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Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators

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I. INTRODUCTION

Many federal judges do not have time for their civil dockets. The amount of time the average district judge devotes to civil trials has declined steadily in the last ten years.1 Simultaneously, the criminal dockets have grown too large and become too complex for the district

1. Chief Justice William H. Rehnquist, Remarks to the Litigation Section of the American Bar Association 8 (Oct. 21, 1993)(on file with the author) (“Recent studies show that the number of civil trials conducted on the average by each judge, and the number of days each judge spends in civil trials, are both at all time lows. Today, although criminal cases make up only fifteen percent of the docket of the federal courts, forty-seven percent of the trials conducted in federal court are criminal trials.”). See Patrick E. Longan, The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials, 35 Ariz. L. Rev. 663, 671 (1993). Although not every district is experiencing this shortage of civil trial time, it is significant where it occurs. In 1991, for example, the active judges of the Middle District of Florida suspended civil trials “in an effort to keep pace with the court’s criminal felony caseload.” Middle District of Florida Suspends Civil Trials, Third Branch (Admin. Off. of the U.S. Cts., Wash., D.C.) Feb. 1991, at 9.
judges to spend sufficient time tending to civil cases which by law have lower priority. Congress continues to create more federal crimes despite urgent entreaties not to do so. The President and Senate have moved slowly to fill district court vacancies, and many believe that adding more judges is an unacceptable solution.

The ever-increasing pressures on the district judges have resulted in two trends in the handling of civil cases. The first is the increasing

2. According to the Administrative Office of the United States Courts, the number of new criminal cases increased from 27,968 in 1980 to 47,467 in 1992. Longan, supra note 1, at 673 (summarizing statistics appearing in the Annual Report of the Director of the Office of the United States Courts for the years 1980-92). The “weighted” criminal filing per judgeship, which is a measure of the number and complexity of the criminal case, increased from 47 to 54 in the same time period. Id. at 674. See also 1980 ANN. REP. OF THE DIRECTOR OF THE ADMIN. OFF. OF THE U.S. Cts. 290 [hereinafter 1980 ANNUAL REPORT](discussing the weighting system).

3. The Speedy Trial Act imposes deadlines on the indictment and trial of federal criminal defendants, but there is no comparable statute for civil cases. 18 U.S.C. § 3161 (1988).


5. The Director of the Federal Bureau of Investigation was recently quoted as saying: “Rapid, unchecked federalization of criminal activity could overwhelm the limited resources of federal law enforcement agencies, including the FBI.” Dan Freedman, FBI Criticizes Trend Toward “Federalizing”; Agents Don’t Want to Be Street Cops, HOUS. CHRON., Dec. 19, 1993, at A2. The same report quoted Chief Justice William Rehnquist: “To shift large numbers of cases presently being decided in the state courts to the federal courts for reasons which are largely symbolic would be a disservice.” Id. Senator Ernest Hollings recently observed that one could get the Senate to vote in favor of virtually any expansion of criminal jurisdiction and stated “[i]t’s gotten silly around this town.” Congress Focuses on Cost of Crime, THIRD BRANCH, (Admin. Off. of the U.S. Cts., Wash., D.C.) Mar. 1994, at 5.

6. In October 1994, there were 93 vacancies in the federal courts and only 27 nominations pending. Total Vacancies, FED. CT. APPOINTMENTS REP. Sept.-Oct. 1994, at 50. See also Chief Justice Urges Fast Appointments of Federal Judges, N.Y. TIMES, Jan. 2, 1994, § 1, at 17.

use of judicial "adjuncts" such as magistrates, bankruptcy judges, law clerks, staff attorneys, interns, externs, and the other ingredients of "bureaucratic justice." The second development, more aptly called a movement, has been to direct civil cases away from adjudication to alternative forms of dispute resolution such as arbitration, mediation, early neutral evaluation, and summary jury trials. Each of these developments attempts to cope with the logjam in the district judge's courtroom. Each has its supporters and its critics. The two developments converge when judicial adjuncts, particularly magistrates, mediate civil cases. Using magistrates to assist in


11. Compare, e.g., Kaufman, supra note 9 (advocating increased use of ADR), with Judith Resnik, Failing Faith: Adjudicatory Procedure in Decline, 53 U. CHI. L. Rev. 494, 535-39 (1986)(expressing concern about ADR becoming a substitute for trial). See also Albert W. Alschuler, Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases, 99 Harv. L. Rev. 1808, 1811 (1986). ("[J]udges, lawyers, and legal scholars have embraced a host of nonadjudicative shortcuts. They have invented innumerable rationalizations for not doing the job and innumerable ways to avoid it.").

12. The literature on alternative dispute resolution makes a distinction between judicial mediation and settlement conferences hosted by a judicial officer. See, e.g., Carrie Menkel-Meadow, Judges and Settlement, TRIAL, Oct. 1985, at 24 (stating that when more than facilitating communication occurs, it is not mediation). The distinction is unimportant for purposes of this Article because both a "mediation"
settlement is not a new idea. Magistrates preside over tens of thousands of pretrial conferences each year, and one of the topics appropriate for such conferences is settlement. Some magistrates have become settlement "specialists" with little other responsibility. Other magistrates report having presided over hundreds of settlement conferences. One study of magistrates concluded fourteen years ago that settlement is where magistrates can have the most impact on expediting civil cases. Another study, however, indicated that district judges hesitate to turn such matters over to magistrates because the magistrates do not command sufficient respect from the bar to make the exercise useful and because the magistrates have been fully occupied with other matters. There are strong indications, however, that magistrates are being called upon to take a greater role in the settlement of civil cases. In 1990, Congress passed the Civil Justice Reform Act and charged each district court with the responsibility for devising plans to reduce cost

and a "settlement conference" are occasions for magistrates to facilitate settlement. The terms, therefore, will be used interchangeably.

13. See Christopher E. Smith, United States Magistrates in the Federal Courts, 130 (1990)(describing magistrates' role in settlement). See also Hubert L. Will et al., The Role of the Judge in the Settlement Process 10, 27 (1985)(describing usefulness of using magistrates to settle non-jury cases); Carrie Menkel-Meadow, For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference, 33 UCLA L. Rev. 485, 492-93 (1985)("[T]he magistrates in the federal system provide another class of judicial personnel to conduct settlement conferences. In some cases, their presence moots the debate about judicial role by creating a set of 'settlers or managers' distinct from the set of 'adjudicators and decision-makers.'"). One recent notorious case, Heileman Brewing Co., Inc. v. Joseph Oat Corp., 871 F.2d 648, 650 (7th Cir. 1989)(en banc) dealt with the question whether parties could be ordered to attend settlement conferences, and it began with an order from a magistrate.


and delay in the civil dockets.\textsuperscript{19} Thirty-four districts implemented plans by the end of 1991. Four of these incorporate magistrate mediation into their plans\textsuperscript{20} while another eight provide for settlement conferences to be presided over by magistrates.\textsuperscript{21} Among the recommendations in other districts are at least three that involve magistrate settlement conferences.\textsuperscript{22} Also, a committee of the Judicial Conference approved a long-range plan in 1993 that forecast expanded use of magistrates for alternative dispute resolution.\textsuperscript{23}

The trend toward using magistrates as mediators is no accident. To understand why, one must first understand what prevents parties from settling without assistance. Part II of this Article examines this question and concludes that parties increasingly need more information than the attorneys can provide. In addition, the parties also need a more satisfying and structured forum than lawyer-to-lawyer negotiation. One must then compare different forms of mediation to see how

\begin{itemize}
  \item \textsuperscript{19} 28 U.S.C. §§ 471-482 (Supp. V 1993). The statute states that each district plan "shall consider and may include . . . authorization to refer appropriate cases to alternative dispute resolution programs that (A) have been designated for use in a district court; or (B) the court may make available, including mediation, mini-trial, and summary jury trial." \textit{Id.} § 473(a). The statute also requires the district to consider, and permits them to include, "a neutral evaluation program for the presentation of the legal and factual basis of a case to a neutral court representative selected by the court at a nonbinding conference conducted early in the litigation." \textit{Id.} § 473(b). For discussion of the background of the Civil Justice Reform Act, see Linda S. Mullenix, \textit{The Counter-Reformation in Procedural Justice}, 77 MINN. L. REV. 375 (1992).
  \item \textsuperscript{20} Donna Stienstra, \textit{ADR In The CJRA Early Implementation Districts, in New Directions in Federal Civil Practice and Procedure} 491, 493-94 (Sol Schreiber ed., 1993). The districts are the Southern District of Illinois, the Northern District of Indiana, the District of Kansas, and the Western District of Wisconsin. \textit{Id.} at 494.
  \item \textsuperscript{21} Litigation Section, A.B.A., \textit{Report of the Task Force on the Civil Justice Reform Act} 34-35 (1992). The districts are the Eastern District of Wisconsin, the Eastern District of California, the Eastern District of New York, the District of Montana, the District of Idaho, the Northern District of California, the Western District of Oklahoma, and the District of Wyoming. \textit{Id.}
  \item \textsuperscript{23} Magistrate Judges System Marks Twenty-fifth Anniversary, Third Branch (Adm. Off. of the U.S. Cts., Wash., D.C.) Oct. 1993, at 7. It is also interesting to note that the Judicial Conference's representative at a recent House subcommittee hearing on alternative dispute resolution was a magistrate judge. \textit{House Studies Alternative Dispute Resolution in Federal Courts, Third Branch} (Admin. Off. of the U.S. Cts., Wash., D.C.) June 1992, at 5. Each of these events confirms one commentator's recent observation that the trend toward having magistrates conduct settlement discussions is "a trend that is likely to continue." Janet Cooper Alexander, \textit{Judge's Self-Interest and Procedural Rules: Comment on Macy}, 23 J. LEGAL STUDIES 647, 652 (1994).
\end{itemize}
each meets those needs. Part III makes those comparisons with respect to mediation by private lawyers, trial judges, and magistrates. It concludes that magistrates are being used to mediate cases more because they are in a unique position to do so effectively. Other forces are also driving magistrates into more mediation. Part IV discusses why district judges need to spend the limited time they have for civil cases in other ways. It also examines changes in the workload of magistrates that may make it possible for the magistrates to realize their potential as mediators.

The magistrate system was designed to be flexible so that it can adapt to changing needs and possibilities. The nature of federal civil litigation has changed and continues to change in ways that permit and, indeed, require magistrates to assume a greater role in settling cases. This Article explains why magistrates can and should mediate more civil cases.

II. OBSTACLES TO UNASSISTED SETTLEMENT

Alternative dispute resolution techniques exist because parties and lawyers need help in settling cases. The first problem with which they need help is the problem of divergent expectations about the outcome of trial. The second type of problem concerns the nature of the forum for settlement. This section discusses each of these needs as a prelude to comparing how well different forms of mediation meet them.

A. Informational Needs

1. The Need for Convergent Expectations

The economic model of settlement assumes that each party will come to a bottom-line figure by predicting the outcome and extra expense of continued litigation and comparing that expected value with settlement. The plaintiff’s expected outcome of trial, \( E_p \), is the probability of victory multiplied by the plaintiff’s estimate of the amount of the judgment if there is one. The plaintiff’s expected net return from continued litigation is this figure minus the cost, \( C_p \), that the plaintiff will incur to obtain it. The plaintiff will settle if the settlement offer is at least equal to the expected return from trial, \( E_p - C_p \).

