

1-1-2006

Improving Judicial Settlement Conferences

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Original Citation

Jeffrey A. Parness, Improving Judicial Settlement Conferences, 39 U.C. Davis L. Rev. 1891 (2006).

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Improving Judicial Settlement Conferences

Jeffrey A. Parness*

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INTRODUCTION

Legal academics have long asked how judicial civil case settlement conferences “can be conducted to maximize their usefulness without seriously threatening the appropriate role of judges in formal adjudication.”¹ Some have found the threats so significant and the benefits so speculative that they conclude there should be very few, if any, judicial settlement conferences.² Though the numbers of such conferences likely will, and should, continue to grow, certain warnings by the critics must be heeded. Even the most ardent supporters of increased managerial judging have expressed concerns about the absence of written guidelines to govern judicial settlement conferences.³

While judicial settlement conferencing is here to stay, far too often it is undertaken with unbounded, unbridled, and virtually unfettered trial

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¹ Carrie Menkel-Meadow, Essay, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 486 (1985).

² See, e.g., Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (characterizing settlement as “a highly problematic technique for streamlining dockets”); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 90 (2003) (“[W]e should abolish, or at least substantially revise, . . . the judicially imposed settlement conference.”).

³ See, e.g., Jeffrey A. Parness & Matthew R. Walker, *Enforcing Settlements in Federal Civil Actions*, 36 IND. L. REV. 33, 54-56 (2003) (calling for new written federal laws on ancillary settlement enforcement jurisdiction).

court discretion. New written guidelines are needed. Unfortunately, federal judicial rulemakers, who have prompted most of the significant civil procedure reforms within American trial courts, beginning with their promulgation of the *Federal Rules of Civil Procedure* in 1938,⁴ have shown little leadership in the area of judicial settlement conferences. Further, notwithstanding the Federal Arbitration Act (and its broad use of Commerce Clause powers),⁵ Congress is likely to provide little or no leadership. Fortunately, however, federal and state civil procedure lawmakers interested in new written settlement conference guidelines can look to some local federal district rules, as well as to a smattering of state statutes and court rules, for assistance. In doing so, they should heed critics who warn about the threats judicial settlement conferences pose to the traditional judicial role as well as about the need for participant control and written standards.

I. CRITIQUES OF JUDICIAL SETTLEMENT CONFERENCES

Professor Jonathan T. Molot recently observed that civil litigation in American trial courts “is changing so rapidly that even new models of judging designed to update traditional ones have quickly become outdated.”⁶ Even newer models are necessary today, he says, due to “overcrowded dockets” that prompt trial judges to stray from passivity and take “an active, largely discretionary approach to pretrial case management.”⁷ Professor Molot joins other distinguished academics who have bemoaned the increasing responsibilities of American trial court judges in facilitating civil case settlements.⁸ In contemplating even

⁴ FED. R. CIV. P. 86 (prescribing effective date of rules).

⁵ The Federal Arbitration Act, 9 U.S.C. §§ 1-14 (2005), has been read to allow Congress to impose pro-arbitration policies on the state courts, requiring compulsory and binding arbitration agreements, even when state laws frown on arbitrations. *See, e.g., Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995). In reaffirming the Act’s applicability to state court proceedings, the *Allied-Bruce Terminix* Court validates the use of Commerce Clause power by Congress where contracts in fact involve interstate commerce, even though the contracting parties did not contemplate interstate activity. *Id.* at 281.

⁶ Molot, *supra* note 2, at 29.

⁷ *Id.*

⁸ *See, e.g., Fiss, supra* note 2, *passim*. Professor Judith Resnik, in tribute to Professor Fiss, described the landscape:

A conflict has emerged between judging as we understand it and systems of dispute resolution that lack most of adjudication’s values and attributes. As Owen Fiss has many times insisted, adjudication is predicated on public and disciplined fact-finding, licensing judges to impose regulatory obligations. The focus on the individual judge and the belief in adjudication embraces the state as a central regulator of conduct. The presumption is that transparent decision-

newer models, however, he urges that we reexamine the old, since the differing litigation landscapes of today and tomorrow do not render the “traditional” model of yesterday irrelevant.⁹

Professor Molot’s old model of choice is Professor Lon Fuller’s “traditional judicial role.”¹⁰ This model has “two guiding principles: Judges rel[y] on parties to frame issues and on legal standards to help resolve them.”¹¹ Molot finds that this model reflects the “judiciary’s . . . core institutional competence, its role in the constitutional structure, and the considered judgment of two centuries of judges.”¹² Using Fuller’s

making by state-empowered judges can be controlled through judges obliged to invoke facts adduced through a record, to give explanations, and to make available appellate review.

But that view now has a serious competitor, committed to the utility of contract and looking to the participants to validate outcomes through consensual agreements produced through processes sometimes styled “alternative dispute resolution” (ADR) and sometimes “dispute resolution” (DR). Civil processes are one site of the struggle between public and private governance and between state-based redistribution efforts and market-focused mechanisms — between constitutionalism on the hand [sic], working through a regulatory state that relies in part on adjudication, and contract on the other, aimed at maximizing utility by reflecting preferences and tastes.

Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 173, 175-76 (2003); cf. Judge Harold Baer, Jr., *History, Process and a Role for Judges in Mediating Their Own Cases*, 58 N.Y.U. ANN. SURV. AM. L. 131, 151 (2001) (stating that well-trained trial judges “should be commended for conducting mediations”). A more recent work by Resnik is Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005) [hereinafter Resnik, *Procedure as Contract*] (offering guidelines for judicially managed settlement conferences). An excellent review of the varying views on the effects of the emerging (alternative) dispute resolution mechanisms on the traditional formal adjudicatory systems and their trial judges appears in Menkel-Meadow, *supra* note 1, at 486-90.

⁹ Molot, *supra* note 2, at 30.

