

2006

## Adding Judicial Mediation to the Debate about Judges Attempting to Settle Cases Assigned to Them for Trial

Peter Robinson

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# JOURNAL OF DISPUTE RESOLUTION

VOLUME 2006

NUMBER 2

## ARTICLES

### Adding Judicial Mediation to the Debate about Judges Attempting to Settle Cases Assigned to Them for Trial

*Peter Robinson\**

I. INTRODUCTION .....	336
II. THERE IS A DEBATE ABOUT JUDGES ATTEMPTING TO SETTLE CASES ASSIGNED TO THEM FOR TRIAL.....	337
A. <i>Legal Commentators are Conflicted</i> .....	337
B. <i>Active Judges Are Conflicted</i> .....	341
1. <i>Methodology for Surveying California Judges</i> .....	342
2. <i>Judges' Attitudes Toward Settlement Conferences</i> .....	343
3. <i>Frequency of Judicial Settlement Conferences</i> .....	345
4. <i>Percentage of Settlement Meetings Where the Settlement Judge Was Also the Trial Judge</i> .....	346
III. HOW DOES THE ADVENT OF "JUDICIAL MEDIATION" AFFECT THIS DEBATE? .....	347
A. <i>San Luis Obispo County As an Example of the Advent of Judicial Mediation</i> .....	347
1. <i>San Luis Obispo's Statewide Influence</i> .....	350
2. <i>Delaware's Contrast to San Luis Obispo and Napa</i> .....	351
B. <i>Legal Commentators Are Conflicted about Judges Mediating Cases Assigned to Them for Trial</i> .....	352
1. <i>Concerns</i> .....	352
2. <i>Endorsements</i> .....	353
C. <i>Empirical Data Regarding Judges' Attitudes and Practices</i> .....	355

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1. Attitudes.....	355
2. Practices.....	357
a. Extent Settlement Proceedings Are Labeled "Mediation".....	357
b. Frequency of Judicial Mediation.....	358
c. Extent Settlement Judge Is the Trial Judge.....	359
IV. JUDICIAL ETHICS CURRENTLY AUTHORIZE THE PRACTICE . . . BUT THAT COULD CHANGE.....	360
A. Analysis of Current Statements of Judicial Ethics.....	360
B. Proposed Revisions.....	364
V. ADDING JUDICIAL MEDIATION FURTHER CONFUSES THE LAW .....	365
A. Confusion in the Law Regarding Settlement Conferences for Cases Assigned for Trial.....	365
B. California As an Example of How Judicial Mediation Creates Additional Confusion in the Law.....	367
1. Determining Mediation Confidentiality by the "Label of Process" ....	367
2. Determining the Legitimacy of Settlement Techniques by the "Label of Process" .....	370
3. Questioning the "Label of the Process" Approach with Empirical Data.....	372
C. The Uniform Mediation Act Uses "Subsequent Decision Making" to Determine Mediation Confidentiality.....	378
VI. HOW JUDICIAL MEDIATION COULD ASSIST IN RESOLVING THE CONTROVERSY AND CLARIFYING THE LAW .....	380
VII. CONCLUSION .....	381
APPENDIX A.....	382

## I. INTRODUCTION

The propriety and desirability of judges attempting to settle cases assigned to them for trial is a subject of debate. Historically, scholars framed the debate in terms of judges conducting "settlement conferences" for cases assigned to them for trial. This article shares empirical data from a survey of all California judges in 2004 regarding their attitudes of approval or disapproval of judges conducting settlement conferences for cases assigned to them for trial. More importantly, it documents the extent to which those judges engage in the practice, differentiating the extent of the practice between judges with family law, general civil, limited civil, and complex civil assignments.

A contemporary wrinkle in the historic debate concerns judges conducting "mediations" of cases assigned to them for trial. There have been notable successes in some California jurisdictions with sitting judges serving as mediators, attracting the attention of legal commentators debating the issue. This article documents the extent to which judges conceptually approve of this practice and the extent they engage in it.

The phenomenon of judges mediating cases assigned to them for trial is examined from the perspective of judicial codes of ethics, which in current form permit the practice. This article considers both proposed revisions to such codes, and those in current force and effect. The confusion in the law created by the

advent of judicial mediation is illustrated by examining California statutory and case law on confidentiality and standards of practice, which differ depending on whether the process is labeled a “settlement conference” or “mediation.” California law relies heavily on the label of the process to determine the rights and responsibilities thereof. This article questions the “label of the process” methodology by documenting a strong degree of similarity in the content of the two processes as practiced by judges in California.

The article then explores the ramifications of the Uniform Mediation Act’s express inapplicability of its confidentiality provisions to a mediation “conducted by a judge who might make a ruling on the case.”<sup>1</sup> Finally, the article suggests how the advent of judicial mediation might lead to standards of practice that would clarify the law and resolve the debate about judges conducting either settlement conferences or mediations for cases assigned to them for trial.

## II. THERE IS A DEBATE ABOUT JUDGES ATTEMPTING TO SETTLE CASES ASSIGNED TO THEM FOR TRIAL

### A. Legal Commentators are Conflicted

Professor Marc Galanter documented the evolution in judicial attitude and practice regarding involvement in settlement from the late 1800s to 1986.<sup>2</sup> By the 1920s, early initiatives for “conciliation courts,” where judges would encourage reconciliation, were affected by some judges’ observations of opportunities for greater efficiency in judicial administration.<sup>3</sup>

Galanter documented “a considerable difference of opinion” among judges regarding whether settlement was the chief purpose of the Federal Rule of Civil Procedure (FRCP) 16 pretrial conference or whether settlement was a merely a byproduct.<sup>4</sup> The Judicial Conference of the United States resolved the matter by adopting the “byproduct” view in 1944 that, with notable pockets of contrary practice, prevailed for about a decade.<sup>5</sup>

1. UNIF. MEDIATION ACT § 3(b)(3) (2001).

2. Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 256 (1986). For a brief history of settlement conferences, see also Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 490 (1985). Professor Galanter’s documentation of the evolution of judicial practice is nicely complemented by Professor Judith Resnik’s article on, among other things, “how and why federal judges came to reorient the processes of judging and, in essence, to redefine their jobs by adding the management and settlement of civil cases to their judicial role.” Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 929 (2000). Professor Resnik describes the background conditions and organizational development that enabled this transformation: she cites the importance of rulemaking in the 1930s, protracted litigation in the 1950s, schools for judges in the following decades, judges who were committed advocates for the changes, and “official mandates for federal judges and in conceptions of the judicial role” as well as the creation of an “institutional voice” for the federal judiciary. *Id.* at 948.

3. Galanter, *supra* note 2, at 258.

4. *Id.* at 259. See also Michael Hogan, *Judicial Settlement Conferences: Empowering the Parties to Decide Through Negotiation*, 27 WILLAMETTE L. REV. 429 (1991). Hogan concludes that “from 1938 to 1983, settlement was generally considered to be only a by-product of a good pretrial procedure rather than a primary objective.” *Id.* at 431.

5. Galanter, *supra* note 2, at 259-60.

Galanter quotes three federal judges' ardent endorsement of settlement efforts in the early 1960's, and documents that by the 1970's federal judges had embraced the role of mediator because settlement was perceived as producing a superior quality of justice.<sup>6</sup> Galanter describes the 1983 amendment to FRCP 16, specifying the possibility of settlement as one of the appropriate topics at a pre-trial conference, as formal ratification of what had become the "unmistakably . . . 'established' position in the federal judiciary."<sup>7</sup>

Professor Judith Resnik's 1982 article articulating concerns about managerial judging<sup>8</sup> became a reference point for much of the subsequent scholarship about the role of judges in settlement.<sup>9</sup> She claimed that managerial judging, which includes judges conducting settlement conferences for their own cases, results in a reduction of distance between parties and the judge, a distance necessary to maintain the image of judge as dispassionate agent of justice.<sup>10</sup> She argued that it is especially problematic if a judge considered matters not admissible at trial because of the shielding from review enjoyed by pretrial procedures.<sup>11</sup> Resnik also argued that a "blurring [of] roles," motivated by too high a volume of cases, would cause acceptance of the view that "less judging and more settling" is generally appropriate.<sup>12</sup>

Professor Leroy Tornquist reviewed the pros and cons of judges being involved in settlement and recommended reforms including, "The judge who is to try the case on the merits should be barred from participating in settlement negotiations."<sup>13</sup>

Michael R. Hogan, a United States Magistrate Judge at the time, rebutted the criticisms of judges attempting to settle cases.<sup>14</sup> He countered the concern about accomplishing justice by referencing a study finding that participants in mediation were much more likely to perceive the outcome as fair than participants in adjudication.<sup>15</sup> The concern about settlement judges sacrificing the quality or justness of a resolution on the alter of efficiency and docket management he countered with, among other things, the commitment to assuring fairness in the judges' oath of office, and with FRCP 1 (requiring a judge mediator to consider the "justness" of

6. *Id.* at 261.

7. *Id.* See also Carrie Menkel-Meadow's statement in 1985 that "My own view is that [judicial involvement in] settlement is now the norm." Menkel-Meadow, *supra* note 2, at 513.

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

9. See Menkel-Meadow, *supra* note 2, at 513.

10. See Resnik, *supra* note 8, at 383; see also Menkel-Meadow, *supra*, note 2, at 407.

11. Resnik, *supra* note 8, at 408.

12. Resnik, *supra* note 2, at 992-93.

13. Leroy Tornquist, *The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry*, 25 WILLAMETTE L. REV. 743, 773 (1989). In his opinion, "this conclusion is true whether or not there is a jury trial." *Id.* at 773 n.141.

14. Hogan, *supra* note 4.

15. *Id.* at 436, (citing Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 245 (1981)); see also Marc Galanter and Mia Cahill, *Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1354 (1994). But see E. ALLAN LIND ET AL., *THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES* 33-37, 44-47 (1989) (survey results of 286 personal injury tort litigants finding higher satisfaction with the outcome and perceived greater fairness in the process when cases were resolved by trial or arbitration as opposed to judicial settlement conferences).

settlement).<sup>16</sup> He addressed the concern about the lack of empirical documentation, showing that judicial settlement conferences create more or earlier settlements, by arguing that experienced judges are in the best position to determine on a case by case basis the amount of effort that should be invested in judicially supervised settlement conferences.<sup>17</sup>

Hogan also addressed the concerns about settlement judges presiding at subsequent trials.<sup>18</sup> First, he claimed that this concern “implies a misunderstanding of what the judge’s role in the negotiation process should be.”<sup>19</sup> He suggested that it is the rare judge who becomes “such a partisan advocate of a certain settlement” and tries to impose “sanctions for a party’s failure to adopt the court’s settlement figure.”<sup>20</sup> In contrast, he suggested that “judges who understand and use successful intervention tactics in the negotiation process would (not) blame one particular party for a case not settling.”<sup>21</sup> He stated that the desire to insulate judges from knowledge about cases before trial fails to acknowledge that “[j]udges frequently are called upon to compartmentalize their thoughts by separate rulings without defending claims of partiality.”<sup>22</sup>

While making the case that the focus of settlement conferences should be better quality solutions rather than judicial efficiency, Professor Carrie Menkel-Meadow observed both sides of the debate: The settlement conference should not be managed by the trial judge “so that the interests and considerations that might effect a settlement but would be inadmissible in court will not prejudice a later trial.”<sup>23</sup> Although, “some of the settlement authority of the third party may be directly related to the judge’s power, control, or knowledge of the specific case and the value of the conference may be diminished if another person is used.”<sup>24</sup>

Professor E. Donald Elliott argued that using managerial judicial powers to accomplish settlement under some circumstances will accomplish more just resolutions.<sup>25</sup> In his discourse he observed:

Managerial judging is evolving rapidly from a set of techniques for narrowing issues to a set of techniques for settling cases. . . . On the other hand, other judges, including some staunch advocates of managerial judging oppose the use of managerial powers to encourage (or, some would say, to coerce) settlement. . . . Once managerial judging became established, it was inevitable that some judges would begin using their discretionary power to impose procedural costs on particular litigants to

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16. Hogan, *supra* note 4, at 437.

17. *Id.* at 440.

18. *Id.* But he includes in his defense of this practice an assumption that “if the parties and attorneys request that an unsuccessfully negotiated case be assigned to another judge for trial, it is difficult to imagine that it would not be assigned. To insist on trying the case only to have a party object afterwards, based on a claim of partiality, would be a waste of time and money and would create more litigation.” *Id.* at 439. This assumption may not always be the case.

19. *Id.* at 439.

20. *Id.* at 439.

21. *Id.*

22. *Id.*

23. Menkel-Meadow, *supra* note 2, at 511.

24. *Id.* at 512.

25. E. Donald Elliot, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986).

stimulate settlements that they considered to be in the interest of justice. However, these uses of the managerial powers of judges and masters to promote settlements are controversial and it is important to understand why. Ultimately, procedure and substance cannot be divorced: no procedural decision can be completely 'neutral' in the sense that it does not affect substance. Increasing litigation costs does not merely increase the likelihood of settlement; it inevitably alters the amount that a rational party would be willing to pay to settle, and hence is likely to alter the terms of the settlement as well.<sup>26</sup>

He illustrated his argument by noting that "if there is a pronounced difference in the economic resources available to the parties of the lawsuit, a judge might very well promote a more just solution by restricting the ability of the wealthier parties to use their economic resources to tactical advantage."<sup>27</sup>

Professors Menkel-Meadow and Elliot, as well as Hogan, have defended managerial judges using their powers to advance settlement based on judges using those powers "to stimulate settlements that the [judges] consider to be in the interest of justice."<sup>28</sup> Moreover, such use of judicial power is defensible because settlement offers "a substantive justice that may be more responsive to the parties' needs than adjudication."<sup>29</sup> These advantageous opportunities of settling judges must be weighed in light of some of the dangers of abuse.

Professor Peter H. Schuck's analysis of Chief Judge Jack B. Weinstein's orchestration of settlement of the Agent Orange class action case offers observations of how judges assist settlement, as well as the concurrent dangers of doing so.<sup>30</sup> Explaining the advantages of having judges involved in settlement, he stated:

In fact, a judge controls four distinct kinds of resources that may facilitate or even be indispensable to settlement, especially in complex cases. Typically, these resources are inaccessible to lawyers except insofar as the judge decides to make them available. They include control over the disposition of certain issues; knowledge about other factors relevant to settlement of the case; the judge's reputation for fairness; and control over certain inducements and administrative supports.<sup>31</sup>

Despite these advantages, he stated:

The analysis also suggests, however, that there are risks to justice, and to the appearance of justice when judges—especially those who are in a position to rule on the merits and thus control the outcome of a case—actively involve themselves in settlement. These risks exist even when settlement is thought to be a good thing, either in general or in a particu-

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26. *Id.* at 324-25 (citations omitted).

27. *Id.* at 325-26.

28. *Id.* at 325.

29. Menkel-Meadow, *supra* note 2, at 504.

30. Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337 (1986).

