The Hidden Parameter: Spatial Dynamics and Alternative Dispute Resolution

JEFFREY S. WOLFE*

The settlement judge returned to the small conference room with both lawyers in tow. They were met with angry glares from the defendants and demands from the plaintiffs to speak privately with the judge. The two plaintiffs, former wards of the defendant, now suing their one-time Guardian over alleged misappropriation of trust assets, informed the settlement judge that while she was in another room conferring with counsel, the Guardian's son, also a named defendant, had threatened, literally, to murder them. "If I ever see you in our county again, the last thing you'll see is me standing over you with a smoking shotgun . . . ."

* * *

Twelve lawyers awaited the settlement judge. Together with two or three corporate representatives per side, no fewer than seventeen persons sat, ready for the settlement conference. The setting was a large judicial conference room, the parties and counsel arrayed about opposite sides of the table, the judge at the far end. Fifteen minutes after the judge concluded her opening remarks, it was all too apparent that the conference was destined for an interminable round of legal haggling, lawyers from both sides arguing the arcane intricacies of the contract.

In an effort to make meaningful progress, the judge asked the lead representatives from each company to join her in another room. Both representatives were senior executives, one a Vice-President and the other, President, of their respective companies. Taking them down the hall, the judge entered a small witness room, gathering the two corporate officers about her. They sat about a small table no more than three or four feet long.**

---

* Jeffrey S. Wolfe is an administrative law judge with the United States Social Security Administration Office of Hearings and Appeals. He was previously a United States Magistrate Judge for the Northern District of Oklahoma. He is currently a member of the adjunct faculty at the University of Tulsa College of Law and has previously served as Visiting Associate Professor at Texas Wesleyan University and as Lecturer at California Western School of Law.

** These descriptions are from court-ordered settlement conferences in the United States District Court for the Northern District of Oklahoma. Rule 16.1 of the Local Rules of the United States District Court for the Northern District of Oklahoma provides that conferences are confidential; hence, the names of the parties together with the case citation are omitted. However, the events depicted in these scenarios reflect actual settlement conferences held before the court. *See* N. DIST. OKLA. LOC. R. 16.1

TABLE OF CONTENTS

I. INTRODUCTION

In the first scenario, opposing parties were left in a small conference room while their lawyers and the settlement judge conversed in the judge's office. Feeling cloistered and unable to leave, the room offered no opportunity for separation between the parties. Inevitably, conflict occurred and a dramatic confrontation was barely avoided by the judge's return.

In the second scene, the formality of a large conference room was replaced by the relative intimacy of a smaller, less crowded room, enabling the judge to sit with the parties in close proximity—dispelling the formality created by a crowd of lawyers seated about a large conference table. In the more intimate, less formal setting, the judge was able to encourage a pragmatic approach to settlement.

In both cases, the characteristics of the settlement space directly contributed to the tenor of the negotiation. In the first instance, the small room produced a negative impact; whereas, an even smaller room produced a positive result in the second.

The resulting questions are evident.

- Do spatial dynamics shape interaction in a settlement conference?

More succinctly,

- do the size and shape of a room affect the manner in which litigants interact within it?

And,

- do the locations of parties, relative to one another, affect their perceptions of one another?

With the ultimate question being,

- does the physical setting within which ADR proceedings occur affect the substantive result?

Two analogous venues offer insight: the lawyer's office and the courtroom. Interviewing, counseling and negotiation often occur within the confines of the lawyer's office. Advocacy, on the other hand, achieves its pinnacle in the drama of courtroom confrontation. The dynamic interplay characterized by each encounter is the subject of increasing comment, with growing emphasis on ADR techniques as cost-effective alternatives to traditional advocacy. Each venue is examined below.

A. *The Lawyer's Office*

The arrangement of furniture and even the type of furniture used in a given space sends a message to those who use the space. As Bastress and Harbaugh note, "[t]he arrangement and appearance of your law office can affect your interpersonal relations."[1]

For the lawyer, nonverbal communication has potential to reinforce personal expression, enhance the lawyer-client relationship and subtly telegraph an image or perception by which relationships within the office are defined.[2] One of the primary channels through which nonverbal communication operates is proxemics.

Proxemics describes spacing and use of distance in interpersonal dynamics. According to noted anthropologist Edward Hall, proxemics is a manifestation of microculture and has three aspects: fixed-feature space, semifixed-feature space and informal space.[3] Fixed-feature space is defined as a material extension of territoriality and "one of the basic ways of organizing the activities of individuals and groups."[4] It refers to the spatial organization of objects within a given space.[5] In Hall's view, spatial organization is both expressive and determinative of communication and

---

[1] ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING AND NEGOTIATING 134 (1990).

[2] *See id.* at 132.

[3] *See* EDWARD T. HALL, THE HIDDEN DIMENSION 103 (1982).

[4] *Id.*

[5] *See id.*

behavior patterns occurring within the space.[6] Simply put, fixed-feature space "is the mold into which a great deal of behavior is cast."[7] The law office, like the courtroom, is a primary example of fixed-feature space, comprised of discrete elements, including the central desk and chair arrangement.

Bastress and Harbaugh pose five distinctive "chair-and-desk" arrangements for the law office, each telegraphing a different proxemic message. Figure 1 depicts what the authors describe as "the most authoritative" arrangement:

Figure 1

In this arrangement, the lawyer and client "oppose" one another across the lawyer's desk. "The desk acts as a barrier, a protective device for the lawyer."[8] Although Bastress and Harbaugh attribute "control" and "professionalism" to the desk barrier, for adversaries this arrangement communicates formalism and opposition. The subtle message is that of a "barrier between us."[9]

Figure 2 illustrates a different dynamic, placing both the lawyer and the client on the same side of the desk but still in an opposed orientation.

Figure 2

For Bastress and Harbaugh, this orientation "emphasizes openness although still permitting . . . [the lawyer] . . . to keep materials in a

[6] *See id.*

[7] *Id.* at 106.

[8] BASTRESS & HARBAUGH, *supra* note 1, at 135.

[9] *Id.*

convenient place [on the desk]."[10] However, for others this configuration may be perceived as unbalanced, creating a sense of discomfort. Able to use the desk as a convenient place to keep materials, the lawyer, having access to the desk, may be regarded as being in a more powerful position. The other person is essentially adrift, unable to anchor to the proxemic solidity of the desk. The net effect is functionally equivalent to the scenario described in Figure 1. The lawyer occupies a superior position to the other, much as if he were seated behind the desk facing a visitor, who is otherwise in unfamiliar territory.

In Figure 3, the parties remain on the same side of the desk but in co-equal relationship; each has equal access to the desk and neither assumes a "superior" position to the other by virtue of furniture placement. This arrangement is said to reduce "the interference created by the desk," while creating "a more open impression."[11]

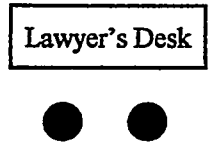


Figure 3

In Figure 4, the parties are positioned across the corner of the desk. Such positioning "reduces the interference created by the desk . . . while still providing . . . some support and convenience . . . ."[12] In this configuration, both parties share the advantage of openness, yet each retains some degree of authority, endowed by reason of the shared corner.

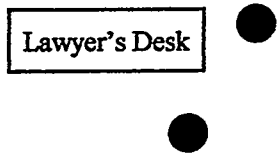


Figure 4

[10] *Id.*
[11] *Id.*
[12] *Id.*

Notably, Bastress and Harbaugh find that the "least threatening and intimidating and the most intimate" situation is "a place away from the desk."[13] Sitting around a coffee table in couch and chairs, say the authors, is "especially good for accommodating conversations among three to five people."[14] However, when in need of "additional authority or control, as in a discussion or negotiation with another lawyer," counsel may stay "at the desk."[15]

Thus, for Bastress and Harbaugh, discussion or negotiation with another lawyer implies a need for "additional authority or control." Yet, as seen, they also view the lawyer's desk, presumably the most prominent furniture in the office, as "interfering" with communication.

Bastress and Harbaugh's observations are supported to some degree by psychologist Robert Sommer's work. Examining the dynamics of small group communication, Sommer explored the effect of seating arrangements, similar to those posed by Bastress and Harbaugh.[16] He examined seating orientation about rectangular and circular tables, asking students to arrange themselves and one other person for (1) casual conversation, (2) cooperative activity and (3) competitive activity.[17] The results are noteworthy.

At rectangular tables, students chose corner-to-corner (diagonally across the corner) or face-to-face arrangements for casual conversations; side-by-side arrangements for cooperative activity; and distant, face-to-face seating when competing.[18] Sommer concluded that corner-to-corner seating emphasized both proximity and visual contact, while side-by-side seating only emphasized proximity, enabling ready exchange of physically "shared" items. Like Bastress and Harbaugh, Sommer found these two positions more conducive to communication.

Interestingly, Sommer also noted that competing pairs indicated face-to-face seating (or being physically opposed to one another) "stimulated competition," enabling eye contact but at greater than personal interaction

---

[13] *Id.* at 136.

[14] *Id.*

[15] *Id.*

[16] Sommer writes:

> Textbooks of group dynamics and applied psychology frequently allude to the idea that certain arrangements of people are more suited to certain activities than others. We decided to investigate this problem, not from the standpoint of specific practical tasks such as might occur in a work situation, but from that of certain attitudes (cooperation, competition, or separate action).

ROBERT SOMMER, PERSONAL SPACE: THE BEHAVIORAL BASIS OF DESIGN 61(1969).

[17] *See id.* at 61-64.

[18] *See id.* at 62.

distances. Placing a desk or table between opposing parties emphasized competition, or, as Bastress and Harbaugh observe, provides "additional authority or control" in negotiation.[19]

At round tables, Sommer found similar results, with one striking difference. Although rectangular tables provide for six different possible seating positions, including two that may be termed "distant," round tables only allow half as many seating arrangements. Only one such position may be termed "distant"—where the parties are diametrically opposed to one another. Round tables consequently offer greater opportunity for psychological closeness than their rectangular counterparts.[20]

Furniture arrangement or proxemics thus plays an important role in defining the character and nature of interpersonal communication within the law office. Analogous questions have long interested trial counsel in the courtroom. A brief overview of that venue is also important.

B. *The Courtroom*

Unlike the law office, the courtroom is a highly structured forensic space, whose rigid rules of procedure are mirrored in the formality of its construction. A stylized architectural layout reflects equally stylized roles of trial participants—each limited by rules as to when and how they can speak, and in some cases, how they can move. In the words of architect Allan Greenberg, "the architectural forms [of the courtroom] must be seen in terms of their symbolic content as a 'sign system through which a society tries to communicate its ideal model of a relationship between judges, prosecutors, juries and others involved in judicial proceedings.'"[21] However, the forms of the courtroom have remained largely the same through the years. "[I]t is remarkable how the old standards for courtrooms persist. The arrangement of the elements within the courtroom has been substantially unchanged for centuries."[22]

What has come to be known as the "traditional American courtroom" represents a closed system, fixing the locations of the judge, jury and witness. Only the lawyer is free to actively move through this otherwise

---

[19] *Id.* at 62-63. Sommer also found that side-by-side seating was always "the most intimate," followed by across-the-corner seating, face-to-face seating and various distant or catty-corner arrangements. *Id.* at 64.

[20] *See id.* at 63-64.

[21] Allan Greenberg, *Selecting a Courtroom Design*, 59 JUDICATURE 422, 424 (1976) (quoting ROBERT GUTMAN, PEOPLE AND BUILDINGS 229 (1972)).

[22] Dori Dressander, *Modern Courts and Ancient Courtrooms*, 50 JUDICATURE 76, 76 (1966).

fixed environment.[23] As a result, the dynamic relationship between judge, jury and witness is mediated by the advocate, who, by changing her location during trial, affects the direction and import of communication among all other courtroom actors.

This physical dynamic mirrors traditional adversarial theory. "[I]n the adversary system, lawyers are extremely active and judges relatively passive and quiet . . . ."[24] "[T]o work properly, the adversary model of justice requires the attorneys representing each side to be highly combative, and, moreover, to be evenly matched in combativeness."[25] Aggressive use of the courtroom reflects the spirit of the arena. James Jeans's earthy description captures the essence of this view of trial advocacy:

> The trial lawyer must possess a combativeness, a bellicosity which responds to the challenge of impending conflict. By some unconscious remembrance he is linked to that first stand-in-trail combatant and as his heir it is he who now grasps the cudgel to swing on behalf of his client. There must be no agonizing uncertainty, no hesitation of the thrill to the exhilaration of the coming conflict. It is not enough to merely tolerate the tooth and nail—he must yearn for it. He must relish the thwack of a well landed left hook, tingle with the thump of a rushing block. The physical crudities will not be there, but the verbal jousting, the tactical thrusts, the legal clouts will be. It's heady stuff this advocacy and you'll have to have leather balls to play the game.[26]

Indeed, "[i]t is cliché among trial lawyers that good trial work is good theater."[27] Accomplished trial lawyers recognize the inherent drama of the stage and strive to make full use of the arena into which they are thrust.

---

[23] Even the advocates are fixed when seated at counsel tables. Furthermore, traditional rules of practice before the federal court require counsel to remain at a podium, to depart only upon rare occasions during an examination.

[24] Brenda Danet & Bryna Bogoch, *Fixed Fight or Free-For-All? An Empirical Study of Combativeness in the Adversarial System of Justice*, 7 BRITISH J.L. & SOC. 36, 37 (1980).

[25] *Id.* at 41.