¹⁰ *Id.* at 29 (citing Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 363-87 (1978)). Professor Resnik nicely described the “traditional” role when she said:

The old judiciary was doing something different from the modern managerial ideal, something quite out of step with the world of time and motion studies. Among all of our official decisionmakers, judges — and judges alone — are required to provide reasoned explanations for their decisions. Judges alone are supposed to rule without concern for the interests of particular constituencies. Judges alone are required to act with deliberation — a steady, slow, unhurried task.

Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 445 (1982).

¹¹ Molot, *supra* note 2, at 29.

¹² *Id.* at 118. Resnik has noted that:

[Fuller’s analysis] rests on a series of normative and political judgments: that the

principles to assess current practices, Molot laments that with the “informal” case management tool of the settlement conference,¹³ a trial judge today usually has “a level of control and a degree of discretion that strain the boundaries” of the traditional role,¹⁴ since the customary “litigant input or legal criteria” are lacking.¹⁵ For Molot, the old model suggests that “we should abolish, or at least substantially revise the worst offender in the arsenal of judicial management tools — the judicially imposed settlement conference.”¹⁶ According to Molot, conferences that judges order and direct, at times without consent,¹⁷ are subject to “virtually unfettered discretion”¹⁸ that invites “judicial overreaching.”¹⁹ Such conferencing may also be unnecessary, in his

state is the appropriate central regulator of conduct, that norm enforcement through transparent decisionmaking by state-empowered judges is desirable, that public resources ought to be spent upon individual complaints of alleged failures to comply with legal obligations, that litigants ought to be provided with opportunities to present proofs and reasoned arguments, that the power of adjudicators can be controlled by obliging them to rely on facts adduced on the record and to perform some of their duties in public, and that legitimate judgments thus result.

Resnik, *Procedure as Contract*, *supra* note 8, at 624.

¹³ Molot, *supra* note 2, at 30.

¹⁴ *Id.*

¹⁵ *Id.* at 31.

¹⁶ *Id.* at 90. Molot seems to be addressing settlement conferences ordered and directed by individual trial judges in the absence of litigant consent (as contrasted, for example, with court-mandated mediation or nonbinding arbitration before lawyers as mediators or arbitrators).

¹⁷ In the absence of consent, a trial court’s power to compel the attendance of parties or nonparties (such as lienholders) at settlement conferences may be lacking where there is no explicit rule or statutory authorization, such that the court must rely on its inherent judicial authority. For differing views on such power, see the majority and dissenting opinions in *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 *passim* (7th Cir. 1989) (en banc) (reviewing earlier version of Federal Rule of Civil Procedure 16 which did not recognize compelling attendance of represented parties). Compare *In re Atl. Pipe Corp.*, 304 F.3d 135, 145-47 (1st Cir. 2002) (recognizing inherent power to compel nonbinding nonconsensual mediation before private mediator, with costs and expenses to be shared), with *In re NLO, Inc.*, 5 F.3d 154, 157-58 (6th Cir. 1993) (“Requiring participation in a summary jury trial, where such compulsion is not permitted by the Federal Rules, is an unwarranted extension of the judicial power. Reliance on the pure inherent authority of the court is equally misplaced.”).

¹⁸ Molot, *supra* note 2, at 92.

¹⁹ *Id.* at 87 (noting fewer risks of judicial overreaching when judicial intervention “is party-initiated and governed by established legal standards” than when there is “ad hoc intervention left to each individual judge’s discretion”). Molot notes that while litigants can always refuse to settle and demand a trial, their settlement conference actions can frustrate judges who may then become “hostile.” *Id.* at 93. In addition, settlement talks preceded by little or no litigant input are more likely to be driven by “erroneous” judicial views prompted by “personal whim.” *Id.* at 93 & n.292.

view, since most civil cases may settle anyway²⁰ and since there is no evidence that wholly private settlement talks result in inequitable settlements due to “bargaining imbalances . . . of a kind that judges are institutionally equipped to offset.”²¹

On the increasing responsibilities of American trial judges in facilitating civil case settlements, Professor Owen M. Fiss had earlier opined:

I do not believe that settlement as a generic practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis. It should be treated instead as a highly problematic technique for streamlining dockets. Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.²²

Professor Fiss was particularly troubled by the increasing use of judicial settlement conferences as a means of dispute resolution.²³ In settlement conferences, he noted, trial judges cannot “lessen the impact of distributional inequalities” between the parties (involving information access, financial pressures to obtain settlement funds earlier, and “resources to finance the litigation”) as they can, at least to some degree, in trials.²⁴ Settlements, he said, also often leave “justice undone” — in school desegregation cases, for example, they might secure “peace, but not racial equality” — and they do not yield any authoritative interpretation of law.²⁵ Fiss further noted that settlements prompt compelling questions about “authoritative consent.”²⁶ Finally, Fiss found that new settlement conference guidelines could not effectively address the differences in what might be appropriate for amicably resolving

²⁰ *Id.* at 92.

²¹ *Id.*

²² Fiss, *supra* note 2, at 1075.

²³ *Id.* at 1073-75.

²⁴ *Id.* at 1076-77.

²⁵ *Id.* at 1085.

²⁶ *Id.* at 1078-82. Such questions arise where parties “are not individuals but rather organizations or groups” whose voices regarding consent are unknown. *Id.* at 1078.

“significant” cases²⁷ as compared to more routine cases, such as “boundary quarrels.”²⁸

In an early work, Professor Judith Resnik also spoke warily of the new initiatives promoting increased judicial settlement conferencing in the federal district courts.²⁹ Generally, she was less concerned with congressional changes to the role of judges involving “procedural innovations and the articulation of new rights and remedies”³⁰ where judicial discretion often is controlled.³¹ Rather, she was especially uneasy with “the growth of managerial judging” which had been prompted by “changes initiated by judges themselves in response to work load pressures.”³² In particular, Professor Resnik was distressed with judges making such changes ad hoc and not by rule, standing order, or any other written guideline.³³ She lamented that judge-initiated changes are made “privately, informally, off the record, and beyond the reach of appellate review.”³⁴ She further reflected that federal judicial rulemakers actually encouraged settlement initiatives³⁵ but then “failed to articulate the rules by which judicial management should work.”³⁶

The scheduling, and even mandating, of judicial settlement conferences should be more significantly regulated, not eliminated or dramatically reduced. Abolition or retrenchment seems unlikely, at least in the short term. Professor Resnik has chronicled that many federal courts have only begun to encourage settlement conferencing more strongly.³⁷ More importantly, elimination or reduction of settlement

²⁷ *Id.* at 1087.