24. Smith, supra note 13, at 3.
25. This process has been described in more detail elsewhere. Longan, supra note 1, at 683-95. The origins of the model of settlement are in the work of John Gould, Richard Posner, and William Landes. See John P. Gould, The Economics of Legal Conflicts, 2 J. LEGAL STUD. 279 (1973); William M. Landes, An Economic Analysis of the Courts, 14 J.L. & Econ. 61 (1972); Richard A. Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. LEGAL STUD. 399 (1973).
Any lower offer would be unacceptable because the plaintiff expects to do better at trial.

Similarly, the defendant compares settlement to the expected outcome of the trial. The expected loss of the defendant, $E_d$, is the probability assigned by the defendant to a plaintiff victory multiplied by the defendant's estimate of the judgment if there is one. The defendant must also consider the cost of continuing to litigate, $C_d$, and compare any settlement demand with the expected total loss if the defendant does not settle, $E_d + C_d$. Only if the settlement demand is less than or equal to this figure will the defendant settle.

The condition for settlement is that the plaintiff's minimum demand, $E_p - C_p$, must be less than or equal to the defendant's maximum settlement offer, $E_d + C_d$. An equivalent formulation is that settlement will occur if $E_p - E_d < C_p + C_d$. The settlement decision thus depends upon the parties' expectations and the costs of litigation.26

Cases will be difficult to settle if the parties have divergent expectations about the outcome of trial. If the plaintiff assigns a significantly greater probability to victory or a significantly higher damage award if there is a judgment than the defendant does, then the plaintiff's expectation, $E_p$, will be much different than the defendant's expectations, $E_d$. The higher $E_p - E_d$ is, the less likely settlement is to occur. The algebraic result confirms common sense. The plaintiff with high hopes is hard to pacify. The defendant with no fear is less likely to pay a large settlement. Divergent expectations make settlement unlikely.

On the other hand, settlement should occur if the parties have convergent expectations.27 The closer their expectations are, the more likely the parties are to reach agreement and to split the savings of not litigating to a foregone conclusion.28 If $E_p - E_d$ approaches zero, the condition for settlement is more likely to be satisfied. It is easy to see why. If the parties know what the outcome of trial will be, they can settle and save the cost of going forward with the litigation. Convergent expectations are the primary reason that ninety percent of all

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disputes never reach litigation. Litigation is simply self-defeating when the outcome is certain.

2. **Why Parties Need Assistance**

In a perfect world, the lawyers should be able to gather and process the information about the case and, using their experience and expertise, agree on the likely outcome of all but the most novel of cases. In particular, lawyers should be able to draw on their own experiences and the results of trials of similar cases to predict accurately the value of a case. There are at least two reasons, other than the novelty of a case, why lawyers may not be able to agree on the likely outcome of a case. Both problems are of recent origin. Both are getting worse.

First, today's civil litigators—as opposed to trial lawyers—are incapable of predicting trial outcomes reliably because so few have significant trial experience. One judge noted that experienced lawyers can settle cases "before the coffee gets cold." However, the size of the litigation bar in the United States has increased dramatically in the last twenty years. As a result, there is an entire generation of litigators for whom trial remains theoretical. Lawyers with little or no trial experience are in no position to assess the effect of evidence, witnesses, or theories. They need help to predict accurately what will

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32. See Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. Pa. L. Rev. 1147, 1223 (1992) (“The average active litigator tries only a handful of cases each year. A trial lawyer’s situation [in attempting to value a case] is similar to that of a blindfolded archer who is permitted to see the target only 5 percent of the time, and then only through a fog at dusk.”). See also Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 Am. B. Found. Res. J. 217, 239 (1980); John F. Grady, *Trial Lawyers, Litigators, and Client Costs*, 4 Litig. (A.B.A. Sec. on Litig.), Spring 1978, 5, 6; Longan, supra note 1, at 659-91; Resnik, supra note 11, at 522.

happen at trial. As a result, the unassisted settlement process can break down.

The lawyers' inexperience is exacerbated by the second problem. There is, at least in federal court, a shortage of civil trial time. The number of civil trials in federal court is declining while the size of the litigation bar is increasing. Because there are fewer federal trials to be shared among more litigators, obtaining the litigation experience necessary to predict results is becoming more difficult. The diminishing stock of trial results also impedes the efforts of those litigators to base their expectations on results obtained by others. There are simply fewer cases to which the lawyer can compare his or her case. Without the information and the experience to process that information, litigators are less able to come to reliable, convergent expectations about a case. Accordingly, unassisted settlement is less likely.

B. Procedural Needs

The economic model of settlement tells us when settlement is rational, but it is not always enough for a settlement to be rational. Settlement involves people, litigants and lawyers, and the indisputable theorems of algebra and probability do not satisfy the human needs that can impede settlement. Process, as well as substance, matters. What those human needs are, and how mediation can assist in satisfying them, is the subject of this section.

34. WAYNE D. BRAZIL, SETTLING CIVIL SUITS 97-98 (1985). See also FREDERICK B. LACEY, THE JUDGE'S ROLE IN THE SETTLEMENT OF CIVIL SUITS 14-15 (1977)("[T]he difficult cases to settle are those in which there is a disparity in counsel's skill, experience, and knowledge of the case.").
35. See generally, Longan, supra note 1, at 691 (describing causes and consequences of the "disappearance of the trial lawyer").
36. See supra note 1. See also Mitchell F. Dolin & Robert N. Sayler, Twenty Years of Litigation, Lrrc. (A.B.A. Sec. on Litig.), Fall 1993, at 6, 6 (stating the size of ABA Litigation section has grown from 38,000 to 65,000 in 10 years while the size of the Association of Trial Lawyers of America has grown significantly to 57,000).
37. See Longan, supra note 1, at 689-91.
38. See Carrie Menkel-Meadow, Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR", 19 FLA. ST. U. L. REV. 1, 6 (1991)("In what has become a commonly recognized division in the literature and advocacy about ADR, we see two basically different justifications for processes that resolve cases short of trial—what I call quantitative-efficiency claims versus qualitative-justice claims."). See also Paul Marcotte, Can't Get No Satisfaction?, A.B.A. J., July 1988, at 28 ("[P]eople often care less about how much money they can get than about the process by which they got it.").
1. The Procedural Needs of the Parties

a. Catharsis

Litigants usually feel wronged or wrongly accused. Those feelings must be dealt with before the parties will be ready psychologically to accept even the most rational settlement. What the litigant needs is a catharsis, the chance to express his or her position about the events that led to the dispute. Litigants “must be allowed to tell their stories to a sympathetic listener who is not attempting to ignore or minimize their tragic circumstances... They have at least been provided with the opportunity to explain.” When the settlement process makes such a catharsis possible, settlement often follows quickly.

b. Deflation

Another frequent problem is that clients either do not receive or do not believe reliable information from their counsel about the likely outcome of the case. Lawyers do raise false hopes about cases, especially early in litigation, and they may be reluctant to share with their clients their revised, more realistic assessment, later in the case. Clients, of course, have the final word with respect to settling cases. If the lawyers filter the information about the case and do not assist the clients with realistic predictions, settlement opportunities will be missed.

39. See Hogan, supra note 16, at 445 (noting that, in this magistrate’s experience, feelings have a life of their own, and that clients often feel emotionally that their integrity has been challenged). See also Robert Mnookin, Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict, 8 OHIO ST. J. ON DISP. RESOL. 235, 248-49 (1993).


42. See, e.g., Katz, supra note 26, at 291-92 (observing that “some disputes settle as soon as each side has the chance” to tell their story).

43. Judge Patrick Kelly’s letter to counsel about mediation in the District of Kansas recognizes this problem when it states, “Hopefully, [the client’s] expectations have not been unduly inflated, i.e. can’t lose-can’t win!” Kelly, supra note 15, at 147. Judge Richard Posner has observed that part of the judge’s role in settlement is to communicate the realities of the case to the client without the “distortion” of the lawyer. Posner, supra note 10, at 392.

44. See, e.g., RULES REGULATING Fla. BAR 4-1.2 (1991)(“A lawyer shall abide by a client’s decision whether to make or accept an offer of settlement of a matter.”).
Sometimes the client simply does not believe the lawyer and needs to have his optimism doused by someone else.\textsuperscript{45} Try as the lawyer might, the lawyer cannot convince the party that things are as bleak as they really are, either because the lawyer's earlier advice was different or because the client is simply bull-headed. The settlement process that relies on convergent expectations cannot settle such a case until the client, who retains the power to settle or not to settle, is convinced of the calculation.

2. The Procedural Needs of the Lawyers

Often the lawyers are the ones who need a mediator.\textsuperscript{46} Because litigation practice has become uncivil and unprofessional, even bitter, many lawyers on opposite sides of a case cannot bring themselves to speak to one another, let alone work cooperatively toward a settlement.\textsuperscript{47} Reflections of this problem appear in the numerous professionalism codes that courts and bar associations have promulgated in

\textsuperscript{45} Wayne D. Brazil et al., \textit{Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution}, \textit{69 Judicature} 279, 283 (1986) ("In other cases the evaluator's assessments could help attorneys with unrealistic clients. Occasionally clients have unrealistic expectations about litigation (both its probable outcome and its burdens). And, occasionally, lawyers hired by such clients have difficulty dislodging those expectations.").


\textsuperscript{47} The bitterness in many cases has resulted in obscenity and in a few cases in fisticuffs. One widely reported deposition exchange involved Joseph Jamail calling his adversary a "fat boy," an "asshole," and "a big fat tub of shit," while the target of these comments called him "Mr. Hairpiece." \textit{Bar Wars}, \textit{Harper's Magazine}, Jan. 1993, at 32. It is difficult to imagine these two lawyers working cooperatively toward a settlement of whatever dispute brought them together, but that type of behavior is all too common. \textit{See} David A. Kaplan, \textit{How's Your Lawyer's Left Jab?}, \textit{Newsweek}, Feb. 26, 1990, at 70 (reporting on fist fight that erupted in Dallas during a witness interview).
an attempt to remedy this problem. Many of the codes deal with the problem of lawyers who cannot, or refuse to, discuss amicable resolution of their dispute. One example is the civility code of the Seventh Circuit which imposes a duty on counsel to "endeavor to confer early with other counsel to assess settlement possibilities" and recognizes that "[conduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently." 48 The Tenets of Professional Courtesy of the Kansas City Metropolitan Bar Association states that "A Lawyer Should Maintain a Cordial and Respectful Relationship With Opposing Counsel." 49 The comment to this tenet recognizes that "effective and open communication between lawyers aids the resolution of the conflict." 50 Perhaps the saddest commentary is that lawyers need official reminders of such obvious facts. In today's environment, they must be told that the lawyer sometimes owes the client, and always owes the system of justice, the duty to seek peace.

