had made a settlement offer that was acceptable to RME, Possi and Fitzpatrick might have felt their interpretation of the magistrate's order—that Fitzpatrick's attendance would constitute compliance—was validated, and, I suspect, the magistrate also would have been satisfied.

As to why National sent no representative to the second settlement conference, my speculation must be even more rank. National may have believed it was not subject to the order since it was not a party to the suit. That position had been rejected in another circuit. *In re* LaMarre, 494 F.2d 753 (6th Cir. 1974).

National apparently thought this case was distinguishable from *La Marre* in part because Wisconsin, unlike Michigan—where *La Marre* arose—allowed direct action against a party's insurer, and none of the litigants made National a direct party. Letter from John Possi to the author (Feb. 1, 1991). A subsequent decision of the Eleventh Circuit also would support National's belief that it was not subject to the order, but that decision would have required it to follow appropriate procedures to challenge the order. *In re* Novak, 932 F.2d 1397 (11th Cir. 1991), discussed *supra* note 25.

A lawyer familiar with the case suggested to me that National's decision against sending a representative to the conference could have been a strategic move in the adversarial negotiation, intended

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In sum, it seems likely that the lawyers and executives for Oat pictured a settlement conference featuring adversarial negotiation among lawyers, without direct client involvement. They also might have assumed that the magistrate intended to apply pressure on them to settle, or that he had already applied pressure by ordering a corporate representative to attend. In other words, they embraced Model I perspectives.

In contrast, Magistrate Groh and Chief Judge Crabb seemed to assume that the settlement conference would allow for both Model I and Model II features. Although the magistrate concluded that Rule 16 gave him ample authority to compel the presence of "the parties themselves,"[95] he did not seem to envision any coercion toward settlement once the parties were present: ". . . these settlement conferences were not attempts to bludgeon unwilling litigants into submission, but rather a response to the request of the majority of the litigants who earnestly sought compromise."[96] And, plainly, he saw opportunities for both adversarial and problem-solving negotiation:

> The authority to convene a settlement conference under Rule 16 is a hollow authority indeed if the power is lacking to require the presence at the conference of the parties themselves. Only in that way may proposals and counter-proposals be advanced and responded to without delay. The presence of the parties, who are, of course, the most familiar with their claims and the nature of their businesses, also opens opportunities to explore the existence of other common grounds for agreement which may involve matters outside the litigation.[97]

Thus, it seems clear that Magistrate Groh was open to either adversarial or problem-solving negotiation, or both.[98]

Chief Judge Crabb believed this when she declined to reconsider the order.[99] In addition to finding that the motion for reconsideration came

to reduce the expectations of plaintiff Heileman. The move also might have helped National save time or avoid the possibility of feeling pressure to make a payment. To the extent that this was a deliberate strategy, the company also must have assumed that the settlement conference would have facilitated an adversarial negotiation over how much money it would pay, and when. National's attorney believes that the "magistrate, by temperment and personality, was not so much a facilitator of settlement, but, in my view, acted with a heavy hand throughout the litigation process." Letter from John Possi to the author (Feb. 1, 1991).

95. *Heileman I*, 107 F.R.D at 281.

96. *Id.* at 280.

97. *Id.* at 281.

98. But see quotation from the Letter from John Possi to the author, *supra* note 94.

99. *Id.* at 277.

too late,[100] she concluded that Rule 16 provides authority for a court to require the presence of parties at a settlement conference "in appropriate situations," and she found that this was an appropriate situation.[101] Judge Crabb plainly shared the magistrate's understanding that representatives with full settlement authority could engage in problem-solving as well as adversarial negotiation; she suggested that they could have "explore[d] the existence of other common grounds for agreement which may involve matters outside the litigation" and that they might have become "aware of all aspects of the case and the anticipated costs of its prosecution and defense."[102] Thus, both Magistrate Groh and Judge Crabb seemed to envision the magistrate extending his hand to create an open, facilitative, noncoercive process that allowed for both problem-solving negotiation and repeated offers and counter offers in an adversarial negotiation. They anticipated that clients might become more willing and able to settle their case if they were exposed to the other side's views and to the costs of litigation.

This perception, as I shall argue below, also formed the basis for the majority decision in the Court of Appeals.

D. *In The Court of Appeals*

Oat appealed, but National did not. In June, 1988, a three-judge panel of the Seventh Circuit reversed Judge Crabb's order, holding 2-1 that a federal district court was not authorized to order a represented party to send to a settlement conference, along with its attorney, a representative having full settlement authority. The sanctions, therefore, could not stand.[103] Shortly thereafter, however, the court ordered a rehearing *en banc*.

This appeal obviously pained the Seventh Circuit. On rehearing, a six-judge majority disagreed with the panel and affirmed the district court; the five dissenters each wrote a separate opinion. I explain the split by arguing that the majority and dissenting judges entertained sharply different conceptions about the nature of settlement conferences, including

100. *See supra* note 44.

101. *Heileman I*, 107 F.R.D. at 277.

Judge Crabb also argued that recent amendments to the Federal Rules gave courts the ability to manage their docket, and she considered it "a misuse of [expensive public] resources for any party to refuse even to meet personally with the opposing party or its counsel to attempt to resolve their disputes prior to trial." *Id.*

102. *Id.* at 277.

103. G. Heileman Brewing Co. v. Joseph Oat Corp., 848 F.2d 1415 (7th Cir. 1988).

Washington University Open Scholarship

the types of lawyer-client relations, negotiation approaches, and judicial interventions that characterize such conferences.

1. The Majority

In the majority opinion, Judge Kanne ruled that a federal court has authority to order represented litigants to appear at a pretrial settlement conference, that ordering Oat to send a representative with full settlement authority was not an abuse of the magistrate's discretion, and that the district court did not abuse its discretion in ordering sanctions.[104]

Joseph Oat Corporation had argued that the power Rule 16(a)(5)[105] gives the court to order attorneys and *unrepresented* parties to appear at a settlement conference impliedly negates the court's authority to order represented parties to attend such conferences. Judge Kanne concluded, however, that this language did not preclude the order because the rules themselves do not limit the "inherent" authority of a federal court unless they expressly impose such limits. Rule 16 does not so limit a court's authority. Indeed, the very purpose of Rule 16 was to permit courts to manage their dockets actively.[106]

Oat Corporation argued in the alternative that the court abused its authority in light of the expense and burden to Joseph Oat, noting that the business was "a going concern" and the "principal" would have had to travel from Camden, New Jersey to Madison, Wisconsin. Judge Kanne agreed "that circumstances could arise in which requiring a corporate representative (or any litigant) to appear at a pretrial settlement conference would be so onerous, so clearly unproductive, or so expensive in relation to the size, value, and complexity of the case that it might be an abuse of discretion."[107] However, he held that the order in question was not an abuse of discretion given the great size and complexity of the case.[108]

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

105. FED. R. CIV. P. 16(a)(5). For the text of Rule 16(2)(5), see *supra* note 22.

106. *Heileman III*, 871 F.2d at 650-63.

107. *Id.* at 654. The majority also concluded that the Joseph Oat Corporation was obligated to comply with the order because it had failed to object to the order before the second conference. *Id.* Finally, the court held that while the initial verbal order may have been "somewhat ambigous" the subsequent written order, and the magistrate's subsequent remarks, eliminated any such ambiguity. *Id.* at 655-56.

108. "This litigation involved a claim for $4 million—a claim which turned upon the resolution of complex factual and legal issues. The litigants expected the trial to last from one to three months and all parties stood to incur substantial legal fees and trial expenses. This trial also would have preempted a large segment of judicial time—not an insignificant factor." *Id.* at 654.

https://openscholarship.wustl.edu/law_lawreview/vol69/iss4/4

Judge Kanne plainly shared the expectation of the Magistrate and Judge Crabb that there would be no coercion in the settlement conference. Recognizing the distinction between a requirement to attend a conference and a requirement to settle, he explained:

> "[A]uthority to settle," when used in the context of this case, means that the "corporate representative" attending the pretrial conference was required to hold a position within the corporate entity allowing him to speak definitively and to commit the corporation to a particular position in the litigation. We do not view "authority to settle" as a requirement that corporate representatives must come to court willing to settle on someone else's terms, but only *that they come to court in order to consider the possibility of settlement*.
>
> * * *
>
> If this case represented a situation where Oat Corporation had sent a corporate representative and was sanctioned because that person refused to make an offer to pay money—that is, refused to submit to settlement coercion—we would be faced with a decidedly different issue—a situation we would not countenance.[109]

The assumption that there would be no coercion *in*, though there may have been coercion *into*,[110] the settlement conference, informs the majority opinion. The opinion, accordingly, allows for, but does not explicitly invoke, the vision of a settlement conference that Magistrate Groh and Judge Crabb shared.[111] Thus, although the magistrate's order commanded the attendance of a corporate representative with full settlement authority, neither the magistrate nor the district judge nor the majority of the Seventh Circuit thought the order inappropriately coercive because they did not envision that further pressure toward settlement would be used. The dissenters saw a different picture.