31. *Id.* at 350.

lar case. Even if the risks of judicial involvement are outweighed by the advantages, as I think they were in the Agent Orange case, they merit profound concern. These risks seem to me to be of three main types: judicial overreaching, judicial over-commitment, and procedural unfairness.<sup>32</sup>

He explained judicial overreaching by stating, “even if judges scrupulously avoid rewarding or punishing lawyers who do or do not cooperate in effecting settlement, the danger remains that lawyers will interpret judicial involvement as thinly-veiled coercion . . . .”<sup>33</sup> He encouraged a sensitivity to this concern because there is little consensus on what constitutes judicial impropriety; settlement discussions are often highly emotional and interpretation is subject to perception, and there is no objective transcript of what was said and done.<sup>34</sup>

He explained judicial over-commitment with the statement,

[A] judge who makes such an investment [in helping to fashion a settlement] is unlikely to remain indifferent as to the outcome of the negotiations. The risk is that the judge’s commitment may become excessive, compromising the appearance or reality of the judge’s fairness as to whether the case will be litigated or settle, and possibly even with regard to the merits.<sup>35</sup>

He went on to explain that this is especially troubling in cases, such as the Agent Orange case, that require the judge to confirm the settlement as fair, reasonable, and adequate.<sup>36</sup>

He explained that the informal and secretive nature of settlement conferences threaten common aspects of procedural fairness such as accuracy, individual dignity, participation, and openness of decision making.<sup>37</sup> Especially when the judge meets privately with both sides, due process is wanting because parties may not be aware of accusations or interpretations presented outside their presence, and thus may not know of the need to rehabilitate or rebut.<sup>38</sup>

Professor Schuck concluded with the recommendation that trial judges be barred from participating in settlement negotiations.<sup>39</sup>

### *B. Active Judges Are Conflicted*

In addition to legal academic debate, this issue is a source of controversy among the sitting bench. The debate surfaced anecdotally, and regularly, when this author led more than eight groups of about twenty-five California judges, each in mediation skills training programs over five years. California’s Adminis-

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32. *Id.* at 359.

33. *Id.* at 359-60.

34. *Id.* at 360.

35. *Id.* at 361.

36. *Id.* at 362.

37. *Id.* at 362-65.

38. *Id.* at 362.

39. *Id.* at 364-65.



trative Office of the Courts (AOC) was unequivocally supportive when the author became interested in documenting judicial attitudes and practices about settlement conferences and/or mediation. The data might assist academics and policy makers wrestling with an array of questions related to judges attempting to settle cases assigned to them for trial. It might also be of interest to those judges, who at times feel isolated and are curious about judicial norms.

### 1. Methodology for Surveying California Judges

California's AOC allowed the author to survey each of California's 1800 bench officers<sup>40</sup> regarding judges attempting to settle civil or family law cases. The data developed from this survey is suspect in that the judges were self reporting and thus prone to view and interpret themselves in the best possible light.<sup>41</sup> The AOC<sup>42</sup> participated in developing the survey,<sup>43</sup> which asks judges about their views regarding judges assisting in settling cases as well as their practices in the last four years.<sup>44</sup>

The surveys were mailed out in an AOC envelope with other AOC correspondence.<sup>45</sup> The responses were returned to a Post Office Box in Winnetka, California, a little-known community in the San Fernando Valley, as part of a comprehensive commitment to ensure that participants not know that a professor from the Straus Institute at Pepperdine University in Malibu, California, was the AOC's collaborator for this project.<sup>46</sup>

Three-hundred and sixty-eight out of 1,800 bench officers responded. While this was a little disappointing, it was not completely surprising because the survey was extensive, requiring about fifteen minutes to complete, and judges are notorious for not completing surveys. One weakness of the following analysis and conclusions is that they are based on a limited response. The 368 who responded

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40. This number includes all appellate judges and commissioners, as well as elected and appointed trial judges.

41. "[P]eople's assessments of their own abilities to meet various challenges exceed the best dispassionate analyses of those abilities." Thomas Gilovich et al., *Shallow Thoughts About the Self: The Automatic Components of Self-Assessment*, in *THE SELF IN SOCIAL JUDGMENT* 67 (Mark D. Alicke, David A. Dunning, Joachim I. Krueger eds., Psychology Press 2005). "[P]eople's assessments of their own traits and abilities have been shown, time and time again, to be overly optimistic." *Id.*

42. Special appreciation is expressed to AOC staff attorneys Kareen Alvarado, Heather Anderson, and Alan Wiener, and Judge E. Jeffrey Burke.

43. See *infra* app. A.

44. The instructions stated that participation was completely voluntary and that respondents were free to not answer any question for any reason. The judges were told that participating would assist in documenting judicial norms and they could receive a composite summary of the responses by returning a separate postage paid postcard, even if they chose to not complete the survey.

45. The judges were informed of the AOC's partnership with a law school professor on this research project to insure the anonymity of their responses. The judges knew that even the law school professor would not know which judges responded and only the aggregate compilations of the data would be provided to the AOC.

46. The concern was that the responses from the approximately 200 judges who had completed the Straus training program might be positively biased because they appeared to appreciate the training and like the faculty. Pepperdine and Malibu were not identified in any way in the cover letter, return address envelope and post card or the questionnaire, until the last question which lists various training programs including JAMS, AAA, community mediation organizations, and Pepperdine.

stated that in the last four years, they had the most experience in conducting settlement conferences or mediations in the following areas:

*Responding Judges by Assignment*

General Civil <sup>47</sup>	129 respondents
Family Law <sup>48</sup>	72 respondents
Limited Jurisdiction Civil <sup>49</sup>	22 respondents
Complex Civil <sup>50</sup>	6 respondents <sup>51</sup>
Marked more than one of the above	10 respondents
Did not conduct mediations or settlement conferences in any of the above types of cases in the last four years	85 respondents <sup>52</sup>
Did not respond to this question	44 respondents

Table 1

## 2. Judges' Attitudes Toward Settlement Conferences

One of the first questions in the survey asked judges about the extent to which they agree or disagree<sup>53</sup> with the statement: "With the consent of the parties, I believe that civil or family law judges should be allowed to conduct settlement conferences for cases assigned to them for trial." The judges' reactions to this statement are summarized below in Table 2.

47. The California Rules of Court define "General Civil Case" as "all civil cases except probate, guardianship, conservatorship, family law (including proceedings under the Family Law Act, Uniform Parentage Act, and Uniform Child Custody Jurisdiction Act; freedom from parental custody and control proceedings; and adoption proceedings), juvenile court proceedings, small claims proceedings, unlawful detainer proceedings, and "other civil petitions" as defined by the Judicial Branch Statistical Information Data Collection Standards." CAL. CT. R. 200.1.

48. Family law embodies "all family law matters like divorce, child custody, child support, and domestic violence." STATE OF CALIFORNIA, GUIDE TO COURTS 2 (2000), available at [http://www.occourts.org/home/brochures/family\\_en.pdf](http://www.occourts.org/home/brochures/family_en.pdf); Black's Law Dictionary defines family law as "[t]he body of law dealing with marriage, divorce, adoption, child custody and support, child abuse and neglect, paternity, juvenile delinquency, and other domestic-relations issues." BLACK'S LAW DICTIONARY 638 (8th ed. 2006).

49. In this context, limited jurisdiction means that a court has [pecuniary] restrictions on the cases it can decide. See BLACK'S LAW DICTIONARY 869 (8th ed. 2006). E.g., small claims is a court of limited jurisdiction, because it can only hear cases that claim damages of \$5,000 or less. In 2004, California's Limited Jurisdiction Courts handled cases that claimed damages up to \$25,000. CAL. CIV. PROC. CODE § 86 (West 2006).

50. Complex civil cases are "cases that require exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants", and "may involve such areas as antitrust, securities claims, construction defects, toxic torts, mass torts, and class actions." CALIFORNIA ADMINISTRATIVE OFFICE OF THE COURTS, COMPLEX CIVIL LITIGATION FACT SHEET 1 (2006), available at <http://www.courtinfo.ca.gov/reference/documents/complit.pdf>.

51. While this number is small, there are only 18 Complex Civil Judges in the entire state of California.

52. The assumption is that the 85 respondents who had not conducted mediations or settlement conferences in any of the above categories had appellate or criminal law assignments.

53. Specifically, in response to a particular statement, the judges were asked to indicate "Strongly Disagree," "Disagree," "No Opinion," "Agree," or "Strongly Agree."

*Settlement Conferences Should Be Allowed: By Response Strength*

	Number of Responses (FREQ)
Strongly Disagree	28
Disagree	32
No Opinion	7
Agree	84
Strongly Agree	183
DID NOT ANSWER	34

Table 2

Comparing the combined “Strongly Agree” and “Agree” categories with the combined “Strongly Disagree” and “Disagree” categories reveals a 267 to 60 (82% of those with an opinion) acceptance of judges conducting settlement conferences for their own cases. Among the interesting aspects of this data is the similarity to data reported 24 years earlier.<sup>54</sup> While documenting that a supermajority of judges support the proposition in concept, it is important to note that nearly one-fifth of the judges do not agree. The ratio was fairly consistent across the spectrum of judicial assignments.<sup>55</sup> The conflict among sizable segments of sitting judges reveals that the debate is not merely academic.

In order to gauge the impact of this conflict among judges, the survey went on to assess the frequency and prevalence of judicial settlement conferences. The difference in beliefs on this issue could be minimized or magnified depending on the number of settlement conferences judges conduct.

The demographics of the respondents evolves because the survey instructed judges who had not had a family or civil assignment in the last four years to answer questions about their beliefs regarding judges conducting settlement conferences and mediations, and then to not answer additional questions. Thus the focus of the survey was to quantify judicial *attitudes* of all judges, but only the *practices* of current civil and family law judges. “Current” was defined as having conducted a settlement conference or mediation within the last four years. Eighty-five judges without civil or family law assignments revealed their attitudes toward judicial settlement conferences and mediations, and then followed the instructions to not answer any further questions. The demographics for the judges who completed the rest of the survey are as follows: 72 family law judges, 129 general civil

54. See Marc Galanter, “A Settlement Judge, Not a Trial Judge:” *Judicial Mediation in the United States*, 12 J.L. & Soc’y. 1, 7 n.41 (1985) (citing JOHN PAUL RYAN ET AL., *AMERICAN TRIAL JUDGES: THEIR WORK STYLES AND PERFORMANCE* 170 (1980) (stating survey results which show that over 75 percent of judges as intervening in settlement discussion compared to almost 22 percent as non-intervening)).

55. *Settlement Conferences Should Be Allowed: By Response Strength and Assignment*

	Number of Responses (FREQ)			
	Family Law	General Civil	Limited Jurisdiction	Complex Civil
Strongly Disagree	5	9	1	0
Disagree	7	12	1	1
No Opinion	1	1	0	0
Agree	18	28	5	1
Strongly Agree	38	71	14	4
DID NOT ANSWER	3	8	1	0

Table 3

judges, 22 limited jurisdiction judges, 6 complex civil judges, and 10 judges who reported having assignments in more than one category. The judges with assignments in more than one category were not counted in any of the designated categories, but were included in the category of all judges, when used.

### 3. *Frequency of Judicial Settlement Conferences*

The survey asked, "The number of settlement meetings I conduct a week is about \_\_\_\_." Separate answers were requested for settlement conferences and mediations, if any. The responses, by the judges' assignments, for settlement conferences are summarized below in Table 4.

*Number of Settlement Conferences per Week:  
By Percentage of Respondents*

Number	Family Law	General Civil	Limited Juris.	Complex Civil
0		1.9% (2)		
¼-1	20.3% (12)	41.3% (43)	30% (6)	60% (3)
2-5	50.8% (42)	46 % (48)	65% (13)	40% (2)
6 - 9	6.7% (4)	5.7% (6)		
10 -15	15 % (9)	3.7% (4)	5% (1)	
16 - 27	6.7% (4)	0.9% (1)		
No Response	(12)	(25)	(2)	(1)

Table 4

First, it is interesting to note that only 2 judges stated that they do not conduct settlement conferences. A sizable number of judges did not answer, which could be interpreted a variety of ways.<sup>56</sup> The discussion above noted that a sizable minority of judges disapprove of judges conducting settlement conferences for cases assigned to them for trial. Nevertheless, those judges conduct settlement proceedings, presumably for cases not assigned to them for trial.

While this data establishes that almost all judges conduct settlement conferences, the mode<sup>57</sup> response for every judicial assignment except complex civil is the range of 2 to 5; that is, the most common judicial practice is to conduct between two and five settlement conferences per week. The practice of conducting between one-fourth and one settlement conference per week is significant, representing the practice of 20% of family law judges and 40% of general civil judges. Conducting more than five per week is fairly rare, with the exception of a signifi-

56. For example there were 69 family law judges who answered the question about their beliefs regarding whether judges should be allowed to conduct settlement conferences for cases assigned to them for trial, compared to 62 family law judges who answered this question and the 12 who chose not to answer this question. Likewise for general civil judges, 121 answered the question about their beliefs, but only 98 answered this question with 25 choosing not to answer. Despite the availability of being able to indicate zero per week, some of the judges may have chosen not to answer this question because they do not conduct any settlement conferences.

57. In statistics, mode is defined as "[t]he value or item occurring most frequently in a series of observations or statistical data." AM. HERITAGE DICTIONARY 1160 (3d ed. 1992).

cant cluster (15%) of family law judges who conduct between ten and fifteen per week.<sup>58</sup>

#### 4. Percentage of Settlement Meetings Where the Settlement Judge Was Also the Trial Judge

The questionnaire asked the judge to fill in a blank for the question, "The percentage of my settlement meetings that are for cases in which I am assigned as the trial judge is about: \_\_\_\_." Separate answers were requested for settlement conferences and mediations, if any.

The responses, by judicial assignment, for settlement conferences are summarized in Table 5.

*Grouped Percentages of Judges Responding*

Percentage	Family Law	General Civil	Limited Juris.	Complex Civil
0	7.3% (5)	29.6% (35)	15.7% (3)	33.3% (2)
1-10	4.4% (3)	10.1% (12)	5.2% (1)	16.6% (1)
11-40	2.9% (2)	6.7% (8)	5.2% (1)	
41-89	13.2% (9)	15.2% (18)		16.6% (1)
90-99	14.7% (10)	20.3% (24)	5.2% (1)	
100	57.3% (39)	17.8% (21)	68.4% (13)	33.3% (2)

Table 5

This question is the core of the debate.

The responses to the first question in the survey revealed that 82% of the judges believed that it was appropriate to conduct settlement conferences for cases in which they were assigned as the trial judge.<sup>59</sup> This data confirms to what extent they engage in the practice.

The data also confirms the split in the judiciary about this practice. The general civil bench is most polarized with 17.8% of judges reporting that all their settlement conferences are for cases assigned to them for trial and 29.6% responding that they never conduct settlement conferences for cases assigned to them for trial. The comparison of combined "0-10%" and "90-100%" responses for general civil judges reveal an almost evenly balanced, polarized judiciary: 38.1% of judges report that they are the trial judge for 90% or more of the settlement conferences they conduct, compared to 39.7% of judges who report that they are the trial judge for 10% or less of the settlement conferences they conduct.

58. Another question in the survey documented that the average number of new cases per year for family law judges was about 1300 compared to about 450 for general civil judges. The greater frequency of settlement conferences may reflect the need to manage a greater caseload. This theory is not confirmed by the volume of cases assigned per year for limited jurisdiction civil judges, an average of nearly 1300, whose frequency for settlement conferences is more similar to judges with a general civil assignment. Interpreting the variances in the number of settlement conferences per week for the different judicial assignments requires a detailed examination of the differences in types of cases between the judicial assignments. For example, there are no jury trials in family law and some of the limited jurisdiction judges may handle small claims cases in which parties are prohibited from being represented.

59. See *supra* Part II.B.ii.

It is especially interesting to contrast the frequency of the practice between family law judges and general civil judges. Of family law judges, 54.9% responded that all their settlement conferences are for cases assigned to them for trial, compared to only 17.8% of general civil judges. Combining the 90-99% category with the 100% category captures 72% of family law judges, but only 38.1% of general civil judges. While there are variations, the middle categories are roughly similar. Only 7.3% of family law judges decline to engage in the practice, compared to 29.5% of general civil judges. This indicates the existence of a highly polarized general civil bench, to be contrasted with a much more generally accepting family law bench.<sup>60</sup> Note that the profile for limited jurisdiction judges is similar to that of family law judges, and that the profile for the complex civil judges is similar to the general civil judges.