At the root of the problem is the combination of three facts about American civil litigation. First, the process is adversarial, meaning that the development of the case is in the hands of the lawyers. That power and posture breed the attitude that the adversary's lawyer is your enemy. Second, virtually all of pretrial practice occurs outside the direct supervision of any judicial authority. Any lawyer who is inclined to be combative has some rein. Third, the litigation bar has grown so dramatically, particularly in urban areas, that the lawyers have less fear that they will face the same adversary in a series of cases over their careers. One is more apt to misbehave when one is unlikely to encounter the victim again. 51 Each of these facts contribute to the "Rambo" approach to litigation. Rambo does not settle.

48. COMMITTEE ON CIVILITY, SEVENTH FEDERAL JUDICIAL CIRCUIT, FINAL REPORT, 1A, 2A (1992)(on file with the author).
49. KANSAS CITY METRO. BAR ASS'N, TENETS OF PROFESSIONAL COURTESY 2 (1987)(on file with the author). See also Mississippi Guidelines of Professional Conduct, Miss. LAW. Apr.-May 1991, at 10 ("Lawyers should treat each other . . . with courtesy and civility and conduct themselves in a professional manner at all times.").
50. KANSAS CITY METRO. BAR ASS'N, supra note 49. In a similar vein, the Illinois State Bar Association has recognized that "courtesy can facilitate clients' interests and the expedient handling of matters at a lower cost to the client." ILLINOIS STATE BAR ASSOCIATION THE BAR, THE BENCH, AND PROFESSIONALISM IN ILLINOIS 15 (1987)(on file with the author). See also PENNSYLVANIA BAR ASSOCIATION WORKING RULES OF PROFESSIONALISM (on file with the author)("Communications are life lines. Keep the lines open. Telephone calls and correspondence are a two-way channel; respond to them promptly . . . Resolve differences through negotiation, expeditiously and without needless expense.").
Rambo kicks adversaries and takes names. That attitude impedes even a rational resolution, and settlement simply cannot occur if the lawyers will not talk to each other.52

The informational and procedural needs of the parties and lawyers impede unassisted settlement. Mediation can help, but the question is what type of mediation can help the most. The next section discusses three candidates.

III. THREE TYPES OF MEDIATION COMPARED

There are three types of mediation. The first is referral mediation. Here, the district court refers the case to a non-judicial mediator either in private practice or, more rarely, as part of a full-time court-annexed mediation service. The second type is mediation by the trial judge. The third is mediation by the magistrate. How well each can assist the parties and lawyers in overcoming the obstacles to unassisted settlement is the measure of its value.

A. Referral Mediation

1. Meeting the Informational Needs of Settlement

a. How Referral Mediation Can Work

Non-judicial mediators can contribute to convergent expectations if their evaluations are credible.53 The mediator assesses the case in light of his or her experience and frankly shares that assessment.54 For this reason, non-judicial mediation programs routinely employ only very experienced lawyers as mediators.55 For example, in con-

52. By causing the court system to use scarce resources to bring them together, when behaving themselves would obviate the need to use resources in this way, lawyers are imposing needless costs on the court system. One suggestion has been to fund these services by special fees. See Stephen B. Goldberg et al., ADR Problems and Prospects: Looking to the Future, 69 JUDICATURE 291, 297 (1986) ("Texas, meanwhile, has developed a novel path for raising public funds for alternative dispute resolution; it has authorized counties to add a surcharge to the civil filing fee, with the accumulated funds to be used to fund alternative programs.").
53. See, e.g., the comments of one lawyer regarding credibility, in Brazil, supra note 34, at 83. See also Kelly, supra note 15, at 134 ("The secret to successful mediation is that litigants are heard and advised by one whose judgment they all respect.").
55. See, e.g., John C. Coughenour, Volunteer Attorney Mediation in Washington, in ADR AND THE COURTS, supra note 15, at 119, 121 (stating that W.D. Wash. requires substantial litigation practice, a current member of the bar of the W.D. Wash., and a member of the bar of any federal district court for at least seven years). See also Middle District of Florida Local Rule 9.02(c); William D. Underwood, Divergence In The Age of Cost and Delay Reduction: The Texas Experience With Federal Civil Justice Reform, 25 TEX. TECH. L. REV. 261, 318 (stating that
nection with the early neutral evaluation program in the Northern District of California (a special form of mediation used soon after a suit is filed), one commentator noted:

For the pilot program, the evaluators were handpicked by the court. They are all locally well-regarded litigators, with 10-20 years of litigation experience. The evaluators also almost always possessed great subject matter expertise. These factors enhanced the quality of the evaluations and their credibility for the participants. The parties and the lawyers seemed more willing to listen and consider the evaluation of people with well-established reputations and expertise.56

The wise senior lawyer, as mediator, can help the inexperienced litigator value his or her case by bringing experience to the bargaining table. That experience can guide the lawyers to realistic expectations about the outcome of the case and can result in settlement where none was possible before.

b. How Referral Mediation Can Fail: False Convergence

The risk with referral mediation is not that the mediator will fail to bring the parties to agree upon the likely outcome of the case but rather that the mediator may be too good at doing so. A mediator determined to settle a case may manipulate the settlement process to see that cases settle regardless of the fairness of the result.57 A settlement is unfair to the extent that it is based upon factors other than the underlying rights and obligations of the parties.58 Referral mediators are in a position to settle cases without regard to those underlying rights, and they have incentive to do so. Both of these facts should cause attorneys to hesitate to overcome the barriers to settlement with such a system.

i. How False Convergence Happens

As we have seen, one reason mediation is necessary is to overcome the inexperience of counsel that makes them unable to form reliable expectations about the likely outcome of the case. That same inexperience, however, makes the lawyers vulnerable. The litigator is in no position to judge for himself or herself the reliability of the information that the mediator is providing. The mediator may sense which

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57. Goldberg et al., supra note 52, at 295 (raising the question whether there is "a danger that in our preoccupation with finding the appropriate dispute resolution process, we will lose sight of the need for fair outcomes").
58. See Longan, supra note 1, at 684-85. See also Maurice Rosenberg, The Federal Civil Rules After Half a Century, 36 Ms. L. Rev. 243, 245 (1984)(stating that "just determination" under FED. R. CIV. P. 1 "is one that responds to the merits of the case and strives to uphold the side that has the support of the facts and the law").
lawyer is more susceptible to manipulation and take advantage of that fact in order to achieve a settlement, regardless of the parties' underlying rights and obligations.69

Evidence of lawyers' susceptibility to manipulation comes from the Civil Appeals Management Plan (CAMP) of the United States Court of Appeals for the Second Circuit. Since 1974, the Second Circuit has employed staff counsel whose job it is to settle cases or at least narrow the issues for the court.60 Several lawyers surveyed regarding CAMP expressed the concern that "inexperienced advocates . . . 'might take as 'gospel' staff counsel's analysis of the chances for success in the Second Circuit.'"61 Two of the comments are instructive:

Staff counsel purported to speak knowledgeably on how the court was likely to rule on the claims in an effort to pressure a withdrawal of the appeal. This was confusing, at best, to a first time participant concerning the authority of staff counsel and his representations on how the merits would be treated by the court. If staff counsel were inclined to solicit the NLRB attorney's candid appraisal of the case prior to the conference, those attorneys might be spared the uncomfortable experience—reported by many—of watching the other side browbeaten into abandoning a respectable—sometimes possibly a winning—position.62

The inexperienced lawyer, the one most in need of guidance from the mediator, is the most vulnerable.

The risk of manipulation is especially great because most mediators use a "caucus" method in which they meet with each side outside the presence of the others.63 A mediator who is determined to settle the case may simply evaluate the case differently for each party, hoping to make at least one side significantly less optimistic. The case will settle if that process is successful, albeit without regard to whose case truly is weaker. One study of mediator behavior described this process of "trashing" each side's case:

[Plaintiff's lawyer:] The mediator will tell you how bad your case is . . . try to point out the shortcomings of the case to the parties and try to get the plaintiff to be realistic. They point out that juries aren't coming back with a lot of money anymore on these types of cases. They ask you tough questions to get you to see that you might have a liability problem or the doctor says you don't


60. See generally ANTHONY PARTRIDGE & ALLAN LIND, A REEVALUATION OF THE CIVIL APPEALS MANAGEMENT PLAN (1983)(describing and analyzing the effect of CAMP); Kaufman, supra note 9, at 10-12.

61. PARTRIDGE & LIND, supra note 60, at 66. It is important to note that this type of response to the survey was the exception rather than the rule. Id. at 67. The point for present purposes is that a full-time settler of cases has the incentive to manipulates the process and at least some participants in the CAMP process detected such manipulation.

62. Id. at 66.

have a permanent injury so you may get nothing. They will try to get you to take a hard look at the deficiencies in your case. . . . [Defense lawyer:] He'll then work through the case with us, pointing out outstanding medicals, lost wages and other special damages, then tallying them up and a certain percentage of pain and suffering and come up with a figure. And then they may discuss the strength of the case. I've had mediators say things to me in the caucus such as, "I was impressed by the plaintiff; I think they're going to be believable. Have you factored that into your evaluation of the case"?64

Another study concluded that mediators who use caucuses do emphasize different things to each side.65 If the mediator is trashing both sides, he or she is not working to overcome the inexperience of counsel by providing an experienced perspective, but rather playing on that inexperience and the timidity that comes with it to achieve a settlement, any settlement. The side with the more resolve, which is probably the side with the more experienced and more expensive lawyer, emerges with the more favorable settlement.

Such behavior is not in the interest of justice because it settles cases without regard to rights of the parties. Settlement processes must be judged by whether their results are just.66 One proposed solution is to impose upon mediators a code of conduct, but many mediators do not operate under such a code.67 Only Florida has a code with provisions for its enforcement.68 One federal district court recently attempted to deal with the ethical problems of referral mediation by requiring mediators to take the same oath that justices and judges take.69 The available evidence, however, indicates that even the few codes of conduct in effect are not helpful in controlling the

65. Katz, supra note 26, at 325.
66. See Hogan, supra note 16, at 437. See also CRAVER, supra note 41, at 306 (arguing that the judicial system must bear the responsibility if it assists in creating unfair, one-sided settlements).
67. Robert A. Baruch Bush, Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation, 41 FLA. L. REV. 253, 255 (1989). For a comprehensive bibliography regarding ethical problems in mediation and a list of jurisdictions that have attempted to impose specific ethical obligations on mediators, see Robert B. Moberly, Ethical Standards For Court-Appointed Mediators and Florida's Mandatory Mediation Experiment, 21 FLA. ST. U. L. REV. 701, 704 n.n.15, 16, & 17 (1994).
68. Moberly, supra note 67, at 719.

The oath is:
I, __________ do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as __________ under the Constitution and laws of the United States. So help me God.
mediators' behavior. Indeed, it is hard to imagine how they could when the behavior about which we are worried occurs in private, off-the-record conversations with people who are not in a position to know they are being manipulated. The problem is a systemic one for referral mediation, and it arises in part because of the way referral mediators are compensated.

ii. Why False Convergence Occurs

The mediator's incentive to manipulate the lawyers is financial, and it exists regardless of whether the mediation is "in-house" or by external referral. Although some referral programs rely on volunteers, many private mediators who participate in referral mediation programs are compensated for their time and effort. Lawyers are increasingly making mediation a part of their practice. Judge Harry T. Edwards has observed that "some people have joined the ADR bandwagon... because they see it as a fast (and sometimes interesting) way to make a buck" and that "[t]here are now a number of self-proclaimed ADR 'experts,' with business cards in hand and consulting firms in the yellow pages." The few institutional mediation programs compensate their full-time mediators.

