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Judge's Role in Settlement: Opinions from Missouri Judges and Attorneys, The

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Wall and Rude: Wall: Judge's Role in Settlement:

THE JUDGE'S ROLE IN SETTLEMENT: OPINIONS FROM MISSOURI JUDGES AND ATTORNEYS

JAMES A. WALL, JR.*
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I. INTRODUCTION

This study investigates judges' involvement in settlement, and the opinions that Missouri judges and attorneys hold toward that involvement. In a survey of 1,100 judges and 1,550 attorneys, we found that Missouri judges differ significantly from Missouri attorneys. Specifically, Missouri judges prefer less judicial involvement in settlement and they, in the cases sent to them, were less aggressive in facilitating settlement. Finally, judges and attorneys from Missouri's metropolitan areas were found to favor stronger involvement in settlement than were their counterparts from the non-metropolitan areas.

Currently, the judge's role in settlement negotiations is a controversial one. Some in the judiciary hold the belief that, "[i]n general, judicial participation in settlement resembles sex in one respect: When it's good, it's very good, and when it's bad, it's still good."¹

Judges in this ideological camp evaluate settlement rather favorably. Indeed, they labor to facilitate it because they believe settlement benefits not

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1. Broder, *Judicial Techniques In Settlement*, 196 N.Y.L.J. 1 (1986).

only themselves as judges, but the clients and society as well.² For example, it saves money for both sides because the costs of trials and appeals are avoided. In addition, settlement gives the parties control of the case. They can settle at any time in the proceedings—before the case goes to trial, before the verdict, or even after the verdict is rendered. Further, if one side appeals, the parties can settle prior to, during, or after the appellate process. Settlement also yields certainty, because it cannot be appealed. Finally, it offers confidentiality and is expedient.

For the judge and the judicial system, the process offers many advantages. Since settlement is a final disposition of a case, the process saves time for the judges, as only those cases not settled come to trial. Resolution by settlement thereby results in efficient calendar control and reduced time between filing and disposition. This latter advantage, in addition to aiding the judge, also improves the public's evaluation of the efficiency of judicial administration.

While many judges smile upon judicial involvement in settlement and attempt to facilitate the process, they do not constitute a consensus.³ As an illustration, some judges believe that involvement in settlement tarnishes their po-

2. For detailed discussions of settlement, its benefits and the judge's role, see Aldisert, *A Metropolitan Court Conquers Its Backlog—part II From Pure Pretrial to Compulsory Settlement Conferences*, 51 JUDICATURE 247 (1968); Avakian, *How One Trial Judge Settles Cases*, 35 GUILD PRAC. 15, 16 (1978); W. BRAZIL, *SETTLING CIVIL SUITS: LITIGATORS VIEWS ABOUT APPROPRIATE ROLES AND EFFECTIVE TECHNIQUES FOR FEDERAL JUDGES* (1986); Fox, *Settlement: Helping The Lawyers To Fulfill Their Responsibility*, 53 F.R.D. 129, 142 (1972); Galanter, *A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States*, 12 J. L. & SOC'Y 1 (1985); Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 256 (1986); Kritzer, *The Judges Role in Pretrial Case Processing: Assessing the Need for Change*, 66 JUDICATURE 28 (1982); F. LACEY, *THE JUDGE'S ROLE IN THE SETTLEMENT OF CIVIL SUITS* (1977); Lynch, *Settlement of Civil Cases: A View from the Bench*, 5 LITIGATION 8 (1978); McEwen & Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 L. & SOC'Y REV. 11 (1984); Menkel-Meadow, *Judges and Settlement*, TRIAL 24 (Oct. 1985); Naythons, *Civil Settlement Conference*, 9 FORUM 75 (1973); J. RYAN, A. ASHMAN, B. SALES, S. SHANE-DUBOW, *AMERICAN TRIAL JUDGES: THEIR WORK STYLES AND PERFORMANCES* (1980); Schiller & Wall, *Judicial Settlement Techniques*, 5 AM. J. TRIAL ADVOC. 39 (1981); Schumaker, *An Appraisal of Pre-Trial in Ohio*, 17 OHIO ST. L.J. 204 (1956); Title, *New Settlement Techniques for the Trial Judges*, 18 JUDGES J. 42 (1979); Vidmar, *Assessing the Effects of Case Characteristics and Settlement Forum on Dispute Outcomes and Compliance*, 21 L. & SOC'Y REV. 155 (1987); Will, Merhige & Rubin, *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203 (1977).