### III. HOW DOES THE ADVENT OF "JUDICIAL MEDIATION" AFFECT THIS DEBATE?

#### A. *San Luis Obispo County As an Example of the Advent of Judicial Mediation*

The impact and momentum of judges embracing the concept of mediating cases assigned to them for trial is illustrated by the experiences of the Honorable E. Jeffrey Burke and the courts where he sits in San Luis Obispo County, California.<sup>61</sup> The journey began in the fall of 1998 when Judge Burke attended a six day workshop entitled, "Mediating the Litigated Case," presented by the Straus Institute for Dispute Resolution at Pepperdine University School of Law.<sup>62</sup>

Judge Burke was about to begin an assignment as the supervising civil judge for the San Luis Obispo County Superior Court. He only recently had been appointed to the Superior Court<sup>63</sup> and faced a daunting backlog of civil cases.<sup>64</sup> Judge Burke was unfamiliar with mediation and thought it might be helpful to learn whether mediation could be employed to help manage the backlog.<sup>65</sup>

San Luis Obispo County has a population of roughly 300,000 and is a regional commercial hub for the largely agricultural central California coast. In 1999, the San Luis Obispo County Superior Court had thirteen judicial officers

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60. This is an important area for further investigation because it suggests that despite the greater concern about compromising the adjudicatory process (because family law trials are always bench trials), family law judges might be more accepting of conducting settlement conferences for their own cases because it is necessary to manage the docket. See *supra* note 58 (discussing the greater volume of caseload for family law judges).

61. This incidence of documented enhanced court productivity or efficiency should be considered in the context of Professors Galanter's and Cahill's conclusion, after examining the research regarding court efficiency as a reason for judges to invest in settlement, that, "in conjunction with judges who are skilled and motivated mediators and supportive attorneys, a well designed program of judicial promotion of settlement may sometimes produce court savings. But there is no reason to think that in the ordinary mix of circumstances judicial settlement efforts produce significant payoffs in terms of court savings." Galanter & Cahill, *supra* note 15, at 1369.

62. Personal Statement of Judge E. Jeffrey Burke, Superior Court Judge in San Luis Obispo (on file with author) ¶ 7.

63. *Id.* ¶ 1. Judge Burke was sworn in on May 27, 1997. *Id.*

64. *Id.* ¶ 4.

65. *Id.* ¶ 8.

assigned to four divisions: seven judges handled criminal cases and juvenile court matters; three judges handled civil cases, probate matters, and the court's appellate division; two judges handled family law matters; and one judge dealt with traffic and small claims.<sup>66</sup>

Before 1999, civil cases in San Luis Obispo County were managed in a Master Calendar system. In such a system the supervising civil judge is responsible for all of the civil cases in the courthouse, assigning hearings and trials to whoever on the civil team is available.<sup>67</sup> Judge Burke attended the Mediating the Litigated Case program because he had been informed that San Luis Obispo ranked thirty-fifth out of California's fifty-eight counties in its compliance with statewide case management standards for civil cases.<sup>68</sup>

In early 1999 there were 276 cases set for trial, and nearly every one of them had been called for trial before but had to be reset because there was no judge available to conduct the trial. Many of the 276 cases had been in the system for more than two years and the typical case that was actually tried was over three years old.<sup>69</sup> Only 53% of new civil filings were disposed of within one year,<sup>70</sup> compared to California's statewide "Fast Track" standards of 90%.<sup>71</sup> The cases that resolved within one year were matters the parties took care of on their own; judges were simply too busy dealing with the backlog to give much attention to settlement.<sup>72</sup>

Judge Burke's tenure as supervising civil judge began on April 1, 1999. In anticipation of his first week, Judge Burke realized that seven cases were set for jury trial, but only one department would be available.<sup>73</sup> The other civil judges were engaged in ongoing jury or court trials.<sup>74</sup> This progressively enlarging backlog was not because judges were not trying cases. In the three months between January 1, 1999 and March 31, 1999 there were 13 civil jury trials by five different judges.<sup>75</sup>

Judge Burke, with the support of the other judges in his county, initiated two significant changes to the administration of the civil docket in the spring of 1999. Judge Burke replaced the Master Calendaring system in which a judge is assigned for all purposes, and initiated an aggressive civil mediation program.<sup>76</sup>

The mediation program encourages, but does not require, litigants to attempt to resolve cases by mediation. Litigants can hire private mediators or ask any one of the judges to serve as the mediator.<sup>77</sup> Cases could be reassigned to another judge if the litigants, their attorneys, or the mediating judge believed that another

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66. *Id.* ¶ 2.

67. *Id.* ¶ 3.

68. *Id.* ¶ 5.

69. *Id.* ¶ 4.

70. *Id.* ¶ 5.

71. Under the California Rules of Court, each court shall have the goal to resolve 75% of all civil cases classified as "unlimited" within one year. CAL. CT. R. § 2.1(f)(1) (2006) (resolution percentage goal amended from 90% effective Jan. 1, 2004).

72. Personal Statement of Judge E. Jeffrey Burke, *supra* note 62, ¶ 4.

73. *Id.* ¶ 9.

74. *Id.*

75. *Id.* ¶ 12.

76. *Id.* ¶¶ 10, 13.

77. *Id.* ¶ 14. Mediation was an exception to the judge-for-all-purposes system in that the parties could request any of the three civil judges to serve as their mediator. *Id.* ¶¶ 14, 16.

judge should preside over the trial.<sup>78</sup> In the six years San Luis Obispo's mediation program has been in place, no one has requested a reassignment.<sup>79</sup>

The decision to make sitting judges available to serve as mediators was influenced by Judge Burke's belief that mediation should be available through the public courthouse.<sup>80</sup> Although California is the birthplace of Judicial Mediation and Arbitration Services (JAMS), and despite wide acceptance of the practice of utilizing retired judges as mediators since 1996, it is not a process that is available to everyone. Judge Burke acknowledged the important service that retired judges and private practice mediators provide to those who can afford it and recognized the important advantages of this alternative dispute resolution option, but he could not support a system that by reason of delays, abusive discovery, and high costs pressures litigants out of the courthouse and into a process that is unaccountable to anyone.<sup>81</sup> Burke thought that if the court was going to strongly encourage litigants to mediate, then mediation should be available at no cost, and sitting judges should make their singular accountability and strengths as mediators available for that purpose.<sup>82</sup>

The seven cases set for trial the first week of April 1999 were calendared for three- to four-hour mediations with Judge Burke during the preceding week. All seven cases settled. Judge Burke then moved on to the cases set in the next week calendaring each of them for a three-hour mediation.<sup>83</sup> As trials cleared, other judges were able to schedule mediations, and the backlog in San Luis Obispo began to disappear.<sup>84</sup>

The adjustments to the civil calendar system in San Luis Obispo have been well-received, and the sitting judges are widely accepted as mediators.<sup>85</sup> The judges' times were reallocated to conducting half-day mediations instead of conducting trials.<sup>86</sup> The results were dramatic. By the end of 1999, only a handful of cases set for trial were reset, and only about a dozen were more than two years old.<sup>87</sup> By 2003, San Luis Obispo County was resolving 67% of new civil filings within a year, compared to 53% in 1998, and ranked third out of California's fifty-eight counties—compared to thirty-fifth in 1998—for statewide case processing compliance.<sup>88</sup>

In the beginning, Judge Burke, a former civil litigator from that county, was the judge most often selected to serve as mediator. In the last nine months of 1999, Judge Burke mediated 91 cases with an 81% settlement rate.<sup>89</sup> The two other civil judges combined to mediate only 2 more cases.<sup>90</sup> In 2000, the Con-

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78. *Id.* ¶ 15.

79. *Id.*

80. *Id.* ¶ 24.

81. *Id.* ¶ 25.

82. *Id.*

83. *Id.*

84. *Id.* ¶ 11.

85. *Id.* ¶ 17.

86. *Id.* ¶ 12. The 13 jury trials in the first three months of 1999 are contrasted with 7 court and 1 jury trials in the last nine months of 1999. On average, San Luis Obispo civil judges allocate about one-third of their time to conduct meditations. *Id.*

87. *Id.* ¶ 12.

88. *Id.* ¶¶ 5, 19, 20.

89. *Id.* ¶¶ 18, 19.

90. *Id.* at add. ¶ 1.



sumer Attorneys of California, the dominant statewide plaintiff trial lawyers association selected Judge Burke as the Trial Judge of the Year.<sup>91</sup>

Any objective analysis of the Saint Louis Obispo experience must acknowledge that in the beginning the program was dependent on Judge Burke's vision, excellent relationship with the bar, and talent as a mediator.<sup>92</sup> Judge Burke's intention that this program would not be based on him personally has been established by the statistics showing that, over time, the other judges increasingly were selected and were successful as mediators.<sup>93</sup>

A passing of the torch occurred in 2003 when Judge Burke accepted an assignment as Supervising Family Law Judge, where he continues to serve today. In 2003, without Judge Burke, the civil judges in San Luis Obispo mediated 103 cases with a 58% settlement rate.<sup>94</sup> The importance of mediation in managing civil cases has not diminished; the civil team sets aside three days each week for mediation, and the court requires any judicial officer who applies for a position on the civil team to complete a week long mediation training program.<sup>95</sup>

### 1. San Luis Obispo's Statewide Influence

Judge Burke shared San Luis Obispo's positive experience in judicial mediation with the staff and governing body of the Education Division of the Administrative Office of the Courts for California (AOC) and requested permission to work with Pepperdine faculty to adapt its mediation workshop for presentation to judicial officers. The program was approved for a one-time trial.<sup>96</sup>

The first course had three times as many applicants as could be accommodated. The workshop has been offered twice a year between 2000 and 2002 and, because of California's budget crisis, once a year from 2003 to the present. It is one of the California Center for Judicial Education and Research's (CJER) most popular offerings and has trained more than 300 California judges.<sup>97</sup> The program has been retitled, "Mediation Skills for Judges," and the emphasis is on how individual judges can use mediation skills to manage their dockets instead of starting a county-wide program like Judge Burke.

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91. It seems particularly ironic that he was recognized as an exceptional trial judge by trial lawyers for essentially spending the vast majority of his time mediating.

92. The observation was first made to the author by another San Luis Obispo civil judge in January 2002. See also Personal Statement of Judge E. Jeffrey Burke, *supra* note 62, ¶ 18.

93. *Id.* at attachment ¶¶ 1, 2, 3, 4. Court statistics reveal that in 1999 Judge Burke conducted 91 out of a total of 93 mediations conducted by the Court; in 2000 Burke conducted 167 out of 261 mediations; in 2001 Burke conducted 79 out of 152 mediations; and in 2002 Burke conducted 71 out of 191 mediations. By 2002, there were five judges conducting from 22 to 71 mediations each with settlement rates ranging between 81 and 59%. *Id.*

94. *Id.* attachment ¶ 6.

95. *Id.* ¶¶ 21, 23.

96. *Id.* ¶ 26. At first the AOC was reluctant because the last time it had offered a short three-hour course on mediation, only five persons expressed interest. The idea of offering a mediation program lasting five days and having it feature professional faculty instead of CJER's practice of having only judges teach other judges was met with skepticism. Members of the governing board, however, recognized the increasing popularity of mediation and saw the advantage of having judges trained in mediation as a way of resolving litigated disputes. *Id.*

97. *Id.* ¶ 27.

One of the questions for the author conducting these training programs was whether the success of the San Luis Obispo experience was unique to Judge Burke or the idyllic environment of San Luis Obispo—that is, whether the San Luis Obispo experience could be replicated in other counties with different demographics, or whether this phenomenon was only possible with a relatively small bench and bar. Some of the judges who completed the training program took the time to anecdotally report to the author that after the course, they were increasingly encouraging mediation as well as serving as the mediator in cases assigned to them for trial. They reported that this focus not only helped manage their dockets, but it was also a source of great personal satisfaction. The judges reporting the positive experience with mediation were from the full range of size of counties and benches.<sup>98</sup> Because many of them had cases assigned for all purposes, they could implement a mediation emphasis for their calendar independent of a county-wide initiative such as Judge Burke's.

Reports of the San Luis Obispo experience and the regular offering of the Mediation Skills for Judges program encouraged the expansion of this practice. In addition to individual judges managing their calendars differently, in 2003, the Superior Court of Napa County, California, announced a judge-centered mediation program. Presiding Judge W. Scott Snowden stated, "Attorneys were coming into court asking for an alternative dispute resolution process. Many were unsatisfied with expensive private mediators whose decisions were not final. So we decided to cut through the red tape and give the litigants what they wanted directly from our judges."<sup>99</sup>

After the entire civil bench from Napa County attended Pepperdine's Mediating the Litigated Case, a mediation facility was opened in the courthouse and each judge set aside at least one day a week to mediate cases.<sup>100</sup> Judicial mediation would only occur at the request of the parties.<sup>101</sup> Litigants can request mediation from the judge assigned to the case or from another judge.<sup>102</sup> Presiding Judge Snowden is extremely enthusiastic about and committed to the project.<sup>103</sup>

## 2. *Delaware's Contrast to San Luis Obispo and Napa*

In 2003, the author had an opportunity to meet with a committee of judges from the state courts in Delaware commissioned with the revision of Delaware's Court Annexed Mediation Programs. Most of the judges had completed an ABA-

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98. Conversations with Judge Peter Norell (San Bernadino), Judge Denise LeFluer (Santa Barbara), Alexander Williams (Los Angeles), Judge Robert B. Atact (Santa Cruz), and Judge John Van de Camp (Sacramento).

99. *Napa Judges Cut Caseloads Using Mediation Skills*, COURT NEWS [OF THE JUDICIAL COUNCIL OF CALIFORNIA], May-June 2004, at 8, available at <http://www.courtinfo.ca.gov/courtnews/mayjun04.pdf>.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* Snowden states, "A court's place is to serve the community. We're trying to redefine what it is to be a superior court. This is the most exciting project I've been involved with in all my years as a judge. It's just a matter of reprioritizing resources to save trial time down the road. Litigants have been very receptive and grateful." *Id.*

sponsored mediation training program for judges that the author helped teach, and there was general support for judges serving as mediators.

When the issue of judges mediating cases assigned to them for trial arose, members of the committee expressed serious opposition. Creative brainstorming resulted in the suggestion of judges being organized into clusters that could mediate each others' cases, but concern about judges mediating cases assigned to them for trial was significant.<sup>104</sup> The committee decided that Delaware's court-annexed mediation program would avoid such a practice.<sup>105</sup>

Resolution of the controversy regarding judges mediating cases assigned to them for trial is necessary because either the blossoming of or refraining from the practice needs to be corrected. If legitimate concerns cannot be addressed, the court programs in San Luis Obispo and Napa Counties, and the increasing practice of individual judges, needs to be constrained. If the concerns can be resolved through, for example, a clarification of judicial ethics in settlement proceedings, then the restraint in Delaware should be relaxed.

## *B. Legal Commentators Are Conflicted about Judges Mediating Cases Assigned to Them for Trial*

### *1. Concerns*

The practice of judges mediating cases assigned to them for trial must come under careful scrutiny when thoughtful dispute resolution advocates such as Frank Sander and James Alfini argue against the practice.<sup>106</sup> Sander's *Friendly Amendment* article<sup>107</sup> identifies four reasons why Frank Sander's multi-door courthouse<sup>108</sup> does not include judges mediating cases assigned to them for trial: undue coercion, role confusion (leading to possible misuse of confidential information), competence and training, and appearance of impropriety.<sup>109</sup>

Dean Alfini observes that the convergence of the managerial judge and alternative dispute resolution movements has transformed the role of American civil trial judges. He argues that judges mediating cases assigned to them for trial is problematic because the only guidance provided by the judicial ethical standards are blanket statements in favor of impartiality and against coercion. The trial judge's personal interest in managing the docket, and the parties' awareness of that interest, creates too great a risk of coercion for the trial judge to be involved in settlement discussions. He concludes that updated standards of judicial ethics should require judges to receive mediation training as a prerequisite to intervening in settlement, clarify permissible limits of judicial intervention, and consider a

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104. Conversations with the author on May 28, 2003.

105. *Id.*

106. See James J. Alfini, *Risk of Coercion Too Great: Judges Should Not Mediate Cases Assigned to Them for Trial*, DISP. RESOL. MAG., Fall 1999, at 11; Frank E. A. Sander, *A Friendly Amendment*, DISP. RESOL. MAG., Fall 1999, at 11.