In either situation, the mediator's financial incentive is to settle cases. Although the mediator does not operate on a contingent fee, the private mediator who mediates to make money relies on repeat business. The institutional mediator needs to justify the expense of his or her office. Because the judges who make the referrals are usually interested in dispositions, the mediator's incentive is to have a high "batting average" for cases settled. That batting average will justify

71. See Brazil et al., supra note 45, at 284 (describing fixed, per case fee for evaluators in early neutral evaluation program). See also PROVINE, supra note 15, at 54 (describing how several districts handle the cost of settlement activities).
72. Goldberg et al., supra note 52, at 297.
74. Kelly, supra note 15, at 135 ("Given an established pattern of successes, in time these attorneys will be sought for their skills.").
75. Bush, supra note 67, at 260 (describing the focus on mediators' "settlement rates"). See also Susan A. Fitzgibbon, Appellate Settlement Programs: A Case Study, 1993 J. DISP. RESOL. 57, 82 (observing that abuses can stem from mediators' perception that the success of a mediation program depends upon the number of cases settled); ADR IN D.C. CIRCUIT SHOWS PROMISE, THIRD BRANCH (Admin. Off. of the U.S. Cts., Wash., D.C.) Mar. 1990, at 1 (measuring success of mediation program by high settlement rate).
the repeat business or the budget required by the mediator. Indeed, it is hard to imagine by what other criterion they would be evaluated. The judge or the court administrator is not likely to take an independent look at the underlying fairness of each settlement achieved. They will rely on the convenient assumption that the result must be fair because the parties agreed to it, in turn ignoring the one reason why mediation is necessary: the parties through their inexperienced lawyers are incapable of judging what is fair.

Professor Robert Baruch Bush has summarized this fear eloquently as follows:

If we adopt the efficiency conception, under which the mediator’s primary role is to simply reach agreements as expeditiously as possible, the effect is to create a role devoid of any clear ethical constraints on mediator behavior. Mediators become little more than case-movers; the only performance standards are their agreement rates and time/cost figures. Such a conception creates perverse incentives; it opens the door to, and indeed encourages, manipulative and coercive mediator behavior, especially in a process unconstrained by procedural or substantive rules or fear of publicity. Mediation becomes the “forced march to settlement” that many of its critics have rightly decried. One might expect two possible outcomes from the adoption of such a role for the mediator: disputants with any presence of mind simply will balk, rendering the process useless; or disputants with less presence of mind will be intimidated, rendering the process abusive.

The incentives are to see that cases settle on any terms, without regard to the fairness of the particular terms. Referral mediation must be judged with this fundamental flaw in mind.

2. Meeting Procedural Needs With Referral Mediation

a. How It Works

Referral mediators can help to a limited extent with the procedural obstacles to settlement. Referral mediation can help to achieve a catharsis first by involving the parties directly in the settlement process. The parties will feel unburdened because they have the chance to tell their story to a neutral figure. A distinguished private mediator may also be able to convince the stubborn client of the realities of the case, and the prospect of such a conversation may persuade the

76. Goldberg et al., supra note 52, at 298 (citing Jay Folberg and Allison Taylor, Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation 244 (1984)) (“[T]he quality of services cannot easily be judged by the results obtained . . . .”).
77. Bush, supra note 67, at 264.
78. Id. at 261 (“A mediator focusing on reaching agreements, and doing so expeditiously, will inevitably be insensitive to protection of rights.”).
79. Id. at 267. See also Menkel-Meadow, supra note 38, at 6; Menkel-Meadow, supra note 13, at 504-05 (“[S]ettlement offers a different substantive process by allowing participation by the different parties as well as by the lawyers.”).
80. Brazil et al., supra note 45, at 283. See Peckham et al., supra note 40, at 175.
reluctant lawyer to come clean on the likely outcome of the case. This is one reason why the personal presence of the client at the mediation session is crucial. Private mediation also provides a forum where combative lawyers must meet and talk settlement in the presence of a third party. The procedural problem with referral mediation, however, is not that it cannot work but that it is inferior in every respect to judicial mediation.

b. Why Referral Mediation Is Inferior Procedurally

The problem with the referral mediator is that he or she is just another lawyer. The parties already have a lawyer, and they need someone with more legitimacy, while the lawyers need someone with more authority to overcome the procedural obstacles to settlement. A judge will better serve the parties' needs. A catharsis will occur much more often when a judicial officer is involved. One magistrate judge who has presided over hundreds of settlement conferences described the cathartic effect of the judge's presence:

Having a judge listen and show understanding for the litigant's concerns, without passing judgment, is often more important than adding an extra twenty percent to the settlement figure. A judge can make a valuable contribution to the parties' negotiation process by allowing the clients time to express their views and feelings.

Judges are better mediators because litigants can express themselves to someone who embodies "the prestige and power of the judicial system." The deflation effect is also easier to achieve with a

81. See Kelly, supra note 15, at 136, 147 (stating that the secret is to get the clients to "come to grips" with the situation). See also Fed. R. Civ. P. 16(c)(16)("If appropriate, the court may require that a party or its representative be present . . . in order to consider possible settlement of the dispute."); G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989)(en banc) (affirming sanctioning of corporation for failure to send representative to settlement conference); In re LaMarre, 494 F.2d 753 (6th Cir. 1974); In re Air Crash Disaster at Stapleton Int'l Airport, 720 F. Supp. 1433 (D. Colo. 1988); Lockhart v. Patel, 115 F.R.D. 44 (E.D. Ky. 1987).

82. See Posner, supra note 10, at 392 ("The client may wonder why he is hiring a lawyer to argue before another lawyer, rather than hiring the second lawyer directly to receive authoritative legal advice."). See also Katz, supra note 26, at 330 (explaining that non-judicial settlement in L'Ambiance Plaza cases failed because mediator lacked the necessary "status and authority").

83. One district's expense and delay reduction plan under the Civil Justice Reform Act attempts to give referral mediators this stature by calling them "adjunct settlement judges." United States District Court, W.D. Pa., Delay and Expense Reduction Plan, 1993 WL 385784*21 (Oct. 1, 1993). Under the Civil Appeals Management Plan of the United States Court of Appeal for the Second Circuit, the in-house mediators did not, at first, dispel lawyers' mistaken impressions that they should be addressed as, "your Honor." Jerry Goldman, Ineffective Justice 30 (1980).


85. Katz, supra note 26, at 307. As one magistrate explained:
Clients believe judges more than lawyers and are more likely to be persuaded by hearing how a judge views their case than by hearing how another lawyer views it. The lawyers who need to level with their clients are much more likely to do so ahead of time if they know that the rosy expectations they have created are about to be punctured by the judge. The lawyer will not want either the client's wrath or the judge's disdain and, instead, will give reliable information about the case. A mediation session with a judge also gives the lawyer authoritative ammunition with which to persuade a recalcitrant client that settlement is the best course. One judge has reported that his practice of telling the lawyers what the case is worth and telling them to tell the clients that he said so was popular with counsel because "[t]hey want to be able to go back to their clients and have some of the load taken off their shoulders. They say, 'This is what I think, but the judge says this.'"

The mediation session is also an opportunity for the judge to attempt to overcome hostility between lawyers. In attempts to create

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[A judge] can permit parties . . . to vent their spleen to her in private sessions, thus offering catharsis without carnage. More broadly, [the judge] can, in effect, give the litigants their day in court, i.e., a chance to tell their side of the story and to release their frustrations to a representative of the judicial branch. Such a "day in court" may be the only thing a litigant needs to be sufficiently "emotionally cleared" to begin constructive settlement negotiations.

_BRAZIL, supra_ note 16, at 95-96.

86. _BRAZIL, supra_ note 16, at 98.

87. One of the things the judge can do in this [settlement] conference is give the lawyer something to take back to his client. After this pretrial conference, when the client asks about settlement, he wants to know what the judge said. It gives the lawyer something to tell his client about what the judge said.

_WILL ET AL., supra_ note 13, at 21 (remarks of Judge Rubin). _See also_ Fitzgibbon, _supra_ note 75, at 81 ("In addition, an attorney who has overestimated the chance for success on appeal or the risk of retrial may be better able to 'save face' in suggesting a settlement to the client if it comes with the recommendation of an active member of the court.'").

88. J. Skelly Wright, _The Pretrial Conference_, 28 F.R.D. 141, 145 (1977). _See also_ Kristena A. LaMar, _Pre-Trial Settlement Conferences in Multnomah County_, 27 _WILLIAMette L. Rev._ 549, 557 (1991)(stating that judges can help by giving their "seal of approval" to what lawyer has been saying).

89. Judges have recognized this role for settlement conferences for some time. _See WILL ET AL., supra_ note 13, at 19.

It's important that you do several things at the pretrial conference. One is to create an atmosphere where settlement can be discussed. One of the impediments to settlement may have been some rancor between counsel, some inability to communicate. There is some need by each lawyer to enlist the judge's sympathy. They want a chance to tell their story.

_Id._ (remarks of Judge Will). _See also_ Levine, _supra_ note 56, at 238 (observing that early neutral evaluation session was able to change the tone of case to a "civilized" one).
a cooperative, working climate, some judges have arranged for lunch with the lawyers and their clients and invited them to social evenings together.\(^9\) Another attempts to overcome the "intractable belligerence" of counsel by holding conferences in a local coffee shop or while strolling together in a local park.\(^9\) If such tactics are not effective, the judicial mediator is also much more likely to adjust the attitude of combative trial lawyers. The presence of the judge improves the civility of lawyers and can keep them talking.\(^9\) With a judicial officer, they know they are dealing with someone who has the authority to enforce, and will enforce, appropriate standards of professional conduct.\(^9\) No longer is the lawyer free to misbehave, secure in the knowledge that the judge is not watching. The judge is there.\(^9\) Furthermore, the lawyer will be constrained by the likelihood that he or she will have repeated interactions with the judge. In an urban trial practice today, one can alienate other lawyers with little fear of retaliation in future cases. This is not so with the judge. Civility becomes the order of the day, and settlement is more likely.

Thus, referral mediation is not a full solution to either the informational or the procedural needs of the parties and lawyers. The fear of manipulation and the lack of legitimacy and authority in a non-judicial mediator both must raise doubts about the efficacy of this process. A judicial officer, without the financial incentive to manipulate parties and with the legitimacy and authority of office, is needed. The question is who that judicial officer should be.

