# WHY SETTLE FOR LESS? IMPROVING SETTLEMENT CONFERENCES IN FEDERAL COURT

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*Abstract:* Most cases settle before trial. Recent studies show that approximately 1% of cases filed in federal court go to trial. Alternative dispute resolution processes have been fully incorporated into federal court, and settlement conferences have long been used by federal court judges to control their dockets. Do they provide litigants with both substantive and procedural justice in the vast majority of cases that do not proceed to trial? Lawyers have raised concerns about judicial coercion to settle cases at settlement conferences, the loss of confidentiality that occurs when parties raise claims of bad faith participation at the conference, and that litigation over the level of participation at settlement conference threatens the premise that settlement conferences help reduce court congestion.

This Article analyzes the dynamics of the settlement conference to show how common intuitive biases and other factors may cause each of the participants—the parties, insurers, lawyers, and judge—to incorrectly evaluate a case and whether it should settle. The Article reviews recent studies of judicial reasoning and decisionmaking, case law and empirical studies to reach several conclusions. The first is that trial judges should not hold a settlement conference in their own cases. Second, courts should adopt an objective standard for assessing good faith participation at a settlement conference. Third, courts should not award sanctions against a party for failing to bargain sufficiently at a settlement conference or for failing to have a representative present with full settlement authority. The Article concludes by suggesting several procedural reforms, aimed at improving the actual and perceived fairness of the proceeding.

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## INTRODUCTION

Originally conceived as an alternative to litigation, alternative dispute resolution (ADR) processes have been fully integrated into the federal court system. ADR developed in the United States in several distinct phases. Communities established neighborhood justice centers in the 1960s to allow parties to resolve their own disputes without court intervention.[1] In the 1970s and 1980s, states created screening panels and arbitration of medical malpractice claims in an attempt to reduce the cost of malpractice insurance, and the business community adopted mediation and other ADR techniques to resolve claims more quickly.[2] In the 1980s and 1990s, both state and federal courts incorporated ADR techniques into

1. William P. Lynch, *Problems with Court-Annexed Mandatory Arbitration: Illustrations from the New Mexico Experience*, 32 N.M. L. REV. 181, 182 (2002).

2. *Id.*

their court systems.[3] While proponents of ADR claim a variety of benefits, including increased flexibility in resolving issues and the possibility of reconciliation between the parties, the primary motivation of court incorporation of ADR has been to reduce court dockets.[4]

ADR attempts to assist the parties in reaching settlement by providing them with unbiased information about possible trial outcomes that may encourage them to reevaluate their positions and explore mutually acceptable solutions. While a variety of ADR processes exist, this Article focuses on mandatory settlement conferences in federal court.

Though much has been written over the years about the advantages and disadvantages of court-annexed ADR,[5] recent research on decisionmaking and negotiation theory, case law, and empirical studies illustrates significant concerns about settlement conferences in federal court. This Article addresses three primary concerns about settlement conferences. First, because judicial authority exerts pressure even in an informal process such as a settlement conference, there is a danger that parties will feel coerced to settle their cases, especially when the conference is held by the trial judge. Second, when a party raises a claim of bad faith participation at a settlement conference, that claim's resolution can result in a loss of confidentiality. Awareness of this risk (that the confidentiality promised at the settlement conference may later be compromised) may cause parties to bargain strategically at the conference and may affect their perception of the fairness of the process. Third, litigation over the required level of participation at settlement conferences has increased significantly, and this litigation threatens to undercut the premise that settlement conferences help resolve cases efficiently and reduce court congestion.

Settlement conferences cannot be understood and evaluated in the abstract. Part I of this Article briefly traces the development of judicially-led settlement initiatives in civil cases in federal court, contrasting settlement conferences with privately held mediations. Part II(A) discusses empirical studies of whether parties who turned down a pre-trial settlement offer improved their positions at trial. The studies show that although plaintiffs make many more errors in rejecting settlement offers, the cost of the defendants' errors in rejecting plaintiffs' offers is significantly higher. Part II(B) reviews recent studies of decisionmaking

3. *Id.*

4. *Id.*

5. *See, e.g.*, Wayne D. Brazil, *Continuing the Conversation about the Current Status and the Future of ADR: A View From the Courts*, 2000 J. DISP. RESOL. 11 (2000) [hereinafter Brazil, *Continuing the Conversation*] (discussing the variety of court-sponsored ADR programs and the danger that ADR will be used to pressure parties to settle their cases to advance the court's interest in reducing its case load).

and negotiation theory and practice, and it points out psychological biases and other common problems that may be encountered when evaluating a case for settlement purposes. Many people make decisions based on intuition, and though intuition can be surprisingly accurate, it is not well suited to the resolution of complex disputes with multiple actors and sophisticated rules. Part II(C) examines the dynamics of the settlement conference from the perspectives of the participants—the parties, insurers, lawyers, and the judge—and shows how intuitive biases and other factors unique to each participant might cause them to incorrectly assess the value of the case and whether it should settle.

There can be distinct advantages to a settlement conference conducted by a judge, and Part III reviews those advantages. Part IV evaluates the risks to the parties and to the court of settlement conferences. Part IV(A) discusses the pressure the parties may feel to settle the case when the conference is conducted not by a disinterested neutral, but by a judge who has decisionmaking authority in that case or a future case. Part IV(B) examines how requiring judges to evaluate whether a party participated in good faith undercuts the confidentiality that is essential to the integrity of the settlement conference. Part IV(C) demonstrates how the increase in satellite litigation over the parties' level of participation at the conference endangers the primary purpose of settlement conferences—reducing court congestion.

Part V proposes several recommendations to improve federal court settlement conferences. First, Rule 16 of the Federal Rules of Civil Procedure should be amended to (1) preclude trial judges from conducting settlement conferences in their own cases and (2) bar the pretrial judge from ruling on dispositive motions after holding an unsuccessful settlement conference. Second, Rule 16's good faith participation requirement should be assessed using an objective standard, and courts should not order parties to attend a settlement conference with "full settlement authority." Finally, federal district courts should adopt certain procedural safeguards to ensure that the settlement conference process is fair to all parties. These safeguards include adopting local ADR rules that provide for the confidentiality of information discussed at the settlement conference. Confidentiality allows the parties to raise sensitive issues with the judge, contributes to the free flow of information between the parties, protects the neutrality of the judge, and ensures that the parties perceive that the settlement conference is procedurally fair. Because only a small percentage of cases go to trial, making these changes will have a profound impact on the parties' perceptions of fairness in the much greater percentage of cases that settle before trial.

## I. SETTLEMENT CONFERENCES IN FEDERAL COURT

Trials are important for at least two reasons. First, they directly affect the participants: they resolve the dispute between the parties in the case.[6] Second, and more importantly, they impact a wider audience: trial verdicts establish benchmarks for the settlement of the vast majority of cases that do not proceed to trial.[7] The far-reaching impact of a trial may deter future actors or serve as precedent for future decisionmakers.[8] As Samuel Gross and Kent Syverud stated, "trials cast a major part of the legal shadow within which private bargaining takes place."[9] In bargaining in the shadow of the law, "litigants order their private, out-of-court negotiations around the substantive law and procedure that will be applied if the negotiations break down and the court steps out of the shadows to adjudicate the dispute."[10]

But the reality of the civil justice system is that most cases settle. In fact, remarkably few civil cases in federal court are actually decided by a jury. In his landmark study, Marc Galanter documented the steep decline in both the percentage and the number of civil trials in federal court over the years.[11] The percentage of federal civil cases resolved by trial fell from 11.5% in 1962 to 1.8% in 2002.[12] In addition, the actual number of civil jury trials decreased by more than 20%, from 5,802 to 4,569 over the same time period.[13] More recent studies suggest that the percentage of civil cases resolved by trial has fallen even further, to approximately 1%.[14] When too many cases settle, the parties are deprived of the supply of

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6. Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1378–79 (1994).

7. Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 4 (1996) [hereinafter Gross & Syverud, *Don't Try*]; *see* Galanter & Cahill, *supra* note 6, at 1379.

8. Galanter & Cahill, *supra* note 6, at 1379.

9. Gross & Syverud, *Don't Try*, *supra* note 7, at 4.

10. Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiation and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 327 (1991) [hereinafter Gross & Syverud, *Getting to No*].

11. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMP. L. STUD. 459, 460–61 (2004).

12. *Id.* at 461.

13. *Id.* This decline cannot be attributed to an increase in criminal jury trials: the percentage of criminal dispositions by trial fell from 15% in 1962 to under 5% in 2002, while the total number of criminal trials decreased from 5,097 to 3,574, a drop of 30%. *Id.* at 492–93.

14. J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1720 n.21 (2012).

precedent that sets the framework for their private negotiations.[15]

### *A. The Development of Settlement Conferences in Federal Court*

The inaugural version of the Federal Rules of Civil Procedure, adopted in 1938, did not mention judicial promotion of or involvement in settlement discussions.[16] The dominant view at that time was that settlement was a by-product of good pre-trial procedure and judicial case management, not a primary purpose to be actively pursued by the judge.[17] Beginning in the 1970s, however, as judges shifted from being merely neutral adjudicators to "managerial judges" whose main task is to manage legal dockets and reduce the costs of adjudication, judges began to view participation in settlement negotiations as an essential part of controlling their dockets.[18] Rule 16 was amended in 1983 to specifically authorize judges to discuss settlement of the case at the pretrial conference.[19] Indeed, the Advisory Committee acknowledged that the 1983 amendments regarding settlement conformed the rule to existing practice because "it has become commonplace to discuss settlement at pretrial conferences."[20]

Federal courts have continued to play a significant role in settlement negotiations during the modern era. The Civil Justice Reform Act of 1990 (CJRA) required district courts to consider six case management principles to reduce expense and delay in the courts, including referring cases to ADR, and many districts included some form of ADR in their plan.[21] After considering the experience of district courts with experimental ADR programs in federal court, Congress enacted the Alternative Dispute Resolution Act (ADRA) of 1998.[22] The ADRA mandated that every federal district court establish an ADR program and

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15. *Id.* at 1743; RANDALL KISER, BEYOND RIGHT AND WRONG: THE POWER OF EFFECTIVE DECISION MAKING FOR ATTORNEYS AND CLIENTS 189–90 [hereinafter KISER, BEYOND RIGHT AND WRONG]; Galanter & Cahill, *supra* note 6, at 1385.

16. Ellen E. Deason, *Beyond "Managerial Judges": Appropriate Roles in Settlement*, 78 OHIO ST. L.J. 73, 79–80 (2017).

17. *Id.* at 81; Nancy A. Welsh, *Magistrate Judges, Settlement, and Procedural Justice*, 16 NEV. L.J. 983, 1004 (2016).

18. Deason, *supra* note 16, at 85–86.

19. FED. R. CIV. P. 16 advisory committee's note to 1983 amendment.

20. *Id.*

21. Civil Justice Reform Act of 1990, Pub. L No, 101-650, 104 Stat. 5089–98 (codified at 28 U.S.C. § 471–82 (1994)); Deason, *supra* note 16, at 91.

22. Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. §§ 651–58 (1998)).

authorized federal courts to compel parties to participate in ADR.[23] While there are a variety of ADR processes, mediation is the most common court-connected process, authorized by two-thirds of the ninety-four federal district courts.[24] As of 2011, ten federal district courts designated settlement conferences as the sole type of ADR process authorized by their local rule, although judges in other districts conduct settlement conferences as part of or in addition to the ADR processes offered in their district.[25] For the twelve-month periods ending September 30, 2017 and September 30, 2018, magistrate judges conducted 21,258 and 21,185 settlement conferences/mediations respectively.[26]

Courts have incorporated ADR with the hope of settling cases short of trial.[27] As with much of life, settlement of cases implicates two, apparently conflicting premises. On one hand, judges must manage their caseloads efficiently to deal with growing dockets and to control costs.[28] On the other hand, most civil litigants have a Seventh Amendment right to jury trial.[29] While public policy favors the private resolution of disputes without court involvement, the parties should not feel pressured to settle their cases to satisfy the court's interest in reducing its caseload.[30]

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23. 28 U.S.C. § 652(a) (1998).

24. DONNA STIENSTRA, ADR IN THE FEDERAL DISTRICT COURTS: AN INITIAL REPORT 5 (2011).

25. *Id.* at 5, 13; Deason, *supra* note 16, at 92.

26. *See* ADMIN. OFF. OF THE COURTS, TABLE S-17, MATTERS DISPOSED OF BY U.S. MAGISTRATE JUDGES FOR THE 10-YEAR PERIOD ENDED SEPTEMBER 30, 2018 (2018), https://www.uscourts.gov/sites/default/files/data_tables/jb_s17_0930.2018.pdf [https://perma.cc/R7ET-SGLJ]. The Administrative Office of the Courts does not report the number of settlement conferences conducted by district judges. *See* ADMIN. OFFICE OF THE COURTS, TABLE T-8, U.S. DISTRICT COURTS—TRIAL HOURS AND ACTIVITY, BY DISTRICT, DURING THE 12-MONTH PERIOD ENDING DECEMBER 31 (2018) (on file with author).

27. James J. Alfini & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 ARK. L. REV. 171, 173–74 (2001) ("Court-sponsored mandatory mediation programs generally are promoted and established, however, for reasons of judicial economy, with little attention given to mediation's core values."); Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should be Required?*, 46 SMU L. REV. 2079, 2081 (1993) ("The primary motivation of court rules and orders incorporating ADR has clearly been the hope of achieving settlement short of trial.").

28. Galanter, supra note 11, at 485 (2004) (stating how filings in federal court increased fivefold from 1962–2002).

29. U.S. CONST. amend. VII.

30. Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985). Several commentators have questioned whether court-annexed ADR is effective in producing more settlements or making courts more productive. *See* Galanter & Cahill, *supra* note 6, at 1370 ("The limited efficacy of judicial promotion of settlement is not surprising if we recall that most cases would settle anyway."); Gross & Syverud, *Don't Try*, *supra* note 7, at 60 ("Information-based techniques includ[ing] judicially supervised settlement conferences . . . are unlikely to succeed in squeezing out many more trials."); Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some*

### *B. The Differences Between Settlement Conferences and Mediations*

There are two primary models of settlement conferences in federal court. In the first, one of the judges assigned to the case, either the trial judge or the judge who handles pretrial matters, conducts the settlement conference.[31] In the second model, the settlement conference is held by a judge who is not assigned to the case.[32]

Judges have great discretion in how they conduct a settlement conference.[33] Settlement conferences are held off the record, and many judges hold a joint initial session with all parties before beginning separate ex parte conferences with each side.[34] At the settlement conference, judges may use methods associated with facilitative mediation, in which a mediator does not express to the parties an analysis or evaluation of the case and helps the parties find their own resolution to the dispute.[35] However, they also may use traditional evaluative techniques and attempt to push the parties towards settlement.[36] This behavior can cause confusion for the parties because it blurs the lines between settlement conferences and mediations.[37]

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*Cautionary Observations*, 53 U. CHI. L. REV. 366, 382 (1986) [hereinafter Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution*] ("To summarize, the study does not support a conclusion that the summary jury trial increases judicial efficiency."). Others have noted that cases that once might have been settled by direct negotiation between counsel are now settled through court-annexed ADR, which is more expensive than negotiation and may delay resolution of the case. RANDALL KISER, HOW LEADING LAWYERS THINK: EXPERT INSIGHTS INTO JUDGMENT AND ADVOCACY 189–91 (Anke Seyfried ed., Springer 2011); Galanter & Cahill, *supra* note 6, at 1364–65, 1371. These issues are beyond the scope of this Article.

31. Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 OHIO ST. J. ON DISP. RESOL. 271, 272–73 (2011); Deason, *supra* note 17, at 137. The trial judge may be a district judge or a magistrate judge if the parties have consented to a magistrate judge holding the trial. 28 U.S.C. § 636(c)(1) (2012).

32. Wissler, *supra* note 31, at 272–73.

33. Michael Alberstein, *Judicial Conflict Resolution (JCR): A New Jurisprudence for an Emerging Judicial Practice*, 16 CARDOZO J. CONFLICT RESOL. 879, 905 (2015) ("[M]ost of the judicial conflict resolution activities of judges are unregulated and mostly unconscious."); Jeffrey A. Parness, *Improving Judicial Settlement Conferences*, 39 U.C. DAVIS L. REV. 1891, 1891–92 (2006) ("[F]ar too often [judicial settlement conferences are] undertaken with unbounded, unbridled, and virtually unfettered trial court discretion.").

34. John C. Cratsley, *Judicial Ethics and Judicial Settlement Practices: Time for Two Strangers to Meet*, 21 OHIO ST. J. ON DISP. RESOL. 569, 573–74 (2006). The Code of Judicial Conduct allows judges, with the consent of the parties, to engage in ex parte communications with parties when discussing settlement. CODE OF JUDICIAL CONDUCT FOR U.S. JUDGES Canon 3(A)(4) (ADMIN. OFFICE OF THE COURTS 2014).

35. Deason, *supra* note 16, at 97–105; Brazil, *Continuing the Conversation*, *supra* note 5, at 32 ("[A] facilitative mediator is never to form or express normative or analytical critiques.").

36. Deason, *supra* note 16, at 97–105; Brazil, *Continuing the Conversation*, *supra* note 5, at 32.

37. Welsh, *supra* note 17, at 1018 ("But in practice, it can be difficult to discern a bright line

Mediation envisions a different paradigm for dispute resolution than that provided by the court system. Mediation is a private, confidential process in which an experienced neutral facilitates communication between the parties to help them find their own solution to their dispute.[38] Mediation offers the possibility of innovative results that may not be available through the court system because assisted dialogue between the parties may lead to collaboration, creativity, and cooperation as they search for mutually beneficial solutions to their dispute.[39] A mediator can help the parties communicate; share their perspectives and analyses; identify their underlying interests, needs and priorities; repair damaged relationships; and search for common ground.[40] The core values of the mediation process are party self-determination, mediator neutrality, and confidentiality.[41] The parties decide the timing of the mediation, the issues to be discussed, and who will attend.[42] In facilitative mediation, the neutral mediator refrains from evaluating the case and giving an opinion on the best way to resolve it, and information flows from the parties to the neutral.[43] If a settlement is not reached, the parties and the mediator are bound to keep all mediation communications confidential.[44]

While a settlement conference may be similar to a mediation in some ways, there are important differences between them. First, settlement

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distinction between judicial settlement sessions and mediation."); Deason, *supra* note 16, at 102 ("[I]t is difficult to separate judges' behaviors in court settlement conferences from those of private mediators.").

38. Kimberlee K. Kovach, *The Mediation Coma: Purposeful or Problematic*, 16 CARDOZO J. CONFLICT RESOL. 755, 773 (2015) [hereinafter Kovach, *Mediation Coma*]; Peter N. Thompson, *Good Faith Mediation in the Federal Courts*, 26 OHIO ST. J. ON DISP. RESOL. 363, 364 (2011).

39. Kovach, *Mediation Coma*, *supra* note 38, at 762; Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 FORDHAM URB. L.J. 935, 947 (2001).

40. Wayne D. Brazil, *Hosting Mediations as a Representative of the System of Civil Justice*, 22 OHIO ST. J. ON DISP. RESOL. 227, 249 (2007) [hereinafter Brazil, *Hosting Mediations*].

41. Kovach, *Mediation Coma*, *supra* note 38, at 773–75; ABA SEC. DISPUTE RESOLUTION, RESOLUTION ON GOOD FAITH REQUIREMENTS FOR MEDIATORS AND MEDIATION ADVOCATES IN COURT-MANDATED MEDIATION PROGRAMS (2004), www.abanet.org/dispute/draft2.doc [https://perma.cc/MTB9-B3T3].

42. Kovach, *Mediation Coma*, *supra* note 38, at 773; Brazil, *Hosting Mediations*, *supra* note 40, at 237–38; Michael P. Dickey, *ADR Gone Wild: Is it Time for a Federal Mediation Exclusionary Rule?*, 25 OHIO ST. J. ON DISP. RESOL. 713, 717 (2010).

43. Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 583 (1997) [hereinafter Kovach, *Good Faith*]; Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 22–24 (1996).

44. *See, e.g.*, UNIFORM MEDIATION ACT §§ 4–6 (amended 2003) (explaining the evidentiary privilege that protects the confidentiality of mediation disclosures, waiver and preclusion of the privilege, and exceptions to the privilege).

conferences have always unambiguously sought settlement of cases, while mediation has been more focused on assisting communication between the parties and maintaining party control of settlement decisions.[45] Second, a settlement conference is not conducted by a private mediator hired by the parties, but by a federal district or magistrate judge who may have to rule on substantive or procedural motions if the conference is unsuccessful.[46] Third, the parties may be ordered to attend a settlement conference even if they have indicated they have no interest in discussing settlement.[47] Fourth, courts often order parties to appear at the conference with "full settlement authority,"[48] which may mean different things to the parties and the court. Fifth, the court can issue sanctions if a party or its attorney "is substantially unprepared to participate—or does not participate in good faith—in the conference."[49] Sixth, while a judge may use a facilitative approach, many judges use evaluative techniques to analyze the case and may push the parties hard to settle the case, and information often flows from the judge to the parties.[50] Finally, confidentiality is not guaranteed to the participants: the federal districts have widely varying rules concerning confidentiality at settlement conferences.[51]

As most cases settle before trial, a settlement conference may be a party's "day in court," and consequently it is imperative that the settlement conference process provide both substantive and procedural fairness to the parties. This Article will examine some of the ways the current settlement conference process in federal court falls short of the mark and how settlement conferences may be improved to ensure they are of high quality, meet standards of fair procedure, and provide a beneficial outcome for the parties.

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45. SARAH R. COLE, CRAIG A. MCEWAN, NANCY H. ROGERS, JAMES R. COBEN, PETER N. THOMPSON, MEDIATION: LAW, POLICY AND PRACTICE, § 1:1 (2d ed. 2016); Dickey, *supra* note 42, at 719. There can be benefits to the parties even if a case does not settle at a settlement conference. Lawyers and litigants often use ADR to further their understanding of the strengths and weaknesses of the case, the opposing parties and lawyers, which makes them better prepared for trial. Brazil, *Hosting Mediations*, *supra* note 40, at 232, 245 n.29; E-mail from Kari Cole to William Lynch (Oct. 31, 2018, 19:04) (on file with author).

46. *See supra* note *.

47. FED. R. CIV. P. 16(a)(5) & (c)(1).

48. *See supra* note *.

49. FED. R. CIV. P. 16(f)(1)(B).

50. Deason, *supra* note 16, at 102–04; Campbell Killefer, *Wrestling with the Judge Who Wants You to Settle*, 35 LITIG. 17, 17 (2009); Steven J. Miller, *Judicial Mediation: Two Judges' Philosophies*, 38 LITIG. 31, 37 (2012).

51. Dickey, *supra* note 42, at 732–35.

## II. EVALUATING A CASE FOR SETTLEMENT

Assessing the settlement value of a case is a subjective process. There is no scientific process for evaluating factors intrinsic to any particular case. Further, each case has the possibility of variable outcomes based on factors extrinsic to the case, and "lawyers, judges and juries may produce very different results in the same case."[52] Therefore, there is not "one correct number for a settlement, but there are a range of numbers in which a settlement can be perceived as fair."[53] Moreover, there is uncertainty in any negotiation. "It's not often that you can foretell success or failure clearly at the beginning of a negotiation process."[54]

### *A. Studies of Settlement Decisions*

Several empirical studies over the past twenty years have examined whether parties in civil cases erred by rejecting a settlement offer and proceeding to trial where they received a verdict that was less beneficial than the settlement offer.[55] In evaluating this issue, the researchers constructed three categories: (1) the plaintiff made a decision error if the judgment was less than the final settlement offer made by the defendant; (2) the defendant made a decision error if the judgment exceeded the final settlement offer by the plaintiff; and (3) there was no decision error when the judgment fell between the final two settlement offers.[56] Although the

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52. Galanter & Cahill, *supra* note 6, at 1347; *see also* KISER, BEYOND RIGHT AND WRONG, *supra* note 15, at 20; Gross & Syverud, *Don't Try*, *supra* note 7, at 37; Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 13, 13 n.54 (1999).

53. Morton Denlow, *Settlement Conference Techniques: Caucus Dos and Don'ts*, 49 JUDGES J. 21, 24–25 (2010).

54. Deepak Malhotra, *I'm an Expert on Negotiations, and I Have Some Advice for Theresa May*, N.Y. TIMES, Dec. 20, 2018 https://www.nytimes.com/2018/12/20/opinion/brexit-theresa-may-negotiations.html [https://perma.cc/JG6R-NFZC]. As Niels Bohr, the physicist and Nobel Prize winner, put it, "[p]rediction is very difficult, especially about the future." JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION AND DECISION MAKING 68 (2012).

55. KISER, BEYOND RIGHT AND WRONG, *supra* note 15, at 31–85; Gross & Syverud, *Don't Try*, *supra* note 7, at 41–42; Randall L. Kiser, Martin A. Asher & Blakely B. McShane, *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5 J. EMPIRICAL LEGAL STUD. 551, 556–67 (2008) [hereinafter Kiser et al., *Let's Not Make a Deal*]; Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 152–60 (1996).

56. KISER, BEYOND RIGHT AND WRONG, *supra* note 15, at 37; Gross & Syverud, *Don't Try*, *supra* note 7, at 41–42; Kiser et al., *Let's Not Make a Deal*, *supra* note 55, at 563; Rachlinski, *supra* note 55, at 152–53. These categories may underreport decision errors because even if a verdict is an improvement on the other party's final offer, the costs and attorney's fees incurred in going to trial may exceed the gains in the verdict. Gross & Syverud, *Don't Try*, *supra* note 7, at 43–44.

results of the studies are not identical, they are consistent: plaintiffs make many more decision errors, but the costs of the defendants' errors are significantly higher. Plaintiffs made decision errors in 56.1% to 65% of the cases studied, while the defendants made errors in 23% to 25% of the cases.[57] One study published in 1996 found that the average cost of a plaintiff's error was $27,687 per case, while the average cost of a defense error was $354,949 per case.[58] Twelve years later, another study also found a substantial difference in the mean cost of error between plaintiffs and defendants: $43,100 for plaintiffs and $1,140,000 for defendants.[59]

Randall Kiser and his co-authors examined whether decision error rates were related to certain types of cases and forums.[60] They found that plaintiffs had higher error rates in cases in which contingency fee arrangements are common (i.e., personal injury and medical malpractice) and lower error rates in cases in which contingency fee arrangements are not common (i.e., contracts and eminent domain).[61] Conversely, the defendants had higher error rates in cases where insurance coverage is not generally available (i.e., contracts and fraud) and lower error rates in cases where insurance coverage is generally available (i.e., premises liability and personal injury).[62] They also found remarkably different error rates when comparing bench and jury trials. The plaintiffs' error rates were considerably higher in jury trials, while defendants committed substantially less decision error in jury trials relative to bench trials.[63]

### *B. Studies of Decisionmaking and Negotiation*

Settlement conferences cannot be evaluated in isolation. They are part of a larger negotiation process by which the parties attempt to resolve the case. Recent studies of decisionmaking and negotiation theory and practice help us understand the dynamics of negotiations at a settlement conference. These studies explain why parties, insurers, lawyers, and judges may reach different conclusions about the value of a case and whether it should settle. The studies also provide insight into possible

57. Gross & Syverud, *Don't Try*, *supra* note 7, at 42; Rachlinski, *supra* note 55, at 154; Kiser et al., *Let's Not Make a Deal*, *supra* note 55, at 566; KISER, BEYOND RIGHT AND WRONG, *supra* note 15, at 42–45.

58. Rachlinski, *supra* note 55, at 154.

59. Kiser et al., *Let's Not Make a Deal*, *supra* note 55, at 566.

60. *Id.* at 552–54.

61. *Id.* at 577–78.

62. *Id.*

63. *Id.* at 579–81.

improvements to the settlement conference process.

### *1. Decisionmaking*

There are many theories concerning how people make decisions under conditions of uncertainty. Researchers began extensive study of human judgment and decisionmaking in the 1920s.[64] Economists who were trying to determine how people make good decisions conducted research providing the building blocks for an early model of decisionmaking.[65] This model studied game theory, expected utility theory, litigation risk analysis, the Coase Theorem, and the prisoner's dilemma, among other matters, to predict how decisions would be made.[66] This model of decisionmaking—the law and economics model—assumes that parties are generally rational and will consistently make decisions in litigation that maximize their economic interests.[67]

Research by cognitive psychologists and behavioral economists has demonstrated that the law and economics model is incomplete and must be supplemented with insights into the psychological barriers to the rational resolution of disputes.[68] As those researchers have shown, people routinely make choices that do not maximize their economic interests. In doing so, they make decisions using either deliberative processes, intuitive processes, or a combination of the two.[69] Deliberative processes are mental operations requiring effort, motivation, concentration, and the execution of learned rules.[70] Intuitive processes, on the other hand, occur automatically, do not require or consume much attention, and are

64. KISER, BEYOND RIGHT AND WRONG, *supra* note 15, at 108–10.

65. Richard Birke, *Neuroscience and Settlement: An Examination of Scientific Innovations and Practical Applications*, 25 OHIO ST. J. ON DISP. RESOL. 477, 485–87 (2010).

66. *Id.* at 486–90.

67. Birke, *supra* note 65, at 486; *see generally* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 8 (2011); Chris Guthrie & Jeffrey J. Rachlinski, *Insurers, Illusions of Judgment & Litigation*, 59 VAND. L. REV. 2017, 2018–19 (2006) [hereinafter Guthrie & Rachlinski, *Insurers*].

68. KISER, BEYOND RIGHT AND WRONG, *supra* note 15, at 89–90; Birke, *supra* note 65, at 490–91; Birke & Fox, *supra* note 52, at 2; Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1075–76 (2000).

69. PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT 22 (2010) ("Problem solving and decision making in professional contexts and in everyday life calls for a mixture of intuition and deliberation—of System 1 and System 2 processes."); Chris Guthrie, Jeffrey J. Rachlinski & Andrew Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 6–10 (2007) [hereinafter Guthrie et al., *Blinking*].

