Judicial Mediation and Settlement

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This column provides a wonderful forum for telling you, our Section members, of two important Section initiatives.

At our recent Section Council meeting at the ABA Midyear Meeting in Atlanta, we launched a project (or series of projects) intended to address the need for improved civility in public, political, and government discourse. No one can legitimately dispute that our modern public dialogue is often hyperpartisan, simplistic, irrational, untruthful, and too often just plain stupid. The problem can properly be blamed upon many in our society: leading political figures of all persuasions, the media, and private citizens.

Our Section members have an abundance of skills, experiences, and interests in mediation and other forms of collaborative problem solving that may be appropriate for addressing these kinds of issues. Also, I believe many of our members have a genuine interest in finding ways to address these disturbing trends in our public discourse. And, further, as lawyers and as dispute resolution professionals, we have an obligation to seek out solutions and model appropriate behaviors to address this lack of civility.

At our recent council meeting, we heard brief presentations by Lisa Blomgren Bingham and Richard Reuben on some of the approaches to these problems taken by professionals in various fields, including dispute resolution, law, communications, political science, and public policy. Former Section Chair Bruce Meyerson then led a discussion of ideas on how the Section and its members might address issues related to civility in public discourse; Bruce is chairing a task force that will coordinate our Section efforts. Those efforts may include projects of several Section committees (including Public Policy, Mediation, and Pro Bono), and a possible series of articles in a future edition of this magazine. The task force is meeting by telephone, and we hope to have some concrete ideas to pursue when you read this around the time of the Section Spring Conference in mid-April in Denver.

Also at the ABA Midyear Meeting, we learned of the ABA Board of Governors’ approval of our application to hold an ABA Mediation Week October 16–22, 2011. The initiative will promote and educate several important constituencies about mediation, especially lawyers, law students, parties, judges, and court personnel in civil and family disputes. We conducted essentially a dry run of this project last year with celebrations, seminars, and related functions in nine cities from the Bahamas to Hawaii. Participants included leading judicial figures, academics and practitioners—many members and many nonmembers. A highlight was a talk by BP and 9/11 neutral Ken Feinberg to a full room at ABA headquarters in Washington, DC.

This year, ABA Mediation Week will follow a theme of Civility in Public Discourse—in legal, political/government, and other contexts. This project will continue to be run at very low cost through extensive collaboration with our friends across the country in state and local bar groups, as well as law schools, and hopefully in a growing number of locations as compared to last year. This initiative provides an important outlet for communication both to our members and to nonmembers who might have a chance to see some of what we do, as well as an opportunity for us to collaborate on an important initiative with state and local bar groups and law schools. We also intend to expand the program by asking for appropriate resolutions and proclamations from judicial, executive, and legislative branch officials in the national and state governments. We are thankful for the leadership on this project from our Mediation Committee Chairs, Geetha Ravindra and Inga Watkins, and our Section Director David Moora.

Both of these initiatives are potentially important public service projects for our Section, and I hope you will take the opportunity to join in them.

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JUDGES AND SETTLEMENT
So Little Regulation With So Much at Stake

By John C. Cratsley

As the relevant literature over the past 20 years has made clear, there is nothing approaching consensus within the American judiciary about what role, if any, judges should play in helping or encouraging parties to settle civil cases. As this article will show, even judges sitting in the same courthouse may have quite different ideas about, and approaches to, settlement work.

Moreover, while some of the literature describes the different formats that are used by judges in settlement conferences, as well as the range of philosophies settlement judges embrace, there are two important subjects in this arena that have received only superficial treatment. One of those subjects is practical: How, very specifically, do judges actually behave as they are working within the formats or procedures they have adopted? What concrete actions or steps do they take, or which specific techniques do they use when they engage in settlement work?

The second subject that remains in need of considerably greater attention is ethics. Between 2003 and 2007, the ABA devoted considerable and commendable effort to revising the Model Code of Judicial Conduct. In my view, however, the product that emerged from that undertaking fails to come to terms with some of the very serious ethical issues that some behaviors by settlement judges raise.

There is only one provision in the new Model Code that speaks directly to how judges should handle settlement activities. That provision, Rule 2.6(B), states, in its entirety:

A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

This provision, even as elaborated in the comments to Rule 2.6(B), is so elastic and general that it leaves individual judges free to conclude that any one of a number of extremely different approaches to settlement work is ethically permissible.

I believe that a great many judges are uncomfortable with the scope of the ethical responsibility that the current generalized ABA norm puts on their shoulders. These judges would actively welcome more specific and definitive ethical prescriptions in this important arena. Clearer and more detailed rules will promote litigants’ confidence in the trustworthiness and fairness of the players in the civil justice system who wield the most power—the judges. As I suggested in my 2006 article, there is an inescapable human tendency (from which judges are not immune) to develop opinions about matters that we discuss at length and try hard to understand. That tendency can surface as judges and parties wrestle with evidence and law during settlement negotiations. It is that natural tendency that creates the likelihood of real or perceived judicial bias.

To try to learn more about what judges actually do during settlement conferences, and about the play between their approaches to settlement work and available ethical guidelines, I interviewed three of my colleagues on the Superior Court of Massachusetts who are well known for their work as settlement judges. I learned that each judge behaves quite differently in seeking to help parties settle disputes. I also learned that none of them has received substantial guidance from colleagues or from ethical standards as they have developed their approaches to this work.

During our interviews, each judge, whom I will call Judge A, Judge B, and Judge C, outlined procedures, but it was only when I insisted that they describe their specific settlement techniques that I learned what follows.
After an introductory meeting with all the attorneys and their clients, Judge A asks everyone to leave his chambers except the defendant's attorney, client, or representative. When he is alone with the defense lawyer or defense team, the judge asks, “How much money is available to settle this case?” He will then tell the defense team, “This is too low; here is the amount of money that I think is fair value for this case”—and he gives them an amount of dollars. Then he asks the defense team, “What amount of money can you get to?” Starting with that response, Judge A pushes hard, “Can you do better?”

Once Judge A has obtained the highest number of dollars he can get from the defense, at least at this juncture, he meets in chambers with the plaintiff’s attorney with the client present and asks that attorney, “What do you have to have to settle this case?” As Judge A gets a feel for the plaintiff’s position, he eventually asks the plaintiff’s attorney, “If I could get you X (X being a number based on what the defense team has already told him that they would be willing to pay, or, in some situations, a slightly higher number because Judge A believes that the defense team will move up a little), would that actually settle the case?” Using this response, Judge A tells the plaintiff’s attorney, “Do not tell your client this number.”

Then Judge A meets separately again in chambers with the defense team and says, “If it takes Y to settle this case, could you do it?” (Y is a number that is usually more than X, but an amount that plaintiff’s attorney has indicated he could persuade his client to accept to settle the case or, in some situations, a slightly lower number because Judge A believes that the plaintiff will move down a little if the defense team comes up a little.)

Once the defense team, meeting alone with the judge, gives the judge a higher and usually final number, Judge A meets privately with the plaintiff’s attorney and says, “Here is what I can get for you in dollars and no more!” Judge A adds, “Please tell your client that this is a good settlement offer and describe to him how we reached the number.”

If the plaintiff’s attorney comes back and asks for more money, Judge A tells him “no” since he believes the plaintiff will actually settle for the lower amount (the Y number) already separately proposed by plaintiff’s counsel.

Judge A’s philosophy is that if he can use this technique to close the gap between the two sides, even if a settlement is not immediately reached, the attorneys will eventually settle the case because neither side wants to run the risks or incur the expense of trial with such a small gap, a small amount of dollars, left open between them. Judge A says this process usually takes two to three hours, but often achieves a settlement, saving many days of trial.

Judge B never separates the attorneys and clients into separate groups and always starts with everyone in the room discussing the parties’ most recent financial offers and demands. Judge B will comment to everyone on the realism of the respective numbers when they can be measured, such as medical expenses and lost wages. In the presence of everyone, he also offers comments about the realistic prospects of the plaintiff prevailing and the strengths of the pleaded defenses.

If the attorneys seem comfortable with settlement terms that appear accessible, but one of the clients remains unwilling to settle, Judge B will talk directly with that party, in the presence of counsel and the other parties, about the risks of trial, the uncertainty of a jury decision, some of his views about the strengths of the evidence on both sides, and what other juries have awarded following similar trials.

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Judge B also is willing to employ a technique he calls the practice jury. In this approach, he seeks volunteers from the jury pool (jurors brought to court for the day but not used for any actual trials) who then listen to both attorneys make a presentation about the issues in the case and the evidence that would be introduced on each issue. Then, the attorneys are permitted to ask questions of the practice jury. Judge B says it is helpful if the clients see the presentations to the practice jury and hear the jurors’ responses to their attorneys’ questions. But if the clients have not been present throughout this “practice” trial, the attorneys bring the views, the evaluation of the practice jury, to their clients. Judge B feels that as long as there is a firm trial date looming, this technique is as useful in promoting settlement as his hands-on settlement approach described above.

Judge C calls his technique judicial mediation. He refuses to remain as the trial judge for any case in which his efforts at judicial mediation are unsuccessful.

Judge C’s approach to judicial mediation begins with a meeting in which all attorneys and their clients are present. Thereafter, he uses shuttle diplomacy, meeting with one side and then the other. As these meetings progress, Judge C listens for ideas that he can inject into the conversations to bring the two sides closer together. He is always balancing in his own mind the positions of the parties with his own view of the value of the case.

He sometimes proposes settlement terms to one side during a private caucus. If that side indicates that it would accept the terms suggested by the judge, he seeks its permission to share his proposal with the other side. If he receives permission to do so, he then presents his proposal to the other side in a private caucus.

Some of the approaches that Judge C uses to move the parties closer together and to break deadlocks between them include: (1) suggesting to the parties that they “split the difference” between them; (2) suggesting that the side that has more assets or that arguably faces a greater risk of losing pay slightly more than half to close the gap; (3) suggesting one or more nonfinancial options that might be important to resolve the dispute, such as an apology, a donation to a charity, or some future business relationship; and (4) identifying some of the issues that only the judge has control over that might close the gap, such as determining the amount of time the defendant has to pay the settlement, holding the case open after the settlement for judicial supervision, or agreeing to certain terms of privacy for the settlement terms.

Finally, if no other technique for settlement works, Judge C will give his personal view of the logical “best” settlement for the case and describe the reasons that support his views. He will then offer the disputing parties one last chance to evaluate his recommended settlement.

If the parties decline that invitation, or otherwise fail to come to terms, Judge C tells them that they are free to continue talking, but that he will not be their trial judge after investing so much of his time and energy into this judicial mediation.

Should Our System Be Comfortable With Such Disparate Approaches to Judicial Settlement Work?

I think it is unhealthy for our system of civil justice to permit such substantial disparities in how judges conduct settlement negotiations. How litigants and lawyers are treated when they engage in such sensitive and important activities should not be so variable, unpredictable, and dependent on which judge they happen to draw.

Because such a small percentage of cases proceed through trial, and because trial judges are always under caseload and administrative pressure to “move the work,” it is in the settlement arena that many parties and lawyers have their most extensive and significant interaction with the judiciary. We need to take assertive, clear steps to improve the likelihood that litigants will emerge from this interaction with respect for and confidence in the judiciary.

Endnote

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The Judicially Hosted Settlement Conference

My Case in the Balance: Musings of a Trial Attorney

By Gregory D. Brown

It really does seem timely and appropriate to revisit the merits of the judicially hosted settlement conference (JHSC). Once the standard in the legal industry for the resolution of disputes, its role and stature have diminished, rightly or wrongly, with the blossoming of the private mediation field. This is not necessarily a logical or even a good thing—in part because settlement conferences can deliver kinds of value that mediation often cannot, and in part because private mediation has morphed into a broad morass of options that can produce traps for the unwary and a good deal of confusion, both on the part of mediators and mediation participants.

We lawyers tend to forget who is supposed to be at the center of the show: the client. And, more often than not, our client never really wanted to be involved in the litigation process to begin with and can’t wait to get out of it. Even as a mediator and a mediation advocate, I still, at times, find myself longing for the straight-up, down-to-business, highly evaluative “let’s get this case settled” mandatory settlement conference presided over by a judge who is very much involved in the trial dynamics of the superior court in which you are going to try your case.

So, let’s address the pros and cons for the judicially hosted settlement conference. What follows are not just the musings of the author, but also thoughts and concerns that are shared by many lawyers with whom I have daily interaction and a shared history of trial work.

Cheaper, Better, Faster
These three virtues are the Holy Trinity of conflict resolution, at least from the client’s prospective. We can start by using these three criteria to assess the pluses and minuses of judicially hosted settlement conferences. In a large number of cases, in a very significant spectrum of litigation, the JHSC fares surprisingly well under these standards.

It is both a pleasure and a relief to have someone willing to listen to your case and try to help you resolve it, even for a limited period of time, at no additional expense. That’s the cheaper part.

The answer to better is that it can be “yes” in some respects or circumstances and “no” in others. Clearly, the long and varied experiences of the sitting trial judge can be invaluable to today’s “trial” lawyer, especially the trial lawyer who hasn’t had many trials or who is not intimately familiar with the venue. Sitting judges are immersed, every day and in real time, in the strengths and struggles of the local jury pool. They have seen how local jurors have responded to similar claims, and they are familiar with their moral and emotional sensibilities and sensitivities.

To be sure, retired judges who have become private mediators often cite a long history in the local court, but the richness and reliability of their contact with the local jury pool (and with other judges who are in constant contact with that pool) wanes over time. Demographic, political, and philosophic shifts in jury pools can occur rapidly, changing the litigation landscape in dramatic fashion over a short time.

Better is a relative term and begs the question, “Better for whom?” Settlement conference judges are widely perceived as being less interested than many mediators in the finer arts of getting your client to “yes,” of enhancing your client’s sense of personal empowerment over the resolution of the case, or the many other “touchy-feely” phenomena that can be achieved through the mediation process. The settlement conference judge’s ultimate goal is to close the case, to reduce the number of matters on the civil active list, and to clear as many matters as possible, as quickly as possible, off the trial calendar.

No one likes to be on the receiving ends of comments like, “I think your defense is weak!” or “This case is not worth what your client thinks it’s worth!” or “You really should be offering this much money and I’m expecting you...
to come up with that authority.” Nonetheless, many judges and lawyers believe that such strong, direct, and evaluative statements and techniques are necessary to achieve the goal of getting as many cases settled as possible.

Such direct and sometimes rough approaches, however, do little for clients’ appreciation of the civil justice system—especially if the clients feel that they have been strong-armed into settlement. Perhaps it’s all a matter of how the message is delivered.

*Faster* also is a relative term. Settlement through a judicially hosted conference certainly is faster than disposition by trial (and appeal). But is it faster than private mediation? For litigators who want the direct settlement conference approach, most courts will make settlement conferences available at an early stage and, resources and calendars permitting, will hold multiple settlement conferences.

But all too often, courts postpone offering settlement conferences until the parties have tried private mediation—so this form of court service often is not available until a point much closer to trial. Theoretically, this should be the right time for a resolution. The lawyers should have actually evaluated their cases carefully and provided their clients with an informed-risk analysis. However, the settlement conference that occurs within eight or ten days before trial usually occurs after most of the money has been spent, when positions frequently have hardened, and when the lawyers have come to feel more firmly in control of the fate of the lawsuit: not the best chemistry for the resolution of many cases.

The settlement conference is clearly and triumphanty faster in one blessed aspect—getting to the point. Mediations are now frequently bogged down for hours while the lawyers and the mediator bill merrily along. For extended periods, the lawyers cling passionately to highly unreasonable demands or offers—figures that bear no practical relationship to the real value of case. Generally, this phenomenon is justified as “testing the low range” or wanting to “send the right message” before real negotiations occur. In mediations that are scheduled for a whole day, nothing ever seems to happen before about 2:30 in the afternoon. Frequently, the pace of progress seems dictated by how much time is left before one of the parties needs to catch an airplane home. Lawyers have a knack for expanding the amount of work they perform to fit the time allotted. After all, we have all day, right?

No, not in a settlement conference, where you know you will get only an hour, maybe two, of the judge’s time. If you hope for any progress, you must use this time efficiently. You must address the merits directly and move fairly quickly toward the line of probable impasse. Doing this well requires a lot of social and emotional intelligence, refined communication skills, comfort with face-to-face bargaining, and the ability to take a hit without blinking.

Cheaper, better, faster. Hooray for the settlement conference!

Settlement conference work also requires a lot from the judges. A settlement judge must temper the robes of power and concern about the needs of the court system with the experience, tact, and patience necessary to pursue the deal and not polarize the parties. Often, it is within minutes of reading settlement conference briefs that the judge must become the confessor, adviser, and negotiator for each of several parties. This is no easy task.

**Suggestions for Improving Settlement Conferences**

A caveat: these are my musings after all—untested by debate with people who have different perspectives and knowledge bases. As such, they may fail to pass the test of practicality, especially given the acute financial pressures on the courts. No magic wand will fill judge seats that remain open or fund new judgeships, restore staff, reduce filings, provide greater access to justice for the poor, or expand the time available to help parties settle their cases.

First, why do the clients get to stay home from the JHSC? A lot of clients would never forgive me this heresy. But really, the system suffers by the relatively little involvement of clients in the settlement conference process. Telephone standby is, to be sure, an unavoidable necessity in many cases. However, when a necessary party is allowed to be on standby, the other litigants are likely to believe that the odds that a settlement will be reached have plummeted. Some litigants bristle at the perceived unfairness of this special dispensation.

Of course, any such additional emotional baggage that is added to the strain of litigation needs to be overcome during the conference, increasing the burden on the judge and using up valuable time in getting to “yes.” Cases may not have settled earlier because at least one of the real decision makers has not faced reality or been compelled to reach a decision point. Allowing such decision makers to be on telephone standby insulates them from the real debate and protects them from having to justify their inability or unwillingness to make the decisions necessary for disposition. This scenario saddens many lawyers and litigants, who view it as a tacit recognition by the court that the conference may not have real significance in the life of the case in any event.

Second, why are the clients who actually do attend the settlement conference often left out in the proverbial hall while the judge conducts the conference in chambers with the attorneys? Many trial lawyers have been forced to argue with the judge about the right of their clients to be in the conference itself. Such arguments too often seem to fall on deaf ears. So, far too often, the clients remain in the hall.

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Besides its rudeness and insensitivity, why might it be a mistake to leave the clients in the hall? Judges who deal directly only with counsel are, in effect, asking the cats to guard the cream. When a settlement judge leaves a client in the hall, this deprives clients of what is likely to be their only opportunity to escape, or to assess reliably, the influence of their own lawyer. A settlement judge who communicates with the clients only through counsel sets up a double dependency. Both the judge and the client become dependent on the lawyer's ability and willingness to communicate accurately and effectively—first with the client, and then, on the return trip, with the judge. This does not always happen.

Permitting clients to participate directly in the proceedings can increase the judge's access to important information—about the case, about the decision makers, and about external factors that can be players in the settlement dynamic. Some clients really want to reason directly with the judge, and giving them that opportunity can make them more ready to move toward settlement. And many clients want or need to see how convincing their attorney can be, or how weak their position is on its merits.

Clients benefit from directly observing how their lawyer and their position hold up under direct and active scrutiny by a judicial mind. Trial attorneys have been known to fall too deeply in love with their own analyses and strategy. Vested beliefs can be hard to overcome, and criticisms of them can be hard to accept. So it can be important to give clients direct access to the analytical dynamic between the lawyers and an independent, probing, and legally sophisticated mind.

Why don't more settlement judges take the opportunity to break through the lines of miscommunication, filtering, and exaggerated influence that sometimes attend relationships between lawyers and their own clients? Why not take this one brief moment to ensure that daylight can shine clearly on the merits of the arguments and can expose fully the opportunities for resolution?

Third, can we please get rid of the "confidential" settlement conference statement? What good does it do to shelter your views of the case from your opponent on the eve of a settlement conference where time is of the essence? Unbelievably, some litigants are forced to attend settlement conferences without ever having been favored with a demand or an offer, and without ever having heard about an important factual contention or legal defense. No wonder sufficient authority often is not available, or negotiations bog down over newly disclosed information. It takes time to digest information and arguments and to assess possible responses. Surprise often is the primary obstacle to settlement.

Fourth, judges, please don't abandon the joint session too early, especially if you have invited the clients into your chambers. Everyone needs to see the action, watch the advocacy, and hear the same messages. This is another important advantage of breaking the exclusive hold by the attorney on the client's attention. Sadly, and increasingly, many litigators today seem to have less interpersonal skill and much less courtroom experience than their predecessors. It is not their fault. They come from a generation where electronics dominate communication, work, and free time—all at the expense of in-person, face-to-face interaction. Few of them have been called upon to learn the art of negotiating vigorously across the table. And few of them have experienced the satisfaction that comes from working through a problem with someone whose interests are aligned quite differently and being able to part as friends or respected colleagues. Many of today's lawyers have learned what they know about bargaining in mediations, where, under current conventions, most of the significant work is done indirectly, in private caucuses, and through a professional intermediary.

Moreover, most of today's litigators have tried very few cases. The "litigation" that "litigators" do is pretrial, consisting almost entirely of discovery and motion work. The result is that it is harder for the newer generation of lawyers to accept the significance of the arguments or the wisdom of the assessments they hear from settlement judges. This substantially enlarges the challenges that settlement judges must overcome—in less and less available time. C'est la guerre.

An additional challenge for settlement judges arises from the fact that they do not see the same decision makers anywhere nearly as often as in days gone by. When there was little private mediation and more judicial time, settlement judges would frequently see the same decision makers (from insurance companies, third-party administrators, risk managers, etc.) repeatedly. The judges and the client representatives would have a history with one another and grounds for mutual respect and trust. This provided them with an invaluable capacity to engage in real give-and-take based on shared experience and prior settlement success. The fact that this constructive circumstance cannot be replicated under current conditions makes it all the more important for judges to include the client representatives, directly, in the heart of the settlement conference process.

Advice to Attorneys in Settlement Conferences

Lastly, I dare presume to offer some advice to lawyers going into settlement conferences. First, please leave some of your time-consuming mediation strategies at home. Be courageous enough to cut to the chase and to efficiently get to either "yes" or "no." Frequently, even a "failed" settlement conference plants the seed and lays the framework for later resolution. So don't waste the relatively little time that a settlement conference consumes—use it to build.

Second, bear in mind that a settlement conference is not the forum to try your case. Keep the mediation brief. You are not arguing a motion for summary judgment. Use the court's limited time to full advantage by crisply presenting the information the judge needs to give...
you a useful second opinion. And directly involve your decision maker. This is good for you and good for the process in the end.

Third, do not spend an inordinate amount of time trying to show your client what a good trial attorney you are, or might be. Clients hate trials. Trials are expensive, stressful, and unpredictable. They are not even remotely viewed as good tools for risk management. Most of our clients are in the business of exchanging risk, i.e., your favorite case, for money. Help them do that as quickly and efficiently as possible.

Finally, beware of one potentially significant trap for the unwary in settlement conferences, especially if you have become accustomed to the mediation arena. Mediation practice is now almost completely sheltered by confidentiality statutes, court rules, litigation privileges, and case law that, together, insulate mediation communications and activities almost completely from discovery or admissibility. Almost nothing can get out to haunt you later.

Not so in the settlement conference arena. The level of protection for settlement conference communications varies considerably between jurisdictions, but, at least in California, is far lower than the level of protection for mediation communications. And there are many circumstances in which courts seem prepared to penetrate settlement conference dynamics in order to enforce other rights, e.g., the right to have an agreement between a plaintiff and one of multiple defendants deemed a "good faith settlement," or the right to enforce the terms of a contract that a settlement conference produced. In short, counsel must attend more carefully to the risk of compromised confidentiality in settlement conferences than in mediations.

So, counsel, when you are heading for a judicially hosted settlement conference, do your homework. Be well prepared to address the critical parts of your case directly and to move efficiently through assessments of all dimensions of the situation that bear significantly on settlement. In the conference itself, be on your best behavior—and focus on communicating accurately and respectfully with the judge, with your opponents, and with your own client. Be prepared to be buffeted by the fast-moving dynamics of face-to-face negotiations and strong evaluative opinions from your judge. Sit down, buckle up, cut to the chase, and let’s talk about what this case is really worth!

Endnotes
I Think I Blew It

By Kristena A. LaMar

Fast-forward to 1987. I had been a circuit court judge since 1984, and I enjoyed immensely almost everything about the job. It did seem to me, however, that the general civil process was disturbingly expensive and drawn out for relatively modest controversies. I also noticed that the “winners” never seemed to be doing cartwheels out of the courtroom.

So when a colleague requested volunteers to host one settlement conference a week—he was starting at 6:00 a.m. before a full trial docket—I jumped at the chance. Not long thereafter, my colleague decided to quit mediating. I volunteered to fill the gap, and within a few months, requests for settlement conferences consumed all of my time. I eventually gave up all trials and my courtroom. For the next 23 years I did almost nothing but host settlement conferences—for the first few years in general civil cases, then primarily in family court matters.

I boldly ventured into “judicial mediation” with absolutely no training. I assumed that everyone would gather in one room and, without subtle interventions, could just talk things toward a sensible conclusion. So the first “format” I used was simple. I had everyone come in to chambers. Without coaching, and unencumbered by any sense of restraint or balance, the plaintiff’s attorney would tell...
me about the case. Repeat: the attorney, not his client, talked to me, not to the other parties. Not to be outdone, defense counsel would then tell me why: (1) the plaintiff was lying; (2) the plaintiff hadn't really been injured; (3) even if the plaintiff were injured, it was mostly his or her fault; and (4) even if there were enormous medical bills that had to be paid, the treatment providers were quacks, plaintiff-oriented, or too expensive.

As these low-brow versions of performance art played themselves out, I watched incredulously as blood pressures rose and IQs seemed to drop. Things got even worse when my settlement calendar began to include family cases, where hatred, distrust, and ineffective communications are standard. And that's just the attorneys! Often, it was a close call to see whether the litigants, formerly in love enough to share the same bed, or the attorneys could "out-trash" the other. How could generally well-educated, good-intentioned professionals say such awful things in semipublic places? What good were the attorneys accomplishing when they regularly wrote libelous letters, demonizing the parents of their clients' children? And what was the fallout when the kids were exchanged on Friday and Sunday nights?

Bear in mind that I worked in a very high-volume, resource-strained urban state court. I was expected to spend only about an hour in each settlement conference in general civil cases and no more than two hours in family cases. I understand now, but didn't fully appreciate then, how such severe time constraints can warp mediation processes and participants' behavior.

Before too long, it occurred to me that what we needed was a less emotionally dangerous format. Memories of Kissinger's shuttle diplomacy sputtered to the surface of my brain. I decided that if that approach was good enough for Henry and the Vietnam War, it should be good enough for me and the "civil" cases on our crowded docket. So I stumbled onto an approach to settlement conferences that I followed for most of the remaining 23 years that I spent as a full-time settlement judge.

Separating clients from the core of the process was the key to my new format. With no clients as an audience, I assumed that performance art by counsel would be relegated to a fade from the past.

First, assuming all parties were represented by counsel, I would meet with counsel in my chambers, having their clients remain in cheerful, glassed-in, magazine-equipped meeting rooms.

What I envisioned being a brief session with the attorneys to identify issues and develop a format for the remainder of the conferences often devolved into an unproductive hissing match between and among professional negotiators and counselors. I soon learned who came prepared with facts, agendas, prepared clients, and priorities of settlement. And I occasionally "black listed" attorneys for whom the state did not pay me enough to risk my mental health.

Next, I tried to identify which party was the stumbling block in the negotiations. The one who would hear the word only from a judge? The one who was still in denial about his or her role in compromise—and who would typically insist that only the US Supreme Court could properly do justice in the matter? Or the client who needed to be informed (subtly, of course) that his or her attorney wasn't helping things?

Then I'd go talk with that person, using my best facilitative self. Often, the client seemed clueless about who I was, why we were there, or what would happen afterward, even while counsel was sputtering about their conversation of only an hour ago in the attorney's office.

If things went smoothly, I'd shuttle back and forth until the plaintiff's lawyer concluded that he had finally extracted the best offer the defense was going to make—and the defendant acted as if any additional bleeding really would result in a fatality. When an agreement was reached, I would write up a small memo of settlement (if the terms were involved or if someone feared that one of the parties might back out), and I'd sign a dismissal order.

The parties reached an agreement in about half of the 15,000 cases that I helped "mediate"—you can host a lot of hour-long conferences in 23 years. Another 40 percent or so settled between the conference and the trial date.

I assumed that these procedures were about as good as any were going to get. But over the years, I came to feel that the court needed to make sure that everybody really tried to settle. So, about 10 years ago, I made the mistake of persuading the court to adopt a rule that required parties to participate in some form of ADR if their case hadn't resolved in the nine months after filing.

I hadn't foreseen how this new system would play out. My judicial colleagues, thinking they could push counsel into more responsible case development practices, refused to continue trial dates beyond a year unless the parties had engaged in an ADR process. The part of the pretrial amoeba that regrouped, however, was not counsel's approach to pretrial case development, but the form of their participation in ADR. It was easier to "show up and salute" at one of my settlement conferences than it was to conduct the investigations, do the discovery, and file the motions that might be necessary to get a case really prepared for trial. So attorneys began showing up for my settlement conferences armed with only the most cursory information and declared they were ready neither for negotiation nor trial. They even began leaving their clients at home.

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This development was accompanied by the emergence of a vast array of private mediators and mediation services, who could reserve expansive, and often expensive, periods of time for facilitated negotiations. Persistent marketing efforts, a perception that I was still “booked to the gills,” and my growing boredom and dissatisfaction with babysitting cases caused my mediation docket to shrink.

I once again began to take on cases for trial—and, again, my docket featured a lot of family cases. In a majority of these cases over the past two years, one of the parties has not been represented by an attorney.

The absence of counsel from so many of my cases essentially forced me to abandon my former approach to settlement work. Instead of leaving the clients in the waiting room while the lawyers and I “handled” the guts of the negotiations, I had to include clients directly in the settlement conversations. And because it didn’t seem appropriate for a judge, who might have power over some contested matters down the road, to meet separately with unrepresented parties, I ended up hosting a lot of “mediations” in the “joint-session” format and in which the principal players were the litigants themselves.

Forced to change my settlement conference ways, I discovered that I had been doing it the wrong way all these years! I had always believed that: (1) keeping warring parties separated helped reduce the friction; and (2) attorneys’ presence helped diffuse explosive behavior.

But with few exceptions, I have observed that unrepresented domestic relations litigants have or can be coached into using appropriate communication skills, at least in the presence of a judicial mediator. I also have been surprised to find that unrepresented litigants not only are open to a hearing, but they also actively seek a perspective on their shared lives that is different from their own. There will always be personalities who insist on interrupting, bullying, and ignoring everyone else’s point of view. But the pro se parties I have worked with actually appreciate a judge’s input, not only about the law, but also about ways of interacting and of considering things that will help them avoid some of the draining difficulties that have characterized their recent pasts.

I knew that the ritual inherent in a courthouse, a courtroom, and a robe could be a powerful element in a transformative process. What I did not appreciate was the power of face-to-face communication that is liberated from the deficiencies inherent in the representative process and that is uninterrupted by the shuttling and by the “translations” of a Kissinger-style mediator. The people in crisis that I observe in my “courtroom” are capable of organizing, prioritizing, and explaining their past troubles, their frustrations with other participants, and their hopes for the future.

But to create the room that this kind of communication needs to really work, I have had to force myself to suppress, or at least recognize and control, my own aversion to people acting badly. Perhaps because of childhood experiences living with conflict, or perhaps because I have been submerged in conflict-infested work for all these years on the bench, my instinct is to put a lid on outward signs of aggression and disrespect. In the past, I have feared that parties would damage the prospects of settlement and further damage their own relationships if I permitted them to express intense, hostile emotions to one another. I have permitted emotional parties to vent only in private sessions with me, and I have assumed that venting in that separate setting was all the catharsis they needed. I also have thought I could reduce the risk of triggering harmful emotional counter-reactions if I could sugarcoat one party’s harsh words when I tried to share his or her thoughts and feelings with the other side.

I now think I was wrong on all these scores.

Unrepresented parties have shown me that they can take much more directly from one another than my arguably precious, and perhaps elitist, assumptions predicted. They also have shown me that they can teach and learn more from one another than I thought—and that it is the directness of their communication with one another that produces the greatest gains in understanding and in emotional movement.

I have read some blogs and other forms of feedback about my former approach to settlement conferences. Lack of transparency was occasionally identified as a problem. Shielding parties from one another’s feelings, even their intense ire, and preventing them from engaging in honest, face-to-face confrontations may have inadvertently intensified the sense of isolation and the frustrations that accompanied their dispute in the first place. Moreover, if their attorneys’ “counseling” and often unhelpful behavior did not adequately communicate—let alone assuage—their clients’ needs, I missed the real value of mediation when I dealt primarily with the lawyers in my settlement conferences.

If I had it to do all over again, I would host settlement conferences much like I now conduct family court “hearings.” I would allow everyone to introduce themselves; I would lay down ground rules about how we only speak one at a time and listen respectfully while others were talking; I would ask what process the parties would like to use to enable all of us to have a hand in solving the problems before us; and I would shepherd the discussions in the manner that the participants needed. I would use judicial restraint in curbing excessive or hurtful diatribes, and judicial wisdom in giving insights.

Sometimes, we learn the limitations, if not errors, of our ways long after we have a chance to correct them. In the remaining three years of my service as a judge, I hope to use what I have belatedly learned to help parties who must navigate the legal system without a lawyer to feel safe and to feel heard—by me and by the other parties to their disputes. ♥
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Look, I’m sure you’re very competent and all, but my clients are foreign nationals, they’re very traditional people, and, with all due respect, they’ll only listen to a judge.” So said a lawyer a number of years ago in a Ninth Circuit settlement assessment conference, a telephone conference the court schedules in almost all civil appeals during which counsel and a mediator discuss the parties' interest in settlement. The Ninth Circuit Mediation Program—staffed by nine mediators employed directly by the court—is noted for its flexibility and its ability to design an individualized process for each case.1 However, flexible as we are, providing a circuit judge to host a settlement conference is not among the process options we usually offer; helping to resolve cases is what the mediators are for. In fact, parties rarely request settlement assistance by a circuit judge.

Thus, the request threw me a bit. I understood the lawyer to be saying that—at least for these clients in this case—authority, status, and a directive approach were the most important factors in his and his clients' choice of a neutral. Because the clients came from a traditional culture in which age, status, authority, and the male gender were highly valued, these clients, navigating as they were in a foreign legal system, desired a neutral who would most closely evoke a familiar authority figure. I, at that time a youngish female of only middling status within the judicial hierarchy, did not fit the role.2 And, while I’m sure this lawyer and his clients had no inkling of Len Riskin's grid of mediator styles (new, old, or otherwise),3 I do imagine they feared I would be either too elicitive or insufficiently authoritative to pull off the directiveness they sought.

While I believe the lawyer had given zero thought to the actual skills he desired in a neutral, I deconstructed his words to glean his meaning on the subject. I think he was saying either that a judge's authority and status were more important than his or her skill at settlement, or that settlement skill in a judge was assumed. Either way, I knew that he was wrong.

That said, except for my worry that acceding to the request was eroding the legitimacy of my own profession, pandering to sexism, and supporting an overly hierarchical world view, I thought the request for a judge, in this instance, made some sense.

The first few judges I approached turned me down. “Isn’t it your job to save me work?” and “You’ve got to be kidding” were among the responses I received. Undaunted, I persevered until I found a judge who missed his days as a litigator and thought that serving as a settlement judge might be interesting. The judge seemed almost perfect: brilliant, thoughtful, personable, authoritative, older, male, and willing to help. His only downside was that he possessed virtually no experience as a settlement neutral. He agreed that if the case did not settle, he would recuse himself from any future consideration of the merits.

It was a pretty straightforward breach of contract case decided below on summary judgment. I sent the judge the summary judgment papers along with short mediation statements prepared for the conference. The judge called me afterward to say that the case had not settled. He had given the parties his evaluation—he had believed everyone faced some risk—and had suggested a settlement plan that apportioned the risk. But neither party had gone for it. The judge confessed that he was shocked. Shocked

Is a Robe Ever Enough? Judicial Authority and Mediation Skill on Appeal

By Claudia L. Bernard

Look, I’m sure you’re very competent and all, but my clients are foreign nationals, they’re very traditional people, and, with all due respect, they’ll only listen to a judge.” So said a lawyer a number of years ago in a Ninth Circuit settlement assessment conference, a telephone conference the court schedules in almost all civil appeals during which counsel and a mediator discuss the parties' interest in settlement. The Ninth Circuit Mediation Program—staffed by nine mediators employed directly by the court—is noted for its flexibility and its ability to design an individualized process for each case.1 However, flexible as we are, providing a circuit judge to host a settlement conference is not among the process options we usually offer; helping to resolve cases is what the mediators are for. In fact, parties rarely request settlement assistance by a circuit judge.

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that the parties had not accepted the advice they had clearly asked for, and shocked that once the parties had rejected his plan, he had no help to offer. He graciously acknowledged that he had neither the patience nor the time to figure out how to help them further.

I called the lawyers and learned that there were a number of business realities that made it impossible to settle the case solely as a legal problem. Over the next couple of weeks, I worked with the lawyers to help them negotiate a resolution that both looked at the risks to their clients of going forward and recognized the business and financial realities they both faced.

The clear lessons of this experience were that: (1) status and authority do not trump skill and experience as a neutral; (2) while often necessary, a neutral's status and authority is rarely sufficient; and (3) the combination of a judge's status and authority with a mediator's skill, time, and patience is a dynamite combination in the right case.

Taking these lessons, the judge (who was somehow not daunted by this experience) and I developed a system for working together. In those rare cases in which cultural or other considerations seemed to require an extra dose of authority, the judge would render his analysis of the legal issues and I would follow up with a more broadly focused interest- and needs-based mediation using the judge's analysis as the background for the parties' best and worst alternatives to a negotiated agreement. We enjoyed remarkable success in our tag-team operation. He brought the stature and authority of a sitting federal appellate court judge, and I added the necessary process, communication, and negotiation skills, as well as greater availability and lots of patience.

Although our process varied a little depending on the case, usually the judge would meet with the lawyers, their clients, and me in his chambers. He would exchange a few pleasantries, ask a few questions, and explain to all assembled that what he was about to say was his opinion based on what he knew at that moment, and that he had no idea how his colleagues might look at the case. Then, he would render his “decision” accompanied by a concise, well-reasoned explanation. Afterward I would take the lawyers and clients off elsewhere in the building and facilitate their negotiations. At other times, the parties and lawyers and I would be together in one location, and we'd talk to the judge over speakerphone from another. Sometimes I'd negotiate with the parties and lawyers in advance of the judge's “ruling.” If the judge indicated “X” the parties, would have agreed on solution “A;” if the judge indicated “Y,” they would have agreed on solution “B.” This interesting variant worked well in single-issue cases and had the great advantage of guaranteeing a resolution.

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At the time, I thought our tag-team operation was as good as it gets in the realm of judicial settlement at the appellate level. My judge left the bench, requests for judicial involvement declined as the reputation of the Ninth Circuit Mediation Program grew, and I thought very little about involving sitting judges in our mediation work.

Then in October 2010, an en banc panel of the Ninth Circuit referred to Senior Ninth Circuit Judge Edward Leavy—for the purposes of exploring settlement—a legally complex, politically charged class action involving environmental and other claims against an international copper mining company doing business in Papua New Guinea. Over a vigorous dissent by Judge Andrew J. Kleinfeld, Judge Stephen Reinhardt stated:

Because mediation allows for compromise and creativity in a way that litigation cannot—circumscribed as it is by procedure and precedent—parties have often found that mediation provides more satisfactory relief than the court could fashion itself. Today we turn to our colleague, Judge Edward Leavy, who has mediated many significant disputes, such as a suit by sixty victims of clergy sex abuse against the Archdiocese of Portland, the largest investment manager fraud case in American history, and the criminal prosecution of nuclear scientist Wen Ho Lee, in which Judge Leavy succeeded in negotiating a plea agreement between the defendant and the Department of Justice. Id. at 17574–17575.

If mediation of a case ever called for the authority, stature, and gravitas of a federal judge, this was it. It had foreign nationals on all sides; two putative classes of aboriginal people fighting a quasi-governmental, multinational corporation; and explosive complexity on all fronts, including allegations of war crimes and systemic environmental degradation. And if ever a case called for a neutral with process and negotiation skills, patience, and lots of time, this was it. That Judge Leavy, a Ninth Circuit judge who previously served as a district court judge, a US magistrate judge, and a state trial court judge, possesses the requisite authority for the job is irrefutable. That he possesses the requisite skills and personal traits appeared likely from Judge Reinhardt's laudatory referral, but I wanted to find out for myself, so I asked Judge Leavy if we could talk.

Judge Leavy told me that he tries to host his settlement conferences “just like you mediators do.” He says he is not evaluative. Having once evaluated a case for an amount that proved to be half of what a jury ultimately awarded, he now believes it is an impossible task. Nor does he limit the scope of the mediation to the legal problem. “The beauty of mediation is that you get to think more

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holistically and creatively about a problem than you can as a judge,” he told me. “You get to think of everything; you don’t have to be constrained by the litigation. It’s a challenge to think of ways to solve the problem that don’t occur in the main line of who’s right and who’s wrong.”

Judge Leavy credits his upbringing on a farm during the Great Depression with the development of the philosophy that guides him as a mediator. He says he learned that once people are stripped of their need to display their pride, they can be happy and fulfilled in ways not measured by money. He told me that he looks for those paths to happiness that the lawyers and the parties—blinded as they are by their roles in the adversary system—cannot see.

He also says he’s not a “head-knocker,” as he puts it. “Whenever people act freely, they act for a purpose, which is always their own happiness.” Judge Leavy has taken the authority attendant to his role as a federal judge and used it to forge a holistic, creative, problem-solving approach to settlement.

The vast majority of the settlement work Judge Leavy conducts is referred to him by district court judges, who appear to be as respectful of his skill and reputation as are his Ninth Circuit colleagues. Meanwhile, the circuit’s staff mediators provide virtually all of the settlement services for cases on the circuit’s appellate docket. Thus it is somewhat ironic to be writing about settlement work by judges at the appellate level, as its occurrence is so rare here at the Ninth Circuit.

Given the professionalism and skill of the court’s mediators, it is the rare case that calls for that extra dose of authority or gravitas that only a judge can provide. When that rare case does arise, however, the potent combination of judicial authority and mediative skill is accomplished most reliably and most consistently through the partnering of judge and mediator. It is accomplished most efficiently (and perhaps most spectacularly) in the person of Judge Leavy, a settlement host with the skills, temperament, and personal qualities of a mediator wrapped in the authority, dignity, and stature of a federal appellate judge. Although I have no empirical data to support this assertion, I’m guessing that Judge Leavy’s settlement approach is fairly unique among Article III judges, appellate or otherwise. So I suspect that others wishing to replicate one of these models would do best to pair judge with mediator rather than attempt to clone Judge Leavy, a topic well beyond the scope of this short article.

Taking these lessons, the judge and I developed a system for working together.

Endnotes
2. I don’t mean, of course, to understate the value of the work we staff mediators do or the respect we enjoy in the legal community. That respect is the product not only of the high quality of the work we do and the significance (to litigants and lawyers) of the service we provide, but also to the visibly substantial role this circuit has given us and the considerable discretion it has bestowed upon us. Because we are employed directly by the court, and are highly identified with it, we share in the respect and authority with which the institution is imbued. See Wayne D. Brazil,
YOU CAN READ OUR MISSION STATEMENT.

Or, hear it through how you’re spoken to.
Note it in our recruiting standards.
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Tricia Lunceford
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The jury was in the box. The plaintiff was the older brother of the defendant, a lawyer. The family was divided in its seating in the courtroom—like at a wedding. The plaintiff was a carpenter by trade, and the family had grown in wealth from the parents of these litigants who created a pot into which went the profits from trading in real estate. The older brother was suing his sibling for a larger share in the profits of the sale of a condominium in New Jersey. The defendant-lawyer-brother claimed that there were no more profits to yield up and that the plaintiff had received the lion’s share of the transaction.

I thought, “What a destructive lawsuit this is for one brother to accuse the other of fraud and bring the rest of the family into the fray.” It was not the merits of the claim or defense that impelled me to call the parties into the robing room for a settlement conference but, rather, the polarization of the entire family that the case had created. After securing permission to deal with the lawyers and clients ex parte, I conferred first with the plaintiff and his lawyer. Sensing that there was more to this lawsuit than the legal issues and the pleadings, I asked the plaintiff why he was driven to sue his younger brother, a lawyer. His answer revealed what actually was going on and gave me the key to settlement.

“I was the older brother and the defendant was the favored child,” the plaintiff told me. “I recognized that my parents wanted the best education for him but could not afford to give both of us a college education. So, after high school, I went to work and contributed to the family’s support, including my younger brother’s college and law school education. Do you think he ever thanked me or told me he loved me for what I did for him? Nothing. Ever. So, why should I care if he is a lawyer and my case charges him with fraud?”

Then I switched litigants and sat alone with the defendant and his lawyer. The younger brother swore that he had done nothing wrong, that he had favored the plaintiff with more than his share of the proceeds of sale of the condo, and that he, the defendant, was tapped out of funds with which to settle this case. (The plaintiff was willing to settle for $65,000, and the defendant could raise no more than $15,000.) I asked the defendant about the facts of his education, and he corroborated all that the plaintiff had revealed to me. Then, I sprang the crucial question: “How have you shown your appreciation for the sacrifices your brother made for you?”

At this point in the negotiations, I suggested that the brothers and their lawyers go out for lunch and discuss...
settlement. The postprandial settlement was modest in amount but came with the lawyer-brother saying how much he loved and appreciated his older brother for putting him through college and law school. The plaintiff—to the consternation of my court officer—then threw his arms around me and bestowed a big hug.

You can see that I learned something basic from the experience. Settlements come in all sizes and forms and depend not just on the technical legal issues the case presents. I use the human relations technique that I first learned in my experience as a judge quite considerably in my mediation practice.

Some judges, I heard, achieved settlements by coercion and bullying or by denigrating the case in the separate caucus just to soften a party. I never, ever resorted to this technique. If I were the fact-finder in a nonjury case, I would not even conference the case for settlement just to soften a party. I never, ever resorted to this technique. If I were the fact-finder in a nonjury case, I would not even conference the case for settlement but would send it to another judge in whom I had confidence. If the case were going before a jury, I felt an ethical obligation not to comment on the issues or the merits. It would offend the New York Rules Governing Judicial Conduct and the ABA Model Code of Judicial Conduct to comment on a pending case and would lend an appearance of impropriety. However, this stance would not prevent me from asking, in a diplomatic way, how, for example, the plaintiff was going to combat a statute of frauds or statute of limitations defense or how a defendant intended to demonstrate that her signature was forged.

Since I left the judiciary and became a mediator, I was slow to understand that parties selected me because of my experience on the bench in trying cases and participating in panels that adjudicated appeals. They really did expect me to give an opinion on the merits of their claim or defense. This dawned on me after a good year in my new role of nonjudge neutral. I traveled to Dallas from New York to conduct an all-day mediation in a case pending in the commercial division of the New York State Supreme Court, a court of which I was a graduate. The judge presiding in the case was a friend of mine for 30 years, and I knew how he thinks. The defendant had made a crucial motion that was pending while we were mediating. I was in the unique position of being able to assess the viability of the motion with an edge that the lawyers could not have possessed.

On the plane, I had plenty of time to read and digest the motion papers and transcript of the oral arguments. After the joint session when we recessed to separate caucuses, I told the party who had made the motion that I thought its attorney’s papers were extremely persuasive, “But you are going to lose.” They were taken aback; yet, when their attorney took me aside in the hallway he said, “Bless, you, judge for saying that to my clients. I’ve been telling them the same thing for weeks, but they believed what I wrote in the motion.” So, another lesson learned. And, I think it enhances the ratio at which my cases settle in mediation, because I do express my opinions on the merits and value of the cases.

When I was a trial judge in the Commercial Division of the New York State Supreme Court and simultaneously served as the administrative judge in New York County, I was devoted to the court-annexed mediation protocol that we had developed. A Commercial Division judge was given the right to direct the parties to appear, in good faith, before a pro bono mediator drawn from a list of volunteers. Although the overall settlement rate from this protocol in 1996 started modestly in the 40 percent range, it improved steadily. Involved as I was with the business cases that were subject to this procedure, I felt an obligation to understand the techniques of the mediator. Two of the members of our pro bono panel had vast mediation experience. They volunteered to conduct a three-day CLE in basic mediation skills. I enrolled. It was enlightening and useful and, of course, gave me the rudiments I built on in the more advanced courses I experienced when I came to JAMS. One of my Commercial Division colleagues, still presiding there, later followed suit and took training in mediation. I understand that he uses those techniques in his own settlement conferences. Yet, we both understand completely the difference between judge-induced settlements and mediator-produced agreements.

When I became the administrative judge, I decided to expand court-annexed mediation beyond the Commercial Division, which had been a testing ground for this and a number of other innovations. Michael McAllister, then a law-trained clerk in the court, was responsible for the most remarkably successful of these expansions. He had approached me with an idea to screen personal injury cases as they became ready for trial. He was to be invested with the authority to send a case to pick a jury immediately if any party were not negotiating in good faith.

In carrying out this plan, Michael conducted his own negotiations. He quickly built his skills and experience as mediator and could easily identify which parties were not participating before him in good faith, for example, when a party stonewalled by refusing to negotiate meaningfully, leading him to believe that settlement was impossible. The secret is to tell the parties, “Pick a jury,” and that gets them to be more realistic about settlement. His program was so successful that it contributed, along with the hard-working trial judges, to a drop in the inventory from 55,000 cases in 1996 to 35,000 cases by the time I left for the appellate division in March 2001.

Michael McAllister is a success story. He started in the court system as a court officer. He went to law school at night and became a member of the bar. He continued to serve the court as a clerk to Hon. Edward Lehner, a
Supreme Court Justice in New York County, whose cases he conferenced for settlement. He enjoyed that role and was so successful at it that he wanted to do it full time. His program grew when another clerk-lawyer joined the team, and the chief administrative judge wanted to copy the program in other counties. Michael became such a legend that the inevitable occurred: he was offered a position as a neutral at JAMS, where he served until, to the lamentation of us all, he died unexpectedly at age 59 on January 27, 2011.

Our court also tried to expand the program that Michael started into other areas, such as cases against the City of New York, an intractable inventory, and medical malpractice cases. These court-annexed programs, I submit, were influential in making the New York legal culture much more accepting of alternate dispute resolution and mediation than it had been. This cultural shift over the last decade and a half is certainly palpable at JAMS, where I now serve.

As a kind of summary, let us consider a few pros and cons for participants in judicially hosted settlement conferences compared to mediations conducted by private neutrals. I perceive that the environment is inherently coercive in a settlement conference conducted by a judge, at least if the judge would have some power over the case if it continued to trial. In such a setting, the following concerns might run through the mind of counsel or client: “I want my day in court before a jury and don’t want to feel betrayed by the system or required to sacrifice even a little in avoiding trial. After all, my legal position is unassailable. Yet, will the judge be displeased if I refuse to compromise? Will the judge take it out on me during trial?” These are legitimate concerns and have fueled a long-running debate among judges themselves, many of whom have expressed that it is the judge’s role to preside and decide cases, not to try to settle them. This may be an outmoded view, especially with the volume of cases in our courts, most of which cannot possibly be tried. But a judge who does not think of his role as a helpmate in settling cases is not likely to be a good settlement judge in any event. And woe to the parties and their attorneys who confront one of those abusive settlement judges, who, not content with implicit coercion, resort to a “technique” that amounts to little more than outright bludgeoning.

Compounding the problems of judicially conducted settlement conferences is the need, in an ideal world, for the presence in the judge’s chambers of decision makers on both sides with the authority to settle. The lawyers are accustomed to appearing before judges and biding time until their cases are called. Not so the clients. Will they be cowed or awestricken? Will they have the time to waste before their case is called?

On the other hand, some parties might feel they are actually being heard if the person listening to them is a real judge and if this listening occurs in a courthouse. Some litigants might be ready much faster to make the emotional transition to being open to settlement if they have been able to speak their peace, directly or through their lawyer, to a real judge. This becomes their “day in court.”

In addition, a judicially required conference takes the “sign of weakness” syndrome out of the negotiation calculus. There is folk wisdom that the party who first suggests settlement or mediation is exhibiting anxiety and may be perceived by the adversary to have a weakness or defect in this party’s case. By the judge requiring a conference or sending the case to a court-appointed mediator, this syndrome is avoided.

With private mediation, the parties may be reluctant to participate because of the expense, even though litigating often turns out to be much more costly. The fear of appearing weak may be an inhibitor, but it can be managed by a skilled advocate. Parties and lawyers who really want a clearly articulated second opinion on the merits can secure it from a private mediator; yet, clients might ascribe less weight to this opinion when it comes from a private mediator rather than a sitting judge. On the other hand, a sitting judge may be violating the ethical rule prohibiting comment on any pending case by delivering such a second opinion.

The process of mediation, where the parties engage in meaningful negotiations, entails risks. Among the chief of these is the risk that the party will sacrifice too much. But a private mediator may be better positioned or more inclined than a sitting judge to help allay anxiety over this kind of risk by engaging in a more detailed analysis of the often far greater risks of litigating. A mediator also might emphasize more than a sitting judge that the parties themselves control the outcome in mediation, whereas outsiders control it in litigation. Then there is the beauty of any negotiated settlement—finality. A private mediator might feel freer to be blunt about the limitations of the adjudicative process and inclined to focus on the possibility that, without settlement, a trial may only be the beginning of a long path of appellate combat and possible retrial.

In the end, however, whether the host of their negotiations is a sitting judge or a private mediator, it is the parties’ responsibility and privilege to reach settlement.
The Section of Dispute Resolution would like to extend a special thanks to the Sponsors of the 2011 Annual Spring Conference.
As the role of judges in settlement has evolved from merely telling the lawyers to go out in the hall and get their case settled to becoming actively involved in the details of facilitating a mediated result, the issue of whether it is appropriate for a judge who would preside at trial to host a settlement conference has taken on increasing significance. Some question whether a judge can remain neutral as a mediator, knowing that he or she may later hear the merits in the matter. Some wonder whether a judge hearing a case on summary judgment or at trial can disregard what he or she has learned as a result of mediating that same case. Others argue that it is advantageous to have the assigned judge serve as mediator because he or she is likely to have a richer understanding of the case.

Federal judges are specifically authorized by Rule 16 of the Federal Rules of Civil Procedure to meet with lawyers and parties for the purpose of encouraging settlement. But Rule 16 does not distinguish among judges who are specially assigned solely to host settlement negotiations, judges who also have case management duties (such as discovery management), and judges to whom a case is assigned for trial. So it is not inconsistent with Rule 16 for a judge to host a settlement conference in a case in which he or she would rule on dispositive motions or preside at trial. Nonetheless, there is considerable disagreement among federal judges about whether it is appropriate for a judge to be involved in settlement negotiations in a case in which that judge “has power” over the merits of the action.

To explore these issues, Wayne Brazil, professor at Berkeley Law, interviewed US magistrate judges Celeste F. Bremer (Southern District of Iowa) and Karen K. Klein (District of North Dakota), both of whom have hosted innumerable settlement conferences. Despite their vast experience in this arena (as well as in case management and trial), these two judges have quite different views about the propriety of a judge “with power” over the merits of a case becoming involved in settlement negotiations.

Judge Bremer has almost exclusively mediated cases in which she was not assigned as the trial judge, while Judge Klein has served as the judicial mediator both in cases assigned to her for trial and in cases not assigned to her for trial.

Prof. Brazil: Opinion surveys indicate most attorneys believe that it is preferable to have a different judge mediate the case than the one assigned to the case for trial. What is your position on the advisability of judges mediating cases in which they will preside at trial?

Judge Bremer: I think the judge assigned to try the case should rarely or never serve as the settlement judge. In my district the magistrate judges serve as settlement judges in most cases and conduct mediation-style settlement conferences. When one of us is assigned as the trial judge on consent of the parties, another magistrate judge will serve as the settlement judge. Because our local rules provide that the trial judge should not be informed of any positions that parties take during an ADR proceeding, the settlement judge reports to the trial judge only that the case settled or didn’t settle.

Prof. Brazil: Opinion surveys indicate most attorneys believe that it is preferable to have a different judge mediate the case than the one assigned to the case for trial. What is your position on the advisability of judges mediating cases in which they will preside at trial?

Judge Klein: I have served as the trial judge on consent of the parties in cases where I have mediated. In my opinion such a situation presents no issues as long as the parties consent. It is a bit more nuanced when a judge is serving as mediator in a case where he or she is assigned to preside. When this occurs, I think it is better to have a different judge conduct the mediation or an independent mediator be brought in to conduct the mediation.
In cases assigned for trial to a district judge, the magistrate judges manage the pretrial phase of the cases, including discovery. If the magistrate judge has discovery issues under consideration that might affect case value, such as striking expert testimony, barring late-listed witnesses, or prohibiting exploration of subjects that one side believes are really important, we trade cases so that the magistrate judge who is managing discovery does not hold the settlement conference.

Judge Klein: It depends on the circumstances. I think it is perfectly acceptable for the trial judge to serve as the settlement judge if the practice is limited: (1) to situations in which the parties voluntarily consent to the trial judge's involvement in settlement; and (2) to jury cases that are fact-driven, rather than driven by issues of law.

In the District of North Dakota, the magistrate judges also conduct mediation-style settlement conferences, but as a small court, we do not have the luxury of multiple magistrate judges in the same location. We will travel to conduct settlement conferences in one another's trial cases, but we also offer the parties the option of choosing the trial judge as the settlement judge, and they often select that option.

In my view, the trial judge's involvement in settlement depends entirely on the parties' wishes, not the trial judge's. The parties should feel no pressure to agree to settlement discussions led by the trial judge, but if they understand the judge's dual role and voluntarily consent to it, the court should make that option available.

If the parties choose the trial judge as their settlement judge, they are probably highly motivated to settle and do not anticipate going to trial. I always assure the parties that if their case does not settle, we will reassess the propriety of my continued involvement as the trial judge.

In a nonjury case the settlement judge should never preside at the trial. On a few occasions, however, I have agreed, at the request of the parties, to serve as the settlement judge in a nonjury case that is assigned to me for trial, but on the strict condition that the case would be reassigned to another judge for trial if the parties could not reach a settlement. Fortunately, these cases all settled at the settlement conference.

Prof. Brazil: Some commentators argue that judges should not mediate cases assigned to them because doing so eliminates the distance between the parties and the judge that is necessary "to maintain the image of judge as dispassionate agent of justice." Such concerns, among others, have led the ABA Section of Dispute Resolution to propose revisions to the Model Canons that, in many circumstances, would prohibit judges from mediating cases assigned to them for trial—on the theory that the "integrity of the adjudication process" is compromised when the trial judge mediates.

How do you think the trial judge's participation in mediation might affect the parties' perception of the integrity and fairness of the adjudication?

Judge Bremer: I am especially concerned about issues surrounding the "valuation" of cases. In mediation, all participants are likely to learn one another's views about the value of the case. Confidential information is disclosed that the judge would not otherwise have known.

In the mediation format I use, I begin with a very facilitative approach but often move, gradually, toward a more evaluative style as I learn more about how the parties and counsel assess the issues and value the case. It would be difficult for me to conduct a settlement conference without at some point dealing with the issue of value, so I do not think I should serve as the settlement judge in cases assigned to me for trial.

While, in some situations, it might help the parties to hear the assigned judge's thought process about the

In a nonjury case the settlement judge should never preside at the trial.

factual and legal issues, in most mediations the judge also learns about the parties' and counsel's thought processes, as well as their valuation of the case. If parties fail to settle, and the judge later presides at trial, the judge will have a hard time separating the confidential information from the evidence he or she hears when adjudicating the merits of the case. Even if a jury is the trier of fact, a judge who has learned the parties' confidential assessments of the merits of the litigation will have a hard time ignoring that information when ruling on potentially dispositive motions or on challenges to potentially important evidence.

Moreover, even if the judge really can compartmentalize his or her mind, the parties are likely to believe the judge can't "unring the bell"—that he or she won't be able to put aside everything learned during the mediation about the parties' analyses. Such parties will fear the judge has prejudged the issues (forming judgments during the settlement conferences—as reflected in the opinions

Wayne D. Brazil formerly served as a US magistrate judge in the Northern District of California. He implemented the ADR program for the court and presided as the court's first ADR magistrate judge. He can be reached at wdbrazil@law.berkeley.edu. Judges Bremer and Klein were both appointed as US magistrate judges in 1985. They coteach settlement techniques and mediation skills to other federal judges through the Federal Judicial Center. They can be reached at celeste_bremer@iusd.uscourts.gov and karen_klein@ ndd.uscourts.gov, respectively.
Some settlement judges are highly evaluative: they freely and assertively express their opinions on the issues and the likely outcome at trial.

Lawyers or litigants who anticipate these kinds of problems—or who anticipate worrying about them—may hold back and not participate fully or candidly in the mediation process. And if parties hold back, they may fail to learn through mediation what their best settlement option really is. When that happens, the court has served poorly both the parties and itself.

Judge Klein: I believe that how the lawyers and litigants feel about these kinds of issues depends in substantial measure on two factors: (1) how they feel about the human being who, in the judicial role, is hosting their mediation; and (2) the way that human being plays her role during the settlement conference.

If the parties know, respect, and trust the judge, they are not likely to be concerned about the possibility that something happens during a settlement conference will color the judge's subsequent rulings. Moreover, if the judge's style during the settlement conference is respectful and analytically cautious, and if he or she expresses opinions on the merits only when her opinions are solicited and only with appropriately tempering prefaces or conditions, there is little risk that the judge's effort to help the parties explore their situation and their options will compromise the parties' confidence in the integrity of the judicial institution, or that it will provoke fear of contamination of the judicial mind or of retaliation for exercising Seventh Amendment rights.

In my experience, the parties' perceptions are influenced greatly by the judge's mediation style. Some settlement judges are highly evaluative: they freely and assertively express their opinions on the issues and the likely outcome at trial. While the parties may invite such an evaluation from the trial judge (at least before they hear it), there is a real risk, if the case does not settle, that the parties will later become uncomfortable and question the judge's ability to remain impartial.

Like Judge Bremer, I generally use a facilitative style at the outset—but, if the case is not assigned to me for trial, I may move to a more evaluative approach as needed. When I am serving as both settlement judge and trial judge in a case, however, I try to remain facilitative throughout the entire process, exercising considerable caution about expressing my own assessment of the strengths and weaknesses of the parties' positions.

Instead, I use a facilitative form of reality checking, in which the parties assess their own and the other party's strengths and weaknesses, rather than listen to my assessment. I try to get the parties to acknowledge their own vulnerabilities, rather than naming them myself. And I try to limit my comments on value to suggesting where the parties' negotiations seem to be headed on their own momentum, rather than using my views of the merits to tell the parties where their negotiations should be headed.

By following this approach, I don't end up "owning" an opinion on the value of the case if it doesn't settle. I also go to great lengths to assure the parties that they control the outcome of the mediation, and that no adverse consequences will result from their failure to settle.

Prof. Brazil: The proposal by the Section of Dispute Resolution would permit a trial judge to serve as mediator if the parties freely consent. That proposal also would permit this practice when there is no realistic alternative, such as in a jurisdiction having only a single judge.

What reasons do you think the parties might have for choosing the trial judge to serve as their mediator? And do you think the trial judge's involvement affects the behavior of the lawyers or parties, even where the parties have freely consented to the trial judge serving as their mediator?

Judge Bremer: I would only conduct mediation in a case assigned to me for trial if there were no other judges, or private mediators, available within a time or location constraint. In my one experience with this situation, I made certain that the parties and the lawyers agreed, on the record, that I could conduct a settlement conference using a mediation format, where case value would be discussed, and then preside at a subsequent jury trial if the case did not settle.

When we first started doing judicial mediation in our court, there were not many private mediators. Today, there are a number of qualified mediators in our area, so that resource is readily available to litigants, even if one party has to pay the entire cost. In today's environment,
I think involvement by the trial judge in mediation is rarely appropriate, given the ethical concerns.

When the judge assigned for trial hosts the settlement conference, the parties and lawyers will most likely hold back critical information, which may undermine the prospect of settlement. When they agree to mediate before the trial judge, they may hope, or even assume, their case will settle, but if they reach impasse, they will invariably be concerned about the judge’s impartiality. Or they may feel pressured into agreeing to a settlement they don’t want out of fear of displeasing the judge, who, they assume, will want their case off the docket. The risks are just too great to justify the practice, except in the most limited circumstances.

Judge Klein: Mediation is a process that empowers the parties to reach their own decisions, and that should include the power to choose the trial judge as their mediator, as long as they are well-informed about their options and really can choose among those options freely.

There are several reasons why the parties might want the trial judge to serve as their settlement judge. The trial judge in the case may have a reputation as an accomplished settlement judge, and the parties may prefer that judge’s mediation style. The lawyers may know from experience that the judge will not bully them into settlement, and that she will be quite willing to recuse herself from adjudicating the case if her impartiality is called into question.

It is not clear to me that lawyers or parties handle themselves differently in settlement conferences hosted by the trial judge and in such conferences hosted by some other judge. It seems to me that most lawyers have developed styles or approaches by the time I encounter them in settlement conferences—and that they stick with those styles or approaches whether I would preside at trial nor not.

Some lawyers are always guarded in mediation and will only speak to their clients or allow their clients to speak after I leave the room—whether or not I might later preside at trial. Other lawyers speak freely and candidly in front of me and encourage their clients to do so as well, even though they know I would be their trial judge.

The parties themselves, the clients, may perceive “added value” in trial-judge-led mediation, and in many cases seem quite eager to tell their stories to “their” judge. Since most cases settle, the parties may feel that having the opportunity to address the trial judge in their own words will provide the equivalent of a “day in court,” which is actually more meaningful and rewarding than meeting with a judge they have never seen before or with a private mediator—and a lot more meaningful than responding to counsel’s questions during direct and cross-examination at trial. This is particularly true for one-time litigants, who may be highly emotional and need to feel heard and understood before they can agree to a settlement. They may feel a judicial system that offers them mediation before the trial judge seems more respectful toward them and more responsive to their needs.

I have never sensed during mediation of a case assigned to me for trial that the lawyers or parties felt any obligation to settle, or any duty to please me or to relieve my docket. If anything, because of the dearth of civil trials, the lawyers sometimes express regret at depriving themselves and the court of the opportunity to have a trial. Likewise, I have never felt that the lawyers or institutional-party representatives fear future appearances before me if they fail to settle. Whether or not I am assigned as the trial judge, I assure all settlement participants that mediation is the parties’ opportunity to control the outcome of the dispute, and while the court encourages them to make a good faith effort to settle, the court has no stake in the outcome and is pleased to have a trial if they don’t reach a settlement.

Prof. Brazil: Though you express different opinions on the appropriate frequency of mediation by the trial judge, you seem to agree that the practice should be limited to situations in which the parties have fully and freely chosen this option. You also appear to agree that the court should reassure the parties, before they participate in a settlement conference hosted by the assigned judge, that they will have the right to have the case reassigned to another judge for trial if they do not reach a settlement.

Both of you also stress the importance of the judiciary providing the parties with meaningful service in the settlement arena—especially given the very small percentage of cases that can afford to proceed through trial. While your gentle debate of these matters has exposed several important issues, it is quite obvious that both of you recognize that judicially hosted mediations must focus on the needs and interests of the litigants, and must honor, scrupulously, the parties’ right to determine for themselves (without pressure from the court) whether to settle their case or take it to trial.

The risks are just too great to justify the practice, except in the most limited circumstances.

Endnote
2. Id. at 364.

Conversational in tone and presentation, this text aims to document prominent national negotiation styles and give the reader a clear sense of cultural nuances in order to improve negotiated business deals. The authors draw on their 50 years of combined experience interacting with more than 2,000 business people. They marshal examples involving such Fortune 500 companies as AT&T, Boeing, Ford, Intel, Rockwell, Toyota, and Wal-Mart. The book presents practical guidelines for managers, executives, and corporate leaders involved in international and cross-cultural negotiations. The authors help lead the Leadership Development Institute at Eckerd College in St. Petersburg, Florida.


This comprehensive course on mediation aims to explain everything from the basics to advanced strategy. It is peppered with a variety of realistic examples of how exactly to say the most important things that mediators need to say. It also includes self-help exercises, sample agreements, and other resources. It presents multiple mediation styles (facilitative, evaluative, transformative) and strategies without endorsing any. Coauthored by educator-practitioners in Texas and Australia, this text will appeal especially to the new mediator or to the more seasoned one hitting the books for the first time.


This is a book for deal negotiators and the managers who hire them. Its thesis is that deal-making is as much about implementation as getting to yes—that “yes” only gets you so far. The authors draw on their experience as global business consultants for Fortune 500 chief executive officers and board members, diplomats, and entrepreneurs, citing plenty of case studies and anecdotes from various industries, countries, and functions. The book’s first third discusses the “implementation mindset,” including: treating the deal as a means, not an end; performing away-from-the-table work with stakeholders who will be instrumental in executing an agreement; setting precedents for cooperative joint behavior after the deal is signed; highlighting, instead of papering over, potentially deal-threatening obstacles; helping other parties avoid overcommitting to unrealistic deals; and articulating within written agreements how deals will be implemented. In the second third, the authors discuss how to build this mindset into an entire organization. Finally, the book brings the implementation mindset to bear on two kinds of important deals: “bet-the-company deals,” such as mergers, alliances, and outsourcing, and also “bread-and-butter deals,” pertaining to customers and suppliers.


Instead of managing one organization by themselves, many of today’s managers “often find themselves facilitating and operating in multi-organizational networked arrangements to solve problems that cannot be solved, or solved easily, by single organizations.” This book collects empirical research on this collaborative public management from scholars writing about public management, public policy, and public affairs. Part I looks at why public managers collaborate. It touches on topics such as resource sharing, incentives and obstacles for collaboration, partner selection and interorganizational effectiveness, local emergency management, and disaster response. Part II looks at how public managers collaborate. It touches on recent contracting patterns and performance within state agencies, relational contracting, mechanisms for collaboration in emergency management, and the structure of employment and training programs. Part III examines how and why public managers get others to collaborate. It discusses public organization start-ups, environmental conflict resolution, leadership, and, finally, some predictions, paradoxes, and odd results found in collaborative public management research.


This first installment in the “Cultures and Globalization” series presents a broad survey of conflicts and tensions within and between cultures around the world. Roughly the first half of the book comprises about 30 short essays authored mostly by social scientists. All explore conflict through such topics as migration, cultural values, cultural or religious or geopolitical tension, the realities of globalization, and approaches to conflict resolution. Through...

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charts, graphs, maps, and tables, the second half of the book artfully displays a wide-ranging menu of cultural indicators: values, knowledge, heritage, economy, professions, corporations, and organizations, sites, and events, communications and media, movements, and communities, regulatory frameworks, policy, and current conflicts and cooperation.


American University professor Charles Call was formerly a peace-building consultant to the United Nations Department of Political Affairs and coordinator of the War-Torn Societies Project at Brown University's Institute for International Studies. Framed by his essays, this book brings together extensive reviews of postconflict efforts to build self-sustaining public security systems in El Salvador, Haiti, Guatemala, South Africa, Rwanda, Bosnia, and Herzegovina, Kosovo, and East Timor. The collection coheres around the hypothesis that postconflict transition creates a window for reforms that would not otherwise have been possible. It makes a case for the connection between the comprehensiveness of peace agreements to the success of subsequent reforms. It shows that politics are inextricable from postconflict reform, and those who stand to lose the most will usually attempt to thwart reconstruction. The authors illustrate the importance of citizen participation, choosing personnel for the justice system, and addressing corruption. Finally, the collection shows that international actors can help or hurt the rebuilding processes, depending on who they are and how successfully they can disentangle themselves if and when peace is secured.


From the American Management Association comes a brief introductory crash course on negotiation, complete with fill-in-the-blank quizzes punctuating each short chapter. It covers win-win negotiation, concepts employed by good negotiators, communication styles, listening, conflict management, assertiveness, preparation, and common pitfalls. Free of footnotes, this installment of the WorkSmart series lives up to that series' self-description: “simple solutions for busy people.”


Distilling principles culled from the negotiation literature down to 53 two-page “truths,” the author, the J. Jay Gerber Distinguished Professor of Dispute Resolution and Organizations at the Kellogg School of Management at Northwestern University, has crafted an easily digestible introductory book that is especially suitable for the rushed businessperson. One could read each of the quick and clear explanations of time-tested ideas, such as “Negotiate Issues Simultaneously, Not Sequentially” and “How to Negotiate With Someone You Hate,” between subway stops during a daily commute. The book has received accolades from both negotiation scholars and business leaders.

**Julie MacFarlane, The New Lawyer: How Settlement is Transforming the Practice of Law** (University of British Columbia Press 2008), ISBN: 0774814365

Culminating 10 years of empirical research—mostly in Canada but also in the United States—this thorough work of scholarship combines descriptions of how legal practice has evolved toward conflict settlement with recommendations for how the profession ought to rethink its work and identity in light of this evolution. The idea of “lawyer as warrior,” Professor MacFarlane writes, is outdated because lawyers now settle most cases by negotiating behind closed doors rather than speechifying in court. She describes changes requested by clients, undertaken voluntarily by legal professionals, and imposed from the top down. Rooted in hundreds of interviews with legal professionals, this careful catalogue of the transformation of the field—not a paradigm shift, says the author, but a change requiring new applications of old skills—appeals to a wide audience of law students, professors, committees that govern legal bodies and law schools, and lawyers who either do or do not welcome the changes she documents.

**Lawrence Susskind & Larry Crump (eds.), Multiparty Negotiation** (Sage 2008), ISBN: 1412948126

The editors compile more than 100 articles written by leading negotiation scholars to create a comprehensive look at the complex and rapidly developing field of multiparty negotiation. Drawing from literature scattered across a broad range of disciplines, this four-volume collection seeks to consolidate knowledge on multiparty negotiation by bringing together both classic works and more cutting-edge articles from law, international politics, organization studies, and public administration. Authors include Kenneth Feinberg, John Forester, Deborah Kolb, Carrie Menkel-Meadow, Robert Mnookin, Dean Pruitt, Howard Raiffa, Frank Sander, James Sebenius, and William Zartman, among many others. ◆
Court Shoots J.R.—His Arbitration Award, That Is
Arbitration Vacatur

Larry Hagman et al v. Citigroup Global Markets, Inc.
The Superior Court of California granted vacatur of a
$12 million Financial Industry Regulatory Authority
board’s (FINRA) arbitration award based on the failure
of an arbitrator to disclose the fact that he had been
involved in similar litigation in the past.

Last fall, Larry Hagman, the actor who played the
notorious J.R. Ewing on television’s Dallas and Major
Anthony Nelson on I Dream of Jeannie, won a FINRA
board ruling totaling nearly $12 million in compensatory
and punitive damages from the brokerage Smith Barney,
then owned by Citigroup, whose handling of Hagman
and his wife’s investments had resulted in over a million
dollars in losses. In addition to the nearly $2 million in
compensatory damages, Hagman was awarded $10 million
in punitive damages stemming from the assertions of
breach of fiduciary duty, fraud by misrepresentation and omission, breach of contract, and violation of state and federal securities law, statutory and common law, NASD rules of fair practice, and NYSE rules.

Citigroup petitioned to vacate the award claiming the arbitrator, Peter Steinbroner, failed to disclose that he had been involved in similar litigation in the past. California law, CCP section 1281.9(a) requires an arbitrator to disclose “all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial.” In 2007 Steinbroner petitioned a bankruptcy court alleging fraud, breach of fiduciary duty, and willful and malicious injury arising from a real estate partnership in which Steinbroner and his wife sustained investment losses.

In the order dated February 9, 2011, Judge Rosenblatt vacated the award on the single ground that Steinbroner failed to disclose involvement in the 2007 matter and that matter was deemed to be the same subject matter. To read more, go to http://finraawardsonline.finra.org/search.aspx.

Confidential Communications in Mediation Are
Just That: Confidential

Cassel v. Superior Court of Los Angeles County
51 Cal. 4th 113, 244 P.3d 1080, Cal., 2011
The Supreme Court of California answered a question of mediation confidentiality in deciding that, “attorneys’ mediation-related discussions with client[s] were confidential and, therefore, were neither discoverable nor admissible for purposes of proving claim of legal malpractice.”

The petitioner, Michael Cassel, entered into mediation regarding business litigation. Upon advice of counsel, Cassel agreed to a settlement. Subsequently, Cassel sued his attorneys for claims of malpractice, breach of fiduciary duty, fraud, and breach of contract. Cassel alleged his attorneys gave him bad advice and that the attorneys had a conflict of interest that caused them to deceive and coerce him to settle for an amount less than he believed the case to be worth and less than he said he would accept. Cassel sought to enter these discussions into evidence.

In examining California Evidence Code section 1119, which applies to communications during mediation and how they are to be handled, the court determined applicable subsection (a): “No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other non-criminal proceeding in which, pursuant to law, testimony can be compelled to be given.”

The court held, “attorney-client communications, like any other communications, were confidential, and therefore were neither discoverable nor admissible—even for purposes of proving a claim of legal malpractice—insofar as they were ‘for the purpose of, in the course of, or pursuant to, a mediation.’” Additionally, the court determined that in crafting the code, the legislature’s intent was not to give courts discretion to “balance the importance of mediation confidentiality against a party’s need for the materials sought” since they did not include a “good cause” limitation in the statute.

The Supreme Court to Address Waiver Under
the Federal Arbitration Act

Stok & Associates PA v. Citibank NA
The United States Supreme Court will hear arguments in Stok & Associates PA v. Citibank NA, a case on appeal from the 11th Circuit. The issue presented is “Under the Federal Arbitration Act, should a party be required to demonstrate prejudice after the opposing party waived its contractual right to arbitrate by participating in litigation, in order for such waiver to be binding and irrevocable?”

Stok & Associates entered into a contract with Citibank regarding their banking arrangements. The contract contained an agreement to arbitrate all disputes. One such dispute did occur. Stok sued in state court. Citibank’s answer in state court made no claim for arbitration. Stok made subsequent filings related to the litigation and received a trial date. It was then Citibank made known their desire for arbitration. They then filed a petition in federal court to compel arbitration. The district
Section Chair Wayne Thorpe is pleased to announce the 2011 recipients of our Section Awards:

**D’Alemberte-Raven Award**

John D. Feerick, director and founder of the Feerick Center for Social Justice at Fordham Law School, has been selected as the 2011 recipient of the Section’s D’Alemberte-Raven Award. The ABA’s D’Alemberte-Raven Award recognizes leaders in the dispute resolution community who have contributed significantly to the field by developing new or innovative programs, improvements in service and efficiency, research and writings in the area of dispute resolution, or continuing education programs. Dean Feerick has had a long career as a mediator and mediation advocate, beginning before mediation was commonplace.

**Lawyer as Problem Solver Award**

The College of Commercial Arbitrators (CCA) has been selected as the 2011 recipient of the Lawyer as Problem Solver Award. The Lawyer as Problem Solver Award recognizes individuals and organizations that use their legal skills in creative, innovative, and often nontraditional ways to solve problems for their clients and within their communities. The award recognizes CCA’s 10 years of contribution to the profession, particularly the National Summit on Business to Business Arbitration and the Protocols for Expeditious, Cost Effective Commercial Arbitration.

**Award for Outstanding Scholarly Work**

Professor Carrie Menkel-Meadow has been selected as the recipient of the ABA Section of Dispute Resolution’s first-ever Award for Outstanding Scholarly Work. This award honors individuals whose scholarship has significantly contributed to the dispute resolution field. Professor Menkel-Meadow is the A.B. Chettle, Jr. Professor of Dispute Resolution and Civil Procedure at Georgetown University Law Center and Chancellor’s Professor of Law at the University of California, Irvine Law School. She is a tireless, prolific, and influential researcher and writer.

The award recipients will be honored at the 2011 Section of Dispute Resolution Spring Conference in Denver, Colorado.

**Section Council Nominations Deadline April 20**

Section Chair Wayne Thorpe has appointed the Nominating Committee to receive nominations for Council seats and officer positions for the 2011–12 bar year. Nominations are due April 20, 2011. The positions that will be available include four at-large council seats, the Section Budget Officer position, and the Delegate to the ABA House of Delegates. Section Chair-Elect Debbie Masucci will chair the Nominating Committee.

**2011 Boskey Essay Writing Competition**

The 2011 Boskey Essay Writing Competition will award a prize of $1,000 to the best essay submitted by a law student. The essay may address any aspect of dispute resolution practice, theory, or research that the contestant chooses. Entries for the competition must be submitted by June 15, 2011.

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ADR Cases

(continued from page 30)

court denied the motion, and the 11th Circuit reversed.

In an unpublished opinion, the 11th Circuit found that Stok did not fulfill its burden in showing Citibank’s delay before invoking its right to arbitrate in itself constituted waiver, and Stok could not show it was prejudiced by this delay in that they spent time and money conducting expensive and time-consuming discovery and litigation preparation. The 11th Circuit reversed the district court and remanded the case to decide arbitrability issues that remained. The issue reached the Supreme Court on appeal, and the Supreme Court granted certiorari. To read more, including the petition and briefs go to www.scotusblog.com/case-files/cases/stok-associates-v-citibank.
The Lighter Side

Spring 2011 Captioning Contest
By John Barkai

Because most agree that creativity and humor are effective in resolving disputes, we test our readers’ mettle with an occasional cartoon caption contest.

Submit as many captions for the above illustration as you wish. Please submit captions promptly to meet our strict publication deadlines. All entries are judged by Professor John Barkai of the University of Hawaii School of Law, and the winners will be published in the next edition of Dispute Resolution Magazine.

Mail, fax, or email your entries to:
Professor John Barkai
University of Hawaii School of Law
2515 Dole Street
Honolulu, HI 96822
Fax: 808-956-5569
Email: barkai@hawaii.edu

Winter 2011 Winners

"Can we change to interest-based negotiations? I don’t like my position."
—Evan Chaffin

"I know it’s a little late to bring it up, but I don’t suppose you would be willing to mediate, would you?"
—Robert N. Dokson

“Would you mind telling me where you received your ADR training?”
—A. Alan Cade

“We have ways of making you tell us your bottom line.”
—Lee Jay Berman

Thanks to new technology, Getting to Yes just got easier and faster.
—Hazel Warnick

“I hate it when arbitrators ‘split the baby’ but, in this case, you leave me no choice, Mr. Bond.”
—Manuel Pelaez-Prada

Mediator Methods: Facilitate, Evaluate, and Intimidate: “Now do you want to settle?”
—Ngoc K. Le

“Now, exactly what is your BATNA?”
—Jacqueline D. Shipma
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Beyond Yes: Deeper Wisdom and the Art of Negotiation with Erica Ariel Fox

Harnessing the Power of the Master Mediator with Lee Jay Berman and Doug Noll

Mediating the Non-Litigated Dispute with Doug Noll and Lee Jay Berman

Mediating Mortgage Foreclosures with Mel Rubin

Nov 11  Introduction to a Career in Mediation with Lee Jay Berman

Dec 10–11  Mediating Dangerously: The Frontiers of Conflict Resolution, Transformation and Forgiveness with Ken Cloke

Jan 25–29  Mediating and Negotiating Commercial Cases with Lee Jay Berman

Jan 25–29  Mediating Divorce Agreements with Jim Melamed

Feb 4–5  Building a Profitable Family Mediation/Collaborative Practice with Forrest “Woody” Mosten

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