\section{Trial Judge Mediation}

The first judicial option is to have the district judge mediate his or her own cases. The discussion of settlement as part of the Rule 16 pretrial conference is the most frequently used form of mediation in the federal courts.\(^9\) It overcomes many of the problems of referral mediation but creates others. It is better than referral mediation, but it is not the answer.

\begin{thebibliography}{99}
\bibitem{will} WILL \textit{et al.}, \textit{supra} note 13, at 11, 23-24.
\bibitem{conn} CONN, \textit{supra} note 33, at 7.
\bibitem{brazil} BRAZIL, \textit{supra} note 34, at 46.
\bibitem{dondi} See, \textit{e.g.}, Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284 (N.D. Tex. 1988)(en banc and per curiam)(adopting professionalism standards pursuant to the inherent power of the court).
\bibitem{brazil1} BRAZIL, \textit{supra} note 16, at 96 ("The presence of a judicial officer is especially likely to\textsuperscript{9} control bullying tactics.").
\end{thebibliography}
1. Meeting the Informational Needs of Settlement

a. Why Judges Are Better Than Lawyers

Experienced lawyers can help settle cases, but experienced judges enjoy a special ability and credibility in assessing cases and therefore have a unique ability to bring the parties' expectations together. Many have processed thousands of cases and thus their view on the value of a case is entitled to, and will receive, extra respect. Especially today, in an era of few civil trials, the trial judge will have more experience with the results of trial than even the most experienced lawyer. Their evaluations of a case are likely to be quite accurate. They have no financial incentive to manipulate those predictions, and lawyers rightly believe that the involvement of a judge makes a fair settlement more likely.

The trial judge is also more likely to bring the parties' expectations together because the judge's evaluation has more credibility than that of a non-judicial mediator. That credibility arises both from the reputation of the individual judge and the status of the judge's office. As one retired judge-mediator in Florida told a researcher, "If you're a retired judge you bring much more prestige to the mediation table than just an attorney because the people look at this attorney and say, 'I have an attorney; what do I need this guy for?' A judge they listen to."

b. Why It Is Worrisome: The Potential for Coercion

The trial judge, however, can bring the parties together for reasons other than the judge's expertise in assessing cases. The judge can coerce as well as inform. Although judges, unlike referral mediators, have no financial incentive to coerce settlement, they have other reasons to do so. They have too much to do. They face peer pressure among their fellow judges to keep their docket moving and to keep

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96. Brazil, supra note 34, at 2 (reporting that a majority of lawyers surveyed believe the judges' status and perspective give a "special potential" for assisting in settlement).

97. Brazil, supra note 16, at 97-98.

98. Brazil, supra note 34, at 57.

99. Hogan, supra note 16, at 452 ("The credibility that the parties place in a negotiation process supervised by a judge can at times be a direct function of the confidence they have in the person leading the process."). See also Brazil, supra note 34, at 45 ("Good judges become skillful at cutting through verbal and emotional camouflage to identify pivotal issues, at ferreting out key evidence, assessing credibility, and analyzing strengths and weaknesses of arguments.").

100. Katz, supra note 26, at 329-30 ("Any judge has, by virtue of the office, considerable persuasive powers.").

101. Alfini, supra note 64, at 69. See also LaMar, supra note 88, at 557.

their dispositions high.\textsuperscript{103} The fear of coercion is what leads lawyers overwhelmingly to prefer a judge other than the judge who will preside over the trial if a settlement conference is to occur.\textsuperscript{104}

Some judges succumb to the pressure to coerce settlements, although detection of such activity in chambers is difficult.\textsuperscript{105} One survey of trial judges revealed that one-tenth of those surveyed described their typical practice as "interven[ing] aggressively through the use of direct pressure."\textsuperscript{106} For example, Judge Weinstein of the Southern District of New York had enormous success in settling the Agent Orange litigation, but his tactics were considered coercive by some.\textsuperscript{107} Another judge took the direct approach and sanctioned a party for refusing to settle,\textsuperscript{108} despite the fact that the law is clear that parties cannot and should not be forced to settle against their will.\textsuperscript{109} The exasperation of the overworked trial judge with the positions parties take can and does lead to inappropriate pressure.\textsuperscript{110}

\begin{footnotesize}
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\item \textsuperscript{103} Braza, supra note 16, at 107 (discussing judges' incentives to settle cases). See also Daisy Hurst Floyd, Can The Judge Do That?—The Need For A Clearer Judicial Role In Settlement, 26 Ariz. St. L.J. 45, 85 (1994) (discussing daily pressures on judges to keep their dockets moving).
\item \textsuperscript{104} See Braza, supra note 34, at 67.
\item \textsuperscript{105} James A. Wall, Jr. & Lawrence F. Schiller, Judicial Involvement in Pre-Trial Settlement: A Judge is not a Bump on a Log, 6 Am. J. Trial Advoc. 27, 32-33 (1982) (citing examples). See also Katz, supra note 26, at 305 (quoting one judge-mediator: "I don't want to hear any law, any facts, any theories of liability. I just want to know how much you are going to pay.").
\item \textsuperscript{106} Alschuler, supra note 11, at 1829 (quoting J. Ryan et al., American Trial Judges: Their Work Styles and Performances 177 (1980)).
\item \textsuperscript{107} Peter H. Schuck, The Role of Judges in Settling Complex Cases: The Agent Orange Example, 53 U. Chi. L. Rev. 337, 360-61 (1986).
\item \textsuperscript{108} Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985).
\item \textsuperscript{109} G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 653 (7th Cir. 1989)(en banc) (quoting Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985)).
\item \textsuperscript{110} In G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989)(en banc), Judge Coffey in dissent described the statement of one district judge who had no hesitation about exercising his authority to resolve a matter:

I will tell you now that I am through with the Department of Labor's waltzing around, taking ridiculous positions, and saying that this is the Government. The Government is the Secretary of Labor, so far as I am concerned. And I want to see him at 10:00 o'clock on the 23rd of April in this courtroom to tell me why the Secretary of Labor is taking these idiotic positions.

Id. at 661. The former Chief Judge of the United States Court of Appeals for the Fourth Circuit, Harris L. Winter, expressed his fears on this point as follows:

I think that a judge should confine himself to a very limited role in seeking settlements. Perhaps I am a bit gun-shy from my experience over the years. As a practicing lawyer I had some bad experiences, and resented greatly what I considered to be improper pressure from a judge to settle a case. I know that some judges have a reputation among the bar as improperly pressing for settlements and in some instances, I regret to say, I think the reputation is well deserved. . . . My experience [with judges exerting pressure to settle] has been that it is not just a "little"
A trial judge determined to settle a case has enormous power to coerce a settlement. The court can threaten to remove a case from the trial docket. The court can instill in the parties a fear of retaliation which makes a trial an unappealing alternative to almost any settlement. The court can create that fear by intimating how the court will rule on particular matters such as admissibility of crucial evidence, choice of law, or immunity. The judge can play on the fears of the lawyers who have other cases to come before that judge and fear alienating the court. A judge simply has countless ways to use his or her discretion to nudge a reluctant party toward making a deal.

The possibility of coercion by the trial judge, like the possibility of manipulation by the referral mediator, means that cases may settle on terms and for reasons other than the underlying justice of the dispute. Such settlements are unacceptable. The parties need to obtain the information about the value of the case from someone without the incentive to manipulate or the power to coerce them.
2. The Procedural Problems of Trial Judge Mediation

As discussed above, judicial mediation is much preferable to referral mediation as a procedural matter. The parties' needs for a catharsis and deflation, and the lawyers' needs for an authoritative third party, are better served when a judge is involved. There are significant problems, however, with the process of trial judge mediation. In addition to the obvious problem that a truly vindictive judge may tilt the scales of justice against a party who refuses to settle, there are two other problems: preconceptions of the merits of a case and disclosure to the court of information that is irrelevant to the trial.

a. Premature Decisionmaking

Settlement discussions will involve the disclosure of information about the merits of the case and the information that will be presented at trial. Although necessary, this disclosure will not be in the full glory of adversarial trial. The lawyers will summarize evidence but not be permitted to cross-examine witnesses during a mediation. The trial judge who participates in mediation may, indeed must, form judgments about the case and how it should come out and share those with the lawyers. Although one would hope that those judgments are reliable, they cannot be permitted to become self-fulfilling. The judge may become psychologically committed to one view of the case—the view he or she expresses in the privacy of chambers during the court-sponsored mediation—and be unable to shake that conception even in the face of evidence to the contrary.

117. See supra section II.A., regarding the necessity of predicting the outcome if settlement is to occur.

118. See WILL ET AL., supra note 13, at 9 ("I don't make assumptions out of the blue. I make assumptions on representations of counsel as to what they think the evidence will be.")(remarks of Judge Will).

119. Judge Merhige's policy is to avoid talking about numbers in order to avoid prejudicing his rulings later. Id. at 13. The problem is that the judge cannot give any guidance, cannot help the lawyers come to convergent expectations, without talking about numbers. Judge Merhige's approach preserves impartiality at the cost of effectiveness.

120. If even the judge's assessments are not reliable, then it is hard to imagine how any mediation could help overcome the informational obstacles to settlement. The parties could not rely on the judge's assessments and would not do so. They would be as much in the dark as before.

121. See Alschuler, supra note 11, at 1835 ("Without affording the parties a full opportunity to be heard, a 'managerial' judge may, in effect, decide a case and encourage settlement on terms that correspond to his barely provisional views."). Judge Merhige described his attempt to avoid this type of commitment as follows: You're not making any ruling. I tell them that a judge, speaking for myself, is like the third baseball umpire. The first baseball umpire said, "I call them as I see them." The second baseball umpire said, "Not me, I call them as they are." The third umpire said, "They ain't nothing until I call them."
One district judge, in describing a hypothetical case, "quoted" himself as suggesting to a plaintiff in a settlement conference that a jury verdict in the amount sought might require a remittitur or new trial. That is precisely the kind of information necessary for the predictive settlement conference to work: the lawyer has received some valuable information from a reliable source about the likely damages in the case. However, if the case does not settle, can the judge objectively evaluate after hearing all the evidence whether a total victory for the plaintiff should be reduced or set aside? The risk that the judge will be wedded to his or her preconception, or feel compelled to carry out the implied threat of a new trial in order not to be perceived as weak, is real. Even if this judge waited to make up his or her mind, the appearance of impartiality may have been compromised. Yet a motion to recuse on this basis will fail. Someone other than the judge who will preside over trial needs to conduct the mediation.

b. Reluctance to Share Crucial Information

Another problem with the use of the trial judge to perform the mediation is that mediation requires the parties to negotiate and exchange information. Often, information relevant to settlement is irrelevant to adjudication, and parties justifiably fear that revelations that might help settlement will taint a later trial if mediation is unsuccessful. Precisely this concern excludes from evidence at trial statements made in the course of settlement. Parties may not be candid with the trial judge in a settlement conference. To permit the judge who will officiate at trial to conduct the mediation risks either unproductive negotiations because the parties withhold their

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122. WILL ET AL., supra note 13, at 12.
123. See also Harry M. Fisher, "Judicial Mediation: How It Works Through Pre-Trial Conference," 10 U. Chi. L. Rev. 453, 455 (1944) ("Lawyers would feel, rightfully so, that no judge could successfully detach himself from the information absorbed during the conference or escape forming views on the merits of the case which might unconsciously color his rulings at trial.").
125. Menkel-Meadow, supra note 13, at 511. See also Judith Resnik, "Managerial Judges," 96 Harv. L. Rev. 374, 408-09 (1982) (describing how judges who involve themselves at the pretrial stage in "managing" cases may learn much more about the parties and the dispute than would be acceptable at trial).
126. Fed. R. Evid. 408.
true interests or a tainted trial process because the judge knows information he or she should not, or both.\textsuperscript{128}

In summary, trial judges are better situated than referral mediators to overcome the informational and procedural obstacles of settlement. Yet using the trial judge as a settlement officer creates additional risks of coercion and of a tainted process not present when the mediator is uninvolved in the trial if settlement does not occur. The ideal settlement officer would combine the expertise, legitimacy, and authority of the trial judge with the distance of the referral mediator. The magistrate's position is evolving in ways that make that combination possible.