2. *The Dissents*

The dissenters, as I illustrate below, partook of a vision drenched in adversarialism and drawn entirely from Model I perspectives. Not all the judges saw adversarialism in all aspects of the settlement conference; some emphasized the adversarial qualities of the judicial host, others saw

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109. *Id.* at 653 (emphasis added).

110. The distinction between coercion *into* and coercion *in* a settlement conference also has been recognized as crucial in a recent report of the Society of Professionals in Dispute Resolution. SPIDR Report, *supra* note 71, at 5-6.

111. *See supra* notes 95-101 and accompanying text.

Washington University Open Scholarship

such qualities in the lawyers or their clients. The composite picture drawn by the dissenters, however, includes: 1) a judge who takes sides during the settlement conference, coercing parties into exchanging offers; 2) adversarial (and *not* problem-solving) negotiation; 3) "traditional" lawyer-client relationships, in which the lawyers, impelled as much by fear of malpractice suits as by their affirmative duties to client and court, competently convey all information relevant to the client's settlement decision; and 4) clients who need their lawyers to shield them from speaking to the judge or opposition, for fear that they might make a damaging statement, and whose innocent (and salutory) belief in the impartiality of judges would be shattered by exposure to the judge's conduct in a settlement conference.

So, while the magistrate, the chief district judge and, probably, the Seventh Circuit majority thought the settlement conference might include aspects of both Model I and Model II features, the dissenters envisioned only Model I.

Although all the dissenting opinions held that the magistrate lacked authority to issue the order in question, two different types of analyses emerged. Judges Manion, Coffey, and Ripple concluded that neither Rule 16 nor their inherent authority empowered district courts to order a represented client to attend a settlement conference. The other two opinions, those of Judges Posner and Easterbrook, took no position on the question whether, in an appropriate case, a district court could require the presence of a represented party at a settlement conference. They maintained, however, that the magistrate's order in this case constituted an abuse of discretion.

a. The Coffey, Ripple, and Manion Dissents

The Coffey, Ripple, and Manion dissents accepted the argument that the majority rejected: Rule 16(a)(5)'s explicit grant of authority to direct attorneys and *un*represented parties to attend a settlement conference did not give a court the authority to require the attendance of represented parties.

Judge Coffey argued that courts may not exercise their inherent authority in a manner inconsistent with the rule and that the federal rules, the result of a careful process involving both Congress and the courts, are designed to consider needs both for efficiency and for protection of indi-

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vidual rights.[112] Judge Ripple followed the same analysis and stressed the danger of the majority's decision on "the relationship between the judiciary and Congress in establishing practice and procedure for the federal courts."[113] Both Judge Manion[114] and Judge Coffey[115] stressed Rule 16's consistent differentiation of represented parties and attorneys.

I agree with Judge Posner that the conclusions of Coffey, Ripple, and Manion were as supportable "on narrowly 'legal' considerations" as the majority's conclusion.[116] However, I wish to explore the dissenters' underlying assumptions.

Each of these judges worried that the majority's conclusion would impair traditional, hierarchical (Model I) arrangements in settlement conferences. Judge Coffey seemed to think that settlement discussions should not even be an important part of the pretrial conference which, he stated, was intended solely "to discuss the upcoming trial, to frame and define the issues, and through custom to explore with the consent of the litigant's attorneys, in very limited situations, the discussion of settlement possibilities."[117] He argued an attorney need not produce his client because the client might make a damaging admission[118] or because the client who appears could conclude that the process is unfair.

> I believe that we are all aware of the fact that the appearance of fairness, impartiality and justice is all imperative, and based upon logic I fail to understand how a litigant sitting at a *command appearance before a judge* who injects himself into an adversarial role for either of the parties' positions during settlement negotiations can feel that he or she (the litigant) will have a fair trial before the judge if he or she fails to agree with the judge's reason-

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112. *Heileman III*, 871 F.2d at 658 (Coffey, J., dissenting, joined by Easterbrook, Ripple, and Manion, JJ.).

113. *Id.* at 665 (Ripple, J., dissenting, joined by Coffey, J.).

114. *Id.* at 666 (Manion, J., dissenting, joined by Coffey, Easterbrook, and Ripple, JJ.).

115. Judge Coffey wrote:

> Rule 16(b), concerning scheduling, requires a judge to "consult with the attorneys for the parties and any unrepresented parties." Rule 16(c), regarding subjects to be discussed at a pretrial conference, states that "[a]t least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed." Similarly, Rule 16(d), concerning final pretrial conferences, provides that "[t]he conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties."

Id. at 660 (Coffey, J., dissenting).

116. *Id.* at 657. (Posner, J., dissenting). The Civil Justice Improvement Act of 1990 seems to have vindicated the majority's conclusion. *See supra* notes 16-18 and accompanying text.

117. *Heileman III*, 871 F.2d at 660 (Coffey, J., dissenting).

118. *Id.* at 662.

Washington University Open Scholarship

> ing or direction regarding a recommended settlement. . . . Since litigants are neither trained in the law nor have the basic understanding of the nuances of legal proceedings that we as lawyers have gained through years of education, professional training and experience, they could well be confused and dismayed with judicial participation in settlement negotiations.[119]

Similarly, Judge Manion emphasized the importance of the role of counsel and a litigant's "right" to be represented by an attorney.[120] Although he acknowledged that some attorneys may not always convey all relevant information to the client, he stressed the pressures on the attorney to do so.

> Rule 16's distinction between represented and unrepresented parties is consistent with a litigant's statutory right to representation by an attorney. It is also consistent with the attorney's traditional role in litigation. Litigants hire attorneys to take advantage of the attorney's training and skill and, as Judge Posner notes, "to economize on their own investment of time in resolving disputes." . . . Part of an attorney's expertise includes evaluating cases, advising litigants whether or not to settle, and conducting negotiations. I realize that attorneys may sometimes convey inadequate information to their clients regarding settlement. But an attorney has a strong self interest in realistically conveying to the client relevant information necessary for the client to make an informed settlement decision, and in accurately conveying the client's settlement position to the court and opposing litigants. The attorney also has an ethical duty to convey that information. The threat of malpractice suits and disciplinary proceedings should be sufficient to make any attorney think twice before trying to mislead his client or the court. Attorneys play an important role in our adversary system, and we should not denigrate that role by presuming that attorneys will be incompetent to perform one of the most important functions for which their clients hire them. Nor should we presume that Rule 16's drafters meant to encroach on a litigant's right to conduct his case through counsel.[121]

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119. *Id.* (emphasis in original). Here Judge Coffey assumed that the trial judge would conduct the pretrial conference. In *Heileman*, the magistrate who conducted the pretrial conferences would not have tried the case. Many federal district courts now use such an arrangement to avoid some of the problems Judge Coffey suggests, as well as others. For a discussion of the advantages and disadvantages of employing the same judge to mediate and try a case, *see* BRAZIL, *supra* note 75, at 104-08. Professor Judith Resnik suggests prohibiting the practice. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 435 (1982).

Judge Coffey also assumed that the judge will be, or appear to be, authoritarian. What else could explain his suggestion that the client might think he would not get a fair trial "if he or she fails to agree with the judge's reasoning or direction"? *Heileman III*, 871 F.2d at 662.

120. *Heileman III*, 871 F.2d at 667 (Manion, J., dissenting).

