Education and Training Series

The Role of the Judge in the Settlement Process

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Federal Judicial Center

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THE ROLE OF THE JUDGE IN THE SETTLEMENT PROCESS

by

HONORABLE HUBERT L. WILL *

HONORABLE ROBERT R. MERHIGE, JR.**

and

HONORABLE ALVIN B. RUBIN ***

JUDGE WILL: One of the fundamental principles of judicial administration is that, in most cases, the absolute result of a trial is not as high a quality of justice as is the freely negotiated, give a little, take a little settlement. About 90% of all civil cases are disposed of without trial, and have to be or we would all be out of business. That means that a substantial number of them are disposed of by settlement. Some of those which are not tried are disposed of on other grounds, but the largest single category of non-trial dispositions is, of course, the cases that are settled. Therefore, it is essential as part of your procedures to provide some techniques that will maximize the possibility of freely negotiated settlements in cases for which you are responsible.

There is probably no aspect of the art of judging which is more personal, more subjective in the sense both that each judge does it his or her own way, and also with respect to the extent that a judge participates in settlement negotiations. I know judges who will not participate at all, and all settlements are achieved without the judge's assistance or prodding. I know other judges who enjoy participating in the process of negotiating settlements because they rightly feel that they are making a significant contribution to the just disposition of the particular case.

You have to recognize also that, given the personality of the judge, there are a variety of techniques which the judge may use if he decides that he will participate in the settlement process.

* United States District Judge, Northern District of Illinois, Chicago, Illinois.

** United States District Judge, Eastern District of Virginia, Richmond, Virginia.

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There are also questions as to timing. I do not agree with the conclusion in the tentative District Courts Studies Project Report which says that the role of the Court in settlement is minimized in the most effective courts, and that the judges are highly selective in initiating settlement negotiations, and normally do so only when a case is ready for trial or nearly so. But the survey reached what I consider a mistaken conclusion that each participation is not desirable. In my opinion, depending on the case, early settlement discussions may not only be desirable, but may also add considerably to just disposition of the case at the earliest possible time, at the lowest possible cost.

There is no hiding the fact that discovery is expensive. One of the reasons for our twenty question rule is that it minimized the expenditure of time, money and energy in the discovery process. I'm not derogating discovery. I'm a full discovery judge, but the other side of that coin is the fact that discovery has become a tactical device in many cases, and discovery can be very expensive indeed. If the case is ripe for settlement in the sense that counsel know enough about the facts with respect to liability and damages so that they can conduct an intelligent discussion, then it is highly desirable that discussions of settlement be invoked or encouraged at an early stage. So that, in fact, they will produce the best result at the shortest time at the lowest cost.

My preliminary pretrial is held normally between 60 and 90 days after the case is filed in those cases in which I hold a preliminary pretrial. There are a number of routine cases in which I do not. In those that I do, however, after we talk about jurisdiction and issues, the scope of discovery, the probable length of discovery and any other questions that may be involved, the last thing we discuss is the possibility of settlement at that time.

In a case in which they do not yet have adequate knowledge, counsel will say so. "It's too early. We can't talk about it now. We've got to find out some more about this, that, or the next thing—medical findings—the underlying facts with respect to how the accident happened, or we've got to depose the plaintiff's president as to what he really said at that conference when they made the oral agreement which they subsequently reduced to writing which they now say is ambiguous," etc.

There's no point in talking about settlement at a time when the parties are not well enough informed to rationally discuss the elements in the case, and so that they can tell you enough about it so you can make an intelligent contribution to an evaluation of the case.

On the other hand, in a substantial number of cases, they'll say, "We think we know enough about the case to talk." Or, "We'd be just as happy to talk about it even though we may not be able to come to an agreement today. We can go back, and then talk about settlement versus discovery."

If you get to that point, then you are faced with the question as to what your role should be. I always say, "Do you want me to participate in the discussions, or do you want to go off and have them by yourselves?" This is because, as far as I'm concerned, the use of judge time in settlement negotiations is valuable only if desired. Moreover, psychologically you're in a much better position to be useful in settlement discussions if the lawyers want you to participate. I don't think you can shoot yourself into settlement negotiations effectively unless you're prepared to shoot all the way, which I strongly oppose.

If you coerce a settlement at some figure that you suggest, or come close to coercing it, that is a terrible mistake. I don't think it's a judge's role to decide the case without a trial. In my practice days, I've been the beneficiary, if you like, or the victim of judges who have told me what to pay or what to take in a case at a settlement conference. I think that's outrageous, and not a judicial function at all.

We are catalysts in settlement. Our role is not that of a traditional judge. Our role at that stage is that of a mediator. The settlement has to be, as far as I'm concerned, a voluntary one on the part of the parties.

That does not mean, however, that you may not make a significant contribution. The outline you have received considers the dynamics of the settlement process. It says settlement negotiations are, in some respects, like a game. They have players, a beginning, and an end. Somebody has to make the first move. And then it points out that the first move is usually a matter determined by local custom. In some places, it's expected that the plaintiff will make a demand. In other places, it is customary for the defendant to make an offer.

I tried cases in the circuit court in Chicago in which the usual technique was for each side to put a figure on a piece of paper and then hand it to the judge. And that's how we started the negotiations. He had two pieces of paper, one of which said X dollars, and one of which said 10X dollars. If it said 10X dollars and X dollars, he had his hands full. But you had at least the start of it, and you had somebody who had made an indication of some kind of opening position.

Now, when you get into discussions, if you do so on invitation of counsel, I think you should make yourself available. I think your role should be "I'm ready to talk settlement of this case if you want me to," and this is both at the preliminary pretrial conference, if counsel are ready, as well as at the final pretrial conference.

Let's assume that you've got a case in which counsel say, "Yes, we'd like to have your participation. We think with a little help we might be able to obviate the necessity for further discovery or for any discovery or a trial. We've already had our investigations, we've already looked at documents, and so we're ready to talk at this point."

My approach is to say, "All right. Let's attempt to ascertain the present value of this case." And that's when I say "Let's assume that we are the underwriters at Lloyds in London." And the defendant comes in. You can do it either way but if you do it with the plaintiff you've got to convert the calculations. The direct calculation is easier.

So, let's assume that the defendant comes in and wants to purchase a policy to insure against possible loss in the case in question. We, the underwriters, say, "All right, the first thing we have to determine is, what is the insurance premium? What's the risk premium in this case? We can add on the administrative and overhead costs, and the commission for the agent and so forth afterwards. But the base figure we have to get initially is how much do we have to have to protect us against our risk of loss in this case."

Well, we have to know two things. We have to know how likely are we to have to pay. How likely is the defendant to lose? What are the risks of liability? What are the chances it's going to rain on the second day of the Bing Crosby Open? Or, what's the chance that Ringling Brothers tent is going to collapse—whatever we're insuring against?

I say to the plaintiff, "What do you think the chances of the defendant losing are, or what do you think the chances of your winning are?" I'll usually get a pretty high probability in favor of the plaintiff—75, 80, 90%. Then I'll say to the defense counsel, "What do you think the chances of the defendant losing are?" And I'll get a figure—normally it runs anywhere from 30 to 50 or 60%.

Interestingly enough, I find counsel are comparatively objective. If they're not, it's not difficult for you to ask the kind of questions that will inject some objectivity. For example, you get a plaintiff who says he's got a 90% case. My reaction is

that's got to be a very, very good case, and what about this possibility of contributory negligence, or what about that possibility, etc.