3. For detailed discussions of the drawbacks to settlement and the reasons judges should not facilitate it, see Bedlin & Nejelski, *Unsettling Issues About Settling Civil Litigation: Examining "Doomsday Machines," "Quick Looks" and Other Modest Proposals*, 68 JUDICATURE 9 (1984); Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984); Resnik, *Managerial Judges*, 96 HARV L. REV. 376, 445 (1982).

sition and that they were appointed (or elected) to adjudicate, not to arbitrate or mediate.⁴ Many others note that participation in the settlement process is overly time consuming.⁵ While some find that calendar control expedites cases sufficiently, others feel judicial participation in settlement is ethically improper.⁶ Finally, a few feel the techniques available are illegal.⁷

Because they believe it could prejudice them, a significant number of judges do not become involved in settlement.⁸ Other judges hold that most cases are settled by attorneys; therefore, the need for judicial participation is minimal.⁹ Still others feel that fostering or aiding settlement will engender the attorneys' dependence such that they will invest few hours in the settlement negotiation prior to the judge's involvement.¹⁰ And some fear being sued by the adversaries.¹¹ Suffice it to say, something far from a consensus exists in the judiciary concerning judges' roles in settlement procedures.

Surveys of attorneys and discussions with them reveal that they, too, hold diverse views as to the appropriate role for judges in settlement.¹² In brief, many feel that settlement saves time and money for the clients and judges can be instrumental in gleaned these benefits.¹³ On the other hand, they feel clients have the right to trial, and judges should not interfere with the exercise of that right.¹⁴ After being pressured by judges to settle, some attorneys have developed an immunity or reaction to judicial settlement efforts.¹⁵

Judge Brazil's signal work on attorneys' views attests to the variety in their opinions.¹⁶ For example, in his survey, 92 percent of the responding attorneys from the Northern California courts felt that judges' involvement in settlement discussion was likely to improve the chances of settlement.¹⁷ Yet,

4. Personal correspondence and conversations.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. See generally Schiller & Wall, *Judicial Settlement Techniques*, 5 AM. J. TRIAL ADVOC. 39 (1981); Wall & Schiller, *Judicial Involvement in Pre-Trial Settlement: A judge is not a bump on a log*, 6 AM. J. TRIAL ADVOC. 27 (1982); Wall, Schiller & Ebert, *Should Judges Grease the Slow Wheels of Justice? A Survey on the Effectiveness of Judicial Mediation Techniques*, 8 AM. J. TRIAL ADVOC. 83 (1984); Wall & Rude, *Judicial Mediation: Techniques, Strategies and Situational Effects*, 41 J. SOC. ISSUES 47 (1985).

13. See generally Schiller & Wall, *Judicial Settlement*, *supra* note 12; Wall & Schiller, *Judicial Involvement*, *supra* note 12.

14. *Id.*

15. *Id.*

16. See BRAZIL, *supra* note 2, at 84-118.

17. *Id.* at 40.

only 75 percent of the Northern Florida attorneys gave this positive assessment.¹⁸ When queried about the *appropriateness* of judicial involvement, the attorneys' responses were even more varied. For example, 48 percent of the Northern California attorneys felt it was improper in jury cases for the assigned judge to become involved in settlement talks.¹⁹ However, only 17 percent of the Northern Florida attorneys felt it was improper.²⁰ In addition, Brazil discovered even more variation in the attorneys' opinions about the techniques that judges should use to facilitate settlement.²¹

These extensive differences in opinions raise questions as to where Missouri judges and attorneys stand on judicial involvement.

II. THE STUDY ITSELF

To probe these attitudes and their effects, we sent surveys to 450 state judges and 450 attorneys in Missouri. In order to compare the Missouri responses to national opinions, we also surveyed 650 state judges and 1,100 attorneys nationally. The response rate was favorable with 66 percent of the judges and 68 percent of the attorneys replying to our questions.

In order to tap the judges' and attorneys' opinions toward judicial involvement in settlement, we asked each to respond to the question, "In general, how strongly should judges facilitate the settlement of cases?" on a 7-point bipolar scale (1 = not at all, 7 = very strongly). As expected, the lawyers overall favored a higher level of involvement (average = 4.6) than did judges (average = 4.3); yet, the difference was not strikingly large. A comparison of the Missouri judges' responses (average = 3.9) to that of other judges nationally (average = 4.8) indicated that Missouri judges are less favorably inclined toward involvement.

The most striking observation, however, was that Missouri's judges are significantly more conservative than any of the other three groups surveyed, i.e., even more so than Missouri attorneys, attorneys nationwide, and judges nationwide. Specifically, the Missouri judges' responses averaged 3.9 while the average for the Missouri attorneys was 4.8; for the national attorneys it was 4.9; and for the national judges it was 4.8. This pattern proved a harbinger of our subsequent findings.

Each attorney and judge was also sent a hypothetical product liability case that several judges helped us develop. In the case, the attorneys and judges were informed that the workers in a liquid fertilizer manufacturing plant were injured while using a toxic chemical. Consequently, these workers were seeking damages from the producer of the chemical. The workers alleged that the producer was negligent in the production of the chemical and failed to

18. *Id.*

19. *Id.* at 91.

20. *Id.*

21. *Id.* at 64-99.

provide proper instructions for its use. As a result of that negligence, the plaintiff-workers suffered dizziness, headaches, temporary loss of memory, and lengthy periods of fatigue.

The defendant-chemical producer argued that their chemical does not produce such effects when the instructions are followed. According to the chemical producer, the employees did not use the chemical as prescribed in the instructions. Rather, the employees mixed the chemical in large batches, did not wear protective suits at all times, and on occasion they failed to use masks that filtered the fumes.

After reading the case, both the judges and attorneys were given 20 techniques (*see* Table 1) that could be used to bring about settlement of the case. It should be noted that the 20 techniques from Table 1 which were given to the survey participants had previously been found to be used by judges in actual cases. Judges selected the techniques they would use in this case, and the attorneys selected the ones they wanted the judge to employ.

TABLE 1

TECHNIQUES SELECTED BY JUDGES AND ATTORNEYS

Technique	Percent of Missouri Judges Who Would Use Technique	Percent of Missouri Attorneys Who Want Technique Used	Percent of Judges Nationally Who Would Use Technique	Percent of Attorneys Nationally Who Want Technique Used
1. Pressure the ill-prepared attorney.	9	19	15	22
2. Ask both lawyers to compromise.	42	51	56	46
3. Offer alternative proposal not thought of by lawyers.	44	70	53	63
4. Call a certain figure reasonable.	16	25	29	27
5. Bring the client to the conference.	4	12	24	30

6. Point out, to the client, the strengths and weaknesses of his or her case.	3	14	13	24
7. Require a settlement conference even though one is not mandated by court rules.	48	63	62	67
8. Channel discussion to areas which have the highest probability of settlement.	55	63	58	61
9. Speak personally with the client to persuade him or her to accept.	1	3	4	5
10. Suggest a settlement figure to the client.	1	5	5	8
11. Argue logically for concessions.	33	56	47	52
12. Downgrade the merits of the stronger case and/or the demerits of the weaker.	4	5	8	6
13. Analyze the case for a lawyer.	12	16	23	16
14. Note to a lawyer the high risk of going to trial.	27	20	39	18
15. Note, for the client, the rewards of pretrial settlement.	10	24	20	27

16. Offer advice to a lawyer.	4	12	10	7
17. Talk to each lawyer separately about settlement.	9	26	42	26
18. Set an inexorable trial date.	25	31	24	29
19. Inform the attorneys as to how similar cases have been settled.	55	61	61	61
20. Suggest a settlement figure after asking lawyers' inputs.	25	40	49	42

Looking at the judges' and attorneys' responses as set out in Table 1, we find that the Missouri attorneys' responses approximated those of attorneys nationally. In addition, they did not differ significantly from the responses of the judges in other states.

The most salient pattern in Table 1 is that Missouri judges again differed significantly from the other three groups. For every technique except #14, i.e., "Note to a lawyer the high risk of going to trial," the percentage of Missouri judges who would utilize any of the techniques was the lowest of the four groups. This difference is most striking for the client-oriented techniques, i.e., technique numbers 5, 6, 9, 10, and 15. As the reader can note, judges and attorneys—from Missouri as well as nationally—generally eschew client involvement. Yet the Missouri judges' preferences for these techniques lie far below that of the other three groups.

Take technique 6, i.e., "Point out, to the client, the strengths and weaknesses of his or her case," as a representative example. Fourteen percent of the Missouri attorneys, 13 percent of the national judges, and 24 percent of the attorneys nationally (for an average of 17 percent) want the technique employed in the case sent to them. However, only 3 percent of the Missouri judges would use it.

In addition to the above questions, the judges were also asked to indicate how strongly they would facilitate settlement of the case. Likewise, the attorneys were queried with the analogous question of how strongly should the judge facilitate settlement of the case. For both the judges' and the attorneys' responses, again a 7-point bipolar scale (1 = not at all; 7 = very strongly) was used.

The responses to these questions, as set out in Table 2, fit the previous

pattern, with Missouri judges being less assertive than judges nationally. Also, their level of involvement was lower than that preferred by Missouri attorneys and by attorneys in other states. As can be seen in the lower section of Table 2, an identical pattern surfaced for the number of techniques chosen for use in the case.

TABLE 2
JUDGES' AND ATTORNEYS' RESPONSES

	Missouri		National	
	Judges	Attorneys	Judges	Attorneys
Strength of involvement ^a	3.9	4.4	4.6	4.9
Number of techniques used	4.3	6.2	5.4	6.6

^a 1 = Not at all; 7 = Strong involvement

A. Case Characteristics

In addition to tapping the judges' and attorneys' attitudes toward judicial involvement, the survey also allowed us to explore the extent to which judges' involvement in settlement, and the attorneys' preferences for this involvement, depend on the elements of a given case. Within the survey, we varied four elements of the case—case size, trial time, trier of fact, and ultimate judge who would preside at trial. Specifically, in the case he or she received, the judge or attorney was informed that as to case size, the plaintiffs were seeking \$30,000, \$500,000, or \$30,000,000. As for the trial time, the options were 5, 15, or 25 days. The trier of fact was either a judge (bench-tried) or jury (jury-tried). Finally, on the element of who would ultimately preside at trial, the judge was to be either the current or a different one. As an illustration, some survey participants received a case of \$500,000 that was predicted to take 15 days of trial time; the case was to be jury-tried, and the judge handling the settlement was to be the trial judge.

We found that the case characteristics had no effect. Rather, attitudes toward judicial involvement dictated the choices of Missouri judges and attorneys. Specifically, those Missouri judges who favored judicial involvement in settlement intervened more strongly in their specific case, regardless of its characteristics. They also employed more techniques than did judges not favoring judicial involvement. The same observation held true for those Missouri attorneys who favor judicial intervention.

These responses were quite different, however, from those of judges and attorneys nationally. For all of the national survey participants, case size and trial time had a significant effect upon their behavior. Indeed, we found the

strength of the judges' settlement efforts, as well as the attorneys' preferences for judicial involvement, increased as the size of the case decreased. This finding seems to indicate that judges, as we had expected, work hard to keep small cases out of court, and attorneys favor judicial settlement efforts that serve this goal.

We also found that judges and attorneys nationally were affected by the consistency between trial length and case size. That is, for a \$30,000,000 case, 15 or 25 days of trial time was considered acceptable; consequently, the judges did not intervene strongly, nor did the attorneys wish for them to do so. For the smaller cases—\$30,000 and \$500,000—these times seemed excessive, and the level of judicial involvement, and attorneys' preference for same, increased.

B. Differences within Missouri

Judges and attorneys with whom we discussed our study suggested that we compare the judiciaries' opinions in Missouri's major metropolitan areas with those in the other regions. We did so, specifically comparing the responses of judges and attorneys from Kansas City, St. Louis, Springfield, and St. Joseph, with those outside these cities. The results of this comparison comprise Table 3.