107. Sander, *supra* note 106, at 11.

108. See THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A. Levin & R. Wheeler eds., 1979) (for a history and explanation of the multi-door courthouse concept).

109. Sander, *supra* note 106, at 11.

“bright line rule” prohibiting judges from mediating cases assigned to them for trial.<sup>110</sup>

Other authorities agree that a trial judge should not act as the mediator in cases he or she might later try. Robert B. McKay, an ardent advocate of court-annexed alternative dispute resolution, assumes without explanation that “federal judges should not themselves function as mediators in cases which they might later try.”<sup>111</sup> Chief Judge Robert F. Peckham suggests that settlement negotiations be referred to a second judge or magistrate “to insure the appearance of impartiality and to encourage attorneys to participate with candor.”<sup>112</sup> Describing his concerns about potential coercion, premature decision making, and a reluctance to share crucial information, Patrick E. Longan concluded, “[s]omeone other than the judge who will preside over trial needs to conduct the mediation.”<sup>113</sup> Citing many similar concerns, Martin Frey concluded, “[t]he mediation process lacks fairness when the trial judge acts as the mediator in his or her own case.”<sup>114</sup> One court even declared that “mediation should be left to the mediators and judging to the judges.”<sup>115</sup>

## 2. Endorsements

The practice of judges mediating cases assigned to them for trial also has its supporters. Professor Marc Galanter’s scholarship cites numerous sources supporting the practice.<sup>116</sup> Federal District Judge Harold Baer argues that judge-led mediation lends the process an air of legitimacy for clients who want to know that they are participating in a viable substitute for litigation and specifically refutes many of the criticisms with these explanations.<sup>117</sup>

Another central criticism of judicial mediation argues that, not only is it a waste of resources for a federal judge to act as mediator, but it is also unethical for a judge to mediate a case that appears on his own docket. An allied concern is that acting as a case manager is not part of a federal judge’s job description and that a judge should do nothing of the kind.

Remarkably, though, this criticism does not spill over to the allied realm of settlement conferences. In order to understand the criticism more fully, then, we must examine the differences between settlement conferences and mediation. As mentioned above, settlement conferences are governed by Rule 16 of the Federal Rules of Civil Procedure. Rule 16

110. Alfani, *supra* note 106, at 14.

111. Robert B. McKay, *Rule 16 and Alternative Dispute Resolution*, 63 NOTRE DAME L. REV. 818, 827 (1988).

112. Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 263 (1985).

113. Patrick E. Longan, *Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators*, 73 NEB. L. REV. 712, 738 (1994).

114. Martin A. Frey, *Does ADR Offer Second Class Justice?*, 36 TULSA L.J. 727, 760 (2001).

115. *Evans v. State*, 603 So. 2d. 15, 17 (Fla. Dist. Ct. App. 1992).

116. See generally Galanter, *supra* note 54.

117. Harold Baer, Jr., *Judges’ Forum No. 2: History, Process, and a Role for Judges in Mediating Their Own Cases*, 58 N.Y.U. ANN. SURV. AM. L. 131, 138 (2001).

was amended in 1983 so as to “validate what many judges were already doing,” and provided specific authority for judges who had up until then been reluctant to discuss settlement with parties because of uncertainty about their authority to do so. The Advisory Committee’s notes to Rule 16 state that the amendment “recognizes that it has become commonplace to discuss settlement at pretrial conferences. Since it obviously eases crowded court dockets and results in savings to the litigants and judicial system, settlement should be facilitated at as early a stage of the litigation as possible.”

It is true that settlement conferences are generally less pro-active than mediations. Unlike settlement conferences, mediations involve an inquiry into the pros and cons contended for by each side, the presence and participation of the parties, submissions, *ex parte* caucus, and a search for creative solutions. They also take longer than do settlement conferences. There may, however, be a modicum of arm twisting in both settlement conferences and mediations, as both invariably involve an effort to convince one side or the other that a proposed resolution is a fair one . . . . Thus, although the judge is somewhat more involved in the mediation process than in a settlement conference, it is odd that critics frown upon participation in one and not the other, since both involve the judge’s recommendation as to an appropriate resolution.

Particular criticism of an Article III judge’s mediation of a case comes primarily from academics (who frequently possess little practical experience). Criticisms include a suggestion that judges either do not understand confidential communications or cannot be trusted to use them in an unbiased manner; and, too, that regardless of a judge’s good intentions, if the judge conducts a mediation that does not come to closure and then tries the same case, he may “inflict his wrath” on the party he believes kept him from reaching closure. That this may happen is hard to deny categorically. However, it seems to me that such a judge would likely take sides at some stage of the litigation anyway. Therefore, ought judges be barred from the mediation process and all the advantages it holds on the unlikely chance that an extremely small percentage of judges will not act impartially? Judges who have sworn to do their job objectively do their job, and do it well—without regard to who the litigants may be and certainly without regard to whether six months earlier they had conducted a failed mediation. Further, the fact that any number of appellate decisions credit district judges with the ability in bench trials to make impartial, discretionary decisions, such as what statements do or do not constitute hearsay, lends support to this view. Most litigators will agree that hardly a trial goes by where some action by some lawyer could be off-putting to the judge—far more off-putting, I dare say, than not reaching closure after a couple of hours of mediation. No suggestion has

been made, however, that a judge need recuse him or herself when a litigator is off-putting.<sup>118</sup>

It is important to note that even an ardent supporter of trial judges mediating their own cases, like Judge Baer, recommended against the practice in bench, as opposed to jury, trials.<sup>119</sup>

Rather than refute criticisms, Edward Brunet articulated a unique advantage to judges being allowed to mediate cases assigned to them for trial.<sup>120</sup> Professor Brunet described his conversion from the “modern” view that trial judges should never be allowed to mediate cases<sup>121</sup> to a position against “an inflexible rule, mandating routine reassignment” of the settlement function away from the trial judge.<sup>122</sup> Professor Brunet explained that natural human behavior is that “[d]ecision makers do not wait until all the evidence relevant to a choice has been collected to begin their evaluations.”<sup>123</sup> Thus, Professor Brunet argued that decision making is an evolving process, like keeping score in a nine-inning baseball game.<sup>124</sup> He then suggested there may be legitimate advantages for the participants to know the decision maker’s view of the issues and arguments in interim stages.<sup>125</sup> Judicial mediation by the trial judge allows the ultimate decision maker to “signal” to the participants his or her evolving reactions to the case, empowering the participants to reach an informed settlement.<sup>126</sup> While Professor Brunet pointed out that this dynamic is controversial, it also provides a unique advantage to having the trial judge mediate her own cases.<sup>127</sup>

### *C. Empirical Data Regarding Judges’ Attitudes and Practices*

#### *1. Attitudes*

The survey<sup>128</sup> asked judges to indicate the degree to which they agreed or disagreed<sup>129</sup> with the statement: “With the consent of the parties, I believe that civil

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118. *Id.* at 144-47. (internal citations omitted).

119. *Id.* at 150-51.

120. Edward Brunet, *Judicial Mediation and Signaling*, 3 NEV. L.J. 232 (2003).

121. *Id.* at 232-33.

122. *Id.* at 233.

123. *Id.* at 254.

124. *Id.* at 255.

125. *Id.* at 255-56.

126. *Id.* at 253-54. He explains:

Viewed in this light, a signal from the bench may advance decisional efficiency and enhance the opportunity for settlement. Without a signal, the judge may feel, for example, that the defendant’s affirmative defense looks unlikely to succeed, but the defense counsel may feel confident about her defense. A significant informational asymmetry exists. Once the court signals on the issue, the informational asymmetry is lessened substantially. The defendant and her lawyer know which way the judge is leaning and can adjust their settlement strategy accordingly.

*Id.*

127. *Id.* at 239.

128. *See infra* app. A.

129. Again, judges were asked to indicate “Strongly Disagree,” “Disagree,” “No Opinion,” “Agree,” or “Strongly Agree.”

or family law judges should be allowed to mediate cases assigned to them for trial." Judges' reactions to this statement are summarized in Table 6.

*Mediation Should Be Allowed: By Strength of Response*

	Number of Responses (FREQ)
Strongly Disagree	38
Disagree	49
No Opinion	30
Agree	83
Strongly Agree	135
Did Not Answer	33

Table 6

Comparing the combined "Strongly Agree" and "Agree" categories with the combined "Strongly Disagree" and "Disagree" categories reveals a 218 to 87 (71% of those with an opinion) acceptance of judges mediating their own cases. The ratios are approximately consistent, regardless of family law, general civil, limited jurisdiction civil, or complex civil assignment by the responding judge.<sup>130</sup> While a 71% acceptance rate for judges mediating their own cases establishes a credible judicial community norm, it again reveals significant dissent within the community.

A point of reference to interpret this data would be the same judges' attitudes about conducting settlement conferences for cases assigned to them for trial. The questions were asked side by side, without defining or differentiating between the processes; the data reveals whether the judges perceive that the processes are different and should be treated differently.

It is both interesting and predictable that judges more readily accept the proposition of judges conducting settlement conferences for their own cases (82%), as compared to the proposition of judges mediating their own cases (71%). It is predictable because mediation is the "new kid on the block" compared to judicial settlement conferences. It is interesting because it is difficult to distinguish between the two processes.

To further explore this aspect of the data, the responses to these questions will be discussed in three categories: judges who supported both mediations and settlement conferences, judges who disapproved of both mediations and settlement conferences, and judges who were split in their opinions. The following percentages are of the 325 judges who answered both questions and expressed an opinion on one of the questions.

*130. Mediation Should be Allowed: By Response Strength and Assignment*

Q1A For Mediation	Number of Responses (FREQ)				
	Overall	Family Law	General Civil	Limited Juris	Complex Civil
Strongly Disagree	38	7	14	1	1
Disagree	49	12	18	4	1
No Opinion	30	5	11	1	0
Agree	83	20	28	6	1
Strongly Agree	135	25	50	10	3
Did Not Answer	33	3	8	0	0

Table 7

Sixty-one percent (203 out of 325) of the judges indicated that they agreed or strongly agreed with both statements about judges conducting mediations or settlement conferences for cases assigned to them for trial. These judges not only support both processes, but ranked their support identically for the two processes 89% percent of the time.

Sixteen percent (52 out of 325) of the judges indicated that they disagreed or strongly disagreed with both statements about judges mediating or conducting settlement conferences for cases assigned to them for trial.

Perhaps most interesting is that 17% (56 out of 325) of the judges had a different reaction for judges conducting settlement conferences versus judges conducting mediations. The criterion for this group was that their responses in the 1 to 5 rating in the survey were at least two degrees different. That means that judges who responded to one question with "Strongly Agree" and to the other question with "No Opinion" would be counted. Similarly, judges who responded with the combination of "Agree" and "Disagree," and "No Opinion" and "Strongly Disagree" would be included in the 17% of judges characterized as conflicted about this issue. This last point is interesting because these judges apparently perceive that there were, or should be, differences between the two processes.

Viewing the data more broadly, the sample of California judges in 2004 were largely supportive (71% agreed or strongly agreed) of the concept of judges mediating cases assigned to them for trial, with the parties' consent. Nevertheless, the support for this proposition was less than the support for judges conducting settlement conferences under the same circumstances (82%), and with respect to mediation, there was a larger percentage of judges (29%) with a dissenting view.

## 2. *Practices*

As with settlement conferences, the amount of attention that should be paid to this issue will depend on the pervasiveness of the practice. The survey attempted to document the frequency of the occurrence by asking the judges three questions: (1) how often they label judge-led settlement proceedings "mediations" (as compared to the label of "settlement conferences"); (2) the number of settlement proceedings that they labeled "mediations" they conduct per week; and (3) the percentage of those mediations that are for cases assigned to them for trial.

### *a. Extent Settlement Proceedings Are Labeled "Mediation"*

First the survey asked judges to fill in blanks for the following question:

When I schedule meetings to try to help settle a case:

- a. I label those meetings settlement conferences \_\_\_ % of the time; and
- b. I label those meeting mediations \_\_\_% of the time. (The two answers should total 100%)



The response to this question is important because it quantifies the degree to which the attitudinal support for judicial mediation reflected above<sup>131</sup> was manifest in practice. The following table reveals the frequency judges used the two labels for their settlement meetings:

*Extent Settlement Proceedings Are Labeled "Mediation" versus "Settlement Conference"*

Percentage of times labeled "settlement conference"	Percentage of times labeled "mediation"	Number of judges using the percentages
100	0	228
99.5	.5	1
99	1	1
92	2	4
95	5	6
90	10	6
80	20	4
75	25	3
70	30	1
50	50	3
40	60	1
20	80	4
5	95	1
2	98	1
1	99	1
0	100	3
		Total 268

Table 8

Eighty-five percent (228 out of 268) of judges answering this question always use the label of "settlement conference" when meeting with the parties to help settle a case. Only 1.1% (3 out of 268) always use the label of "mediation," and only 5% (14 out of 268) use the label of "mediation" half of the time or more. The ratios are fairly consistent across assignments.

The small number of judges using the label, "mediation," was surprising in light of the theoretical support for the proposition that judges should be allowed to conduct mediations documented above.<sup>132</sup> The survey established that judicial attitudes support the right of a judge to mediate, but practice is to almost always label such meetings settlement conferences.

*b. Frequency of Judicial Mediation*

Second, the survey asked, "The number of settlement meetings I conduct a week is about \_\_\_\_." Separate answers were requested for mediations and settle-

131. See *supra* Part II.B.ii.

132. *Id.*

ment conferences. The responses, by the judges' assignments, for mediation are summarized below in Table 9.

*Number of Mediations per Week: By Percentage of Judges Who Responded*

Number	Family Law	General Civil	Limited Juris	Complex Civil
0		8.5% (1)	100% (1)	
¼-1	29% (2)	41% (5)		50% (1)
2	29% (2)	34% (4)		50% (1)
3				
4-6	42% (3)	17% (2)		

Table 9

A major problem is that the prior question about using the label of "mediation" revealed that only 40 judges reported conducting any mediations. Of those 40, 18 either didn't answer this question or cannot be isolated by judicial assignment because they reported multiple assignments. The result is that the responses of only 22 judges can be reported. Such a small sample becomes increasingly suspect when it is divided into the four categories of judicial assignments. While informative, the small sample does not permit the data to be authoritative.

It is interesting that judges using the label, "mediations," are largely divided into three frequencies: those who conduct them once a week or less, those who do two a week, and those who do four to six per week. These fairly small frequencies of judicial mediations are important because it begins to document judicial norms at a given time in one region. The dramatic reallocations of judicial resources in San Luis Obispo and Napa Counties<sup>133</sup> are still very much the exception rather than the rule in California.

*c. Extent Settlement Judge Is the Trial Judge*

Third, the questionnaire asked the judge to fill in a blank for the question, "The percentage of my settlement meetings that are for cases in which I am assigned as the trial judge is about: \_\_\_\_." Separate answers were requested for settlement conferences and mediations, if any. Table 10, below, describes the responses, by judicial assignment, for mediations.

*Percentage of Mediations in Which Settlement Judge Is the Same as Trial Judge*

Percentage	Family Law	General Civil	Limited Juris.	Complex Civil
0		17% (1)		
10	17% (1)	33% (2)		
50	17% (1)		33% (1)	
60				100% (1)
95		33% (3)		
99			33% (1)	
100	66% (4)		33% (1)	

Table 10

133. See *supra* notes 62-70 and accompanying text.

Again the sample is so small that it may be informative, but not authoritative. The patterns are generally similar to the patterns for the settlement conferences. Half of the general civil judges who reported conducting “mediations” do it for cases assigned to them for trial 95% of the time while the other half do it 10% or less of the time. Like with settlement conferences, there is greater receptivity of the practice in family law assignments than in general civil. Again, the limited jurisdiction judges seem to have similar attitudes as the family law judges.