Over a relatively short discussion, in my experience, you can get to a rough consensus. In the kind of situation which I've just been discussing, my guess is that you'll end up with a probability somewhere in the range of 65–35, 60–40, 70–30—somewhere in that range.

You've now established the first element that you need in the evaluation of the risk premium in the case. Now, we have to talk about how much are we going to have to pay if we do have to pay, because that's the second thing we at Lloyds want to know before we figure out how much to charge you for the policy that you want.

And I will attempt to ascertain from plaintiff's counsel, first of all what they think the special damages are if its a tort case or a contract case. If it's a tort case, I'll ask for their estimate as to the maximum judgment which they think a jury might reasonably return, or which I might stand still for in the event that a jury did return it.

Let's assume that the plaintiff says, "I think I can get $100,000.00 out of this case." And I say, "Well, that's pretty steep for $8,000.00 in specials, but okay. Let's assume for the purposes of discussion that you might get as much as $100,000.00 and I wouldn't order a remittitur or a new trial."

Then you ask defense counsel, "What do you think the least the defendant might have to pay is, assuming now, of course, the defendant has lost the issue of liability?" We're now talking about how much is the defendant going to have to pay, assuming the defendant has to pay at all.

You get the figure of, say $20,000.00, with $8,000.00 in specials. You say, "All right." So, you're talking about a range of verdicts which a jury might return of $20–100,000.00. That means that the most probable verdict, the median verdict, is $60,000.00; 20 from 100 is 80—cut it in half, add the 20—$60,000.00.

The most probable verdict in the case is $60,000.00, and the likelihood of our having to pay is let's say two-thirds, one-third. Then in this case at this time—if you want an insurance policy you ought to pay us $40,000.00 for the insurance policy. Or put another way, the present value of this case is $40,000.00, because that's the synthesis of the probabilities of liability and the possibilities of damages.

You'd be surprised at the reactions you get to that kind of an analysis. Some counsel say, "Well, you know, there's nothing wrong with your mathematics except that my client won't pay that kind of money," or, "My client won't accept it." And I say, "Oh, well, then, there is nothing I can do. One of the things which this system permits is gambling in court. It may be illegal on the street, but it's okay in court if the defendant or the plaintiff wants to do it.

"The question, of course, is whether it is good business judgment or good legal advice for you or your client to participate in that kind of a gamble. But I'm not going to tell you you have to settle this case. You're entitled to a trial. I'm here to serve as the croupier if necessary, if you want to gamble in court."

That's the kind of analysis, however, that claims adjusters and insurance men do all the time. They understand the valuation of a case, so defense counsel can talk to them on that basis. It's the kind of analysis which a plaintiff's counsel can take back to his client, and most plaintiff's lawyers don't want to try the case if they can avoid it.

If you don't believe that, go look at the class actions; the massive cases in which every effort is made to settle them so that counsel can get their fees without trying the case, because the trial of a case is not usually profitable to a trial lawyer. Settlement of a case is likely to be much more profitable because he can settle a lot more cases over a shorter period of time than he can try.

And so the plaintiff's lawyer is happy to have an analysis he can take back to his client as an evaluation of the case with the judge's imprimatur on it. This is what the judge has valued the case at.

I give you a couple of interesting examples of the way it works. I had a case several years ago in which Bordens was suing a small milk producer in Illinois. We did the Lloyds of London analysis one night at a final pretrial conference, and it came out to a 50–50 chance of getting a median judgment of $125,000.00 or $62,500.00.

There was dead silence. I said, "What's the matter? Somebody's got to have a reaction. What's right with it? What's wrong with it? Why don't you say something?" Finally, Borden's counsel said, "Well, we're speechless because we've been demanding 75 and they've been offering 50." I said, "Okay, that's the end of that, isn't it?" And they said, "That's the end of it. The case is settled."

I was, of course, lucky. But not entirely so, because obviously this evaluation had some relationship—some relevance to what they themselves had evaluated the case at over a series of discussions.

I did it once in a case, one of the 18 cases that I've tried on the issue of damages. We had an additional conference on settlement between the trial of the issues of liability and the trial on damages. We got an $18,000.00 Lloyds of London evaluation. At that point, actually, the evaluation didn't have any liability factor in it because the jury had decided liability. We were just talking a range of damages, and we came up with $18,000.00

We tried damages, anyhow, because the plaintiff said that $18,000.00 was not enough. He wouldn't take less than $25,000.00 and the defendant wouldn't pay over $15,000.00. The jury came back with $18,000.00, and I haven't the slightest doubt that both sides think that I somehow fixed the jury.

I don't know how many thousand civil cases, in the 15 years, I've disposed of by participating in negotiations. The Lloyds of London technique has served me very well indeed. It doesn't settle every case because sometimes you have people who want to try the case, want to shoot for more, or hope to get away with nothing, or very little.

Don't neglect to use it both before and after the issue of liability has been resolved when you're just talking about the range of damages. It makes it much easier. It adds a great deal to the rational evaluation and analysis of a case when you get down to just the question of damages, as well as at the outset.

The nice part about it incidentally, when you're talking at a pretrial, is that the combination of the two factors, the probability of liability and the range of damages usually works out so that it doesn't make all that much dollar difference. If you change the probability of liability from two thirds—one third to 60–40, or 70–30 when you got this median out of a fairly wide range, it's going to make only a few thousand dollars difference at the most.

What you've done in any event is to narrow the focus of the discussion down to a relatively small range of dollars, and that's the important thing. The important thing is to get out of the "I-want-the-moon" and "I-won't-give-you-anything" positions with which you normally start. The Lloyds of London analysis gets you into a fairly narrow range, even if you accept some variations on what the probability of liability is, or what the range of damages may be, because you can change that from $20–100,000.00 or $15–125,000.00, to 75 to 25. And it isn't going to make

that much difference in dollars. But it does get you down to a relatively narrow range in which you can talk money, and talk a settlement.

I have never set, on my own initiative, a settlement conference. I do not believe that judges ought to be calling litigants in and saying, "You have to talk settlement." I have, however, set settlement conferences upon request, on innumerable occasions, not at one of my standard two pretrials. My two standard pretrials are the preliminary pretrial and the final pretrial in the routine case. In a complex case, of course, you have as many pretrials as you need in order to keep supervision over the development of the discovery in the case, and the disposition of the innumerable motions that will be presented to you.

In the routine case, I've never invoked the settlement process by calling a separate conference for settlement discussions. I have, however, set settlement conferences at counsel's request. But it is routine at either the preliminary pretrial conference or the final pretrial conference to talk settlement; it's on the agenda automatically. If you'll look at the notice for both of those conferences, the subject of settlement is the last subject to be discussed at either the preliminary pretrial conference, or the final pretrial conference. And then only if counsel agree that it's useful to discuss it.

To call a settlement conference on your own inevitably initiates the whole thing on the wrong note. I do not believe that's a way you can be effective, or that it is a proper way in which for you to participate in the settlement process.

Now, as the outline points out, there are a lot of psychological factors which are very important in the settlement process. You have to permit lawyers to maintain their professional position and their self respect, to save face, if you like. The object is to attempt to replace uncertainty with certainty, and that's what I've said the Lloyds of London analysis does.