TABLE 3
**RESPONSES FROM MISSOURI METROPOLITAN
AND NON-METROPOLITAN AREAS**

	Metropolitan Areas	Non-Metropolitan Areas
Attitude generally toward judicial involvement in Settlement ^a	4.8	4.2
Desired level of judicial involvement in hypothetical survey case ^b	4.4	3.7
Number of techniques to be used	5.8	4.2

^a As to whether judges should generally involve themselves; 1 = Not at all; 7 = Very strongly

^b 1 = Not at all; 7 = Very strong involvement

This "geographical" analysis provided the strongest differences in the study. As the first row of figures in Table 3 indicates, judges and attorneys from the metropolitan areas (Kansas City, St. Joseph, St. Louis, and Springfield) *generally* preferred stronger judicial involvement in settlement than did

their counterparts in the remainder of the state. This same *general* sentiment favoring increased judicial involvement in settlement followed through to our specific hypothetical survey case as well. Looking at the judges' and attorneys' responses listed in the second and third rows of figures in Table 3 dealing with the hypothetical survey case sent to them, we find the respondents from the metropolitan areas again preferred stronger judicial involvement in the settlement and the use of more settlement techniques.

The metropolitan/non-metropolitan differences were as expected. From correspondence and discussions with judges and attorneys around the state we had noted that trial calendars are more crowded in the metropolitan areas, and there is a preference for stronger levels of judicial involvement in settlement. At present, we are unable to determine whether the crowded dockets beget preferences for judicial involvement in settlement. However, the Missouri data is consistent with that gathered elsewhere,²² which shows that preferences for judicial involvement correlate highly with the backlog of trial dockets.

C. Discussion

This study delineates Missouri judges' and attorneys' opinions toward judicial involvement in settlement; specifically, Missouri attorneys are more positively inclined toward judicial involvement than are our judges. When compared with the national sample, the Missouri data reveals that Missouri attorneys hold opinions closely akin to those of attorneys and judges nationally. Yet, Missouri judges' opinions are significantly more conservative than those of Missouri attorneys and of judges and attorneys nationally.

Secondly, the data—nationally and from Missouri—show that judges' and attorneys' opinions strongly affect their behavior in any case. Judges and attorneys nationally are, in part, affected by the size and trial time of the case, but the dominating factor is their attitude.

For the Missouri judges and attorneys, attitude is even more dominating, such that the characteristics of a given case have no effect on either judges' involvement or upon the attorneys' preference for judicial involvement. In Missouri, we also find that location—metropolitan versus non-metropolitan—strongly affects opinions toward judicial involvement in settlement.

III. CONCLUSION

While the metropolitan/non-metropolitan differences are seemingly explainable, the Missouri/national comparisons leave us with an interesting conundrum. Why do Missouri judges differ from both Missouri attorneys and judges nationally?

Addressing first the differences between Missouri judges and Missouri at-

22. See Wall & Schiller, *Judicial Involvement*, *supra* note 12.

torneys, we found that judges, on average, are older. Also they, to a greater extent than attorneys, were schooled and practiced in the tradition that judges are appointed or elected to adjudicate, not to mediate. Therefore, it is arguably consistent for them to be more conservative toward judicial involvement in settlement than perhaps the attorneys appearing before them would prefer.

The difference between Missouri judges and national judges also calls for an explanation. It was suggested that Missouri judges might be older than judges nationally and therefore more conservative. Testing this hypothesis, we found Missouri judges to be 60 years of age, on average, whereas judges nationally average 58 years. This small difference probably does not account for the differences in attitude and behavior.

A second, more feasible, explanation rests upon differences in trial backlogs. In Missouri, judges' dockets are significantly less congested than those to be found nationally.²³ On average, cases nationally face a delay of 18 months, whereas in Missouri the time between initial filing and trial is about 10 months.²⁴ Since Missouri judges are in less need of out-of-court settlements, they probably are less apt to facilitate the process. Hence, they tend to be more conservative than their nationwide counterparts in their attitudes toward participation in settlement.

23. *Id.*; See also Wall, Schiller & Ebert, *supra* note 12.

24. *Id.*