70. KAHNEMAN, *supra* note 67, at 20–21; Guthrie et al., *Blinking*, *supra* note 69, at 7–8.

effortless and fast.[71] Although intuition can be surprisingly accurate, it is often not well-suited to complex disputes that have multiple actors and intricate rules, and good judgment sometimes requires verifying or eliminating intuition's influence on the deliberative process.[72]

There are many intuitive biases[73] that may produce errors when people make decisions.[74] Perhaps the most significant cause of decisionmaking failure is optimistic overconfidence, in which people underestimate the risks they face, exaggerate their own capabilities, and fail to allow sufficiently for uncertainty in their judgments.[75] Other biases include:

- Confirmation bias: People look for information that buttresses their preexisting conclusions and disregard conflicting information, instead of attempting to systematically gather accurate information;[76]
- Anchoring: People get stuck on available numbers that do not necessarily provide relevant information when making a decision and then fail to adjust sufficiently away from the anchor;[77]
- Framing: Different ways of presenting identical information to people often triggers different decisions; people are risk-avoiding in the face of gains but risk-seeking in the face of losses;[78]
- Hindsight bias: Information about what occurred tends to influence people's judgments about what they thought would

71. KAHNEMAN, *supra* note 67, at 20–21; Guthrie et al., *Blinking*, *supra* note 69, at 7.

72. KISER, BEYOND RIGHT AND WRONG, *supra* note 15, at 89; Guthrie et al., *Blinking*, *supra* note 69, at 8.

73. KAHNEMAN, *supra* note 67, at 3 ("Systematic errors [that people make] are known as biases, and they recur predictably in particular circumstances."). Intuitive biases are also sometimes referred to as cognitive heuristics and can be considered mental shortcuts or rules of thumb. *Id.* at 4.

74. KISER, BEYOND RIGHT AND WRONG, *supra* note 15, at 90 ("Cognitive psychologists and behavioral economists have identified and studied more than 100 decision-making biases, heuristics and illusions."); Birke, *supra* note 65, at 492–97 (identifying thirty-four psychological concepts that may interfere with appropriate decisionmaking when evaluating settlement).

75. KAHNEMAN, *supra* note 67, at 255 ("[T]he optimistic bias may well be the most significant of the cognitive biases."); KISER, BEYOND RIGHT AND WRONG, *supra* note 15, at 124–26 ("Many psychologists and law professors regard overconfidence as the most significant contributor to decision-making failures.").

76. ROBBENNOLT & STERNLIGHT, *supra* note 54, at 15; KISER, BEYOND RIGHT AND WRONG, *supra* note 15, at 126–29.

77. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 787–89 (2001) [hereinafter Guthrie et al., *Inside*]; Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences*, 90 IND. L.J. 695, 701–05 (2015) [hereniafter Rachlinski et al., *Can Judges Make Reliable Numeric Judgments?*].

78. Birke, *supra* note 65, at 493–94; Korobkin & Ulen, *supra* note 68, at 1104–07.

occur before they knew the outcome ("Hindsight is 20/20")[79]; and

- The sunk-cost fallacy: There is a psychological investment in prior decisions, which causes people to overweigh costs already incurred when making decisions about costs to be incurred in the future.[80]

Unfortunately, intuitive biases are generally studied individually, and individual principles are rarely encountered in isolation in civil litigation, so little is known about which biases will trump other biases when people make decisions during litigation.[81]

### *2. Negotiation*

In trying to resolve their case, parties and lawyers must choose a negotiation strategy and must contend with the negotiation strategy or tactics taken by the other side. There are a wide range of approaches to negotiation.[82] Furthermore, negotiation theorists do not agree on the number of different styles or techniques of negotiation or even the terminology for them.[83] In 1983 Gerald Williams concluded that attorneys employed two primary styles of negotiation: cooperative and competitive.[84] That same year Carrie Menkel-Meadow also divided negotiation behavior into two different styles: problem-solving and adversarial.[85] Other commentators have divided negotiation behavior into three, four, or five categories.[86]

Economists, psychologists, lawyers, and others have studied negotiation theory for approximately forty years.[87] Since the early 2000s, negotiation theory has been enriched by insights into how individuals

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79. KAHNEMAN, *supra* note 67, at 203, KISER, BEYOND RIGHT AND WRONG, *supra* note 15, at 132, 199; Guthrie et al., *Inside*, *supra* note 77, at 799.

80. KAHNEMAN, *supra* note 67, at 345; KISER, BEYOND RIGHT AND WRONG, *supra* note 15, at 136–39; Korobkin & Ulen, *supra* note 68, at 1124–26.

81. KISER, BEYOND RIGHT AND WRONG, *supra* note 15, at 91–92; Birke, *supra* note 65, at 497–98.

82. ROBBENNOLT & STERNLIGHT, *supra* note 54, at 254; Gross & Syverud, *Getting to No*, *supra* note 10, at 328 ("The array of possible strategies is virtually unlimited.").

83. Andrea K. Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 14 HARV. NEGOT. L. REV. 143, 151–52 (2002).

84. *Id.* at 149.

85. *Id.* at 151.

86. *Id.* Bernard Mayer's recent book examines whether concepts thought of as opposing approaches or theories of negotiation are as distinct as previously thought. BERNARD MAYER, THE CONFLICT PARADOX: SEVEN DILEMMAS AT THE CORE OF DISPUTES (2015).

87. Birke, *supra* note 65, at 485–98; Andrea K. Schneider & Roy J. Lewicki, *The Past and Future Challenges of Negotiation Theory*, 31 OHIO ST. J. ON DISP. RESOL. 1, 3–8 (2016).

resolve disputes from multiple additional fields, including the hard sciences, anthropology, neuroscience, the study of emotions, complexity science, and even the physiological bases of willpower.[88] Despite the significant advances in understanding negotiation theory, no general theory of negotiation claims to describe the optimal settlement strategy, and "[b]argaining remains an art rather than a science."[89]

### *C. The Dynamics of Settlement Conferences*

A settlement conference involves the exercise of judgment by the participants—the parties, insurers, lawyers and judge—in a complex situation with multiple variables. Each of the participants brings his or her own interests and perspectives to resolution of the case. Reconciling these different perspectives to reach settlement can be challenging.

#### *1. The Parties*

More often than not, plaintiffs are one-time participants in the legal system.[90] They are sometimes referred to as one-shot players, as they cannot spread their risk of loss across a number of cases.[91] Thus, they tend to be more risk-averse than defendants.[92] In deciding whether to settle, a plaintiff will consider the amount of a settlement offer in light of the risk and rewards of continued litigation, the possibility of delay in getting the case to trial and through an appeal, and personal factors such as available financial resources, earning capacity, expenses, health, and subjective risk preferences.[93] Further, litigation can be an extremely stressful experience.[94] Litigants may be unfamiliar with the court process and too emotionally invested in the case to make intelligent decisions about the advantages of settlement.[95]

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88. Roy F. Baumeister et al., *The Glucose Model of Mediation: Physiological Bases of Willpower as Important Explanations for Common Mediation Behavior*, 15 PEPP. DISP. RESOL. L.J. 377 (2015); Birke, *supra* note 65, at 523–24; Schneider & Lewicki, *supra* note 87, at 4–7; Martha E. Simmons, *Calming the Chaos: A Complexity Science Approach to Dispute Resolution on a Macro and Micro Level*, 17 PEPP. DISP. RESOL. L.J. 157 (2017).

89. Gross & Syverud, *Getting to No*, *supra* note 10, at 327.

90. *Id.* at 349; Gross & Syverud, *Don't Try*, *supra* note 7, at 55.

91. Gross & Syverud, *Getting to No*, *supra* note 10, at 349; Gross & Syverud, *Don't Try*, *supra* note 7, at 55.

92. Gross & Syverud, *Getting to No*, *supra* note 10, at 349; Gross & Syverud, *Don't Try*, *supra* note 7, at 55.

93. Gross & Syverud, *Getting to No*, *supra* note 10, at 352; Kiser et al., *Let's Not Make a Deal*, *supra* note 55, at 552.

94. ROBBENNOLT & STERNLIGHT, *supra* note 54, at 45; Michaela Keet, *Informed Decision-making in Judicial Mediation and the Assessment of Litigation Risk*, 33 OHIO ST. J. ON DISP. RESOL. 65, 71 (2018).

95. Gross & Syverud, *Getting to No*, *supra* note 10, at 372; Robert Rack, *A Letter to My Successor*,

In contrast, entities that get sued regularly—insurance companies, large businesses and government agencies—are considered repeat players in the litigation process.[96] Because of their frequent participation in litigation, repeat players tend to be more sophisticated about the court process and more focused on goals beyond the outcome of the particular case.[97] Accordingly, they tend to bargain strategically to influence the outcomes of other cases.[98]

People have their own preferred approach to decisionmaking.[99] When making a decision, some people will rely solely on instinct, while others will "view a decision from either a promotion perspective (trying to make decisions that ensure positive outcomes and take advantage of opportunities) or a prevention perspective (trying to make decisions that minimize harm and avoid mistakes)."[100] Some litigants will "have a deep need for closure, [while] others will be much more comfortable with suspending judgment, considering other perspectives, and entertaining alternatives; and some will be inclined to avoid making a decision at all."[101]

Parties may make mistakes when assessing the value of their case and deciding whether to settle.[102] They may choose not to settle their case because they do not trust their lawyer's assessment of the case.[103] One study showed that more than half of the cases that went to trial did not settle before trial because one of the parties rejected its own lawyer's recommendation to settle.[104] Also, plaintiffs may pursue legally irrelevant issues, such as social and emotional benefits from litigation, in contrast to their lawyers, who typically view the case in strictly economic terms.[105]

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26 OHIO ST. J. ON DISP. RESOL. 429, 430 (2011).

96. Gross & Syverud, *Don't Try*, *supra* note 7, at 55.

97. *Id.* at 56; Galanter & Cahill, *supra* note 6, at 1385–86.

98. Gross & Syverud, *Don't Try*, *supra* note 7, at 53.

99. ROBBENNOLT & STERNLIGHT, *supra* note 54, at 232.

100. *Id.* at 232–33.

101. *Id.*; *see also* Korobkin & Ulen, *supra* note 68, at 1079 ("In any given choice situation, actors might use a nearly infinite number of decision-making strategies that deviate from the predictions of expected utility theory.").

102. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (AM. BAR ASS'N 2012) ("A lawyer shall abide by a client's decision whether to settle a matter."); Guthrie & Rachlinski, *Insurers*, *supra* note 67, at 2019 ("[L]awyers and judges can only do so much to ameliorate the potential foolishness of the litigants who, in the end, must decide how to conduct themselves."); Andrew J. Wistrich & Jeffrey J. Rachlinski, *How Lawyers' Intuitions Prolong Litigation*, 86 S. CAL. L. REV. 571, 577–78 (2013) [hereinafter Wistrich & Rachlinski, *Lawyers' Intuitions*].

103. Miller, *supra* note 50, at 35.

104. COLE ET AL., *supra* note 45, at § 13:7.

105. *See* ROBBENNOLT & STERNLIGHT, *supra* note 54, at 258; Alberstein, *supra* note 33, at 890;

Ideally, parties would make decisions after obtaining all relevant information, analyzing their options, and making trade-offs among the various components that apply to the decision.[106] This rarely happens, though, because people generally cannot obtain full information and lack the time to consider all possible options.[107] And, as discussed above, they are susceptible to intuitive biases that may prevent them from analyzing their options clearly or selecting the options that promise the greatest return.[108]

Intuitive biases can affect decisionmaking at all stages of a case. The attribution bias shifts attention from the actual events and conditions that preceded the litigation to the perceived motives and character flaws of another individual or organization.[109] This bias may influence whether suit will be filed and may also raise emotional barriers to settlement.[110] During the discovery process, parties may unconsciously seek additional information that confirms their preexisting views, disregard conflicting information, and assess evidence by the extent to which it is consistent with their expectations (confirmation bias and biased assimilation).[111] They may also emphasize anecdotal information and concrete, as opposed to abstract, information while ignoring statistical or quantitative information (the representativeness and availability biases).[112] Optimistic overconfidence may cause litigants to unrealistically assess their chances of prevailing in court and predicting the outcome at trial.[113] This bias may combine with the sunk-cost bias, which affects decisionmaking in two ways.[114] First, because of large costs incurred prior to settlement discussions, litigants may decide to make increased expenditures to protect the already incurred costs.[115] Also, there is a psychological investment in prior litigation decisions, and litigants may feel a need to

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Tamara Relis, *"It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 341, 373 (2006).

106. ROBBENNOLT & STERNLIGHT, *supra* note 54, at 85.

107. *Id.*; Birke & Fox, *supra* note 52, at 1–2; Rachlinski, *supra* note 55, at 118.

108. *See supra* note *.

109. KISER, BEYOND RIGHT AND WRONG, *supra* note 15, at 92–97.

110. *Id.*

111. *Id.* at 127–28; ROBBENNOLT & STERNLIGHT, *supra* note 54, at 15.

112. KISER, BEYOND RIGHT AND WRONG, *supra* note 15, at 129–32; ROBBENNOLT & STERNLIGHT, *supra* note 54, at 72–73.

113. KISER, BEYOND RIGHT AND WRONG, *supra* note 15, at 27; ROBBENNOLT & STERNLIGHT, *supra* note 54, at 68–69.

114. KAHNEMAN, *supra* note 67, at 345; KISER, BEYOND RIGHT AND WRONG, *supra* note 15, at 136–39.

115. KAHNEMAN, *supra* note 67, at 345; KISER, BEYOND RIGHT AND WRONG, *supra* note 15, at 136–38.

justify those decisions.[116] In settlement negotiations, litigants may anchor on damage awards in memorable cases or best-case scenarios instead of focusing on more realistic probabilities.[117] They may also react emotionally, which may affect their ability to convey information and make good decisions (the affect heuristic).[118] Intuitive biases act in concert, so that a relatively minor susceptibility to multiple biases may have significant influence.[119]

### *2. Insurers*

Insurers play a key role in the civil justice system. In most personal injury litigation, the individual defendant is insured, and the insurer provides a defense and exercises complete control over whether to settle the case.[120] Insurance is also the norm in medical malpractice cases, but there is an important difference: most malpractice policies require the insurer to obtain the physician's consent to settle the case.[121] Hospitals often have liability insurance for malpractice claims, but they may have a large deductible and may have to pay a portion of the defense costs.[122] Insurance coverage is less likely in cases involving commercial transactions, real estate, and contract disputes.[123]

Insurance companies require their counsel to analyze the case and provide a written evaluation of all pertinent aspects of the case well before the settlement conference.[124] The insurer will consider the information provided—using a claim committee or other internal process—and decide on its valuation of the case.[125] The insurer's representative who attends the conference may not tell the defense lawyer the extent of the authority he or she has to settle the case.[126]

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116. KAHNEMAN, *supra* note 67, at 345; KISER, BEYOND RIGHT AND WRONG, *supra* note 15, at 136–38.

117. KISER, BEYOND RIGHT AND WRONG, *supra* note 15, at 115–20; ROBBENNOLT & STERNLIGHT, *supra* note 54, at 72.

118. KAHNEMAN, *supra* note 67, at 346–48; ROBBENNOLT & STERNLIGHT, *supra* note 54, at 285, 289.

119. KISER, BEYOND RIGHT AND WRONG, *supra* note 15, at 91–92.

120. KISER, BEYOND RIGHT AND WRONG, *supra* note 15, at 56; Gross & Syverud, *Getting to No*, *supra* note 10, at 360–61; Guthrie & Rachlinski, *Insurers*, *supra* note 67, at 2020.

121. Gross & Syverud, *Getting to No*, *supra* note 10, at 361.

122. *Id.* at 363.

123. *Id.* at 367, 371, 377; KISER, BEYOND RIGHT AND WRONG, *supra* note 15, at 56.

124. E-mail from Kari Cole to William Lynch (Oct. 31, 2018, 07:04 PM) (on file with author); E-mail from Michael Dickman to William Lynch (Oct. 31, 2018, 12:18 PM) (on file with author); E-mail from Robert Sabin to William Lynch (Oct. 15, 2018, 11:26 AM) (on file with author).

125. *Id.*

126. E-mail from Michael Dickman to William Lynch (Oct. 31, 2018, 12:18 PM) (on file with author).

A study by Randall Kiser demonstrates that the existence of insurance coverage is correlated with notable differences in plaintiff and defendant settlement error rates and the costs of those errors when cases proceed to trial.[127] Plaintiffs' decision error rate was slightly higher in cases where the defendant had insurance (62% v. 58%), while the defendants' decision error rate was lower when the defendant had insurance (22% v. 30%).[128] Further, the plaintiffs' cost of decision error was considerably higher in cases with an insured defendant ($83,665 v. $60,644), while defendants with insurance coverage had a substantially lower mean cost of error than defendants without insurance ($1,076,082 v. $1,683,437).[129] Kiser suggests that multiple factors may explain the relatively low error rates for insured defendants: "experienced claims management, extensive data regarding similar cases . . . regular reporting of case status and explanation of settlement positions, [and] ongoing evaluation of liability and reserve amounts," among other factors.[130]

A study of insurance company claim professionals by Chris Guthrie and Jeffrey Rachlinski suggests an additional reason for lower decision error rates when defendants have insurance: insurers are less likely to be affected by the intuitive biases discussed above.[131] The study found that while insurers were not impervious to anchoring effects, they were less likely than others to be influenced by them.[132] They demonstrated some resistance to framing and adopted a risk-neutral perspective.[133] They were not susceptible to self-serving biases in evaluating cases for settlement.[134] According to the authors, this suggests that, relative to uninsured parties, insurers are more likely to value cases objectively, to offer more equitable settlements, and to settle more cases.[135]

### *3. The Lawyers*

Plaintiffs' lawyers are considered repeat players, and as such they can limit the strategic bargaining power of defendants and restore some

127. KISER, BEYOND RIGHT AND WRONG, *supra* note 15, at 73–76.

128. *Id.* at 74.

129. *Id.*

130. *Id.*

131. Guthrie & Rachlinski, *Insurers*, *supra* note 67, at 2022.

132. *Id.* at 2025–33.

133. *Id.* at 2033–42.

134. *Id.* at 2047–48.

135. *Id.* at 2048–49.

balance to the litigation process.[136] Lawyers can be extremely influential in shaping their clients' decisions regarding settlement.[137] Just as parties may make mistakes when evaluating cases, lawyers can make mistakes that interfere with settlement in several ways. Studies have shown that lawyers, like many other professionals, are overconfident and that there is no relationship between levels of confidence and decisionmaking accuracy.[138] Lawyers can inaccurately predict the likely outcome of trials because they make overly optimistic assessments of their cases.[139] They tend to view the evidence in the light most favorable to their case, they overestimate their abilities and underestimate the abilities of their opponents, and they overestimate their ability to control outcomes that are determined by factors outside their control.[140] If lawyers are overconfident about their chances at trial, they may make unrealistic settlement demands and offer fewer concessions during negotiations.[141]

Lawyers may fail to bargain properly for reasons extrinsic to the case. Plaintiffs' lawyers may bargain strategically to increase future settlements or to develop a reputation for toughness or resolve.[142] Conversely, lawyers for repeat party litigants—insurance companies and large business that are frequently sued—may bargain strategically to attempt to discourage future litigation and induce plaintiffs to accept settlements below the expected value of their claims.[143] Trials may occur when such strategic bargaining misfires.

When evaluating cases, lawyers are also vulnerable to many of the same kinds of intuitive biases that mislead their clients. Lawyers are influenced by the framing effect—they treat economically equivalent gains and losses differently—which leads them to take chances on trials that are not worth taking.[144] They are influenced by confirmation bias and nonconsequentialist reasoning, which causes them to gather more information than they need and to interpret conflicting information in self-

136. Galanter & Cahill, *supra* note 6, at 1386; Gross & Syverud, *Getting to No*, *supra* note 10, at 350; Guthrie & Rachlinski, *Insurers*, *supra* note 67, at 2022.

137. Gross & Syverud, *Getting to No*, *supra* note 10, at 351.

138. KISER, BEYOND RIGHT AND WRONG, *supra* note 15, at 298; Birke & Fox, *supra* note 52, at 13–14.

139. KISER, BEYOND RIGHT AND WRONG, *supra* note 15, at 124–26; ROBBENNOLT & STERNLIGHT, *supra* note 54, at 68–69; Birke & Fox, *supra* note 53, at 13–18; Wistrich & Rachlinski, *Lawyers' Intuitions*, *supra* note 102, at 579–80.

140. KISER, BEYOND RIGHT AND WRONG, *supra* note 15, at 126; Birke & Fox, *supra* note 52, at 13–18.

141. Birke & Fox, *supra* note 52, at 13–18.

142. Gross & Syverud, *Getting to No*, *supra* note 10, at 389.

143. *Id.*

144. Wistrich & Rachlinski, *Lawyers' Intuitions, supra* note 102, at 589–92.

serving ways by disregarding information that suggests their position might be wrong.[145] They are also subject to the sunk-cost fallacy, in which they make decisions based on past costs, unduly influencing their analysis of the future costs and benefits of proceeding to trial.[146] By relying heavily on intuition, rather than deliberative mental processing, to evaluate cases, lawyers may make poor decisions about whether and when to settle cases.[147]

Lawyers may also have financial interests that conflict with those of their clients. A lawyer billing by the hour may be inclined to spend more time on a case than the client desires and may be reluctant to settle the case without additional discovery or motion practice.[148] In contrast, a lawyer paid on a contingency basis or on a flat-fee basis may be inclined to minimize the amount of time spent on a case and may push for an early settlement before spending much time on the case.[149]

*4. The Judge*

While judges may be experienced and well-trained decision makers, they are still human. Research shows that judges, like litigants and lawyers, rely on the same decisionmaking processes that can produce systemic errors when evaluating cases.[150] For example, studies show that numerical "anchors" trigger intuitive judicial decisionmaking.[151] Anchors can arise from multiple sources, including settlement demands, policy limits, and caps on allowable damages, and study after study shows that judges are powerfully influenced by them.[152] One study demonstrated that an unrealistically high demand made at a settlement conference served as an anchor to increase the amount of damages subsequently awarded by

145. *Id.* at 594–612; Birke & Fox *supra* note 52, at 16, 21–28.

146. Wistrich & Rachlinski, *Lawyers' Intuitions*, *supra* note 102, at 612–20.

147. *Id.* at 587.

148. ROBBENNOLT & STERNLIGHT, *supra* note 54, at 395–98; Rachlinski, *supra* note 55, at 172.

149. ROBBENNOLT & STERNLIGHT, *supra* note 54, at 395–98; Rachlinski, *supra* note 55, at 172.

150. Guthrie et al., *Inside*, *supra* note 77, at 779; *see also* Guthrie et al., *Blinking*, *supra* note 69, at 27–28.

151. Guthrie et al., *Inside*, *supra* note 77, at 787–94; Guthrie et al., *Blinking*, *supra* note 69, at 20–21; Rachlinski et al., *Can Judges Make Reliable Numeric Judgments? supra* note 77, at 735–36; Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding,* 153 U. PA. L. REV. 1251, 1286–94 (2005) [hereinafter, Wistrich et al., *Can Judges Ignore*].

152. Guthrie et al., *Inside*, *supra* note 77, at 787-794; Guthrie et al., *Blinking*, *supra* note 69, at 19-21; Wistrich et al., *Can Judges Ignore*, *supra* note 151, at 1286–93; ROBBENNOLT & STERNLIGHT, *supra* note 54, at 72.

the judges.[153] Judges in the anchor group learned that the plaintiff's lawyer had demanded $10 million in damages at the settlement conference, while judges in the control group learned that the plaintiff's lawyer had asked only for a significant monetary recovery.[154] Knowledge of the $10 million demand clearly influenced the judges: they awarded over $2,200,000 on average, while the judges in the control group awarded $808,000 on average.[155] Another study showed that a motion to dismiss on the ground that the case failed to meet the $75,000 jurisdictional minimum served as an anchor to lower the amount of damages awarded by the judges.[156] Judges in the anchor group were first asked to rule on the motion to dismiss before awarding damages, but the judges in the control group were not informed about the motion to dismiss and were simply asked to award damages.[157] The $75,000 jurisdictional minimum served as an anchor: the judges in the anchor group awarded an average of $882,000, while the judges in the control group awarded an average of $1,249,000.[158]

Other research confirms that judges are predominantly intuitive decisionmakers.[159] They are influenced by the same intuitive biases discussed above, for example, the framing effect, the representativeness heuristic, the hindsight bias, and the affect bias.[160] Studies show that the decisions judges make at a settlement conference are more likely to be intuitive rather than deliberative and well reasoned.[161] Further, recent studies show that shifting the judge's attention by presenting the judge with additional information or altering the way the information is presented can alter the judge's decisions.[162]

Many judges would believe that they are impervious to the effects of these intuitive biases and that they know the value of a fair settlement. Judges are often very confident in their decisionmaking abilities, but it is important to be skeptical of judges' own assessments of their abilities. Studies show that judges, like all people, are susceptible to egocentric bias

153. Wistrich et al., *Can Judges Ignore*, *supra* note 151, at 1288–90.

154. *Id.* at 1288–89.

155. *Id.* at 1290.

156. Guthrie et al., *Inside*, *supra* note 77, at 790–92.

157. *Id.* at 790–91.

158. *Id.* at 791–92.

159. Guthrie et al., *Blinking*, *supra* note 69, at 6–8.

160. *See supra* note *.

161. Guthrie et al., *Blinking*, *supra* note 69, at 36.

162. Jeffrey J. Rachlinski, Andrew J. Wistrich, & Chris Guthrie, *Altering Attention in Adjudication*, 60 UCLA L. REV. 1586, 1615–16 (2013) (Judges are "vulnerable to distraction, misdirection, and manipulation . . . . [T]heir attention may be shifted to the wrong place at the wrong time, rendering them susceptible to sophistry.").

and overconfidence.[163] Due to these biases, judges overestimate their own abilities and are more confident in their decisions than is appropriate, which makes it hard for them to recognize that their decisions may be mistaken.[164]

A judge's evaluation of a case may be improperly influenced by the lawyers themselves. Lawyers often present the facts they think are most advantageous to their position at the settlement conference and may be reluctant to acknowledge deficiencies in their case. As Judge Posner stated recently, "[l]awyers are advocates; one can't expect candor from them."[165] Judges cannot know what agendas or facts the parties are hiding from them at the settlement conference, what arguments and evidence opposing parties might present at trial, and what strategies they might pursue.[166] Both sides may be less than candid about their analysis of the factual and legal issues and about what issues are driving their negotiation strategy.[167]

Also, judges may know less about the case than they think and may devote too little time preparing for and conducting the settlement conference. One study reported that some judges spend one to one-and-a-half hours preparing for a settlement conference.[168] Even judges who spend more time preparing can do little more than review written materials provided by the parties, which does not allow them to judge a crucial issue—the credibility of the witnesses.[169] Judges typically schedule a half day or less for a settlement conference.[170] Because the

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163. Guthrie et al., *Inside*, *supra* note 77, at 811–16. Egocentric bias is pervasive: most people overestimate their abilities relative to their peers. For example, "[n]inety-four percent of university professors believe they do a better job than their colleagues." Birke & Fox, *supra* note 52, at 17–18. Similarly, 97.2% of judges in one study believed that they were better able than their colleagues to avoid the influence of race and gender bias. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1519 (2009).

164. Guthrie et al., *Inside*, *supra* note 77, at 813–15, 828.

165. RICHARD A. POSNER, THE FEDERAL JUDICIARY, STRENGTHS AND WEAKNESSES 387 (2017).

166. ROBBENNOLT & STERNLIGHT, *supra* note 54, at 389, 401; Brazil, *Hosting Mediations*, *supra* note 40, at 254, 257.

167. Wayne Brazil, *The Mediator as Medium: Reflections on Boxes; Black, Transparent, Refractive, and Gray*, DISP. RESOL. MAG., Winter 2017, at 22, 23–26 [hereinafter Brazil, *Mediator as Medium*]; Email from George Bach to William Lynch (Oct. 28. 2018, 03:44 PM) (on file with author).

168. Welsh, *supra* note 17, at 1002.

169. Kothe v. Smith, 771 F.2d 667, 670 (2d Cir. 1985) ("As every experienced trial lawyer knows, the personalities of the parties and their witnesses play an important role in litigation."); Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution*, *supra* note 30, at 374 ("The jury's principal functions is to determine the credibility of witnesses," and the "jury may react quite differently when confronted with the actual witnesses.").

170. Welsh, *supra* note 17, at 1002; Wissler, *supra* note 31, at 277–79.

lawyers are more familiar with the case than the judge, they may have a better grasp of the intangible factors that affect the settlement value of the case.[171] Evaluating a case with only a generalized understanding of the facts, or based on incomplete or misleading information provided by the parties, may lead to inaccurate conclusions.

As set out above, all the participants in a settlement conference are subject to intuitive biases and other factors unique to each participant that may cause them to incorrectly assess the value of a case and how it should be resolved. Because there is no scientific process for evaluating a case for settlement, the settlement conference process should be designed to ensure that judges do not coerce the parties into settlement and instead help the parties focus on the issues at hand. Additionally, the judge and the parties should not be distracted by extraneous factors such as arguments over good faith participation that divert their attention to subsidiary issues that interfere with reaching settlement.

## III. ADVANTAGES OF SETTLEMENT CONFERENCES

There can be important advantages to a settlement conference conducted by a judge. For some parties, it is important to feel that they have had their "day in court."[172] Settlement conferences in federal court are typically held at a federal courthouse, frequently in a courtroom, the judge may wear a robe while in session, and the party can address the judge directly while in separate caucus.[173] The parties incur no costs for the judge's time, although they must still prepare for and attend the conference.[174] Sometimes parties fear that being the first to propose settlement discussions suggests weakness or lack of confidence in their case.[175] If the court orders the parties to the settlement conference, neither side has to worry about conveying a perception of weakness.[176] The judge may require the presence of non-parties such as insurers or other representatives.[177]

A judge may have more credibility with a party than a mediator would

171. Killefer, *supra* note 50, at 19; Sherman, *supra* note 27, at 2087–88 ("[T]he parties are in the best position to know the facts and appreciate their objectives.").

172. *See* Deason, *supra* note 16, at 107–08.

173. Deason, *supra* note 16, at 107' Killefer, *supra* note 50, at 22; Miller, *supra* note 50, at 33–34; Welsh, *supra* note 17, at 1002.

174. Deason, *supra* note 16, at 107.

175. Miller, *supra* note 50, at 34; Wistrich & Rachlinski, *Lawyers' Intuitions*, *supra* note 102, at 577.

176. Rack, *supra* note 95, at 431; Miller, *supra* note 50, at 34; Wistrich & Rachlinski, *Lawyers' Intuitions*, *supra* note 102, at 577;.

177. FED. R. CIV. P. 16(c)(1); Parness, *supra* note 33, at 1897.

by virtue of the inherent respect and authority of his or her position as a judge.[178] Some parties may not have accurately evaluated their cases or may not trust their lawyers' advice about settlement. In those circumstances, the judge can assist counsel by evaluating the case and explaining to the party the dangers of proceeding to trial.[179] Judges may be in a position to help bridge the gap between the parties because they "are in a unique position to re-frame settlement decisions for the parties because they have no stake in the outcome" of the case.[180] Judges may be able to manage difficult parties better because of their "greater status, authority, and credibility," and they may also be able to offset bargaining imbalances between parties with unequal sophistication and resources.[181] The judge may have greater knowledge about the potential jury pool than counsel or a private mediator.[182]

Finally, a judge who is assigned to the case may have an informational and efficiency advantage. A judge who has ruled on discovery or dispositive motions may have in-depth knowledge of the facts, the legal issues, parties, and counsel that another judge or a mediator cannot easily duplicate at the start of a settlement conference or mediation.[183]

## IV. RISKS OF SETTLEMENT CONFERENCES

While there may be certain advantages to settlement conferences, there are also very real risks. The possibility of coercion is inherent in the structure of a settlement conference because the judge may rule on substantive or procedural motions in the present case or future cases after an unsuccessful settlement conference. This potential is heightened by the good faith participation requirement imposed by Rule 16 of the Federal Rules of Civil Procedure. Parties may feel pressured to settle their cases to ensure that they are not sanctioned for their level of participation at the conference. Litigation over the requisite level of participation at the settlement conference threatens the confidentiality that is essential to the integrity of the settlement process. Further, satellite litigation over how the parties participated could undermine the primary purpose of settlement conferences—reducing court congestion.

178. Deason, *supra* note 16, at 105–06; Wissler, *supra* note 31, at 292–93; Miller *supra* note 50, at 33.

179. Deason, *supra* note 16, at 106; Miller, *supra* note 50, at 34–35.

180. Guthrie et al., *Inside*, *supra* note 77, at 822.

181. Wissler, *supra* note 31, at 295; Galanter & Cahill, *supra* note 6, at 1346; Pamess, *supra* note 33, at 1897.

182. Galanter & Cahill, *supra* note 6, at 1344.

183. Wissler, *supra* note 31, at 293; Deason, *supra* note 16, at 108; Killefer, *supra* note 50, at 19.

### *A. The Potential for Coercion*

Courts must provide litigants with a forum in which they will receive both substantive and procedural justice.[184] Procedural fairness in ADR includes an opportunity for the parties to express their positions, thorough consideration of the issues by a neutral, respectful decisionmaker, and lack of pressure or coercion to settle the case.[185] The Commentary to the Code of Conduct for federal judges cautions that "[a] judge may encourage and seek to facilitate settlement but should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts."[186] Allowing judges to actively promote settlement of civil cases in federal court contrasts sharply with the prohibition of judges being involved in settlement discussion in criminal cases. In 1975, Federal Rule of Criminal Procedure 11 was amended to provide that the court "must not participate" in discussions with a defendant to reach a plea agreement.[187] As the United States Supreme Court recognized, this prohibition ensures that a defendant will not "be induced to plead guilty rather than risk displeasing the judge who would preside at trial."[188]

Plaintiffs have complained that they were forced to accept paltry and inadequate settlements, while defendants have asserted that judges forced them into large settlements that were not appropriate.[189] Parties who feel pressured during a settlement conference to settle their case will not respect the process, which could undermine public respect for the judicial system.[190]

Some judges are proud of the assertive style they use at settlement conferences, which they believe helps them settle difficult cases.[191] But even judges who do not purposely use an assertive style may feel subtle pressure to resolve cases at a settlement conference. For example, judges might feel such pressure if they know that the court keeps track of their rate of success at settlement conference.[192]

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184. Welsh, *supra* note 17, at 1022–28, 1045.

185. *Id.*; Wissler, *supra* note 31, at 300–02.

186. CODE OF JUDICIAL CONDUCT FOR U.S. JUDGES Canon 3A(4) (ADMIN. OFFICE OF THE U.S. COURTS 2014).

187. FED. R. CRIM. P. 11(c)(1).

188. United States v. Davila, 569 U.S. 597, 606 (2013).

189. Cratsley, *supra* note 34, at 590–92; Galanter & Cahill, *supra* note 6, at 1353; Killefer, *supra* note 50, at 19–20.

190. Brazil, *Continuing the Conversation*, *supra* note 5, at 26–27; Miller, *supra* note 50, at 37.

191. Deason, *supra* note 16, at 110.

192. Brazil, *Continuing the Conversation*, *supra* note 5, at 26 n.47; Rack, *supra* note 95, at 436.

Judicial involvement in settlement conferences brings with it the possibility that the parties will settle the case under an explicit threat of coercion. In one case, a defendant was sanctioned when he did not accept the trial judge's recommended settlement amount before trial but settled for a similar amount after the first day of trial.[193] In imposing the sanction, the trial judge stated that he was "'determined to get the attention of the carrier' and that 'the carriers are going to have to wake up when a judge tells them that [he wants] to settle a case and they don't want to settle it.'"[194] The Second Circuit reversed the award of sanctions, holding that parties may not be sanctioned for failing to concur with the judge's evaluation of the case and that a judge should not directly or indirectly effect settlements through coercion.[195] The court recognized that while Rule 16 was amended in 1983 to encourage pretrial settlement discussions, the Advisory Committee Notes make clear that its purpose was not to "impose settlement negotiations on unwilling litigants."[196] The court concluded that Rule 16 "was not designed as a means for clubbing the parties—or one of them—into an involuntary compromise."[197]

Even if judges do not explicitly threaten retribution if the case does not settle, judicial involvement in settlement discussions brings with it an implicit threat of coercion. Parties may worry that adverse consequences might follow if they do not settle the case at the settlement conference.[198] If the trial judge holds the settlement conference, a party may fear that its refusal to settle could affect the judge's subsequent rulings on dispositive motions, motions in limine, evidentiary issues during trial, jury instructions, or post-trial motions.[199] If the pretrial judge holds the settlement conference, a party may be concerned about the judge's rulings

193. Kothe v. Smith, 771 F.2d 667, 668–69 (2d Cir. 1985).

194. *Id.* at 669.

195. *Id.*

196. *Id.* (quoting FED. R. CIV. P. 16 advisory committee's note to 1983 amendment).

197. *Id.*; *see also* Cratsley, *supra* note 34 at 590–92; Deason, *supra* note 16, at 110–11 (reporting other examples of explicit coercion by judges at settlement conference). The trial judge's approach in Kothe is apparently not an isolated occurrence. Several lawyers reported that, although their clients subsequently prevailed on the merits of the case, their clients were sanctioned or threatened with sanctions for failing to make an offer at a settlement conference. Email from Jennifer Noya to William Lynch (Oct. 14, 2018, 08:31 PM) (on file with author); Email from Kari Cole to William Lynch (Oct. 31, 2018, 07:22 PM) (on file with author); Email from Christopher De Lara to William Lynch (Feb. 21, 2019, 02:51 PM) (on file with author).

198. Killefer, *supra* note 50, at 18–19; Miller, *supra* note 50, at 37. Because settlement conferences are not held on the record it will be difficult for a party to establish improper coercion during an ex parte session with the judge at the conference. *Id.*, at 22; Deason, *supra* note 16, at 113.

199. Killefer, *supra* note 50, at 19.

on scheduling deadlines, discovery issues, or other preliminary matters.[200] The lawyers may also worry that the judge will hold their actions at settlement conference against them in future cases.[201]

A study conducted in the Southern District of Ohio that compared attorneys' attitudes about various forms of ADR confirms these fears.[202] Lawyers who participated in the study thought that they could be less candid and less able to explore settlement with judges assigned to the case without prejudice to the ongoing litigation if the case did not settle.[203] They also believed that judges assigned to the case were much more likely to be biased than the other neutrals.[204] Lawyers believe that judges are eager to settle cases to reduce their trial docket and fear that information discussed at the settlement conference will affect subsequent rulings.[205] Parties may therefore be reluctant to fully disclose information at a settlement conference.[206] They may also attempt to bargain tactically, by exaggerating their strengths and minimizing their weaknesses, in an attempt to influence the judge if the case proceeds to trial.[207]

The potential for coercion is exacerbated by Rule 16, which provides that the court may sanction a party who "is substantially unprepared to participate—or does not participate in good faith—in the conference."[208] The Rules and Advisory Committee notes do not define what constitutes good faith participation at a settlement conference.[209] As many commentators have noted, good faith participation is difficult to define, and the ad hoc nature of case adjudication provides scant guidance as to the minimum level of participation required at a settlement conference.[210]

Courts consistently state that a judge may not coerce a settlement or force a party to make an offer at a settlement conference.[211] As the Fifth

200. Deason, *supra* note 16, at 111–12.

201. Wissler, *supra* note 31, at 313, 317, 305 n.140.

202. *Id.* at 274–75.

203. *Id.* at 284–86.

204. *Id.* at 287–88.

205. *Id.* at 303–04.

206. *Id.* at 304.

207. *Id.*

208. FED. R. CIV. P. 16(f)(1)(B).

209. *See id.*; FED. R. CIV. P. 16 advisory committee's notes.

210. Brazil, *Continuing the Conversation*, *supra* note 5, at 31–32; Kovach, *Good Faith*, *supra* note 43, at 599–600 ("[T]he courts, in particular, have struggled with defining good faith . . . [b]ut, in the end, perhaps it is like obscenity: you know it when you see it."); Sherman, *supra* note 27, at 2092 ("The lack of a substantive entitlement in ADR makes it especially difficult to define the content of good faith participation.").

211. *See* Gevas v. Ghosh, 566 F.3d 717, 719 (7th Cir. 2009); Negron v. Woodhull Hospital, 173

Circuit stated, "there is no meaningful difference between coercion of an offer and coercion of a settlement: if a party is forced to make a settlement offer because of the threat of sanctions, and the offer is accepted, a settlement has been achieved through coercion."[212] But judges have considerable discretion to interpret what constitutes good faith participation at a settlement conference, and the line between "(acceptably) encouraging a settlement to (unacceptably) coercing" settlement is not bright as the boundaries of sanctionable conduct seem to vary by judge.[213] For example, in a later Fifth Circuit case, the court affirmed an award of sanctions despite the fact that the defendant increased its settlement offer from $50,000 to $100,000 at the settlement conference.[214] Although the court stated in passing that a party may not be sanctioned for failing to make what the settlement conference judge considered a serious offer, the court inferred lack of good faith participation in part from defendant's refusal to make a settlement offer "with a realistic potential of being accepted by the plaintiff."[215] The lack of an objective standard for assessing good faith participation at a settlement conference may contribute to the parties' perception of coercion and has caused increased litigation that may worsen court congestion, the very thing that settlement conferences were developed to address.[216]

### *B. Loss of Confidentiality*

Numerous cases and commentators have recognized that confidentiality is essential to the integrity of ADR processes.[217] Confidentiality allows parties to raise sensitive issues and discuss creative ideas and solutions that they may otherwise be unwilling to discuss.[218] Instead of imposing a national standard for rules on confidentiality, the Alternative Dispute Resolution Act of 1998 directed local districts to provide for the confidentiality of ADR processes and to prohibit the

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Fed. App'x 77, 79 (2d Cir. 2006); Gross Graphics Systems, Inc. v. DEV Indus., Inc., 267 F.3d 624, 627 (7th Cir. 2001); Dawson v. United States, 68 F.3d 886, 897 (5th Cir. 1995).

212. *Dawson*, 68 F.3d at 897.

213. Deason, *supra* note 16, at 112.

214. Guillory v. Domtar Indus. Inc., 95 F.3d 1320, 1325, 1334–35 (5th Cir. 1996).

215. *Id.* at 1334–35, 1334 n.13.

216. *See infra* Part V(C).

217. *See, e.g.*, *In re* Teligent, 640 F.3d 53, 57–58 (2d Cir. 2011); *In re* Anonymous, 283 F.3d 627, 636–37 (4th Cir. 2002); Clark v. Stapleton Corp., 957 F.2d 745, 746 (10th Cir. 1992); Dickey, *supra* note 42, at 731; Welsh, *supra* note 17, at 1030–31.

218. *In re* Teligent, 640 F.3d at 57–58; *In re* Anonymous, 283 F.3d at 636–37.

disclosure of confidential communications.[219] This process led to inconsistent rules being adopted by the federal district courts. Some districts, by local rule, have provided for confidentiality only as provided in Federal Rule of Evidence 408.[220] While Rule 408 prohibits the use of settlement communications to establish liability or damages, it does not preclude their use to prove other matters, such as bad faith participation at a settlement conference.[221] Other districts have not addressed the issue of confidentiality for settlement conferences, even when they have provided for confidentiality for court-ordered mediations.[222] Some districts provide more expansive confidentiality protections, such that the settlement conference judge "may not reveal to the trial Judge any information about offers made, or statements made, by any party at the settlement conference, other than whether the case was or was not settled."[223] Yet, by requiring the settlement conference judge to evaluate what occurred at the settlement conference and report bad faith participation to the court, other districts undercut their promise of confidentiality.[224] Confidentiality is even more important to the parties where participation in the settlement conference is court ordered.[225] If the parties are confident that what they say or do at the settlement conference will not be used against them if the case does not settle, they will be more forthcoming and may be more open to making concessions and taking risks to reach an agreement.[226] To the extent that parties fear that their discussions at the settlement conference will be used against them later, they are more likely to behave strategically in settlement talks. They will disclose less information to the judge, which will give the judge less to work with and could lead to a bargaining impasse.[227]

To be effective at a settlement conference, judges need to build

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219. 28 U.S.C. § 652(d) (2003).

220. *See, e.g.*, W.D. MICH. LOCAL CIV. R. 16.2(d).

221. Holly v. UPS Supply Chain Sols., Inc., No. 3:13–CV–980–DJH–CHL, 2015 WL 3850103, at *9–10 (W.D. Ky. June 22, 2015); Grigoryants v. Safety-Kleen Corp., No. 11–267E, 2014 WL 2214272, at *4 (W.D. Pa. May 28, 2014); Rhoades v. Avon Prods., Inc., 504 F.3d 1151, 1161–62 (9th Cir. 2007); Thompson, *supra* note 38, at 417–18.

222. *Compare* D. HAW. LOCAL R. 16.5, *with* D. HAW. LOCAL R. 88.1 (no mention of confidentiality for settlement conferences, while mediations are provided with confidentiality under FRE 408), *with* C.D. CAL. LOCAL R. 16–15.8 (confidentiality "applies only to ADR Procedure No. 2, mediations conducted by the Court's Mediation Panel").

223. *See, e.g.*, D.N.M. LOCAL R. CIV. P. 16.2(e).

224. *See infra* Part IV(C).

225. *In re* Anonymous, 283 F.3d 627, 637 (4th Cir. 2002).

226. Brazil, *Continuing the Conversation*, *supra* note 5, at 30; Deason, *supra* note 16, at 118.

227. Brazil, *Continuing the Conversation*, *supra* note 5, at 30; Deason, *supra* note 16, at 118.

relationships with the parties.[228] A duty to report bad faith participation may move the judge from a neutral stance to a judgmental one, threatening his or her ability to build appropriate relationships.[229] Further, the neutrality of the judge is important to the parties' perception of the fairness of the settlement conference process.[230] Their perceptions of fairness are likely to be undermined by their knowledge that the judge may disclose confidential communications or behaviors during the settlement conference.[231] To ensure the integrity of settlement conferences, settlement conference communications should not be disclosed in a motion that seeks sanctions for failing to participate in good faith.[232]

### *C. Satellite Litigation*

One of the stated purposes of the Alternative Dispute Resolution Act of 1998 was to reduce crowded dockets through "greater efficiency in achieving settlements."[233] As Kimberlee Kovach presciently stated, "[i]t would be paradoxical indeed if a process designed to reduce litigation and ease the administration of justice created its own special brand of vexing and annoying motion practice."[234] Beyond being simply vexing and annoying, motions seeking sanctions for failure to participate in good faith have increased significantly and threaten to undercut the premise that settlement conferences help reduce court congestion.

While there has been litigation over court-mandated ADR for many years,[235] litigation over the good faith participation requirement has increased greatly in recent years. In the mid-1990s, commentators reported that few cases had examined the good faith standard adopted in Rule 16 in 1983.[236] Yet, by 2010, Michael Dickey reported that there had been an explosion in motion practice related to good faith participation at court-ordered mediation.[237] Not only has that trend continued, but it has

228. Brazil, *Continuing the Conversation*, *supra* note 5, at 32.

229. Alfini & McCabe, *supra* note 27, at 180; Dickey, *supra* note 42, at 751–56, 758.

230. Dickey, *supra* note 42, at 754.

231. Welsh, *supra* note 17, at 1030–31.

232. *See infra* Part V.C.

233. Alternative Dispute Resolution Act of 1998, Pub. L. 105–315, 112 Stat. 2993, § 2(1) (codified as 28 U.S.C. §§ 651–58 (1998)).

234. Kovach, *Good Faith*, *supra* note 43, at 603.

235. *See, e.g.*, *In re* Novak, 932 F.2d 1397 (11th Cir. 1991); G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 653 (7th Cir. 1989); Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985).

236. Kovach, *Good Faith*, *supra* note 43, at 578; Sherman, *supra* note 27, at 2089–91.

237. *See* Dickey, *supra* note 42, at 744–50.

also appeared in motions concerning Rule 16's requirement that the parties participate at the settlement conference in good faith. For example, the Western District of Pennsylvania issued eight opinions in two years concerning good faith participation at court-annexed ADR.[238] Many other courts[239] have been forced to address claims concerning a party's participation at a settlement conference.[240] This mirrors what happened in

238. *See* Lea v. PNC Bank, No. 15-776, 2016 WL 738053 (W.D. Pa. Feb. 25, 2016); Palmer v. Fed. Express Corp., No. 15-202, 2015 WL 9295917 (W.D. Pa. Dec. 18, 2015); ThermoLife Int'l, LLC v. D.P.S. Nutrition, Inc., No. 15-273, 2015 WL 12781024 (W.D. Pa. Dec. 15, 2015); Exec. Wings, Inc. v. Dolby, 131 F. Supp. 3d 404 (W.D. Pa. 2015); Blakeney v. Faros Pittsburgh, LLC, No. 14-437, 2015 WL 4162390 (W.D. Pa. Jul. 9, 2015); Vay v. Huston, No. 14-769, 2015 WL 791430 (W.D. Pa. Feb. 25, 2015); Grigoryants v. Safety-Kleen Corp., No. 11-267E, 2014 WL 2214272 (W.D. Pa. May 28, 2014); Arneault v. O'Toole, No. 1:11–95, 2014 WL 1117900 (W.D. Pa. Mar. 20, 2014), *aff'd*, 718 Fed. App'x 148 (3d Cir. Dec. 4, 2017).

239. It is somewhat difficult to track the cases because many opinions involving sanctions for good faith participation are not published. For example, *see* Joint Brief of Defendant-Appellees, Klein v. Commerce Energy, Inc., No. 17-1959, 2017 WL 4865135 (3d Cir. Oct. 23, 2017) (Answer brief in support of District Court's March 29, 2017 order awarding sanctions for bad faith conduct during court-ordered mediation; the District Court's order is not published).

240. Cases from January 1, 2014 to March 30, 2018 include: Brittany O v. Bentonville Sch. Dist., No. 5:15-cv-5020, 2017 WL 4005161 (W.D. Ark. Sep. 12, 2017); Barnes-Boers v. TRU 2005 REI, LLC, No. 2:13-cv-1827-WBS-CMK, 2014 WL 1400952 (E.D. Cal. Apr. 10, 2014), *aff'd*, 2014 WL 1775491 (E.D. Cal. May 2, 2014); Apelian v. Allstate Ins. Co., No. LA CV 16-4977 GHK (PLAx), 2016 WL 7388276 (C.D. Cal. Dec. 20, 2016), *aff'd*, 2017 WL 6028742 (C.D. Cal. Mar. 9, 2017); Anhing Corp. v. Thuan Phong Co., 215 F. Supp. 2d 919 (C.D. Cal. 2015); Concealfab Corp. v. Sabre Indus., No. 15-cv-01793-CMA-KLM, 2017 WL 4407924 (D. Colo. Aug. 3, 2017); Bakken Waste, LLC v. Great Am. Ins. Co. of New York, No. 15-cv-00303-CMA-MEH, 2015 WL 4036191 (D. Colo. June 30, 2015); Peterson v. Murphy, No. 2:16-cv-00075-EJL-REB, 2018 WL 1526070 (D. Idaho Mar. 28, 2018); Koehn v. Tobias, No. 12 C 50321, 2016 WL 4436131 (N.D. Ill. Aug. 23, 2016), *aff'd*, 866 F.3d 750 (7th Cir. 2017); Morland v. Ghosh, No. 12 CV 0500, 2014 WL 279666 (N.D. Ill. Jan. 24, 2014); Britt Interactive LLC v. A3 Media LLC, No. 1:16-cv-2884-TWP-DML, 2017 WL 3601371 (S.D. Ind. Apr. 14, 2017); Lethiot v. JB Hunt Shipping, No. 3:14-CV-488-CRS, 2017 WL 3044762 (W.D. Ky. July 18, 2017); Holly v. UPS Supply Chain Sols., Inc., No. 3:13-cv-980-DJH-CHL, 2015 WL 4776904 (W.D. Ky. Aug. 12, 2015); MHD-Rockland Inc. v. Aerospace Distribs. Inc., 102 F. Supp. 3d 734 (D. Md. 2015); Tuscola Wind III, LLC v. Almer Charter Twp., No. 17-cv-10497, 2018 WL 1250476 (E.D. Mich. Mar. 12, 2018); Akbar v. Bangash, No. 15-cv-12688, 2017 WL 2953047 (E.D. Mich. July 11, 2017); Mager v. Wisconsin Cent. Ltd., No. 2:16-cv-145, 2017 WL 8218992 (W.D. Mich. Dec. 28, 2017); Satgunam v. Basson, No. 1:12-cv-00220-PLM, 2016 WL 9274719 (W.D. Mich. Oct. 24, 2016); Great Lakes Gas Transmission Ltd. P'ship v. Essar Steel Minnesota, LLC, No. 09-CV-3037 (SRN/LIB) 2014 WL 12597430 (D. Minn. Mar. 11, 2014); Ewald v. Royal Norwegian Embassy, No. 11-cv-2116 (SRN/SER), 2014 WL 5840566 (D. Minn. Mar. 7, 2014); Hall v. Kirkegard, No. CV-1400011-H-DLT-JTJ, 2017 WL 8787176 (D. Mont. July 31, 2017); Cross v. Jaeger, No. 3:13-cv-00433-MMD-WGC, 2017 WL 2255754 (D. Nev. May 22, 2017); Hologram USA, Inc. v. Pulse Evolution Corp., No. 2:14-cv-0772-GMN-NJK, 2016 WL 2757377 (D. Nev. May 11, 2016); Richard v. Nevada, No. 2:12-cv-01236-GMN-CWH, 2016 WL 1294337 (D. Nev. Mar. 11, 2016); Griego v. Douglas, 264 F. Supp. 3d 1109 (D.N.M. 2017); Alvarez v. GEICO Ins. Agency, Inc., No. 15-cv-0198 MV/SCY, 2016 WL 7173811 (D.N.M. Feb. 29, 2016); Super Express USA Publ'g Corp. v. Spring Publ'g Corp., No. 13-CV-2814 (DLI)(JO), 2018 WL 2078234 (E.D.N.Y. Feb. 23, 2018); Thrane v. Metro. Transp. Auth., No. 15-cv-07418(FB)(LB), 2018 WL 840043 (E.D.N.Y. Feb. 12, 2018); Lin v. City of New York, No. 14 Civ. 9994 (PAE), 2016 WL 6962536 (S.D.N.Y. Nov. 28,

Illinois state court after the Illinois Supreme Court in 1993 adopted a rule requiring good faith participation in court-annexed ADR.[241] A flood of litigation ensued concerning the parameters of good faith participation and appropriate sanctions, with at least nineteen reported cases from the Illinois Court of Appeals in the next five-and-one-half years addressing these issues.[242]

When deciding whether to sanction a party for failing to act in good faith at a settlement conference, the court is forced to delve into that party's motives for its actions.[243] The parties will have to brief the issues, which the court will have to review and perhaps hold a hearing to address. The sanctioned party may file multiple motions concerning the sanctions which the court will have to resolve, with the possibility of an appeal to the district judge or circuit court.[244] Further, parties may be tempted to file tactically driven motions for sanctions.[245] While ostensibly seeking sanctions for bad faith participation, the moving party may primarily seek to gain a litigation advantage over the other party or to bias the judge against the other party.[246] Rather than reducing court dockets, litigation over the level of participation required at a settlement conference may actually increase court congestion.[247]

While there can be advantages to settlement conferences in federal court, there are also significant risks to both the parties and the court. As discussed above, the primary concerns are explicit or implicit judicial coercion of parties to settle the case, the loss of confidentiality that occurs when parties litigate over good faith participation at a settlement conference, and satellite litigation over good faith participation that may

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2016); Chen v. Marvel Food Servs., LLC, No. CV 15-6206 (JMA) (AYS), 2016 WL 6872626 (E.D.N.Y. Nov. 21, 2016); Grenion v. Farmers Ins. Exch., No. CV 12-3219(JS)(GRB), 2014 WL 1284635 (E.D.N.Y. Mar. 14, 2014); Day-Lewis v. United States EEOC, No. 12-2638, 2015 WL 221067 (E.D. Pa. Jan. 15, 2015); Perez v. Lantern Light Corp., No. C12-1406RSM, 2014 WL 4409466 (W.D. Wash. Sep. 8, 2014).

241. Lynch, *supra* note 1, at 200.

242. *Id.* at 200 & n.192.

243. Sherman, *supra* note 27, at 2093.

244. *See, e.g.*, 2015 WL 3850103 (W.D. Ky. June 22, 2015) (Magistrate judge denies defendants' motion to seal the settlement conference report and order); *aff'd*, 2015 WL 4776904 (W.D. Ky. Aug. 12, 2015) (affirming the imposition of sanctions on defendants by a district judge); Holly v. UPS Supply Chain Sols., Inc., No. 3:13-cv-980-DJH-CHL, 2015 WL 2446110 (W.D. Ky. May 20, 2015) (denying defendants' motion to stay payment of sanctions while appeal is pending on behalf of a magistrate judge); Koehn v. Tobias, No. 12 C 50321, 2016 WL 4436131 (N.D. Ill. Aug. 23, 2016), *aff'd*, 866 F.3d 750 (7th Cir. 2017); Arneault v. O'Toole, No. 1:11-95, 2014 WL 1117900 (W.D. Pa. Mar. 20, 2014), *aff'd*, 215 Fed. App'x 919 (3d Cir. 2017).

245. Brazil, *Continuing the Conversation*, *supra* note 5, at 33.

246. *Id.*

247. Dickey, *supra* note 42, at 757–58; Lynch, *supra* note 1, at 199; Sherman, *supra* note 27, at 2093.

actually increase court dockets. The settlement conference process must be fair for the parties to perceive that they have received justice.

## V. IMPROVING SETTLEMENT CONFERENCES

The final part of this Article suggests several changes to Rule 16 or to local district court rules to improve settlement conferences in federal court. Part V(A) draws primarily on new understandings of judicial reasoning and decisionmaking to propose that Rule 16 should be amended to provide that the trial judge may not hold settlement conferences in his or her own cases. Part V(B) advocates for the adoption of an objective standard for assessing good faith participation at a settlement conference. Part V(C) addresses the procedural protections necessary to ensure that settlement conferences are held in an appropriate manner.

### *A. The Trial Judge Should Not Conduct the Settlement Conference*

Rule 16 expressly permits judges to preside over settlement conferences.[248] A settlement conference may be held by one of the judges assigned to the case (either the trial judge or the pretrial judge) or by a judge who is not assigned to the case.[249] In addition to concerns about judicial coercion at settlement conferences, recent studies of decisionmaking by judges raise several questions about whether a judge assigned to the case should hold a settlement conference. First, judges may have difficulty disregarding inadmissible information learned during the settlement conference. Second, they may be improperly influenced by their feelings about the litigants based on information learned during the settlement conference. Third, some of the intuitive biases discussed above may impact their decisionmaking after an unsuccessful settlement conference.

#### *1. The Difficulty of Deliberately Disregarding Inadmissible Information*

Psychological studies demonstrate that people have difficulty disregarding information once they have learned it.[250] Several reasons may explain why. First, people may not agree that the information learned

248. FED. R. CIV. P. 16(a)(5), 16(c)(2)(I).

249. *See supra* notes 23–24.

