

The emergence of the judge as a mediator in civil cases

Although attempts by the court to "settle" cases has long been an informal part of our system of justice, today cases that once might have been settled by negotiations between opposing counsel are settled with the active participation of the judge.

by Marc Galanter

Most civil cases filed in American courts are settled by an agreement between the parties rather than resolved by a decision of the court. "Bargaining in the shadow of the law" is the prevalent means of resolving civil cases in American courts. Typically, settlement negotiations involve only counsel for the respective parties. But in many instances the negotiations are encouraged, brokered, or actively mediated by the judge. Most American judges participate to some extent in the settlement of some of the cases before them. Indeed, this has become a respectable, even esteemed, feature of judicial work.

There have always been a lot of settlements in American civil courts. It remains unclear whether the percentage of cases terminated by settlement has increased in recent years. And, if there has been an increase, it is unclear whether it is caused by the increased intervention

of judges. There has been a sea change, however, in the way judges talk about settlement and think about their roles as judges. In this article I shall trace the change in judicial views over the past half century and speculate on the causes and effects of this change.

As we look back to examine past settlement practices, it is worth noting that "settlement" is *our* category. As one pushes back from the 1930s to the 1920s, the term settlement virtually disappears from the literature. A case may occasionally be described as "settled," but "settlement" is not a category for talking about or conducting policy. (Neither, for that matter, is "policy.") The terms employed in the 1920s were, "adjustment," "compromise," and "conciliation." The last of these three deserves special attention because it carries a heavy ideological and programmatic load.

Conciliation

"Conciliation" is closely connected with one of the two recurrent themes that impel and justify judicial involvement in the settlement process. We might call these the "warm" theme and the "cool" theme. The "warm" theme refers to the impulse to replace adversary conflict by a process of conciliation to bring the parties into a mutual accord that expresses

and produces community among them. The "cool" theme emphasizes not a more admirable process but efficient institutional management: clearing dockets, reducing delay, eliminating expense, unburdening the courts. As we shall see, these themes recur, sometimes singly and often entwined together, in discussion of judicial involvement in settlement.

Before the turn of the century, conciliation modeled after the conciliation courts of Norway and Denmark had been urged on Americans as a superior way of dealing with disputes. Although its proponents emphasized conciliation tribunals as informal forums for producing mutual accord, separate from the ordinary courts, the conciliation idea became linked with the notion of providing accessible and inexpensive justice to small claimants in the courts. A Conciliation Branch was established in the Municipal Court of Cleveland in 1913 with jurisdiction of cases up to \$35. A few other cities followed suit. Some of its supporters viewed conciliation as a procedure for the adjustment of "all the little neighborhood disputes and misunderstandings."¹ It was commended as relieving the courts of "a numerous class of little cases which this machinery is not well designed to handle, and never can be made to handle economically and sensitively."²

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1. Harley, *Conciliation is Succeeding*, 45 J. AM. JUD. Soc'y 73 (1920).

2. *Id.* at 74.

Others, like Reginald Heber Smith, the patron saint of legal services, retained the notion of a private and informal, voluntary proceeding in which a conciliator would get both parties to agree to an honorable adjustment. This proceeding could be conducted in a separate tribunal or in a court, but Smith saw it as "used before *and only before* resort is had to litigation in the courts."³ For Smith, conciliation is entirely separate from the court's coercive power. It is a superior method of dispute resolution which supplants (and prevents) adversary litigation.