#### IV. JUDICIAL ETHICS CURRENTLY AUTHORIZE THE PRACTICE . . . BUT THAT COULD CHANGE

##### A. Analysis of Current Statements of Judicial Ethics

Another perspective on the propriety of the judicial settlement conference experience is to consider the rules articulating judicial ethics. Dean Alfini, a noted scholar on judicial ethics, concluded that the current ethical standards permit judges to attempt to settle cases assigned to them for trial,<sup>134</sup> but an exploration of the standards may be instructive.

The ABA publishes a Model Code of Judicial Conduct (hereinafter the ABA’s Model Canons) which serves as a platform for various jurisdictions to make modifications and then adopt the controlling codes for judges under their authority. This article will consider the ABA’s Model Canons,<sup>135</sup> and compare the Code of Conduct for United States Judges<sup>136</sup> and the California Code of Judicial Ethics.<sup>137</sup>

A review of the ABA’s Model Canons for guidance on the boundaries of judges involved in settlement activity reveals the following pertinent provisions:

1. Canon 1 states, “A Judge Shall Uphold the Integrity and Independence of the Judiciary.”<sup>138</sup>
2. Canon 2 states, “A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.” The advisory committee commentary specifies, “The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.”<sup>139</sup>

134. Alfini, *supra* note 106, at 11.

135. MODEL CODE OF JUDICIAL CONDUCT (2004), available at <http://www.abanet.org/cpr/mcjc/toc.html>.

136. CODE OF CONDUCT FOR UNITED STATES JUDGES (2000), available at [http://www.uscourts.gov/guide/vol2/ch1.html#N\\_1\\_](http://www.uscourts.gov/guide/vol2/ch1.html#N_1_).

137. CAL. CODE OF JUDICIAL ETHICS (2005), available at <http://www.courtinfo.ca.gov/rules/appendix/appdiv2.pdf>.

138. MODEL CODE OF JUDICIAL CONDUCT at Canon 1.

139. *Id.* at Canon 2.

3. Canon 3 states, “A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently.” Section B is titled, “Adjudicative Responsibilities” and has 11 subsections.<sup>140</sup> Pertinent provisions include:

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.  
 . . . .

(4) A judge shall be patient, dignified and courteous to litigants, . . . lawyers and others with whom the judge deals in an official capacity.  
 . . . .

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.<sup>141</sup>

The commentary for this subsection explains,

In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.<sup>142</sup>

Other pertinent provisions of Canon 3B include:

(7) . . . A judge shall not initiate, permit, or consider ex parte communications . . . concerning a pending or impending proceeding except that: . . . (d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.  
 . . . .

(9) A judge shall not, while a proceeding is pending or impending in any court, . . . make any non public comment that might substantially interfere with a fair trial or hearing.<sup>143</sup>

The ABA’s Model Canons authorize judges to attempt to settle cases assigned to them for trial.<sup>144</sup> While explaining Canon 3B(8)’s duty to dispose of judicial

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140. *Id.* at Canon 3.

141. *Id.* at Canon 3B(1), (4), (8).

142. *Id.* at Canon 3B(8) cmt.

143. *Id.* at Canon 3B(7), (9).

144. *Id.* at Canon 3B(7)(d).

matters promptly, efficiently and fairly, the commentary specifies that “a judge should encourage and seek to facilitate settlement.”<sup>145</sup> Canon 3B(7)(d) clarifies that a judge needs the consent of the parties for *ex parte* communications when attempting to mediate or settle matters pending before the judge.<sup>146</sup> The implication is that, in the absence of *ex parte* communications, the judge does not need the consent of the parties to facilitate settlement in a matter pending before the judge.

The following six limitations for judges facilitating settlement for cases assigned to them for trial can be extrapolated from the ABA’s Model Canons:

1. The settlement facilitating judge should not engage in any behavior that would undermine the integrity of the judiciary.<sup>147</sup>

2. A judge should not be the trial judge for a case that he has tried to settle if what the judge learned in settlement proceedings, including private sessions if utilized, “would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.”<sup>148</sup>

3. A judge must “be patient, dignified, and courteous” to everyone she may have contact with in the course of facilitating settlement.<sup>149</sup>

4. A judge “must demonstrate due regard for the rights of the parties to be heard” and to “preserv[e] fundamental rights of parties.”<sup>150</sup> The duty to “have

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145. *Id.* at Canon 3B(8). The rationale before this statement cautions that fundamental rights must be preserved, but seems to acknowledge that a judge should protect an interest of the general public in containing costs and reducing delay. It could be argued that these interests authorize the judicial encouragement of settlement for the purposes of docket management. Stating that judges should “monitor and supervise cases” for these ends suggest that the Rules of Judicial Conduct support the managerial judge. *Id.*

146. *Id.* at Canon 3B(7)(d).

147. *Id.* at Canon 1. This could lead to a special standard of mediation practice in which the sitting judge has a greater duty to protect the integrity of the process and his or her role. The relative absence of ethical standards for settlement judges is concerning. *See, e.g.,* Alfini, *supra* note 106, at 12 (“The Model Code of Judicial Ethics admonishes judges not to be coercive in settlement, but provides no guidance as to how or when a judge’s behavior may be deemed coercive”). The ABA Dispute Resolution Section’s proposal to augment Canon 3B’s statement of Adjudicatory Responsibilities with a new section specifying “Settlement Responsibilities” is a helpful beginning. MODEL CODE OF JUDICIAL CONDUCT (Proposed Addition by the ABA Section of Dispute Resolution Feb. 4, 2005), available at [http://www.abanet.org/judicialethics/resources/comm\\_rules\\_aba\\_dispute%20resolution\\_020405\\_ddt.pdf](http://www.abanet.org/judicialethics/resources/comm_rules_aba_dispute%20resolution_020405_ddt.pdf). The challenge becomes to conceptualize whether, and if so how, the duties of settling judges (with a duty of upholding the integrity of judiciary) are different than the duties of private sector mediators. For example, a federal judge strongly rebuked the Houston chapter head of the Association of Attorney-Mediators for publicly saying that “what most people might consider a little bullying is really just part of how mediation works.” *Allen v. Leal*, 27 F. Supp. 2d 945, 947-48 (S.D. Tex. 1998). Similarly, the California Supreme Court has ruled that a judge’s self-claimed “assertive” style of settling cases, which included shouting at a crying plaintiff, was inappropriate. *Dodds v. Comm’n on Judicial Performance*, 906 P.2d 1260, 1266, 1270 (Cal. 1996).

Even an otherwise just settlement, if imposed summarily and coercively, is likely to disserve justice by leaving the parties with a lingering resentment of one another and the judicial system . . . when a judge, clothed with the prestige and authority of his judicial office, repeatedly interrupts a litigant and yells angrily and without adequate provocation, the judge exceeds his proper role and casts disrepute on the judicial office.

*Id.*

148. MODEL CODE OF JUDICIAL CONDUCT at Canon 2 cmt. This Canon is the foundation for Robert McKay’s article on the subject. McKay, *supra* note 111.

149. MODEL CODE OF JUDICIAL CONDUCT at Canon 3B(4).

150. *Id.* at Canon 3B(8) cmt.

issues resolved without unnecessary delay,”<sup>151</sup> seems pointed at eliminating dilatory behavior by parties, but a case could be made that it imposes a duty on a judge to not unnecessarily delay a ruling or trial to force a settlement. Similarly, this provision imposes a duty that “parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.” This aspect of subsection (8) could be found to be reinforced by the duty on a judge “to hear and decide matters assigned to the judge.”<sup>152</sup>

5. A judge must acquire the parties’ permission to utilize *ex parte* conversations as part of the settlement effort of matters pending before that judge.<sup>153</sup>

6. A judge cannot make any nonpublic comment that might substantially interfere with a fair trial or hearing of a matter that is pending or impending in any court.<sup>154</sup> Thus, judges facilitating settlement must be cautious about private comments that might be construed to interfere with a fair trial. Examples could include comments to parties in caucus for cases assigned to that judge for trial and hallway comments to the trial judge if the settlement judge is not the trial judge. The provision states that judges can make “public statements in the course of their official duties.” A judge’s comments in *ex parte* caucus while facilitating settlement are probably part of his official duties, but those comments might not be deemed to be public.

There are only two provisions in the Codes of Conduct for Federal judges that differ enough from the ABA’s Model Canons to mention. The prohibition against commenting on pending cases specifies public comments only and does not extend to non-public comments.<sup>155</sup> The requirement of acquiring parties’ permission for *ex parte* conversations as part of settlement applies to “pending matters” as opposed to “matters pending before the judge.”<sup>156</sup> This could suggest that such permission is necessary for all pending cases, including cases not assigned to the settlement judge for trial.

California’s Code of Judicial Ethics follows the same structure as the ABA’s Model Canons but provides a few modifications in language. An important difference is Canon 3B(9), which specifies that “This Canon does not prohibit judges from making statements in the course of their official duties . . . .” The ABA’s Model Canons use similar language, but only in reference to public statements. The difference could be significant in the case of private comments in an *ex parte* caucus while facilitating settlement. Another interesting difference is the Advisory Committee Commentary for California’s Canon 3B(8), which states, “The obligation of a judge to dispose of matters promptly and efficiently must not take precedence over the judge’s obligation to dispose of matters fairly and with patience.”

California’s Advisory Comments set a clearer standard on the priority between docket management and better outcomes. Caseload management efficiency must not take precedence over patient judges disposing of matters fairly. The

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151. *Id.*

152. *Id.* at Canon 3B(1).

153. *Id.* at Canon 3B(7)(d).

154. *Id.* at Canon 3B(9).

155. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3A(6), available at <http://www.uscourts.gov/guide/vol2/ch1.html#3>.

156. *Id.* at Canon 3A(4).

same message can be deduced from the language in the ABA's Model Canon, but it is unequivocal in California's provision.

### B. Proposed Revisions

The ABA's Model Canons are in the midst of a two-year revision project for the first time in eighteen years.<sup>157</sup> The ABA's Section of Dispute Resolution has proposed that the Model Canons include a new paragraph to address "Settlement Responsibilities."<sup>158</sup> In addition to prohibiting a judge from acting "in a manner that coerces a party into settlement,"<sup>159</sup> this proposal also states, "Ordinarily, a judge should not conduct a settlement conference or mediation in a case in which the judge will serve as the adjudicator of the merits of the case."<sup>160</sup> This initiative has been presented to the joint commission revising the Model Canons by nationally prominent ADR leaders.<sup>161</sup>

The ABA's Dispute Resolution Section proposal includes a commentary that explains the proposed prohibition against judges mediating cases assigned to them for trial. The pertinent section of the commentary states,

When conducting settlement conferences or mediations, particularly when caucusing (i.e., *ex parte* conversations with parties and/or litigants) is used, judges become aware of parties' confidential information to which they would not be privy, had they not conducted the settlement activity. If the parties do not settle and the judge later tries the case, this confidential information is often difficult for the judge to separate from evidence that the judge hears when adjudicating the merits of a case. The result is that, often, the confidential information serves to bias the adjudicating judge in favor of or against one or more of the parties to the dispute, thus compromising the integrity of the adjudication process. Section 3C(2) recognizes these facts and additionally counsels against the settlement judge being the adjudicating judge. The word "ordinarily" recognizes that there may be instances where this section should not apply. For example, there may be situations where a jurisdiction may have only a single judge and/or where the parties, having been fully informed of the possible consequences of having one judge serve in both the settlement and adjudication role, nonetheless jointly agree to such procedure.<sup>162</sup>

157. ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, Introduction to Final Draft Report (2005), available at <http://www.abanet.org/judicialethics/IntroductoryReportFinal.pdf>.

158. MODEL CODE OF JUDICIAL CONDUCT (Proposed Addition by the ABA Section of Dispute Resolution Feb. 4, 2005), available at [http://www.abanet.org/judicialethics/resources/comm\\_rules\\_aba\\_dispute%20resolution\\_020405\\_ddt.pdf](http://www.abanet.org/judicialethics/resources/comm_rules_aba_dispute%20resolution_020405_ddt.pdf).

159. *Id.* at C(1).

160. *Id.* at C(2).

161. See Molly McDonough, *Meddling in Settling: Pressure to Clear Caseloads Spurs Judges to Coerce Settlements, Critics Say*, 91-JUN A.B.A. J. 14 (2005).

162. MODEL CODE OF JUDICIAL CONDUCT (Proposed Addition by the ABA Section of Dispute Resolution Feb. 4, 2005) at cmt. (on file with author).

The result of the equivocation in the proposed Canon and commentary is a failure to resolve the issue. On one hand, the commentary identifies the concerns, concluding that the process biases the judge and compromises the integrity of the adjudication process. On the other hand, it permits the process when agreed to by informed parties and acknowledges that at times it appears necessary. The proposal could have declared that this practice incurably compromises the integrity of the adjudicatory process and should be forbidden. Instead, the language is qualified by the word “ordinarily.” The comment then explains that, arguably, the practice can continue as long as either the parties make a knowing waiver, or the judge faces logistical challenges.<sup>163</sup>

If this proposal is adopted, does it require a judge to acquire consent from the parties to conduct a non-caucus settlement conference? The current Model Code of Judicial Conduct already requires consent from the parties for *ex parte* communications (caucus) in settlement conferences.<sup>164</sup> How should judges reconcile the apparent conflict between this proposed judicial ethic and the statutory permission for judges to conduct settlement conferences?<sup>165</sup>

It is interesting that the proposal goes beyond the recent concern about judges mediating cases assigned to them for trial and includes the practice of conducting settlement conferences. Including both processes in the proposal acknowledges that the criticisms and concerns apply to both processes. It is noteworthy that both the proposed language and commentary use the word “or” between the processes to suggest they are distinctive. Should the commission distinguish between these processes by forbidding judges from conducting mediations, but accepting the comparatively established practice of judges conducting settlement conferences?

Illumination and, hopefully, resolution of the controversy about judges conducting settlement conferences and mediations for cases assigned to them for trial would be helpful to the entities responsible for regulating judicial conduct. Once these issues are resolved by the ABA’s joint commission for the Model Code, it will be repeated on the state levels as states wrestle with updating their codes of judicial ethics.

## V. ADDING JUDICIAL MEDIATION FURTHER CONFUSES THE LAW

### A. *Confusion in the Law Regarding Settlement Conferences for Cases Assigned for Trial*

Professor Daisy Hurst Floyd’s article entitled, *Can the Judge Do That? – The Need for Clearer Judicial Role in Settlement*,<sup>166</sup> presents many of the pertinent

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163. *Id.* The commentary seems to approve the practice if there is only one judge in a jurisdiction; but the question arises: what if there are other judges, but they are either unwilling or untalented at facilitating settlement? This is not quite the “bright line test” that Dean Alfini suggested be considered. Alfini, *supra* note 106, at 14.

164. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) (2004), available at <http://www.abanet.org/cpr/mcjc/toc.html>.