250. Wistrich et al., *Can Judges Ignore*, *supra* note 151, at 1252–59.

should be ignored and may not be motivated to ignore it.[251] "Motivation is critical to ignoring known information. People who do not agree that the relevant information should be ignored are apt to rely on it when making a decision."[252] Second, efforts to ignore thoughts about a subject ("try not to think about a white bear") might produce more thoughts about the subject as people confirm that they are not thinking about it.[253] Third, through a process that psychologists call "mental contamination" or "belief perseverance," the new information changes how people think, creating beliefs that may guide the integration and assessment of subsequent information.[254] Once people incorporate the new information, they have great difficulty disregarding the beliefs that the information inspired.[255] As psychologist Daniel Gilbert explained, once people have an experience they cannot set it aside and see the world as if the experience had not happened.[256] "Our experiences instantly become part of the lens through which we view our entire past, present and future, and like any lens, they shape and distort what we see . . . [o]nce we learn to read, we can never again see letters as mere inky squiggles."[257]

An empirical study by Andrew Wistrich and his co-authors confirms that judges who learn inadmissible information are often unable to disregard that information when making decisions later.[258] The judges in the study had difficulty disregarding information that they received in a variety of contexts in both civil and criminal cases. For example, some judges had trouble disregarding settlement demands made during a settlement conference in a civil case, while other judges were improperly influenced by information that the government had promised not to rely upon at sentencing in a criminal case.[259] This information influenced the judges' decisions even when they had ruled that the information was not admissible.[260] The authors conclude that the mental contamination or belief perseverance that persists after judges learn inadmissible

251. *Id.* at 1260–62.

252. *Id.* at 1260.

253. *Id.* at 1262–64.

254. *Id.* at 1264–70.

255. *Id.*

256. DANIEL GILBERT, STUMBLING ON HAPPINESS 49 (2006).

257. *Id.*

258. Wistrich et al., *Can Judges Ignore*, *supra* note 151, at 1323–24.

259. *Id.* at 1286–312. The study did show that the judges were able to ignore the outcome of a search when determining whether probable cause existed and inadmissible information obtained in violation of a criminal defendant's right to counsel. *Id.* at 1313–23.

260. *Id.* at 1297, 1302–03.

information can operate outside conscious thought, that judges are "unwittingly influenced" by inadmissible information, and that they are unable to ignore it most of the time.[261]

While the Federal Rules of Evidence limit the evidence that a judge or jury will hear at trial, those rules do not apply during a settlement conference. During a settlement conference, a judge will have direct personal contact with the litigants, their lawyers, and insurers. The judge will likely discuss with the parties and counsel their analysis of any pending or anticipated motions. The judge may learn that a defendant in a tort lawsuit has taken subsequent remedial measures, information that would not be admissible under most circumstances unless it meets one of the exceptions set out in Federal Rule of Evidence 407.[262] The judge will learn the policy limits of any applicable insurance, counsel's evaluation of the strength and weaknesses of the case, and counsel's view of its most likely outcome. Because many judges conduct most or all of the conference in separate sessions with each party, neither party knows exactly what the judge discussed with the other party and consequently cannot rebut any selective or one-sided information or argument the other side provided.[263] As the conference progresses and offers are exchanged, the judge will likely develop an impression of each party's cooperation in the process and their strategies and priorities for resolution. The judge may also be privy to the feelings of the parties, their motivations, and any personal reasons that impact resolution of the case.[264] Thus, a judge is likely to be exposed to a great deal of inadmissible information during a settlement conference and may have trouble disregarding it in later rulings if the settlement conference is unsuccessful.

### *2. The Emotional Influence of Settlement Conferences on Judges*

A second danger is that a judge may be influenced by feelings about the parties that are generated during the conference. A judge may be exposed to a broad spectrum of emotions from the parties as the settlement conference progresses. Studies show that an emotional response—like sympathy or disgust toward a person—can occur rapidly and completely determine a person's judgment about an issue, precluding rational

261. *Id.* at 1323.

262. FED. R. EVID. 407.

263. Deason, *supra* note 16, at 125.

264. For example, in one settlement conference that I held, I learned late in the day that plaintiff's daughter, a crucial witness on damages, had joined the military, was being deployed to Japan, and would not be available to testify at trial.

deliberation.[265] Psychologists use the term "affect heuristic" to refer to a person's wholesale reliance on an emotional response to make a judgment.[266] But even when people do not rely completely on an emotional reaction, emotions can guide their judgment.[267] Emotions can affect people's cognitive processing, guiding their perceptions of others, and shaping their attitudes and beliefs about people and issues.[268] Therefore, even deliberative reasoning can be influenced by a person's emotional reactions.[269]

A recent study of how judges reacted to both sympathetic and non-sympathetic parties in hypothetical cases demonstrates that judges' moods, emotions, and reactions to parties can influence their judgment.[270] In one of the studies, the judges were asked to decide whether a debtor would be allowed to discharge credit card debt under Chapter Seven of the Bankruptcy Code.[271] Half of the judges read a version of the case in which the debtor had incurred the debt during a spring break trip to Florida, while the other half were told that the debtor had incurred the debt during a visit to her mother in Florida who had cancer and needed assistance with her medication.[272] While the reason for the debt was not relevant, the judges in the latter group apparently allowed their sympathy for the debtor to influence their decisions: 52% of the judges who reviewed the "sick mother" version discharged the debt, compared to 32% of the judges who reviewed the "spring break" version.[273] In another study, judges were asked to dismiss charges of possession of marijuana because the defendant obtained a medical marijuana registration card from his physician after his arrest.[274] Half of the judges were informed that the defendant was being treated for occasional mild seizures, was nineteen years old, unemployed, on probation for beating an ex-girlfriend, and had a juvenile record for drug possession and drug dealing.[275] The

265. Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 866 (2015) [hereinafter Wistrich et al., *Heart Versus Head*].

266. *Id.*

267. *Id.* at 869; KAHNEMAN, *supra* note 67, at 346–47.

268. KAHNEMAN, *supra* note 67, at 346–47; ROBBENNOLT & STERNLIGHT, *supra* note 54, at 285.

269. Wistrich et al., *Heart Versus Head*, *supra* note 265, at 869.

270. *Id.* at 862, 874–98.

271. *Id.* at 887.

272. *Id.* at 888.

273. *Id.* at 888–89.

274. *Id.* at 880–81.

275. *Id.* at 881.

other half of the judges were told that the defendant was being treated for cancer, was fifty-five years old, married with three children, employed as an accountant, and had no criminal record.[276] As in the credit card debt scenario, the judges were more lenient with the more sympathetic defendant: 84% of the judges dismissed the charges against the fifty-five-year-old defendant, while only 54% of the judges dismissed the charges against the nineteen-year-old defendant.[277]

After reviewing all the studies, the authors found that they demonstrated "clear evidence that emotions influence judges."[278] The results showed that the judges consistently favored the litigant who generated the more sympathetic response.[279] And the judges' favoritism extended beyond simply finding the facts of the case: the study demonstrates that emotion influences how judges interpret and apply the law "even in the relatively emotionally arid (compared to trial) setting of pretrial motions."[280] The authors conclude that judges react in much the same way that other people do and that motivated cognition explains how, without consciously being aware of it, judges covertly lean toward the more likable or sympathetic party, resulting in that party prevailing more often than the less sympathetic party on seemingly objective and legitimate grounds.[281]

### *3. The Impact of Intuitive Biases Formed at Settlement Conference*

Finally, some of the intuitive biases previously discussed may unconsciously impact a judge's rulings after the settlement conference. Anchoring can exert a powerful effect on judgment and may influence judges' civil damage awards.[282] Even if the judge does not suggest that the parties settle for a certain amount or on particular terms, the judge will likely form an initial opinion of the case based on the evidence presented at the settlement conference.[283] This could trigger confirmation bias, where the judge might unconsciously seek additional information that confirms the judge's initial opinion, and biased assimilation, where the

276. *Id.*

277. *Id.* at 882.

278. *Id.* at 898.

279. *Id.* at 898–99.

280. *Id.* at 899.

281. *Id.* Psychologists use the term "motivated cognition" to explain the tendency for people to seek consistency between their deliberative judgment and their emotional reaction to a person or issue. *Id.* at 869.

282. *See supra* Part II(B).

283. Brazil, *Hosting Mediations*, *supra* note 40, at 262.

judge may assess evidence by the extent to which it is consistent with that initial opinion.[284] Judges are also subject to the hindsight bias, which generally benefits tort plaintiffs because the bias makes it seem as if the defendant had a greater ability to predict what occurred than was actually true.[285] Judges often tend to undervalue statistical information when assessing liability (the representativeness bias).[286] Further, exposure to the parties and the issues at a settlement conference could affect judges' demeanor during trial, reflecting their opinion about the proper trial outcome, thereby influencing the jurors.[287]

Given all of these issues that arise when a judge conducts a settlement conference, Rule 16 should be amended to prohibit trial judges from holding settlement conferences in their cases, and pretrial judges should not rule on dispositive motions after an unsuccessful settlement conference.[288] While it may be possible in larger judicial districts with many judges to have a judge not assigned to the case hold the settlement conference, that might not be feasible in smaller judicial districts.[289] In most instances there is less danger when the pretrial judge conducts the settlement conference. The pretrial judge generally does not rule upon dispositive motions but instead addresses scheduling deadlines, discovery motions, and other preliminary matters.[290] In some cases the settlement conference is held after discovery has been completed and pretrial motions are resolved. In other cases, counsel are professional and cooperative during discovery, and there are no significant motions for the pretrial judge to address. In yet other cases, both sides bargain

284. Deason, *supra* note 16, at 113, 124–25.

285. Guthrie et al., *Inside*, *supra* note 77, at 828.

286. Guthrie et al., *Blinking*, *supra* note 69, at 22–24.

287. Deason, *supra* note 16, at 142; Killefer, *supra* note 50, at 17; Wissler, *supra* note 31, at 312.

288. Some commentators have argued that neither the trial judge nor the pretrial judge should conduct settlement conferences, while others have concluded that only the trial judge should be precluded from doing so. *Compare* Deason, *supra* note 16, at 139–40, *and* Wissler, *supra* note 31, at 302–14, *with* Wistrich et al., *Can Judges Ignore*, *supra* note 151, at 1325–26, Killefer, *supra* note 50, at 21–22, *and* Cratsley, *supra* note 34, at 571.

289. For example, the District of North Dakota has two magistrate judges located in Bismarck and one located in Fargo, while the District of South Dakota has magistrate judges located in Sioux Falls, Rapid City, Pierre and Aberdeen. *See, e.g.*, *Magistrate Judge Clare R. Hochhalter*, U.S. DISTRICT COURT OF N.D., http://www.ndd.uscourts.gov/Judge/JHochhalter [https://perma.cc/G9F5-7YER]; *Magistrate Judge Charles S. Miller, Jr.*, U.S. DISTRICT COURT OF N.D., www.ndd.uscourts.gov/Judge/JMiller [https://perma.cc/HQL2-3NU6]; *Magistrate Judge Alice R. Senechal*, U.S. DISTRICT COURT N.D., www.ndd.uscourts.gov/Judge/JSenechal [https://perma.cc/KV8X-43DN]; *District of South Dakota Court Info*, U.S. DISTRICT COURT OF S.D., www.sdd.uscourts.gov/court-info [https://perma.cc/9A9E-FVDJ].

290. FED. R. CIV. P. 72(a); Deason, *supra* note 16, at 111.

cooperatively during the settlement conference but are unable to reach an agreement because of a good faith dispute about the law or how the jury will view the facts of the case. If a pretrial judge believes that he or she has learned information during the settlement conference that may compromise the judge's ability to rule on pretrial motions, the judge can recuse from the case. Given the studies of judicial reasoning and decisionmaking, I agree that the pretrial judge should not rule on dispositive motions after holding an unsuccessful settlement conference.[291]

### *B. Good Faith Participation: An Objective Standard*

To ensure that parties do not feel coerced into settling their case and to reduce the likelihood of satellite litigation, courts should adopt an objective standard for assessing whether a party participated in good faith at a settlement conference.[292] Sanctions are appropriate if a party violates a rule or order specifying objectively determinable conduct.[293] For example, in the District of Hawaii, sanctions may be imposed if a party, lawyer, or authorized representative fails to attend the settlement conference or fails to submit a position paper prior to the settlement conference.[294] Sanctions may also be imposed if a party violates an order that directs the parties to notify the court before the settlement conference if the party is not prepared to negotiate at the settlement conference.[295]

Courts must resist the temptation to award sanctions based on a subjective evaluation of good faith participation. Subjective behaviors include failing to bargain sufficiently, failing to make a reasonable offer, and failing to have a representative present at the settlement conference with "sufficient settlement authority."[296] Even the proponents of a "good faith participation" standard admit the phrase is ambiguous, and ambiguity about the level of participation required at the conference does

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291. *See, e.g.*, Blackmon v. Eaton Corp., 587 Fed. App'x 925, 933–34 (6th Cir. 2014) (concluding that a magistrate judge who conducted an unsuccessful settlement conference was not disqualified from issuing a report and recommendation on a motion for summary judgment without addressing any recent studies on judicial decisionmaking).

292. ABA, GOOD FAITH REQUIREMENTS, *supra* note 41, at 2; Thompson, *supra* note 38, at 377; Dickey, *supra* note 42, at 767.

293. ABA, GOOD FAITH REQUIREMENTS, *supra* note 41, at 2; Thompson, *supra* note 38, at 377; Dickey, *supra* note 42, at 767.

294. D. HAW. L.R. 16.5(b)(3); *see also* Alvarez v. GEICO Ins. Agency, No. 15-cv-0198 MV/SCY, 2016 WL 7173811, at *2–3 (D.N.M. Feb. 29, 2016) (imposing sanctions for failing to timely submit a position paper).

295. *See infra* Part V.C.

296. ABA, GOOD FAITH REQUIREMENTS, *supra* note 41, at 2.

not provide the parties with a clear understanding of what they must do to comply.[297] Assessing sanctions for bad faith participation will also require the court to make complex evaluations of the parties' substantive bargaining positions at the settlement conference, including examining their motives.[298]

Kimberlee Kovach believes that good faith relates to the manner of participation at the conference, and that the substance of the negotiations (the specific offers and counteroffers) should not be admissible in proceedings for sanctions: the "economic aspects of the negotiations—the offers and responses, in and of themselves—may not create a bad faith claim."[299] The Western District of Pennsylvania's ADR rules state that "[i]n good faith negotiations, neither party is required to make a concession or agree to any proposal, nor are they precluded from seeking the best possible resolution for their own interests."[300] Similarly, the Committee Notes to section 4.3.1 of the Ethical Guidelines for Settlement Negotiations promulgated by the ABA Section of Litigation state: "[i]t is not bad faith for a party to refuse to engage in settlement discussions or to refuse to settle. Settlement is not an obligation, but an alternative to litigation."[301]

The participants at a settlement conference may have different interests and perspectives about settlement. And, as discussed above, they are all subject to intuitive biases that may produce errors when attempting to resolve a case at a settlement conference.[302] It can be "extremely difficult" to evaluate subjective claims of bad faith and distinguish good faith from bad faith participation at a settlement conference.[303] A party should not have to surrender its honest evaluation of the case to avoid the imposition of sanctions based on a court's subjective evaluation of whether the party participated in good faith at the settlement conference.

Courts should also refrain from requiring parties to attend a settlement conference with "sufficient settlement authority." While some courts fail to define this term, others define it to mean that the party must have

297. Thompson, *supra* note 38, at 374; Brazil, *Continuing the Conversation*, *supra* note 5, at 31–32; Kovach, *Good Faith*, *supra* note 43, at 600.

298. Thompson, *supra* note 38, at 375; Sherman, *supra* note 27, at 2093.

299. Kovach, *Good Faith*, *supra* note 43, at 603.

300. W.D. PA. ALT. DISPUTE RESOLUTION POLICIES AND PROCEDURES § 2.8 (2018).

301. ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS, ABA SECTION OF LITIG. § 4.3.1 committee note to 2002 amendment (Aug. 2002).

302. *See supra* Part II(B).

303. Tuscola Wind III, LLC v. Almer Charter Twp., No. 17-cv-10497, 2018 WL 1250476, at *10 (E.D. Mich. Mar. 12, 2018); *see also* Exec. Wings, Inc. v. Dolby, 131 F. Supp. 3d 404, 421 n.24 (W.D. Pa. 2015).

complete and unfettered authority to meet or pay the opposing party's last demand without consulting with anyone else.[304] Requiring a party (usually a defendant) to appear with "full settlement authority" ignores the reality of pretrial bargaining. Settlement conferences are not held in a vacuum; they are part of a larger negotiation process by which the parties try to resolve the case.[305] The process generally includes informal discussions between counsel involving initial offers and counteroffers that are often extreme.[306] As Richard Birke and Craig Fox stated, "[w]e consider it unfortunate that 'starting reasonably' appears to be an ineffective negotiation strategy."[307] Negotiators may make "take it or leave it" offers, offer proposals that are extreme and predictably unacceptable, or fail to respond meaningfully to the offers of the other side.[308] Parties often bargain strategically, disguising their true intentions, desires, or chances of winning in order to obtain an advantage in settlement negotiations.[309] Traditional litigation behaviors include pressing arguments known to be specious, concealing significant information, obscuring weaknesses, attempting to divert attention away from the main analytical or evidentiary matter, misleading others, and remaining rigidly attached to positions not sincerely held.[310] Parties may begin bargaining at a conference using an adversarial/competitive approach and may posture and make few concessions until the settlement conference is almost over.[311] At that point, they may switch to a more cooperative/accommodating approach

304. *See, e.g.*, MD. LOCAL R. 607(3) (demonstrating an example where a court provided no definition); Bakken Waste, LLC v. Great Am. Ins. Co. of New York, No. 15-cv-00303-CMA-MEH, 2015 WL 4036191, at *1 (D. Colo. June 30, 2015) (holding that "full authority" means the representative possesses the complete and unfettered capacity to settle the case). Courts that do not define the term create additional uncertainty for the parties, because a party who believes that the other party's claim is totally without merit may view "full settlement authority" quite differently than the other party.

305. Sherman, *supra* note 27, at 2083 ("ADR . . . is 'fundamentally a process of assisted negotiation.' The extensive literature on negotiation theory and strategy is central to ADR practice, reflecting the degree to which negotiation underlies ADR." (citation omitted)).

306. Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985); ROBBENNOLT & STERNLIGHT, *supra* note 54, at 265–66 ("[E]xtreme demands and offers are just starting points in most negotiations."); Galanter & Cahill, *supra* note 6, at 1371.

307. Birke & Fox, *supra* note 52, at 41 n.170.

308. Birke & Fox, *supra* note 52, at 40; Schneider, *supra* note 83, at 165; Sherman, *supra* note 27, at 2092–93.

309. Brazil, *Continuing the Conversation*, *supra* note 5, at 29; Gross & Syverud, *Don't Try*, *supra* note 7, at 52; Gross & Syverud, *Getting to No*, *supra* note 10, at 328; Sherman, *supra* note 27, at 2097 n.81.

310. Brazil, *Hosting Mediations*, *supra* note 40, at 239–40; Brazil, *Mediator as Medium*, *supra* note 167, at 23 (discussing how gaming the mediator "can include actively misleading the mediator (by lying or otherwise) about anything that might be a factor in the negotiation dynamics").

311. Baumeister et al., *supra* note 88, at 399–400; Dickey, *supra* note 42, at 767.

and make concessions to attempt to reach a deal just before the settlement conference concludes.[312]

Courts have overlooked these basic principles of negotiation theory and practice when they sanction a party for failing to appear with "full settlement authority" at a settlement conference. One example should suffice. In a civil rights case involving claims for excessive force and failure to intervene against several police officers, the defendants initially offered $47,500 in settlement and later increased the offer to $200,000.[313] In response, the plaintiff demanded $3.6 million and an admission of liability.[314] Had the defendants been ordered to appear at a settlement conference with "full settlement authority" before trial, they would have had to obtain authority of $3.6 million to comply with the order. A jury subsequently awarded the plaintiff $32,092 in damages.[315] When evaluating plaintiff's post-trial motion for attorney's fees, the court stated that the case was a "textbook example" of a plaintiff aiming unreasonably high, that the defendants more realistically evaluated the case, and that the case "never was more than a low end five-figure case and never merited a seven-figure settlement demand."[316] Rather than requiring a party to appear with "full settlement authority," the court should require that a party or party's representative hold a position with the party or insurer that allows him or her to speak definitively and commit the party to a particular position in the litigation.[317] As the Seventh Circuit recognized, a party's representative need not "come to court willing to settle on someone else's terms," but need only "come to court in order to consider the possibility of settlement."[318] Adopting an objective standard for assessing good faith participation will help ensure that the parties receive procedural justice, do not feel coerced into settling at the settlement conference, and reduce the likelihood of time-consuming litigation over this issue.

### *C. Procedural Safeguards*

Each judicial district's local ADR rules should contain substantive and procedural safeguards to ensure that a settlement conference is not used

312. Baumeister et al., *supra* note 88, at 401, 404; Dickey, *supra* note 42, at 767.

313. Capps v. Drake, No. 3:14-cv-441-NJR-DGW, 2017 WL 1178263, at *5 (S.D. Ill. Mar. 30, 2017). The trial court denied the plaintiff's request for attorney's fees for a variety of reasons. *Id.* at *2. The Seventh Circuit reversed the denial of attorney's fees because plaintiff's recovery was more than "de minimis." Capps v. Drake, 894 F.3d 802, 804–06 (7th Cir. 2018) (italics omitted).

314. Capps v. Drake, 2017 WL 1178263, at *5.

315. *Id.*

316. *Id.* at *6.

317. G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 653 (7th Cir. 1989).

318. *Id.*

improperly and that the parties understand clearly what they must do to comply with the court's expectations at the conference. They must also protect the confidentiality of the process.

First, the rules should inform the parties that they must notify the court if the party is not prepared to or does not intend to negotiate at the settlement conference. Courts should recognize that there are many reasons why a party might not be interested in negotiating at a settlement conference. Plaintiffs may refuse to accept less than the defendant's insurance policy limits in a case involving wrongful death or serious personal injury because of the extent of the damages or because of a potential bad faith claim, while defendants may refuse to make an offer if they believe they are not liable.[319] In addition, both sides may wish "to establish favorable legal precedent, send signals of resolve to other potential adversaries, [or] secure the procedural protections and public visibility that trials afford."[320] If the parties do not wish to discuss settlement, they should be allowed to request to be excluded or to opt-out of participation in the settlement conference.[321]

Federal courts have heavy caseloads, and judges and other parties do not want to waste time if a party is not interested in discussing settlement.[322] Courts may wish to consider adopting a rule similar to one found in the Western District of Pennsylvania's ADR rules, which requires a party to explicitly inform the neutral and the other parties no later than ten calendar days prior to the mediation session if (1) the party does not intend to make a demand or settlement offer, or (2) the party intends to wait until the disposition of certain motions to engage in settlement discussions.[323]

Second, the parties or their representatives and their attorneys should be required to attend the settlement conference and be prepared to state their positions on the issues presented in the case.[324] When a party is fully

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319. *See, e.g.*, Griego v. Douglas, 264 F. Supp. 3d 1109, 1110–11 (D.N.M. 2017).

320. Don Peters, *Just Say No: Minimizing Limited Authority Negotiating in Court-Mandated Mediation*, 8 PEPP. DISP. RESOL. L.J. 273, 276 (2008); Rachlinski, *supra* note 5655, at 122; Gross & Syverud, *Don't Try*, *supra* note 7, at 52–57.

321. Thompson, *supra* note 38, at 424. If the court orders the parties to attend a settlement conference when they have stated that they do not wish to attend, the court should not find bad faith participation if the parties fail to bargain at the conference.

322. *Id.* at 417.

323. W.D. PA. ALT. DISPUTE RESOLUTION POLICIES AND PROCEDURES § 2.8 (2018).

324. Lynch, *supra* note 1, at 202–03; Sherman, *supra* note 27, at 2094–96. Given advances in technology, courts may consider allowing parties or insurance company representatives to participate by telephone or video conference. The District of Hawaii allows parties to be present in person or by telephone at a settlement conference. D. HAW. L.R. 16.5(b)(2). *See also* Thomas J. Stipanowich, *Living the Dream of ADR: Reflections on Four Decades of the Quiet Revolution in Dispute*

insured and the insurer has assumed that party's defense, there may be little reason to have the party present because the insurer will usually have sole authority over defense of the claim, including whether to settle the claim or go to trial.[325] Therefore, an adjuster or other representative may be the appropriate party to attend the hearing.[326] In some cases it is not necessary or even helpful to have certain defendants present. For example, in civil rights cases involving claims for excessive force or sexual discrimination, it can be detrimental to the process if the individual defendant is present, and the parties often agree that another defense representative and an individual with settlement authority should attend.[327] But if a party and the party's insurer have differing opinions about the case, or a party has a reasonable exposure to a recovery above his or her insurance policy limits, the party should be required to attend the settlement conference.[328]

Third, courts should provide for confidentiality of the information discussed at the settlement conference. This will allow parties to raise sensitive issues with the judge, contribute to the free flow of information between the parties that makes a settlement conference more likely to be productive, protect the neutrality of the settlement conference judge, and help ensure that the parties perceive that the settlement conference process is procedurally fair.[329] Because the federal district courts have a wide variety of inconsistent rules on confidentiality, Rule 16 should be amended to provide that communications during a settlement conference shall not be disclosed in a motion seeking sanctions under Rule 16.[330] Because it is a lengthy process to amend the Federal Rules of Civil Procedure, in the interim courts should amend their local rules to provide such confidentiality.

Fourth, to ensure that an economically more powerful party does not use a settlement conference to gain leverage over another party, the court should set reasonable limits on the length of the settlement conference and the number of sessions mandated.[331] Similarly, the court should not order

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*Resolution*, 18 CARDOZO J. CONFLICT RESOL. 513, 543–44 (2017); Rack, *supra* note 95, at 442–43.

325. Lynch, *supra* note 1, at 203.

326. *Id.*

327. Griego v. Douglas, 264 F. Supp. 3d 1109, 1113 (D.N.M. 2017).

328. *Id.*; Gross & Syverud, *Don't Try*, *supra* note 7, at 53–54; Sherman, *supra* note 27, at 2105; Email from Beth German to William Lynch (Oct. 31, 2018, 03:03 PM) (on file with author).

329. *See supra* Part IV(B).

330. Deason, *supra* note 16, at 141; Dickey, *supra* note 42, at 765.

331. *In re* Atl. Pipe, 304 F.3d 135, 146–47 (1st Cir. 2002); Brazil, *Continuing the Conversation*, *supra* note 5, at 16, 31–32.

the parties into multiple settlement conferences to attempt to force a settlement.[332]

A final procedural issue concerns the timing of the settlement conference.[333] The parties usually need time to conduct some initial discovery and perhaps file any critical motions before they are ready to consider settlement of the case.[334] Cases that settle before the litigants have adequate information about the case might "send inaccurate signals to the parties and to society about what conduct is permitted and what the consequences of impermissible conduct will be."[335] On the other hand, settling too late increases the costs for the parties and the court system, may provide a strategic advantage to a wealthy defendant, delays compensating victims, and potentially diminishes the deterrence of wrongdoers.[336] The judge should broach the idea of settlement early in the case to try to select the appropriate time for the settlement conference.

The adoption of these procedural safeguards will help ensure that the parties believe that the settlement conference process is a fair procedure in which they freely and fully express their positions, discuss the issues with a neutral decisionmaker, and consider resolution of the case without being pressured to do so.

## CONCLUSION

Settlement conferences are an important part of the ADR processes offered in federal court. A settlement conference conducted by a judge can have numerous advantages. But judges who conduct settlement conferences should be aware of recent studies of decisionmaking and negotiation that explain how each participant at a settlement conference will bring a different perspective and outlook to the conference and how each is subject to factors such as intuitive biases that could interfere with settlement of the case.

Judges can get caught up in "their zeal to settle cases."[337] Because a

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332. *See, e.g.*, HTK Hawaii, Inc. v. Sun, No. 15-00114 JMS-RLP, 2016 WL 6917284, at *1 (D. Haw. May 12, 2016) (denying motion for sanctions when trial court ordered two settlement conferences and then a mandatory mediation in what it admitted was not "a big case.").

333. Miller, *supra* note 50, at 32 ("We have to be sensitive to the different dynamics of each case and that each case has its own optimal time for settlement . . . [s]o if we push too hard at the wrong time, it's simply not going to work . . . .").

334. Galanter & Cahill, *supra* note 6, at 1369–70; Killefer, *supra* note 50, at 21; Miller, *supra* note 50, at 31.

335. Wistrich & Rachlinski, *Lawyers' Intuitions*, *supra* note 102, at 573–74.

336. *Id.* at 574–75.

337. G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 657 (7th Cir. 1989) (Posner, J., dissenting).

settlement conference is conducted by a judge, there is the potential that a party will feel coerced, either explicitly or implicitly, to settle the case at the conference to avoid unfavorable rulings as a punishment for failing to settle. This potential is exacerbated by Rule 16's ambiguous good faith participation requirement. Another danger is that confidentiality, which is considered essential to the integrity of a settlement conference, will be compromised when a party raises claims of bad faith participation at the conference. And satellite litigation over whether a party participated in good faith has increased significantly and undercuts the premise that settlement conferences help reduce court dockets.

As reported in 1994, the vast majority of cases settle before trial.[338] Perhaps because of the federal court's incorporation of ADR into the court system, even fewer cases reach trial now. Because a settlement conference may substitute for a party's "day in court," settlement conferences should be of high quality, providing parties with procedural fairness so that they perceive that the settlement conference process is fair and that they were not coerced into settling their case. To ensure that the parties receive both procedural and substantive justice in attempting to resolve their cases, this Article suggests several improvements to the current settlement conference process. First, Rule 16 should be amended to provide that the trial judge may not hold a settlement conference, and the pretrial judge should not rule on dispositive motions after holding an unsuccessful settlement conference. Second, courts should adopt an objective standard for assessing good faith participation and should not award sanctions for failing to bargain sufficiently at a settlement conference or failing to have a representative present with full settlement authority. These changes would reduce satellite litigation over the parameters of good faith participation and appropriate sanctions. Third, other procedural safeguards, including those allowing parties to opt-out of a settlement conference and protecting the confidentiality of settlement conference communications, should be adopted to ensure that the parties feel they have been treated fairly when attempting to resolve their case at a settlement conference.

338. Galanter & Cahill, *supra* note 6, at 1342.