²⁸ *Id.* at 1089 (employing phrase used by Derek Bok in report to Harvard Overseers to illustrate “essentially private” disputes).

²⁹ Resnik, *supra* note 10, at 417 (“No one can oppose efforts to curtail exploitation of the judicial system, to make dispute resolution quick and inexpensive, or to increase the accountability of judges and attorneys. I do, however, question the extent to which managerial judging contributes to these worthy aims and whether it is wise to rely on judges to achieve these goals.”).

³⁰ *Id.* at 391.

³¹ *Id.* at 439 (“Congress is better equipped than the judiciary . . . to investigate and refashion systematically the dispute resolution process”); *see also id.* at 444-45 (arguing that Congress, and thus not “judges alone,” should be involved in addressing “problems raised by managerial judging”).

³² *Id.* at 391.

³³ *Id.* at 426.

³⁴ *Id.*

³⁵ *See id.* at 378-79; *see also id.* at 399-400 (referencing proposed amendments to federal civil procedure rule on pretrial conferences).

³⁶ *Id.* at 439.

³⁷ *See, e.g.,* Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 937 (2000). Resnik herself has recently suggested

conferencing is unwarranted, as the judicially imposed settlement conference is crucial, in Professor Molot's words, "in the arsenal of judicial management tools."³⁸ Wholly private settlement talks are no substitute.³⁹ Such private settlement talks can be hindered by "bargaining imbalances"⁴⁰ that trial judges would otherwise be able to offset.⁴¹ The presence of unwilling but important participants cannot be coerced privately. Privately arranged settlement pacts also fail to assure summary judicial enforcement for later breaches, which is often an important factor in civil case agreements. Assessments and suggestions made during settlement talks by impartial, informed, and experienced judges can often move even recalcitrant adversaries to compromise, especially when the parties responsibly estimate the true costs of adjudication. Participants in judicial settlement conferences are also likely to exchange better information, as "court-based bargaining" can involve both compelled disclosures and duties of candor.⁴² Finally, trial judges can, to some degree, protect weaker parties from overreaching by stronger parties, by lessening what Professor Fiss calls "distributional

varying settlement conference reforms. Resnik, *Procedure as Contract*, *supra* note 8, at 626-65.

³⁸ Molot, *supra* note 2, at 90. See, for example, *Fong v. American Airlines*, 431 F. Supp. 1334, 1339 (N.D. Cal. 1977), where the court observed:

Judicial intervention in the settlement process, even if not universally favored or practiced, is an absolute necessity in the federal judicial system, burdened as it is by a staggering and ever-growing case load. . . . Intervention may, of course, take many different forms depending on the personality, style and experience of the individual judge. It may, among others, take the form of an expression by the judge of his reaction to the allegations, admissions and denials contained in the pleadings and his evaluation of each party's prospects of success in the litigation. To subject judges to the risk of disqualification on the basis of statements of this kind would jeopardize their effectiveness as catalysts in the settlement process.

³⁹ Cf. Molot, *supra* note 2, at 92 (arguing judicial settlement conferencing is unnecessary since most civil cases will be "settled anyway"); Resnik, *supra* note 10, at 424 ("Further, because many cases settle without judicial intervention, management may require judges to supervise lawsuits that would have ended of their own accord, lawsuits that would not have consumed any [or many] judicial resources.").

⁴⁰ Molot, *supra* note 2, at 92.

⁴¹ For example, should judicial enforcement of any settlement breach be available in the same court where suit was commenced, the trial judge's approval, and thus input, will be necessary.

⁴² Resnik, *Procedure as Contract*, *supra* note 8, at 652 (discussing disclosures akin to "discovery rights" and candor like that required in class action settlement talks); see also MODEL RULES OF PROF'L CONDUCT R. 3.1 (2003) (requiring meritorious claims and contentions by lawyers to judges); MODEL RULES OF PROF'L CONDUCT R. 3.3 (requiring candor of lawyers to tribunals); MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (prohibiting lawyer conduct involving dishonesty, fraud, deceit, or misrepresentation).

inequalities”⁴³ that can result in unfair settlements.⁴⁴ This is not to suggest that judicial management should be employed in all lawsuits; especially unworthy are “lawsuits that would have ended of their own accord . . . [and] would not have consumed any [or many] judicial resources.”⁴⁵

In pursuing more judicial case management, federal and state lawmakers should revise current judicial settlement conference practices.⁴⁶ Today there are significant difficulties arising from, in Professor Molot’s words, the relatively “unbounded,”⁴⁷ “unchecked,”⁴⁸ “unbridled,”⁴⁹ and “virtually unfettered discretion”⁵⁰ of trial judges. Molot warns that judicial “efforts to influence outcomes in settlement conferences” can “represent a wild card beyond the control of the litigants or the law.”⁵¹

II. IMPROVING JUDICIAL SETTLEMENT CONFERENCES

In frowning upon possible new formalities for judicial settlement conferences, Professor Molot failed to explore completely Professor Fuller’s analysis of the “traditional judicial role.”⁵² In fact, that analysis is quite helpful to those who would formalize judicial settlement practices. Fuller recognized that, at times, trial judges should propose a “deal,”⁵³

⁴³ Fiss, *supra* note 2, at 1077-78.