It gets discussions out of the area of vagueness, and "I-want-the-moon" and "I-won't-give-them-anything," down to a relatively narrow area. Sometimes you've got to really analyze the case for a lawyer who hasn't done it himself, which is an interesting phenomenon. But you have, I'm sure, already run into a number of lawyers who have either filed lawsuits or filed answers but who really don't know what the case is about in terms of any realistic evaluation of the facts of the case, the probabilities of their success, and the risks of their failure. So, for the first time frequently, in this kind of a settlement discussion, you get the case in perspective. That, incidentally, may be helpful throughout the rest of the development of the case.

I've had cases which were settled at a final pretrial conference at exactly the figure we talked about at the preliminary pretrial conference two, three, four, five, or six months before, only because the discovery ultimately bore out the factual assumptions which we made at the initial conference.

Now, I don't make assumptions out of the blue. I make assumptions on representations of counsel as to what they think the evidence will be, and, in those cases, the discovery developed that the evidence, in fact, was as we assumed. Sometimes at a preliminary pretrial conference you will find one lawyer who says the evidence is going to be thus and so. The other lawyer says it's going to be very different, and it isn't until they've gone through discovery that they find out which one is right or which one is closer to right.

But the important thing, it seems to me, is that you start out recognizing, first that most cases are going to be settled. Second, that you can play a useful role in the settlement process if desired. Third, that you cannot normally play a useful role if you force yourself into participating in the settlement discussions without the desire of counsel.

That is not to say that you should automatically withdraw if one lawyer says, "Well, I don't know whether I want to talk settlement or not." If, however, the lawyer says, "I don't have enough information, I'm not in a position, I have to find out more about the case," I don't see any purpose to be served in the judge saying, "You've got to talk a settlement." That is no way to handle the matter.

On the other hand, I think that, in many cases, the settlement will not be achieved without the participation of the judge. In many cases it will. Lawyers can settle cases and do all the time. Blessings on them. But there are a lot of cases in which settlement can be achieved only through the intervention of a third party who has objectivity, who has no stake in either side of the case, who has no prestige involved, and who is ultimately prepared to try the case if necessary.

One final word on the difference between jury and non-jury cases. I have no hesitation in rolling up my sleeves and going the whole way in an analysis of a jury case. I have some reservations about non-jury cases, but, if asked by counsel to participate, I will do so. You have to be a little more careful, and you have to indicate the possibility that you'll transfer the case to another judge for trial if it becomes apparent that, as a result of the negotiations, you are now prejudiced, or believe one side thinks you're now prejudiced, to the point where you couldn't fairly try the case.

Or you could do what Judge Rubin and I have both done in some instances: Get some other judge or the magistrate to participate in the settlement discussions of the non-jury case, so that you don't get involved in those intensive discussions. In any event, I think in a non-jury case you ought to approach settlement discussions like porcupines presumably approach making love, and that is very carefully. If counsel want you to participate, go ahead because you can be useful even though the case is one that you're going to try eventually, and if worse comes to worst, which it rarely does, you can transfer the case to another judge to try.

My final word. Don't neglect the settlement process in your formulation of a procedure for judicial administration because it's the single most important, and most frequent, way of disposing of cases.

JUDGE MERHIGE: I'm always a little bit embarrassed when I address judges on such and such a settlement, simply because I think you know as much about it as I do. And you've probably —you know more about it. Most of you were trial lawyers.

I will tell you a little bit about why I was late today. I have a multi-district case, having to do with the Westinghouse Power Company uranium issues. If Westinghouse were to walk in tomorrow and say that we admit everything that's charged against us by various power companies and there's no argument about damages, the damages would roughly be about $3 billion.

There are 13 or 14 cases that have been sent to me by the multi-district panel. All good lawyers. The lawyers have been working very hard. We have a liaison counsel, and Westinghouse has a local counsel in Richmond.

I induced them to select a committee on behalf of the plaintiffs to explore settlement possibilities. The liaison counsel and Westinghouse counsel indicated to me that they weren't getting anywhere with their general negotiating committee.

They told me that they thought one of the difficulties was that the people really didn't know each other, and, although all plaintiffs had similar issues, everybody was watching the guy next to him. They thought if we could get them all together, including some of the officials we might get somewhere.

The thought occurred to me that maybe we ought to get all the people together, but I knew it was going to take some time. So I went home and I told my wife I had set up three days of conferences. There were too many lawyers to have a single effective conference. And I sent out invitations, not an order, I simply sent a letter. I said, "I think it's time now to get down

to your individual cases, because each of you has primary responsibility to your own power company, although your clients are presenting a united front."

I asked them what their view was of coming in to see whether the court could be of any help. I didn't think we were going to dispose of it in one sitting, but let's see how far apart they were and what the issues were, and do it in an informal manner. I also suggested that it might be a good idea if we could sort of get together socially before each of these conferences.

Well, I was really surprised at the response I got. These are not lawyers who are coming for a free hors d'oeuvre, or free cocktails. It couldn't mean less to them, but they were fairly enthusiastic about it. So, I went home and spoke to the little Irish girl I married and said, "You're going to have three parties, one Sunday night, one Monday night, and one Wednesday night."

She wanted to know how many were going to be there, and I told her I could not tell because I didn't know how many each of the plaintiffs were going to bring. I had asked them to bring somebody with authority.

We started on Sunday and we had about 35 people. The weather was delightful. And these guys were calling each other by their first name. We met on Monday, and the plaintiffs made their presentations, and then we had another party on Monday night. And the crowd came in yesterday, and they made their presentations and we're going to give it another stab tonight.

We broke for lunch, and, when they came back, they were talking. We'll see what happens.

Now, that probably is a little extreme. I would not suggest to any of you that you have cocktail parties for the litigants and their lawyers the night before settlement discussions in every case, but I think this is a different type of case.

I do think that settlement discussions are better conducted in a reasonable air of informality. I think you can accomplish an awful lot in your chambers over a cup of coffee with the lawyers. It's important to let counsel know that you recognize that judges can't settle cases, and courts are not supposed to settle cases. Only the lawyers can settle the case.

I let them know in the very beginning that I'm absolutely satisfied that they know more about the case than I will ever know because the lawyers do know more about their cases. But it does take some encouragement. You have to be careful. You never know when you talk numbers that they may not come back to haunt you. I personally try to stay away from knowing the real settlement figure on the part of the plaintiff and the offer

from the defendant. I know the initial demand by the plaintiff; that's the way I usually get the lawyers started.

I think it's important that you let them know that, when you get involved in the settlement, any suggestions you make—and I rarely suggest dollars and cents but I do suggest things in reference to legal issues—that you're like the baseball umpire; that all you're doing is getting a conversation going. You're not making any ruling. I tell them that a judge, speaking for myself, is like the third baseball umpire. The first baseball umpire said, "I call them as I see them." The second umpire said, "Not me, I call them as they are." The third umpire said, "They ain't nothing until I call them."

And I try to impress upon the lawyers that "they ain't nothing" until an order is presented on a particular issue. I have the good fortune of having practiced literally five days a week for 23 years in my area in Richmond, and I know most of the lawyers. I know the lawyers that are going to try the cases, and I know the ones that are not.

Now, let me tell you how we get started, and I'm not saying that it's absolutely the best system. It's the one that suits me, and each of you will have to develop your own system within the constraints, depending on your district, or your divisions, or how many judges you have. I think settlement—the thought of settlement—ought to begin as soon as the complaint is filed. We have two judges in my division. As soon as the case is assigned, the clerk then knows who the judge is that's going to handle it, and 21 days after the filing of the complaint, or as soon as somebody has come in as counsel for the defendant, she sends out what we call a pretrial order. That's really a misnomer. It's not a real pretrial order. It simply says that, at 8:30 on such and such a date, counsel will appear before the court for the initial pretrial. The order also reminds the lawyers that, except in exceptional circumstances, we expect the case to be tried within 90 days. We don't get them tried within 90 days, but it does get them moving. They come in and that's a three minute conference. I might have as many as five or six in one day, and then I won't have any for a couple of days, then I might have ten or twelve. But they're only three minutes, and they're set three minutes apart, 8:30, 8:33, 8:36.