C. Magistrate Mediation

1. Informational Role: Credible Convergence Without Coercion

As discussed in Part II, the informational role of the mediator is to bring the parties to convergent expectations about the outcome of the case because most lawyers do not have, and cannot get, the kind of trial experience necessary to give reliable predictions. Because they try more cases than any lawyer could and enjoy special credibility that makes their predictions more likely to be believed, judges are better than referral mediators at overcoming informational obstacles. Magistrates are emerging as effective mediators in part because their experience, and the lawyers' and parties' perceptions, are giving them the expertise and the credibility they need to be effective. Furthermore, their unique position as neither a referral mediator in need of repeat business nor the trial judge in need of an additional disposition lessens the fears of manipulation or coercion of the parties.

a. Changes in the Magistrate's Role and Experience

The Federal Magistrates Act of 1968 left largely undefined what duties the magistrates could undertake.\textsuperscript{129} Their duties were defined by the district judges in each district, resulting in differing authority

\textsuperscript{128} Professor Menkel-Meadow has noted:

[I]f settlement processes are to be conducted within the courts, they should be facilitated by those who will not be the ultimate triers of fact. Because I believe that good settlement practice frequently depends on the revelation of facts that would be inadmissible in court, the facilitator of settlement cannot be the same person who will ultimately find facts or decide the outcome of the case. In some courts this will mean the use of magistrates, and in others it will mean rotating judges through cases on other dockets.

Menkel-Meadow, supra note 38, at 43.

from district to district. Some districts authorized magistrates to hold civil trials upon the consent of the parties. To remove any controversy about the practice, Congress amended the Magistrates Act in 1979. Today, magistrates have the undoubted authority to conduct complete civil trials upon consent of all parties.

Magistrates are trying more civil cases. Magistrates conducted 825 civil trials in 1982. In 1992, magistrates held 1368 consensual civil trials. From 1991 to 1992 alone, the number of civil jury trials conducted by magistrates increased by twenty-four percent while the number of civil non-jury trials increased twenty-two percent. The significance of these numbers is that magistrates are gaining precisely the type of experience that will enable them to help parties come to convergent expectations about the outcome of cases. As the magistrates try more cases, they gain greater insight into the likely impact of evidence, theories, and recovery on a judge or jury. They bring increasing expertise to the settlement conference.

Recent legislation may accelerate the trend. Before 1990, neither the district judge nor the magistrate was permitted to tell the parties of their option to consent to trial before the magistrate. To prevent coercion, only the clerk of court could do so. Now, the district judge and magistrate may tell the parties of their option. If as a result more parties avail themselves of the magistrate as a trial judge, the


131. Smith, Lobbying and Reform, supra note 130, at 176.


133. The Magistrates Act provides that:

Upon the consent of the parties, a full-time United States Magistrate or a part-time United States Magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves.


135. Id.

136. Id.

137. Before the law was changed, it read:

[T]he clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate.
magistrates will be that much better able to assess the value of cases and accordingly that much better able to render useful assistance in mediation of other cases.

Those assessments will also improve because the office of magistrate is becoming more attractive to more qualified individuals. In 1981, magistrates earned seventy-six percent of what district judges made. In recent years, Congress has pegged magistrates salaries at ninety-two percent of the salary for an Article III judge. This tie to the Article III judiciary is an important step for magistrates as a demonstration of their importance to the judicial system. In addition, with recent changes in the compensation for Article III judges, magistrate compensation has increased to $120,000 per year. The increased compensation, and its tie to the Article III judiciary, will attract more experienced and qualified applicants. The combination of increased civil trial experience and better credentials is improving the ability of magistrates to help parties overcome the informational obstacles to settlement.

b. Changes in the Perception of the Magistrate

Even the best evaluation of a case will not affect settlement if it is not believed. Overcoming the informational obstacles to settlement requires that the parties place great faith in the mediator's assessment of the case. The perception of the magistrate as well as the reality, thus, is important. The evidence indicates that the perception of magistrates is improving and will continue to improve. The increased number of parties consenting to trial before the magistrate is itself some evidence of confidence in the magistrates' abilities. At least one of the Advisory Groups under the Civil Justice Reform Act noted the increasing awareness of lawyers and litigants of the abilities of magistrates, although the report lamented the speed with which that perception was spreading.


141. Frances E. McGovern, Use of Magistrates and Masters in Complex Litigation, in ADR AND THE COURTS, supra note 15, at 221, 223 (observing that magistrate mediation will be successful only if "the attorneys have great confidence in the ... magistrate's ability and fairness").

Another important recent development that will give the magistrates increased credibility has been the magistrates' successful effort to secure the title "Judge." The title had been given to magistrates in some districts for years but deliberately denied to magistrates in other districts. Magistrates feared that the term "magistrate" instead of judge was confusing and "invite[d] comparisons to odious experiences with 'magistrates' and justices of the peace in judicial systems of some states." Magistrates very much desired to have their status increased by the more customary and prestigious title, "Judge." After intense efforts, magistrates recently obtained the official title "Magistrate Judge." No longer can there be any doubt that magistrates are entitled to the important status of being called judge. Accordingly, their assessments of cases in settlement conferences will be given more weight. They are better equipped to help parties settle cases on fair terms.

143. See Smith, supra note 13, at 80-81 (describing the difference between how magistrates are addressed in one district and how they are addressed in another). The sensitivity of this issue is hard to overstate. As Professor Smith described in another piece:

At an annual training conference for magistrates from three federal circuits, one magistrate addressed his colleagues about the potential for obtaining litigants' consent for magistrate-supervised civil trials through the use of the title "judge." He concluded his remarks by shaking his head with an expression of sad disbelief, saying "there are still district judges out there who won't allow magistrates to be called 'judge.'" Whereupon a magistrate, from a district noted for its conflicts between judges and magistrates, yelled from the audience, "No kidding!" Although the magistrates at the conference laughed in commiseration with their colleague, the emphasis given to the subject by the speaker and the abrupt interjection by the magistrate in the audience indicated the heartfelt importance which title and other aspects of status have for subordinate judicial officers.


144. JUDICIAL CONFERENCE OF THE U.S., supra note 138, at 60, quoted in Smith, Lobbying and Reform, supra note 130, at 181.

145. Those efforts are the primary focus of Smith, Lobbying and Reform, supra note 130.


147. The chairman of the Judicial Conference Committee on the Administration of the Magistrate Judges System described the importance of the change in title as follows: "It may seem like a small thing, but I think that the statute conferring the title magistrate judge has been a very important step in both the maturation of the magistrate judge system and the way that magistrate judges are perceived by members of the community." Judge Wayne E. Alley: The Growing Role of the Magistrate Judge, THIRD BRANCH (Admin. Off. of the U.S. Cts., Wash., D.C.) Sept. 1992, at 10, 11.
c. Lack of Incentive to Manipulate or Coerce

Fears of manipulation and coercion are much less necessary with magistrates than with referral mediators and trial judges. The magistrate can help the parties' expectations to converge without encountering the problems of the referral or institutional mediator who relies upon a "batting average" of settled cases to justify repeat business or continued funding of institutionalized mediation. The magistrate is in a position to seek only just settlements. The magistrate has the security of a definite term of office—eight years for full-time magistrates—and so is not dependent for continued livelihood of a record of dispositions. Furthermore, to the extent that magistrates are subject to non-renewal at the end of their term, settlement is only one of many tasks performed by them and thus is unlikely to be a source of overwhelming pressure to settle cases at the cost of justice. The temptation to manipulate the settlement process to justify one's place in it is not as great when there is a definite term of office and other bases for defending one's place.

Furthermore, unlike the trial judge mediator, the magistrate will not be able to coerce settlements when the parties have not consented to trial before the magistrate. Magistrate mediation insulates the trial from the settlement discussions. The parties always have the resort of trial. The magistrate thus can feel free to become deeply involved in settlement in innovative ways. A survey of lawyers concluded, not surprisingly, that they believed that settlement conferences should be conducted by judges other than the trial judge, and their worries "about the propriety of judicial participation in settlement all but evaporates... when the judicial officer who hosts the

148. Hogan, supra note 16, at 437 (explaining that judges take oath of office that commits them to fairness). Professor Christopher Smith has expressed some doubt about this point after extensive observations of magistrates in action: While magistrates may conscientiously seek to encourage fair settlements, they also have an interest in the judicial system's goals of minimizing the number of cases that go to trial in order to save the system's resources. The fact that many magistrates view a successful case settlement as a "victory" indicates that they are not strictly impartial facilitators who are ambivalent about whether a litigant insists upon taking a case to trial.

Smith, supra note 13, at 164.

149. See Linda J. Silberman, Magistrates and Masters, Part I: The English Model, 50 N.Y.U. L. Rev. 1070 (1975) (discussing the English system of using masters to accomplish the same objective). The argument is one of analogy, since masters do not participate in settlement discussions in Great Britain. Id. at 1111 & n.70. See also Flanders, supra note 110, at 521 (making the same analogy).

150. Smith, supra note 13, at 130. It must be noted that Professor Smith found the potential for coercion even in these situations inappropriate. Id.
settlement conference is not the judge to whom the case has been assigned for trial."\textsuperscript{151}

Thus, of the three types of mediation, magistrate mediation is superior in overcoming the informational obstacles to settlement. Magistrates are gaining in experience and prestige. Magistrates bring their new-found ability and credibility to the table and will be better able to guide parties to realistic, convergent expectations. Furthermore, their evaluations will be believed. In addition, there is less fear of manipulation or coercion. There remains, however, the evaluation of the ability of magistrates to assist with the procedural obstacles to settlement.

2. Magistrate Mediation and Procedural Satisfaction

As discussed above, what parties need from the settlement process is a catharsis and a deflation. Magistrates are now in a better position than ever to provide both. The litigant who unburdens himself to the magistrate is talking not only to a disinterested third party but also to someone with the trappings and the title of judicial office. It is one thing for a party to tell her story to her lawyer or to another lawyer appointed or employed to mediate the case. It is quite another to walk into the chambers of a judicial officer with the title of judge and the accoutrements of office and tell that same story. The satisfaction of participating in the resolution of the dispute in this official and impressive setting is significantly different and much more likely to lead to settlement. The catharsis is dependent upon the party's perception of the legitimacy of the forum, and the magistrate, as judge, has become more legitimate. Deflation also is more likely. As discussed above, a client who is out of control may see reason if the bad news comes from a judge. A lawyer who is reluctant to deliver the bad news will know that he or she will have many other occasions to interact with the magistrate and thus will have an incentive to give realistic advice before the magistrate does so. The key is that the magistrate is a judicial officer and now is more likely to be perceived as one.

The increasing status of the magistrate also lends increasing authority to the mediation process.\textsuperscript{152} Magistrates are in an excellent position to control attorney incivility. First, the magistrates are prob-

\textsuperscript{151} Alschuler, \textit{supra} note 11, at 1849 n.172.

\textsuperscript{152} Professor Smith's research led him to this conclusion:

The magistrates recognize the value of high status. The title "Judge" creates a clear image in the minds of lawyers and parties about expected deference and appropriate formal behavior in the presence of an identifiable judicial officer. Magistrates have, in effect, a more authoritative voice when ruling on motions, \textit{guiding settlement negotiations}, and undertaking other judicial tasks within their authority as federal judicial officers.

\textit{Smith, supra} note 13, at 80-81 (emphasis added).
ably the judicial officers who are most likely to be familiar with the phenomenon, having fought in the trenches of discovery warfare for years. Second, such behavior is usually best controlled when a judicial officer is present to referee. One conference observed by Professor Christopher Smith began to degenerate when a lawyer sarcastically accused another lawyer of misrepresenting the facts of an earlier dispute. The magistrate scolded the attorney with the desired effect.\textsuperscript{153} The fact that the lawyers will have repeat business with the magistrate will also help keep them under control. In fact, they probably will have more frequent interaction with the magistrate than with the district judge and thus will have more incentive to appear reasonable in front of the magistrate.

Thus, magistrate mediation also has significant procedural advantages over other forms. It combines the legitimacy and authority of judicial office with the insulation of the non-judicial mediator. The magistrate is in a unique position to help parties overcome the obstacles to settlement without encountering the problems of referral mediation and trial judge mediation. But other factors, in addition to this unique position of the magistrate, are making magistrate mediation more necessary and more likely. These factors concern how the district judge should, and how the magistrate will, spend his or her time.

IV. THE USES OF JUDICIAL TIME

A. Trial Judges: Should They Spend Time in Mediation?

One solution to the problems of trial judge mediation is to have trial judges swap cases.\textsuperscript{154} Mediation under such a system has the virtues of judicial mediation without the baggage of coercion or a tainted process. There are other problems, however, and not all of them can be solved by a buddy system. The brutal fact of the matter is that federal trial judges do not have time to devote to assisting settle-

\textsuperscript{153} Id. at 100-01.

\textsuperscript{154} See, e.g., Provine, supra note 15, at 21 ("Some judges exchange cases with colleagues in order to avoid the possibility that the settlement judge will also try the case."). See also Will et al., supra note 13, at 24, in which Judge Merhige described this process as follows:

\begin{quote}
Instead of running a risk of being required to reassign the case, you can work with someone else on the court in a buddy system for talking settlement. We do that quite commonly on our court. Not all judges are equally good at it. Not all judges are equally willing to swap off. But if you find someone on your court who shares the same attitude that you have, it's a very useful device to be able to call a week before trial and say, "Joe, I've got this case. It's going to take three weeks to try, and I think some settlement discussions would be helpful and it's a nonjury case. Could you spare a couple of hours?"
\end{quote}

\textit{Id.}
ment negotiations at the level of detail required to do any good. Furthermore, at least some of the impediments to settlement have their roots in the size of the criminal docket and the resulting paucity of civil trials. Whatever time is left for the civil docket will be more profitably spent trying civil cases than settling them.

1. Trials and the Generation of Results

An experienced trial judge can settle cases by helping parties to make better predictions about how the case will come out. The reasons why parties need assistance in making those predictions, however, is that the lawyers are inexperienced and there are not enough cases being tried to give reliable guidance. The trial judge may do more for settlement by bypassing settlement conferences in favor of holding trials. Trial judges need to preside over trials to ensure that there are enough trial results to give negotiated settlements some basis in reality. Trial judges may also better spend their time deciding new legal questions that, when the opinion is published, will resolve numerous other disputes. If the problem is information, as it is in part, then the trial judge helps more by generating that information in a public trial or opinion than by whispering it to parties in settlement caucuses.

2. Trial Dates and the Generation of Settlements

Other problems with unassisted settlement include, as previously discussed, the lawyer who does not tell the client the truth about his or her chances at trial or who refuses to be civil to the opposing attor-

155. The need for the mediator to be immersed in the case is hard to overstate. To predict the outcome, the mediator will need to know the case thoroughly. To deflate clients credibly, the mediator will need to be able to recite chapter and verse to them about the weaknesses of their case. To achieve catharsis, the mediator must sit and listen for as long as it takes. All of these steps can take a significant amount of time. Professor Janet Cooper Alexander has written:

[A] settlement judge cannot serve as an effective evaluator or negotiator unless she is familiar with both the substantive law and the evidence in the case. This requires detailed preparation; indeed settlement conference briefs can be as lengthy as pretrial memoranda. Moreover, the effective settlement judge applies her own creative legal thinking to the case. She must figure out how the issues fit together, which ones are proving an obstacle to a negotiated resolution, and how to break the logjam. . . . [S]ettlement often requires intense, energetic work by the judge. She must schedule and run numerous meetings in which she cajoles, berates, reasons, and remonstrates with and just plain wears down lawyers, parties, and insurers.

Alexander, supra note 23, at 651.

156. Longan, supra note 1, at 682-95.

157. Resnik, supra note 125, at 422 (commenting on the difficulty of measuring the quality of judicial output because of the possibility that one disposition may resolve many other disputes).
ney. Nothing makes lawyers see their cases more clearly than the dawn of the first day of trial. The lawyer who has not been realistic with the client may prefer the abuse of the client to the humiliation of public defeat. That choice only becomes real when trial approaches. Similarly, the Mr. Hyde lawyer may become Dr. Jekyll when it becomes clear that the case may be decided by public trial rather than by deposition-room intimidation. Believable trial dates galvanize settlement.

It may be that "the best that judges can do to promote good settlements is to adjudicate as many cases as possible to make clear the alternative to consensual agreement." One trial judge who spent considerable time in settlement conferences concluded that the same results would have followed from setting a firm trial date. Many other judges and observers have reached much the same conclusion.

One prominent federal judge, the late Robert Peckham, concluded that judges who spend time on settlements are actually less productive than judges who keep their cases moving toward trial. Taking the trial judges out of settlement conferences will leave them more time to try cases. Once the word gets out that trial has become a more likely alternative, the lawyers and parties may find it easier to settle more cases without assistance. Trial is a better use of the district judge's time than settlement.

158. See Conn, supra note 33, at 13 ("Until lawyers feel the icy lump of anxiety in their bellies, they do not evaluate their cases in earnest.").

159. Menkel-Meadow, supra note 38, at 33 n.169. See also Roger Fisher & William Ury, Getting to Yes 101-11 (1981)(a standard text on negotiation strategy). Fisher and Ury emphasize that parties must evaluate their BATNA (the best alternative to a negotiated agreement) in formulating negotiation strategies. If the BATNA for a party to litigation is immediate trial on the merits, settlement may be much more likely. Id.

160. Helda R. Gage, How to Reduce the Docket, 23 Judges J. 12, 15 (1984). See also Craver, supra note 41, at 283 (arguing that settlement is much more likely if the case is moving "inexorably toward trial").

161. See Lacey, supra note 34, at 9-11 ("The routinely mailed notice [from the court] is important because it sets deadlines, including the greatest of all settlement inducements, the trial date."). See also Brookings Inst., Justice For All: Reducing Costs and Delay in Civil Litigation 17 (1989)(recommending that every federal district court be required to set early and firm trial dates for all non-complex cases); President's Council on Competitiveness, Agenda For Civil Justice Reform 7, 19 (Aug. 1991)(urging judges to set early trial dates and to allow delay only for compelling reasons); Will et al., supra note 13, at 17 (remarks of Judge Rubin)("There isn't any settlement device better than a firm trial date that the lawyers can't get continued.").

B. Magistrates: Do They Have Time for Mediation?

One of the most vigorous supporters of alternative dispute resolution in the federal courts has opposed using magistrates as mediators because of the burden of other activities such as pretrial disputes.\footnote{Peckham, supra note 162, at 274.} Magistrate mediation in at least one magistrate's experience has averaged two to three hours per case.\footnote{Provine, supra note 15, at 85.} That figure probably is conservative. There is room for hope, however, that magistrates may be able to make a significant contribution to mediation efforts because the primary source of docket pressure does not affect them as much as it affects district judges, and recent changes in the discovery rules have the potential of lifting some of the burden of discovery disputes from the magistrates' shoulders. Also, there may be some relief in sight from the flood of prisoner cases handled by magistrates.

1. Criminal Jurisdiction

The single biggest impediment to giving civil cases adequate attention is the criminal docket.\footnote{Longan, supra note 1, at 672-77.} The number of felony cases commenced in the district courts grew from 21,042 (with a total of 32,366 defendants) in 1982 to 34,119 (with a total of 53,260 defendants) in 1992.\footnote{1982 ANN. REP. OF THE DIRECTOR OF THE ADMIN. OFF. OF THE U.S. CTS., tbl. D-1 [hereinafter 1982 ANNUAL REPORT]; 1992 ANNUAL REPORT, supra note 14, at tbl. D-1.} The pressure of trying to give speedy trials to accused criminals is likely to increase. The crime bill recently signed by President Clinton creates nineteen new categories of federal felonies, from drive-by shootings to telemarketing fraud.\footnote{The Violent Crime Control and Law Enforcement Act of 1994, 55 Crim. Law Rep. (BNA) 2431 (1994).} The most time-consuming aspect of the criminal docket is the criminal trial, particularly the large, multi-defendant criminal trial.\footnote{For example, in fiscal 1992, there were 104 criminal cases that were in trial for 20 days or more. All together, they used 3811 days of federal trial time. 1992 ANNUAL REPORT, supra note 14, at 223-25, tbl. C-9. See also Criminal Trials Dominate District Courts' Workload, THIRD BRANCH (Admin. Off. of the U.S. Cts., Wash., D.C.) Sept. 1993, at 4-5 (noting that multi-defendant cases take roughly twice as long, per defendant, to try).} A major reason district judges cannot mediate significant numbers of civil cases effectively is simply that the criminal docket requires too much of their time.

Magistrates, however, do not bear as much of the burden of the criminal cases because they may not preside over felony trials.\footnote{Smith, supra note 13, at 26. See also United States v. Jenkins, 734 F.2d 1322 (9th Cir.), cert. denied, 469 U.S. 1217 (1985).} To be sure, the magistrates are affected indirectly because they do have a
limited criminal jurisdiction. Among the preliminary criminal matters handled by magistrates are search warrants, arrest warrants, summonses, initial appearances, preliminary examinations, grand jury sessions, and arraignments. In addition, under the Bail Reform Act, the magistrate has the responsibility for holding hearings and making findings regarding the eligibility of accused persons for bail. Magistrates also conduct pretrial conferences in criminal cases, decide some motions subject to appeal for abuse of discretion or error of law, and hear other motions and make findings of fact subject to de novo review. The magistrates’ lack of authority to try felony criminal cases, however, at least buffers them from the worst effects of the burgeoning criminal docket and potentially leaves them with more time to capitalize upon their unique position to mediate civil cases effectively.

2. **New Discovery Rules**

A primary role that magistrates have played for some time is to assist the district judges in presiding over pretrial matters in civil cases, such as discovery plans and disputes. A magistrate “may hear and determine any pretrial matter pending before the court” except certain designated (for the most part dispositive) motions. The parties have the right to appeal any such preliminary rulings, but they will be overturned by the district judge only upon a showing of abuse of discretion or error of law. This role is the primary role magistrates are playing in the processing of civil cases.