Not all proponents of conciliation saw it as a separate and alternative track; it might resolve or cure litigation as well as avoid it. Thus Edgar J. Lauer, a justice of the Municipal Court in New York, described his mid-1920s experiments as providing an opportunity for the court to interpose its "good offices as mediator or conciliator:"

It is the duty of the court, as I see that duty, to stop the fight if possible before the fighters are seriously hurt. This can be attempted by an effort to adjust the dispute or differences of the contending parties.⁴

Justice Lauer proposed that attorneys be required to attempt conciliation (i.e., to negotiate a settlement), but if this failed, he would

invoke the rule-making power of the court to require a judge in the trial court to tender his good offices to bring about an adjustment of differences in each case awaiting trial.⁵

In his own court he made it a practice to call counsel to the bench before me and interrogate them respecting the nature of the case and the prospect of adjusting differences. I have secured many settlements without the exercise of any pressure on the parties to reach settlement.⁶

What Justice Lauer had in mind is more than a settlement that satisfies the minimum expectations of the parties: he envisioned "the bringing of parties litigant into harmony,"⁷ encouraging concord and good will, and dispelling discord.⁸

The title of Lauer's 1928 article, "Conciliation—A Cure for the Law's Delay," suggests the second theme that animates judicial interest in settlements—the problems of judicial administration. Conciliation not only provides better outcomes for the parties than does an adversary contest, but it also remedies

Reginald Heber Smith saw conciliation as separate from the court's coercive power.

the congestion and delay that plague the courts. These twin themes—conciliation as a superior mode and as wise judicial administration—remain in uneasy combination in all subsequent discussion of judicial participation.

How widespread was the kind of practice described by Lauer? I know of no direct evidence. A contemporary proponent of conciliation who corresponded with a number of trial judges about their practices reported that "some judges consistently do all in their power to bring about conciliation and others do very little...."⁹ Yet,

...with few exceptions, they do little more than maintain a sympathetic attitude toward parties and their attorneys. They are passive and receptive. They do not initiate, and they are not active.... It is a matter of mental attitude. Instead of mere casual assent on the part of the judge, there should be a conscious definite policy to bring about conciliation.¹⁰

Institutionalized settlement

The first institutionalization of some-

3. Smith, *The Place of Conciliation in the Administration of Justice*, 9 A.B.A. J. 747 (1923).

4. Lauer, *Conciliation—A Cure for the Law's Delay*, 136 ANNALS 55 (1928).

5. *Id.* at 56.

6. *Id.* at 57.

7. *Id.* at 56.

8. *Id.* at 56-59.

9. Randall, *Conciliation as a Function of the Judge*, 18 KY. L. REV. 330, 340 (1929).

10. *Id.* at 339-40.

11. Brand, "Mighty Oaks"—*Pretrial*, 26 J. AM. JUD. SOC'Y. 36 (1942).

12. Boies, *The Executive Judge*, 167 ANNALS 21 (1933).

13. Ryan and Wickhem, *Pre-Trial Practice in Wisconsin Courts*, 1954 WISCONSIN L. REV. 24

thing like a settlement conference seems to have occurred in the Circuit Court of Wayne County (Michigan). In the late 1920s, that court had devised procedures for untangling a chancery docket congested by mechanic's liens (produced by the 1920s building boom) and had extended them to mortgage foreclosures after the 1929 crash. In August 1930, those procedures were extended to the law side and a "Conciliation Docket" was set up. Recourse was optional, but in late 1930 it was made compulsory and shortly after renamed the "Pretrial and Conciliation Docket." This innovation attracted considerable notice.¹¹ A conciliation docket was established in Cleveland's Court of Common Pleas in 1931¹² and a conciliation branch in Milwaukee's Circuit Court in 1937.¹³

In 1938, pre-trial conferences were prescribed as part of the new Federal Rules of Civil Procedure, and counterparts soon appeared in many localities.¹⁴ However, the relationship between pre-trial and settlement was ambivalent. According to the dominant view, pre-trial would sharpen cases for trial, making litigation more effective. A 1937 discussion of "Theory and Practice of Pre-Trial Procedure" by a leading academic proceduralist concludes with the observation that pre-trial:

substitutes an open, business-like and efficient presentation of real issues for the traditional strategy of concealment and disguise. Its general adoption and use might do much to restore the confidence of the public in litigation as a desirable method of settling disputes.¹⁵

In a paper on "Procedure for Pretrial Conferences in the Federal Courts" prepared for the 1944 meeting of the Committee on Pretrial Procedure of the Judicial Conference of Senior Circuit Judges, that same professor reported a "considerable difference of opinion" concern-

(1954).