121. *Id.* at 667.

https://openscholarship.wustl.edu/law_lawreview/vol69/iss4/4

Finally, Judge Manion's unwillingness or inability to recognize the potentially enormous difference between requiring attendance and requiring negotiation[122] is explicable only if based on assumptions of adversarial negotiation and coercive practices by the magistrate. These same assumptions probably also inspired Judge Ripple's concern that the majority opinion will be "used to justify far more questionable 'innovations' than the strong-arm settlement methodology of the magistrate at issue in this opinion."[123]

b. The Posner and Easterbrook Dissents

Judges Posner and Easterbrook took no position on whether a district court had authority to order a represented client to attend a settlement conference. Instead they maintained that even if such authority existed, it did not authorize the order in question. Although they recognized the possibility of a more open settlement process, they believed that the conference itself would have been coercive, i.e., that Magistrate Groh *must* have intended to require adversarial bargaining through the exchange of monetary offers. Thus, Judge Posner thought that the order, which was

> different from a demand that a party who has not closed the door to settlement send an executive to discuss possible terms, would be defensible only if litigants had a duty to bargain in good faith over settlement before resort-

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122.

> The majority . . . [draws] a distinction between being required to attend a settlement conference and being required to negotiate. This distinction is puzzling. I suppose that if a represented party is required to come to court to state his position—even if that position is simply, "I refuse to settle. See you at trial."—that would not be requiring the represented party to "negotiate." But if that is all the majority is requiring, the majority has recognized nothing more than a district court's inherent power to waste litigant's time in doing what their attorneys could have done (and were hired to do). . . .
>
> But requiring that a party consider the possibility of settlement and that the party have authority to settle if another party proposes acceptable terms presupposes that besides stating his own position, the party must sit and listen to other parties' (and, possibly, the court's) proposals. . . . It appears that the court is saying that a district court may order a represented party to appear in court both to talk and listen about settlement—in other words to actually discuss settlement. I cannot see any meaningful distinction between this kind of activity and "negotiation;" after all, negotiation in large measure simply involves discussion. If a distinction does exist, it is so blurry as to be almost invisible, and certainly difficult, if not impossible, to enforce. The distinction is especially elusive in this case because . . . the magistrate's order that Oat send a representative with "authority to settle" could only mean that Oat's representative had to have the *ability* to settle *by paying money*—even if, as the majority claims, "authority to settle" did not mean that the representative had to be willing to use that ability. What is the point of insisting on such authority if not to require negotiation?

Id at 669 (emphasis in original).

123. *Id*. at 666 (Ripple, J., dissenting).

Washington University Open Scholarship

> ing to trial, and neither Rule 16 or any other rule, statute, or doctrine imposes such a duty on federal litigants . . . [citing cases] . . . There is no federal judicial power to coerce settlement. Oat had made clear that it was not prepared to settle the case on any terms that required it to pay money. That was its prerogative, which once exercised made the magistrate's continued insistence on Oat's sending an executive to Madison arbitrary, unreasonable, wilful, and indeed petulant.[124]

Both Posner and Easterbrook also perceived an enormous practical problem in the magistrate's order. As Judge Posner put it: ". . . since no one officer of Oat may have had authority to settle the case, compliance with the demand might have required Oat to ship its entire board of directors to Madison."[125] Judge Easterbrook noted that corporations frequently use lawyers as negotiators. Accordingly, he argued, it is inappropriate to require a corporation to send an employee, rather than another agent—here a lawyer who served the corporation only part-time.

> Most corporations reserve the power to agree to senior managers or to the board of directors, especially with claims of this size ($4 million). It was understandable here that Oat wanted its managers to conduct its business.
>
> Fitzpatrick was deemed inadequate only because he was under instructions not to pay money. . . . On learning that Fitzpatrick did not command Oat's treasury, the magistrate ejected him from the conference and never listened to what he had to say on Oat's behalf, never learned whether Fitzpatrick might be receptive to others' proposals. (We know that Oat ultimately did settle the case, after it took part and 'prevailed' in a summary jury trial—participation and payment each demonstrating Oat's willingness to consider settlement). The magistrate's approach implies that if the chairman and CEO of Oat had arrived with instructions from the board to settle the case without paying cash, and to negotiate and bring back for the board's consideration any financial proposals, Oat still would have been in contempt . . .
>
> Fitzpatrick came in with power to discuss and recommend; he could settle the case on terms other than cash; he lacked only power to sign a check. The magistrate's order, therefore, must have required either (a) changing

124. *Id.* at 658 (Posner, J., dissenting). Judge Easterbrook betrayed the same underlying assumption. *Id.* at 665 (Easterbrook, J., dissenting).

Posner apparently thought Oat's indication, through its representative, that it was not prepared to make any offer of payment clearly demonstrated the futility of the settlement conference. He seemed unaware that litigants frequently state positions more firmly than they actually hold them. Posner also seemed oblivious to the possibility that the parties might learn something at the settlement conference that would cause them to change their positions.

125. *Id.* at 658.

https://openscholarship.wustl.edu/law_lawreview/vol69/iss4/4

the allocation of responsibility within the corporation, or (b) sending a quorum of Oat's board.[126]

My mission in the foregoing discussion was not to explain *why* the majority and dissenting judges had such different expectations about what would happen in the settlement conference. Rather I merely intended to show the correspondence between the judges' assumptions about the characteristics of the settlement conference and their conclusions about the case. I cannot help noting, however, that all of the judges who had previously served as federal district judges voted with the majority.[127]

II. THE REPRESENTED CLIENT IN THE SETTLEMENT CONFERENCE

All the opinions in *Heileman* agree that it is inappropriate for a federal judge to coerce a litigant to settle. Accordingly, they also agree that a federal judge should not order a represented client to attend a settlement conference where such an order would tend to force the litigant to settle in order to avoid the burdens of attendance. Yet the opinions say little about when and for what purposes a judge *should* order such a client or representative to attend a settlement conference. Moreover, they skip lightly and inconsistently across the most perplexing questions the case raises: what position, if any, must the representative of a corporation hold? And what constitutes "full authority to settle the case?"

This Part addresses these issues. Section A describes the advantages and disadvantages of client participation in settlement conferences. Sec-

126. *Id.* at 664 (Easterbrook, J., dissenting). Easterbrook also highlighted a related problem: the limitations on settlement authority of the federal government. *Id.* at 665.

Carrie Menkel-Meadow has suggested that the Easterbrook and Posner dissents were grounded in their interest in promoting efficiency for both courts and litigants. Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR"* 19 FLA. ST. U. L. REV. 1, 22-23 (1991).

Easterbrook's conclusion that the magistrate "ejected" Fitzpatrick is inconsistent with attorney John Possi's recollection. Possi explained that after the initial meeting of the representatives, the magistrate met privately with representatives of each group. Rather than "ejecting" Fitzpatrick and Possi, the magistrate simply did not meet with them again. Telephone interview with John Possi (Apr. 19, 1989).

127. Judges Kanne, Bauer, Wood, and Flaum. 2 ALMANAC OF THE FEDERAL JUDICIARY (1989). I am indebted to Richard Florsheim, Esq., of Foley and Lardner, Milwaukee, for mentioning this to me and suggesting that an underlying motive might have been to support the trial judge. Telephone Interview with Richard Florsheim (Apr. 18, 1989). Only one of the dissenters—Judge Coffey—had served as a judge before his appointment to the Seventh Circuit. He served on the Milwaukee County Civil, Municipal, and Circuit Courts and the Wisconsin Supreme Court. 2 ALMANAC OF THE FEDERAL JUDICIARY (7th Circuit) 18 (1989).

Washington University Open Scholarship

tion B considers when and why a court should compel a represented client or a representative of an organizational litigant armed with full settlement authority to attend a settlement conference. Finally, Section C considers the nature of the "full settlement authority" that such a special representative should have.

A. Advantages and Disadvantages of Client Attendance in Settlement Conferences

A client's attendance at a settlement conference can take numerous forms. The following continuum describes one aspect of such involvement:

- -Client is available by telephone.
- -Client waits outside the conference room.
- -Client waits outside the conference room part of the time and sits in on the conference part of the time.[128]
- -Client sits in on the conference but does not speak, except perhaps to his lawyer.
- -Client sits in on the conference and speaks in response to questions from his lawyer or in response to questions from the other lawyer or judge.
- -Client sits in on the conference and speaks and asks questions relatively freely.
- -Client takes lead in speaking; consults lawyer as needed.
- -Client and lawyer meet privately with judge.[129]
- -Client meets with judge without lawyers.[130]
- -Client meets privately with other client, without lawyers.[131]

Add to these variables differences in attorney-client, client-client, and judge-attorney relationships, differences in the nature of the case, in the type of negotiation conducted, and in the judicial host's interventions, and you have an inkling of the complexity of the idea of client involvement in a settlement conference. Lawyers, judges, and commentators tend to argue about the advantages and disadvantages of client involve-

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128. U. S. Magistrate Wayne Brazil, for instance, often requires the attendance of a client or a client representative, but typically does not allow such persons actually to sit in on many of the sessions. Although he begins and ends with group meetings, most of his work is conducted in separate private caucuses with lawyers for each party. BRAZIL, *supra* note 75, at 239.

