Objectivity and Accountability: 
Limits on Judicial Involvement in Settlement

The 1983 amendments to Rule 16 of the Federal Rules of Civil Procedure encourage judicial involvement in settlement. When judges become heavily involved in negotiations between or among parties to suit, however, procedural safeguards against judicial bias disappear. Such bias may affect the substance of settlement or the outcome at trial if the settlement fails. Judges may misuse docket control mechanisms or other settlement techniques in order to coerce agreement, even to the point of denying due process to litigants. Yet judicial involvement in settlement is perceived as speeding the disposition of cases. As a result, a fundamental tension exists between the goal of ethical judicial conduct and the goal of efficient judicial administration.

The rules which presently regulate judicial behavior are chiefly concerned with the danger that judicial involvement in settlement will interfere with a judge’s impartiality at trial. This perspective has spawned its own critique of case-management techniques, articulated most fully by Professor Resnik. Both the present rules and the existing critique are helpful to a point, but in a sense, both are inadequate. They may guard the trial, but provide insufficient protection against bias in settlement agreements themselves.

This comment is motivated by a concern which is derived from but goes deeper than concern for impartiality at trial. The possibility of bias at trial enhances a judge’s power to foster settlement, but not in a way that the judicial system should wish to encourage. The parties know that the judge will ultimately decide the merits of the case if the settlement negotiations fail. As a result, judicial evaluations and statements of opinion about the law or facts gain extra force and become opportunities for judicial coer-

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1 Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 376 (1982).
During settlement negotiations, judges may make representations about the law and facts which would be unsupportable if made on the record, subject to judicial review. A judge may thereby dispose of a case by settlement, without subjecting that legal outcome to the public scrutiny which is, or at least should be, a prerequisite to any exercise of judicial power.\(^2\)

This comment contends that judges should only encourage settlement in ways which do not allow the judge to utilize the power of his or her position to coerce settlement. Under this approach, the judge may encourage settlement through the use of neutral time pressure; by requiring the parties to participate in a settlement negotiation, as long as the judge remains an impartial moderator; or through the use of on-the-record techniques such as decisions regarding admissibility of evidence and/or choice of law. Part I develops the theory behind this position. Part II discusses the existing decisions, rules, and ethical canons that affect judicial conduct in this context, and demonstrates the inadequacy of both their theoretical bases and positive prescriptions. Part III discusses alternative techniques which, though acceptable under present ethical guidelines, allow serious risk of coercion, as exemplified by *In re Agent Orange Product Liability Litigation.*\(^3\) Part IV proposes a solution.

I. SEPARATING THE MEDIATIVE AND ADJUDICATIVE FUNCTIONS

Martin Shapiro offers us a view of litigation as a triangular process that develops as follows.\(^4\) Two neighbors disagree about their rights in a particular piece of land. Discussion breaks down, and they agree to submit their dispute to a third party for resolution. The judge is the embodiment of the disinterested decision maker.\(^5\) A prerequisite to the neighbors' choice of a third party is that the third party will not take sides.

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\(^2\) Owen M. Fiss, Justice Chicago Style, 1987 U. Chi. Legal F. 1, 12-17.


\(^5\) Fiss challenges the accuracy of the dispute resolution story as an account of the function of the judiciary. Owen M. Fiss, Against Settlement, 93 Yale L.J. 1073, 1075 (1984). The criticism has merit, but the goal of this comment is to accept the dispute resolution model on its own terms, and to articulate the concern with judicial involvement in settlement through the use of arguments intrinsic to the dispute resolution model.
A. Settlement in the Real World—The Danger of Coercion

Today, when parties choose to litigate, they do not have the option of choosing a single person in the community known for his or her impartiality. They choose not a person but an institution. Parties cannot select a particular judge, but in return the judiciary provides a set of processes which seek to protect the impartiality of all judges. The primary procedural safeguard of impartiality is the public nature of on-the-record judicial action. On-the-record law and fact are subject to appellate review. Even rulings on discovery motions are given with justification on the record.

When a case is settled, however, these procedural protections are absent. This is not a problem when settlement negotiations are purely private. Public power has not been invoked to achieve the settlement. If, however, a judge becomes involved, he or she may attempt to apply pressure on one of the parties to settle the case. Unlike a purely private settlement, such a settlement involves the exercise of public power effected in private.

The danger of undue coercion becomes particularly acute when one recognizes that a judge who may favor a particular result has an opportunity to use threats of sanctions or unfavorable treatment at trial—in addition to making representations as to his own view of the law and facts—to make a decision and then effectively insulate it from review by bringing about a settlement. And since judges have a personal interest in keeping their dockets under control, the incentive exists for judges to exercise their power accordingly.

Thus, a judge is different from any other third party enlisted to aid in the negotiation of a settlement. A private mediator may make substantive suggestions about how a case should be resolved, because he is not the person who will ultimately try the case. When settlement is promoted by a judge there is a link between the mediative function and the judicial function which lends coercive force to statements by the judge. The power to mediate may become the power to decide—without procedural constraint or substantive accountability.