14. The institutionalization of active judicial participation in settlement is closely tied to the institutionalization of the pre-trial conference and to the reform of civil procedure. I will not attempt to recount the history of the institutionalization of pre-trial but only note how it is entwined with the notion of the active judicial promotion of settlement.

15. Sunderland, *Theory and Practice of Pre-Trial Procedure*, 21 J. AM. JUD. SOC'Y. 131 (1937); similarly an enthusiastic account of a Detroit experiment commends the bar for supporting "a bench which had taught it efficiency in bringing cases to trial, and trying them." Nims, *Pre-Trial Procedure Adopted for Boston*, 19 J. AM. JUD. SOC'Y. 12 (1935).

ing the position and importance of settlement in the pre-trial conference. Some judges, he reported, considered settlement "the chief purpose of the proceeding," while others believed that settlements emerged as a by-product of the clarification of issues and preparation for trial. Professor Sunderland himself clearly thought that "maximum benefit from the pre-trial conference would be obtained if it were administered primarily for the purpose of designating and eliminating issues, facilitating proof and disposing of preliminary matter, with settlement playing a secondary role."¹⁶

A federal judicial administrator serving as secretary of the Committee on Pre-Trial Procedure of the Judicial Conference of Senior Circuit Judges surveyed judges on their attitudes toward pre-trial and found that "[i]n general the opinion is that it is proper for the judge to ask the parties whether settlement has been discussed. This opens the subject up and there are many judges who will not go further without the request of the parties."¹⁷ The Committee's opinion that "settlements are a useful by-product of pre-trial procedure..."¹⁸ was fortified, according to Shafroth, by a survey of all federal judges. Shafroth's excerpts from the responses of five of the judges surveyed suggest that those judges saw themselves as initiators of settlement discussions but not as participants in them.

The by-product view

In 1944, the Judicial Conference of the United States approved the recommendations of its Pre-Trial Committee, including the view that settlement is a "by-product of good pre-trial procedure rather than a primary objective to be actively pursued by the judge."¹⁹ This "by-product" view remained the prevailing notion in the federal courts well into the 1950s.

Addressing the Attorney General's 1954 Conference on Court Congestion and Delay in Litigation, Justice Brennan declared:

In the 1940s, settlement was viewed as a by-product of pre-trial procedure.

We have stood steadfastly against the perversion of the pretrial procedure into a device for forcing settlement.... With us, because the overriding, primary, almost exclusive function of the pretrial conference is to further the disposition of the cases according to right and justice on the merits, the contribution of the conference to a settlement, can never be the reason for the conference, but merely an incidental, although, of course, valuable, result of it.²⁰

But even before this, the by-product doctrine began to be qualified. Chief Judge Murrah observed, "[t]he settlement of cases is not a primary objective of pre-trial conferences, but, when properly presented, it is an important by-product and often the logical result of pre-trial."²¹ He suggested that a judge might not only ask whether settlement has been considered, but "may even go further and make discreet suggestions as to the possible outcome of a trial.... [B]y pointing out the pitfalls of going to trial, the pre-trial judge... can attempt to clear the way for a settlement advantageous to the interests of both parties."²²

In contrast with this restrained endorsement from the federal judicial establishment, settlement-oriented pre-trial with active judicial participation was flourishing in some state courts. Judge Cornelius J. Harrington of the Circuit Court of Cook County, for example, described the techniques he used to hold

informal conferences in negligence cases:

A memorandum... is required to be filled out by counsel for the plaintiff before the hearing. At the hearing I examine the pleadings and the police and accident prevention reports which are public records. I, also, examine the statements of witnesses which are submitted by both counsel and any other data either counsel wishes to submit. I do not disclose to either counsel what is contained in the file of the other. If it is a case that I conclude would go to a jury at the close of the plaintiff's case I so advise counsel and then request an expression from counsel for plaintiff as to the amount for which he would settle and adjust his case, and inquire if there were any offers of settlement prior to the court hearing. Then I inquire of the defendant's counsel at what figure he values the case.²³