129. *Id.*

130. *Id.* at 521.

131. Although not common in settlement conferences, this is a standard feature of the minitrial. John H. Wilkinson, *A Primer on Minitrials*, *in* DONOVAN, LEISURE, NEWTON & IRVINE ADR PRACTICE BOOK 171, 179 (John H. Wilkinson ed., 1990).

https://openscholarship.wustl.edu/law_lawreview/vol69/iss4/4

ment based largely upon unarticulated assumptions about some of these variables.

1. *"Client-Centered" Arguments*

One area of debate concerns the effect of the client's participation on the client's own interests. For each potential advantage trumpeted, a corresponding risk or potential disadvantage waits to be sounded:

-The client's presence increases the likelihood that her lawyer will be well prepared.[132] {But: the client's presence may incline some lawyers to posture, to "show off."[133] In addition, the client may become a great bother, interfering with the lawyer's ability to accomplish her or his work.}

-The client's presence can reduce the risk that interests of the lawyer will prevail over those of the client. For instance, a lawyer might recommend for or against a particular settlement because of the lawyer's own financial or professional needs, which could be related to excessive pressure from the judge.[134] {But: the client's presence may remove tactical advantages. For example, often a lawyer will falsely attribute a stubbornness to the client to give the lawyer negotiating strength.[135] In addition, it may be strategically useful to delay consideration of an offer from the other side; this is easier to do with an absent client.}

-The client may be better able to appreciate the value of alternate dispute resolution processes if he hears about them directly from a settlement judge, rather than from his lawyer, who might be unfamiliar with or biased against such processes.[136] {But: the client may too readily succumb to the allure

132. ROSENTHAL, *supra* note 48, at 57. Rosenthal concluded that plaintiffs in personal injury cases who participated with their lawyers in the preparation, negotiation, or trial of their cases recovered more money. This is because the client's involvement kept the lawyer honest and alert, and because the client could actually help the lawyer gather, organize, and present information.

133. BRAZIL, *supra* note 75, at 468.

134. Professor Peter Schuck, expressing a fear of judicial overreaching, notes that:

> [T]he only people in a position to identify and appraise [judicial overreaching]—the lawyers who interact with the settlement judge—cannot always be counted on to blow the whistle. For example, the lawyer may have a personal financial or professional stake in a settlement that the client, if fully informed, would reject. The lawyer may not be sufficiently strong or independent to resist an oppressive judge bent upon settlement.

Schuck, *supra* note 70, at 363-64.

135. This is a variation of the well-known "good cop-bad cop" routine. Jeffrey Z. Rubin & Frank E.A. Sander, *When Should We Use Agents? Direct vs. Representative Negotiation*, 4 NEGOTIATION J. 395, 398 (1988).

136. SINGER, *supra* note 71, at 176-77 (discussing lawyers' resistance to alternative dispute resolution). *See generally*, Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819 (1990). Of course, the judge also may be unfamiliar with or biased against such processes.

Washington University Open Scholarship

of a "quick fix," thereby giving up the chance of a better result through trial. In addition, the other side may perceive as weakness the client's expression of willingness to try an alternative process.}
-The client could gain respect for the judicial process.[137] {But: if the client is exposed to the realities of settlement conferences he could lose respect for the process and for the impartiality of the judge.}[138]
-The client will feel he has had a chance to tell his story, in his own words,[139] by participating in a settlement conference. {But: to the extent that such a feeling makes it easier for the client to settle, he loses his real day in court.}[140]
-The client can learn much about the strengths and weaknesses of both sides of the case by observing the conduct of the other parties, the lawyers, and the judge;[141] this can soften his attitudes or positions. {But: exposure to the other side's behavior will anger or harden some clients, making settlement more difficult.}
-If the client actually observes the exchange of monetary offers, he can better assess the strength of the other side's commitment to a position; he may notice things the lawyer misses. Although there may be some lawyers who can fully appreciate and convey the nuances of a settlement negotiation, many are vulnerable to misreading, to oversimplifying, and to embracing too warmly the virtues of their own side's case.[142] {But: the client may misinterpret the events and affect the lawyer's judgment in an erroneous direction or become more difficult to "control."}[143]
-The client's presence permits more rounds of offers and counter-offers. It permits him to act on new information and allows cooperation and momentum to build.[144] In addition, attendance requires the client to pay attention to the case, which, in itself, makes settlement more likely. {But: the client may lose his resolve because of the "crucible effect."}[145]

137. *See* Lind, *supra* note 21, at 341.

138. *Heileman III*, 871 F.2d at 662 (Coffey, J., dissenting).

139. *See* CONLEY & O'BARR, *supra* note 46, at 179.

140. This may deprive both the individual and the courts of an opportunity to establish or clarify public policy. *See* Fiss, *supra* note 73, at 1082-90.

141. *Cf.* BRAZIL, *supra* note 75, at 476.

142. *See* DEAN PRUITT, NEGOTIATION BEHAVIOR 41-45 (1981); Rubin & Sander, *supra* note 135, at 397.

143. *See infra* note 160 and accompanying text.

144. *See* ROBERT M. AXELROD, THE EVOLUTION OF COOPERATION 3-27 (1984); BRAZIL, *supra* note 75, at 266.

145. U.S. Magistrate Wayne Brazil explains that

> [J]udicially hosted settlement conferences . . . can have a "crucible effect," creating pressures and generating an energy that makes litigants more malleable than they would be in a setting outside the courthouse. To take advantage of such fleeting "moments of malleability," you must have ready access to your client, and you must have prepared her so well

https://openscholarship.wustl.edu/law_lawreview/vol69/iss4/4

-The client can clear up miscommunications about facts and interests between lawyers. {But: the client may be too emotionally involved to see the facts clearly.}[146]
-Direct communication between clients can lead to better understanding of each other or of the events that transpired, perhaps even allow a healing of the rift between them.[147] {But: direct communication may cause a flare-up and loss of objectivity. Parties may harden their resolve.}
-The client, because he is more familiar with his situation, may be more able to spot opportunities for problem-solving solutions, which could lead to quicker and more satisfying agreements.[148] {But: the client may give away information about his underlying interests that could leave him vulnerable

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> that she is equipped to make sound decisions about offers or demands with only a few minutes notice.
>
> In some cases counsel may view the "crucible" effect of the judicially hosted settlement conference as a threat rather than as an opportunity. They may fear that the result of increased client malleability will be a hastily entered bad deal. There is some risk, especially with judges who are known to press hard for settlements, that in the heat of the closing moments of a conference you and your client might agree to terms that in a cooler setting you would not accept. The way to minimize that risk is by knowing that it exists, preparing well for the conference, and asking to take a break before responding to a final offer (to permit you to discuss the proposal with your client in a less pressured setting).

BRAZIL, *supra* note 75, at 212-13.

146. Rubin & Sander, *supra* note 135, at 399 ("With just the lawyers present, there may be less direct factual information, but concomitantly more candor about delicate topics.").

147. Professor Bush has stressed the public value of such an educational function. Bush, *Dispute Resolution and Ideology*, *supra* note 71. *See also* Leonard L. Riskin, *The Special Place of Mediation in Alternative Dispute Processing*, 37 U. FLA. L. REV. 19, 26-27 (1985); Hank de Zutter, *Proponents Say ADR Spells Relief*, ILL. LEGAL TIMES, Jan. 1988, at 1.

148. *Cf.* BRAZIL, *supra* note 75, at 501-03; Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086 (1990).

John Martin, Settlement Director for the U.S. Court of Appeals for the Eighth Circuit, gave these examples:

> In [a] fraud case involving two medical professionals, when a traditional legal analysis failed to close the impasse, the clients, who together had expended more in legal fees than the judgment itself, responded to the suggested certainty that legal costs would continue (an appeal and possible remand). They then agreed to [a] higher figure but a partial deferred payment plan, with one client meeting the objection of the other to commercial financing by suggesting a chattel mortgage on the other's office equipment. In another case a manufacturer's representative offered to pay a significant portion of a judgment for breach of warranty by supplying improved replacement products, thus achieving an additional savings represented by a profit margin of about 20%. It was particularly helpful in a slack economy to keep its work force intact. Similarly an insurance company self funded a personal injury structured settlement which resulted in substantial savings represented by the difference between its profit margin and the market interest rate used by annuity underwriters.
>
> As was true in these cases it is more likely that imaginative solutions will emanate from clients rather then their lawyers who are often naturally engaged in an adversarial and argumentative posture. Sometimes the subject matter of settlement discussion is so complicated only the clients can readily understand it.