⁴⁴ See also Resnik, *Procedure as Contract*, *supra* note 8, at 662 (arguing that in prompting “growing obligation to bargain” on behalf of civil litigants, lawmakers should also “improve the ability of litigants to bargain” fairly, though there may be “conditions of profound inequality”).

⁴⁵ Resnik, *supra* note 10, at 424.

⁴⁶ Brian J. Shoot & Christopher T. McGrath, “Don’t Come Back Without a Reasonable Offer”: Surprisingly Little Direct Authority Guides How Judges Can Move Parties (pt. 2), 76 N.Y. St. B.J. 28, 34 (2004) (“[W]hile it may be pointless to mandate or preclude a ‘pro-active’ pursuit of settlements, there should be, we believe, some guidance as to which procedures are permissible and which are not. Such standards are necessary not only to curb coercive practices, but also to provide positive assurance to judges who may shy away from permissible procedures out of a misguided but understandable concern that such conduct may later be criticized as violating the current amorphous standards.”).

⁴⁷ Molot, *supra* note 2, at 93.

⁴⁸ *Id.* at 85.

⁴⁹ *Id.* at 93.

⁵⁰ *Id.* at 92.

⁵¹ *Id.* at 84 & n.246 (stating that “open-ended, case-specific character” of eighteenth-century trial court efforts to influence outcomes by commenting on evidence “rendered them less susceptible to control by appeals courts and the rule of law than other trial court mechanisms”).

⁵² See *supra* note 10 and accompanying text.

⁵³ Fuller, *supra* note 10, at 369-70.

though when doing so, they mediate rather than adjudicate. Such dealing makes the relevant “form of social ordering” more one of contract than adjudication⁵⁴ and changes the judge’s role from a relatively pristine form of adjudication to a “mixed, parasitic, and perverted” form of adjudication.⁵⁵

The move to a mixed form of adjudication prompts unique dangers, according to Fuller, including “premature cataloguing,”⁵⁶ standardless “wisdom-directed personal power,”⁵⁷ and judges who attempt “to write contracts” rather than lay down “rules about contracting.”⁵⁸ Yet, Fuller recognized that, notwithstanding these dangers, this mixed form of adjudication can promote good civil dispute resolution. Thus, he did not “condemn[] all departures of adjudication from a state of pristine purity.”⁵⁹ In fact, he found certain mixed forms of adjudication “valuable and almost indispensable.”⁶⁰

The “traditional judicial role” has always contemplated at least some settlement facilitation by trial judges.⁶¹ Yet the recognition of even this simple proposition has often been flawed. Consider the American Bar Association’s *Model Code of Judicial Conduct*, now undergoing a major revision. The chair of the reviewing committee has solicited comments on the role that judges should play in encouraging parties to settle.⁶² The final draft of the new judicial code suggests it will continue to say: “A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the

⁵⁴ See *id.* at 363.

⁵⁵ *Id.* at 382; see also *id.* at 408 (arguing that “adjudicative process” becomes “parasitic upon a regime of contract” when settlement talks occur).

⁵⁶ *Id.* at 383.

⁵⁷ *Id.* at 406.

⁵⁸ *Id.* at 404.

⁵⁹ *Id.* at 382.

⁶⁰ *Id.*; see also *id.* at 405 (“It may be well to warn again against the assumption that every mixed or ‘impure’ form of adjudication is here condemned.”).

⁶¹ See, e.g., Alfred P. Murrah, *Pre-Trial Procedure: A Statement of Its Essentials*, 14 F.R.D. 417, 424 (1953-1954) (noting recognition in 1944 by U.S. Judicial Conference “that settlement is a by-product of good pre-trial procedure rather than a primary objective to be actively pursued by the judge”).

⁶² Memorandum from Mark I. Harrison, Chair, ABA Joint Comm’n to Evaluate the Model Code of Judicial Conduct, to Individuals and Entities Interested in Judicial Ethics (May 11, 2004), available at http://www.abanet.org/judicialethics/memo_canon1_051104.pdf (accompanying release of preliminary draft of revisions to Canons 1 and 2). The work of the Commission is regularly updated at American Bar Association, ABA Joint Commission to Evaluate the Model Code of Judicial Conduct Webpage, <http://www.abanet.org/judicialethics/home.html> (last visited Mar. 17, 2006).

judge.”⁶³ Unfortunately, this statement fails to embody all that might occur at judicial settlement conferences. The suggested settlement prerogative would appear within the second section of Canon 2, which speaks to the judge’s responsibilities with respect to “adjudication.”⁶⁴ The implication is that the pending “matters” are the same matters that are otherwise subject to adjudication. Likewise, the code mentions only the “parties” — by implication, the parties with matters pending before the judge in question — and their lawyers. Yet, federal and state trial judges often help settle matters that they could not adjudicate. For example, participants often settle matters factually related to pending civil claims and involving subrogation, insurance, indemnification, or attorney’s fees. The decision in *Matsushita Electric Industrial Co. v. Epstein*⁶⁵ is particularly illustrative, as it allows state judicial involvement in civil case settlement talks about federal claims that could never have been brought to trial in state court due to exclusive federal court subject matter jurisdiction.⁶⁶ Put another way, settlement conferences can include discussions of claims and other matters that could not be tried on the merits. Thus, settlement talks often should (and do) involve those who are neither “parties” nor lawyers for parties. Yet, these same participants go unnoted in both the current and the proposed judicial conduct codes.

Some techniques for contemporary judicial settlement conferences pose little threat to the traditional judicial role. Not surprisingly, Professor Fuller envisioned techniques that center around “the affected party’s [or person’s] participation.”⁶⁷ He declared:

Even in the most formal and adversary presentation an arbiter can often discern some indication of what the parties would regard as an acceptable settlement simply from the relative emphasis placed on the various issues and arguments. This discreet reading between the lines, far from being a perversion of adjudication, serves to enhance its efficacy. But the fact that all human relations are

⁶³ ABA JOINT COMM’N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, FINAL DRAFT REPORT, Canon 2.10(A)(3), at 7 (2005), available at <http://www.abanet.org/judicialethics/Canon2Final.pdf> [hereinafter FINAL DRAFT REPORT]. The current Model Code contains this language in MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7)(d) (1999).