Judge Harrington continues:

... After a frank discussion by counsel as to the value of the case, I give expression as to what, in my judgement, the case should be settled for. I would say that in approximately 90 percent of the cases the counsel agree on a figure approximating the court's recommendation. The figure the court expresses is not compulsory and if counsel cannot agree, then the case is reassigned to the head of the assignment division for an immediate jury trial.²⁴

A similar picture is supplied by a Municipal Court of Chicago judge... writing six years later:

After all the information is examined, the court asks the plaintiff what he feels would be a reasonable settlement. The defendant is then asked as to what he figures the value of the case. If the parties can agree, the court does not intervene. However, if they do not seem to be able to reach a compromise figure, the court very often attempts to bring the parties to a basis upon which the case can be mediated. If counsel requests, the court will give its ideas as to what it feels the value of the case to be. The figure that the court expresses is not controlling and if counsel cannot agree, the case is then given a trial number and placed on the trial call.²⁵

In addition, an ardent proponent of "pre-trial," surveying the scene in 1947, found to his satisfaction that:

Pre-trial seems to have developed a method of disposing of controversies, within the court, with the aid of lawyers, but without the delay, expense and technicality that have cursed the judicial process for years. It eliminates appeals. It commends itself to businessmen as a sensible and practicable procedure. It provides a method by which disputes can be disposed of in a way that leaves all parties satisfied instead of one or both disgruntled and with a grievance against courts and the law. It should increase the use of the courts.²⁶

16. Sunderland, *Procedure for Pretrial Conferences in the Federal Courts*, 3 WYOMING L. J. 203 (1949).

17. Shafroth, *Pre-Trial Techniques of Federal Judges*, 21 DICIA 250 (1944).

18. *Id.* at 252.

19. Murrah, *Pre-Trial Procedure, A Statement of Its Essentials*, 14 F. R. D. 424 (1954) reprinted.

20. "Proceedings of the Attorney General's Conference on Court Congestion and Delay in Litiga-

tion," held at the Great Hall of Justice, Washington, D.C., 1956, at 87.

21. Murrah, *supra* n. 19, at 420.

22. *Id.*

23. Nims, *Pre-Trial in the United States*, 25 CAN. B. REV. 702 (1947).

24. *Id.* at 703.

25. Robson, *Streamlining Justice by Pre-Trial Procedure*, 40 ILL. B. J. 344 (1952).

26. Nims, *supra* n. 23, at 717-718.

It is not clear just how much Nims credited these benefits to pre-trial in general and how much to active judicial attempts to induce settlement, but he seems to have had the latter in mind since he equated pre-trial with "mediation."²⁷

The most comprehensive cross-sectional picture of settlement practice is found in Ryan and Wickhem's 1953 survey of pre-trial in state and federal courts in Wisconsin. Responses to letters of inquiry by the circuit judges revealed considerable division. A few were outspoken proponents of aggressive judicial promotion of settlement. For example, the presiding judge in Madison wrote:

The primary purpose I seek to obtain out of such [pretrial] conferences is to effect settlement without trial. To accomplish that end at every conference I offer suggestions, intimate to the attorneys and clients the possibility and extent of liability, suggest the range of what I believe to be a fair settlement, and then also attempt to persuade the parties and their attorneys to accept a settlement within that range. Of course, I can only do this when I am fully advised of all the facts. I realize in doing this I am out of step with many of the circuit judges of this state and the original purpose of a pre-trial conference....²⁸

A judge in Columbia County was even more blunt:

I exert all the pressure I can, short of giving the impression that I am prejudiced, or that I would take it out on anybody if a trial is found necessary, and short of actually compelling any party to act against his well considered judgement....²⁹

Most respondents took a much more restrained view, indicating that they avoided recommending settlement figures and confined themselves to a general support of parties' efforts. In Milwaukee, the settlement conference had been separated from the pre-trial conference and established as a separate Conciliation Branch, which was estimated to dispose of about 70 per cent of the cases noticed for trial.³⁰

The federal courts covered a comparable range. The judge in the Western District wrote that "[A] discussion of proposed settlement terms is not permitted in the presence of the court."³¹ In the Eastern District, on the other hand, the court expected attorneys in personal injury cases to come to the pre-trial conference "clothed with power to stipulate and settle...."³²

Active promotion of settlements is the established position in the federal judiciary.