Washington University Open Scholarship

to exploitation.[149] Moreover, the client will not be sufficiently objective. A lawyer knowledgeable about the client's situation might do a better job of developing problem-solving solutions.}
-Because the client's presence increases the likelihood of a settlement,[150] and a settlement that will be satisfactory to the client, participation likely will result in a savings of time and money for the client. {But: if some of the risks described above materialize, his presence will have caused him to lose time and money.}
-The client would not consider an order to attend a settlement conference as coercive, but rather as an opportunity to participate. {But: the client might react negatively to the coercive nature of the order and be uncooperative.}

These arguments bear two important implications. First, the assertions of both risk and benefit gain strength as the client's actual participation increases. Thus, the client who not only observes the settlement conference, but also talks, may enhance his or her opportunities for developing a problem-solving solution, while simultaneously increasing his or her risks of being exploited, of angering the opponent, or of revealing potentially damaging information. Clearly, this was the situation in the personal injury claim mediation described in the beginning of this Article; the session could have ended explosively at any moment. However, in the police brutality claim mediation, also described in the beginning of this Article, if both the plaintiff and a member of the police department had been present, opportunities would have arisen to discuss more than a financial settlement based upon the probable outcome in court. The clients could have focused on exactly what happened, and on how and why, and looked toward changing police practices. There might even have

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Letter from John H. Martin, Settlement Director, U.S. Court of Appeals for the Eight Circuit, to the Author 4 (Feb. 17, 1990) (on file with the author).

Sometimes the problem solving can extend to developing future relations.

> In a million dollar collection case involving two corporations, the CEOs for both parties were present. An ironic change occurred after the respective teams of lawyers engaged in an extremely argumentative discussion, representing in my view, a vicarious catharsis. The CEOs decided to meet alone (excluding the mediator as well as the lawyers) and negotiated a settlement figure which enabled a mutually profitable business relationship to resume and assistance to be rendered the judgment creditor in a major litigation elsewhere.

Id. at 5.

149. *See supra* text accompanying note 67.

150.
> Th[e] listing [of cases in which the clients' presence increased chances of settlement] could continue indefinitely. In the several hundred cases I've handled for the Eighth Circuit, I always suggest the presence of the clients in a conference because it enhances the prospects of settlement dramatically. I can think of no case where it was a detriment.

Martin letter, *supra* note 148, at 5. *See also* Wendy Faulkes, *Pursuing the Best Ends by the Best Means*, 59 AUSTL. L.J. 457, 458 (1985) (effectiveness of mediation reduced when parties represented by an agent).

https://openscholarship.wustl.edu/law_lawreview/vol69/iss4/4

been a place for an apology.[151] On the other hand, the plaintiff might have revealed damaging information or succumbed to the apology and therefore reduced his demand.[152]

Second, all the arguments in favor of including the client presume that the client is a competent, reasonably intelligent person with good judgment who will not be pushed into making an agreement. Conversely, the arguments against including the client assume he lacks one or more of these qualities, and that the client's lawyer has them. In other words, the arguments against inclusion of clients are more consistent with Model I perspectives: a traditional lawyer-client relationship, adversarial negotiation, and coercive intervention by the judicial host. The pro-inclusion arguments are generally consistent with the assumptions that undergird the Model II perspectives: a participatory lawyer-client relationship, problem-solving negotiation, and facilitative intervention by the judicial host.

2. *Lawyers' and Judges' Perspectives*

Although most lawyers apparently believe that the client's presence enhances the prospects for settlement,[153] many judges and lawyers are inclined to exclude clients from active participation in settlement conferences.[154] This inclination is anchored in large part on Model I assumptions: traditional lawyer-client relations and adversarial negotiations under a judge's heavy thumb.[155] These assumptions gain strength from the "lawyer's standard philosophical map"[156] and induce many lawyers and judges to credit the arguments against including clients. Thus, a lawyer may have a reflexive aversion to direct contact between clients because he fears the client may make a damaging disclosure.[157] In turn,

151. *See* RISKIN & WESTBROOK, *supra* note 1, at 202-204; Stephen B. Goldberg et al., *Saying You're Sorry*, 3 NEGOTIATION J. 221 (1987).

152. For a discussion of the possibilities for problem-solving negotiation in the *Heileman* case, see *infra* note 185 and accompanying text.

153. WAYNE D. BRAZIL, SETTLING CIVIL SUITS: LITIGATORS' VIEWS ABOUT APPROPRIATE ROLES AND EFFECTIVE TECHNIQUES FOR FEDERAL JUDGES 102-05 (1985).

154. *See* BRAZIL, *supra* note 75, at 522-29; *supra* note 21.

155. This should not be surprising because mediation tends to take on the characteristics of the process it replaces. Kolb, *supra* note 73, at 59. In this sense, the judicial settlement conference takes the place of a trial, which is adversarial, representational, and hierarchial, with both sides seeking the coercive power of the judge. *See* Keating & Shaw, *supra* note 73, at 219-20.

156. Riskin, *supra* note 62, at 43-48, 57-59.

157. Federal Rule of Evidence 408 provides some protection.

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this fear may impair the lawyer's ability to imagine opportunities for creative problem solving.

Other, more subtle factors also may incline both lawyers and judges toward excluding clients. The client's presence threatens customary, hierarchial professional practices. It creates a risk, for instance, that the judge's comments could embarrass the lawyer, a risk that could restrict the judge's perception of his freedom to speak with counsel.[158] It also appears to threaten the lawyer-client relationship.[159] Both lawyer and judge may wish to save the time required to explain to the client what is going on. Lawyers also may resent the loss of certain negotiating techniques, such as the "good-cop/bad-cop" routine.[160]

On the other hand, good lawyers and wise settlement judges do not approach settlement discussions woodenly. Many will recognize particular circumstances in which client involvement, even if contrary to their general predilections, is appropriate. This may occur, for example, when the lawyer encounters "client control problems" or when he recognizes that unique characteristics of the case or the client make the client's presence essential.[161]

In addition, the psychological needs of lawyers and judges may be fac-

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> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

FED. R. EVID. 408. In addition, settlement conference orders frequently provide more extensive blanket protection against using any information revealed in the settlement conference in a subsequent trial. *See, e.g.*, Settlement Conference Order (Form) (N.D. Okla Aug. 3, 1989) ("Neither the settlement conference statements nor communication of any kind occurring during the settlement conference can be used by any party with regard to any aspect of the litigation or trial of the case.").

Still, there are risks. For example, a client could reveal information that could lead to other discoverable evidence or that would reveal the client's bottom line for settlement purpose. In addition, a settlement judge who will not try the case might inadvertently reveal confidential information to the trial judge.

158. BRAZIL, *supra* note 75, at 469.

159. *Cf. id.* at 475.

160. Rubin & Sander, *supra* note 135, at 398.

161. BRAZIL, *supra* note 75, at 468-69. The frequency of discussions of "client control" problems in Brazil's book (*id.* at 127-30, 209-211, 226, 239-40, 245, 417, 429-32, 468-69, 528) suggests that he regularly confronts traditional lawyer-client relationships.

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tors in the decision to exclude clients or to suggest, directly or indirectly, that the clients not participate. Take, for example, the personal injury insurance claim mediation described in the beginning of this Article. The clients' presence impaired my ability as mediator to predict and control events.[162] That made me anxious. It called into question my own professional expertise, and, I imagine, that of both of the lawyers. In the mediation of the police brutality claim, at which only professionals were present, we could define the problem simply: finding a settlement agreement acceptable to the clients. The session included only matters that we could handle, in our professional roles, better than could the clients: arguments and discussions about law and fact and predictions about how a judge or jury would behave. The emotional relationship between the parties, which resides in a sphere typically beyond the lawyer's expertise, did not seem important.