165. FED. R. CIV. P. 16. For one interpretation of the scope of FRCP 16, see McKay, *supra* note 111, at 822-23.

166. Daisy Hurst Floyd, *Can the Judge Do That? – The Need for a Clearer Judicial Role in Settlement*, 26 ARIZ. ST. L.J. 45 (1994).



aspects of the law regarding settlement conferences. She traces how case law relies on a trial court's inherent authority and Federal Rule of Civil Procedure 16 to establish the right of a federal district judge to conduct settlement conferences for her own cases.<sup>167</sup>

Professor Floyd examines many cases determining whether a judge's behavior in settlement constituted judicial misconduct for the purposes of either recusal of the trial judge or reversal of a trial court decision.<sup>168</sup> She summarizes an important aspect of the law in this arena:

Unless a judge's remarks demonstrate such pervasive bias or prejudice that one party is actually prejudiced, the bias must stem from an extrajudicial source to be disqualifying. A source of bias is extrajudicial if the bias "is not derived from the evidence or conduct of the parties that the judge observes in the course of the proceedings." The requirement of an extrajudicial source for the bias has been the basis for many courts rejecting an argument that the trial court should be disqualified for bias based on conduct during pre-trial proceedings.<sup>169</sup>

Floyd's article described several pretrial behaviors by trial judges found to be acceptable:

- A statement that "he had seen better cases before and that the case did not impress him,"<sup>170</sup>
- Expressions of skepticism about the validity of a defense;<sup>171</sup>
- Forming opinions about the credibility of counsel;<sup>172</sup>
- A statement that the lawsuit was a "personal tragedy for the defendants" who were "honest men of high character,"<sup>173</sup>
- A statement to plaintiff that "these matters never work out for a plaintiff unless they are settled and that he [the plaintiff] ought to settle because the judge could not rule in his favor . . . ;"<sup>174</sup> and
- A statement that the judge was "outraged by the fact that in this day and age a man's life could be ruined because he stole a few sandwiches," which was the defendant's justification for firing an employee.<sup>175</sup>

Despite the clear authority for federal judges to conduct settlement conferences for their own cases and the difficulty of having a judge removed or reversed for bias due to pretrial behaviors, Floyd also revealed some mixed results when courts have attempted to define the limits of a federal judge's power in settlement.<sup>176</sup> For example, one appellate court found that a trial judge exceeded his authority when he followed through on his threat to impose sanctions if the parties

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167. *Id.* at 45 *passim*.

168. *Id.*

169. *Id.* at 68 (citations omitted).

170. *Pau v. Yosemite Park and Curry Co.*, 928 F.2d 880, 885 (9th Cir. 1991).

171. *N.L.R.B. v. Honaker Mills*, 789 F.2d 262, 265 (4th Cir. 1986).

172. *In re Ellis*, 108 B.R. 262, 266 (D. Haw. 1989).

173. *Johnson v. Trueblood*, 629 F.2d 287, 291 (3d Cir. 1980).

174. *Franks v. Nimmo*, 796 F.2d 1230, 1233 (10th Cir. 1986).

175. *Fong v. American Airlines, Inc.*, 431 F. Supp. 1334, 1338 (N.D. Cal. 1977).

176. *Hurst Floyd, supra* note 166, at 57.

waited until trial to settle within a suggested range.<sup>177</sup> Another appellate court, though, found that it was within a trial court's authority to impose sanctions for the parties' failure to comply with the trial court's deadline to conclude negotiations two weeks before trial.<sup>178</sup>

The confusion in the law regarding judges seeking to settle cases assigned to them for trial is amplified when considering state law. The Connecticut Supreme Court has ruled that "[w]hen a judge engages in a pretrial settlement discussion in a court case, he should automatically disqualify himself from presiding in the case in order to eliminate any appearance of impropriety."<sup>179</sup> The Montana Supreme Court requires the disqualification of a judge who will be trier of fact if that judge participates in unsuccessful pretrial settlement negotiations and is requested to do so by one of the parties.<sup>180</sup> In contrast, the case law in Hawaii and California establishes that trial judges need not recuse themselves, even in bench trials, simply because they conduct settlement conferences in cases assigned to them for trial.<sup>181</sup>

## *B. California As an Example of How Judicial Mediation Creates Additional Confusion in the Law*

### *1. Determining Mediation Confidentiality by the "Label of Process"*

Like many states, California has a statute that provides for the confidentiality of mediations.<sup>182</sup> The application of these provisions was clarified by the California Supreme Court in *Foxgate Homeowners Ass'n. v. Bramalea California, Inc.*<sup>183</sup>

177. *Kothe v. Smith* 771 F.2d 667, 668-69 (2d Cir. 1985).

178. *Newton v. A.C. & S., Inc.*, 918 F.2d 1121, 1126 (3d Cir. 1990).

179. *Timm v. Timm*, 487 A.2d 191, 193 (Conn. 1985).

180. *Shields v. Thunem*, 716 P.2d 217, 218-19 (Mont. 1985).

181. *See, e.g., Moran v. Guerreiro*, 37 P.3d 603, 621-23 (Haw. 2001).

Moran now argues that Judge Nakatani . . . should have recused herself from presiding over the various order to show cause hearings because she was privy to confidential information as a result of settlement negotiations . . . . In light of [*Associates Fin. Servs. v. Mijo*, 950 P.2d 1219 (1998),] in which the Hawaii Supreme Court upheld the propriety of a trial judge encouraging settlement of a case on the eve of trial, we disagree with Moran that information Judge Nakatani was privy to during settlement negotiations disqualified her from reviewing the [later] settlement agreement").

*Id.* *See also* *Roth v. Parker*, 57 Cal. App. 4th 542, 547, 549 (Ct. App. 1997).

When the case was called for trial, defendants Perez and Parker, who had posted jury fees, informed the court that they were waiving a jury trial and would prefer a court trial. Roth's counsel stated then that "[U]nder those circumstances I would request that this court recuse itself from trying this case. . . . Your honor participated intensely . . . in a mandatory settlement conference. And there have been *ex parte* communications to the court by both sides. The court seemed to have formed [an opinion on the] value of this case . . . ." . . . The court responded, "Well, Mr. Roth . . . to take your position to an extreme, no IC [i.e., individual or all purpose calendar] court could ever participate in any settlement conference other than pro forma settlement discussions . . . . And there's nothing that I know of that indicates that a judge who fully participates in a settlement conference has to automatically recuse himself or herself from . . . court trial. I don't force anybody to settle . . . . I have . . . no preconceived ideas of the case." . . . We also note that the mere fact that Judge Romero participated in settlement discussions is not a proper ground for disqualification under Code of Civil Procedure section 170.2 . . . .

*Id.*

182. CAL. EVID. CODE §§ 1115-28 (2004).

183. 25 P.3d 1117 (Cal. 2001).

The issue in *Foxgate* was whether a retired judge could submit a declaration in support of a motion for sanctions against a party who allegedly sabotaged a mediation. The court concluded that the statute prohibits such behavior. The structure of the statute and reasoning of the court creates a chaotic state of the law for judicial mediation.

The *Foxgate* court's reasoning attempts to conform to the statute's distinction between mediation and settlement conferences. The statute specifies, "This chapter does not apply to . . . [a] settlement conference pursuant to Rule 222 of the California Rules of Court."<sup>184</sup>

Applying this statute, the court reasoned:

Had [the retired judge] been classified as a special master ordered to report to the court, his report would not have been subject to the mediation confidentiality statutes and would be governed by the parties' agreement to the CMO provision for reporting. The superior court CMO states: "[The] Judge . . . is appointed as Special Master pursuant to Code of Civil Procedure Sec 638 et seq., and shall act as mediator for settlement conferences and as discovery referee. The Special Master shall rule on all discovery disputes, shall assist in the implementation of the Order and shall preside over mediation conferences and make any orders governing the attendance of parties and their representatives thereat." Amicus curiae . . . suggests that Judge Smith acted as though he was conducting a settlement conference and asks this court to clarify the differences between a settlement conference at which a court may, on its own motion, sanction a party for not participating (Code of Civ. Proc., Sec 177.5) and mediation, . . . . We have no occasion to do so here. It seems clear from the record, and the parties appear to agree, that the proceeding about which Judge Smith reported was a mediation proceeding and the judge was acting as a mediator.<sup>185</sup>

The court thus predicated its upholding of mediation confidentiality on a finding that the judge was presiding over "a mediation proceeding and the judge was acting as a mediator."<sup>186</sup> The court appears to affirm that had the proceedings been found to be a settlement conference or had the judge been acting as a Special Master, the result would be different.<sup>187</sup> The *Foxgate* court could have found that the judge was serving in any one of three capacities: a Special Master who is required to submit reports to the court, a settlement conference judge who had power to sanction a party for not participating, or a mediator in a mediation proceeding who is required to maintain confidentiality. The propriety of the judge's conduct would be dramatically different depending on his status.

This creates confusion in the law regarding judicial mediation because of the difficulty of distinguishing between a settlement conference and judicial mediation. What standard should a court utilize in making such a determination? Statu-

184. CAL. EVID. CODE § 1117(b)(2).

185. *Foxgate*, 25 P.3d at 1125 n.8 (emphasis removed).

186. *Id.*

187. *See, e.g., Id.* at 1124-28.

tory definitions of “mediation” would include settlement conferences.<sup>188</sup> Judges conducting settlement conferences fulfill the common dictionary definition of “mediate.”<sup>189</sup> The *Foxgate* court’s determination that “the judge was acting as a mediator”<sup>190</sup> is suspect because that would be true in both a mediation proceeding and a settlement conference.<sup>191</sup>

The scarcity of other differentiating factors is likely to put increased reliance on the process’ label in determining whether a proceeding is a mediation, with all the rights and protections thereto appertaining, or a settlement conference, with different rights and protections. Even this criterion might be suspect, depending on the clarity of the appointing label. For example, in the *Foxgate* case, the operative language in the Case Management Order defined the judge’s role as “act[ing] as a mediator for settlement conferences” and “presid[ing] over mediation conferences.”<sup>192</sup> The likelihood of courts consistently interpreting this type of ambiguous language is problematic.

The *Foxgate* decision creates havoc by differentiating between the protections and powers associated with judicial mediations and settlement conferences, but then declining to provide guidance on how to differentiate between these processes. The court justifies its concluding that this was a mediation at least partly on the basis that, “It seems clear from the record, and the parties appear to agree, that the proceeding about which Judge Smith reported was a mediation proceeding . . . .”<sup>193</sup>

Finding that the parties agree on this issue, which in *Foxgate* was raised in an Amicus brief, will not be of much assistance when the parties frame this as the issue in controversy for determination in subsequent litigation. Parties are certain to litigate whether a proceeding was a settlement conference or mediation now that the law is clear that serious ramifications follow that determination.

That is exactly what happened in *Doe 1 v. Superior Court*.<sup>194</sup> The party seeking to divulge information that had been created as part of a judicially supervised mediation or settlement conference argued that the proceeding was a settlement

188. The California Evidence Code defines mediation as “a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.” CAL. EVID. CODE § 1115. The Uniform Mediation Act similarly defines mediation as, “a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.” UNIF. MEDIATION ACT §2(1) (2002).

189. MERRIAM-WEBSTER COLLEGIATE DICTIONARY (11th ed. 2003). “Mediate” is defined as an adjective meaning “occupying a middle position . . .” or as a verb meaning “to effect by action as an intermediary . . . .” *Id.* See also Galanter, *supra* note 2 (where Marc Galanter traces the judicial role in settlement without differentiating between settlement conferences and mediations).

190. *Foxgate*, 25 P.3d at 1125 n.8.

191. But see Carrie Menkel-Meadow’s opinion that,

Judges who perform these functions [asking questions to explore the parties’ interests and attempting to fashion tailor-made solutions from an objective perspective] are not necessarily mediators, though they are frequently called that by themselves and others. Strictly speaking, a mediator facilitates communication between the parties and helps them to reach their own solution. As a mediator becomes more directly involved in suggesting the substantive solution, his or her role can change and he or she can become an arbitrator or adjudicator. It appears that the role judges and magistrates assume in many settlement conferences is this hybrid form of med-arb.

Menkel-Meadow, *supra* note 2, at 510 (internal citations omitted).

192. *Foxgate*, 25 P.3d at 1125 n.8 (emphasis omitted).

193. *Id.*

194. 34 Cal.Rptr.3d 248 (Ct. App. 2005).

conference, and thus exempt from the mediation confidentiality provisions. The *Doe I* court recognized “the conceptual difficulties in distinguishing between a mediation and a settlement conference when a bench officer is presiding at those talks.”<sup>195</sup> This court found that the proceeding was a mediation despite references to it in the record as both a settlement conference and mediation, because the record was “replete with numerous other references to an ongoing mediation.” The court concluded its analysis by advising counsel and future appellate courts,

If counsel wish to avoid the effect of mediation confidentiality rules, they should make clear at the outset that something other than a mediation is intended. Except where the parties have expressly agreed otherwise, appellate courts should not seize on an occasional reference to ‘settlement’ as a means to frustrate the mediation confidentiality statutes.<sup>196</sup>

The advent of judicial mediation further complicates the confusion in the law regarding judges seeking to settle cases assigned to them for trial, because under *Foxgate*, it could be determined that a settlement judge conducted either a settlement conference or a mediation, with different powers and protections dependent upon that determination.

## 2. *Determining the Legitimacy of Settlement Techniques by the “Label of Process”*

The progeny of the *Foxgate* precedent and reasoning includes another California appellate decision regarding whether a settlement judge exceeded his authority. The issue in *Travelers Cas. & Sur. Co. v. The Superior Court of L.A. County*<sup>197</sup> was whether the settlement judge exceeded his authority by making a finding that there was probable liability, and then finding the range of likely damages.<sup>198</sup> The judge made these findings because the defendant’s insurers had threatened the defendant that they would forfeit their insurance coverage if the defendant settled the case without their consent and prior to determinations of liability and the amount of that liability.<sup>199</sup>

The appellate court acknowledged, “The stipulated order appointing Judge Lichtman as settlement and mediation judge stated that he could review the probable evidence, offer evaluations of the strength of the evidence, the applicable law, the amount of damages, and ‘take any other steps or apply any other settlement techniques he finds appropriate . . . .’”<sup>200</sup> Despite this apparent prior agreement among the parties (a stipulated order) to invest the settlement judge with broad powers, the defendant’s insurers asked the appellate court to vacate the findings by the settlement judge.<sup>201</sup>

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195. *Id.* at 252.

196. *Id.* at 225-53.

197. *Travelers Casualty & Surety Co. v. Superior Court*, 24 Cal.Rptr.3d 751 (2005) [hereinafter *Travelers*].

198. *Id.* at 754-57.

199. *Id.* at 755-57.

200. *Id.* at 762 n.15.

201. *Id.* at 756.

The appellate court found that this was a “type of mediation conducted as part of voluntary settlement conferences.”<sup>202</sup> Following the example of *Foxgate*, the *Travelers* court found that Judge Lichtman was conducting a mediation and that the process “was governed by the rules applicable to mediations, . . . even though that mediation took place as part of a voluntary settlement process.”<sup>203</sup>

Upon finding that this proceeding was governed by the rules applicable to mediations, the *Travelers* court applied the California Rules of Court for Court Annexed Mediations (California Rules).<sup>204</sup> The court acknowledged that the California Rules specifically exempt sitting judges and settlement conferences.<sup>205</sup> The *Travelers* Court justified its application of the California Rules to this settlement judge on the Advisory Committee Comment to California Rule 1620.1(d), which states:

Although these rules do not apply to them, judicial officers who serve as mediators in their courts’ mediation programs are nevertheless encouraged to be familiar with and observe these rules when mediating, particularly the rules concerning subjects not covered in the Code of Judicial Ethics such as voluntary participation and self-determination.<sup>206</sup>

Because rule 1620.1(e) specifically states, “The rules in this part do not apply to settlement conferences conducted under rule 222 of the California Rules of Court,” the only way the *Travelers* court could apply these rules was to find that the proceeding was a mediation rather than a settlement conference. As in *Foxgate*, the criteria for such a determination are unclear.<sup>207</sup>

Also similar to *Foxgate*, the *Travelers* court appeared to give great weight to the label of the proceeding. The description of the judge’s extensive powers in the stipulated appointment might have justified a finding that this proceeding was more similar to a settlement conference than a mediation. The *Travelers* court confirms the confusion when it finds that this is “the type of mediation conducted as part of voluntary settlement conferences.”<sup>208</sup>

The *Travelers* court found that “[a] mediator must conduct the mediation in a manner that supports the principles of voluntary participation and self-

202. *Id.* at 757-58, 758 n.8.

203. *Id.* at 758 n.8.

204. *Id.* at 758.

205. *Id.* at 758. CAL. CT. R. 1620.1 (d) and (e) provide:

(d) The rules in this part do not apply to judges or other judicial officers while they are serving in a capacity in which they are governed by the Code of Judicial Ethics.

(e) The rules in this part do not apply to settlement conferences conducted under rule 222 of the California Rules of Court.