A few years later, an Ohio lawyer informally surveying pre-trial practice in Ohio reported that the use of pre-trial to effectuate settlements was its most controversial aspect.³³ He concluded that

... in Ohio the majority of judges and lawyers feel that settlement is not merely a by-product, but one of the most desirable objectives, of pre-trial; and the language of the rules that have been adopted in Ohio on the subject are the best evidence that settlement is a prime purpose and perhaps—in most cases—the most motivating consideration leading to the adoption of the rule.³⁴

A California trial judge reported that "[t]he settlement approach to litigation is gaining strong advocates throughout the country."³⁵ In this view,

the court should offer its impartial services to aid the litigants in compromising disputes under proper circumstances, always being careful to preserve the full trial day in court should that prove necessary. This theory contemplates that the trial of a case is a last resort and should only eventuate if reasonable compromise opportunities have been exhausted.³⁶

The pre-trial conference "admirably meets this situation" by affording opportunity for informal discussion of possible compromise. Judge Kincaid recommends that the court "diplomatically broach the subject of possible compromise" to relieve the attorneys from doing so, while avoiding coercion or pressure.³⁷

27. *Id.* at 719.

28. Ryan and Wickhem, *supra* n. 13, at 16-17.

29. *Id.* at 18.

30. *Id.* at 24.

31. *Id.* at 40.

32. *Id.* at 42.

33. Shumaker, *An Appraisal of Pre-Trial in Ohio*, 17 OHIO ST. L. J. 204 (1956).

34. *Id.* at 205.

35. Kincaid, *Pre-Trial Comes to California*, 30 CALIF. ST. B. J. 423 (1955).

36. *Id.* at 448-49.

The first systematic empirical study of pre-trial observed courts in New Jersey from 1960-62 and found that "...[i]n actual operation the typical pre-trial conference in New Jersey is a mixed affair, in part concerned with shaping the case for trial, in part intended to promote a settlement."³⁸ Most judges conducted "mixed or 'hybrid' sessions" in spite of the tensions between preparation for trial and the production of settlements. The rules and manuals, too, were based on "the two-in-one credo" and drew no distinction between the different purposes of the pre-trial conference.³⁹

The emergence of a more single-minded system, however, is described in Judge Aldisert's account of Allegheny County:

From 1939 to 1963 our Court went the full circle from pure pre-trial to settlement conference. In our early phases of pre-trial we meticulously followed the spirit of Federal Rule 16.⁴⁰

But with a high volume of low amount cases,

it does seem ridiculous to attempt to go through the mumbo-jumbo of pure pre-trial. You do not worry too much about sophisticated legal issues in this type of case. Our judge-supervised pre-trials soon degenerated into a routine where clerks supervised the coming together of junior counsel....⁴¹

After an attempt to combine the pure pre-trial session with a settlement conference, the court shifted to a compulsory conciliation conference set close to the scheduled date of trial:

This is not a pure pre-trial conference but essentially a compulsory settlement conference. The plaintiff must be personally available. The claims manager or representative of the carrier who has authority to negotiate must be present.... [A] brief opening session where both sides are present and the essential facts are discussed... is followed by private sessions with each side where the lawyers may talk off the record and tell the judge what they really have in mind. This off-the-record portion is the most valuable part of the conciliation conference. It places the judge in a position to

37. *Id.* at 449.

38. Rosenberg, *THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE: A CONTROLLED TEST IN PERSONAL INJURY LITIGATION 117* (New York: Columbia University Press, 1964).

39. *Id.* at 116.

40. Aldisert, *A Metropolitan Court Conquers Its Backlog (Part II: From Pure Pre-Trial to Compulsory Settlement Conferences)*, 51 JUDICATURE 250 (1968).

41. *Id.*

make a realistic appraisal of both sides; it gives him the proper understanding to mediate the dispute, as he continues to talk to each side separately during the negotiations. Our experience shows that the basic difference between the parties is not usually factual, but is a difference of opinion as to value. Where this is the situation after hearing both sides privately, I am usually asked my suggestion of value and I have no hesitation in offering my ideas.⁴²

Cases that are not settled there or sufficiently "softened by the mass conciliation conference [to]... settle themselves" in the interval are subject, the day of trial, to a "last chance" settlement conference by the calendar control judge.⁴³

Settlement in federal courts

The fading away of the preparation for trial rhetoric and the heightened emphasis on judicial production of settlements were found in federal courts as well. Judge Kaufman reported that in the Southern District of New York, settlement explorations were "another recognized objective of great importance" at pre-trial conferences.⁴⁴ A federal judge from the Western District of Pennsylvania similarly stated his credo:

I feel it is incumbent on every judge to use the pre-trial as an aid in effectuating settlement... the judge can be most effective in acting as the catalytic agent to bring the two parties together.... [I]n a great majority of the cases reasonable men, after all the facts are on the table, can arrive at an area of agreement.⁴⁵

An esteemed federal trial judge described his aggressive intervention at the pre-trial conference of routine cases in his court:

... So, if it's a personal injury case, I look at the doctors' reports—just the last paragraph, where they show the extent of the injury—I tell them, "this case is worth \$20,000 for the settlement," and I tell them why; and I tell them further to go tell their

clients that I said so.

And the funny thing is, the lawyers in our district want the judge to do that. They want to be able to go back to their clients and have some of the load taken off their shoulder. They say, "This is what I think, but the judge says this."⁴⁶

A decade later, in the 1970s, whatever reticence remained among federal judges was barely perceptible. There was a forthright and ardent embrace of active participation in settlement negotiations. This was based on a warm endorsement of settlement as preferable to adjudication—not on grounds of administrative convenience, but because it produced superior results. Thus at a training session for new federal judges they were counselled by a veteran judge that:

[o]ne of the fundamental principles of judicial administration is that, in most cases, the absolute result of a trial is not as high a quality of justice as the freely negotiated, give a little, take a little settlement.⁴⁷

An outline distributed to the new judges reiterated that:

[i]n most controversies, most court cases, the highest quality of justice is not the all or nothing, black or white end result of a trial but is in the grey area—in most cases a freely negotiated settlement is a higher quality of justice which is obtainable earlier and at less cost. Approximately 90 per cent of all suits filed in federal courts are disposed of without trial.⁴⁸

Thus settlement is thought to permit compromise positions that are unattainable in the adjudicative mode.⁴⁹ In the words of one thoughtful federal district judge, settlement "produces results which are probably as close to the ideal of justice as we are capable of producing."⁵⁰

If settlements are good, it is also good that the judge actively participates in bringing them about. He should do this not only by his management of the court

(policies about continuances, etc.) but also by acting as a mediator.⁵¹ As another federal district judge told a 1977 seminar for newly appointed judges:

... I urge that you see your role not only as a home plate umpire in the courtroom, calling balls and strikes. Even more important are your functions as mediator and judicial administrator.⁵²

Current perspective

Active promotion of settlements is now unmistakably the "established" position in the federal judiciary. Judges who are activists on this matter are invited to give seminars to new judges; their views are broadcast by publication in *Federal Rules Decisions* and disseminated in booklets by the Federal Judicial Center. As Charles Renfrew observed in 1975, "Judicial activism in the settlement process appears to have received quasi-official sanction within the judicial family."⁵³ The virtue of active judicial participation in settling civil cases is part of the received wisdom.

Two recent surveys portray contemporary patterns. In a nationwide survey of trial judges, only 21.8 per cent described their typical posture as one of non-intervention in settlement discussions. Over three-quarters did typically intervene; of these, 67.9 per cent regarded their intervention as subtle, "through the use of cues/suggestions" and 10.3 per cent as aggressive, "through the use of direct pressure."⁵⁴ In a study of federal and state courts in five localities, judges were asked about the practices they follow all or most of the time. Seventy-five per cent of federal judges and 56 per cent of state judges reported that they initiated settlement talks in jury cases; and, 41 per cent of federal judges and 56 per cent of state judges reported that they suggested terms of settlement in such cases. (The figures are lower in every category for bench trials.)⁵⁵

This shift to judicial activism received formal ratification in 1983 when Rule 16 of the Federal Rules of Civil Procedure was amended to allow judges to "consider and take action with respect to... the possibility of settlement or the use of extra-judicial procedures to resolve the dispute" during the pre-trial conference.⁵⁶ The Advisory Committee that proposed the change recognized that "it has become commonplace to discuss set-

42. *Id.* at 248.

43. *Id.* at 249.

44. Kaufman, *The Philosophy of Effective Judicial Supervision over Litigation*, 29 F. R. D. 215 (1962).

45. McIlvaine, *The Value of Effective Pretrial*, 28 F. R. D. 162 (1961).

46. Wright, *The Pretrial Conference*, 28 F.R.D. 145 (1962).

47. Will, Merhige, and Rubin, *The Role of the Judge in the Settlement Process*, 75 F. R. D. 203 (1977).

48. Flanders, *Case Management in Federal Courts: Some Controversies and Some Results*, 4 *Just. Sys. J.* 150 (1978).

49. Holland, *William J. Campbell: A Case Study of an Activist District Judge*, 3 *Just. Sys. J.* 143 (1977).

50. Fox, *Settlement: Helping the Lawyers to Fulfill Their Responsibility*, 53 F. R. D. 142 (1971).

51. Will, Merhige, and Rubin, *supra* n. 47, at 205; Fox, *supra* n. 50, at 148.

52. Lacey, *THE JUDGE'S ROLE IN THE SETTLEMENT OF CIVIL SUITS 4-5* (Washington: Federal Judicial Center, Education and Training Series, 1977).

53. Renfrew, *Negotiations and Judicial Scrutiny of Settlements in Civil and Criminal Antitrust Cases*, 57 *CHICAGO B. RECORD* 131 (1975).

54. Ryan, Ashman, Sales and Shane-Dubow, *AMERICAN TRIAL JUDGES: THEIR WORK STYLES AND PERFORMANCES* 177 (New York: Free Press, 1980).

55. Yankelovich, Skelly and White, *Study of the Role of Courts*, conducted for: Office for Improvements in the Administration of Justice, U.S. Dept. of Justice, at 83 (1980).

56. *Fed. R. Civ. Pro.* 16.

tlement at pre-trial conferences." The committee recommended that requests for a conference indicating a willingness to talk settlement "normally should be honored" and that "a settlement conference is appropriate at any time...."⁵⁷

Active participation

What do we learn from this? Certainly, there has been a change in the way that judges talk about settlements and the role they play in producing them. It also seems probable that more judges do participate actively in arranging settlements than was the case earlier, that those who do are more aggressive and inventive, and that they regard it as an integral part of their judicial work. This is not to assert that this activity produces more settlements. Research has not so far confirmed that more judicial intervention produces more settlements.⁵⁸ But it does appear that cases that once might have been settled by negotiations between opposing counsel are now settled with the participation of the judge. We have moved from dyadic to mediated bargaining.

We may contrast contemporary judicial mediation with the "conciliation" of the first three decades of this century. Unlike conciliation, mediation is not just for marginal or petty cases that are unworthy of litigation; it is for the mainstream. It is not outside the court—distant from judges and lawyers—but is located in the strongholds of adjudication. It is not regarded as radically separate from adjudication, but as part of the same process. Litigation and negotiation are not viewed as distinct but as continuous. Finally, contemporary judicial mediation is more widespread and firmly institutionalized than conciliation ever was. In short, mediation has been firmly incorporated into the image of adjudication and into the judicial repertoire.