The lawyers come in. I ask them whether the case is ready. Well, obviously it isn't. No. How long will it take? They tell you. You set it for trial. You ask if there is anything special in the case. If there is, you need a formal pretrial conference. They'll tell you if they think you do, and you can set that down.

Then, my practice is to make the lawyers talk about settlement. As I say, I rarely speak of numbers because I don't want to know the numbers. If a jury comes in and goes wild or something, I may have to consider a post-verdict motion, and it might prejudice me if I know that somebody was perfectly willing to pay $50,000.00. If the evidence indicates that that's an excessive demand, I ought not to be influenced.

But I do ask them, "How far apart are you?" Now, everybody has to use their own way of doing it, and—I remember a lesson I learned many years ago when I hadn't been on the bench very long. I was asked to come down to Lynchburg, Virginia, to try a case, by a Judge Dalton, a really loveable guy. I had not been on the bench very long, and the lawyers involved in the case were men of some substance and much older than I. Before the case started, I brought them into chambers and asked them how close they were; whether there was any chance of getting it settled. They assured me there was not.

Then I said, "Well, just how far apart are you?" The lawyers said, "We are $1200.00 apart." And I just really flipped my lid. I had gotten up at 5:00 in the morning to drive down to Lynchburg. About 40 jurors had been summoned. I just really fussed. I said, "Well, that's just disgraceful, gentlemen, to have me come down here, and the court reporter, and staff, and all these jurors. That's just inexcusable."

They responded, "Judge, the clients just won't move, but, in the light of your statements we'll go back and speak to our clients." Well, they went through the usual charade every lawyer's gone through. One came back and said, "Well, I guess I've lost a client because he didn't really want to take that offer but I forced it on him."

And the other guy said, "Yes, I've lost mine too." And I said, "Well, that's unfortunate." But the case was settled.

Then I thought, well, maybe I'd been a little too rough, because I hadn't been very gentle in my statements and they were older men. So I thought I ought to apologize. And I did. I said, "Gentlemen, I'm sorry if I sounded too rough. I made up my mind that, except for the natural arrogance that Congress gives you when you get the robe, I was going to try to restrain myself from exhibiting any that I was born with. And I hope you don't think I pushed you too hard."

They both started to smile, and finally one of them said, "Judge, don't you worry about that." He said, "Let me tell you of an experience I had here with Judge Dalton about a month ago.

"We came in to try a case, and he did exactly as you did. He called the lawyers in and asked, 'How far apart are you?' We told him we were $2,200.00 apart. Judge Dalton got up, took his hat off the coat tree, put his hat on, never said another word to the lawyers, said to his secretary, 'Tell the clerk this case is settled, I'll be at the farm'."

And Hale Collins said, "The lawyers just looked at each other, and they jumped up and looked out the window, and sure enough, there was Judge Dalton going down to the car." And so he said, "Don't apologize. You didn't put quite as much muscle on us as you may have thought."

Let me mention another thing that I try to be careful about. There are no more small cases in the federal court. We don't get many diversity cases, for example, except for product liability. In nine years I don't think I've tried 15 automobile cases in my court. They just get settled. They're prime cases for settlement.

The lawyers know that I set two, and three, and four cases a day. I have the advantage of knowing most of the lawyers. And as I said before, I know the ones who are going to try cases, and I know the ones that are going to stall. When I get two or three in there who have never tried more than two cases a year, I'll put all their cases on the the same day and figure they're all going to get settled. Somebody will chicken out.

Occasionally you get jammed up, but I've been jammed up just a few times in nine years. My rule is to have my clerk call the plaintiff for the case that's coming up on Monday the preceding Thursday and say, "The Judge wants to know whether you are close to settlement; the reason is that it looks like your case may have to go over." Invariably, I tell the clerk to tell them that I don't have to know right away but I certainly would like to know because I might want to try to get another judge. I don't know whether I can get one or not. The chances are that I can't and the case may have to go over. But if they're close to settlement, perhaps they ought to do so.

The plaintiffs' lawyers don't want you to call the defendants because, as you know, the defendants have got the money and they rarely complain about the case going over. You'd be surprised, how, if a plaintiff's lawyer is holding out for just a couple of thousand dollars, and he thinks the case might go over for another three months, or four months, he will reevaluate it.

I have never adopted the system of offering to speak to the lawyers' clients. I had a case just a few months ago in which the lawyers told me that they had agreed on the amount but the

client was not amenable to it. She wasn't sure about it. I suggested that he go back and speak to her again. He called me and said, "Judge, she wants to speak with you." I was reluctant to do it, but I said, "Well, all right. Call the lawyer on the other side and see what he thinks." He did. The lawyer called me and said, "Judge, go ahead. We'd be delighted." It was a railroad case. So, the lawyer brought his client in and I asked her what she wanted. She said she had confidence in the lawyer but she wanted the Judge to tell her it was a fair amount. That was sort of an awkward position because I don't know the values of these cases until I've really heard them.

We chatted about the thing, and I finally convinced her that, when she calls the doctor, she doesn't hesitate to take whatever medicine he gives her. She had a good lawyer. By the time we were through, she was ready to settle.

One other thing. I go slow on sanctions, and let me suggest that to you too. You get in these heated cases, you know, and somebody gives somebody a hard time on discovery. You would be surprised how lawyers let their emotions get the best of them. Some guys rub the other guy the wrong way, and then they just won't agree on their name.

I take the matter of sanctions under advisement in most cases. I find that, if you dump sanctions on early, you really get the parties emotionally so far apart that it's difficult to settle the case. I don't throw them out. I just say that I want to take it under advisement. So, I suggest that you go slow on dumping sanctions on anybody because you may just keep them further apart than they ought to be.

I think it's our responsibility to push settlements. A lot of judges think it isn't. I think it is because I don't think we could run the courts if we didn't get it, and you know most cases are going to get settled. Most cases should be settled.

I make myself available. I try to. As a matter of fact, I had a meeting on Sunday concerning a case out of North Carolina. The lawyers said they couldn't meet any other day; they were tied up in court. I said, "Well, what about Saturday?" A fellow said, "No, I don't know who's playing but somebody's playing in Raleigh-Durham." It's something that he and his wife have been going to for 30 years. And I said, "Well, fine, I'll either meet you in Raleigh-Durham Sunday morning, or you guys can come to Richmond."

We're going to meet on Sunday, and I'll guarantee the case will be settled. I just know it because I've spoken to both law-

yers, and both of them told me the case could be settled if the guy on the other side wasn't so stubborn.

JUDGE RUBIN: There are those who have observed that any settlement of cases is like curing the common cold. A great number of them will get cured if you don't do anything, no matter what you do. Nationally, the statistics are that about 90 or 91% of all cases filed in federal court will be settled. Something like 85% will settle if you do nothing. In fact, they seem to be settled better sometimes if you do nothing for about three years.

But it is the remaining part really that we address ourselves to, the cases that will not settle unless the judge does something. Or the cases that can be settled sooner or more equitably if the judge does something. I thought it might be well for us to examine our own experiences as practicing lawyers, and think a little bit about why cases settle, because I think that helps us best to analyze the judge's role in the settlement process.

There is now a rather extensive literature in the social sciences; psychologists and others have been studying the human settlement process in international disputes as well as in lawsuits, and there appear to be two primary factors that lead to settlement.

One is anxiety, and the other is the necessity for doing something. Now, none of us likes anxiety. No lawyer likes it. No judge likes it. It's not a desirable human emotion. People go out and run a risk just to be a daredevil. They will do foolish things like water skiing, or mountain skiing.

We know those are foolish things to do. We do them because we enjoy the thrill. But the one emotion that is almost universally sought to be avoided is anxiety. That's an undesirable human emotion. And lawyers, sharing with their clients the desire to eliminate anxiety, want to get rid of it. We eliminate anxiety, of course, by replacing uncertainty with certainty.

But that alone of itself won't settle anything because we are capable of tolerating anxiety for long periods. So, the second thing that seems to me to be an important component of the settlement process is the need to do something by a certain time. All settlement procedures are more efficient if there is a more or less inexorable trial date.

Now, I don't mean a Procrustes bed where you must go to trial if your chief witness dies, or if the lawyer is in the hospital. Obviously, there are good causes for continuance, but absent a really serious cause cases ought to be assigned for trial, and the trial date firmly held.

Now, regardless of all of the profundity or professed profundity that the three of us may give you, and all of the knowledge you may have yourself, it is my conclusion after examining statistics repeatedly and reviewing my own experience that there isn't any settlement device better than a firm trial date that the lawyers can't get continued.

You should make it known to counsel that this is your court policy. You are willing to talk settlement with them; you are looking for them to talk about it alone. If they don't want to talk settlement at all, that's fine. It is not your function to coerce settlements, but it is your function to try cases and this case is set for trial. If you do this, you will enhance the whole settlement process.

Again, I want to repeat: It is important that they understand that you're not saying it's going to trial no matter what, but that it's going to trial absent serious cause. The lawyer's failure to prepare, or the fact that the lawyer was too busy on another case is not cause for a continuance.

Obviously the fact that both lawyers agree that we could settle this case 30 days from now if we could get a continuance is not cause for continuance. That's the oldest excuse in the game. It won't produce any greater percentage of settlements. The best answer to that is, if you can settle it next month, you can settle it this week. Then they say, "Well, judge, I have to write my clients in London."

I respond, "You know, I heard about a device that was invented called the trans-Atlantic telephone. The same answer you can get next month you can get this week."

So quite apart then from your own habits, personality and temperament, those are two things I think that you must keep in mind.

I have another device with respect to the second aspect of the matter that Judge Merhige talked about. Lawyers know, of course, that we over-assign cases. We tell them that. It's no secret. I say, "We have four cases assigned for this Monday." Some of you assign two-week trial dockets and you have 15 cases assigned for this Monday. The inevitable question is, "Judge, are we first?" Usually asked in the context: I need to know whether to get my witnesses here. I tell them always, "You will know by the preceding Friday at noon whether your case is definitely coming to trial. At the moment you're third, but by Monday you're likely to be first because we have a little pooling arrangement in our court: If one of the other judges has all of his cases settled and I happen to have two, they'll help me out in trial."

Now that doesn't happen very often, in fact, but the knowledge that it may happen, the knowledge that Monday morning is coming inexorably and if Judge Rubin is busy my case will be heard by Judge Cassibry or Judge West or Judge Sear or Judge Schwartz acts as a wonderful catalyst to settlement negotiations. Those wonderful things happen without any great knowledge of human psychology or any great contribution by the judge.

I agree with Judge Will that it is important that somewhere early in the case process, settlement possibilities be discussed. But I believe also that it is fruitless in the average case to waste much judge time on it.

The subject ought to be raised; counsel ought to be encouraged to talk settlement. In our district we have a little different procedure than has been outlined to you by the two judges. Most of our judges hold a preliminary conference shortly after the case is filed and after appearance is entered, but instead of its being conducted by the judge, it is held by one of the magistrates.

The magistrate is instructed to ask counsel at that conference simply what the settlement possibilities are. Sometimes that develops nothing. Counsel say it's too early to talk settlement. "We don't know enough about the case." but in a fair number of cases, perhaps 20%, even at that time someone will say, "Well, were only $1500 apart." The magistrate gets a fair notion that the case will settle and sometimes he can assist in the process. In addition, counsel get a notion that the case will settle.

We do one other thing at the preliminary conference. If counsel say, "We ought to talk settlement, but haven't had a chance to do so," it is our practice for the magistrate to direct counsel to have a meeting. They are directed to have a lunch to talk settlement.

In our bar there seems to be a disinclination to be the first one to raise the subject of settlement. It is treated by some lawyers, at least, as a sign of weakness. But if he can rely on the excuse that Magistrate so-and-so told us to meet and talk settlement, then obviously he's not showing weakness. He's just complying with the Court's order, and that may afford an effective rationalization to do something that the lawyers really want to do and ought to do.

Now, if a case doesn't settle in this manner or by the normal inter-lawyer discussions, there should be some judge participation in the settlement process. I agree with both of the prior speakers: The best time for the judge's participation is at the

time of a pretrial conference shortly before the trial. This should be held within two weeks before the trial. That's when the lawyers really know something about the case. If you're having a pretrial order prepared, that's when you can have an effective pretrial order ready in which they set forth everything that you think you ought to know.

You can, in effect, learn something about the strengths and weaknesses of the case merely by reading the pretrial order and listening to the lawyers.

Let's talk about two different kinds of cases for a moment. Let's take first the routine case. It may be a personal injury case. It may be a truth-in-lending case. It may be a jury or a nonjury trial, but it is the kind of case that's going to take a day, or two, or three to try, and it's a run-of-the mill case.

In that kind of case, obviously both the amount of time the judge can afford to spend on settlement, and what is productive, is limited. In addition, in the average case counsel are very capable of conducting their own settlement discussions. But they haven't settled the case up to now and they need perhaps a little impetus.

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

You should try to achieve a nonpressure atmosphere where the judge acts as the kindly mediator figure. This may be helpful to the parties. It gives them a chance to communicate if not directly then indirectly through the judge. A good time for this is at the end of the pretrial conference, as Judge Will has already suggested.

By then the trial date has been set; we've talked about the witnesses; we've talked about the exhibits; we've talked about the stipulated facts; we've talked about the strengths and weaknesses of each side. So, no one will be penalized and no decision turns on whether the judge will like or dislike the litigant for his settlement posture.

If it's the last thing you bring up, the tensions generated sometimes by arguments about exhibits and witnesses can be dissipated. You may introduce the subject by saying, "Counsel, have you talked about settlement?"

The judge is making an opportunity available. He's not compelling anybody to do anything. Where this conference is held

is important. I try to hold it in a conference room, not in my office where I'm sitting behind a desk, and counsel are arrayed in front of me like the boys reporting to the principal, nor in the formal atmosphere of the courtroom. I try to hold it around a conference table where we are all sitting as equals discussing the matter.

I try not to "bull" the settlement. This is not my settlement. I try not to say anything if I don't have anything to say. That's a very important part of conveying confidence in the judge's role in settlement negotiations.

If the lawyers turn to you and say, "Judge, what do you think this case is worth?" and you don't really know, the best thing to say is, "I don't know." You may settle one case by throwing some foolish figure out, but in the long run your habits become well known to the bar.

In our own practice, we have all played on the habits of Judge X or Judge Y. If you say foolish things, the lawyers will learn that you are in the habit of saying foolish or impetuous things. If you say something only when you have something to say, that will become known too.

If you are not prepared to answer, you can turn the lawyer's question around. "Well, I don't know enough about the case. What do you think?"

In the jury case, I think the Lloyds of London approach or something similar, as Judge Will has suggested, is absolutely the finest way to start the discussions that I've been able to find and I've tried many. Where did I learn it? Well, I learned it sitting right in this conference room from Judge Will nine years ago.

In the first place, it gives each lawyer a chance to say something about his case. He's saying something, it's not the judge or the opposing party who's speaking. In the second place, this conversation defines the parameters, the low and the high, by the bounds set by the lawyers themselves.

As Judge Will indicated, the judge can influence the trend of discussion by the type of question that he asks and by the kind of comment he makes. He might say, after plaintiff's counsel says his minimum figure is $100,000, "Well, you know, you might get $100,000, but I haven't seen a verdict of $100,000 for that kind of injury." Frequently one lawyer will respond, "Judge, maybe you're right. Maybe $80,000 is a better figure." You have helped narrow the difference.

At any rate, by a little judicious interplay of thoughts, you help counsel define the high and the low value of the case. You get into a settlement range. I assiduously avoid letting the lawyers tell me, "I've offered to take so much and he's offered to pay so much," at least at that stage. Because at that stage, I don't know enough to know whether an offer of so much is good or bad, nor do the lawyers. If the case should be settled that way, it would have been resolved before now.

In the jury case, if the first thing that is said about settlement is, "Judge, I've offered to take $50,000.00 and he's offered me $25,000.00," the only thing I can say is the obvious and stupid thing: "Why don't you split the difference?"

If you approach settlement from the standpoint of the likelihood of success and the ultimate value of the case, by the time you have felt the lawyers out and have let them talk, there are some things that you can contribute. Whatever you say at that time may be helpful.

Now, I've talked to many, many experienced lawyers about this so-called Lloyds of London approach or probability approach. I find no one who doesn't really find some virtue in it. I talked to one of my classmates in law school who has done nothing but handle personal injury defense work for 31 years. I don't know how many thousands of cases he's disposed of in that period of time.

He said, "You know, I think that approach is nonsense. Nobody knows those figures. But it's great to discuss them, anyhow, even though they are nonsense because you have no other way to explain to your client why you put a certain figure on the case. So, if I can come out of that kind of conference and go to my client and say, it is such and such a size case, there's such and such a chance of success, we can settle for so much, it gives him a rationalization by which to make a recommendation."

So, if it does nothing else, that approach gives the lawyers some illusion of certainty. They have changed this great imponderable from whether the case is worth $50,000 or $25,000 to something that they can cope with. "Well, it is worth $33,000 because * * *"

I think there is more to the Lloyd's approach than mere rationalization, but, even if there is nothing more to it, it's a very good rationalization by which a lawyer can reach a conclusion and explain it to his client. One of the things the judge can do in this conference is give the lawyer something to take back to his client.

After this pretrial conference, when the client asks about settlement, he wants to know what the judge said. It gives the lawyer something to tell his client about what the judge said.

Now let's take the nonjury case where obviously the judge ought to be very chary about talking about numbers. At least in that kind of case, if you handle discussions very tentatively and with assurance that these preliminary ideas will yield to the evidence, you can talk about the most likely judgment value of the case. You will not be discussing what the case is worth in settlement but what its likely judgment value is.

You are going to try the case. You've had some experience with this kind of case. You have some notion of, at this stage, what you would be likely to do unless the evidence persuades you otherwise. That's a very useful thing for both sides to know. Typically, of course, it will be less than the plaintiff thinks he's going to get and more than the defendant thinks he's going to pay. And if it happens to be that, there's no harm in it, of course. So, even in the nonjury case, a discussion of the likely judgment value can be very helpful.

A second important thing is to create a time to talk. I emphasize to you strongly what Judge Will said. You should not only be available if the lawyers want a settlement conference, but you should make it known among the bar that people can call you confidentially and say, "Judge, I think a settlement conference would be useful." They should have confidence that you won't reveal that the plaintiff called you and wanted you to have a settlement conference.

I agree that, apart from the pretrial conference procedure in the routine case, the judge ought not initiate a bunch of settlement conferences on his own. But it's sometimes very useful for the lawyers to know that they can call and you will convene one. I have no reluctance to do that. I will find some reason to call the conference that is not patently to discuss settlement.

Typically when you're dealing with this case just a few days before trial at this stage, there are always reasons why you can have a conference, to talk about some witnesses, or some evidence problems, or something. And then you can bring up the subject of settlement.

Do what Judge Merhige just told you: Make yourself available at odd times, if odd times are called for. I have a little ritual that I go through at the pretrial conference. I say, "I will be available for settlement conference anytime up to and including Sunday night. Your trial starts at 9:00 a. m. on Monday, and we won't talk settlement on Monday. But, if you want to talk Sunday afternoon, call me and we'll talk settlement."

I don't have too many Sunday conferences. I might change my mind about this policy if I began to receive telephone calls

every weekend about Sunday conferences. However, counsel's feeling that the judge is accessible and available for this kind of conference leads to a lot of communication. It also avoids something that I think ought to be avoided: The conference that begins when the jury is ready to be called. Someone says, "Judge, if we could talk about this case for 20 or 30 minutes, we might settle it."

I think that's deleterious to the administration of justice. It gives the jurors a bad impression, and it always means the lawyers are going to wait until the day of trial to make their best offer. If the lawyers know that you will tolerate that kind of settlement discussion on the morning of trial, they're going to wait. Each hopes that the other fellow will flinch on Saturday. "If he doesn't flinch, I can always make another offer on Monday." And obviously this wreaks havoc with other cases, not only with the jurors but with your trial docket.

So, I suggest to you that you have a rule that you don't talk settlement on the morning of trial. Of course, something exceptional may happen; a witness may not appear. The first witness may turn out very badly for the plaintiff when the plaintiff had thought he was going to be very good.

So there may be some need for settlement discussions during the trial, but I go ahead and pick the jury at 9:00 a. m. If counsel wants to discuss settlement, they can discuss it during the first recess immediately after the jury is sworn. That not only assists in the settlement process but it also assists in court administration. So, create a time to talk, a time when you will be accessible. Make it known that you will be accessible but don't do it on the day of trial.

Now let us talk about the non-routine case, the blockbuster case.

This may be a nonjury case and it's apparent the case is going to take three weeks, four weeks, five weeks to try. That's the case that deserves a special effort. I agree with Judge Merhige that you may accomplish something by creating a social opportunity to talk in that kind of case.

Obviously if you have 400 cases on your docket at one time, you can't do it in all 400 cases. But you know the blockbusters. Create a time to talk; for example arrange to meet counsel at lunch. Get a private dining room, ask counsel for both parties and their principals to join you. Let the principals get to know you. You get to know them, and have a pleasant lunch. And then after lunch you spend an hour talking about the case. This may be a very effective device. Needless to say you ought to

discuss in advance who will pay for the lunch. The parties will usually be glad to divide the check. If the case is a nonjury case, it may be very effective to have a "buddy system" with someone else on your court. Talking about numbers can be effective, but obviously in a nonjury case of sizable proportions, you may not want to learn the figures counsel are discussing. The other judges may feel it's unfair for you to get so far into the settlement discussions that you have to reassign this blockbuster case to someone else.

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

If that happens, the other judge tries to read the pretrial order to be familiar with the case so that he can actively participate in the discussions.

I think you, too, will find this very helpful.

SOME SUGGESTIONS CONCERNING THE JUDGE'S ROLE IN STIMULATING SETTLEMENT NEGOTIATIONS

An Outline by
Judge Alvin B. Rubin
and
Judge Hubert L. Will

Settlement negotiations are like a game in some respects. They have to have players, a beginning, and an end.

I. The Beginning Moves

1.1 One party must open the game by making the first move.

1.2 The question who should move first is usually determined by local custom. In many areas, for example, the plaintiff, particularly in a personal injury case, is expected to make the first demand.

1.3 If no move has been made, how should the judge enable the players to start negotiations?

1.4 To start discussion satisfactorily the initial demand must both inform the opponent that the "opener" is prepared to bargain and yet leave room for bargaining. What should the judge do if the opening demand does not fall in this range? What should the judge do if the demand is met by a refusal to negotiate? ("Oh, that's so far out of line, I can't even make an offer.")

1.5 Boulwarism as a tactic. ("Take it or leave it.") This negates negotiation. What should the judge do if one party becomes adamant?

1.6 The "Lloyd's of London" calculation.
The plaintiff says the most likely judgment is $100,000 and he has a 70% chance to win; he has appraised the case at $70,000. He would accept $70,000 "insurance" for his case. The defendant says the likely judgment value is $60,000 and the plaintiff has only a 50% chance to win. He has appraised the case at $30,000. He would pay $30,000 for an insurance policy that would indemnify him for this case. *If* both appraisals are reasonably informed and accurate, the parties ought to

be willing to discuss a settlement midway between their own Lloyd's figures—here $50,000. What should the judge do if it appears one evaluation is so far out of line as to prohibit further negotiation?

II. The Atmosphere

2.1 The lawyer's self esteem is important. The judge should protect the lawyer from embarrassment, while adjusting his demands to the appropriate range.

2.2 Place the lawyers in a comfortable position with respect to place—time available—circumstances. Some judges operate at "high pressure." Most think that a pressureless atmosphere is more conducive to effective discussions. Let the approaching trial date and the lawyer's and client's anxieties generate the pressure. No settlement should be coerced by the judge.

2.3 All negotiation is an attempt to replace uncertainty with certainty. The judge's discussions may re-awaken or even increase anxiety in the negotiators about the outcome. [For example, the judge might talk about some "true examples" to the plaintiff's lawyer who wants $250,000 for a $100,000 case: You are probably right about the value of your case. But did you hear about the trial last week in a similar case that ended in a judgment for defendant? Or, did you hear about the case two weeks ago when the plaintiff turned down $125,000 and the jury brought in a verdict of $40,000?] Use statistical data such as found in the Cook County Jury Reporter if available in your district.

2.4 Watch out for the unskilled negotiator. He lacks the skill and experience to use or interpret signs. Help him understand the conversation and to communicate what he is trying to say.

2.5 Each lawyer also negotiates with his client. Give the lawyer something to "take back" to his client. ("Last week a jury brought in a verdict of $ ——— in that kind of case." Or "Last week the defendant got a verdict under almost identical facts.") The "Lloyd's of London" analysis is helpful with clients particularly with insurance claims agents.

2.6 The judge must be aware of the unspoken things that are happening:

(1) Every session involves reciprocal emotion.

(2) Be aware of your own feelings and the feelings of the lawyers—anxiety, anger, discomfort. Anxiety creates discomfort. Even anger is more bearable than anxiety and gives a feeling of power and suppresses the anxiety that created the anger.

(3) Observe the nonverbal communication of negotiators. What about your own?

2.7 The judge must above all be comfortable in his role and participation in the process.

III. Tactics

3.1 Negotiating too far ahead of time may be a waste of time. One of the initial conclusions of the FJC district court study is that it is not fruitful for the judge to attempt to participate actively in settlement negotiations in every case—or early in the case. Let the lawyers try to settle the case first. If settlement is to be a difficult problem, the discussions can be most fruitful after substantial discovery when the lawyers are fully aware of the strengths and weaknesses of each side. On the other hand, some cases are susceptible of early settlement. This can usually be ascertained by asking counsel if they believe an early settlement discussion would be useful. If a case can be settled before substantial time and money are expended on discovery, it is obviously desirable to do so.

3.2 In many districts, magistrates explore the possibility of early settlement as part of their supervision of discovery, leaving the settlement discussions after discovery for the judge but advising him of any earlier settlement discussions.

3.3 Listen carefully! You will learn the strong and weak points of the case. The lawyers will feel you are more sympathetic, they will have more confidence in moving ahead after urging their respective points of view, and you will be able to discuss the case with accuracy.

3.4 The judge may be able to induce the lawyers to indicate the possibility of concessions even if they aren't ready to make one. ("Would you consider a lesser figure if you had a firm offer?")

3.5 The pretrial conference may increase settlement possibilities before any mention of settlement by narrowing issues, eliminating frivolous or factitious issues, and making a firm commitment to a trial date. Settlement may be a *product* of the pretrial conference; it should not be the *reason* for the conference.

3.6 Give the negotiators a chance to give you and each other signals—devices for breaking concessions down into a number of small revocable steps, each of which invites reciprocal concession before the next is made.

(1) Silence in face of a proposal previously rejected.

(2) Let's pass that for the time being.

(3) I might be willing to recommend it.

(4) Suggestion of what happened in another case.

3.7 The judge may advance information at strategic times—not too much at once. How do you feel about a certain issue, etc.

3.8 Sometimes separate meetings with each side may be advantageous. Be sure both sides know what you're doing in advance and concurrently. Do not hold secret meetings with either side.

3.9 In the words of the psychologists, bargaining must be determinate. In an indeterminate session, a party can talk endlessly and yet not make a real commitment. If he must commit himself to a position, the bargaining is determinate. The ability to withdraw an offer makes it indeterminate. Therefore there must be a deadline, a time when negotiating must end. In litigation, the trial is the deadline.

3.10 Continuances defeat deadlines.

3.11 Morning of trial negotiations weaken deadlines.

3.12 Consider enlisting another judge to help the parties discuss settlement of *nonjury* cases. The judges may exchange such services with each other.

3.13 Try unorthodox tactics in "tough" cases: for example requiring each party to urge his opponent's case.

3.14 Don't forget to consider saving costs of trial as a settlement item.

3.15 Wrap up the loose ends. Be sure the settlement is firm. Make it a matter of record.

IV. Settlement Negotiations in a Bifurcated or Split Trial.

4.1 The most important benefit of a split trial is that it provides an additional opportunity for settlement discussions in cases in which plaintiff prevails on the issue of liability.

4.2 Most counsel of experience have more confidence in a jury's or even a judge's ability to decide the issue of liability than in their evaluation of damages, particularly in a personal injury case. They therefore welcome an opportunity to discuss settlement after the liability issue has been decided in plaintiff's favor.

4.3 Settlement of damages does not foreclose appeal on the issue of liability.

4.4 Same techniques previously discussed are relevant except that discussions are greatly simplified.

4.5 Hold settlement discussions immediately after the return of the verdict or entry of judgment on liability. If a bench trial, it is generally preferable to let counsel discuss settlement alone and participate only upon request but indicate your willingness to do so if requested.

