

Judicial Participation in Settlement: Pattern, Practice, and Ethics

The Alternative Dispute Resolution¹ movement has received serious public attention in the last dozen or so years.² Throughout the United States, mechanisms for ADR are being established as significant substitutes for traditional litigation.³ Underlying this recent growth in the movement is the assumption that settlement⁴ of disputes benefits the clients, the courts, and society in general to a greater extent than does complete adjudication.⁵ It is believed that settlement of disputes reduces backlog of cases and overcrowded dockets,⁶ decreases expense by eliminating the costs of discovery, trial, and appeals,⁷ and, because it entails more party autonomy and freedom of negotiation than traditional litigation, is perceived by the parties as yielding fairer outcomes.⁸

However, the ADR movement is not without its detractors.⁹ One oft-articulated criticism focuses on the disagreement over the appropriate role of judges when participating in ADR, particularly in pretrial set-

1. The term "dispute resolution" encompasses a variety of mechanisms, including negotiation, arbitration, mediation, conciliation, and settlement. This Note will focus on settlement, particularly in the pretrial context.

2. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 668 (1986). Dispute resolution techniques have been utilized for years. "That they are now being characterized as innovative reflects the extent to which they are being institutionalized and applied in new situations, and the increased level of expectation being attached to them." NATIONAL INST. FOR DIS. RES., PATHS TO JUSTICE: MAJOR PUBLIC POLICY ISSUES OF DISPUTE RESOLUTION 5 (1984).

3. Edwards, *supra* note 2, at 669.

4. Settlement is an out-of-court agreement in which a party withdraws pending litigation from the court in exchange for a compromise with the other party. BLACKS LAW DICTIONARY 993 (5th ed. 1979).

5. Wall, Rude & Schiller, *Judicial Participation in Settlement*, 1984 MO. J. DIS. RES. 25, 26 (1985).

6. Wall & Schiller, *Judicial Involvement in Pre-Trial Settlement: A Judge is Not a Bump on a Log*, 6 AM. J. TRIAL ADVOC. 27, 28 (1982). This belief is not shared by all commentators. Certain literature suggests that "dedicating judicial resources to active participation in settlement neither speed[s] dispositions nor increase[s] the productivity of judges," and even indicates that the inverse may be true. Galanter, ". . . A Settlement Judge, Not a Trial Judge": *Judicial Mediation in the United States*, 12 J. L. & SOC'Y 1, 7-8 (1985). See also Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 494 (1985) (showing that federal district courts with the greatest degree of settlement activity also had the smallest number of civil dispositions). See also Oesterle, *Trial Judges in Settlement Discussions: Mediators or Hagglers?*, 9 CORNELL L. FORUM 7, 9 (1982).

7. Wall, Rude & Schiller, *supra* note 5, at 26-27.

8. Galanter, *supra* note 6, at 3.

9. Principal among them is Professor Owen Fiss, who believes settlement is often institutionalized on a wholesale or indiscriminate basis, and is therefore not preferable over judgment. He analogizes ADR to plea bargaining, and maintains that it is tainted with the same attendant flaws: coercion, imbalance of power, and miscarriages of justice.

tlement conferences.¹⁰ Should they adopt an aggressive or "activist" stance, or are the interests of justice better served by an exercise of judicial passivity and restraint? What are the dangers inherent in permitting judges to unilaterally set the tone and pace of pre-trial proceedings, a task traditionally reserved for attorneys and their clients? Finally, does active judicial involvement in ADR violate the ethical Canons embodied in the Code of Judicial Conduct? In order to respond to these questions, it is useful to understand: (1) the degree of involvement and intervention in litigation demonstrated by judges historically; (2) the extent to which the adoption of the Federal Rules of Civil Procedure (FRCP) in 1938 broadened the scope of permissive intervention; (3) the extent to which judges have increased their participation in resolution of disputes as a result of the promulgation of the Rules; and (4) the degree to which, if at all, the practices and methods currently employed by judges in the promotion of settlement violate the ethical considerations embodied in the Code of Judicial Conduct.