Increased participation in settlements does not proceed entirely from the "cool" impulse to efficient management. It also expresses the sense that settlement is preferable. The notion that mediation produces better results than would a trial dimly echoes the "warm" theme of those early 20th century reformers who felt that conciliation would resolve conflict into harmonious accord. There was a notion that conciliation could tap some source of order distinct from—and even antithetical to—the coercive power of

the legal system. Contemporary judicial mediation does not claim or aspire to express such "communal" ordering; instead, it matter-of-factly utilizes the law's coercive power and it attempts to give expression to "legal" norms. (At least, this is what judges say they do. Just what the normative character of this settlement activity is has never been studied.)

Conclusion

Let me close by suggesting some of the connections that remain to be explored. The changes we have traced seem to comport with other changes within the judicial complex. In a recent article, Judith Resnick⁵⁹ portrays increasing judicial participation in settlement negotiations as one component of a shift from a traditional style of common law judging to a managerial style in which judges take initiative to supervise the development of the case through informal discussions. This usefully points out the connection between the increasing respectability of settlement participation and the development of court management, the rationalization of assignments, calendars, record keeping, etc.

It is not clear to me, however, that the shift to active participation in settlement can be subsumed as part of a drive towards managerial efficiency. It may also be a response to a shift in the character of common law adjudication. The trial has been displaced from its central place in common law litigation. The "case" no longer centers (did it ever?) around a discrete plenary trial to which were attached some preliminaries and addenda; instead, it is a series of proceedings (discovery, motions, hearings, conferences, negotiations, pre-trial, fee hearing, etc.) only rarely including a trial. This diffusion is marked by the fact that many American lawyers are now described as litigators in contra-distinction to trial lawyers.⁶⁰ Yet another possibility is that the change is impelled not by the management ideology of the court or the changing character of its business, but by the growth and increasing mobility of the legal profession. The sets of lawyers dealing with medical malpractice or anti-trust in a particular locality, for example, have increased in size so that more of their negotiations are with strangers and create a demand for an honest broker.

Connections with other changes in legal institutions can only be the beginning of an explanation. They lead us to the wider setting of the changing demands and expectations brought to legal institutions by their various sets of users and audiences. During the period we have so hastily surveyed, there was a great proliferation of new regulation by the government, utilizing the legal system to carry out an expanded set of purposes. And there has been a growth in the use of litigation, by citizens, organizations and interest groups. A satisfying explanation of the shift in judicial participation may require that it be linked with these "external" factors. External demand may, for example, better explain why judicial participation gained acceptance first in state courts and only later in federal courts. It may turn out that more than one explanation is called for. Judicial participation in settlements may, in fact, be too broad a category. For example, settlement patterns in medical malpractice cases and in anti-trust class actions may comprise discrete phenomena with their own distinct careers.

Finally, we come to the bottom line: what difference does it make? Are settlements arranged by judges any different than those arranged by lawyers? Do they have more influence on the underlying behavior? How does this participation affect the way judges act in other settings? How does it affect public perceptions of law? Studies of the effects of judicial participation have been confined to the impact on delay and on judges' productivity—that is, they have remained within the tradition of research inspired by the "cool" theme of court efficiency. But in a system that is in large measure a system of settlements, there is much more to be learned from the shift represented by increased judicial participation. □

57. *Id.*, advisory committee note.

58. Church, Carlson, Lee and Tan, JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS (Williamsburg, Va.: National Center for States Courts, 1978); Flanders, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS, (Washington, D.C.: Federal Judicial Center, 1977).

59. Resnik, *Managerial Judges*, 96 HARV. L. REV. 374-448 (1982).

60. Grady, *Trial Lawyers, Litigators and Clients' Costs*, 4 LITIGATION 5, 6 (1978).

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