⁶⁴ FINAL DRAFT REPORT, *supra* note 63, at 3. Likewise, the current Code uses the heading “Adjudicative Responsibilities.” MODEL CODE OF JUDICIAL CONDUCT Canon 3(B).

⁶⁵ 516 U.S. 367 (1996).

⁶⁶ *Id.* at 369.

⁶⁷ Fuller, *supra* note 10, at 382.

tinctured with a slight element of dissimulation is no reason to elevate dissimulation to the level of principle.⁶⁸

Fuller saw certain types of civil disputes as being more appropriate than others for judicial mediation. Such disputes are “polycentric,” or many-centered, making it “simply impossible to afford each affected party a meaningful participation through proofs and arguments.”⁶⁹ These disputes often involve many interested persons, where the disposition of any single dispute between two persons has “implications for the proper disposition” of all other related disputes.⁷⁰ Such disputes are “unsuited to solution by adjudication,”⁷¹ so that in the absence of private contract,⁷² judges should at times try to prompt solutions by employing “managerial direction.”⁷³

Judicial settlement conferences can be, as urged by Fuller, more controlled by participants. For such control, we must recognize not only the need for a more “meaningful opportunity for litigants to control judicial behavior,”⁷⁴ but also the need for a more meaningful opportunity for input from other interested persons, including those not formally joined as parties in the relevant civil litigation. The parties named in the claims that are subject to trial court adjudication should not be the only ones to gain control. Rather, the broader array of adversaries and other folks whose voices should be heard during settlement talks also warrant control. Disputes and interests⁷⁵ that cannot be resolved by adjudication in a civil case can nevertheless still be resolved by settlement.⁷⁶ Indeed,

⁶⁸ *Id.* at 409.

⁶⁹ *Id.* at 394-95.

⁷⁰ *Id.* at 394 (stating that form of adjudication “cannot encompass and take into account the complex repercussions”); *see also id.* at 404 (“Now it is characteristic of a polycentric relationship that the relations of individual members to one another are not controlled by principles peculiar to those relations, just as it is impossible to build a bridge by establishing distinct principles governing the angle of every pair of girders.”).

⁷¹ *Id.* at 398. Disputes can be “sufficiently polycentric” so as to be “unsuited to solution by adjudication” even when the underlying cases are very “simple-appearing.” *Id.*

⁷² *Id.* Fuller suggests that “contract” and “reciprocity” may be interchangeable in this context. *Id.*

⁷³ *Id.* (“[I]n the practical solution of [polycentric issues] a good deal of ‘intuition’ is indispensable.”).

⁷⁴ Molot, *supra* note 2, at 93.

⁷⁵ Herein, “disputes” involve existing claims and adversaries, whether or not they are subject to pleading or party status. “Interests” do not involve alleged breaches of duty, but only similar or overlapping concerns (e.g., future claims) for folks who may then bargain about these concerns for their mutual benefit.

⁷⁶ *See, e.g., Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 375 (1996) (finding federal court deference generally “applicable in cases in which the state-court judgment . . . incorporates a class-action settlement releasing claims solely within the jurisdiction of the

the resolution of such nonjusticiable disputes and interests can be indispensable to any complete settlement of a pending civil action. Trial judges can and should facilitate complete resolutions. Plaintiffs want to know not only what defendants will pay, but also how much of their payment must be given to certain nonparty creditors, including insurers, health care providers, and lawyers. Defendants' insurers, who are adversaries but usually nonparties, want to know not only what the defendants owe, but also what, if any, portions of the debts are the insurers' responsibility. Thus, during judicial settlement conferences, attention must be directed not only to the parties, but also to the adversarial nonparties and others whose input may be necessary for, or may facilitate, complete resolution.

Judicial settlement conferences can also be, Fuller urged, subject to more clearly articulated "legal standards" in line with enhanced participation opportunities and the "traditional judicial role."⁷⁷ Molot was incorrect in denying that additional formalities⁷⁸ could promote not only greater control by all adversaries in judicial settlement conferences, but also "the judiciary's institutional competence, constitutional authority, and historical practices."⁷⁹ Rather, "judicial leeway" would certainly be cabined⁸⁰ if there were standards that generally foreclosed trial judges from scheduling judicial settlement conferences where at least one of the parties, acting in good faith and reasonably, voiced strong objection. When conferences are scheduled, these standards

federal courts"). Thus, a state court can exercise at least some ancillary authority over factually interdependent claims so that it may dispose of all related claims in a single proceeding, even though not all claims were subject to adjudication by that state court. *Id.*

⁷⁷ Molot, *supra* note 2, at 29.

⁷⁸ Molot states:

If we were to . . . reconcile the judicial role in contemporary pretrial practice with the judicial role embraced by the Founders, described by Fuller, and still found today in trial practice — we would promote formal tools of control like summary judgment, formalize those management tools that are susceptible to formalization, like those governing discovery, and either reject or substantially revise management tools that are not susceptible to formalization, like the settlement conference.

Molot, *supra* note 2, at 88. Seemingly because Molot focuses on providing only "a sorely needed conceptual framework with which to analyze contemporary procedural problems," he offers no advice on revising settlement conference practices or on the negative implications of abolishing such conferences. *Id.* at 118; *cf.* Resnik, *Procedure as Contract*, *supra* note 8, at 662-65 (suggesting new written judicial settlement conference guidelines for such matters as contract validity, assignment of judges, and same-case enforcement).

⁷⁹ Molot, *supra* note 2, at 90.