4.6 If discussions do not produce a settlement proceed immediately to trial on damages using same jury if a jury trial.

V. Other Settlement Methods

5.1 Mediation:

5.11 The mediator takes an active role in promoting settlements. The role of mediator may be inappropriate for the judge but it may sometimes be possible to enlist the services of mediators.

5.12 Mediation facilities

5.121 Labor matters: Federal Mediation and Conciliation Service. Primary role is mediator of conflicts that have an impact on the community at joint request of the parties. However, the service maintains a list of qualified private mediators.

5.122 Racial problems:

Justice Department Community Relations Service. FTS 739–4077. Primarily available for cases involving problems of race or national origin. May extend to

cases involving schools, police law enforcement policies, correctional institutions, reapportionment, and revenue sharing where racial or ethnic discrimination is charged. The service attempts either to conciliate or to mediate between the parties and to arrive at an agreement, which may take the form of a consent decree. It has regional offices.

5.123 It may be possible to obtain agreement of the parties to mediate with a professional or semi-professional mediator (e. g. a member of the American Arbitration Association panel or a non-staff member of the approved panel of the Federal Mediation and Conciliation).

5.2 Arbitration:

5.22 Motions to stay may be made pending arbitration agreed upon by the parties. See 9 U.S.C.A. § 3.

5.23 The parties may be induced to agree to arbitration before a professional arbiter.

1. Arbitrator Panel of Federal Mediation and Conciliation Service
2. American Arbitration Association

5.24 Some states (e. g. Pennsylvania) have statutes requiring arbitration of cases involving less than a stated amount. (In Pennsylvania, $10,000). Lawyers familiar with a state procedure might agree to arbitration.

VI. Local Rules to Encourage Settlement Procedures

6.1 See attached copy of Local Rule 9, E.D.La.

VII. Trial by Other Than the Judge

7.1 Will the parties stipulate to trial before a Magistrate? (See attached forms).

[Excerpt of General Rules of the United States District Court for the Eastern District of Louisiana]

RULE 9

NOTICE OF SETTLEMENTS—TAXATION OF JUDICIAL EXPENSES AND COSTS IN CASES OF ABUSE OF JUDICIAL PROCESS AND CONSENT JUDGMENTS

9.1 Responsibility for Settlement Discussions

As officers of the court, counsel in civil cases have a responsibility to minimize the expense of the administration of justice, to refrain from burdening unnecessarily those members of the public called for jury duty, and to avoid inconveniencing witnesses unnecessarily. To these ends, they should conduct serious settlement discussions in time to avoid the expense to the public and to litigants, and the inconvenience to jurors and witnesses, occasioned by settlements made on the eve of, or at the outset of trial.

9.2 Notice of Settlement to Clerk

Therefore, whenever a civil case, jury or non-jury, is settled or otherwise disposed of, counsel shall immediately inform the clerk's office, the judge of the section to which the case is allotted, and all persons subpoenaed as witnesses.

9.3 Captious Settlement Tactics

When such notice is not given, or when a case is settled within the 24 hour period prior to trial, or after the trial has commenced, and the court is not aware of circumstances that indicate that this development was reasonable, it shall afford counsel an opportunity to show that the failure to give notice of settlement, or the failure to agree on settlement at an earlier time, as the case may be, was not the result of captious tactics, did not constitute merely the acceptance of an offer earlier refused as part of a calculated tactic of delay in reaching a settlement in order to attempt to obtain further advantages in disregard of the interests of others, or did not result from some other cause amounting to interference with the orderly conduct of judicial business. If counsel fail to make this showing, the court may assess jury costs, including attendance fees, marshal's costs, mileage and per diem, against the party or counsel deemed responsible, or against the parties or counsel equally if the fault is mutual.

9.4 Reasonable Settlement Discussions

This rule shall be so applied as not to inhibit reasonable settlement discussions. The court recognizes that good cause may exist for a belated change in position—an important witness may fail to appear, counsel may learn that facts deemed provable are not provable, or a witness may change his testimony. But the rule shall also be applied so as to take into account the difference between good cause for delay in settlement and negotiating tactics that, heedless of the inconvenience to the court and the public, use the imminence of trial as a catalyst to attempt to reduce an already acceptable offer.

9.5 Settlement Judgments

When a case is disposed of by settlement involving the payment of a monetary amount, the party to whom the settlement requires the payment of money may present to the court and opposing counsel a proposed executory judgment, casting the parties obligated to make payment in accordance with the settlement agreed upon. The judgment shall set forth the agreement with respect to costs. It shall provide for the payment of interest on all amounts due under the judgment at the current legal rate, commencing at the date agreed upon by counsel, to be not less than fifteen days from the date of the judgment. If counsel cannot agree upon a date, it shall be 45 days from the date of judgment.

9.6 Concurrence in Settlement Judgments

It shall be the duty of counsel for the party or parties who are to pay the funds under a settlement judgment to signify concurrence in the entry of judgment if it is otherwise in accordance with the agreed settlement.

9.7 Satisfaction of Settlement Judgment

Within five days of the consummation of the settlement embodied in any settlement judgment, it shall be the duty of counsel who presented the original judgment to file with the clerk, and to serve upon all other parties to the action, a Satisfaction of Judgment, setting forth that the judgment has been paid in full and that all claims therein are fully satisfied.

9.8 Conditional Dismissals

If the parties have agreed unconditionally to the settlement of a case, it shall be dismissed with leave to reinstate the matter if settlement is not concluded within the time stated in the dismissal order. If the settlement is not consummated, either party may proceed by motion to request that the dismissal be set aside and a summary judgment enforcing the settlement be entered.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

versus

CIVIL ACTION
NO.
SECTION

ORDER OF REFERENCE AND STIPULATION OF CONSENT TO TRIAL OF JURY OR NON-JURY CASE BY UNITED STATES MAGISTRATE

Undersigned counsel are fully aware of the right to trial of the captioned proceeding before a Judge of the United States District Court for this District and in behalf of their clients do hereby specifically waive trial before the District Judge and consent to this reference of the trial before a United States Magistrate and specifically authorize entry of judgment by the United States Magistrate.

New Orleans, Louisiana, this _____ day of _____, 197__.

Attorney for _____ Attorney for _____

ORDER

IT IS ORDERED that this matter be referred to _____, United States Magistrate, for trial in accordance with the foregoing stipulation.

New Orleans, Louisiana, this _____ day of _____, 197__.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

versus

CIVIL ACTION
NO.
SECTION

ORDER OF REFERENCE AND STIPULATION OF CONSENT TO TRIAL OF NON-JURY CASE BY UNITED STATES MAGISTRATE

Undersigned counsel are fully aware of the right to trial of the captioned proceeding before a Judge of the United States District Court for this District and in behalf of their clients do hereby specifically waive trial before the District Judge and

consent to this reference of the trial before a United States Magistrate as a Special Master in accordance with Rule 53, Federal Rules of Civil Procedure.

The Special Master shall make and file a report of findings of fact, conclusions of law and a recommendation of judgment without necessity of filing of a transcript, and the parties hereto further stipulate that the Master's findings of fact shall be final and that only questions of law arising upon the report shall thereafter be considered.

New Orleans, Louisiana, this _____ day of _____, 197__.

_____ _____

Attorney for Attorney for

_____ _____

ORDER

IT IS ORDERED that this matter be referred to _____, United States Magistrate, for trial in accordance with the foregoing stipulation.

New Orleans, Louisiana, this _____ day of _____, 197__.

_____

United States District Judge

☆U.S. GOVERNMENT PRINTING OFFICE: 1983-410-983

END