I. INVOLVEMENT OF THE JUDICIARY IN SETTLEMENT PRIOR TO THE ADOPTION OF THE FRCP

Under the traditional or classical view of the judicial role in the American Legal establishment, judges were not "supposed to have an involvement or interest in the controversies they adjudicate[d]."¹¹ In the words of Dean Roscoe Pound:

[I]n America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference. We resent such interference as unfair, even when in the interest of justice.¹²

"Disengagement and dispassion supposedly enable[d] judges to decide cases fairly and impartially."¹³ An unbiased disposition was facilitated

Fiss, *Against Settlement*, 93 YALE L. J. 1073, 1073-76 (1984). What Fiss ignores, however, are the protective factors incorporated in court-annexed ADR which are designed to prevent financial imbalances of power from coercing settlement, *i.e.*, judicial participation. Furthermore, in most instances, settlement is synonymous with termination, and return trips to the judge for illumination or enforcement of the terms are unnecessary. *See* Wall, Rude & Schiller, *supra* note 5, at 27. Moreover, Fiss neglects to offer much empirical support for his contentions, and fails to make any distinction between the applicability of his criticisms in the ADR context as opposed to the more traditional adjudicatory process. Thus, it is difficult to discern exactly the thrust of Professor Fiss' objections.

10. Menkel-Meadow, *supra* note 6, at 488.

11. Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376 (1982).

12. Fox, *Settlement: Helping the Lawyers to Fulfill Their Responsibility*, 53 F.R.D. 129, 137 (1971). These words were used by Pound as a preface to a scathing commentary on the out-dated, cumbersome, and ineffective procedural methods utilized by the legal establishment before the adoption of the FRCP.

13. Resnik, *supra* note 11, at 376.

by the judge's lack of involvement in case preparation and control over issue delineation and scheduling of the docket. In most instances, judges were not privy to pretrial machinations; they only became involved in the litigation when a particular type of judicial action was requested by one of the parties.¹⁴ In this manner, "the judge [became] the trustee of the assurance of justice . . . [h]e preside[d], he administer[ed], he decide[d]."¹⁵ Thus, in a historical sense, the sanctity of the American adversarial system was "untainted" by judicial participation in litigation in the preliminary stages.

The complacency with which the detached judicial posture in the American legal system was regarded was rather abruptly altered in 1929. In that year, the Circuit Court of Wayne County, Michigan, discovered that its civil docket was backlogged for almost four years.¹⁶ This prompted the Court to devise a system of voluntary pretrial conferences between the lawyers and a judge in the hope of promoting settlement by facilitating issue identification, resolving evidence questions, and disposing of preliminary motions.¹⁷ The results were promising,¹⁸ and several other cities soon followed suit.¹⁹ The chain reaction culminated with the adoption of federal rules establishing procedural guidelines and requirements at various stages of litigation, most notably, for our purposes, at the pretrial stage.²⁰

II. EFFECT OF THE ADOPTION OF THE FRCP ON JUDICIAL INVOLVEMENT IN SETTLEMENT

Judicial involvement in litigation in the form of pretrial conferences received explicit federal approval and promotion with the adoption of the Federal Rules of Civil Procedure in 1938. Of the eighty-six Rules existing today, three—Rules 1, 16, and 83—have either a direct or indirect effect on alternative dispute resolution processes, particularly on efforts to resolve disputes by settlement.

14. *Id.* at 384 (e.g., a motion for summary judgment, a date for trial, or a pretrial conference). See also Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770, 770 (1981).

15. J. BORKIN, *THE CORRUPT JUDGE* 9 (1962).

16. Oesterle, *supra* note 6, at 7. See also Menkel-Meadow, *supra* note 6, at 490 (tracing the origins of modern judicial promotion of case disposition to judicial attempts to apply "Scandinavian conciliation techniques" to cases before them).

17. Oesterle, *supra* note 6, at 7. See also Menkel-Meadow, *supra* note 6, at 490-91.

18. Oesterle, *supra* note 6, at 7 (the waiting time for trial was cut from forty-five months to twelve to fifteen months).

19. *Id.* at 7; Fox, *supra* note 12, at 133; Menkel-Meadow, *supra* note 6, at 491; FED. R. CIV. P. 16 advisory committee's note 1.

20. Oesterle, *supra* note 6, at 7; Fox, *supra* note 12, at 133.

Rule 1 states, in pertinent part, that “[the Rules] shall be construed to secure the just, speedy, and inexpensive determination of every action.”²¹ The language of the Rule suggests that judges are given broad discretion (if used properly) over trial procedure. Thus, judges have interpreted the rule as an implicit grant of authority for judicial intervention in the promotion of settlement,²² especially in light of the growing body of support for the idea that settlement is superior to adjudication in terms of securing “speedy and inexpensive determination” of lawsuits.

The judicial role in pretrial settlement promotion was further expanded by Rule 16.²³ The Rule, as originally drafted and adopted, provided for pretrial conferences as “vehicles for narrowing issues at trial,” but did not approve their use as a forum for settlement discussions.²⁴ The Rule was amended in 1983, however, to “strengthen the hand of the trial judge in brokering settlements: The ‘facilitation of settlement’ became an express purpose of pretrial conferences, and participants were . . . encouraged (not required) to consider ‘the possibility of settlement or the use of extrajudicial procedures to resolve their dispute.’ ”²⁵

The amendment was prompted, in part, by a reluctance on the part of many judges to engage actively in pretrial dispute resolution efforts

21. FED. R. CIV. P. 1.

22. One commentator has noted that while speed and inexpensiveness are important considerations, they should not be pursued at the cost of justice. See Note, *Judicial Authority in the Settlement of Federal Civil Cases*, 42 WASH. & LEE L. REV. 171, 175 (1985).

23. FED. R. CIV. P. 16 reads in relevant part:

(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties . . . to appear before it for a conference or conferences before trial for such purposes as (1) expediting the disposition of the action; (2) establishing early and continuing control so that the case will not be protracted because of lack of management; (3) discouraging wasteful pretrial activities; . . . (5) facilitating the settlement of the case. . . .

(c) Subjects to be Discussed at Pretrial Conferences. The participants at any conference under this rule may consider and take action with respect to . . . (7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute; . . . (11) such other matters as may aid in the disposition of the action. . . .

(f) Sanctions. If a party or party’s attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party’s attorney is substantially unprepared to participate in the conference, or if a party or party’s attorney fails to participate in good faith, the judge, upon motion or the judge’s own initiative, may make such orders with regard thereto as are just. . . . In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney’s fees. . . .

Id.

24. Oesterle, *supra* note 6, at 7.

25. Fiss, *supra* note 9, at 1073-74.

without more explicit guidance or permission from the Rule, despite the existence of empirical evidence showing that early intervention in the form of judicial assumption of control over the case resulted in disposition by settlement or a more efficient, less costly trial.²⁶ The problem of judicial reticence was compounded by a surge in volume and complexity of cases after 1938.²⁷ In response to the needs of modern litigation, the Rule was finally amended in 1983 to reflect the congressional opinion that facilitation of case settlement was a proper function of pretrial conferences (Rule 16(a)(5)).²⁸

Another provision of Rule 16 which impacts upon early resolution, in a less direct way, is Rule 16(f), which imposes sanctions against any party who fails to obey a pretrial order, fails to participate in the conference in good faith, or is substantially unprepared to participate in the conference.²⁹ The Advisory Committee notes to Rule 16(f) explicitly indicate that the drafters intended the Rule to have the effect of encouraging forceful judicial management. Imposition on parties and attorneys of this kind of subtle pressure facilitates settlement efforts advanced by the judge by making parties more predisposed to resolution endeavors, for fear of the potential consequences of refusal.

Finally, Rule 83 fosters judicial participation in settlement by giving district courts power to "regulate their practice in any manner not inconsistent with [the Federal Rules of Civil Procedure]" thereby providing judges with flexibility and a degree of autonomy over the extent to which they can administer the calendar and exert control over the cases on their dockets.³⁰

Clearly, then, the adoption of Federal Rules of Civil Procedure, combined with subsequent amendments to them, have had a persuasive and profound effect on the involvement of the judiciary in pretrial settlement negotiations. One recent study revealed that seventy-five percent of federal judges and over half of state judges initiated dis-

26. FED. R. CIV. P. 16 advisory committee's notes (1983 amendment) (citing S. FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS 17 (1977)).

27. Resnik attributes this growth spurt to four factors: (1) population growth; (2) congressional creation of several new legal rights and redressable wrongs; (3) increase in the number of lawyers; and, (4) new incentives to litigate due to congressional approval of payment of attorney's fees to certain successful parties. Resnik, *supra* note 11, at 396-97.

28. FED. R. CIV. P. 16 advisory committee's notes (1983 amendment). However, it is important to stress that active judicial involvement in settlement was practiced by large segments of the judiciary even before the Rule was amended. Judge Noel P. Fox, Chief Judge of the District Court for the Western District of Michigan in 1977, expressed the judge's role in terms of *duty*: "It is clear that a federal judge has the *positive duty* to advance a case to a just, inexpensive and expeditious resolution." (emphasis added). Fox, *supra* note 12, at 132.

29. FED. R. CIV. P. 16(f).

30. Fox, *supra* note 12, at 132.

cussions which ultimately led to settlement.³¹ Today, about ninety percent of all cases filed, both civil and criminal, are disposed of without trial.³²

However, the degree of involvement and frequency with which judicial participation in dispute resolution occurs is not uniform. A significant portion of judges take full advantage of the opportunity to promote settlement negotiations. Some, however, harbor certain reservations and appear reluctant to adopt an aggressive or "activist" stance. A contrast of passive and aggressive techniques reveals why different judges prefer one approach over the other, and accounts for the higher frequency of utilization of passive techniques over aggressive ones.

Given the benefits to be derived from resolution of disputes before litigation and the flexibility in negotiation provided by the FRCP, it is not surprising that judges and lawyers have employed a vast range of settlement methods. Three commentators, Wall, Rude, and Schiller, have identified over seventy separate techniques utilized in civil cases.³³ These range from "passive" approaches, such as talking with both lawyers about settlement, calling a certain settlement figure reasonable, channeling discussions in a certain direction, and analyzing the case for a lawyer, to so-called aggressive techniques, such as speaking personally with the client to persuade him to accept the settlement offer, requiring one client to pay the other client's attorney fees and expenses, giving information to the lawyer with a weaker case, and threatening to discuss an attorney's recalcitrance with a senior member of the attorney's firm.³⁴

Although a survey conducted by the commentators revealed that judges or lawyers had observed or used all the above-mentioned techniques, they were not utilized with the same degree of frequency. Of 963 participants polled, an average of approximately eighty-two percent

31. Menkel-Meadow, *supra* note 6, at 497. This may be due, in significant part, to their perception that settlement benefits them directly by lightening their workload. See Wall, Rude & Schiller, *supra* note 5, at 25.

32. Will, Merhige & Rubin, *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203, 203 (1978). See also Galanter, *supra* note 6, at 3. Fiss cites this high percentage figure as support for his criticism that settlement necessarily strips the judiciary of its law-making power because the judge's opinion of the cases which he helps settle are never written or reported and thus cannot be used as precedential authority. Fiss has a good point, but it needs refinement. As Menkel-Meadow notes, most cases are not "of the 'structural-reform' variety," and processing them through traditional adjudicative methods serves no useful purpose—they should be settled. Menkel-Meadow, *supra* note 6, at 501. However, this author agrees with Fiss that cases involving controversial issues, establishing legal precedents, and clarifying existing laws should be resolved through traditional litigation. Fiss, *supra* note 9, at 1085-86. This opinion is shared by the National Institute for Dispute Resolution. See NATIONAL INST. FOR DIS. RES., *supra* note 2, at 10. ("[Courts] are the appropriate forum when the purpose is to establish a societal norm or a legal precedent.")

33. Wall, Rude & Schiller, *supra* note 5, at 27.

34. *Id.* at 34-38.

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engaged in the passive activities, while only an estimated eighteen percent admitted using or observing aggressive approaches.³⁵

It is uncertain what precise considerations influence judicial participation, but two factors which appear to affect the utilization of the individual mechanisms are the "perceived effectiveness of the technique and the cost, in terms of time and resources, of its application."³⁶ This may result in a no-win situation. If a judge does not have the requisite time to acquaint himself with all the facts of the case, or to engage in extensive pretrial settlement conferences, *et cetera*, he will be less able to effectuate meaningful dispute resolution. This will result in a backlog of cases, which in turn renders a judge subject to serious temporal constraints. Thus, unless a particular judge is not burdened by an overcrowded docket, which is highly improbable, he may not have the resources available to pursue active alternative dispute resolution. This may account for the greater use of passive techniques in the pretrial settlement process. On the other hand, knowledge of an overburdened docket may compel judges to take special pains to expedite resolution of disputes, in the hopes of alleviating the lengthy backlog.³⁷

Research also suggests that judges are more apt to get personally involved in resolving jury cases of a particularly complex nature on the assumption that relatively simple fact patterns are left to the jury members, who are deemed capable of resolving the dispute effectively.³⁸

Judges also tend to concentrate their dispute resolution efforts on lengthy cases³⁹ in order to achieve a reduction in case delay. "The commonly held belief is that [a] case which will involve an extensive trial and will delay subsequent cases by a substantial amount of time should be settled in order to avoid extensive delay."⁴⁰

Another factor which influences judges' willingness to participate in settlement negotiations is the amount in controversy.⁴¹ Specifically, judges seek to keep small cases out of court. Two reasons explain their stressing settlement of small cases rather than large ones: (1) bringing to trial the millions of cases which are filed each year in the civil courts would cripple the legal system; and, (2) it is grossly inefficient to spend more money trying a case than the case itself is worth.⁴² Thus, judges tend to engage in active settlement efforts in large, complex, time-consuming cases and cases that involve a small amount in controversy.

35. *Id.* at 34.

36. *Id.* at 39.

37. *Id.* at 40.

38. *Id.* at 41.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

The degree of judicial participation practiced during pretrial settlement may be a product of other influences not readily discernible. For instance, some judges reported that they were more predisposed to intervene in settlement procedures where they viewed the attorneys as lacking negotiation skills and where they perceived themselves as excellent negotiators.⁴³ Some judges have indicated that participation in ADR induces a sense of accomplishment and control,⁴⁴ and also tends to be more "fun" than traditional adjudicatory processes.⁴⁵

Thus, given the plethora of techniques available for use by judges in settlement promotion, and the myriad reasons for actively employing them, the natural conclusion is that judicial intervention in ADR is practiced in a uniform manner. However, when asked what role they typically assume in civil settlement conferences, approximately twenty-two percent of 2,500 judges surveyed responded that they "did not intervene, but 'allow[ed] opposing counsel to try to reach a settlement on their own.'"⁴⁶ This suggests that a fair amount of justices harbor reservations about becoming meaningful participants in ADR, and may account for the unwillingness of certain judges to engage in active promotion of dispute resolution by settlement.

One commentator has suggested that the extent and type of judicial involvement in settlement is controlled by one overriding consideration: "[j]udges are more apt to use techniques which are considered ethical by the judicial community."⁴⁷ Of the aggressive techniques noted previously, approximately fifty percent of the attorneys polled had observed their use, yet roughly forty-three percent thought employment of those types of ADR techniques unethical,⁴⁸ some going so far as to say they "represented illegal and impeachable offenses."⁴⁹ For example, forty percent of the lawyers surveyed expressed the opinion that a judge siding with the stronger party in order to force agreement constituted unethical behavior on the judge's part, but nevertheless, as many as twenty-eight percent reported observing the technique utilized in various cases.⁵⁰ Some critics of ADR even claimed that promoters of the movement are motivated by an unethical desire to limit the work of the courts in areas affecting minority interests, civil rights, and civil liberties.⁵¹ As a result, judges may refrain from active participation in

43. Galanter, *supra* note 6, at 8.

44. *Id.* at 13.

45. *Id.*

46. *Id.* at 7 (quoting J. RYAN, AMERICAN TRIAL JUDGES: THEIR WORK STYLES AND PERFORMANCE 177 (1980)).

47. Wall, Rude & Schiller, *supra* note 5, at 38.

48. *Id.* at 35-38.

49. *Id.* at 38.

50. *Id.* at 37.

51. Edwards, *supra* note 2, at 668-69.

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settlement negotiations as a purely reactionary mechanism for fear that they may overstep the bounds of "ethical" or prudent behavior.

Are the perceptions and apprehensions of these judges accurate? Are all types of judicial intervention in ADR unethical, or do only certain extreme methods fall outside the realm of acceptable judicial behavior? How these questions are ultimately resolved may have serious and far-reaching effects on both dispute resolution as it is currently practiced and on the direction in which it is heading.

III. THE ETHICS OF JUDICIAL INVOLVEMENT IN SETTLEMENT

The public perception of ethics⁵² in the legal profession (or lack thereof) is contradictory at best. On one hand, lawyers are perceived by the public as having significantly lower ethical standards than not only doctors and dentists, but most people in general.⁵³ Judges, on the other hand, have been traditionally held in the highest popular regard and even reverence. "Consciously and unconsciously, society has elevated the judge to a carefully protected eminence."⁵⁴ Thus, evidence of any judicial wrongdoing or involvement in scandalous or immoral activity is usually cause for great societal anxiety and alarm.⁵⁵ Rather than risk behavior that might be construed as unethical or result in public condemnation, many judges understandably refrain from active participation in settlement negotiations completely.

Unfortunately, reference to the Code will not aid the scrupulous judge in his search for a definition of his proper role in this regard. The Code of Judicial Conduct⁵⁶ was adopted by the American Bar Association in August, 1972 and was drafted for the purpose of establishing standards which could be applied to both state and federal judges. Canons 1, 2, and 3, however, could be interpreted as restrictions on judicial involvement in ADR.

Canon 1 states that "[a] judge should uphold the integrity and independence of the judiciary."⁵⁷ An independent judiciary, *i.e.*, one free

52. Ethics is defined as the discipline dealing with what is good and bad and with moral duty and obligation; a set of morals or values; the principles of conduct governing an individual or a group. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 426 (9th ed. 1985).

53. O. PHILLIPS & P. MCCOY, CONDUCT OF JUDGES AND LAWYERS ix (1952).

54. J. BORKIN, *supra* note 15, at 10; *see also* L. GOLDBERG & E. LEVENSON, LAWLESS JUDGES iii-iv (1935).

55. J. BORKIN, *supra* note 15, at 17.

56. CODE OF JUDICIAL CONDUCT (1984). The preface to the Code indicates the standards that judges should observe, and the "Canons and text establish mandatory standards unless otherwise indicated." *Id.*

57. *Id.* Canon 1 states in full:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and en-

from influences (be they political or otherwise) "that exceed the four corners of the case presented for disposition,"⁵⁸ is crucial "if the judiciary is to receive the respect and support it requires to function effectively."⁵⁹ This is especially true given the summary power vested in a judge, particularly when disposing of a case by settlement, for three reasons: (1) he has the authority to control the administration of the proceedings and the conduct of counsel, (2) he possesses a tremendous amount of discretion, and, (3) the lack of formal adjudication virtually eliminates the possibility of subsequent judicial review of the proceedings.⁶⁰ Judges who violate the Canons in exercising their abundant authority may find themselves subject to disciplinary action in the form of reprimand, suspension, disbarment, or removal from the bench.⁶¹

For example, in *In re Terry*,⁶² Canon 1 was cited as authority for the suspension of a judge partially on the ground of unduly interfering with the attorneys' presentation of their cases.⁶³ The existence on the books of this and similar cases⁶⁴ may deter many judges from vigorously promoting settlement for fear that it will be construed as violative of Canon 1. Moreover, it may account for the predominance in practice of the use of passive techniques over active ones.

Canons 2 and 3 can also be interpreted as suppressive of active judicial involvement in settlement activity. Both address the concern that the judiciary remain steadfastly impartial in their treatment of each case. Canon 2 mandates that "[a] judge should avoid impropriety and the appearance of impropriety in all of his activities." Subsection A of Canon 2 states that a judge "should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."⁶⁵ This includes freely and willingly accepting restrictions

forcing, and should observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Id.

58. Kaufman, *Lions or Jackals: The Function of a Code of Judicial Ethics*, in SELECTED READINGS: JUDICIAL DISCIPLINE AND REMOVAL 5-6 (G. Winters ed. 1973).

59. J. BORKIN, *supra* note 15, at 20.

60. Buckley, *The Commission of Judicial Qualifications: An Attempt to Deal with Judicial Misconduct*, in SELECTED READINGS: JUDICIAL DISCIPLINE AND REMOVAL 60 (G. Winters ed. 1973).

61. *Id.* at 65.

62. 323 N.E.2d 192 (Ind. 1975).

63. D. FRETZ, R. PEEPLES & T. WICKER, ETHICS FOR JUDGES 8-9 (1982).

64. See, e.g., *Steinberg v. Ogden Foods Inc.*, 501 F.2d 1339 (6th Cir. 1974); *Nebraska Pub. Power Dist. v. Austin Power Inc.*, 773 F.2d 960 (8th Cir. 1984) (per curiam); *McCargo v. Hedrick*, 545 F.2d 393 (4th Cir. 1976); *In re LaMarre*, 494 F.2d 753 (6th Cir. 1974); *J. M. Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338 (D. Conn. 1981).

65. CODE OF JUDICIAL CONDUCT, *supra* note 56, Canon 2. Canon 2 provides:

A. A judge should respect and comply with the law and should conduct

on his conduct that might be viewed as burdensome by the ordinary citizen.⁶⁶

Canon 3 imposes on a judge the affirmative obligation to perform the duties of his office impartially and diligently.⁶⁷ Included in the definition of judicial duties are all the duties of a judge's office prescribed by law.⁶⁸ Canons 2 and 3, particularly Canon 3, are the most troublesome to a judge concerned about active involvement in dispute resolution, which, although more efficient and less expensive than traditional adjudication, also carries with it the potential danger that it may, in practice, be considered violative of the ethical standards on which the Code of Judicial Conduct is based.

When judges become intricately involved in case management at the beginning stages, they naturally negotiate at length and with great frequency with the parties over scheduling, issue clarification, and the possibility of settlement.⁶⁹ Pretrial proceedings are usually informal,

himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify as a character witness.

Id.

66. *Id.*

67. CODE OF JUDICIAL CONDUCT, *supra* note 56, Canon 3. Canon 3 provides, in part:

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative responsibilities.

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before him.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers. . . .

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding

Id.

68. *Id.*

69. Resnik, *supra* note 11, at 378.

unstructured meetings,⁷⁰ during which the judge is presented with the opportunity to become more familiar with the attorneys and litigants, and may thus develop favorable or unfavorable impressions of them based on personality, demeanor, attitude, or other character traits which have no bearing on the merits of the litigation. He may become predisposed to one party for personal reasons, and this bias may affect his ability to impartially judge the factual or legal merits of the case. The likely result of this scenario is an error in judgment or a miscarriage of justice, either of which may reflect badly on the judge's ability to render fair decisions or may call into question his integrity.

In addition, a judge may become exposed to information during informal pretrial proceedings that may not otherwise constitute admissible evidence at trial. Unfortunately, because "a bell cannot be unrung," the judge "may [already] have a tainted view of the facts before the trial even begins."⁷¹ If this bias manifests itself, particularly during a jury trial, the chances of a fair resolution of the case are near impossible. A judge's position and the respect with which he is addressed by counsel leads jurors and witnesses to believe that the judge is infallible.⁷² Thus, any indication from the judge of his opinion of any matter involved in the case, whether it be shaking of his head in disbelief⁷³ or even a cordial greeting to a witness, may be adopted by the jurors, consciously or unconsciously, as their own opinion. "This type of influence is almost impossible to counteract, even if counsel should detect it."⁷⁴ Moreover, the likelihood of its occurrence is increased when a judge becomes immersed in the details of a case and familiar with the personalities of the parties involved. He may become swayed in favor of one litigant without consciously realizing it.⁷⁵

In addition, much of the information disclosed to a judge during pretrial proceedings is imparted *ex parte*, and thus deprives the opposing

70. *Id.* at 407.

71. Note, *supra* note 22, at 183.

72. Buckley, *supra* note 60, at 60.

73. Porcaro v. United States, 784 F.2d 38 (1st Cir. 1986). In this case, the defendant alleged:

The trial judge would look at the jury and make faces, shake his head in disbelief, look at the ceiling . . . use obvious jesters (sic) and mannerisms whenever defense witnesses testified conveying to the jury that the defense witness should not be believed. Yet whenever a government witness testified, the trial judge would express a genuine interest and nod his head in approval looking directly at the witness, then at the jury.

Id. at 41.

74. Buckley, *supra* note 60, at 60.

75. In the words of Thomas Jefferson: "All know the influence of interest in the mind of man and how unconsciously his judgment is warped by that influence." See Goldberg & Levenson, *supra* note 54, at vi.

party of the opportunity to hear it and challenge its validity.⁷⁶ The assumption that *ex parte* proceedings pose a threat to the independence of the judiciary has been made explicit by Canon 3A(4): "A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider [substantive] *ex parte* or other communications concerning a pending or impending proceeding"⁷⁷ Accordingly, in *In re Conduct of Jordan*,⁷⁸ it was held improper for a judge to discuss a case with an important witness in the case, and in *Manekis v. State*,⁷⁹ the Indiana Court of Appeals held that Canon 3A(4) was violated when a judge discussed with a litigant the litigant's desire to have the attorney withdrawn and to substitute new counsel in his stead. Likewise, in *In re Boyd*,⁸⁰ a judge was found to have violated the Code of Judicial Conduct when he received a memorandum from an attorney in the case and did not inform opposing counsel of that fact. Although the Supreme Court and lower federal courts have declined to rule on the effect pretrial involvement has on judicial interest,⁸¹ it is certainly possible that increased participation paves the way for diminished impartiality. Although Canon 3, as recently amended, does not prohibit a judge from engaging in non-substantive *ex parte* communications on procedural matters and matters affecting prompt disposal of the business of the court, it may be difficult in practice to isolate substantive issues from non-substantive ones during a pretrial discussion. Thus, the amendment may not achieve the desired effect of ensuring judicial impartiality in case disposition.

Yet another result of judicial involvement in settlement may bring judges in conflict with the ethical aspirations mandated by the American Bar Association, particularly the portion of Canon 3A(1) which dictates that a judge should be "unswayed by . . . public clamor, or fear of criticism."⁸² Professor Resnik notes that the relatively recent concern over clearing court dockets has led to a disposition "obsession" among some judges. She suggests that urging judges to promote settlement and effectuate case termination may be teaching judges to pay more attention to their statistics rather than to the quality of their dispositions.⁸³ Ironically, this development was prompted by what was initially perceived as a benefit of the movement towards accelerated case processing:⁸⁴ as

76. Resnik, *supra* note 11, at 427.

77. CODE OF JUDICIAL CONDUCT, *supra* note 56, Canon 3.

78. 624 P.2d 1074 (Or. 1981).

79. 411 N.E.2d 669 (Ind. Ct. App. 1980).

80. 308 So. 2d 13 (Fla. 1975).

81. Resnik, *supra* note 11, at 428.

82. CODE OF JUDICIAL CONDUCT, *supra* note 56, Canon 3.

83. Resnik, *supra* note 11, at 380.

84. *Id.* at 416.

court administrators collected data on the number and type of case terminations, as well as which judges were credited with them, "lazy" judges became pressured to be more diligent in fulfilling the demands of their office. However, the availability of additional information also had the undesirable effect of inducing a competitive quality into judicial case management. When a judge perceives that his ability and past performance are assessed by the public, attorneys, or other judges, according to the number of cases he settles or terminates, he may feel compelled to engage in coercive tactics in order to prompt docket clearing. Or, he may participate in behavior that is less obviously egregious (e.g., verbal criticism or impatience with attorneys or litigants who are reluctant to settle), but is nevertheless forbidden by the Code of Judicial Conduct.⁸⁵ Although many judges recognize that such activity falls clearly outside the proper judicial function,⁸⁶ it has nevertheless been demonstrated in numerous cases.⁸⁷

Furthermore, judicial involvement in settlement may violate the Canon of Ethics which mandates that "[t]he judicial duties of a judge take precedence over all his other activities."⁸⁸ United States District Judge Hubert L. Will has admitted that the judicial role in settlement is "not that of a traditional judge, [it] is that of a mediator."⁸⁹ Thus, perhaps it is proper for a judge to engage only in those activities expressly provided for by Rule 16 rather than more activist involvement which may be outside the contemplation of the Rule, (i.e., involvement that is not expressly authorized by law and therefore unethical). Yet this, too, presents a dilemma for the judiciary, because the Canons of Ethics also direct a judge to be diligent and efficient (e.g., "[a] judge should dispose promptly of the business of the court."⁹⁰) To this effect, some states have established time limitations within which decisions must be rendered.⁹¹ Although provisions such as these may ensure efficiency, the

85. See CODE OF JUDICIAL CONDUCT, *supra* note 56.

86. See generally Wall, Rude & Schiller, *supra* note 5, at 38.

87. *In re La Marre*, 494 F.2d 753, 756 (6th Cir. 1974) ("[N]o judge can compel a settlement prior to trial on terms which one or both parties find completely unacceptable."); *Citron v. ARO Corp.*, 377 F.2d 750 (3d Cir. 1967) (attempt to speed a case to completion under threat of extensive delay a misuse of judicial power); *Wolfe v. La Verne*, 17 A.D.2d 213, 233 N.Y.S.2d 555 (1962) (error to accelerate trial date because one party had refused an offer of settlement); *Rosenfeld v. Vosper*, 45 Cal. App. 2d 365, 114 P.2d 29 (1941) (judge should not constantly suggest settlement to attorneys). *But see Johnson v. Trueblood*, 629 F.2d 287 (3d Cir. 1980) (no error for judge to state during settlement negotiations that defendants were "honest men of high character"); *Romines v. Illinois Motor Freight, Inc.*, 21 Ill. App. 2d 380, 158 N.E.2d 97 (1959) (no error for judge to say in closed conference that he hoped defendant would lose).

88. See CODE OF JUDICIAL CONDUCT, *supra* note 56, Canon 3.

89. Will, Merhige & Rubin, *supra* note 32, at 205.

90. CODE OF JUDICIAL CONDUCT, *supra* note 56, Canon 3A(5).

91. D. FRETZ, R. PEEPLES & T. WICKER, *supra* note 63, at 20. In Minnesota, Wisconsin, and California, the time allowed is 90 days.

attempt to conform to the mandates of both diligence and impartiality under Canon 6 may leave many judges between a rock and a hard place. Since there is little in the form of common law authority to guide judicial behavior, the extent to which active judicial participation in settlement is proper remains uncertain.

IV. CONCLUSION

It is clear at this point that judicial participation in and promotion of settlement negotiations can be both beneficial and detrimental to the interests of justice. On one hand, it results in speedy, inexpensive, and, in the vast majority of cases, just resolution of civil disputes. On the other hand, it is often effectuated through judicial behavior which is considered contrary to the ethical considerations underlying the Code of Judicial Conduct. In this author's opinion, much of the conflict could be eliminated by congressional amendment of Rule 16 to reflect the requirement that a judge who actively participates in pretrial settlement activity be ineligible to hear the case if settlement efforts fail and traditional adjudication is undertaken. In this manner, the worry over potential impartiality resulting from judicial exposure to inadmissible evidence and personal familiarity with the parties and attorneys is completely avoided. Employment of this method places no additional burden on court resources, yet provides greater assurance that justice will be accomplished. Amendment of Rule 16 seems obviously preferable to again altering the Code of Judicial Conduct to allow substantive *ex parte* communications or qualify the requirements of diligence and impartiality. Without the institution of corrective measures, judges may either overstep the boundaries of ethical judicial involvement, or, for fear that they might overstep them, will refrain from participation in productive and valuable settlement negotiations.

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