⁸⁰ *Id.* at 87. This is a desirable goal for Molot. *Id.*

could also require adversaries and others to routinely provide certain input in advance (i.e., by completing court-mandated forms that need not be fully revealed to all participants and would only be accessible to the presiding trial judge or officer).⁸¹ This would serve to deter the frustration of the judge, which can lead to hostility as well as to “erroneous” judicial views prompted by “personal whim.”⁸² Finally, requiring trial judges to accommodate reasonable requests for accessible and inexpensive techniques for participation in settlement talks, such as telephone conferencing, would further promote participant control.⁸³

Might new written standards further “cabin judicial leeway and promote uniformity in judicial approach,”⁸⁴ thus enhancing “the judiciary’s institutional competence”?⁸⁵ Might “legal criteria”⁸⁶ or “legal standards”⁸⁷ limit “judicial overreaching”?⁸⁸ While Congress and the federal civil procedure rulemakers have written little on judicial settlement conferences, a few contemporary, local federal district court rules, as well as some generally applicable state statutes and court rules, exemplify worthy guidelines. It bears repeating that any newly written laws must include all those who might participate in settlement talks, recognize all that might be discussed in settlement talks, and anticipate all that might be involved in post-settlement court proceedings. Thus, any new laws should mention not only the parties, their agents, and their lawyers, but others as well, including varying types of lienholders and insurers. Further, any new laws should contemplate possible conferencing about disputes and issues beyond the pleaded claims and

⁸¹ See, e.g., ALASKA R. APP. P. 222(d)(1) (“The settlement conference will be conducted informally at a location designated by the settlement officer. The parties shall not submit settlement briefs unless requested to do so by the settlement officer. If briefs are requested, they must be submitted directly to the settlement officer, who will return them to the parties who submitted them at the conclusion of the settlement proceedings. A party’s brief may not be disclosed to anyone, including any other party, without the submitting party’s consent and will not be available to the court.”); see also 11TH CIR. R. 33-1(d) (“The court requires, except as waived by the circuit mediator, that counsel in appeals selected for mediation send a confidential mediation statement assessing the appeal to the Kinnard Mediation Center before the mediation. The Kinnard Mediation Center will not share the confidential mediation statement with the other side, and it will not become part of the court file.”).

⁸² Molot, *supra* note 2, at 93 & n.292.

⁸³ Cf. FED. R. CIV. P. 16(c) (noting only that if “appropriate,” trial court “may” require either presence or reasonable availability by telephone).

⁸⁴ Molot, *supra* note 2, at 89.

⁸⁵ *Id.* at 90.

⁸⁶ *Id.* at 31.

⁸⁷ *Id.* at 29.

⁸⁸ *Id.* at 87.

defenses. Guidelines for same-case civil claim settlement enforcement proceedings should be included as well.⁸⁹ Express declarations would lessen debates about what, if any, inherent judicial powers go beyond those powers explicitly recognized in rules or statutes.⁹⁰ They would also eliminate any perceived need for a tortured judicial reading of an existing written law so that an unaddressed issue will fit.⁹¹

Some lawmaking initiatives on judicial settlement conference guidelines may raise vexing separation of powers issues. Legal criteria on such conferencing may contain elements appropriate for the differing lawmakers (i.e., legislatures and varying judicial rulemakers) responsible for laws on substance (i.e., settlement contract), procedure (i.e., settlement contract enforcement), and professional conduct (i.e., attorney settlement authority and judicial impartiality).

Certain current, "established legal standards,"⁹² addressing matters beyond Fuller's concerns about greater control by adversaries, are available for more widespread adoption. One type of guideline concerns who should or may preside at judicial settlement conferences. An appellate court guideline declares that upon motion or on its own, the court may appoint an otherwise uninvolved "retired justice or judge, an active judge, or a private neutral to serve as the settlement officer."⁹³ This approach may be impractical and very inefficient, however, especially for courts situated in rural communities with only a few trial judges. A guideline now employed by some state trial courts prevents a

⁸⁹ See, e.g., Parness & Walker, *supra* note 3, *passim* (discussing when civil case settlement may be enforced in very same case in which it arose and when judicial enforcement requires filing of new case).

⁹⁰ See, for example, the varying opinions about whether there are inherent powers to compel attendance at settlement conferences that extend beyond the precise powers recognized expressly in the 1983 version of Rule 16 of the Federal Rules of Civil Procedure (on pretrial conferences) expressed by the panel in *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 *passim* (7th Cir. 1989). Cf. ME. R. CIV. P. 16(b) (expressly allowing certain types of attendance orders unaddressed in 1983 federal rule, including mandates to parties and their insurers). On the general confusion over the scope of inherent federal judicial powers, see, for example, *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 561-62 (3d Cir. 1985) (en banc) (noting that few cases have discussed inherent powers, that they have been described as "nebulous" and "shadowy," and that "it is not always possible to categorize inherent power decisions").

⁹¹ See, e.g., *In re Novak*, 932 F.2d 1397, 1407 n.19 (11th Cir. 1991) (straining to read term "unrepresented parties" in Rule 16 of Federal Rules of Civil Procedure to include some parties who have lawyers). This opinion has been criticized in Jeffrey A. Parness & Matthew R. Walker, *Thinking Outside the Civil Case Box: Reformulating Pretrial Conference Laws*, 50 KAN. L. REV. 347, 364-65 (2002).

⁹² Molot, *supra* note 2, at 87.

⁹³ ALASKA R. APP. P. 222. Absent party waiver, this officer "shall not participate in subsequent judicial decisions related to the case." *Id.*

trial judge who will preside at any later bench trial in a case from conducting a settlement conference.⁹⁴ Here, too, practicalities may preclude full implementation, especially in the absence of available fellow trial judges or parajudges.⁹⁵

Another type of guideline involves the possible enforcement of agreements reached at judicial settlement conferences. One state statute says: "If parties to pending litigation stipulate, in a writing . . . or orally before the court, for settlement . . . the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement."⁹⁶

Yet another type of guideline involves the validity of settlement agreements. One state court rule says: "Unless otherwise provided . . . no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record."⁹⁷ A comparable statute from another state says that agreements "must be either reduced into writing or recited in open court and capable

⁹⁴ See, e.g., C.D. ILL. LOCAL R. 16.1(B) ("The settlement conference in a matter to be tried to the court shall be conducted by a judge who will not preside at the trial of the case.").