[26] JAMES W. JEANS, TRIAL ADVOCACY 6 (1975).

[27] Janeen Kerper, *Stanislavsky in the Courtroom*, LITIGATION, Summer 1984, at 8, 8.

> The trial advocate competes with his adversary in the role of producer-director of the courtroom drama. Just as the theater director must first know the dimensions, boundaries and limitations of the stage, and just as a World Series or Super Bowl team will arrive early to practice on the grounds of the home team, so should the advocate visit the courtroom before a trial.[28]

"All in all, every aspect of the courtroom must be examined for flaws which may impair counsel's effectiveness or present unique opportunities which he can turn to his advantage.[29]

The proxemic value of courtroom space during trial is well documented. In a recent study, the author examined "the questions [sic] whether courtroom location per se impacts jury perception of lawyer performance."[30] The results clearly demonstrated that a "lawyer's location in the courtroom affected juror perception of the lawyer's performance. Jurors consistently selected attorneys . . . closest to the jury box, over lawyers in the remaining . . . locations" as being more effective advocates.[31]

In the scientifically less rigorous venue of trial lore, it is well accepted among accomplished trial lawyers that careful use of courtroom space advances a client's cause before the jury.[32]

Figure 5 depicts the traditional American courtroom.

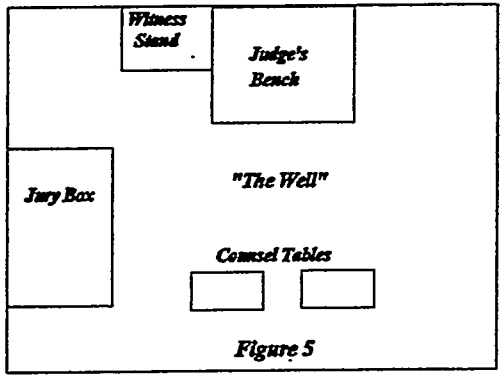


Figure 5

---

[28] Francis E. Barkman, *Make the Courtroom Your Home Ground!*, TRIAL DIPLOMACY J., Spring 1981, at 26, 26.

[29] *Id.* at 29.

[30] Jeffrey S. Wolfe, *The Effect of Location in the Courtroom on Jury Perception of Lawyer Performance*, 21 PEPP. L. REV. 731, 747 (1994).

[31] *Id.* at 770.

[32] *See, e.g.*, THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 84 (3d ed. 1992).

Positioned about a central space, judge, jury and witness look away from each other, to the center of the room. Termed the "well," this central space is the advocate's "home ground"—the territory through which he moves, balancing the intricacies of interpersonal interaction. Judge, jury and witness are dynamically "passive," occupying fixed locations about the well.

Because the advocate is the only moving actor in the courtroom, strategic use of courtroom space becomes an integral part of effective courtroom presentation. Such "use of courtroom space keys into several potent principles of human nature."[33] Givens observes: "[O]ccupying a large space rather than cleaving to a single spot will give a sense of your authority and confidence."[34]

The courtroom naturally lends itself to proxemic interpretation:

> [M]ovement gives a visually interesting presentation, strengthening jurors' attention to accompanying words. By marking the logical structure of your argument, you can enhance jurors' recall of even tedious detail. People possess a remarkable "proxemic" memory . . . . Long after details are forgotten, a speaker's physical whereabouts, directionally and proximally, can be remembered.[35]

Specifically, Givens counsels the following: "Walk toward the jury box while delivering a significant remark . . . . Show visual aids at close quarters . . . . Never let impending defeat show in stooped shoulders, lethargic tempo, palm-shrugging gestures . . . downward gazes, hands clasped behind the back, lip-compressions or sighs."[36]

Others exhort similar use of courtroom space. Barkman says of the use of courtroom space: "If counsel are free to stand and move about at will, movement of one counsel may be a studied insult to opposing counsel but so well performed, with a display of disarming innocence, that the possibility of contempt does not even occur to the judge."[37]

"A moving stimulus is . . . more effective than a static one."[38] "An attorney who moves about the courtroom will generally stand out against a background of motionless spectators, witnesses, and courtroom officials."[39]

---

[33] David B. Givens, *Posture is Power,* BARRISTER, Spring 1981, at 14, 55.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 56.

[37] Barkman, *supra* note 28, at 27.

[38] Donald E. Vinson, *Litigation: An Introduction to the Application of Behavioral Science,* 15 CONN. L. REV. 767, 777 (1983).

[39] *Id.*

Use of space in the trial setting is thus viewed as integral to effective trial advocacy.

The efficacy of spatial dynamics within the settlement venue, like that in the courtroom, is directly related to the nature of the undertaking. Like adversarial dispute resolution, the settlement dynamic depends wholly on human interaction. The nature of that interaction, however, differs significantly from that of the traditional adversarial encounter, as discussed below.

C. *The Nature of Settlement*

Although ADR concepts are birthed of a desire to avoid the risks and ultimate costs of advocacy, the two approaches to dispute resolution are fundamentally different.[40] The question becomes, whether, notwithstanding fundamental differences, principles of spatial dynamics and interpersonal relationships yet apply.

Adversarial theory dictates the relative roles of the actors in trial. The jury and judge are neutral passive participants.[41] Each is called upon to weigh the evidence and, respectively, render findings of fact and conclusions of law. The parties and their advocates, and to a lesser extent, the witnesses, are dedicated active participants.[42] Each seeks to win—to triumph over the other. Anglo-American jurisprudence dictates that a neutral and passive third party, unrelated to the contestants, determines the

---

[40] "Many judges, practitioners, and commentators have assailed the gamesmanship, harassment, overdiscovery, evasion, delay and spiralling costs that currently afflict the pretrial process." Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 15 n.49 (1984).

[41] *See* Danet & Bogoch, *supra* note 24, at 37.

[42] *See* Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 714–715 (1983). Landsman notes that in the adversarial system of justice, "the parties are responsible for production of all the evidence upon which the decision will be based." *Id.* at 715. He further observes that:

> This principle insulates the fact finder from involvement in the contest. It also encourages the adversaries to find and present their most persuasive evidence and, therefore, affords the decision maker the advantage of seeing what each litigant believes to be his most consequential proof. Moreover, it focuses the litigation upon the questions of greatest importance to the parties, thereby increasing the likelihood of a decision tailored to their needs.

Id.

outcome of the dispute.[43]

Adversarial theory may be summarized in the simple expression: Out of a sharp clash of proofs, the truth will fall. The express object of trial is to persuade the judge or jury, enabling victory over the opposing party. However, persuasion is integrally a product of both verbal and nonverbal communication.[44] The stylized structure of the courtroom lends itself to such performances.[45] Nonverbal communication is inherently effective in a system in which the recipient, or the audience—here the jury—is passive.

It is no less effective if both parties are active, as in the settlement venue.

In contrast to trial, the form of the settlement conference is free-flowing, occurring within a variety of spaces. Unlike trial, a settlement conference is a private form of dispute resolution, potentially having public consequences.[46] Unlike trial, the outward form of the undertaking is not so important in terms of demonstrating societal values, as is the ultimate outcome—nonadversarial resolution of a contested matter.

The threatening son and the agonizing plaintiff, illustrated in the foregoing examples,[47] demonstrate a fundamental difference between the formality of trial and the informality of an ADR undertaking in the form of a "settlement conference."

---

[43] *See id.*

[44] *See* Stephen H. Peskin, *Non-Verbal Communication in the Courtroom*, TRIAL DIPL. J., Spring 1980, at 8, 8. Peskin observes that "over 60% of the impact or meaning of a communicated message resides in the non-verbal behavior accompanying the oral message." *Id.*

[45] As Landsman noted:

> Elaborate sets of rules to govern the pretrial and post-trial periods . . . the trial itself . . . and the behavior of counsel . . . are all important to the adversary system. Rules of procedure produce a climatic confrontation between the parties in a single trial session or set of trial sessions. This confrontation yields the evidence upon which the decision will be based and diminishes the opportunity for the fact finder to undertake a potentially biasing independent investigation.

Landsman, *supra* note 42, at 716.

[46] "Private" in this context means occurring in a nonpublic forum. Such conferences may be court-sponsored (so-called "court-annexed ADR"), involving sitting judges or may be arranged by the parties without court sponsorship.

[47] *See supra* note ** and accompanying text.

Adversarial trial, by reason of its public formality, offers a limited set of outcomes—one party wins and one loses. The public system of Anglo-American adversarial dispute resolution provides a methodology for peaceful resolution of both societal and individual disputes, absent which anarchy prevails. Outcomes are generally predictable, as are the processes. In the adversarial setting, the dispute is resolved by a neutral decisionmaker "presented with a clear opposition of viewpoints that dramatizes the act of choosing."[48]

However, in a settlement conference it is the parties, themselves biased actors, not a neutral judge or jury, who decide the outcome. Unlike in trial, the only limitation on dispute resolution is the parties' imagination. Virtually anything within the bounds of legality may be offered and agreed upon in resolution of a dispute.

Herein lies a fundamental distinction regarding' "spatial dynamics." Although the forms of trial are mirrored in the formalities of the highly structured forensic setting of the courtroom, the question becomes whether the informalities of the settlement conference are mirrored in the lack of formal spaces. Should ADR undertakings be conducted in dedicated facilities, designed, like courtrooms, for the specific purposes of settlement? Or, is the space within which ADR endeavors occur to be viewed in an entirely different light, driven by (or ignored as a result of) the fundamental differences between ADR and trial?

To better understand the import of nonverbal communication in the settlement venue, a brief overview of the various types of alternative dispute resolution mechanisms is important.

As both the cost of litigation and the number of pending cases have increased, the courts, Congress and others concerned with the integrity and effectiveness of the judicial system have striven to find alternatives to traditional means of adversarial dispute resolution.

Recent amendments to the Federal Rules of Civil Procedure specifically reference alternative means for resolving pending litigation. Rule 16 provides, in part: "At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to . . . *such other matters as may facilitate the just, speedy, and inexpensive disposition of the action.*"[49]

Local court rules have been implemented throughout the ninety-four federal district courts, embracing alternative dispute resolution procedures.[50] Even the circuit courts of appeal have adopted rules for

---

[48] John Thibaut et al., *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386, 400 (1972).

[49] FED. R. CIV. P. 16 (emphasis added).

[50] *See, e.g.*, N. DIST. OKLA. LOC. R. 16.3 (providing in part that "the court may, in its

disposition of cases by alternative means.[51] In an effort to promote experimentation, the Federal Rules of Civil Procedure do not identify a singular means of alternative dispute resolution. Instead, a variety of means have arisen, including settlement conferences, arbitration (both binding and nonbinding), mediation and hybrid forms of each procedure. These include the mini-trial, the summary jury trial and the executive summary jury trial.[52]

These variations represent a fundamental difference between two distinct paradigms. In one, resolution is achieved by adjudicatory means. The parties agree to be bound by a form of adjudication effectively abbreviated in format from full trial presentation. Parties who participate in a summary jury trial, mini-trial, executive summary jury trial or arbitration agree to allow a disinterested ("neutral") third party to render a decision resolving their dispute. Such procedures vary little in ultimate effect from traditional adversarial decisionmaking. The primary difference lies in the means by which the final decision is reached; the attraction is that these proceedings are less time-consuming and less costly than traditional

---

discretion set any civil case for summary jury trial, mini-trial, executive summary jury trial . . . mediation, arbitration, or other method of alternative dispute resolution as the court may deem proper, so long as due process is not abrogated or impaired").

[51] *See* 10TH CIR. R. 33.1; 10TH CIR. R. 33.2. Rule 33.1 provides for a court conference in all "appropriate civil cases." The Rule allows counsel to request a conference for purposes including "discussion of the possibility of settlement." 10TH CIR. R. 33.1. Rule 33.2 requires parties to conduct a settlement conference "in all civil appeals that do no seek relief from criminal convictions, unless one or more parties is proceeding pro se." 10TH CIR. R. 33.2.

[52] The summary jury trial and the executive summary jury trial are undertaken as binding or nonbinding. If binding, the parties agree in advance to be bound by the decision of a jury, selected to hear their case in much the same fashion as a jury would in a "full-scale" trial. However, in these proceedings the lawyers present the majority of the evidence to the jury in "summary format." Variations on the procedure allow each side to present one or two key witnesses with strict time limits for direct and cross-examination. The thrust of such proceedings is economic. By narrowing the issues before the undertaking, litigation expense is limited. Expeditious presentation of a majority of the evidence to the jury by counsel in summary format significantly reduces the actual number of trial days, depending upon the nature of the case. In the executive summary jury trial, the chief executive officers of the respective disputing corporations assume the bench, donning black robes, sitting alongside the judge. This enables the respective CEOs to capture, in effect, the judicial perspective. In nonbinding formats, the summary jury trial culminates *not* with the jury's verdict; it is followed by a mediation or settlement conference in which the jury's verdict is used as leverage to move the parties towards resolution in an otherwise evaluative format. In effect, the nonbinding summary jury trial couples adjudicative and evaluative mediation procedures in an attempt to fuse the best of both paradigms.

litigation. The parties and the court benefit by savings in time and expense.

The summary jury trial, mini-trial, executive summary jury trial and arbitration are, in a real sense, foreshortened versions of the traditional method of adversarial dispute resolution. A neutral third party, separate and distinct from the disputing parties, renders a final decision, resolving the dispute apart from any agreement of the parties.[53] The outcome of the dispute, if the parties concur, remains in the hands of a third party.

In nonadjudicatory evaluative or facilitative procedures, a third party is not called upon to reach a final decision resolving the dispute. Rather, the third party acts as facilitator, bringing the parties to agreement—effectively allowing the disputants to resolve the controversy themselves.[54]

The settlement conference (or other similar mediation alternative) is the recognized form of such proceedings. Although the methodology for conducting settlement conferences varies, the essential thrust remains the same—bringing the parties to an agreed resolution of the dispute, as opposed to one imposed from without.[55]

It is here, in the midst of evaluative or facilitative proceedings, that nonverbal factors have their greatest impact. Unlike adjudicatory dispute resolution mechanisms, these proceedings focus on the parties as decisionmakers. A unique interpersonal dynamic is thus created. Both parties must achieve compromise or fail.[56] To succeed, opposing parties must forsake the goal of "winning." In a system in which success is dependent upon agreed resolution, neither party will agree to give the other a win akin to that which might have otherwise been achieved at trial. The parameters of the undertaking are thus fundamentally distinct from adversarial dispute resolution.

---

[53] Adversarial theory dictates that the decisionmaker be both neutral and passive with respect to the parties and the presentation of the case. In certain adjudicative procedures, the third party, although remaining neutral, becomes, in some cases, more active than in the traditional trial setting. This is particularly the case when adjudicative and evaluative procedures are coupled together as in a nonbinding summary jury trial.

[54] As in adjudicative proceedings, the third party remains ultimately neutral with regard to the parties but is more likely to be an active participant.

[55] Once a settlement agreement is reached, it becomes enforceable, either by filing a motion to enforce settlement in the case, or, in some jurisdictions, by the filing of an entirely new suit.

[56] It is assumed for purposes of this Article that resolution of the dispute is the result desired by both parties, within an acceptable range of potential outcomes. Unfortunately, the dispute resolution process has sometimes been utilized by litigants as a means of imposing additional costs, harassment or achieving impermissible discovery with no real intention of "settling."

In so proceeding, persuasive presentations must focus on mutuality of success rather than unilateral victory. Persuading your opponent is, however, a much different proposition than persuading a neutral disinterested decisionmaker. Application of these concepts within the trial or settlement venue requires an understanding of the difference between communications in the two settings.

In the adversarial setting, each party competes to persuade a disinterested third party of the justifiability of its cause. Each party attempts to present itself as credible, while discrediting the other party.[57] In its most fundamental form, the decisionmaker is led to conclude that one party is believable, while the other is not.[58]

The central precept of the adversarial process is that out of a sharp clash of proofs, presented by adversaries in a highly structured forensic setting, is most likely to come the information from which a neutral and passive decisionmaker can resolve a litigated dispute in a manner acceptable to both parties and to society.[59] More simply, "a neutral and passive decisionmaker can resolve a litigated dispute in a manner . . . acceptable both to the parties and to society."[60] For the advocate, adversarial communication is intended to persuade the neutral decisionmaker of the efficacy of his client's case with attendant negative effects for his opponent. In an evaluative setting, such as a settlement conference, a sharp clash appropriate to an adversarial encounter produces far different consequences. Rather than perceived as persuasive, a clash, unless neutralized by the settlement judge, will likely terminate the settlement process.

Although persuasive communication in an adversarial setting requires destruction of an opponent's credibility, precisely the opposite must occur in the ADR venue. Instead of destroying an opponent's credibility, each disputant must be convinced that the other party is sincere and is seeking a peaceful or nonadversarial resolution.

Credibility is a primary issue in the evaluative process. Unlike the adversarial process, the parties must convince one another of their mutual credibility. Persuading the settlement judge is a secondary function, necessary only to achieve the primary goal of convincing the opposing

---

[57] *See* Elizabeth LeVan, *Nonverbal Communication in the Courtroom: Attorney Beware*, L. & PSYCH. REV., Spring 1984, at 83, 83. "The attorney's purpose in a jury trial is to persuade the jury to find in favor of her client." *Id.*

[58] For example, cross-examination has as one of its primary purposes, impeachment. To successfully impeach an opponent's witness is to increase the examiner's likelihood of victory, depending upon the nature of the case and the importance of the witness. Similarly, corroborating a witness's testimony enhances credibility, also increasing likelihood of victory.

[59] *See* Landsman, *supra* note 42, at 713-714.

[60] *Id.*

party. Thus, each party engages in a carefully orchestrated dance of mutual persuasion, at once threatening the risk of continued litigation, while simultaneously proclaiming genuine commitment to nonadversarial resolution.

It is here that the settlement judge or mediator plays her greatest role. Maintaining the balance of persuasion between the competing outcomes of likelihood of continued litigation and likelihood of settlement is a delicate process of interpersonal communication. Although the settlement judge is able to affect perceptions and facilitate communication, it is the parties who must ultimately be convinced of one another's ability to reach an accord capable of being honored in its effectuation. Persuasion, and more particularly persuasive communication, becomes a key factor in the settlement process.

II. PERSUASIVE COMMUNICATION

That communication can be persuasive in its effect is well understood. Not so clear are the means by which communication is persuasive. Understanding the mechanisms of persuasion is particularly cogent in the settlement venue, in which processes and undertakings are far less structured than that of trial.

Persuasive communication is necessarily influenced by a variety of factors, not the least of which are nonverbal. Nonverbal communication embraces a spectrum of behaviors, including facial expressions, physical gestures, kinesics, proxemics, touch, smell and paralanguage.[61] Kinesics describes body movement; proxemics refers to spatial relationships, together with orientation within space; while paralanguage describes vocal variations in pitch, speech rate and loudness.[62]

Linz and Penrod examined the question of why one person is more persuasive than another even though their appeals are nearly identical and determined:

> Many variables have been found to be associated with a person's persuasive impact. Most important among these are: credibility, attractiveness and power. People who are perceived to be highly credible, personally attractive, or who are in a powerful position are usually more persuasive when they deliver a message than those lacking these characteristics.[63]

---

[61] *See* LeVan, *supra* note 57, at 83.

[62] *See id.*

[63] Daniel G. Linz & Steven Penrod, *Increasing Attorney Persuasiveness in the Courtroom*, L. & PSYCH. REV., Spring 1984, at 1, 29.

Other studies are confirmatory. In a study testing the persuasive effect, if any, of nonverbal body language, researchers videotaped an actor discussing evidence of a mock case using "confident" body language, "doubtful" body language and "neutral" body language.[64] The tapes were then shown to jurors as part of a mock trial exercise and jurors were then asked to complete verdict forms setting forth the extent of their agreement with the speaker.[65] The results demonstrated that agreement was significantly related to the confidence expressed in body language.[66] Confident posturing was found to have the highest level of agreement.[67]

Similar undertakings have produced like results. Woodall and Burgoon examined the effect of two types of verbal messages on the recipients: messages synchronized with body gestures and those not synchronized. They found that highly synchronized verbal messages combined with kinesic cues are more persuasive than verbal messages dissynchronized with kinesic cues.[68] The results also showed that the source was less credible when using dissynchronized message cues than when using cues synchronized with message content.[69]

Research also suggests that greater reliance is placed upon nonverbal communication than verbal content when making judgments in certain situations.[70] In a reported study, Mehrabian and Wiener examined inconsistent communication of a person's attitude as conveyed through both verbal content and voice tone. When the attitude conveyed in voice tone and verbal content conflicted, the observer had a tendency to rely on the voice tone, not content, as the true indicator of the subject's attitude.[71]

Importantly, Mehrabian and Wiener concluded that reliance on voice tone occurred only when the voice tone was negative at the same time the verbal content was positive.[72] In a corroborating study, Domangue examined verbal-nonverbal inconsistency where female students, each acting

---

[64] *See* Lawrence J. Leigh, *A Theory of Jury Trial Advocacy*, UTAH L. REV. 763, 796 (1984) (citing Catha Maslow et al., *Persuasiveness of Confidence Expressed via Language and Body Language*, 10 BRIT. J. CLINICAL PSYCHOL. 234, 235-238 (1971)).

[65] *See id.*

[66] *See id.*

[67] *See id.*

[68] *See* LeVan, *supra* note 57, at 95 (citing W. Gill Woodall & Judee K. Burgoon, *The Effects of Nonverbal Synchrony on Message Comprehension and Persuasiveness*, 5 J. NONVERBAL BEHAV. 207, 219-221 (1981)).

[69] *See id.*

[70] *See id.* at 97.

[71] *See id.* at 97-98 (citing Albert Mehrabian & Morton Wiener, *Decoding of Inconsistent Communications*, 65 J. PERSONALITY & SOC. PSYCHOL. 108, 110 (1967)).

[72] *See id.*

as interviewers of a confederate, made judgments of the confederate's attitude based on the confederate's verbal and nonverbal responses.[73] The students inferred the confederate's attitude from her nonverbal behavior more than from her verbal message only when the verbal message given was positive and the nonverbal behavior was negative (indicated by a backward lean, poor eye contact and few head nods).[74] Domangue concluded "that these results mean that negative communications are more dominant than positive communications."[75]

Studies concerned with proxemics, or "the personal and cultural spatial needs of man, and his interaction with his environing space,"[76] have identified distance and orientation in space as significant nonverbal factors affecting persuasion. Does physical orientation in a given space, like voice tone, affect perception of credibility, such that a disputing party's credibility may be enhanced or impugned by virtue of his location and orientation in relation to her opponent, notwithstanding content of a spoken message?

Is a party less credible when her words fail to comport with the hidden message conveyed by her physical location in relation to the opposing party? Social science research suggests that such an effect is not only possible but likely.

A. *Distance as a Significant Nonverbal Factor*

Anthropologist Edward Hall's work, examining the effect of space on human interaction, is seminal. Hall described man as "surrounded by a series of expanding and constricting fields which provide information of many kinds."[77] Each field or zone is linked with communication behaviors, some of which are acceptable within the zone while others are not.[78]

Hall identified four zones, each with a near and far phase: intimate distance, personal distance, social distance and public distance.[79] Each distance carries with it differing social and personal attributes within which communication occurs. Intimate distance measures from six to eighteen inches and is the distance at which the presence of another is unmistakable,

---

[73] *See id.* at 98 (citing Barbara B. Domangue, *Decoding Effects of Cognitive Complexity, Tolerance of Ambiguity, and Verbal-Nonverbal Inconsistency*, 46 J. PERSONALITY & SOC. PSYCHOL. 519, 522 (1978)).

[74] *See id.*

[75] LeVan, *supra* note 57, at 98.

[76] Peskin, *supra* note 44, at 8.

[77] HALL, *supra* note 3, at 115.

[78] *See id.*

[79] *See id.*

often overwhelming as a result of greatly increased sensory input.[80] Within this distance, vocalization plays a minor role, if any, with both persons keenly aware of either physical contact or the heightened potential for such contact.[81]

Personal distance is described as a protective bubble, circumscribing a zone of close communication, identified by a point "just outside easy touching distance."[82] This distance describes the outer limit of physical domination. Fine details of skin, hair and clothing are apparent, but the zone remains one of limited permission. As Hall noted, a spouse can stay within a mate's personal zone with impunity, but for another to do so is an entirely different matter.[83]

Social distance is that distance at which "impersonal business occurs."[84] It is the common distance for persons attending a casual social gathering and is the frequent distance used during normal work routine.[85]

Public distance, in its close phase, is between twelve and twenty-five feet.[86] Public speakers at this distance are "formal" and adopt a prescribed style of presentation, carefully choosing their words and phrasing sentences.[87] In its far phase, public distance measures from twenty-five feet onward. At this distance, Hall observes that "[m]ost actors know that . . . the subtle shades of meaning conveyed by the normal voice are lost as are details of facial expression and movement."[88]

Hall's research demonstrates that the business of both the courtroom and the settlement conference generally takes place at social distances. Communication at less than social distance is likely to engender an adverse reaction with similar results at greater distances.[89]

Credibility, and derivatively, persuasion, is a function of perception, ultimately dependent upon communication. Hall implied, as a result of his research, that acceptance of influence, or persuasion, is curvilinearly related to distance. Simply stated, distance affects perception, which affects influence. The existence of differing spatial zones, each delineating discrete

---

[80] *See id.* at 116.

[81] *See id.*

[82] *Id.* at 120. Hall described this distance as from one-and-a-half to two-and-a-half feet in the near phase and from two-and-a-half feet to four feet in the far phase. *See id.*

[83] *See id.*

[84] *Id.* at 122.

[85] *See id.*

[86] *See id.* at 123.

[87] *See id.* at 124.

[88] *Id.* at 125.

[89] At lesser distances the recipient is likely to be offended; whereas at greater distances, the speaker is less persuasive. In both cases, credibility is at issue.

communication behaviors, creates the potential for a blend of interactions among ADR participants with attendant positive and negative outcomes.

Specifically, the ability to engage one another at varying distances is, in part, dependent upon the physical configuration of the space within which interaction occurs.[90] Participants at opposite ends of a football field view one another differently than persons squeezed together in a four-by-five foot cubbyhole. The resultant interpersonal dynamics are obvious. It is easy to ignore someone at the opposite end of a football field; it is virtually impossible to ignore that same person in a cramped cubicle.

The significance of spacing and distance is further demonstrated in studies undertaken by Robert Kleck at Dartmouth College. Kleck hypothesized that at highly proximate interaction distances, statements of opinion made by one member of a dyad (twosome) are more likely to elicit nonverbal indicators of agreement than when similar statements of opinion are made at less proximate interaction distances.[91] After videotaping interactions at selected near and far distances, Kleck found that the mean incidence of head-nodding for the near distance was more than twice that for the far—13.4 versus 6.6—a result clearly corroborative of the original hypothesis.[92]

The more proximate the source of the compliance pressure, the more likely it is that the person who is the object of the pressure will conform to it.[93] Kleck thus argued "that the extent to which the behaviour of another is affected by us is inversely proportional to the distance, both physical and psychological, which separates us from that person."[94]

Albert and Dabbs refined Kleck's findings, testing Hall's hypothesis that

> [c]ertain spatial zones are appropriate for certain kinds of communication, and placement of a communicator outside of the appropriate spatial zone will lower his effectiveness through such processes as *distraction* from the content of the message itself, the *arousal of defensive reactions*, the attribution of manipulative intent to the speaker, or the listener's *inference that the speaker is treating him in a negative manner* ranging from discontent to disdainful avoidance.[95]

---

[90] *See* SOMMER, *supra* note 16, at 61.

[91] *See* Robert E. Kleck, *Interaction Distance and Non-verbal Agreeing Responses*, 9 BRITISH J. SOC. & CLINICAL PSYCHOL. 180 (1970).

[92] *See id.* at 181.

[93] *See id.* at 180.

[94] *Id.*

[95] Stuart Albert & James M. Dabbs, Jr., *Physical Distance and Persuasion*, 15 J.

To test the hypothesis of a curvilinear relationship between distance and persuasion, Albert and Dabbs selected three distances: a close distance (from one to two feet); a middle distance (from four to five feet); and a far distance (measuring from fourteen to fifteen feet).[96] At each distance they presented a group of listeners with either friendly or hostile speakers, communicating two to five minute statements.[97] In analyzing the results of their study, Albert and Dabbs found evidence of Hall's spatial zones, observing that attention to message content was greatest at the medium distance and that attention was directed away from the message content toward the physical appearance of the speaker at near and far distances.[98]

Specifically, Albert and Dabbs found that experimenters, who went through the procedure as subjects, experienced interaction at progressively closer distances to be "disquieting."[99] As distance decreased, the subjects reported that the speaker appeared to focus his attention more intently upon the listener and gave the impression of trying to influence him.[100] Consequently, they reported that it was difficult to relax, finding it necessary to observe the "social amenities of paying attention, reciprocating eye contact, and in general avoiding unnecessary movement."[101]

The implications for persuasive communication are clear. Studies examining perception of friendliness related to distance have concluded that increasing distance produces ratings of less acquaintance, less friendliness and, correspondingly, less communication, while decreasing distance has the opposite effect.[102]

In a similar study of significance in the ADR venue, Howard Rosenfeld attempted to isolate nonverbal behavior in interpersonal reactions, again demonstrating the effect of distance in communication. He posed two distinct conditions, asking students to enter a room and demonstrate to a person already seated therein that they were either friendly or unfriendly.[103] The experiment clearly established that distance was a critical factor in communicating nonverbally whether one was friendly or unfriendly.[104] The

---

PERSONALITY & SOC. PSYCHOL. 265 (1970) (emphasis added).

[96] *See id.* at 266.

[97] *See id.*

[98] *See id.* at 269.

[99] *See id.*

[100] *See id.*

[101] *Id.*

[102] *See* Nancy Russo, *Connotation of Seating Arrangements*, 2 CORNELL J. SOC. REL. 37-44 (1967).

[103] *See* Howard M. Rosenfeld, *Effect of Approval-Seeking Indication on Interpersonal Proximity*, 17 PSYCHOL. REP. 120, 120-121 (1965).

[104] *See id.*

average distance between the student decoy and the subject in the approval-seeking (friendly) condition was fifty-seven (57) inches, as contrasted with an average distance of ninety-four (94) inches in the avoidance (unfriendly) condition.[105]

B. *Orientation in Space as Significant Nonverbal Factor*

As important as distance, the parties' orientation with respect to one another is yet another dynamic nonverbal variable affecting settlement. Like distance, orientation is a direct function of the physical limitations imposed by the setting within which settlement processes occur. Sitting back-to-back or facing one another dramatically affects communication.

Orientation in space is fundamental to all communication. Hall noted:

> Man's feeling about being properly oriented in space runs deep. Such knowledge is ultimately linked to survival and sanity. To be disoriented in space is to be psychotic. The difference between acting with reflex speed and having to stop to think in an emergency may mean the difference between life and death—a rule which applies equally to the driver negotiating freeway traffic and the rodent dodging predators.[106]

The manner in which a given space is occupied is an expression of territoriality, the space effectively marked by the physical, or "fixed" features defining its parameters.[107] Fixed or permanent features establish orientation, such that movement, distance and direction adapt to existing structures. It is axiomatic that variation of fixed features within a given space affects behavior.[108] In the courtroom, placement of the bench, jury box, witness stand and counsel tables affects both the pattern and flow of adversarial communication.[109]

The location of all participants in a courtroom is described by both the distance separating them as well as their orientation to or from one another. Fixed locations, such as the jury box, witness stand and bench, are touchstones about which the focus of communication ebbs and flows.[110]

---

[105] *See id.*

[106] HALL, *supra* note 3, at 105.

[107] *See id.* at 103.

[108] *See id.*

[109] *See* Jeffrey S. Wolfe, *Toward a Unified Theory of Courtroom Design Criteria: The Effect of Courtroom Design on Adversarial Interaction*, 18 AM. J. TRIAL ADVOC. 593, 630–631 (1995).

[110] *See* Jeffrey S. Wolfe, *Courtroom Choreography: Systematic Use of the Courtroom*, 8

In a study designed to test the question of whether attorney location affects jury perception of the advocate's effectiveness, results showed the existence of a hierarchy of preferred locations in the courtroom dependent upon the physical configuration of the courtroom itself.[111] These same variables affect the settlement conference.

Notable is Robert Sommer's work. Sommer demonstrated that orientation of objects within a given space changes behavior.[112] Confronted with the problem of decreasing social interaction among patients in a geriatric ward, he discovered that the longer patients remained, the less they seemed to talk with one another.[113] Establishing a baseline for communication, Sommer diagrammed interpersonal interaction dependent upon furniture arrangement. He noted that the number of conversations across a corner (persons seated at right angles to one another) were double that when persons were seated side-by-side, which were three times the number of conversations taking place between persons seated across the table.[114]

Adding small tables and rearranging chairs yielded dramatic results. Allowing the patients to "personalize" the tables enabled them to "territorialize" the space.[115] The number of conversations doubled and reading tripled.[116]

For Hall, Sommer's work demonstrated a fundamental principle of human spatial dynamics. He described certain space as "sociofugal" while others were "sociopetal." Sociofugal space tends to keep people apart, while sociopetal spaces act to bring people together. Hall said:

> [S]ociofugal space is not necessarily bad, nor is sociopetal space universally good. What is desirable is flexibility and congruence between design and function . . . . The main point of . . . [Sommer's] . . . experiment . . . is its demonstration that the structuring of semi-fixed features can have a profound effect on behavior and that this effect is measurable.[117]

TRIAL DIPL. J. 28 (1985).

[111] *See* Wolfe, supra note 109, at 593.

[112] *See* Robert Sommer & Hugo Ross, *Social Interaction on a Geriatrics Ward*, 4 INT'L J. SOC. PSYCHIATRY 128 (1958).

[113] The problem was not one related to a poor physical facility. Sommer observes: *"The ward was a newly built 'model' female geriatrics ward. Everything was new and shiny, neat and clean. There was enough space, and the colors were cheerful." Id.*

[114] *See* HALL, *supra* note 3, at 109 (discussing Sommer & Ross).

[115] *See id.* at 110; *see also* Sommer & Ross, *supra* note 112, at 128-130.

[116] *See* HALL, *supra* note 3, at 110.

[117] *Id.*

Just as it is possible to devise sociopetal space that brings people together, so it is possible to devise sociopetal space conducive to persuasive interaction in settlement. The problem, of course, lies in defining sociofugal or sociopetal space within the context of settlement or nonadversarial dispute resolution. Sommer's later work is again instructive.

When examining the dynamics of the closed system represented by a settlement conference one is immediately drawn to the fact that settlement conferences most often take place within a small room or office, functionally far smaller than the traditional courtroom. Sommer describes the range of behaviors within this setting as part of a "small group ecology."[118] A group is defined as a "face-to-face aggregation of individuals who have some shared common purpose for being together."[119]

In examining the dynamics of small group communication, Sommer embraced experimental conditions akin to those under which the settlement conference occurs.[120] He examined seating orientation about rectangular and circular tables, asking students to arrange themselves and one other person for (1) casual conversation, (2) cooperative activity and (3) competitive activity.[121]

The results are significant.

At rectangular tables, students chose corner-to-corner (diagonally across the corner) or face-to-face arrangements for casual conversations, side-by-side arrangements for cooperative activity and distant face-to-face seating when competing.[122] Corner-to-corner seating emphasizes both proximity and visual contact; while side-by-side seating emphasizes proximity, enabling ready exchange of physically "shared" items. Interestingly, "competing" pairs indicated that face-to-face seating "stimulated competition," enabling eye contact but at greater than personal interaction distances.

Important to the settlement conference, Sommer found that side-by-side seating was always "the most intimate," followed by corner seating, face-

---

[118] SOMMER, *supra* note 16, at 58.

[119] *Id.*

[120] Sommer notes:

> Textbooks of group dynamics and applied psychology frequently allude to the idea that certain arrangements of people are more suited to certain activities than others. We decided to investigate this problem, not from the standpoint of specific practical tasks such as might occur in a work situation, but from that of certain attitudes (cooperation, competition, or separate action).

Id. at 61.

[121] *See id.* at 61–62.

[122] *See id.* at 62.

to-face seating and various distant or catty-corner arrangements.[123] Furniture arrangement becomes, often by default, the operative parameter that defines interpersonal interaction in settlement. The question becomes, whether settlement space should be structured so as to facilitate specific seating arrangements at set distances, in pre-determined orientations, much like a courtroom.

The physical setting within which settlement occurs, and more importantly the creation of spatial parameters that define interpersonal distance and orientation, directly affect the settlement undertaking. Although "behavior is neither totally determined by the physical environment nor does it exist without reference to its spatial context,"[124] it is equally clear that "the physical setting can support some behaviors and discourage others."[125] The key lies in designing space suited for the task undertaken or at the least, to be cognizant of the limitations on interpersonal dynamics imposed by reason of the venue within which it takes place. Overview of the settlement venue itself is important.

III. THE SETTLEMENT VENUE

Unlike the courtroom, the settlement venue is often a conference room, office or even a jury deliberation room. Allocation of space dedicated exclusively to ADR or settlement procedures is rare. Settlement conferences most often take place in a variety of physical locations, in what might otherwise be termed "multi-use" space. Multi-use space portends functionality at minimal levels for multiple activities. In plain terms, settlement conferences often occur in spaces designed for other uses, with little regard for the dynamics of nonadversarial persuasive interaction.[126]

---

[123] *See id.* at 64.

[124] DESIGNING FOR HUMAN BEHAVIOR: ARCHITECTURE AND THE BEHAVIORAL SCIENCES 93 (John Lang et al. eds., 1974) (hereinafter HUMAN BEHAVIOR).

[125] *Id.* One can also conclude that the use of tables, chairs and other "props" are integral elements of the physical space within which they are set; and that they too are constrained or accommodated by the physical limits of the space.

[126] Multi-use space carries with it both negative and positive connotations. Efficient use of space in otherwise limited facilities is laudable and in most cases necessary. The question becomes, can space designated for use in settlement be designed first with this purpose, to be secondarily used for other purposes? Architects note that "changing any part of the setting will have varying effects on *all* other parts, and will result in changes to the characteristic behavior patterns for that setting." HUMAN BEHAVIOR, *supra* note 124, at 95. Indeed, the "environment and the [attendant] behavioral system are unique at any given time and place . . . ." *Id.* Thus, designing space for multiple uses may have a detrimental effect on a specialized use, such as settlement or other ADR proceedings.

The fundamental question is whether the nature of settlement interaction affects the type of space required for a nonadversarial proceeding. More succinctly, does the settlement venue demand special attention in the same manner as trial? Should there be a settlement room for settlement proceedings, just as the courtroom is dedicated to trial?

Although settlement essentially differs from trial in scope and methodology, the purpose of both proceedings remains the same—dispute resolution. Differences in the scope of the undertaking and fundamental methodology embrace corresponding differences in ultimate goals. The task of cross-examination is illustrative of the difference.

During cross-examination, the advocate attempts to show the opposing party to be a liar and a scalawag, creating great hostility in the process.[127] Undertaking the same showing in a settlement conference engenders the same hostility but to a dramatically different end.

A neutral decisionmaker or fact-finder such as a jury may find a courtroom confrontation revealing, if not helpful, in rendering a final verdict.

In the face of a similar attempt to show him to be a liar and a scalawag, a non-neutral party in a settlement conference would angrily believe his opponent had no interest in settlement and scuttle the entire effort. Thus, although cross-examination in trial is an appropriate methodology suited to the nature of such proceedings, it is entirely inappropriate in the settlement venue. Confrontational encounters between opposed parties are not generally conducive to agreed dispute resolution.