Many settlement conferences are sufficiently similar to this kind of nonjudicial mediation that lawyers and judges in those conferences often will have experiences resembling those that the lawyers and I encountered. A lawyer who embraces a Model I vision of professional-client relations may be unsettled by the participation or mere presence of a client in a settlement conference. The lawyer who wants to maintain the mystique of expertise could feel severely threatened by the presence of a client. The client might interpret his uncertainty as incompetence, or, worse, notice that he is unprepared, that the other lawyer is more clever, or that the judge seems not to respect his opinion. Similarly, some judges might feel discomfort about interfering with lawyer-client relations or the possibility of being challenged, questioned, or evaluated by a client who, not being legally trained, might behave less predictably than the lawyer. In short, the presence of clients may breed anxiety and interfere with the lawyers' and judge's feelings of competence and control. This anxiety may cause an unspoken and, perhaps, unconscious conspiracy between lawyers and judges to exclude clients from all or important parts of settlement conferences.

B. *When Should a Judge Mandate or Otherwise Encourage a Represented Client to Attend a Settlement Conference?*

To the extent that a client's attendance at a settlement conference is

162. Of course, the lawyers or I could have sharply limited the amount and nature of client participation.

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likely to be useful to the client, it is more appropriate, and less likely to be an abuse of discretion, for a judicial host to compel such attendance. To the extent that the settlement conference provides for client participation (as opposed to mere attendance) the client's attendance more likely will benefit the client.[163] Additionally, a client more likely will participate in a settlement conference that includes Model II features, such as participatory lawyer-client relationships, problem-solving negotiation, and judicial interventions emphasizing facilitation rather than pressure. Conversely, the client is less likely to participate when the conference is dominated by Model I features, such as traditional lawyer-client relations and adversarial bargaining under threats or pressure from the judicial host.

Many of the potential benefits of client involvement, however, are available even in Model I settlement conferences. Even in a conference in which clients observe but do not speak, in which lawyers dominate, and in which the host attempts to pressure a settlement, the client may feel he benefits from observing both sides' lawyers in action. Such observation may improve his understanding of his legal position. It also may soften his impression of the other side, which could lead to righting the balance between them, to a psychological healing, and perhaps to a final settlement.[164] In addition, the client's "presence," even in the hallway, permits more rounds of offers.

For these reasons, and for a few listed below, I propose that a judicial host should:

1. routinely require attendance of represented clients,[165] and representatives of organizational clients with full settlement authority, in the absence of a suitable,[166] and suitably presented objection; and

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163. Except, of course, if the client falls victim to any of the dangers described in the preceding section.

164. *See supra* notes 132-52 and accompanying text.

165. *Cf.* SPIDR Report, *supra* note 71 ("The parties should normally be allowed to attend and participate [in mandatory dispute resolution processes]").

Specific situations—e.g., when the host believes that the client's lawyer does not understand the case well or that, for some other reason, the lawyer will not convey accurately an offer from the other side—may necessitate that the judicial host undertake additional measures.

A number of strategies are available to deal with such situations. The first is to have a private caucus with the lawyer and client and ask the lawyer to explain the proposal to the client in the judge's presence. The second is to have a group meeting and ask the opposing counsel to explain the proposal in front of the assembled group. The third is to require a written proposal and response. BRAZIL, *supra* note 75, at 244.

166. Grounds for objection should, of course, include circumstances that would make the cli-

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2. take appropriate measures to ensure that the client's presence is worthwhile to the client.[167]

Requiring attendance should be the routine practice because a judge often may have difficulty anticipating what kinds of negotiation are possible. In addition, in my judgment, the potential advantages of client involvement usually outweigh the disadvantages, even under Model I conditions, and the judicial host, along with the lawyers and clients, can adjust the nature and timing of the client's participation to maximize the potential benefits and limit the risks.[168] To limit risks, for instance, the lawyer for an overwrought client can keep him out of parts of the conference, and at other times can caution him against speaking or can ask him leading questions.[169]

The obligation to try to make the client's participation worthwhile for the client has two components. First, the judge should encourage (but not insist upon) actual participation by the client. The judicial host should be wary of wasting the client's time in order to foster judicial efficiency.[170] Thus, the host should not summon the client to conference

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ent's attendance unduly burdensome or that would pressure the client to settle rather than attend the conference. They also should include arguments that the client's personality or situation would make his presence detrimental. At all times, however, the judicial host must be wary of unthinkingly giving in to excuses lawyers proffer based on unexamined Model I assumptions.

167. This is generally consistent with a major recommendation of the SPIDR committee report:

> Mandating participation in non-binding dispute resolution processes often is appropriate. However, compulsory programs should be carefully designed to reflect a variety of important concerns. These concerns include the monetary and emotional costs for the parties, as well as the interests of the parties in achieving results that suit their needs and will last; the justice system's ability to deliver results that do not harm the interests of those groups that have historically operated at a disadvantage in this society; the need to have courts that function efficiently and effectively; the importance of the public's trust in the justice system; the interests of non-parties whose lives are affected and sometimes disrupted by litigation; the importance of the courts' development of legal precedent; and the general interest in maximizing party choice. In weighing these valid and sometimes competing concerns, policy makers should be cautious not to give undue emphasis to the desire to facilitate the efficient administration of court business and thereby subordinate other interests. Participation should be mandated only when the compulsory program is more likely to serve these broad interests of the parties, the justice system, and the public than would procedures that would be used absent mandatory dispute resolution.

SPIDR Report, *supra* note 71, at 11.

Limitations on judges' time can make investigation of clients' underlying interests seem infeasible. BRAZIL, *supra* note 75, at 48. *Cf. id.* at 53. However, such explorations often will lead to quicker, more satisfying settlements. *See supra* notes 132-52 and accompanying text.

168. *Cf.* BRAZIL, *supra* note 75, at 467-501; *but cf.* Menkel-Meadow, *supra* note 126, at 21-22 (emphasizing that routinely requiring attendance of clients would be inefficient for clients).

169. If the client is an organization, it may have several representatives from whom to chose. The lawyer often could influence that decision in the direction of the most capable individual.

170. *See* SPIDR Report, *supra* note 71.

Washington University Open Scholarship

and then keep him out in the hall without a very good reason.[171] Second, the judge should enhance the value of client participation by opening the conference to a consideration of the parties' underlying interests. Of course, the judicial host, along with the lawyers and clients, must decide the extent to which the parties should discuss such matters in joint sessions, and the parties should always have a right to refuse to discuss such issues, even privately with the judge. But opposing lawyers and clients often will be locked in an adversarial battle at the time of the settlement conference. The host's goal should be to help them crack the adversarial shell and to open the discussion to underlying interests in order to make problem-solving negotiation possible—that is, if the parties have an interest in doing so.[172]

In addition, if appropriate, the judicial host can gently call into question the lawyer's analysis of the case. He can ensure that the client is actually present in joint sessions, not just in separate sessions. And he can ensure that both sides consider the possibility of having the clients talk directly with one another.

Another effective technique to foster client participation is to ensure that the client understands the options to trial, including alternative methods of dispute resolution. Often the clients can more easily learn about such procedures directly from the judge rather than from their lawyers.[173] Thus, to the extent that the judicial host feels inclined to intervene in the ways described above, he is more justified in compelling the client to attend.[174]

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171. Magistrate Wayne Brazil describes situations in which clients were angered at being excluded from most of a settlement conference that they were required to attend. He attributes the anger to his own failure to explain adequately his reasons for excluding the clients. BRAZIL, *supra* note 75, at 489.

172. *Id.* at 501-10. Of course the judicial host should not push too hard so as to overcome the parties wish to continue with the litigation.

173. *See supra* note 136 and accompanying text.

174. *Cf.* BRAZIL, *supra* note 75, at 489.

I recognize that to undertake such responsibilities, many judges will need additional training, which I assume will be provided under the Civil Justice Improvement Act of 1990, Pub. L. No. 101-650, § 103, 104 Stat. 5089, 5095 (to be codified at 28 U.S.C. § 480), which requires the Federal Judicial Center and the Administrative Office of the Courts to "develop and conduct comprehensive education and training programs to ensure that all judicial officers . . . are thoroughly familiar with the most recent available information and analyses about litigation management and other techniques for reducing cost and expediting the resolution of civil litigation."

https://openscholarship.wustl.edu/law_lawreview/vol69/iss4/4

C. *A "Representative with Full Authority to Settle the Case"*

The most confusing aspect of the magistrate's order in *Heileman*, and the most crucial, concerned the attributes of the representative whose presence it commanded. The order itself required each party to "be represented at the conference in person by a representative having full authority to settle the case or to make decisions and grant authority to counsel with respect to all matters that may be reasonably anticipated to come before the conference."[175] In his opinion, Magistrate Groh wrote that Oat's failure to send such a representative "could . . . have been excused if counsel had been given unrestricted settlement authority."[176] Judge Kanne, in the Seventh Circuit's majority opinion, wrote that "authority to settle" meant that the "corporate representative . . . was required *to hold a position within the corporate entity* allowing him to speak definitively and to commit the corporation to a particular position in the litigation."[177] This led Judge Easterbrook to contend that the district court inappropriately required the corporate litigant to send *an employee*, rather than another agent, such as a lawyer,[178] and that such an order might have required the corporation to change its internal decisionmaking structure, contrary to state corporate law.[179] It also inspired Judge Posner's notion that compliance with the order might have required the entire board of directors to attend.[180] I do not believe the magistrate could reasonably have expected complete board attendance. What could he have expected?