⁹⁵ The difficulties with perceived and actual biases by trial judges who attempt to facilitate settlements and later preside over trials (bench or jury) are discussed in Daisy Hurst Floyd, *Can the Judge Do that? — The Need for a Clearer Judicial Role in Settlement*, 26 ARIZ. ST. L.J. 45, 84 (1994) ("There should be some vehicle other than disqualification for attacking the problem of judicial bias regarding the court's involvement in settlement."). Perhaps waivers should normally be sought from parties when the same judge pretries and tries a case. See, e.g., *Team Design v. Gottlieb*, 104 S.W.3d 512, 523 & n.33 (Tenn. Ct. App. 2002) (describing history of Tennessee settlement promotion laws since 1995, including provision permitting trial judge assigned to try case to preside over judicial settlement conference only where parties agree (citing TENN. SUP. CT. R. 31, § 20)); see also *Enter. Leasing Co. v. Jones*, 789 So. 2d 964, 967-68 (Fla. 2001) (holding that trial judge is not automatically disqualified simply because of knowledge of settlement offers made during confidential mediation that were reported to judge in violation of confidentiality statute; generally, absent demonstration of bias or prejudice, judges are trusted to set aside their personal knowledge of inadmissible or irrelevant matters).

⁹⁶ CAL. CIV. PROC. CODE § 664.6 (West 2006). Where a court retains settlement enforcement jurisdiction, it should not always exercise it. Unfortunately, the California Civil Procedure Code provides no guidance on making the discretionary determinations on later same-case enforcement (or enforcement in a wholly new case). Cf. *Paulucci v. Gen. Dynamics Corp.*, 842 So. 2d 797, 802-03 (Fla. 2003). The *Paulucci* court would allow same-case enforcement where a settlement contract has continuing validity and the court earlier ordered compliance with the terms of the contract. *Id.* In contrast, where the contractual relationship ends due to material breach and a party seeks general damages that were not specified in the contract, a new civil case is needed for enforcement. *Id.* at 803.

⁹⁷ TEX. R. CIV. P. 11.

of being transcribed from the record of the proceeding.”⁹⁸

At times, general guidelines on settlement conferences are preempted by special guidelines, perhaps written by different lawmakers or by lawmakers employing different lawmaking processes.⁹⁹ In Illinois, the high court has an attorney professional conduct rule that is generally relevant to civil claims and reads: “A lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter.”¹⁰⁰ Yet, Illinois precedents have long recognized the special unwritten standard that an “attorney of record’s authority to settle . . . is presumed” when settlement talks occur in “open court.”¹⁰¹ Further, the Illinois General Assembly has crafted special guidelines on attorney civil claim settlement authority for attorneys representing certain local governments.¹⁰²

Comparably, special guidelines on judicial settlement conferencing can be written for only certain civil cases, such as when the claims are routine rather than “significant,” according to Fiss,¹⁰³ or involve only limited sums. For other civil procedure matters, such as pleading requirements¹⁰⁴ and formal discovery methods,¹⁰⁵ lawmakers have often

⁹⁸ LA. CIV. CODE ANN. art. 3071 (2005).

⁹⁹ Maurice Rosenberg, *The Federal Civil Rules After Half a Century*, 36 ME. L. REV. 243, 249 (1984) (“Selective treatment of cases by distinct categories is not a wild or wicked idea or even a novelty in judicial administration.”).

¹⁰⁰ ILL. R. PROF’L CONDUCT 1.2(a). The rule itself is immediately followed by a seemingly similar declaration that in a criminal case, “the lawyer shall abide by the client’s decision . . . as to a plea to be entered.” *Id.* Despite the similarity, in practice the rule operates very differently in criminal cases, in that there can be no delegation of plea authority by client to lawyer. ILL. SUP. CT. R. 402(b).

¹⁰¹ *Brewer v. Nat’l R.R. Passenger Corp.*, 649 N.E.2d 1331, 1334 (Ill. 1995); *see also* *Koval v. Simon Telelect, Inc.*, 693 N.E.2d 1299, 1306 (Ind. 1998) (recognizing attorney’s inherent agency authority, while noting that rule is “so commonly cited and yet so infrequently explained”); *cf.* *Harris v. Ray Johnson Constr. Co.*, 534 S.E.2d 653, 654 (N.C. Ct. App. 2000) (presuming attorney settlement authority, although talks occurred outside of court).

¹⁰² The civil claim settlement authority of city attorneys and corporation counsels for Illinois municipalities is often set out in municipal codes, though the extent of authority varies. *Compare* DEKALB, ILL., MUN. CODE § 3.17 (2005) (authorizing city attorney to “take[] steps . . . for the best interests of the city and for the promotion of justice”), *with* CHI., ILL., MUN. CODE § 2-60-080 (2005) (authorizing corporation counsel, “when directed by the city council, to make settlements of lawsuits . . . against the city”). Unfortunately, Illinois law does not always clearly describe the settlement authority of other government officials, which leads to confusion. *See, e.g.*, *Carver v. Condie*, 243 F.3d 379, 381 (7th Cir. 2001) (certifying to Illinois Supreme Court question whether Illinois law requires counties to pay judgments entered against sheriffs’ offices when founded on agreements made by sheriffs, after declaring “the law of Illinois does not provide a clean solution to this conflict” and that court’s “tour through state law has not produced a clear answer”).

¹⁰³ Fiss, *supra* note 2, at 1087.

¹⁰⁴ Compare, for example, the general pleading standards in Illinois with the standards

already successfully distinguished among civil cases by following the admonition of the late Professor Maurice Rosenberg, who said: "Cadillac-style procedures are not needed to process bicycle-size lawsuits."¹⁰⁶ As to judicial settlement conferences, written procedural laws could deny, or be very cautious about, same-case judicial enforcement for settlement contract breaches¹⁰⁷ involving novel or complex issues of state law¹⁰⁸ or small dollar amounts.¹⁰⁹ They could also describe the exceptional settings where settlements that would normally be accessible might be sealed.¹¹⁰ They could require that money transfers

governing small claims cases and healing art malpractice cases. Compare 735 ILL. COMP. STAT. ANN. 5/2-601 (West 2005) (requiring "substantial allegations of fact" in order "to state any cause of action"), with ILL. SUP. CT. R. 282(a) (stating that action on small claim is commenced with "short and simple complaint"), and 735 ILL. COMP. STAT. 5/2-622 (2005) (stating that civil actions seeking damages founded on healing art malpractice usually require affidavits indicating consultation and review by health professionals who have concluded that proposed actions present "reasonable and meritorious" causes). In the federal district courts, there are usually notice pleading requirements under Rule 8(a)(1) of the Federal Rules of Civil Procedure, though "particularity" is required when "fraud or mistake" are averred, per Rule 9(b). Even more rigorous special standards govern some federal securities actions under the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(a)(1) (2005).

¹⁰⁵ Compare, for example, the formal discovery generally permitted in civil cases involving less than \$50,000 and more than \$50,000. See ILL. SUP. CT. R. 201(a) (making formal discovery methods generally available); ILL. SUP. CT. R. 222 (allowing limited and simplified discovery in "civil actions seeking money damages not in excess of \$50,000"); ILL. SUP. CT. R. 287(a) (disallowing discovery in small claims cases [under \$5000 per Illinois Supreme Court Rule 281] "except by leave of court"). Discovery may also be limited by the type of civil claimant or the type of civil case. Thus, in some New York federal district courts, formal discovery in certain prisoner pro se cases (use of force, inmate against inmate, and disciplinary due process) is often limited to "standard discovery requests" involving interrogatories and document production. S. & E.D.N.Y. CIV. LOCAL R. 33.2. In Illinois, "by administrative order," there are standard forms of interrogatories for different classes of cases. ILL. SUP. CT. R. 213(j). The forms now encompass motor vehicle, matrimonial, and medical malpractice cases; they supercede, per Illinois Supreme Court Rule 213(c), the general bar on more than 30 interrogatories.

¹⁰⁶ Rosenberg, *supra* note 99, at 247 (noting that such procedures are what Federal Rules of Civil Procedure "often appear to require"). Rosenberg suggests procedural law distinctions can be grounded not only on the types of substantive claims involved or the amount of money in controversy, but also on the significant preferences of the parties (i.e., "informal, inexpensive processing"; "full-scale" procedures; the need for expert decision makers; and "privacy"). *Id.* at 249-50.

¹⁰⁷ See generally *United States v. City of Miami*, 664 F.2d 435, 440-41 (5th Cir. 1981) (refusing to provide "perfunctory approval" of such settlements, and suggesting instead that judicial guidelines be distilled from class action and bankruptcy compromise cases).

¹⁰⁸ See 28 U.S.C. § 1367(c)(1) (2005) (allowing district courts to decline to exercise supplemental jurisdiction over claims raising novel or complex issues of state law).

¹⁰⁹ Guidance is found in COLO. R. CIV. P. 16.1 (providing simplified procedures for many cases involving less than \$100,000).

¹¹⁰ Guidance is found in *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002), as well as in

made to meet routine cash settlements be completed within a certain time period.¹¹¹ Finally, they could describe the general attributes of civil cases where magistrates, masters, or other neutrals might be employed differently to help the parties and interested persons reach an agreement.¹¹²

CONCLUSION

Professors Molot, Fuller, and Fiss, among others, have expressed concerns about the unbounded, unchecked, unbridled, and virtually unfettered judicial discretion of trial judges who preside over civil case settlement conferences. I, too, am concerned. But the best response is not to abolish or severely restrict judicial settlement conferences. Rather, it is to add more formality and more written guidelines. New guidelines would discourage each trial court from marching "to the beat of its own drummer."¹¹³ These guidelines should involve, as suggested by Fuller, both more adversary control and more detailed and written criteria. In addition, new guidelines should expressly recognize that the claims and interests that might be discussed at judicial settlement conferences are far more expansive than the justiciable claims that might be discussed at trial preparation conferences. Thus, civil case settlements subject to same-case judicial enforcement can involve many more claims, interests, and people than would have been involved in any adversarial proceedings in the same case. New written guidelines for federal and state courts should follow existing rules and statutes of general and particular applicability already operating in some American trial courts.¹¹⁴ As with pleading and discovery, new settlement conference guidelines should speak to differences between civil actions, including,

some existing court rules, like S.C. R. CIV. P. 41.1 (governing sealing of settlements).

¹¹¹ Guidance is found in PA. R. CIV. P. 229.1 (providing sanctions for failure to deliver settlement funds within certain period).

¹¹² Guidance is found in D. ME. CIV. LOCAL R. 16.3 (differentiating management track procedures for administrative (including habeas corpus, social security disability and bankruptcy), standard, complex, toxic tort, and prisoner civil rights cases).

¹¹³ *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 666 (7th Cir. 1989) (Ripple, J., dissenting) (frowning on overly broad and nonliteral readings of authorization in federal pretrial conference rule for trial judges to compel attendance at settlement conferences).

¹¹⁴ Guidelines for American trial court judges who attempt to prompt settlements can also be found in the recent American appellate court experiences with settlement conferencing. *See supra* note 81 (describing rules providing for submission of confidential memoranda to appellate court settlement officers or circuit mediators); *supra* note 93 and accompanying text (providing that settlement officer may not be person who might have to decide case on merits later).

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perhaps, distinctions between “significant cases”¹¹⁵ and routine cases or between cases based upon the amounts in controversy.

¹¹⁵ Fiss, *supra* note 2, at 1087.