In 1988, magistrates disposed of 95,953 non-dispositive civil motions. It is no secret why. Civil discovery has grown more and more contentious, requiring more and more judicial time. This burden falls most heavily on the magistrates who under many districts’
local procedures have standing orders to handle discovery disputes.\textsuperscript{180} Pretrial supervision requires a significant amount of magistrates' time and will continue to do so as long as lawyers are prepared to squabble about discovery. By 1992, however, the number of civil non-dispositive motions handled by magistrates had fallen to 49,844, which was fewer than had been handled in the previous ten years.\textsuperscript{181} Many hope that recent procedural changes will accelerate this trend, and if they are right, magistrates may have significant additional time to devote to mediation of civil cases.

\textit{a. Mandatory Disclosure}

The number and ferocity of discovery disputes have been bemoaned for years.\textsuperscript{182} The dissatisfaction with the type of adversary discovery that leads to this number of discovery disputes has resulted in the adoption of an amendment to Rule 26 of the Federal Rules of Civil Procedure designed to foster cooperation and disclosure.\textsuperscript{183} Under new Rule 26(a), litigants will have to disclose automatically the names of witnesses, identities and locations of documents, computations of damages, and insurance agreements.\textsuperscript{184} The lawyers will be obligated to meet and discuss their disclosures and to plan for what additional discovery each will need.\textsuperscript{185} Later in the case, the parties will have to exchange extensive material regarding their experts,\textsuperscript{186} and court approval for expert depositions no longer will be necessary.\textsuperscript{187} All of these provisions are intended to make the pretrial process run more smoothly and with less judicial involvement.

Many people, including a majority of the United States House of Representatives and three members of the Supreme Court of the United States, do not believe that new Rule 26 will have the effect of

\textsuperscript{180} See Silberman, supra note 8, at 2140 (stating that magistrates have the highest degree of participation in civil cases in discovery). See also Judge Wayne E. Alley: The Growing Role of the Magistrate Judge, supra note 147 at 11 (describing the "heavy component of discovery disputes" on magistrates' dockets).

\textsuperscript{181} 1992 ANNUAL REPORT, supra note 14, at 83, tbl. 16.


\textsuperscript{183} FED. R. CIV. P. 26(a).

\textsuperscript{184} FED. R. CIV. P. 26(a)(1). The disclosure obligation is triggered with respect to any disputed matter that is alleged "with particularity." \textit{Id.}

\textsuperscript{185} FED. R. CIV. P. 26(f).

\textsuperscript{186} FED. R. CIV. P. 26(a)(2).

\textsuperscript{187} FED. R. CIV. P. 26(b)(4)(A).
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reducing the number or the ferocity of discovery disputes. Others, prominently among them a number of federal judges and the Director of the Federal Judicial Center (himself a Senior Judge), vociferously disagree. The split has carried into the individual districts, many of which have opted out of new Rule 26, at least temporarily. There is even some indication that Congress may step in and “roll back” the mandatory disclosure rule.

This is not the place to attempt to resolve this debate. But if the critics are wrong and the new rule does have a significant impact on the number of discovery disputes that require judicial intervention, the magistrates will have much more time to spend on their other duties. Their days will no longer be filled with motions to compel, motions for protective orders, and motions for sanctions. They may have time for more productive endeavors. The admittedly time-consuming task of mediating civil cases, to which magistrate judges can make a useful and significant contribution, should be a prime candidate for replacing the time previously devoted to discovery disputes that may be avoided through mandatory disclosure.

b. Depositions

Another potentially significant change is the amendment of Rule 30 of the Federal Rules of Civil Procedure. The new rule prohibits argumentative or suggestive objections in depositions and forbids instructions not to answer except in very limited situations. The new


190. As of January 25, 1994, 28 of the 94 districts had announced that they will operate under mandatory disclosure while 48 have opted out. 62 U.S.L.W. 2449 (Gen. Jan. 25, 1994).

191. Bryan J. Holzberg, Congress Adjourns Without Blocking Discovery Reform, Litig. News (A.B.A. Sec. on Litig.), Feb. 1994, at 11 (quoting Washington lawyer Loren Kieve saying: “Simply because Congress was unable to act in time shouldn’t mean that they won’t kill the bills on mandatory disclosure.”).

192. Fed. R. Civ. P. 30(d)(1) now states: Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may
rule also permits the court to sanction the responsible parties if the "court finds . . . an impediment, delay, or other conduct . . . has frustrated the fair examination of the deponent." 193 Disputes in depositions have been a major source of business for magistrates. 194 If the amendments to Rule 30 succeed in reducing the volume of that business, 195 then the magistrates will have that much more time to devote to other duties such as mediation.

Another rule change that may affect the number of deposition disputes that the magistrates must hear is the new limitation on the number of depositions to ten per party. 196 Also, by local rule, the districts may now establish presumptive time limits on the duration of depositions. 197 If these rule changes result in fewer depositions being taken, there will be fewer opportunities for even legitimate disputes to arise. 198 The magistrates will then have more time to mediate.

c. Discovery Conferences

Motions to compel discovery and motions for protective orders may no longer be filed without a certification from the lawyer filing the motion that he or she has attempted to resolve the discovery dispute without court action. 199 Numerous local rules have heretofore required such a conference, and the experience of those courts indicated that it helped to resolve discovery disputes through informal means. 200 Furthermore, any claims of privilege now must be accom-

instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion [to terminate or limit the examination].

Id.


195. See FED. R. Civ. P. 30 advisory committee's notes.
197. FED. R. Civ. P. 30(d)(2).
198. It is, of course, possible that these particular changes will result in significant increases in the number of discovery disputes that the magistrates must handle. Both the number and the duration of depositions are subject to being changed by order of the court to serve the particular needs of the case. FED. R. Civ. P. 30(a)(2)(A)(more than 10 depositions may be taken with leave of court), and 30 (d)(2)(the court shall allow more than the allotted time if "needed for the fair examination of the deponent" or if the other party has obstructed the deposition). By making limitations presumptive rather than absolute, the drafters of the rule promoted the ability of the court to tailor discovery to the individual case but at the cost possibly of encouraging more skirmishing in front of the magistrate.
199. FED. R. Civ. P. 26(c), 37(a)(2)(A)-(B), 37(d).
200. FED. R. Civ. P. 37 advisory committee's notes.
panied by a list of the privileged material in addition to the grounds for the alleged privilege. The hope is that such a list will forestall the motion to compel by showing that the privileges exist or at least become a basis for resolution of the dispute without judicial involvement. If these changes are effective, this will free the magistrate to seize the opportunity to spend more time settling civil cases.

3. Processing Prisoner Cases

Magistrates spend a significant amount of time handling routine civil cases such as prisoner petitions. Carroll Seron's study of magistrate activity characterized this as the "specialist" role. Whereas changes with respect to discovery may free the magistrates to spend more time in mediation, the trend with respect to prisoner cases threatens to do the opposite.

The numbers and the trend with respect to prisoner petitions are striking. The number of such matters handled by magistrates increased by forty-six percent from 1982 to 1992. Further, they rose by ten percent alone in fiscal year 1993. The number of prisoner petitions is growing dramatically and may well continue to do so, due in large part to the fact that the prison population in this country has grown so dramatically in the past eight years. The number of inmates in the United States has more than doubled since 1980 and now stands at more than one million. Magistrates, who are statutorily authorized to hear not only applications for posttrial relief by prisoners but also petitions challenging the conditions of confinement, must be particularly concerned that forty-three jurisdictions have prison systems that are under court orders to reduce overcrowding. Petitions from prisoners represent the fastest growing part of the magistrate's workload. Unless changes occur, magistrates may expect to be

201. FED. R. CIV. P. 26(b)(5).
203. Seron, supra note 133, at 356-57.
204. See, e.g., Tracey I. Levy, Comment, Mandatory Disclosure: A Methodology for Reducing The Burden of Pro Se Prisoner Litigation, 57 ALB. L. REV. 487, 503 (1993)(describing upsurge in prisoner cases). See also Silberman, supra note 8, at 2140 (noting increase in prisoner cases).
206. Sayler, supra note 4, at 1. Mr. Sayler, the Chair of the Section of Litigation of the American Bar Association, also notes that from 1985 to 1990, the states doubled their spending on prisons, to $13 billion, while the Federal Bureau of Prisons has doubled in size since 1986. Id.
207. Id.
handling increasing numbers of such petitions. All the status, ability, and experience in the world will not help magistrates mediate cases to successful conclusions if they do not have time to do so.

There are, however, attempts being made to curtail the number of prisoner petitions. The Violent Crime Control and Law Enforcement Act of 1994 requires exhaustion of state administrative remedies before petitions under 42 U.S.C. § 1983 can be brought. Such efforts are consistent with one federal judge's view that one percent of prisoner cases have validity and that the others "are just recreation for people with time on their hands." The reform of section 1983 would affect two-thirds of the magistrates' prisoner dockets. Another type of reform would require prisoners to pay some or all of the standard filing fees in connection with their cases.

The other one-third of the prisoner docket consists of habeas corpus petitions. Every recent Congress has seen failed proposals to reform habeas corpus. Once again, both the House and Senate have deleted all provisions relating to habeas reform from the most recent anti-crime legislation. In so doing, Congress has left untouched a fast-growing source of business for magistrates, one that may impair their ability to make a more significant contribution to settlement of civil cases.

Thus, the news on prisoner litigation is mixed. The number of prisoner petitions bears careful watching lest it overwhelm the magistrates and prevent them from playing the significant role in settlement of civil cases that their experience and status are only now permitting them to play.

208. Schwarzer & Wheeler, supra note 4, at 680. See also Smith, Lobbying and Reform, supra note 130, at 195-96.
210. Jeffrey N. Cole & Robert E. Shapiro, Interview with Judge Hubert L. Will, LITIG. (A.B.A. Sec. on Litig.), Fall 1993, at 26, 27. See also Congress Debates Anti-Crime Legislation, THIRD BRANCH (Admin. Off. of the U.S. Cts., Wash., D.C.) Nov. 1993, at 8 (quoting Senator Grassley: "Prisoner civil rights cases are overloading and clogging our federal courts.... These cases average $50,000 each in costs to taxpayers [sic]. A very small percentage of the population is clogging the courts with 14 percent of the cases.").
V. CONCLUSION

Magistrates are in a unique position to assist in settlement of civil cases. In large part, this position is the result of recent trends in federal civil litigation, some of which are desirable and others of which are regrettable. Magistrates are enjoying new status and are exercising their trial authority with increasing frequency. Both trends assist the magistrate in making settlement discussions more realistic, more satisfying, and more productive. Some of the attractiveness of magistrate mediation, however, arises from more negative developments. The inability of lawyers to form realistic trial expectations requires the intervention of experienced lawyers or judges. The habitual incivility of lawyers toward each other requires the presence of a judicial officer to keep counsel in line. Magistrates can perform both roles.

None of these trends, good or bad, shows any sign of abating soon. Ultimately, the success or failure of magistrate mediation may depend upon whether the other duties of magistrates permit them to spend sufficient time in mediations. If they do, their unique position in the federal judicial system will serve the process of settlement well.