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175. *Heileman I*, 107 F.R.D. at 279.

176. *Id.* at 280.

177. *Heileman III*, 871 F.2d at 653 (emphasis added).

178. *Id.* at 663 (Easterbrook, J., dissenting).

179. *Id.* at 664.

180. *Id.* at 658 (Posner, J., dissenting).

A less stringent requirement appears in the standard form U.S. Magistrate John Wagner employs. It provides: "If Board approval is required to authorize settlement, attendance of the entire board is requested. The attendance of at least one sitting member of the board (preferably the Chairman) is *absolutely required*." Mag. John Wagner, Settlement Conference Order (Form) (N.D. Okla. Aug. 3, 1989) (emphasis added).

U.S. Magistrate William A. Knox's form provides:

> Lead trial counsel and persons with actual settlement authority for each party must be present for the conference. A corporate or other nonperson party shall be represented by a person with sufficient authority within the organization to participate meaningfully in a discussion of settlement and to obligate the organization if a settlement is reached. In addition, if an insurance company's approval or authority to settle is required by any party, a representative of that insurance company shall attend this conference.

Mag. William A. Knox, Settlement Order (Form) (W.D. Mo. undated).

Washington University Open Scholarship

The problem arose, of course, only because Oat was a corporation—a juridical person. Had the litigant been an individual or a sole-proprietorship, the magistrate could have ordered a specific individual to attend. Such a person inherently would have "full settlement authority": the capacities to accept a settlement offer, to make proposals, and to learn from the behavior of others in the settlement conference and thereby adjust his position. In addition, he would have knowledge of his own interests and situation that would enable him to partake in problem-solving negotiation. But if the litigant is a corporation or other organization, locating any one person with all these capacities may prove difficult.

What the magistrate legitimately could have wanted was the presence of a representative whose attributes approached, as closely as feasible, those of an individual litigant. We can understand these attributes by referring to notions of *authority, influence, knowledge*, and *discretion*. Thus, a representative with "full settlement authority" should have:

(1) The *authority* to commit the client to a particular course of conduct, such as paying or accepting a certain financial offer.[181]

(2) Sufficient *knowledge*—including an understanding of the client's *needs, interests*, and *operations*—to see opportunities for interest-based or problem-solving negotiation.

(3) Sufficient *influence* within the organization that his recommendations likely would affect the principal's decisions about settlement.

(4) *Discretion* and the wherewithal to negotiate a different kind of arrangement, i.e., a combination of knowledge and influence that makes it likely the decisionmakers will accept his proposal.

Although some corporations could send a person with all of these at-

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181. The standard form Magistrate Wagner employs provides:

> In addition to counsel who will try the case being present, a person with full settlement authority must likewise be present for the conference. This requirement contemplates the presence of your client or, if a corporate entity, an authorized representative of your client. For a defendant, such representative must have final settlement authority to commit the company to pay, *in the representative's discretion*, a settlement amount recommended by the settlement judge up to the plaintiff's prayer (excluding punitive damage prayers in excess of $100,000.00) or up to the plaintiff's last demand, whichever is *lower*. For a plaintiff, such representative must have final authority, *in the representative's discretion*, to authorize dismissal of the case with prejudice, or to accept a settlement amount recommended by the settlement judge down to the defendant's last offer. The purpose of this requirement is to have representatives present who can settle the case during the course of the conference without consulting a superior. A governmental entity may be granted permission to proceed with a representative with limited authority upon proper application pursuant Local Court Rule 17.1A.

Wagner, *supra* note 180 (emphasis added).

https://openscholarship.wustl.edu/law_lawreview/vol69/iss4/4

tributes,[182] a representative with two or three of them ordinarily would satisfy my notion of full settlement authority.[183] In many cases, expecting a corporation or government organization to provide an individual representative with unlimited financial settlement authority will be unrealistic. In such situations, a representative might be acceptable if he had knowledge, discretion, and influence—even if he lacked authority to settle at a specific dollar figure. Conversely, "full settlement authority" sometimes would require more than mere authority to settle at a given amount of money—unless, of course, the case settled within such authority. To enhance the likelihood that the representative's participation would be worthwhile, full settlement authority might also include additional elements of knowledge, discretion, or influence.

If Magistrate Groh had shared my vision of full settlement authority, he might have explored Mr. Fitzpatrick's knowledge, discretion, and influence, rather than rebuking him for lack of authority to offer a financial settlement. It seems likely, however, that, even by my standard, he would have found that John Fitzpatrick lacked "full authority to settle the case." First, Fitzpatrick lacked *authority* in the sense that he did not have authority to make an agreement that called for Oat to pay money.[184] Second, he apparently lacked *discretion* to commit to other kinds of agreements. Fitzpatrick was a member of the law firm that usually represented Oat, not its attorney for all matters. He therefore may have lacked the detailed *knowledge* of the corporation's situation and

182. *See* Keenan, *supra* note 14, at 1508.

183. Eighth Circuit Settlement Director John Martin puts it this way: "I want someone who does not have to make a phone call, someone who knows what will fly." Telephone interview with John Martin (Feb. 6, 1991).

Another interesting formulation was adopted by the Advisory Group appointed under the Civil Justice Improvement Act of 1990 by the U. S. District Court for the Western District of Missouri. That group developed an Early Assessment Program, the central feature of which is a conference at which the parties discuss, among other things, alternative methods of resolving the case. Parties normally are required to attend such sessions.

> Where attendance of a party is required, a party other than a natural person satisfies the attendance requirement if it is represented by a person or person, *other than outside counsel*, with authority to enter into stipulations, with reasonable settlement authority, and with sufficient stature in the organization to have direct access to those who make the ultimate decision about settlement.

U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, PROPOSED GENERAL ORDER, EARLY ASSESSMENT PROGRAM, EARLY IMPLEMENTATION PROJECT, Sec. IV.A. (Sept. 13, 1991) (emphasis added).

184. I do not mean to suggest that Oat should have given him that authority, considering its quite sensible and ultimately vindicated position that any payments should come from the insurance company.

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interests that would have enabled him to spot opportunities for, and engage in, problem solving negotiation. I find it difficult to speculate on the *influence* he enjoyed.

Under my analysis, the exact position the special representative holds would not be determinative. In most organizations, some high-level, full-time executives are *more likely* to have capacity, knowledge, influence, and discretion than even an inside, full-time general counsel. Sometimes, however, a general counsel can possess these attributes. So, too, could an outside, part-time counsel.

What would have happened if both Oat and National sent representatives endowed with the kind of "full settlement authority" described above? The conference might have produced progress toward settlement, even if National's representative asserted that the insurer was unwilling to make an offer and was thinking about contesting coverage. This is true for a number of reasons. First, Oat might have pressured National to make an offer; at the least, it might have forced National to clarify its position. Second, all the representatives might have garnered a better understanding of their cases, which might have inclined them to settle. Third, they might have explored problem-solving solutions[185] or alternative methods of resolving the dispute—such as a summary jury trial (the procedure Judge Crabb imposed that ultimately led to a settlement).[186]

It is impossible to predict what settlement options might have arisen if persons with *authority, discretion, influence*, and *knowledge* had gathered in an atmosphere that supported better understanding of each others' positions or creative problem solving. That, probably, is what the magistrate sought.

D. *The Obligations of the Represented Client in the Settlement Conference*

Once the client appears at a settlement conference, what are her obligations? Rule 16(f) allows the imposition of sanctions ". . . if a party or a party's attorney fails to participate in good faith."[187]

185. These may not have been likely in this case. The prospect of insurance coverage, and Heileman's having already corrected the problems led all concerned to see this as a question of how much money the insurance company would pay. On the other hand, the insurance company might conceivably have agreed to a payment if Oat also agreed to provide some kind of service to Heileman, perhaps at a discount.

186. *Heileman III*, 871 F.2d at 664 (Easterbrook, J., dissenting).

187. FED. R. CIV. P. 16(f). For a review of cases imposing sanctions under this rule, see Kathleen M. Dorr, Annotation, *Imposition of Sanctions Under Rule 16(f), Federal Rules of Civil Proce-*

https://openscholarship.wustl.edu/law_lawreview/vol69/iss4/4

The most extreme position is that the parties must settle. This plainly lacks foundation in the Federal Rules and is contrary to any sound thinking on the subject.[188] A related position would impose an obligation to "bargain . . . in good faith," such as the duty that the National Labor Relations Act fixes on unions and management.[189] This position also lacks foundation.[190]

At the other extreme is the notion that the client is obligated only to attend.[191] But this plainly would not satisfy the good faith participation requirement in Rule 16(f).

Between these extremes, one federal district court requires that "[t]he parties, their representatives, and attorneys . . . be *completely candid* with the mediator (or settlement judge) so that he may properly guide settlement discussions."[192] This is an admirable exhortation, but often unreal-

dure, For Failing to Obey Scheduling or Pretrial Order, 90 A.L.R. FED. 157 (1988). Statutes and court rules in other jurisdictions establish other requirements. SPIDR Report, *supra* note 71, at 8.

188. Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985).

189. 29 U.S.C. § 158(d) (1988).

190. *Heileman III*, 871 F.2d at 664 (Easterbrook, J., dissenting). *But see* Menkel-Meadow, *supra* note 126, at 21 (Judge Kanne's distinction between a requirement to attend and the requirement to settle "is not dissimilar from the requirements in labor law to bargain in good faith.").

The Supreme Court of Georgia found the very aroma of this notion frightening. In Department of Transp. v. City of Atlanta, 380 S.E.2d 265 (Ga. 1989), landowners were allowed to intervene to set aside a takings declaration to build the "Presidential Parkway." The trial court ordered the parties to participate in a mediation and to engage in discussions in "good faith." The Supreme Court of Georgia shared Judge Manion's inability to distinguish between coercion *into* a settlement conference and coercion *in* a settlement conference. *See supra* note 122. Suprisingly, the court found that the language of the trial court order could be "construed to require the parties to mediate their dispute on pain of contempt should they fail. That would amount to an order to settle the case which requires power the court does not have, or an order to do a thing (mediate) which by its nature must be voluntary." 380 S.E.2d at 268.

191. The Iowa Supreme Court apparently took this view in Graham v. Baker, 447 N.W.2d 397 (Iowa 1989). An Iowa statute requires a creditor who wishes to foreclose on farm property first to "participate" in one mediation meeting and then to secure a "mediation release" signed either by the borrower, or if the borrower refuses, by the mediator. The borrower's representative attended the mediation, but his behavior "ranged between acrimony and truculency." *Id.* at 401. He did not allow the borrower even to present its position and stated that his own position was not negotiable. Both the borrowers and the mediator refused to sign the mediation release. The Iowa Supreme Court affirmed the trial court's issuance of a writ of mandamus. The trial court had ordered the mediation service to sign the release, finding that there was no basis in the statute for the mediation service to apply its own standards and that the conduct described above constituted satisfaction of the "participation" requirement. The court emphasized that the statute intended mediation to create an environment for settlement negotiation, not to force a settlement. *Id.*

192. United States District Court for the District of Kansas, Memorandum Order, *in* THE CPR LEGAL PROGRAM, ADR AND THE COURTS: A MANUAL FOR JUDGES AND LAWYERS 145-46 (Erika S. Fine & Elizabeth S. Plapinger eds., 1987) (emphasis added).

Washington University Open Scholarship

istic given the widely perceived need for adversarial strategies. Another court has stated that it can require the representative of a party's insurance carrier "to make reasonable efforts, including attending a settlement conference with an open mind."[193] This obligation may be slightly more onerous than Judge Kanne's idea that the representative "come to court in order to consider the possibility of settlement."[194] Both of these approximate my idea of the obligation of the special representative.

The word "attend" supplies the rest of the notion, for it can mean to pay *attention*, which, in turn, can mean to engage in *careful observation*, to heed, to notice.[195] In my view, the client should be obliged respectfully to consider, and reconsider, with the other parties or the judicial host, the positions *and the interests* of both sides, and to think about ways to resolve the dispute. The reader might argue that this is not the sort of a duty that the law can enforce, and the reader would be correct. If, however, we think of the order to attend as an invitation, to discuss as much as debate, to converse as much as convince, to perceive as much as persuade, we may see more settlements and more "justice" than we expect.[196]

III. CONCLUSION

One's attitude about whether a judge should compel a represented client to attend a settlement conference depends importantly on what one expects to happen at the conference. The practice of requiring or encouraging such attendance is likely to increase. It offers great opportunities for more settlements, many of which would provide relatively high levels

193. Lockhart v. Patel, 115 F.R.D. 44, 47 (E.D. Ky. 1987).

194. *Heileman III*, 871 F.2d at 653.

195. *See* 1 OXFORD ENGLISH DICTIONARY 548 (1933).

196. Professors McThenia and Shaffer explain a view of justice that could spring from direct communication between clients:

> Many advocates of ADR can well be taken to have asked about the law's response to disputes, and alternatives to that response, not in order to reform the law but in order to locate alternative views of what a dispute is. Such alternatives would likely advance or assume understandings of justice (or, if you like, peace) that are radically different from justice as something lawyers administer, or peace as the absence of violence. They assume not that justice is something people get from the government but that it is something people give to one another. These advocates seek an understanding of justice in the way Socrates and Thrasymachus did in the Republic: Justice is not the will of the stronger; it is not efficiency in government; it is not the reduction of violence: Justice is what we discover—you and I, Socrates said—when we walk together, listen together, and even love one another, in our curiosity about what justice is and where justice comes from.

Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1665 (1985).

https://openscholarship.wustl.edu/law_lawreview/vol69/iss4/4

of satisfaction for clients. Client involvement in settlement conferences, however, also creates a risk that the client will be worse off for having attended. Judges, lawyers, and clients, however, can adjust the nature of the client's participation to minimize the risks and enhance the opportunities.

Coercing a client to attend a settlement conference along with the lawyer generally is more justifiable to the extent that the conference embodies elements of what I have called Model II perspectives: participatory lawyer-client relationships, problem-solving negotiation, and judicial intervention designed to facilitate and educate. Yet client involvement can have benefits even in a conference that is dominated by Model I features: traditional lawyer-client relationships, adversarial negotiation, and a judicial host who emphasizes pressure and threats to encourage settlement.

Judicial hosts should routinely include clients in settlement conferences. They also should attempt to make attendance worthwhile by encouraging significant participation by the clients and by opening the conference to "nonlegal" considerations, such as the clients' underlying interests. Judicial hosts should specify the nature of the full settlement authority with which a client representative should be endowed. Full settlement authority can be understood by reference to such notions as *authority, knowledge, influence* and *discretion*. In some situations, authority merely to settle at a particular figure may not suffice. The client who attends a settlement conference is obligated respectfully to consider, and reconsider, the rights and underlying interests of all litigants, rather than simply to rely on adversarial positions.

Coercion into a settlement conference must be matched by a compensating consideration for the needs of the client. Thus the client should have the opportunity to participate, or to restrict her participation, and also to learn about alternatives to the settlement conference, i.e., alternative methods of resolving the dispute.

This is not an easy assignment. It may require judges and lawyers to alter familiar work habits and to question standard assumptions. Opening settlement conferences to clients and to their underlying interests challenges the conventional, hierarchical arrangements that typify Model I relationships. It calls for judges and lawyers to share more of their power with clients.[197]

197. There are many potential obstacles to this rethinking. SINGER, *supra* note 73, at 176; Riskin, *supra* note 62, at 43-51.

Washington University Open Scholarship

A judicial host justifiably can command the attendance of a represented client to the extent that the conference embodies Model II features. Conversely, and perhaps more importantly, involving clients also may be the best way to encourage the development of Model II features in settlement conferences. In other words, a client's presence does not merely call for Model II features, it also increases the likelihood of such features. The client's presence, for example, makes possible more participatory lawyer-client relationships and enables the negotiation to focus more easily on underlying interests. In addition, it can act as a check on the judge who otherwise would be more inclined to pressure the parties than to facilitate their discussion. Thus, having the client in the settlement conference can foster the development of Model II features. Such a client can be a catalyst to make courts and lawyers more responsive to the people they serve.

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