CAL. CT. R. 1620.1(d)-(e). These California rules apparently exempt judges because judges’ ethical boundaries are articulated in the Code of Judicial Ethics. *Id.*

206. *Travelers*, 24 Cal. Rptr. 3d at 758; CAL. CT. R. 1620.1(d).

207. The *Travelers* court could be attributed the proposition that settlement proceedings conducted by the trial judge cannot be “mediations” on the ground of its statement that “[A] mediator should not have the authority to resolve or decide the mediated dispute and should not have any function for the adjudicating tribunal with regard to the dispute, except as a non-decision making neutral.” *Travelers*, 24 Cal.Rptr.3d at 758 (citations omitted). While this court specifically refuses to articulate the difference between a settlement conference and a mediation, a possible criterion that it appears to support is whether the judge will make later rulings on the case. *See id.*

208. *Id.* at 757, 758 n.8.

determination by the parties.”<sup>209</sup> It explained that neither the Judge’s inherent authority nor the broad grant of authority in the stipulated order appointing him as settlement judge could allow the settlement judge “to exceed the neutral, non-factfinding role of a mediator.”<sup>210</sup> The court vacated the findings of the settlement judge on the grounds that the judge “exceeded his authority by making factual findings and otherwise preparing a coercive order in violation of the fundamental principles governing mediation proceedings.”<sup>211</sup>

The *Travelers* court clearly followed *Foxgate*’s lead when it “expressly decline[d] to consider or clarify any differences that might exist between a mediation and voluntary settlement conference.” The court wrote, “Therefore, our decision should not be construed as holding that all voluntary settlement conferences are mediations which are subject to the rules concerning the conduct of mediation proceedings. Instead, we apply the various mediation rules [in this case] because that order was the result of a mediation.”<sup>212</sup>

As in *Foxgate*, then, the propriety of the judge’s conduct might be dramatically different if the proceeding was a settlement conference instead of a mediation. *Travelers* requires judicial mediations to conform to at least the principles of voluntary participation and self-determination articulated in the California Rules.<sup>213</sup> Settlement conferences are specifically exempted from such standards by the California Rules and by the *Travelers* decision.<sup>214</sup> The primary distinction between the processes appears to be the label utilized for the proceedings.

The advent of judicial mediation creates confusion in the law because the powers and boundaries of judicial mediation are different from those in a settlement conference, and it is challenging to differentiate between the processes. California law appears to depend heavily on how the process is labeled.

### 3. Questioning the “Label of the Process” Approach with Empirical Data

Is California’s reliance on the label of the process when determining confidentiality and standards of practice based on an assumption that the content and techniques in mediations are distinct from those of settlement conferences? If the processes are distinct, do those differences ameliorate or exasperate the concerns about judges conducting mediations? For example, it could be argued that the concern about pre-judging the case is absent if mediations consist of an interest-based, problem-solving approach instead of a bargaining-in-the-shadow-of-the-

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209. *Id.* at 758. According to the California Rules of Court, voluntary participation and self-determination require the mediator to:

- (a) Inform the parties, at or before the outset of the first mediation session, that any resolution dispute in mediation requires a voluntary agreement of parties;
- (b) Respect the right of each participant to decide the extent of his or her participation in the mediation, including the right to withdraw from the mediation at any time; and
- (c) Refrain from coercing any party to make a decision or to continue to participate in the mediation.

CAL. CT. R. 1620.3.

210. *Travelers*, 24 Cal.Rptr.3d at 761.

211. *Id.* at 754.

212. *Id.* at 758 n.8.

213. *Id.* at 757-58.

214. CAL. CT. R. 1620.1(d)-(e); *Travelers*, 24 Cal.Rptr.3d at 757-58.

law approach. Likewise, there might be less concern about coercion if mediations are dramatically more facilitative than settlement conferences.

While the California courts might continue distinguishing between the powers and protections in judicial mediation compared to settlement conferences based on the label of the process, they might be persuaded to pursue a more substantive approach by empirical data showing that the processes are substantially the same. Toward that end, the survey of California judges<sup>215</sup> sought to document the content and technique of judicial mediations and settlement conferences.

As described above,<sup>216</sup> the survey of California judges asked those judges who had not had a family or civil assignment in the last four years to only answer questions about their attitudes, and nothing else. The objective of the survey was to quantify judicial attitudes of all judges, but only the practices of current civil and family law judges ("current" being defined as within the last four years). Eighty-five judges without civil or family assignments revealed their attitudes towards judicial mediation and settlement conferences, and then followed directions to not answer any further questions. Thus the demographics for the judges who completed the rest of the survey are: 72 family law judges, 129 general civil judges, 22 limited jurisdiction judges, 6 complex civil judges, and 10 judges who reported having assignments in more than one category. The judges with assignments in more than one category were not counted in any of the designated categories, but were included in the category of all judges.

Rather than imposing definitions on the judges, the survey accepted the labels used by judges to differentiate between the processes. Whenever a judge used the label of mediation for the settlement proceeding, then it was considered a mediation; likewise for settlement conferences.<sup>217</sup> Rather than focusing on definitions to label the processes, the survey deferred to the judges regarding labels and focused on the content of the proceedings. The result is documentation of the conduct and techniques judges used when they conducted processes they label "settlement conferences" and separate documentation of the conduct and techniques when judges label the proceeding "mediation."

The methodology used to document the judges' conduct and techniques was to ask each judge to provide an estimate of how often he used a specific technique in meetings he labeled, "settlement conferences," and a separate estimate how often he used the same technique for meetings he labeled, "mediations." The survey identified thirty-two techniques<sup>218</sup> and asks each judge to indicate whether that technique was used less than 10%, between 10% and 40%, between 41% and 60%, between 61% and 90%, or more than 90% of the time. The techniques queried were largely drawn from the characteristics identified in Professor Leonard Riskin's grid on mediator style.<sup>219</sup>

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215. See *supra* Part II.B, III.C and accompanying notes.

216. See *supra* Part II.B and accompanying notes.

217. See *supra* Part III.C and accompanying notes. This seems especially appropriate because of the times when the label of the process seems to have legal significance.

218. See *infra* app. A.

219. For a background in Riskin's Grid theory, see Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 25 (1996); Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEG. L. REV. 71 (1998); Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003).



The structure of the survey allows for comparison of the content of how a judge conducts each process. Unfortunately, only 40 judges acknowledged ever conducting processes they labeled mediations. Of that number, comparing the difference in how the same judge conducts a mediation and a settlement conference is impossible for three judges because they reported never conducting settlement conferences. Out of this group of 37 judges conducting both processes, only 27 completed the questions about their utilization frequencies of the thirty-two techniques once for settlement conferences and another time for mediations. Despite the extremely limited sample, it is interesting to examine the degree of similarity or difference for how each of these 27 judges conducts both processes. Specifically, the data allows the examination of how each judge's thirty-two measurements for settlement conferences compares with the thirty-two measurements for that same judge conducting mediations.

The first measure of the degree of similarity in technique between how the same judge conducts the two processes is the number of incidents in which the thirty-two techniques for that judge were different. The following table reveals the number of judges reporting the corresponding number of incidences in which the frequency of technique varied between the processes:

*Frequency of Variation in Techniques Used in Mediations versus Settlement Conferences*

Number of techniques (out of 32) used with different frequencies between the two processes	Number of judges reporting that number of variations
0	7
1	4
2	1
3	2
4	1
5	3
9	1
11	1
12	1
13	1
16	1
19	1
20	2
23	1

Table 11

Thus, the data shows that out of the judges that reported conducting both processes (37) and that also reported the content of how they conduct both processes (27), only 9 report a substantially different content between the processes. Of the 27 judges, more than one-fourth (7 judges) report no differences, and two-thirds (18 judges) report variations in the utilization frequency of five or fewer out of thirty-two techniques. One-third (9 judges) report differences in frequencies for nine or more of the techniques, with only 4 judges reporting differences in frequencies for more than sixteen techniques.

The aggregate picture is that out of 864 measures (32 measures for each of 27 judges) there were a total of 174 reported variations between the processes. Eighty percent of the measures showed that techniques were used with the same frequency in a “mediation” as in a “settlement conference.”

A second measure of the degree of difference between the content of these processes is the extent of variation in the frequency of utilization. For example, Judge A reports that he expresses his opinion on the likely outcome of the case at trial between 61% and 90% of the time in settlement conferences, but a different frequency in mediations; the amount of difference between the processes is greater if he reports that he uses this same technique in less than 10% of his mediations compared to between 41% and 60% of his mediations.

The above data identifies a total of 174 variations between the frequencies of utilization of a technique by the same judge in a settlement conference compared to a mediation. Of those 174 variations, 106 were one category different,<sup>220</sup> 47 were two categories different, 16 were three categories different, and 5 were four categories different. This data reveals that of the 20% of all measures that showed a variation (174 out of 864), 60% (106 out of 174) were different by only one category. Thus, there were only 68<sup>221</sup> out of the total 864 measures that were more dramatically different. The data shows a difference in frequency of two or more categories for only 7.9% of the measures.

The final aspect of this data that may be instructive is whether there is a trend in which of the techniques were different between the two processes. For example, it might be important if each of the 20 judges reporting variations in the processes<sup>222</sup> reported differences on the same technique.

The following table describes the number of judges (out of 20) who reported variations in use of a particular technique between processes labeled “mediations” and “settlement conferences.” “Mediations over settlement conferences” is used to describe when a judge uses the technique in mediation more than in settlement conferences. Conversely, “Settlement conferences over mediations” is used to describe when a judge uses the technique in settlement conferences more than in mediation.

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220. The categories referred to are the categories of frequency available to the judges: less than 10%, 10 to 40%, 41 to 60%, 61 to 90%, and more than 90%. One category different would represent a level of frequency immediately greater or lesser than that being compared. Two categories different would be a level of frequency two categories greater or lesser than that being compared, ie 61 to 90% would be two categories different than 10 to 40%. Three categories different would be a level of frequency two categories removed from that being compared, i.e. more than 90% and 10 to 40%. The only way to have four categories different is the two extreme categories, less than 10% and more than 90%.

221. From above,  $47 + 16 + 5 = 68$

222. Twenty-seven judges reported data, but 7 reported no differences.

*Variations in Uses of Particular Techniques: Mediations versus Settlement Conferences*

Technique	Total number reporting variations	Mediations over settlement conferences	Settlement conferences over mediations
"I express my opinions on the likely outcome of the case at trial"	11	0	11
"I focus primarily on satisfying the parties' underlying needs, goals, fears, or feelings"	10	10	0
"I encourage the parties to express their emotions"	10	10	0
"I give advice that addresses the underlying needs, goals, fears and feelings arising out of the dispute, e.g., that settling a lawsuit is not abandoning the memory of a loved one"	8	7	1
"I focus primarily on explaining to the parties the legal strengths and weaknesses of the case"	8	1	7
"I encourage the parties to generate creative solutions that would address the underlying needs, goals, fears, and feelings arising out of the dispute"	8	7	1
"I urge the parties to accept a particular settlement proposal"	8	2	6
"I use conditional or hypothetical offers to assist in bridging the difference between offers and demands"	7	1	6
"I suggest my ideas for creative solutions that would address the underlying needs, goals, fears and feelings arising out of the dispute"	7	5	2
"I use bracketing techniques [have both sides make a confidential offer to me in an attempt to get within a designated range] to assist in bridging the difference between offers and demands"	6	0	6
"I tell the attorneys and parties what I think they should do"	6	1	5
"I emphasize the finality of settlement compared to the possibility of appeals and challenges of enforcing a judgment"	6	2	4
"I help the parties understand each other's underlying needs, goals, fears, and feelings"	6	4	2
"I emphasize that I only have limited time for this settlement meeting"	6	3	3
"I am very influential helping the parties determine the terms of a settlement"	6	3	3

Technique	Total number reporting variations	Mediations over settlement conferences	Settlement conferences over mediations
"I ask the parties (rather than the lawyers) to discuss the case directly with me"	5	5	0
"I request concessions from one or more parties in the negotiation"	5	1	4
"I emphasize the non-financial costs (including but not limited to emotional, relational, and opportunity) of continuing the litigation"	5	4	1
"I provide the parties with a 'net to client' analysis comparing the amounts received by the client after fees and costs from a settlement offer to that from a likely judgment after trial"	5	1	4
"I express my opinion of the parties' needs, goals, fears, and feelings"	5	4	1
"I emphasize the financial costs of continuing the litigation"	5	2	3
"I discuss confidentiality of the settlement discussions with the participants"	4	4	0
"I explain to the parties that they are signaling their degree of flexibility in the negotiation by the size of each concession and the amount of time between concessions"	4	1	3
"I am indifferent as to whether a settlement is accomplished"	4	2	2
"I meet exclusively in private meetings with individual party(ies) – 'caucuses'"	4	2	2
"I show empathy and understanding of the parties' concerns through active listening techniques"	3	3	0
"I emphasize the risks of trying the case compared to the certainty of settling"	3	0	3
"I ask the parties (rather than lawyers) to discuss the case directly with the other side"	3	2	1
"I attempt to be strict or intimidating"	2	0	2
"I ask the attorneys and parties what they think they should do"	2	2	0
"I attempt to be congenial or likable"	2	1	1
"I treat the lawyers' and parties' settlement communications as confidential"	0	0	0

Table 12

Few will be surprised by the trends in the differences between judicial mediations and settlement conferences revealed by this data. Judicial mediations encourage parties to express their emotions more and are more about satisfying the parties' underlying needs, goals, fears, and feelings. In contrast, settlement conferences are more about the judge explaining her opinion of the legal strengths and weaknesses of the case and her opinion on the likely outcome of the case at trial.

But these differences are only a matter of slight degrees because differences were only reported in 174 out of 864 measures and the difference in frequency was only one category 80% of the time. The 68 measures showing a difference of more than one category were distributed among the techniques. In many instances, some of the judges reported using a particular technique more often in mediation, while other judges reported using the same technique more often in settlement conferences.

The fact that 7 of 27 judges reported no differences, the limited number of differences for many judges, and the large number of differences that were only one degree different supports the conclusion that often, when measured by comparing the techniques of judges who use both labels, the content of a mediation is substantially the same as the content of a settlement conference. The conclusion is qualified because of the limited sample and data.

### C. *The Uniform Mediation Act Uses "Subsequent Decision Making" to Determine Mediation Confidentiality*

The most prominent and processed mediation confidentiality statute is the Uniform Mediation Act (UMA),<sup>223</sup> recommended for enactment in all states by the National Conference of Commissioners on Uniform State Laws in 2001.<sup>224</sup> Regarding the issue of judges mediating cases assigned to them for trial, the UMA specifies, "The [Act] does not apply to a mediation . . . conducted by a judge who might make a ruling on the case."<sup>225</sup>

The Comments to this section of the UMA explain that "this Section excludes certain judicially conducted mediations from [the confidentiality provided by] the Act."<sup>226</sup> The comments distinguish between "judicially-hosted settlement conferences that for all practical purposes are mediation sessions for which the Act's policies of promoting full and frank discussions between the parties would be furthered," and case management judicial conferences that could lead to court orders entered into the public record on issues like discovery in which "the parties hardly have an expectation of confidentiality."<sup>227</sup>

Rather than maintaining this distinction, the proposed statutory language "excludes those settlement conferences in which information from the mediation is communicated to a judge with responsibility for the case."<sup>228</sup> Conversely, it ex-

223. UNIF. MEDIATION ACT (2001), available at <http://www.law.upenn.edu/bll/ulc/mediat/uma2001.pdf>.

224. *Id.* at PREFATORY NOTE PART 3.

225. § 3(b)(3).

226. § 3 cmt. 4.