* In their contributions to this symposium, both Professor Resnik and Professor Fiss emphasize the importance of the public nature of decision making. Fiss, 1987 U. Chi. Legal F. at 12-17 (cited in note 2); Judith Resnik, Judging Consent, 1987 U. Chi. Legal F. 43, 73.
B. The Rooster in the Henhouse, or “Don’t worry about us, we’re judges.”

Three concerns emerge out of this scenario: concern for judicial impartiality; concern that the dual role of mediator and adjudicator creates the possibility of coercion; and, finally, concern that biased judges may impose their bias by forcing settlement, thereby avoiding the safeguards provided by the judicial process. Judicial attempts to enunciate limits on the judicial role in facilitating settlement focus first on impartiality, but most proposals by the judiciary fail to account for the power inherent in the dual position of mediator and judge, and the resulting danger of procedural evasion and substantive abuse. As a result, most prescriptions for judicial conduct do not go far enough.

For example, in 1977, in a seminar for newly appointed district judges, District Judges Will, Merhige and Rubin advised the new judges to get involved in settlement as much as possible while keeping within the bounds of accepted judicial ethics. Their suggestions were all carefully stated in neutral terms. They included techniques such as: (1) supervising the parties' efforts to settle; (2) helping the parties calculate a reasonable value to assign to the case; (3) setting rigid deadlines to expedite the case; (4) moving the case to another jurisdiction to increase the incentive to settle by making litigation inconvenient; (5) having each party argue the other's side; and (6) arguing each party's case to its opponent or opponents. The judges then warned new judges to avoid any contact with the parties which might give rise to presumptions of impropriety.

Although they offered no definition of impropriety, they carefully chose techniques which operate, or at least appear to operate, with equal force against both parties. These techniques, however, present potential difficulties. When, for example, a judge argues

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7 Robert R. Merhige, Jr. and Alvin B. Rubin, The Role of the Judge in the Settlement Process 4-7 (1977). This was one of a series of seminars conducted by the Federal Judicial Center as part of its Education and Training series.

8 Even the appearance of impropriety creates problems in settlement, because it undermines the presumption of justice and fairness in the judicial process. Illustrative is the case of Aetna Life Ins. v. Lavoie, 106 S. Ct. 1580 (1986), in which the Alabama Supreme Court justice who wrote the opinion in an insurance claim case had previously filed two actions against insurance companies alleging bad faith failure to file claims. The United States Supreme Court concluded that the justice was disqualified from participation in the case on account of his "direct, personal, substantial and pecuniary" interest in the case. Id. at 1586. The decision was vacated, not because it was necessarily inaccurate, but in order to preserve the "appearance of justice." Id. at 1589.
the case of one party to the other, there is a strong possibility that these statements by the judge may be taken by the parties to reflect the judge's own thinking on the subject.

This underlines the problem with all judicial suggestions of appropriate conduct in settlement negotiations to date. The judges simply assume that they will be able to remain impartial in the face of temptation and in the absence of supervision. They assume that they are the same as any other mediators, and are therefore free to use any effective mediative techniques. Judges sometimes misconstrue the consequences of their actions.

The danger of this position is demonstrated, unwittingly, by Judge Lambros. Judge Lambros, who favors extremely active judicial intervention on behalf of settlement, expresses concern regarding judicial bias, but his suggestions are inconsistent with that concern. He strongly advocates the use of special masters or magistrates in pretrial settlement negotiations in order to avoid compromising the judge's impartiality. At the same time, he suggests that a judge should express his opinion as to the merits of a case during those negotiations. In addition, he asserts that a judge may be in a better position than the parties to assess the settlement value of the case. Settlements, Lambros argues, are not illegitimate, as long as the settlement approximates the outcome that would occur at a properly conducted trial. This is true, but Lambros provides no basis for concluding that judicial intervention will reach that result.

The risk of coerced settlement is compounded when a judge speaks to one or the other party in isolation. The dangers of this technique were demonstrated graphically in the Agent Orange case, where Judge Weinstein, working through settlement masters, achieved a settlement at least in part by conveying differing assessments of the value of the case to each of the parties. The technique led to a settlement, but one must question whether the judiciary should encourage settlements through judicial misrepresentation.

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10 Id. at 1371-73.
11 Id. at 1364.
12 Id. at 1371.
C. Towards Settlement With Process

Thus, there are strong incentives for a judge to coerce settlement, and the danger of coercion is greatest when there is a link between the mediative and adjudicative functions. When a judge states his or her opinions or is allowed to make representations about the law, the merits, or the value of a case to the parties, the likelihood increases that the judge will be able to bring his or her bias to bear against a disfavored party. Since settlement does not produce a written reasoned opinion, it is unreviewable by an appellate court. At least one principle emerges from this discussion. Any satisfactory set of principles governing judicial conduct in settlement negotiations must strive to guarantee the separation of the mediative and adjudicative functions. As a starting point, the principles should forbid any judicial representations as to the value of the case or the state of the law in any proceeding prior to trial.

II. The Focus on Objectivity at Trial

A. Development and Application of the “Objectivity at Trial” Standard

Concern about judicial bias emerging from judicial involvement in settlement negotiations and in case management has generally focused on the judge’s ability to serve as an objective decision maker at trial. Allegations of judicial bias generally arise after trial. After trial, the only question is whether the judge’s conduct during failed settlement negotiations resulted in bias at the trial itself. There is no similar review of settlements. When a judge successfully fosters a settlement, the issue of objectivity at trial is rendered moot. As a result, no equivalent standard has developed defining appropriate conduct in settlement negotiations. During

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16 As a point of comparison with the American adversary system, Professor Langbein observes that the German civil procedure system takes advantage of the mediative/administrative link, but with built-in safeguards. In the German system, the judge gathers the facts with the help and suggestions of counsel. The judge is expected to encourage settlement, and he gives his views as to the merits of the case as it proceeds. The judge’s integrity is protected and justice is preserved by the presence and input of all parties, so there are no ex parte contacts. In addition, German judges are career judges so that they are generally sufficiently concerned about their professional reputations to avoid questionable conduct. The judge in German procedure is not expected to be just an impartial adjudicator, so there is little concern that improper influence will be exerted on or by the parties or that extrajudicial information will endanger the validity of the result. John H. Langbein, The German Advantage in Civil Procedure, 52 U. Chi. L. Rev. 823 (1985).

17 Resnik, 96 Harv. L. Rev. at 376 (cited in note 1).

17 Id.
settlement negotiations, a judge is therefore required to evaluate his or her own conduct during negotiations in light of its potential effect on a hypothetical future decision—a meaningless inquiry.

1. The Focus on Information—The "Extrajudicial Source" Standard. The present standard for evaluating judicial conduct was developed in United States v. Grinnell Corporation, an antitrust case in which the judge was accused of personal bias and prejudice. Because the trial court was primarily concerned with protecting the trial process, and not settlements, the Supreme Court came to the conclusion that as long as all of the information the judge acquired during the settlement negotiation derived from "judicial sources," there was no improper judicial conduct.

In Grinnell, at the pretrial conference, defense counsel asked the judge to suggest what he thought would be appropriate relief. The judge complied, but recognizing the danger of bias, reprimanded the parties for forcing him to consider documents and relief prior to trial. The parties later challenged the judge's ability to adjudicate the case impartially on those very grounds. The reviewing court found, however, that the judge's pretrial opinions were based only on his study of the depositions and briefs, which, even prior to trial, were proper sources of information for the judge. The Supreme Court said that "the alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." The Court in Grinnell was concerned that the judge had formed an opinion about the case before trial that would affect his decisions during and after trial. However, the standard that the court applied allowed the judge to have pretrial information as long as he was not influenced by sources outside of the case which might affect his ability to reach an impartial decision. This standard does nothing to guard against the problem of judicial coercion in settlement negotiations.

2. Ex Parte Contacts—The Inadequacy of the Focus on Information. In Medical Arts Clinic P.C. v. Henry, the court dealt

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19 Id. at 583.
21 484 So. 2d 385 (Ala. 1986).
with the problem of ex parte judicial communications with counsel, emphasizing the effect of such communications on the hypothetical future decision at trial. There, the attorney for one party had “an ex parte in-chambers conversation with the trial judge regarding the terminology” of the judge’s order, as a result of which the judge reviewed and modified his decree.\(^2\)

The court, in dicta, reprimanded the attorney for engaging the judge in ex parte communications, saying:

> this Court does not approve of the manner in which the omissions or errors in the original decree were brought to the trial court’s attention. This Court cautions both bench and bar about ex parte communications involving pending litigation with the judge by attorneys for fewer than all the litigants.\(^3\)

Instead of disqualifying the judge, however, the appellate court upheld the decree, believing that even without the conference the trial judge would have discovered the error pointed out by the attorney. Again, the focus was on the judge’s ability to make an impartial decision at trial.\(^4\)

The effect of the confusion about standards of conduct in settlement negotiations can be seen clearly in *Lazofsky v. Somerset Bus Co., Inc.*\(^5\) There, plaintiff’s counsel challenged the propriety of a conference between the judge and defense counsel in the judge’s chambers without the plaintiff’s counsel being present. The reviewing court was of the opinion that the conferences were held in order to persuade defense counsel to make stronger efforts to persuade their clients to settle the case.\(^6\) The reviewing court found no evidence of any lower court bids against the plaintiff. In fact, it found the court’s conferences with the counsel for the defense to be beneficial to the plaintiff because they encouraged settlement. Since the plaintiff was not in fact injured by the judge’s conduct, the court declined to remove the judge for improper

\(^2\) Id. at 387.
\(^3\) Id. at 388.
\(^4\) In addition to the judge, an attorney who engages in ex parte communications as to the merits of a proceeding with a judge or official before whom the matter is pending, without either notification or the presence of the attorney for the opposing party, may also be subject to disciplinary action. See generally Dale R. Agthe, Disciplinary Action Against Attorney Based on Communications to Judge Respecting Merits of Cause, 22 A.L.R.4th 917 (1983).
\(^6\) Id. at 1044.
conduct.\textsuperscript{27}

By focusing on information rather than coercion, the court missed the point. The problem was not exclusively whether the judge learned anything from the party during the discussion, but whether separation of the parties provided undue opportunity for coercion. The issue was not some subtle effect on the result at trial, but the certainty of altering the substantive content of settlement.

B. Codification of the Focus on Objectivity at Trial

Federal Rule of Civil Procedure 16, Canon 3 of the Code of Judicial Conduct, and 28 U.S.C. § 455(a) each attempts to resolve the problem of judicial involvement in settlement, but all fall prey to the same shortcoming. Though concerned with impartiality at trial, they fail to solve the problem of safeguarding impartiality during the settlement negotiations themselves.

1. Rule 16. The pretrial conference has long been an occasion for judges to encourage and supervise settlement discussions.\textsuperscript{28} This role of the judge as facilitator of settlement was recently codified in the 1983 amendments to Rule 16 of the Federal Rules of Civil Procedure. Rule 16(a) lists expediting the case and facilitating settlement among the objectives of the pretrial conference. Rule 16(c) clarifies this point, suggesting discussion of “the possibility of settlement or the use of extrajudicial procedures to resolve the dispute.”\textsuperscript{29}

Prior to 1983, discussion of settlement was beyond the stated scope of the pretrial conference, although in practice many judges included facilitation of settlement within their general duties of managing their dockets. When Rule 16 was amended in 1983, the Advisory Committee on Civil Rules (“Advisory Committee”) noted

\textsuperscript{27} The court also suggested that plaintiff’s counsel had in fact consented to the conference so that no proscribed conduct had occurred. Id. A similar result was reached in Matter of Georgia Paneling Supply, Inc., 581 F.2d 520, 522 (5th Cir. 1978) (see note 40), which involved charges of collusion between a bankruptcy judge, a trustee and a lawyer. Even though ex parte contacts occurred, the court applied 28 U.S.C. § 455(a) and did not find the extrajudicial basis of prejudice or bias necessary to disqualify the judge. The court concluded that the occurrence of ex parte conferences between the bankruptcy judge, the trustee and the lawyer did not alone demonstrate collusion.

\textsuperscript{28} Resnik, 1987 U. Chi. Legal F. at 96 (cited in note 6).

\textsuperscript{29} Rule 16(a), in relevant part, lists among the objectives of the pretrial conference: “(1) expediting the disposition of the action” and “(5) facilitating the settlement of the case.” Rule 16(c) in relevant part states: “The participants at any conference under this rule may consider and take action with respect to . . . (6) the advisability of referring matters to a magistrate or master; (7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute.”
that it had become "commonplace to discuss settlement at the pre-
trial conference."\textsuperscript{30}

The Advisory Committee noted that settlement is desirable
because it eases crowded dockets, and saves time and money. The
Committee also pointed out that an advantage of including dis-
cussion of the possibility of settlement in the pretrial conference was
that it made earlier settlement more likely. Settlement would be
fostered, first by the provision of a neutral forum in which the par-
ties could meet, such as the judge's chambers, and second, by tak-
ing the burden of suggesting settlement off the parties (because
initiating settlement discussions is sometimes considered a sign of
weakness).\textsuperscript{31}

However, Rule 16 places no limits on what the judge can do.
The Advisory Committee did not voice concern that a judge would
overreach his authority. It simply assumed that judges would be
scrupulous in avoiding doubtful situations.\textsuperscript{32}

2. \textit{The Code of Judicial Conduct.} Canon 3(C) of the Code of
Judicial Conduct specifically protects impartiality at trial.\textsuperscript{33} It re-
quires a judge to disqualify himself in a proceeding where his im-
partiality might reasonably be questioned.\textsuperscript{34}

Canon 3(A)(4) of the Code comes closer to preventing coer-
cion, although the emphasis of the rule is still primarily on infor-
mation. Canon 3(A)(4) prohibits a judge from initiating or consid-
ering ex parte or other communications concerning a proceeding.\textsuperscript{35}

\textsuperscript{30} Advisory Committee Notes to Rule 16, Federal Rules of Civil Procedure (1983) (dis-
cussion of Rule 16(c)(7)).

\textsuperscript{31} Manual for Complex Litigation, Second ("MCL 2d") § 23.11 at 160 (1985). Sugges-
tion of settlement is sometimes viewed as a sign of weakness or an admission that one's side
does not expect to succeed at trial.

\textsuperscript{32} Steven Flanders, Blind Umpires—A Response to Professor Resnik, 35 Hastings L.J.

\textsuperscript{33} Canon 3(C)(1), Code of Judicial Conduct, ABA/BNA Lawyer's Manual on Profes-

\textsuperscript{34} Id. Instances where disqualification would be required are set out under Canon
3(C)(1) and include personal bias or prejudice concerning a party, personal knowledge of dis-
puted evidentiary facts concerning the proceedings, service as a lawyer in the matter, service
as a material witness in the matter, or any other direct or indirect interest or relation to the
controversy.

\textsuperscript{35} Canon 3(A)(4), Code of Judicial Conduct:
"A judge should accord to every person who is legally interested in a proceeding,
or his lawyer, full right to be heard according to law, and, except as authorized by
law, neither initiate nor consider ex parte or other communications concerning a
pending or impending proceeding. A judge, however, may obtain the advice of a
disinterested expert on the law applicable to a proceeding before him if he gives
notice to the parties of the person consulted and the substance of the advice, and
affords the parties reasonable opportunity to respond."
The judge is discouraged even from consulting disinterested third parties unless the litigants are notified and given a chance to respond.\textsuperscript{36}

This prohibition against ex parte or other communications is similar to the prohibition against obtaining information from extrajudicial sources. If all parties are present, conferences with the judge do not involve ex parte communications. Rather, they resemble extensions of the trial, because the substance of any discussion which takes place is common information, even if not part of the official record. In addition, when all interests are represented there is less chance for bias to develop.\textsuperscript{37}

3. 28 U.S.C. § 455(a). Section 455(a)\textsuperscript{38} is the statutory codification of Canon 3(C) of the Code of Judicial Conduct.\textsuperscript{39} It requires any judge to disqualify himself from any proceeding in which his impartiality might reasonably be questioned. The statute has been interpreted to allow a judge to develop an opinion about a case as long as his information does not come from extrajudicial sources.\textsuperscript{40} Information derived from participation in the normal judicial process does not constitute improper conduct.

III. TOWARDS SUBSTANTIVELY JUST SETTLEMENTS: FOCUSING ON COERCION

Alone among the guides to pretrial judicial conduct, the Manual for Complex Litigation, Second (the "Manual") shifts away from the focus on the judge's impartiality at a hypothetical future trial, and focuses on judicial conduct during settlement negotiations. Even so, in spite of its focus on judicial conduct during nego-

\textsuperscript{36} Id.

\textsuperscript{37} The prohibition of ex parte communications extends to the lawyers as well as to the judge. Canon 7 of the Code of Professional Responsibility requires that opposing counsel be present any time the case is discussed with the judge: "A lawyer may not informally discuss a case with the judge without the other lawyer's presence nor should the judge permit this." Canon 7, Code of Professional Responsibility (IICLE 1975). The judge and the attorneys together must avoid extrajudicial contacts that may affect the judge's ability to hear the case impartially.

\textsuperscript{38} 28 U.S.C. § 455(a) (1987). Section 455(a) reads: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." It incorporates the possible sources of partiality from the Code of Judicial Conduct. See note 34.


\textsuperscript{40} See Matter of Georgia Paneling Supply, Inc., 581 F.2d 520, 522 (5th Cir. 1978), vacated, 588 F.2d 93 (5th Cir. 1978), reinstated upon panel rehearing, 607 F.2d 117, 118 (5th Cir. 1979), reinstated upon rehearing, 616 F.2d 893 (5th Cir. 1980) (applying § 455(a)). See note 27.
tiation, the Manual fails to recognize the coercion inherent in cer-
tain of the techniques it recommends for encouraging settlement.

A. Manual for Complex Litigation, Second: Recognition of the
Fact of Settlement

The Manual was written to provide a guide for lawyers and
judges involved in large, complex cases, such as class actions. It
describes the role of the judge in complex litigation, and it is one
of the few sources that attempts to guard against the hazard of
coercion inherent in judicial involvement in the settlement
process.\footnote{It is interesting to note that Judges Will, Merhige and Rubin were among the writers
of the section of the Manual on the role of the court in managing complex litigation. This
explains the similarity in the techniques suggested by the Manual and those recommended
by the judges in the Seminars for Newly Appointed Judges. See note 7.}

Some of the practices outlined in the Manual are intended to
make it easier for the parties to approach the topic of settlement.
These include: (1) inquiring whether the parties have considered
settlement; (2) urging the parties to consider settlement; and
(3) bringing up the subject of settlement so that neither party is seen
as weak or unconvincing of his side of the case.\footnote{MCL 2d § 23.11 at 160 (cited in note 31). See also Judge Rubin on settlement as a
sign of weakness. Merhige and Rubin, The Role of the Judge in the Settlement Process at
18 (cited in note 7).} These practices facilitate settlement without utilizing the power inherent in the
judge's position to force settlement.\footnote{The Manual also suggests alternatives to the judge getting involved in the settlement
negotiations. It proposes that a mini-trial or summary jury trial be conducted as a method
of helping the parties reach agreement without creating the link between adjudicative and
mediative judicial functions. In a mini-trial, counsel present their cases before the parties' representatives who have settlement authority, with a neutral third party presiding as judge. Afterward, the third party mediates between the parties' representatives to assist them in
reaching a settlement. In a summary jury trial, the parties make an abbreviated presenta-
tion of their case to a jury, using witnesses if desired, but under severe time constraints. The
jurors then return a verdict which may help the parties reach a settlement. MCL 2d § 23.12
at 163. For a more complete description of summary jury trials see Lambros, 29 Vill. L. Rev.
at 1373-78 (cited in note 9).}

Unfortunately, other suggestions in the Manual demonstrate
that the drafters did not fully recognize the particular dangers of
linking mediative and adjudicative roles. These suggestions in-
clude: (1) giving an opinion of the merits of the case with all par-
ties present or notified; (2) giving an opinion as to the justness of
proposed settlement terms; (3) estimating the expected cost of trial; (4) pointing out the strengths and weaknesses of the parties’ positions; (5) suggesting areas of agreement; (6) recommending terms of settlement; and (7) meeting separately with the parties, even if all consent.\footnote{MCL 2d § 23.11 at 161 (cited in note 31).}

All of these suggestions involve the risk of coercion, and some of them, such as giving an opinion of the merits of the case or of the justness of the proposed settlement, make explicit use of a judge’s unique position in order to enhance the possibility of settlement. If, for example, the judge points out strengths and weaknesses of the case, the parties may construe the judge’s pretrial views as a forecast of how he or she will decide the case. The same problem of the parties’ adopting the judge’s views arises when the judge proposes areas of agreement or terms of settlement.\footnote{This is particularly a problem in class actions, because the judge is called upon to approve the settlement once it has been proposed. The Manual expresses concern that a judge who helps write a settlement will be unable to evaluate it impartially for fairness, reasonableness and adequacy, as required by Federal Rule 23(e). MCL 2d § 30.44 at 242. See also note 59 on Rule 23(e).} Finally, when a judge meets separately with the parties there is greater opportunity to emphasize particular views for strategic and coercive effect without the balancing presence of the opposing party.\footnote{MCL 2d § 23.14 at 166.}

In all of these circumstances, where a judge who actively seeks to settle a case succeeds in imposing his views on the parties, the resulting settlement becomes, in effect, an unreviewable decision on the merits by the judge. The judge will never be called upon to justify or even publicly articulate his or her position on the point of law.

The Manual recognizes this concern in part, specifically warning judges against the “temptation to become an advocate—either in favor of the settlement because of a desire to conclude the litigation, or against the settlement because of the responsibility to protect the rights of those not parties to the settlement.”\footnote{See Advisory Committee Notes to Rule 16 (1983) (discussion of Rule 16(a)(5)) Fed-} But this admonition is not consistently reflected in the Manual’s procedural suggestions.

B. Special Masters\footnote{See text at notes 42-44.}

A common misconception has developed that a judge can
avoid the problem of bias simply by avoiding direct personal involvement in the case. The appointment of special masters to handle pretrial matters and settlement negotiations does eliminate direct judicial influence on parties, but this technique still is not the perfect solution. Unlike the judge, a special master has the flexibility to go to the parties separately and obtain the information necessary to structure a settlement. However, the familiar risk of bias and coercion remains present where special masters influence or are influenced by the judge. In extreme instances, they may be mere puppets, such as where the judge appoints a master to implement his or her ideas about settlement rather than the ideas of the parties. In addition, the master approaches the parties in the judge's name, which may intimidate the parties and compromise their right to a result that is both socially legitimate and mutually agreeable to them.49

One case addressing special master bias was United States v. Conservation Chemical Co.,50 where the court appointed a special master to resolve a dispute over cleanup of a chemical waste disposal site. The master, rather than the judge, engaged in ex parte meetings with the parties in which the parties were encouraged to express their settlement positions candidly. The master acquired extensive off-the-record information. The reviewing court subjected the master's conduct to the same scrutiny as that of a judge, because there was a danger that the master could pass information and biases on to the judge.

The problem is not that information might have been revealed to the judge, but that the special master may have communicated

49 The risk of the parties misperceiving the authority of the master is reduced when the parties have had a hand in the selection of the master. On the other hand, sometimes the master is intended to be an agent of the judge, especially when the master's role is to provide technical information or to develop a remedy following a judgment or decree.

the judge's opinions to the parties. When a special master uses the judge's opinion to coerce the parties, it is as if the judge has done it himself.

It is important to note that the use of special masters may sometimes help alleviate the problem of coercion, but only if the judge maintains the same distance from the special master that he must maintain from the parties. As soon as the master begins to speak for the judge, or even seems to do so, the risk of coercion reappears.

Appropriate behavior by special masters is distinguishable from appropriate behavior by judges. The use of special settlement masters avoids the link between mediator and adjudicator. When the judge states an opinion it has a powerful influence on the conduct of the negotiations. This is less true when a special master states what he sees as a problem with the case, or an opinion about the law. Thus, special masters are free to say what they want and do what they want in seeking a settlement so long as they make sure that it is possible to distinguish their actions and opinions from those of the judge.

C. The Agent Orange Example

The lack of guidance provided by the "impartiality at trial" standard can be seen clearly by examining Judge Weinstein's conduct in In Re Agent Orange Product Liability Litigation. The focus of the current guidelines upon objectivity at trial allowed Judge Weinstein to state his opinion of the case, while at least by his own testimony retaining sufficient objectivity to try the case. Even taking Judge Weinstein at his word, his behavior was nothing short of outrageous. As Peter Schuck points out, from the moment that Judge Weinstein took over the case, his goal was to achieve a settlement.

Still, less than two weeks before trial, the parties were more than a quarter of a billion dollars apart. In order to resolve these differences, the judge convened a forty-eight hour non-stop negotiating session. During the course of the session, the parties were

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82 Schuck, 53 U. Chi. L. Rev. at 361-62 (cited in note 14). In open court, Judge Weinstein "denounced the 'injustices' [suffered by the Vietnam veterans]," and stated that he believed that "[t]hey and their families should receive . . . financial support." Id. at 343.
83 Id. at 360. See also text at note 58.
84 Id. at 343.
separated and the special master engaged in "shuttle diplomacy," passing offers between the parties and attempting to loosen their entrenched positions.

Throughout these negotiations, it was made clear to the parties that the special master, Kenneth Feinberg, was communicating closely with the judge and that he had the authority to speak for him. In addition, the judge appeared on several occasions to encourage settlement himself.\textsuperscript{55}

Most importantly, during the course of the negotiations the judge and the master emphasized different points to the opposing parties, in the hope of achieving agreement. For example, the judge emphasized the hopelessness of the plaintiff's case on medical causation to the plaintiffs, while emphasizing the uncertainty of outcome to the defendants.\textsuperscript{56}

Assuming that nothing the judge did would actually compromise his impartiality at trial—a trial which Judge Weinstein did everything in his power to avoid—nothing in the existing rules explicitly forbade his conduct. Yet, the settlement could hardly be described as a settlement "of the parties."\textsuperscript{57}

Judge Weinstein's conduct demonstrates clearly the problem of coercion and the fact that the current canons of ethics are insufficient to guard against such behavior. He made statements about the value of the case. He spoke through his special master. He separated the parties in order to make his statements even more coercive. In negotiating the settlement, Judge Weinstein not only did not avoid exploiting the enhanced power of his position, he exploited it to its fullest. An example can be seen in a lawyer's descriptions of the judge's statements during the negotiations:

He would say: "Now I am not going to hold it against you if you don't settle. I am not going to penalize you. I am going to conduct this trial on a fair basis to everybody,"

\textsuperscript{55} Id. at 345.

\textsuperscript{56} Id. See also In re Agent Orange Product Liability Litigation, 597 F. Supp. at 777-787.

\textsuperscript{57} The settlement was nevertheless approved by the Second Circuit. In re Agent Orange Product Liability Litigation, 818 F.2d 145 (2d Cir. 1987). It is important to note that the court recognized that although the settlement was not unfair, it was also not strictly a settlement of the parties. The amount of the settlement, $180 million, was extraordinary in light of the fact that Judge Weinstein had determined that the plaintiffs had little hope of prevailing on the causation issues. It was essentially a payment of nuisance value, accounting mostly for the attorneys' fees which the defendants would have incurred if they continued the litigation. If the plaintiffs had had any chance of succeeding at trial, the defendants' potential liability would have been huge. Thus, the fairness of the settlement depended solely on Judge Weinstein's determination that the plaintiffs' case was weak. Id. at 151.
and then came the “but” . . .

“But,” he would say, “I have carried you plaintiffs all this time. I have decided a lot of questions in your favor I could have decided the other way. And I want you to know that at nine o’clock Monday morning [when the trial was to begin] I am through carrying you. You are on your own. I will do my duty as a Judge.”

Then a little conversation would take place and then he would come back and say: “You know, remember, I just don’t think you have got a case on medical causation. I don’t think you have a case on punitive damages.”

One factor in Agent Orange relieves some of the concern regarding the lack of procedural safeguards and public decision making. The case was a class action, and therefore the settlement required judicial approval and thus became subject to judicial review. In approving the settlement, as required by Rule 23(e), Judge Weinstein articulated his reasons for doing so. In addition, numerous objectors attempted to block the settlement and have in fact subjected it to public scrutiny. The Second Circuit ultimately reviewed the settlement and determined that it was fair in spite of the method by which it was reached. Although the codes of ethi-

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89 Fed. Rule Civil Proc. 23(e) (1986): “Rule 23(e). Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.”
60 The Second Circuit found the settlement reasonable in spite of various factors such as the attorneys’ fee arrangement which could have affected the fairness of the settlement. In re Agent Orange Product Liability Litigation, 818 F.2d at 174. Interestingly, the court declined to criticize Judge Weinstein’s conduct directly, only mentioning in passing that appellants had previously attacked Weinstein’s extensive involvement in the negotiations. Nevertheles, the court’s description of the settlement process reflects the competing incentives to settle.

There is . . . great pressure to settle. Indeed, a settlement in a case such as the instant litigation, dramatically arrived at just before dawn on the day of trial after sleepless hours of bargaining, seems almost as inevitable as the sunrise. Such a settlement, however, is not likely to lead to a fund that can be distributed among the large number of class members. . . . Moreover, the ability of the district court to scrutinize the fairness of the settlement is greatly impaired where the legal and factual issues to be determined in the class action are as numerous and complex as they were under the district court’s order in the instant case. Similarly, the fashioning of a distribution plan that is both fair to the strong plaintiffs and efficient in adjudicating the large number of claims may be impossible. Only the weakness of the evidence of causation as to all plaintiffs and the strength of the military contractor defense enabled the district court to evaluate the settlement accurately and to fashion an appropriate distribution scheme in the instant matter. We regard those factors as largely coincidental and not to be expected in all toxic exposure cases.

Id. at 166.
cal conduct were not sufficient to guarantee a fair, non-coerced result, the eventual judicial review provided some protection against any substantive injustice resulting from judicial coercion. Judge Weinstein provides us with a public example of judicial coercion, but there is reason to believe that this occurs in other less public cases as well, where the size of the case does not generate such public scrutiny.

IV. THE PROPOSED SOLUTION

It is not sufficient during settlement negotiations to protect only the judge's impartiality at a hypothetical future trial, yet this is precisely the limited focus of the existing codes and statutes. The primary function of special masters and of the quasi-trials suggested by the Manual for Complex Litigation is distancing the judge from the parties in order to preserve his or her impartiality. The problem of coerced settlement is not directly addressed. However, these techniques do provide a model that can serve as a starting point for judicial conduct that provides guidance for the judge during settlement negotiations.61

The two elements which guard against judicial coercion of settlement are (1) techniques which allow the judge to facilitate settlement while maintaining his distance, and, more importantly, (2)

61 The standards of conduct for arbitrators provide an alternative method of regulating the mediative function. In arbitration, as in settlement negotiations, the arbitrator has contact with the parties, and he must not be improperly influenced by them. Unlike judges, however, there is only the award at issue—no subsequent trial. In addition, arbitrators are not appointed for life. If their conduct is unsatisfactory they may not be asked to arbitrate again. This factor is absent from judicial standards even if settlements are made subject to appellate review.

The standard of review utilized by courts examining arbitration awards is one of "undue means." "Undue means" implies that an arbitrator's decision was based on improperly obtained information or other unethical conduct such as ex parte communications. Where undue means are proved, an award may be vacated. See Crosby-Ironton Federation of Teachers, Local 1325 v. Independent School District No. 182, 285 N.W.2d 667 (Minn. 1979) (ex parte communications raise a strong presumption that the award was procured by corruption, fraud or other undue means); City of Manitowoc v. Manitowoc Police Department, 236 N.W.2d 231 (Wis. 1975) (ex parte contacts create a rebuttable presumption that the award was procured by undue means).
public scrutiny of judicial action as a safeguard of judicial impartiality. It would be impractical to require the same level of public scrutiny of settlements as is required at trial, but there are a number of ways by which public scrutiny might be encouraged without undue cost.

One way to facilitate public scrutiny of judicial conduct is creation of a written record. A court reporter should be required at every meeting where the judge is present and settlement is discussed. The hazards of ex parte communications would thereby be minimized.

A second way to facilitate public scrutiny would be to extend to all cases which settle subsequent to the pretrial conference, the requirement of Federal Rule 23(e) that a judge formally find that a settlement is fair, reasonable and adequate. Such a finding would be unnecessary where the parties settled prior to the pretrial conference, because that settlement would be a private act.

The chief goal of the judicial system is to promote just resolution of disputes. The concern that justice may be compromised by the judges to whom it is entrusted has led to principles of conduct aimed at preserving impartiality at trial. It is incumbent upon the system to protect the justness of settlements as well as the justness of judgments. By adding these procedures to the settlement process, settlement loses a measure of its speed, but procedure will ensure greater judicial accountability and hopefully provide more just results.

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