The implication is plain. Adversarial interaction mandates consideration of design criteria distinct from those required for nonadversarial settlement proceedings.[128] While the litigator seeks a verdict, or a "win," the

---

[127] *See, e.g.*, Simon H. Rifkind, *How to Try a Non-Jury Case*, 10 LITIG. 8, 10 (1984). The author commented that

> [c]ross examination has only three possible purposes. One, discredit the witness's story by showing it could not have happened. Two, discredit the witness by showing that he did not see or hear, that he does not remember what he saw or heard, that he did not accurately report what he remembered, that he is biased, that he is interested, that he is unworthy of belief. Three, make him your witness.

Id.

Rifkind further noted that "[g]enerally these are mutually exclusive . . . [t]herefore, it is important that you should know before you start which of these objectives you will pursue." *Id.* Plainly, only the third objective has potential for the settlement venue. Discrediting the other party, or showing him to be inaccurate, biased or "unworthy of belief" serves only to foster enmity.

[128] For a discussion of adversarial criteria corresponding to various aspects of trial,

settlement participant strives for agreed resolution. No one in settlement, unless coerced, willingly yields the field and offers his opponent an outright victory. Instead, mutuality of risk of loss drives each party to ultimate compromise. Neither side achieves outright victory, yielding instead to the known results of give-and-take settlement.

To understand the physical/spatial demands of this unique context, it is first important to understand the complex interweaving of interpersonal contacts that transform adversarial interplay to that of mutual settlement.

In trial, the advocate's physical location carries with it various perceptual attributes, which, when maximized by the contours of the space, become adversarial criteria about which courtroom design turns. The proximity of the lawyer to the jury, the ability of the jury to see the lawyer, the ability of the witness to see the lawyer and eye-to-eye jury-witness communication are characteristics of adversarial dynamics.[129]

In settlement, the force and effect of personality and specifically individual perceptions of personality become critical. Unlike the courtroom, macro-dynamic physical factors such as sight and audition are secondary to interpersonal factors. In the relatively small space represented by the typical conference room, the ability to see and hear one another is not a primary issue. Instead, communication and persuasion, being the functional effects of personality, become paramount.

The roles undertaken by the participants define, to some degree, their interpersonal interactions. A brief overview is important.

A. *The Roles of the Participants in the Settlement Process*

Each party to a settlement conference, apart from the neutral "settlement judge"[130] or "mediator" assumes the role of negotiator. In some form, the negotiator role is an evolutionary form of the litigator, best described in political terms as a "kinder, gentler" advocate. It is within this transformation that the essence of the difference between the adversarial and nonadversarial contexts is best viewed. One author described the goals of the negotiator as falling into two discrete categories: that of the competitive negotiator and that of the problem-solving negotiator.[131] Viewed

---

including direct and cross examination, see Wolfe, *supra* note 109.

[129] *See* Wolfe, *supra* note 109, at 611.

[130] The term "settlement judge" is freely used in various contexts to describe sitting members of the bench, or, lawyers acting in what some courts describe as an "adjunct" judicial capacity, presiding over the conduct of ADR proceedings. The term is generally employed in the venue of the "settlement conference." *See, e.g.*, N. DIST. OKLA. LOC. R. 16.1(C)(13).

[131] *See* JOHN S. MURRAY ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF

differently, the neutral party to settlement (the mediator or settlement judge) may opt for either an evaluative or facilitative approach.[132] In the first, the neutral objectively reflects the strengths and weaknesses of the parties' respective positions, highlighting the risk each bears, attempting to achieve resolution through mutual acknowledgment of the potential for loss, together with attendant costs. In the latter, the neutral attempts to bridge the gap between the parties, effectively acting as a problem-solver, proposing solutions, regardless of objective risk. Although both approaches mirror, to some degree, the role of the negotiator, neither role is the same. A neutral mediator is distinctive from that of a biased negotiator. Nevertheless, both roles find their expression within the settlement venue.

The problem-solver is described as employing "nonconfrontational debating techniques," while the competitive negotiator may use "threats, confrontation [and] argumentation."[133] The mediator is called upon to employ an evaluative or adjudicative approach to balance the negotiators' respective strategies. When a highly competitive negotiator faces a calm problem-solver, the task of the mediator is dramatically different from that when the mix is a virtual "head-butting contest" between two competitive negotiators, each using a confrontational style replete with threats and argument.[134]

In effect, the mediator or settlement judge must adapt to the context of the personalities within which he finds the settlement conference cast. So, while the courtroom reflects an extrinsic structure within which confrontation is expected to occur, and by such structure, focuses the dynamics of interaction toward the final verdict, settlement space must facilitate an internal structure, allowing the complex interplay of communication, persuasion and emotion to attain full maturity between involved parties.[135]

LAWYERS II-15 (2d ed. 1996).

[132] *See id.* at III-13.

[133] *Id.* at II-15.

[134] An example is the case of settlement undertaken by the parties absent a neutral mediator or settlement judge.

[135] Maturation of the negotiating relationship in the settlement venue contemplates a spectrum of interpersonal communication. John Murray and his colleagues noted: "Working relationships are important to settlement processes, and often the health of those relationships are founded upon a certain flexibility in honesty. Saving face may be the appropriate term: 'little white lies' are frequently used to help parties bridge personal difficulties." MURRAY ET AL., *supra* note 131, at II-8.

B. *Attributes of Settlement Space*

It is virtually axiomatic among lawyers that the import of communication and persuasion lies within "the actual words exchanged between themselves and clients."[136] In the words of one textbook writer:

> From the outset of their legal careers, lawyers are drilled on the need for precision in the selection and use of words. In their earliest days in law school, lawyers experienced directly or vicariously the results of using loosely such terms as "intended," "caused," "delivered," or "agreed." *Lawyers are the products of a learning environment that ignored the nonverbal circumstances that can surround speech while stressing that the language used by the parties to a legal dispute is at the heart of law and lawyering . . . .*[137]

If this were truly the case, such that words, coupled with the force and effect of the negotiator's or mediator's personality, determined the outcome of settlement, then "any old room" would do—the physical space having a negligible effect on the quality of the resulting interpersonal dynamics.

Figure 6 depicts a narrow room, twelve feet wide, and thirty-five feet long, a virtual courtroom in and of itself. Within the room is a twenty-five foot long conference table, with chairs clustered at either end. The plaintiff and her lawyer are seated at one end of the table, while the defendant and his counsel are seated twenty-five feet away.

Between the parties sits the settlement judge, fully twelve and one-half feet from both parties. The likelihood in such a setting of persuading an opponent or even engaging in an effective dialogue is markedly limited. At twelve to twenty-five feet, the parties are at public distance from one another, a distance characterized by a "formal style," in which the speaker adopts a louder than normal voice with careful choice of words and phrasing of sentences.[138]

In this venue the settlement judge all but loses the advantage of the informal settlement proceeding, forced instead to revert to a formal approach, akin to that of the courtroom. The parties, in turn, faced with the formality engendered by increased distance, are likely to revert as well—adopting the formality of the adversarial role in lieu of the more informal role of negotiator.

---

[136] BASTRESS & HARBAUGH, *supra* note 1, at 131.

[137] *Id.* (emphasis added).

[138] *See* HALL, *supra* note 3, at 123–124.

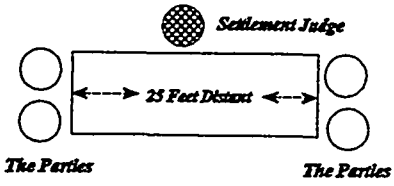


Figure 6

Conversely, settlement cannot occur in a space so restrictive as to invade the cultural boundaries of personal space. Consider again a conference room, barely six feet square. Within sits a two-by-three foot coffee table, and gathered about the table are the parties and the settlement judge, so close their knees almost seem to touch. Figure 7 depicts the arrangement:

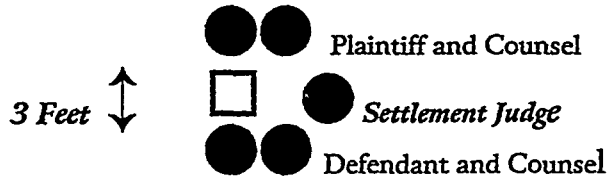


Figure 7

Here, there can be no question of formality. Indeed, the opposite is true. Within the realm of personal distance, voice level is moderate and fine details of individual features are clearly visible. It is at this distance that subjects of personal interest and involvement are discussed.[139] Requiring business discourse at this distance heightens potential for personal stress. Hall observed: "It is . . . possible to conceive that people can be cramped by the spaces in which they have to live and work. They may even find themselves forced into behavior, relationships, or emotional outlets that are overly stressful . . . . When stress increases, sensitivity to crowding rises—people get more on edge . . . ."[140]

Thus, although stress is clearly part of any dispute, creation of additional stress is contrary to the goal of effective negotiation. Parties seeking resolution of a dispute do so in an attempt to alleviate risk.

---

[139] *See id.* at 120.

[140] *Id.* at 129.

Participating in a system that enhances stress, reduces, by definition, the likelihood of agreed resolution.[141]

1. *Orientation in Space as Affecting Settlement*

The settlement environment must facilitate the complex interplay of the parties, such that nonadversarial persuasive communication is enhanced. Effective nonadversarial communication provides each party equal opportunity to assume the role of negotiator, denying neither party the opposing role. Perception of equality by reason of location becomes paramount.

In settlement, sociopetal space may thus be defined as that which confers equality of status upon all parties such that interpersonal communication in the nonadversarial arena is enhanced. Sociofugal space violates or precludes equality of status. A brief explication is important.

The focus of adversarial interaction is persuasion of a neutral and passive decisionmaker. However, in the context of nonadversarial settlement, it is the parties who must persuade one another. No longer is the focus upon an unrelated and disinterested decisionmaker but upon an interested, active participant. Just as the courtroom facilitates the activity of interested parties before a judge or jury, so settlement space must facilitate the mutually dependent activities of the parties.

In order to encourage settlement, neither side should be disadvantaged nor perceived as being disadvantaged by reason of the setting into which they are cast.

Working with discussion groups in a cafeteria setting, Sommer showed that leaders tended to select the head position at a rectangular table. Others would arrange themselves so that they could see the leader. Visual contact with the leader seemed more important than physical proximity.[142] To

---

[141] *See, e.g.*, HUMAN BEHAVIOR, *supra* note 124 and accompanying text.

> Behavior is neither totally determined by the physical environment nor does it exist without reference to its spatial context. The physical setting can support some behaviors and discourage others; if the motive for reaching some goal is strong enough, the individual will adapt his behavior or the setting to fulfill that need. If neither of these options are possible, *a highly stressful situation will develop.*

HUMAN BEHAVIOR, *supra* note 124, at 93 (emphasis added). Forcing parties to engage in settlement negotiations in a physical setting unsuited to the ultimate purpose may, in fact, explain a degree of stress heretofore attributed to (and dismissed as) the "emotion" of the undertaking. Indeed, the parties themselves are likely unaware of the effect of nonverbal factors, which otherwise directly contribute to the stress of the undertaking.

[142] *See* SOMMER, *supra* note 16, at 20 (citing Robert Sommer, *Leadership in Group*

structure a setting wherein one party can assume by virtue of seating or relative location in a given space, the "leadership" role, violates the principle of equality intrinsic to effective nonadversarial dispute resolution.[143] It leaves to chance the simple fact of spatial preemption. The first party in the door "takes the high ground" or leadership position, leaving his opponent in an "unequal" or less powerful position.

Strodtbeck and Hook recorded seating arrangements in experimental jury sessions carried out in Chicago.[144] The experimental jurors were accompanied by a bailiff into a jury room containing a rectangular table with one chair at the head and the foot and five chairs arranged on either side (1—5—1—5).[145] The jurors' first task was to elect a foreman. Researchers discovered a striking tendency for the person seated at one of the head positions to be elected foreman.[146] This was attributed to the "intrinsic propriety" of the chairman being at the head of the table, as well as the likelihood that electing someone else would be taken as personal rejection of the individual at the head position.[147]

Notably, Strodtbeck and Hook also found that the initial choice of seats was not otherwise random. "People from a higher economic class—proprietors and managers—selected head chairs more than would have been expected by chance."[148] In electing a foreman it appeared that the jurors looked at both occupants of the head chairs and selected the one with higher status.

> In view of the head chair's association with leadership as well as the fact that people of higher status occupied the head chair, it was not surprising that people in the head chair participated in the discussion more than people at the other positions. Subsequent ratings by all jury members showed that the people at the head chair were considered to have made the most significant contributions to the deliberations.[149]

Geography, 24 SOCIOMETRY 99, 110 (1961)). These findings demonstrate the importance of relative position and perception of relative position in a small group.

[143] It is important to note that it is the mutual perception of equality that is important in the settlement venue. Although the substantive positions of the parties are not affected by this discussion of spatial dynamics, the point is that nothing in the physical space should unnecessarily give one side or the other a perceived advantage.

[144] *See* SOMMER, *supra* note 16, at 20–21 (citing Fred L. Strodtbeck & L.H. Hook, *The Social Dimensions of a Twelve Man Jury Table*, 24 SOCIOMETRY 397, 415 (1961)).

[145] *See id.*

[146] *See id.*

[147] *See id.* at 21.

[148] *Id.*

[149] *Id.*

The implications for nonadversarial dispute resolution are evident.

Should settlement proceedings be conducted in spaces susceptible to dominance of position, as demonstrated by Strodtbeck and Hook?[150] Will the party who perceives himself to be in the more "powerful" position in the dispute take the "head" chair? More importantly, will the position of a less affluent party, who may otherwise have a strong legal position, be weakened, or will the party affirmatively give up a leadership position?

In a similar study, Leavitt examined the effect of communication patterns on group interaction. He physically structured "various shaped networks—a network was the arrangement of individuals"—in differing configurations.[151] Networks consisted of circles where messages went around the periphery, wheels where all the messages had to come to a center hub, as well as Y-shaped and incomplete circle arrangements.[152] After the sessions, the experimenter asked each group whether one member had been a leader. "About half the group in circular arrangements named someone as leader, and he was found among all positions in the circle, but 92 percent of the groups with the wheel arrangements named leaders, and this was invariably the person at the hub."[153]

Like Strodtbeck's and Hook's study, Leavitt's study demonstrates the fundamental principle that location ("orientation") in space, affects perception of dominance. Significantly, changes in orientation or spatial arrangement changed individual perception of equality. Equality of location, as in circular patterns, resulted in equal distributions of leadership. However, in Y-shaped or other skewed arrangements only those at the center were perceived as leaders. Others were relegated, by implication, to lesser roles. Equality was lost by reason of simple spatial rearrangement. These same possibilities exist in the settlement venue.[154]

In a similar study, college students, asked to rate diagrammed seating arrangements as to "equality" of seated pairs, rated a seated pair as "unequal" where one of the two was seated at the head of the table ("the head position").[155] Pairs seated at the sides of the table or at both ends were

---

[150] *See id.*

[151] SOMMER, *supra* note 16, at 21 (citing Harold J. Leavitt, *Some Effects on Certain Communications Patterns on Group Performance*, 66 J. ABNORMAL & SOC. PSYCHOL. 38, 50 (1951)).

[152] *See id.*

[153] *Id.*

[154] Nancy Russo's studies confirm these findings. *See* SOMMER, *supra* note 16, at 21 (citing Nancy Russo, *Connotation of Seating Arrangements*, 2 CORNELL J. SOC. REL. 37, 44 (1967)).

[155] *See id.*

rated as "equal."[156]

Given that location affects perception of status, the question becomes whether a room per se can be structured to facilitate the principles of perceived equality critical to effective nonadversarial dispute resolution. Two factors must be considered: the dimensions of the room within which settlement occurs and the size and shape of the furniture employed. "A large sociopetal room that orients everyone toward the center makes it difficult for people to retreat. Intimate living rooms as well as Indian tepees or Japanese huts built around a center hearth fall into this category."[157] On the other hand, rooms that create distant seating arrangements or physical barriers to communication, such as chairs arrayed in straight lines along a wall, or long, unmovable benches, are clearly unsuited to the task of settlement.[158]

Rectangular tables create positions of leadership, able to be occupied by only one or two persons. Positions as well as perceptions of inequality are thereby fostered, ultimately to the detriment of the settlement process. Perceptions of inequality reduce opportunity for agreed-upon dispute resolution.

Square or circular tables, by design, leave no such opportunities. However, square tables like the lawyer's desk have potential to create physical barriers, separating opponents, thereby reducing opportunity for mutual resolution.[159] Round tables, conversely, produce seating arrangements dramatically less imposing than their angular counterparts. In a comparative study of seating at rectangular and round tables, Sommer noted that rectangular tables provide for six different possible seating positions, including two which he termed "distant." Thus, round tables allow only half as many seating arrangements. Only one such position may be termed distant—where the parties are diametrically opposed to one another. Round tables offer greater opportunity for psychological closeness than their rectangular counterparts.[160]

2. *Distance as Affecting Settlement*

Distance, whether created by reason of the size of the furniture or as a result of the size of the space itself, implies either formality or intimacy.

---

[156] *See id.*

[157] SOMMER, *supra* note 16, at 51.

[158] *See, e.g., id.* at 73.

[159] *See* BASTRESS & HARBAUGH, *supra* note 1, at 136. A lawyer is perceived as less formal away from her desk. A conference table, like a desk, can interfere with communication, creating impressions of formality akin to that of the law office.

[160] *See* SOMMER, *supra* note 16, at 63.

Formality by default, resulting from use of large conference tables or even larger rooms, defeats the informality of the settlement venue. Sommer observes,

> [i]f two men are given the choice of conversing across from one another at a distance of 30 feet or sitting side by side on a sofa, they will select the sofa. This means that people will sit across from one another until the distance between them exceeds the limit for comfortable conversation.[161]

The principles so critical to effective interpersonal relations are subtle. Exemplary is the difference between inter-acting and co-acting groups. Inter-acting groups sit differently from co-acting individuals.[162] Sommer found that inter-acting groups showed a definite preference for corner seating, whereas co-acting individuals or pairs sat opposite one another.[163] Significantly, more than two-thirds of co-acting pairs chose distant arrangements that served to separate the two people spatially and visually.[164]

Disputants forced into settlement spaces that fail to account for fundamental principles of human interaction, with resulting failures in communication and dispute resolution, may be more likely to attribute their failures to causes other than that which so fundamentally underlie the process. The substantive result may thus be affected by the hidden dimension of interpersonal interaction.

C. *Principles for Design of Settlement Space*

Intentional use of unintentional space creates a less than ideal environment for the tasks undertaken. This is particularly so in settlement. In trial, great effort is expended in an attempt to understand the nature of the proceeding and the setting within which it occurs. Courtrooms are designed as "symbols of the American dream of equal justice for every citizen."[165] However, in settlement little thought is given to the physical configuration of the space into which the parties are thrust. What message is

---

[161] *Id.* at 66.

[162] Inter-acting groups are "people who . . . [are] . . . conversing . . . together," whereas co-acting individuals may "occupy the same table" but are engaged in their own separate activity (reading, studying, eating). *Id.* at 68.

[163] *See id.* at 68.

[164] *See id.*

[165] C. Theodore Larson, *Future Shock Hits the American Courthouse: Opportunities and Parameters for Design*, 64 AM. INST. ARCHITECTURE J. 36, 36 (1975).

thus given?

In an earlier study, two standards were articulated as governing courtroom design: (1) a courtroom should offer each party equal opportunity to present his case, such that each receives equal advantage by reason of design; and (2) a courtroom should facilitate the role of each participant, enabling each person to realize his full potential in the adversarial process.[166]

These same standards may be applied to the design of settlement facilities:

(1) Settlement facilities should offer equal opportunity for presentation, such that each party receives equivalent advantage by reason of design; and
(2) Settlement facilities should foster the role of each party, enabling each to realize his full inter-personal potential throughout the settlement process.

The first of the foregoing standards embraces equality, requiring that settlement facilities themselves lend no advantage to one side over the other.[167] Although adversarial theory dictates neutrality of the decisionmaker, the settlement dynamic requires equality among the parties as decisionmakers. Settlement spaces should afford neither side an advantage different from that of the other side.

The second of the two standards recognizes the inherent difference in roles between the neutral adversarial decisionmaker and the parties as decisionmakers. In trial, judge and jury are passive not involved in the direct presentation and solicitation of evidence. In the nonadversarial venue of settlement, the parties, who are themselves the decisionmakers, are nevertheless directly concerned with the task of presentation. The second standard requires that the settlement facility not limit full development of non-adversarial interaction but that each party have equality of potential to make their presentation. "Neither . . . participant's presentation should be limited or restricted by . . . design."[168]

IV. SETTLEMENT OUTCOMES AS AFFECTED BY SPATIAL DYNAMICS

When examining the influence of spatial dynamics on substantive proceedings, the question of desired outcomes becomes an integral part of the undertaking. The physical space within which settlement occurs is an

---

[166] *See* Wolfe, *supra* note 109, at 633.

[167] *See id.*

[168] *Id.* at 634.

active nonverbal factor affecting communication and persuasion. "The physical properties of a room are a function not only of its decoration but also of the number of people in it, the arrangement of its furniture, and even the amount of light it has."[169] Only by considering the constellation of desired outcomes can one begin to make judgments about the efficacy of spatial influences in a given setting.

Seven potential outcomes flow from settlement undertakings:

1. The dispute is fully resolved between all parties;
2. The dispute is partially resolved with remaining issues to be litigated between the original parties or, with remaining disputes to be litigated between some parties (others having been dismissed as a result of settlement);
3. The dispute is wholly or partially resolved, contingent upon a future showing or event as agreed between the parties;
4. The dispute is partially or wholly unresolved but the parties agree to continue settlement discussions in the future;
5. The dispute is wholly unresolved but the issues for trial have been narrowed as a result of settlement interaction;
6. The dispute is wholly unresolved but agreement has been reached on pre-trial issues (such as discovery), decreasing cost and reducing time to trial; or
7. The dispute is wholly unresolved; suit is filed or litigation resumes.

The settlement process, "designed and structured to foster personal harmony between the 'disputants,' to preserve their relationship and to reduce personal contentiousness," has been termed "nonadversarial."[170] By extension, the facilities within which it occurs must also be nonadversarial.

Only one of seven potential outcomes, outlined above, wholly removes the parties from the settlement modality.[171] When the dispute is unresolved,

---

[169] Harold M. Proshansky et al., *The Influence of the Physical Environment on Behavior: Some Basic Assumptions*, *in* ENVIRONMENTAL PSYCHOLOGY: MAN AND HIS PHYSICAL SETTING 27, 32 (Harold M. Proshansky et al. eds., 1970).

[170] MURRAY ET AL., *supra* note 131, at I-17.

[171] The range of outcomes following a settlement conference embraces the potential for dispute in every instance but one. Only when the parties unequivocally decline to settle, sharpening their swords for the trial arena, is settlement precluded. Indeed, close examination of potential outcomes, only briefly addressed here, reveals a hierarchical structure, incremental in nature, by which the parties approach complete resolution of the entire dispute. The outcomes described above reflect this incremental concept of potential resolution.

and litigation is filed or resumes, adversarial interaction is untempered by potential for future resolution. When the dispute has been partially resolved, the fact of past resolution itself becomes a potential standard for future accord. When the parties do not resolve their dispute but condition future resolution on the happening of another event, the potential for resolution continues to temper adversarial goals.

Even when preliminary agreements have been reached, limiting discovery or issues for trial, the parties have established a precedent for future accord within the framework of the dispute. Clearly when there is agreement to engage in future nonadversarial discussion, adversarial encounters are correspondingly limited.

The fact of settlement carries with it imperatives that flow from the occurrence of the event. In physics, the Heisenberg Uncertainty Principle holds that the very act of viewing sub-atomic interaction changes that which is being observed. The nature of the interaction is changed by the attempt to know it. As between disputing parties, the very act of attempting nonadversarial resolution raises, in every instance but one, the potential for future accord.

It is well recognized that conducting a settlement conference, even where one party objects, increases the potential for future nonadversarial dispute resolution.[172] Given that nonadversarial resolution is a statistically more likely outcome of a concerted ADR endeavor, the forum within which such encounters occur must affirmatively reflect the standards that require both equality of opportunity and equality of potential significant to interpersonal interaction in the settlement venue.[173] To do otherwise is to

---

[172] The requirement that a party's representative attend a settlement conference "with full settlement authority . . . suggests a belief that some good may still come from requiring attendance at the settlement conference despite the defendant's adamant belief that there is no liability." MURRAY ET AL., *supra* note 131, at II-50.

A court should be entitled to require that the representative at least be open to hearing the arguments of the other side with the possibility of settling at any amount found to be persuasive, even though the representative understands that the company has evaluated the case as meritless. If his authority and instructions are so limited that he is deaf to any persuasion, then he is not the proper representative with adequate authority that the court has ordered. *See* Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should be Required?*, 46 SMU L. REV. 2079, 2108 (1993).

[173] The two standards articulated earlier provide:

(1) Settlement facilities should offer equal opportunity for presentation, such that each party receive equivalent advantage by reason of design; and

(2) Settlement facilities should foster the role of each party, enabling each to realize his full inter-personal potential throughout the settlement process.

See *supra* text accompanying note 166.

forsake potential agreed resolution, sacrificed on the altar of intentional use of unintentional space.

V. IMPLICATIONS FOR PRACTICE

Intentionality in the design and use of settlement space is a necessary corollary to effective alternative dispute resolution. Each is discussed below.

A. *Design of Settlement Space*

Alternative dispute resolution methodologies contemplate as carefully crafted a result as that produced by trial. Indeed, alternative dispute resolution, poised in contrast to the adversarial system, is no less efficacious. The results of such undertakings are complex, both in terms of ultimate resolution and in their effect upon on-going litigation.[174] Design of such spaces should, therefore, be as carefully considered as that for the courtroom.[175]

Macro as well as micro-dynamic influences affect design of settlement space. Macro-dynamic factors include configuration of the settlement space as a whole, including multiple individual conference locations. Macro-

---

[174] *See, e.g.*, Edward F. Sherman, *The Impact on Litigation Strategy of Integrating Alternative Dispute Resolution Into the Pretrial Process*, 15 REV. LITIG. 503 (1996).

[175] The settlement conference, as one form of ADR, is generally a "private" undertaking, not open to public scrutiny, and, in many instances, rendered confidential by operation of court order. In contrast, trial is a public proceeding. In the public forum:

> [d]ecisions by courts encourage the assertion of rights; they send warnings about the consequences of behavior; and they establish precedents that give parties entitlements to use in future litigation or as bargaining chips in settlement . . . . Courts help mold future conduct and bring it into accord with public forums . . . . And, at the same time courts, through the generation of precedents promote the process of private settlement, by facilitating planning and helping people figure out their legal rights and obligations. Precedents establish the standards against which future cases are negotiated . . . .

MURRAY ET AL., *supra* note 131, at I-13.

The two processes, public trial and private dispute resolution, are intricately linked. Both are extensions of societal values that encourage efficacious and predictable peaceful resolution of disputes among its members. It makes little sense to promote parameters for design in the instance of trial, yet forsake all such undertakings in settlement. The results of both proceedings govern the rights and liabilities of the parties in a contest. Societal values are advanced in both cases. Just as trial demands certain forms for its undertaking, so by extension does settlement.

dynamically settlement space, depending upon the number of parties to the dispute, should embrace separate locales for each individual party. Each locale should be private, separated from other similar spaces.[176] Each locale should be equivalent to the other, such that both parties have micro-dynamically similar spaces. Neither should perceive the other as having better quarters for settlement.[177] Ideally in a two-party dispute three separate locales should exist in relative close proximity, though perceived as being distant from the others.

A central or joint conference room is dedicated to: (1) joint sessions between the settlement judge or mediator and both parties; and (2) individual "breakout" sessions between the settlement judge or mediator and individual members of a disputing side (e.g., meeting with a party while leaving counsel in the adjoining separate locale or room). Individual locales or conference rooms are used for meetings between the settlement judge and those representing one side of the dispute. A proposed settlement suite is depicted in Figure 8 below.

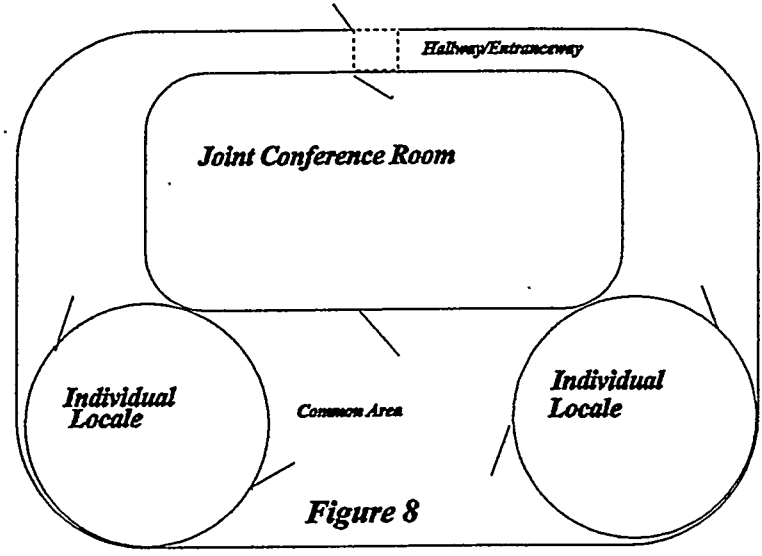


Figure 8

[176] For purposes of this discussion, a two-party dispute is assumed.

[177] For example, in the United States District Court for the Northern District of Oklahoma, one of the Magistrate's offices has a conference room with windows. Jury rooms are windowless. Parties to a settlement conference situated in the jury room, often remarked that the "other side" ended up "with the windows," perceiving the conference room as a "better" locale than the jury room because of the windows. By inference, their windowless space was deemed equivalent to their relative position in the dispute ("we're the bad guys, so, we've got the small room with no windows"; or vice versa).

The joint conference area is rectangular in shape with curved interior corners, emphasizing the central round table, as depicted in Figure 9. Two individual conference areas are located next to the central conference room, with access through an adjacent hallway. Direct access is not provided from the central conference room, creating a perception of distance between distinct locations.

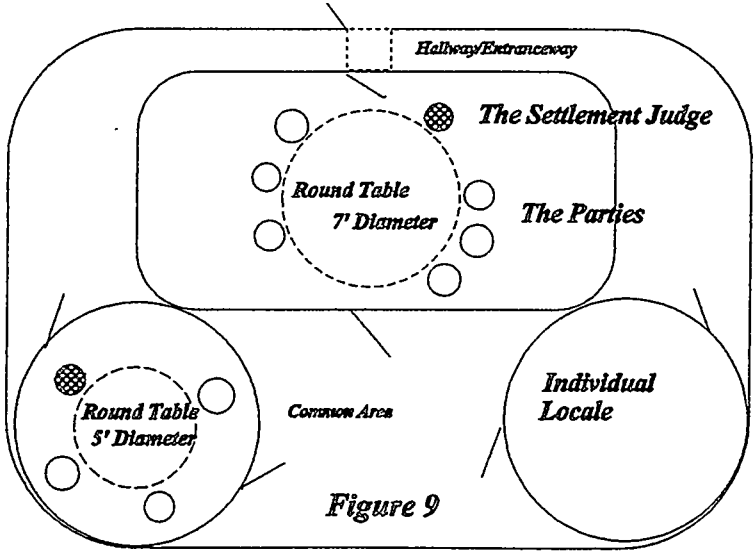


Figure 9

The larger joint conference table provides the minimum social distance between opposing parties,[178] preserving the formality of communication at seven feet, in an otherwise informal communication pattern in which equality of position is stressed.[179] In the smaller conference locale, the round table is reduced in size from seven to five feet, enhancing interpersonal interaction. This creates the potential for persuasive communication between lawyer and client and, ultimately, between settlement judge and parties. Where, as in the smaller locale, only one party is present, less formality, hence less distance, is required. The smaller, less formal space is conducive to persuasive communication, especially at closer distances.

An alternative design eliminates the formality of the round table in the smaller conference locales, replacing it with a surrounding desktop, in effect enclosing the parties within a partial or semi-circular desk. See Figure 10 below.

---

[178] *See* HALL, *supra* note 3, at 122.

[179] *See* SOMMER, *supra* note 16, at 21.

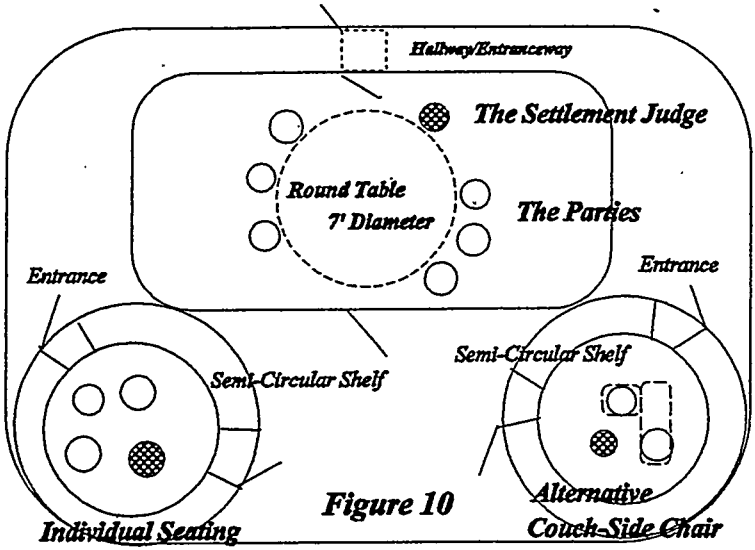


Figure 10

This arrangement removes all physical barriers, such as furniture, creating segregated space, again, enhancing interpersonal communication. It is further facilitated by a couch-and-side-chair configuration (as opposed to a collection of individual chairs), allowing a party's representatives to seat themselves as a group on the couch, as in Figure 10 above. The settlement judge or neutral, seated in an adjacent chair, is able to maintain a full range of eye contact with those seated on the couch, furthering persuasive interaction.

Micro-dynamically, the individual conference locale is circular in form, creating an environment that reflects equidistant spacing such that no one person is farther from another than the absolute inside diameter of the room itself. In a circular pattern, only an individual diametrically across from another is opposite the other. All other locations about the circumference of the circle are closer. Conscious limitation of the size of the space inherently limits the maximum distance at which persons may interact. Designing a circular conference locale with a diameter of twelve feet (the maximum distance for social interaction) necessarily creates a space in which all other distances are at social (seven to twelve feet) or personal (three to seven feet) distances. Persuasive communication is far more likely to succeed at these distances than within spaces that create opportunity for interaction at greater distances.

A circular room has two other primary effects. First, it reinforces the circular form of the furniture within it. Individual chairs are arranged in a circular configuration, mirroring the shape of the exterior walls. Second, applying the axiom "form follows function," a communication hierarchy is

suggested, which offers no single individual a position either superior or inferior to another.[180] Circular spaces are thus sociopetal as regards settlement, enhancing persuasive communication among the participants and highly suited as a design form for such undertakings.

B. *Use of Settlement Space*

Richard Markus, former Chairman of the Board of the National Institute for Trial Advocacy (NITA) emphasizes the importance of spatial dynamics in adversarial interaction: "Subliminal perception may be more difficult to plan, but it is equally important for persuasion. Minor variances in presentation persuasively underscore data reliability . . . . *Physical locations of trial participants demonstrate their interrelationships. Proximity imposes control; distance may imply independence or indifference* . . . ."[181]

Effective use of settlement space is equally important. The luxury of settlement space specifically designed for ADR uses is an unlikely prospect for most practitioners. How then can lawyers who participate, either as advocates or settlement judges ("neutrals") effectively take part in settlement conferences occurring within traditional venues such as conference rooms, jury rooms, offices or even courtrooms, so as to maximize settlement outcomes?[182] The answer depends in large measure upon the goal to be achieved. A brief discussion is important.

ADR by definition intends resolution of disputes by means other than trial. However, although trial virtually always results in resolution of the dispute by reason of a judgment entered, the same cannot be said of those undertakings that require agreement between the parties to achieve an end to the dispute. Conceivably, one or both parties to the settlement conference may not want agreed resolution but would, instead, prefer to put the opposing party through the costly rigors of trial. For some, the goal of settlement is not to achieve resolution but to unearth an avenue to victory through the settlement process, enabling a win at trial.[183] Under these

---

[180] *See id.* Participants in circular communication patterns are perceived as co-equals.

[181] Richard A. Markus, *A Theory of Trial Advocacy*, 56 TUL. L. REV. 95, 124 (1981) (emphasis added).

[182] A settlement outcome is not simply nonadversarial resolution. Instead, each party harbors goals and objectives for resolution of the dispute. Each operates within a *range* of potential outcomes; thus, reference to "outcomes" specifically embraces a result within the range of anticipated acceptable results.

[183] Unfortunately, an all-too-often employed strategy utilized by parties with greater resources is to outspend the opposing party, causing inordinate expenditures of time and money. To some degree, the "new" Federal Rules of Civil Procedure (employing "case

circumstances, settlement efforts are little more than disguised forays into the discovery jungle, with no ultimate resolution to be had.

For others, the settlement process is a genuine opportunity to engage in negotiation leading to compromise resolution. Effective utilization of existing settlement facilities necessarily embraces a good faith undertaking—a sincere attempt to achieve agreed resolution. It is in this light that effective utilization of settlement space is undertaken, contemplating the application of principles of spatial dynamics.

1. *The Nature of Available Space*

The first step for the settlement practitioner, be he advocate or neutral, is to assess the nature of the space available in light of the parties to the conference. If the only available space for a joint meeting with the parties is a relatively small room, with the longest dimension shorter than fifteen feet and the conference table less than seven feet long, the parties should not be left alone together while lawyers talk. The first scenario is an apt case in point:

> The settlement judge returned to the small conference room with both lawyers in tow. They were met with angry glares from the defendants and demands from the plaintiffs to speak privately with the judge. [184]

In a small room across a small table, heightened proximity increases emotional intensity. A settlement neutral or advocate should initially assume that the parties, in the absence of their lawyers or the settlement neutral, should be left alone only at social distances.[185] To do otherwise is to risk the events of the first scenario:

> The two plaintiffs, former wards of the defendant, now suing their one-time Guardian over alleged misappropriation of trust assets, informed the settlement judge that while she was in another room conferring with counsel, the Guardian's son, also a named defendant, had threatened, literally, to murder them. "If I ever see you in our

---

management conferences" and "mandatory discovery") attempt to correct this practice. Nevertheless, utilizing the settlement process to increase costs, engage in interpersonal intimidation and undertake informal discovery simply furthers the "win-at-all-costs" approach. Under such circumstances, compromise negotiation is often minimal with one party all but demanding resolution tantamount to a "win." The ethical questions that surface in light of such goals are many, grist perhaps for yet another writing.

[184] *See supra* note ** and accompanying text.

[185] *See* HALL, *supra* note 3, at 121.

> county again, the last thing you'll see is me standing over you with a smoking shotgun . . . ."[186]

If a small room is the only available joint meeting area, the parties should be separated while counsel talk. If only two rooms are available, each party should be given "their own" room. If the rooms are disproportionate in terms of "appointments" or size, consideration should be given to switching facilities "mid-stream," a change that should be made to seem integral to the negotiation process.

Conversely, a small room may be used to great advantage, again noting that heightened proximity intensifies emotional response.[187] The settlement neutral makes effective use of a small room by placing himself within three feet of a party with whom he is negotiating. Although a large formal setting communicates distance in their negotiating positions by the very fact of the physical distance between the parties, a smaller setting telegraphs potential for resolution. The second scenario illustrates the dynamic:

> Twelve lawyers awaited the settlement judge. Together with two or three corporate representatives per side, no fewer than seventeen persons sat, ready for the settlement conference. The setting was a large judicial conference room, the parties and counsel arrayed about opposite sides of the table, the judge at the far end. Fifteen minutes after the judge concluded her opening remarks, it was all too apparent that the conference was destined for an interminable round of legal haggling, lawyers from both sides arguing the arcane intricacies of the contract.[188]

The formality of the setting dictated the formality of the discussion, the parties' respective lawyers arguing legal interpretation of the contract, much as if they were before the court in a motions hearing. To break through the formality of legal confrontation a different, less formal setting was required.

---

[186] *See supra* text accompanying note **.

[187] *See* LeVan, *supra* note 57, at 97-98.

[188] *See supra* text accompanying note **.

> In an effort to make meaningful progress, the judge asked the lead representatives from each company to join her in another room. Both representatives were senior executives, one a Vice-President and the other, President, of their respective companies. Taking them down the hall, the judge entered a small witness room, gathering the two corporate officers about her. They sat about a small table no more than three or four feet long.[189]

If the only room available is a large room, it is incumbent upon the settlement neutral or lawyer to change the dynamic. Repositioning furniture, or even the location of persons about a table, works to restructure the dynamic of interpersonal communication occasioned by the physical setting. Often, the settlement neutral can change the dynamic simply by choosing to sit among the members of a group, rather than apart from them, as judges are otherwise wont to do.

In the traditional judicial model, judges are removed from the participants, sitting behind an elevated bench. The risk for the traditional judge, in assuming the role of "settlement judge," is foregoing the formality of the "distance" created by both the physical setting of the courtroom and by its formal rules of conduct. In the settlement venue, the black robe no longer distances the judge; instead, she is among the parties. Formal rules of conduct no longer govern the actions of the parties. Lawyers may or may not be present when parties "get to actually talk" to the judge "face-to-face." In settlement, the brief dialogue of the courtroom is lengthened to an on-going negotiation, where the wishes of the judge may not necessarily be implemented by the parties.

The shock value of having the judge climb down from the bench can thus be turned to the benefit of the parties in reaching settlement. Sitting among the parties, for instance, next to someone at the conference table as opposed to at the "head" (power) position, is unexpected and serves to heighten interpersonal communication. The judge is no longer communicating at the formal social or business distance, but is, instead, within the zone of personal interaction.

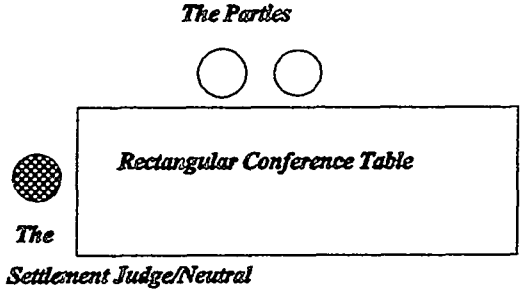
The same dynamic is applicable to the settlement neutral and, if carefully superintended, can be successfully employed with opposing counsel. A lawyer who is convinced of the efficacy of settlement can be a more effective communicator to the opposing party if brought to "sit among" the members of the opposing delegation. This reduces the distance of formality and makes the lawyer appear "human," and hence, less threatening.

---

[189] *See supra* text accompanying note **.

2. *The Nature of Furniture*

The distance and orientation at which one person sits from another is often dictated only by the nature of the available furniture. Classically, a settlement conference takes place at a rectangular table, pictured at Figure 11 below.

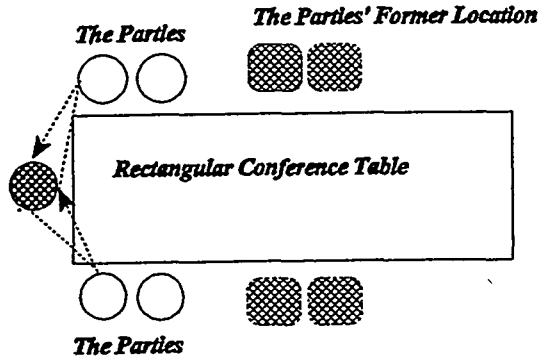


Traditional Settlement Conference Setting

Figure 11

Both distance and orientation separate the parties and the settlement judge. Seated at the head of the table, the settlement judge occupies the power position, implying (because of her status) formality of undertaking. Arrayed about the sides of the table, the parties are opposed to one another, reinforcing confrontation. In all, the setting is little different from a formal hearing, on the record in chambers.

Dispelling the formality of the proceeding is necessarily the task of the settlement judge or neutral, both in joint and individual conferences. In a joint conference conducted about a traditional conference table, the settlement judge should draw the parties to her. Recognizing the inherent difficulty of a traditional, rectangular conference table, the settlement judge is best able to counteract the formality of the setting by occupying the head position, while reducing the distance between the parties. Figure 12 is illustrative.



Traditional Settlement Conference Setting

Figure 12

By positioning herself at the head of the table, the settlement judge is able to remain equidistant from both parties. Where the parties have removed themselves, sitting at distant locations "down" the side of the table (as shown by the "former locations"), it is incumbent upon the settlement judge to reign them in. Bringing the parties to a position immediately adjacent to the head position creates a dialogue that Sommer describes as "across-the-corner seating," second only to "side-by-side seating" in demonstrating cooperation and intimacy of action.[190] By creating an across-the-corner dynamic, the settlement judge also conveys the message that all parties are interacting as opposed to co-acting.[191]

However, when addressing a single party this same positioning conveys a different message. With only one party present, occupying the head or power position immediately creates a dichotomy of influence. The party is left feeling inferior to the settlement judge who has assumed a "judicial stance," creating potential for a defensive response. By sitting side-by-side, even if with only one of the members of the group, the settlement judge defuses the potential defensive reaction, as shown in Figure 13.

---

[190] *See* SOMMER, *supra* note 16, at 64.

[191] *See id.* at 68.

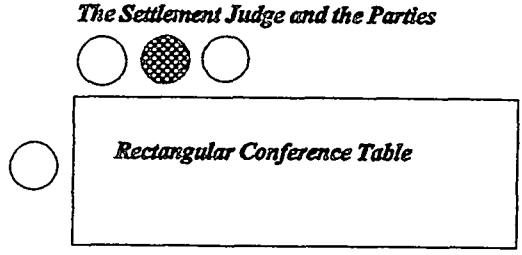


Figure 13

The settlement judge has positioned himself between two members of the group in a side-by-side configuration, while a third member of the group is positioned across the corner. The judge has, in effect, become a "member" of the group, heretofore consisting only of the parties' representatives. All are seated at personal distance, in such a manner as to convey mutual inter-activity, in an atmosphere of cooperative co-equals.

Figure 14 sets forth an alternative arrangement in the case of a single party, with similar results:

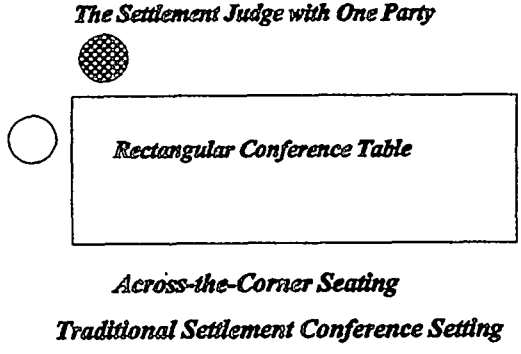


Figure 14

Where only a single individual is part of the conference, across-the-corner or side-by-side seating (Figure 15 below) creates a heightened environment for persuasive communication.

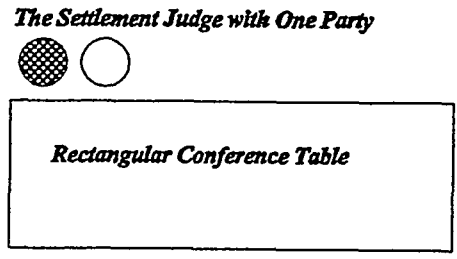


Figure 15

In the absence of a table, chairs should be arranged in much the same fashion. Figure 16 is exemplary:

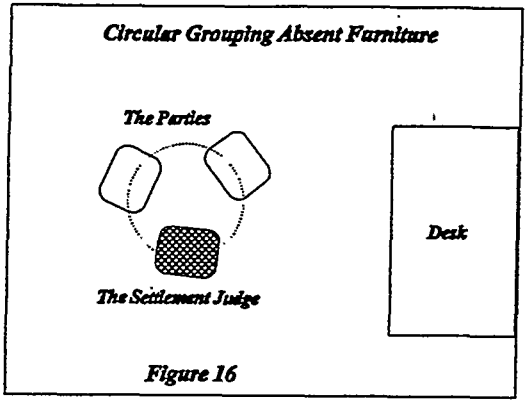


Figure 16

Finally, the settlement judge should avoid, by furniture or seating arrangements, creation of a sociofugal environment—one that dampens communication or hinders persuasive interaction. Creation of settings in which perceptions of inequality are fostered effectively dampens settlement communication. Such perceptions can be created by the settlement judge as well as by opposing parties.[192] Use of furniture to create images of authority or power, often equated with increased height or distance, contributes to such perceptions. Figure 17, below, illustrates many judges' conference rooms.

---

[192] Indeed, among settlement participants a certain measure of posturing is to be expected. The question is whether the physical space itself lends credence to the attempt.

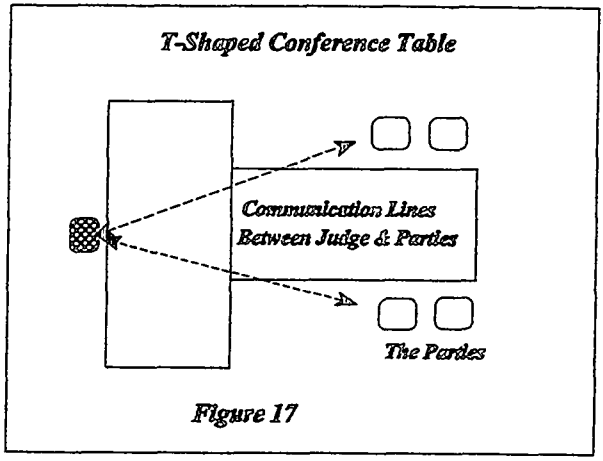


Figure 17

The "T-shaped" conference arrangement places the participants at significantly greater than personal communication distance from one another, reducing persuasive interaction. More importantly, the judge, by positioning himself behind not one, but two tables, has doubly reinforced his power position, effectively communicating to the parties that the proceeding is not an informal undertaking among equals. Instead, it is a formal process in which the participants are not equals; the settlement judge occupies a more powerful position than the others. Similarly, taken to the extreme, a settlement judge who conducts a settlement conference from the bench, in the courtroom, is almost certain to fail.

The lessons for the parties and the settlement judge are plain. By restructuring their spatial relationships, settlement participants are able to maximize the communication persuasion dynamic. Although furniture may apparently dictate the participants' respective locations and positions relative to one another, conscious redeployment of one's location holds potential for reinvigoration of the settlement dynamic.

VI. SUMMARY

Adversarial persuasion demands destruction of the opposing viewpoint. It is the winner whose credibility is elevated and in whose arms the balance of persuasion ultimately comes to rest. Persuasion within the context of settlement is a starkly different reality.

To destroy credibility in settlement is to destroy the settlement process itself. Unlike adversarial dispute resolution, the settlement process requires the willing participation of both parties to accomplish resolution. At issue

for each party is the credibility of the other.

Hidden within the substantive undertaking are the subtle workings of a variety of factors that affect perception of credibility, all ultimately part of the dance of mutual persuasion. Peskin observes that "over sixty percent of the impact or meaning of a communicated message resides the non-verbal behavior accompanying the oral message."[193] If a listener perceives a source to be an expert on the topic at hand and a trustworthy communicator, he will deem the source a "credible one."[194] Such perceptions are part of the larger world of interpersonal communication, described as an integration of both verbal and nonverbal cues.[195]

Beyond the immediate and substantive world of legal interaction is a realm of interpersonal interaction not often considered in the fiery give and take of legal problem-solving. There is an undeniable link between interpersonal interaction distance and the effectiveness of interpersonal communication.[196] Acceptance of influence, or persuasion, varies with distance.[197] One's orientation to others affects perception of cooperation, opposition or indifference. Sitting opposite another individual creates a different perception than sitting catty-corner or side-by-side.[198] Communication is affected by perception of status, which in turn is affected by physical location. The head of a table is a power position, a location that affects the occupant's ability to influence others in a small group setting.[199]

These hidden parameters define the tone and tenor of communication, affecting perceptions of credibility, sincerity and truth-telling. To accomplish maximum effectiveness in a venue in which the traditional roles of adversarial interaction work at cross-purposes with settlement objectives, lawyers and settlement neutrals must be aware of the effect of the environment within which such proceedings take place. Lawyers trained in the formality of adversarial dispute resolution are likely to fall once again into its embrace, unaware of the hidden adversarial message of the spaces into which they are cast.

The perceived relative informality of the settlement undertaking should not be misinterpreted. The spaces within which the settlement process takes place affect the settlement outcome to the same degree as the formality of the courtroom affects the outcome of trial. Settlement communication is a delicate balance of competing interpersonal dynamics. The physical setting

---

[193] Peskin, *supra* note 44, at 9.

[194] Linz & Penrod, *supra* note 63, at 30.

[195] *See* Wolfe, *supra* note 30, at 737.

[196] *See* HALL, *supra* note 3, at 101.

[197] *See* Albert & Dabbs, *supra* note 95, at 265; *see also* Kleck, *supra* note 91, at 181.

[198] *See* SOMMER, *supra* note 16, at 62.

[199] *See* Strodtbeck & Hook, *supra* note 144, at 415.

and the hidden parameters within which it occurs have dramatic potential for dictating the ultimate result.