227. *Id.*

228. *Id.*

tends confidentiality protection to “mediations conducted by judges specifically and exclusively . . . assigned to mediate cases, so-called ‘buddy judges’ . . . because such mediators do not make later rulings on the case.”<sup>229</sup>

Note that the UMA chooses to not try to differentiate between a settlement conference and a judicial mediation. The language in the comment cited above lumps both processes together by referring to “settlement conferences in which information from the mediation . . .”<sup>230</sup>

Instead, the UMA uses the issue of whether trial judges should conduct settlement conferences/mediations for cases assigned to them for trial as the fulcrum point to determine confidentiality.<sup>231</sup> The standards reflected in the comments about promoting full and frank discussions between the parties and whether the parties have a reasonable expectation of confidentiality<sup>232</sup> were transformed into whether the judge might make a ruling on the case. When addressing judges facilitating settlement, the UMA could have distinguished between settlement discussions and other case management discussions. Instead, the proposed statute denies protection for all discussions with a judge who “might make a ruling on the case.”<sup>233</sup>

The UMA’s standard of whether the judge “might make a ruling on the case” does offer the clarity of a bright line test, as suggested by Professor Alfini.<sup>234</sup> The problem is that denying confidentiality protection to judicially supervised settlement discussions for cases assigned to that judge for trial creates confusion in the law. Adopting the standard of whether “a judge might make a ruling on the case” to determine confidentiality doesn’t forbid the practice of trial judges facilitating settlement for their cases. It simply requires other authority for the customary confidentiality protections for such proceedings.

Most jurisdictions have other sources of authority for maintaining the confidentiality of a settlement conference.<sup>235</sup> While the UMA declines to distinguish between settlement conferences and mediations, some state laws may make distinctions.<sup>236</sup> The advent of judicial mediation creates additional havoc in the law because if a judge labels the proceeding a “mediation,” the discussions might not be protected by the UMA (because the judge “might make a decision in the case”) and also might not be protected by whatever the authority for confidentiality for

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* “On the other hand, there are judicially-hosted settlement conferences that for all practical purposes are mediation sessions for which the Act’s policies of promoting full and frank discussions between the parties would be furthered.” *Id.* The California Court Rules are more formal when discussing goals: “These rules are intended to guide the conduct of mediators in these programs, to inform and protect participants in these mediation programs, and to promote public confidence in the mediation process and the courts.” CAL. CT. R. 1620(a). Part of that confidence is, likely, confidentiality. See UNIF. MEDIATION ACT § 8; CAL. CT. R. 1624.

233. UNIF. MEDIATION ACT § 3(B)(3). It is especially interesting that the UMA does not appear to distinguish between a bench and jury trial. Since a judge in a jury trial makes evidentiary and other rulings, the UMA confidentiality protections would not extend to settlement proceedings supervised by the trial judge.

234. Alfini, *supra* note 106, at 14.

235. See, e.g., CAL. CT. R. 3(f)(4). “All settlement conference proceedings shall be confidential.” *Id.* (CA ORDER 06-123).

236. See *supra* Part V.B.i. (discussing California law).

settlement conferences, because the proceeding is a “mediation” rather than a “settlement conference”. It would almost certainly surprise most lawyers and clients to learn that comments in such a judicial mediation could be admissible at trial.

The UMA’s approach of focusing on whether the judge might make a ruling on the case is in stark contrast to the focus in California law on the status of the judge and label of the process as determinative of the judge’s authority and applicability of statutory confidentiality protections. The current law in California focuses on distinguishing between settlement conferences, with certain attached rights, and mediation, with other attached rights.<sup>237</sup> Notice that whether the judge will make a ruling on the case is irrelevant. If a judge labels a settlement proceeding a settlement conference, the mediation confidentiality protections would not apply, but other court rules protect those communications.<sup>238</sup> If a judge labels the settlement proceeding a mediation, the statute’s confidentiality protections would appear to apply, even if the case was assigned to her for trial.

## VI. HOW JUDICIAL MEDIATION COULD ASSIST IN RESOLVING THE CONTROVERSY AND CLARIFYING THE LAW

The mediation movement is creating standards of practice and ethics for mediators. The advent of judicial mediation could assist in resolving the controversy about trial judges seeking to settle their own cases by using the standards for mediators as a basis to articulate ethical standards for settlement judges. The application of standards for self-determination and voluntary participation in the *Travelers* case was confusing only because the law exempts settlement conferences from such standards. The advent of judicial mediation could become the catalyst for clarifying ethical practices for any judge acting in any settlement capacity.

Professors Alfini and Floyd identified the need for such standards a decade ago.<sup>239</sup> The continued refinement in mediator ethical standards like the California Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases<sup>240</sup> and the revised Standards of Practice jointly developed and adopted by the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution<sup>241</sup> provide increasingly refined guidelines for appropriate practices in the settlement support capacity. These standards should not be adopted and applied to judges en masse because perhaps there should be some unique characteristics when a judge, especially the trial judge, is the mediator. But the continued maturation of such standards for the private sector clarifies the thinking and provides the foundation for such standards for sitting judges. Creating explicit ethical standards for judges advancing settlement would be a vast improvement over the calls that trial judges should not mediate or conduct settlement conferences for their own cases, or that the rights and responsibilities

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237. *Id.*

238. CAL. EVID. CODE §§ 1115-28 (2004).

239. Alfini, *supra* note 106, at 14; Hurst Floyd, *supra* note 166, at 90.

240. CAL. CT. R. §§ 1620-22.3.

241. MODEL STANDARDS OF PRACTICE FOR MEDIATORS (2005), available at <http://www.abanet.org/dispute/news/ModelStandardsOfConductforMediatorsfinal05.pdf>.

for judges conducting settlement conferences should be different from those of judges conducting mediations.

## VII. CONCLUSION

The advent of judicial mediation may provide an opportunity to resolve a decades-old controversy about judges attempting to settle cases assigned to them for trial. While it is uncontested that settlement has become a much more significant function for most modern day judges, judicial ethics have not yet evolved to provide clear ethical standards for judges attempting to assist in settling. While some propose a bright line test that would forbid judges from attempting to settle any case in which they might make a decision, such an approach would be contrary to prevailing practice and would eliminate the opportunity for judicial signaling to assist parties in their settlement strategies. Rather than arbitrarily differentiating between settlement conferences and mediations, this author suggests acknowledging that the content and techniques of the processes are virtually identical.

Once the processes are viewed as virtually identical, the judicial ethics community can build on the continuing refinement of standards of practice for mediators to develop specialized ethics for judges attempting to assist in settling cases. Clarifying that judges can assist in settling cases assigned to them for trial and the ethical standards when doing so would empower judges and judicial administrators in encouraging and implementing an important public service in the administration of justice.



APPENDIX A

**JUDICIAL VIEWS AND PRACTICES REGARDING JUDGES ATTEMPTING TO SETTLE CIVIL OR FAMILY LAW CASES**

As a judge, you are in a unique position to help us document judicial views and practices regarding judges who attempt to settle civil or family law cases. For this reason, we are asking you to fill out this survey, which should take about 10 to 15 minutes of your time. If you decide to participate, your experiences and views will be included in reports that are attempting to identify norms in this important part of judicial practice. Your participation is completely voluntary. You are free not to answer any of the questions for any reason.

This project assures the anonymity of your responses. The survey does not identify you in any way, and you are asked to return the surveys in a pre-addressed envelope. The surveys will be mailed to a P.O. Box belonging to a law school professor who is partnering with CJER and the AOC on this project. This way, even the professor will not know which judges have responded. CJER and the AOC will only be given access to the aggregate compilation of the data. The professor and his/her research team will use the data to write articles for publication. You can choose to receive the composite summary of your peers' responses by returning the blue postcard, even if you choose to not complete the survey.

**This survey seeks data about current views and practices of judges. Please answer all questions about your practice over the last four years.**

1. With the consent of the parties, I believe that civil or family law judges;
- a. should be allowed to mediate cases assigned to them for trial;
  - b. should be allowed to conduct settlement conferences for cases assigned to them for trial.

Strongly Disagree  
Disagree  
No Opinion  
Agree  
Strongly Agree

1 2 3 4 5  
1 2 3 4 5

2. In the past four years, which type of cases below have you had the most experience in conducting settlement conferences or mediations? (Please check one)

- Family Law
- General Civil
- Limited Jurisdiction Civil
- Complex Civil

I have not conducted mediations or settlement conferences in any of the above types of cases in the past four years. (If none, please stop here and mail back the survey.)

**Please answer the remaining questions in this survey based on the type of case in which you indicated you have the most experience in the last four years.**

3. When I schedule meetings to try to help settle a case:
- a. I label those meetings *settlement conferences* \_\_\_\_\_% of the time; and
  - b. I label those meetings *mediations* \_\_\_\_\_% of the time. (The two answers should total 100%)

Questions 4-15 asks you about the practices you have typically followed in the mediations and settlement conferences you have done during the last four years. Please use the response column on the left side of the page to describe your practice when presiding over meetings you labeled as mediations. Please use the response column on the right side of the page to describe your practice when presiding over meetings you labeled as settlement conferences.

If you have presided over BOTH mediations and settlement conferences, please complete the separate response columns for each process. If you have only presided over one process (mediations OR settlement conferences), you only need to complete the appropriate response column for that process

<u>Mediations</u>	<u>Settlement Conferences</u>
days after filing _____, or 4. I most typically schedule the settlement meetings:	_____ days after filing, or
days before trial _____ (use 0, if it is the day of trial )	_____ days before trial
minutes _____	_____ minutes
5. My settlement meetings most typically last about: _____	
6. The number of settlement meetings I conduct a week is about: _____	
7. The percentage of my settlement meetings that are for cases in _____% which I am assigned as the trial judge is about: _____%	
_____ % 8. The percentage of cases that settle at my settlement meetings is about: _____%	

More than 90%  
61% - 90%  
41% - 60%  
10% - 40%  
Less than 10%

More than 90%  
61% - 90%  
41% - 60%  
10% - 40%  
Less than 10%

9. Based on your typical practice in the mediations and settlement conferences you have conducted in the last four years, please provide your best estimate of the percentage of mediations and settlement conferences in which the following statements apply:

Mediations						Settlement Conferences				
1	2	3	4	5	a. I focus primarily on explaining to the parties the legal strengths and weaknesses of the case;	1	2	3	4	5
1	2	3	4	5	b. I express my opinions on the likely outcome of the case at trial;	1	2	3	4	5
1	2	3	4	5	c. I request concessions from one or more parties in the negotiation;	1	2	3	4	5
1	2	3	4	5	d. I explain to the parties that they are signaling their degree of flexibility in the negotiation by the size of each concession and the amount of time between concessions;	1	2	3	4	5
1	2	3	4	5	e. I use conditional or hypothetical offers to assist in bridging the difference between offers and demands;	1	2	3	4	5
1	2	3	4	5	f. I use bracketing techniques [have both sides make a confidential offer to me in an attempt to get within a designated range] to assist in bridging the difference between offers and demands;	1	2	3	4	5
1	2	3	4	5	g. I emphasize the risks of trying the case compared to the certainty of settling;	1	2	3	4	5
1	2	3	4	5	h. I emphasize the financial costs of continuing the litigation;	1	2	3	4	5
1	2	3	4	5	i. I emphasize the non-financial costs (including but not limited to emotional, relational, and opportunity) of continuing the litigation;	1	2	3	4	5
1	2	3	4	5	j. I provide the parties with a "net to client" analysis comparing the amounts received by the client after fees and costs from a settlement offer to that from a likely judgment after trial;	1	2	3	4	5
1	2	3	4	5	k. I emphasize that I only have limited time for this settlement meeting;	1	2	3	4	5
1	2	3	4	5	l. I am very influential helping parties determine the terms of a settlement;	1	2	3	4	5
1	2	3	4	5	m. I urge the parties to accept a particular settlement proposal;	1	2	3	4	5
1	2	3	4	5	n. I am indifferent as to whether a settlement is accomplished;	1	2	3	4	5
1	2	3	4	5	o. I show empathy and understanding of the parties' concerns through active listening techniques;	1	2	3	4	5
1	2	3	4	5	p. I encourage the parties to express their emotions;	1	2	3	4	5
1	2	3	4	5	q. I focus primarily on satisfying the parties' underlying needs, goals, fears, or feelings;	1	2	3	4	5
1	2	3	4	5	r. I express my opinion of the parties' needs, goals, fears, and feelings;	1	2	3	4	5
1	2	3	4	5	s. I help the parties understand each other's underlying needs, goals, fears, and feelings;	1	2	3	4	5
1	2	3	4	5	t. I encourage the parties to generate creative solutions that would address the underlying needs, goals, fears, and feelings arising out of the dispute;	1	2	3	4	5
1	2	3	4	5	u. I suggest my ideas for creative solutions that would address the underlying needs, goals, fears, and feelings arising out of the dispute;	1	2	3	4	5
1	2	3	4	5	v. I give advice that addresses the underlying needs, goals, fears and feelings arising out of the dispute, e.g., that settling a lawsuit is not abandoning the memory of a loved one;	1	2	3	4	5
1	2	3	4	5	w. I emphasize the finality of settlement compared to the possibility of appeals and challenges of enforcing a judgement;	1	2	3	4	5
1	2	3	4	5	x. I tell the attorneys and parties what I think they should do;	1	2	3	4	5
1	2	3	4	5	y. I ask the attorneys and parties what they think they should do;	1	2	3	4	5
1	2	3	4	5	z. I attempt to be congenial or likeable;	1	2	3	4	5



16. The average number of civil or family cases that are/were assigned to me per year is about \_\_\_\_\_.
17. The county or district where I serve is organized so that when a case is assigned to me for trial the normal practice is: (Circle one)
- I am the only judge available to conduct settlement conferences or mediations for that case;
  - I am welcome to conduct settlement conferences or mediations, but other judges are available for settlement conferences or mediations for that case; or
  - I am discouraged from conducting settlement conferences or mediations for that case.
18. When I conduct settlement discussions in a civil or family law case and believe that the emerging settlement substantially deviates from what I believe would be the normal range of outcomes at trial, I use the following responses with the designated frequency: (Answer on the left margin column assuming parties are represented by counsel and on the right margin assuming that the party(ies) getting the bad deal is not represented by counsel.)

More than 90%  
61% - 80%  
41% - 60%  
10% - 40%  
Less than 10%

More than 90%  
61% - 80%  
41% - 60%  
10% - 40%  
Less than 10%

<u>Represented</u>						<u>Not Represented</u>				
1	2	3	4	5		1	2	3	4	5
					a. refrain from saying anything that implies my personal view of the settlement terms;					
					b. make sure that participants understand that my role in this meeting is to assist in reaching a solution agreeable to the parties, even if it is substantially different from what I believe would be within the normal range of trial outcomes;					
					c. ask questions to ascertain if the parties are entering the agreement freely and willingly and that there is no fraud, undue influence, or duress;					
					d. ask questions to ascertain if the parties are aware of their legal rights, but are knowingly and purposefully choosing to not exercise those rights;					
					e. make statements acknowledging my limited information about the case, but inform the parties of my general perspective of the parties' legal rights and of the normal range of jury verdicts for cases like theirs;					
					f. inform the parties of the normal range of jury verdicts for cases like theirs, but if I meet serious resistance, do nothing;					
					g. inform the parties of the normal range of jury verdicts for cases like theirs, but if I meet serious resistance, recuse myself as settlement judge;					
					h. recuse myself as the settlement judge explaining that in my opinion the negotiations were producing an unbalanced outcome;					
					i. recuse myself as settlement judge without explanation.					

19. I have received the following training and education regarding settlement techniques: (Circle all that apply)
- informal coaching by other judges for \_\_\_\_\_ hours;
  - a DRPA or other community mediation training program for \_\_\_\_\_ hours
  - the five day Mediation Skills for Judges program presented by Pepperdine's Straus Institute in affiliation with CJER or Pepperdine's Straus Institute six day Mediating the Litigated Case program;
  - JAMS or AAA trainings for \_\_\_\_\_ hours;
  - Other: please describe the source and length of the program: \_\_\_\_\_

***THANK YOU FOR YOUR ASSISTANCE!***

Additional Comments:

