

JUDICIAL MEDIATION AND SIGNALING

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Two seemingly inconsistent developments in settling pending litigation merit special attention. Pretrial conferences conducted under Rule 16 of the Federal Rules of Civil Procedure afford the trial judge an opportunity to engage in a range of settlement activities. The court may “signal” the likely result with a not too subtle query, may ask the parties to attend a settlement conference, or may set an impossible trial date that leaves little alternative but to settle. Under this “traditional” view, the judge will strive to settle cases assigned to the trial court. Put succinctly, the all-purpose judges who use this traditional view unabashedly try to settle their own cases, and later preside over the trial if settlement is not reached.¹ A judge’s settlement effort may take alternative forms, ranging from a formal judicial mediation to an evaluative pretrial comment that a party’s case “looks weak.”

However, the modern view proceeds in a markedly different direction. Increasingly, judges are using the pretrial process to set settlement conferences before a different judge of the same court. Judge A will use a pretrial conference to ask or cajole the parties into agreeing to participate in a settlement conference held before Judge B. Judge B will often be a self-appointed specialist at settling cases and may be trained in mediation techniques. Many court-houses have one or more judges who are very skilled mediators and would prefer to mediate rather than try cases. When the parties appear before Judge B for their settlement conference, the court will essentially be mediating the case. This is modern judicial mediation, characterized by a clear division of labor between the judge assigned to a case and the judge who mediates.

This article will analyze the tension that exists between the traditional view, under which courts seek to settle and evaluate their own cases, and the modern view, under which the case is assigned to a different, more “neutral” judge who may be an expert in settling cases using mediation techniques.

The term “judicial mediation” as used in this essay includes, but goes beyond, mere settlement conferences or judicial mediation sessions. It broadly embraces the concept of settlement efforts by a trial judge and includes any oral or written case evaluation whatsoever by a judge. Here, the term includes signaling by the assigned trial judge at a Rule 16 pre-trial conference (e.g., comments by the court that a particular claim or defense may “appear unsubstantiated”), similar evaluative comments made by the trial court when

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¹ See, e.g., MARC GALANTER, *THE EMERGENCE OF THE JUDGE AS A MEDIATOR IN CIVIL CASES 1* (Disputes Processing Research Program Working Paper No. 1984-5, 1985) (asserting that “[m]ost American judges participate to some extent in the settlement of some of the cases before them” and explaining that judicial participation in settlement of their own cases “has become a respectable, even esteemed, feature of judicial work”).

denying a motion for summary judgment (e.g., “while I cannot say that I think highly of the plaintiff’s case, I must deny the defendant’s summary judgment motion because there may be an issue of fact”), court-annexed mediation before a judge, and settlement conferences.² Judicial mediation comes in a variety of forms and occurs at a variety of times, from very early in the case, soon after filing, to the plenary trial itself.³ The essence of judicial mediation is evaluation by a judge and communication of that evaluation to the parties.

One introductory confession about my prior thinking on this issue is in order. At a 1995 Ninth Circuit Judicial Conference meeting, I confidently took the academic position that the modern view was the only possibly correct procedure. I lamented that judges who tried to settle their own cases by holding more formal mediation sessions risked losing valuable neutrality and failed to use the advantages that a division of labor between judge and mediator might provide. While I was not the only person who took this position,⁴ it is not unfair to say that I was certain that I was one hundred percent correct.

Upon reflection and the passage of seven years, I am confident that the certainty of my earlier conclusion was at least premature. While there is much to be said in favor of the modern view, it is not at all clear to me that systematic and routine assignment of settlement conferences to another judge should be the norm in every case. I also gave too little thought to the efficiencies of judicial signaling and the relationship of signaling (clearly a type of case evaluation) to mediation. Put differently, there are so many advantages to letting courts use the panoply of methods available to settle their own cases that an inflexible rule, mandating routine reassignment and banning signaling, is probably inadvisable. In particular, this essay argues that judicial signaling plays a valuable role in achieving fair and accurate litigation outcomes, whether or not the signaling leads to settlement.

I. PONDERING THE NATURE OF JUDICIAL MEDIATION

Judicial mediation is still mediation. When a judge holds a mediation session, normal mediation procedures are generally used. Nonetheless, judicial mediation is unlike other forms of mediation in one very important respect: the

² See, e.g., *In re Domestic Air Transportation Antitrust Litigation*, 148 F.R.D. 297, 305-06, 316-17 (N.D. Ga. 1993) (in approving class action settlement, the judge sent the signal that he would have granted a summary judgment for the defendants in an antitrust suit, and asserts “[P]laintiffs possess a slim chance of recovery should this action proceed to trial” and that the state of antitrust doctrine and plaintiffs’ lack of evidence “create a considerable risk to the class should plaintiffs proceed to summary judgment or trial”).

³ In theory, judicial mediation can even occur on appeal. Every Federal Circuit Court of Appeals now has a mediation program. Appellate mediation is provided, however, not by judges, but by neutral third parties, schooled in mediation techniques, and is therefore different than the mediation that is the focus of this essay, mediative efforts by the trial court. See generally ROBERT J. NIEMIC, *MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS* (1997); EDWARD BRUNET & CHARLES B. CRAVER, *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE’S PERSPECTIVE* 547-49 (2d ed. 2001) (“[I]n appellate mediation, the neutral is not ‘judicial’: – a third party mediator, not a judge, serves as the mediator.”).

⁴ I was part of a panel on settlement procedures and techniques. I was the lone academic on the panel; the other members were federal judges.

mediator is a judge. This section will compare the similarities and differences between judicial mediation and conventional mediation supplied by private mediators. In particular, the section is designed to provide a descriptive overview of the style of mediation provided by trial judges.

A. *Judicial Mediation as Muscle, "Walk and Talk" Mediation: An Overview of the Characteristics of Judicial Mediation*

The typical model of mediation delivered by today's judge is that of evaluative or "muscle mediation."⁵ In this type of mediation, the judge, as mediator, appraises the relative strengths and weaknesses of the parties' cases, presents a rough case evaluation to the parties, and seeks to extract settlement offers that mirror the judge's analytical perception of the dispute.

My conclusion that judges use their muscle when they mediate is somewhat anecdotal. Former students, some of whom hire me as a private mediator in complex environmental cases, consistently provide me with entertaining war stories of muscle mediation sessions conducted by judges. These anecdotes are confirmed by several writings by federal and state judges who have openly explained their evaluative techniques.⁶ Additional confirmation of the judicial use of evaluative mediation derives from training videotapes used to teach judges how to mediate.⁷ The significance of these educational videos should not be understated. Another judge who stars in a videotape mediation session using the evaluative model to successfully settle a case will be likely to influence a judge untrained in mediation.

I do not suggest that modern judges never use a mediation style closer to that known as facilitative mediation, where the mediator does not evaluate but,

⁵ See generally STACY LEE BURNS, MAKING SETTLEMENT WORK: AN EXAMINATION OF THE WORK OF JUDICIAL MEDIATORS 7 (2000) (sitting judges mediate by offering opinions "as to what a 'fair' settlement in the case" would be); Hiram E. Chodosh, *Judicial Mediation and Legal Culture*, at <http://usinfo.state.gov/journals/itdhr/1299/ijde/chodosh.htm> (last accessed January 22, 2003) ("[J]udicial mediators tend to be more evaluative than facilitative, that is, they are generally more willing to share their evaluation of the merits or value of a claim.").

⁶ See, e.g., Noel P. Fox, *Settlement: Helping the Lawyers to Fulfill Their Responsibility*, 53 F.R.D. 129, 154 (1971) (urging judges who mediate to "develop a keen sense of evaluation" that will "reflect the subjective positions of the parties"); Stanley Ryan & John Wickham, *Pre-trial Practice in Wisconsin Courts*, 1954 WISC. L. REV. 5, 16 ("I offer suggestions, intimate to the attorneys and clients the possibility and extent of liability, suggest the range of what I believe to be a fair settlement, and then also attempt to persuade the parties and their attorneys to accept a settlement within that range."); Ruggero J. Aldisert, *A Metropolitan Court Conquers Its Backlog*, 51 JUDICATURE 247, 248 (1968) (at a compulsory pre-trial settlement conference, the judge makes "a realistic appraisal of both sides" of a case). Accord Deborah Hensler, *A Research Agenda: What We Need to Know About Court-Connected ADR*, DISP. RESOL. MAG., Fall 1999, at 15 (suggesting that judicial mediation is evaluative rather than facilitative); GALANTER, *supra* note 1, at 9-12 (collecting authority that judges present their evaluations at settlement conferences, and concluding that judges use evaluative techniques); Lawrence F. Schiller & James A. Wall, Jr., *Judicial Settlement Techniques*, 5 AM. J. TRIAL ADVOC. 39, 52 (1981) (describing judicial mediation as a judge convincing the attorney of the fairness of a judicial evaluation of the case, then persuading the client to accept a figure agreed to by the attorney).

⁷ See, e.g., THE SETTLEMENT OF *Sechrist v. Burlington Northern*: A Videotape for Mediators (Federal Judicial Center 1994) (videotape of a settlement conference before a federal judge who clearly uses evaluative mediation).

instead, asks probing questions to allow the parties to reach their own interests and positions.⁸ Undoubtedly, some mediator judges use a more facilitative style and eschew evaluative mediation.⁹ Moreover, it is undoubtedly the case that individual judge mediators, like private mediators, combine facilitative and evaluative styles.¹⁰ Nonetheless, I remain steadfast in my belief that the typical style of a judge who mediates is primarily that of evaluative mediation.

The process in which a judge forms a case evaluation merits focus. The court possesses instant access to the entire case file. In addition, if the judicial mediator is the judge originally assigned to the case, all case events that occurred prior to the mediation session cannot help but inform the court. The process of hearing arguments and digesting briefs regarding earlier motions to dismiss and motions for summary judgment will color the way a court evaluates a case. In addition, some judges will request mediation briefs which may set forth the main points of contention, case strengths, and prior settlement history.¹¹

Some judicial mediators will form and articulate evaluations during the mediation session itself. While judicial mediators, like conventional private mediators, can begin with opening sessions involving all parties and their counsel, it is at caucus sessions that most "evaluation" occurs. The judicial mediator is likely to meet with each side privately. One purpose of these confidential caucus sessions is for the judge to learn more about each side's case. In addition, caucuses afford the court a chance to present a confidential case evaluation and to try to convince a party that the evaluation is correct. Caucuses also constitute the foundation of offer generation. They will often conclude with the judicial mediator obtaining an offer and authority to convey the offer to the opposing party. The mediator becomes a conduit between the disputants, conveying and explaining offers and counter offers.

⁸ See, e.g., ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 96-107 (1994) (facilitative mediation permits the parties to form their own empowered negotiation positions and eventually reach a settlement that will be respected).

⁹ See, e.g., ELIZABETH PLAPINGER & DONNA STIENSTRA, *ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS* 65-66 (1996) (suggesting that judges who mediate use both evaluative and facilitative styles).

¹⁰ See Murray S. Levin, *The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion*, 16 OHIO ST. J. ON DISP. RESOL. 267, 269 (2001) ("In practice, however, many mediators combine aspects of facilitative and evaluative mediation."); Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR From Ideology*, 2000 J. DISP. RESOL. 247, 249 (cautioning that the utility of the evaluative and facilitative labels "should not drive . . . policymakers to categorize mediation as either evaluative or facilitative" because "[m]uch mediation . . . has substantial elements of both schools of thought"); Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949 (1997) [hereinafter Stempel, *Beyond Formalism*] (criticizing either characterization of evaluative or facilitative mediation styles as creating a false dichotomy).

¹¹ See BRUNET & CRAVER, *supra* note 3, at 209-10 (describing materials given to mediator by the parties to a dispute); Patrick F. Kelly, *Mediation: A Settlement Conference Format that Works*, in *ADR AND THE COURTS: A MANUAL FOR JUDGES AND LAWYERS* 133, 136 (1987) ("[c]ounsel are also encouraged to submit to the mediator or settlement judge a statement detailing factual or legal issues and the requested relief").

In mediation theory, the process of obtaining and transmitting information is critical.¹² The mediator is an information filter.¹³ Acting as the dual agent for both disputing parties, the private mediator asks questions, whether at a private caucus or at a public session attended by all parties, in order to gain valuable information. Information gained during a mediation session can educate the mediator and permit a more informed and accurate¹⁴ evaluation of the case.

Anecdotal evidence suggests that judicial mediators concentrate less on obtaining information and more on conveying information when mediating a case. This approach may be a reflection of the limited time available for judicial mediation. Judicial mediation generally tends to consist of one short, two or three-hour effort to settle a case. In a mediation of such limited duration, a judge will not be able to hold multiple, lengthy caucus sessions capable of supplying additional information. Instead, the typical judicial mediator focuses on evaluation and muscle during caucuses. In some private mediations, the parties do most of the talking during caucus sessions and the mediator gains information by listening. In judicial mediation caucuses, the parties largely listen and the judge talks.

In judicial mediation, the court's role will often be that of transmitting offers and counteroffers between the parties. The judge acts as a go-between, seeking to achieve a working compromise by shifting from one party caucus to the next. After a fully evaluative caucus in which the judge "talks," the court then "walks" between the parties.

Evaluative mediation can also contain "noisy" caucus exchanges between the mediator and a party.¹⁵ Consider the following example. In *A v. B*, A tells the mediator in caucus he "cannot settle for less than \$100,000," then hints that he would indeed accept a \$75,000 offer from B. The mediator then meets with B and tells B that "A would probably take \$75,000." This noisy communication from the mediator might lead to a \$75,000 offer from B and a subsequent settlement. Yet, the mediator's declaration that "A would probably take \$75,000," while true, was unauthorized as A never gave the mediator specific authority to reveal his willingness to accept a \$75,000 offer. Indeed, A might have expected that the mediator would tender to B an offer of \$100,000.

Noisy mediation helps to settle cases, yet it can destroy the parties' trust in a mediator whom they perceive has breached a confidence. Noisy mediation occurs naturally in the ebb and flow of evaluative mediation, whether judicial mediation or muscle mediation. There is a danger that noisy mediation can inhibit the effectiveness of judicial mediation, as well as private mediation, by destroying party trust. A mediator who leaks information gained in confidence

¹² See generally Jennifer Geralda Brown & Ian Ayers, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 330-31 (1994) (setting forth critical nature of information exchange between mediator and the disputants).

¹³ See Richard A. Posner, *Mediation*, Text of the Eleventh Annual Frank E.A. Sander Lecture, American Bar Association's Section of Dispute Resolution (July 8, 2000) (characterizing the mediator as a conduit of information between the opposing sides).

¹⁴ See, e.g., Norman Brand, *Learning to Use the Mediation Process - A Guide for Lawyers*, 47 ARB. J. 6, 8-12 (Dec. 1992) (describing "information centered mediation" as a process in which the mediator obtains and uses "superior information gained through formal study").

¹⁵ See Brown & Ayers, *supra* note 12, at 331.

is not someone who can be trusted. This problem is complicated by another dynamic of both judicial and private mediation – the mediator’s questions and comments to the opposing side can add information going beyond what one side may have wanted to convey to the other. Judge Posner suggests that the mediator can “fuzz up” information and act as an “impediment to transparent communication” between the parties.¹⁶

Therefore, confidentiality is another critical feature of mediation.¹⁷ The parties, when in caucus, speak to the mediator “in confidence.” The mediator may not disclose confidential information to the other side without express permission of a party. This confidentiality concept supports trust, another cornerstone concept of mediation theory.¹⁸ The parties will not disclose valuable information to a mediator they do not trust.¹⁹ Mediators who breach the duty to keep information confidential soon lose the trust of disputants and cannot function effectively.

The subject of trust and judicial mediation is sticky. Some parties will trust a judge simply out of respect for the judiciary. The legitimacy of an independent judiciary,²⁰ central to our American justice system, spills over to foster respect for judges who mediate. Institutional respect for judges helps to make judicial mediation effective. Other parties may respect an individual judge for reasons unrelated to an independent judiciary, namely, positive prior interactions or a general positive personal reputation.

However, public trust toward sitting judges who mediate cannot be assumed. Individual or institutional reasons can cause a lack of trust toward judicial mediation. A judge with a checkered general reputation is unlikely to be trusted by a litigator or a client forced to mediate before that judge. This might make the judge’s evaluation less influential and tend to deter disclosure of confidential information. Moreover, a judicial mediation process that does not instill public confidence can cause institutional distrust toward the general process of mediation by judges. If this occurs, even respected judges possessing great reputations may have a hard time mediating effectively.

Professor Frank Sander rightly argues that a judge who seeks to mediate cases assigned to her faces a lack of trust from the disputants.²¹ He theorizes that the disputants will be unlikely to speak candidly to a judicial mediator who will later be in a position to decide a case based upon allegedly confidential information obtained during a mediation session. Sander’s position appears logical. Some parties will not open up to the judge assigned to hear a case.

¹⁶ Posner, *supra* note 13.

¹⁷ See BRUNET & CRAVER, *supra* note 3, at 182 (“Confidentiality is a hallmark of mediation.”).

¹⁸ See, e.g., Frank E.A. Sander, *A Friendly Amendment*, DISP. RESOL. MAG., Fall 1999, at 11 (“To be effective, the mediation process must inspire candor by both parties, something that is unlikely to happen if the mediator can later don his judicial robe and render a decision, perhaps based in part on confidential information that was imparted to him in the mediation session.”).

¹⁹ See PIOTR SZTOMPKA, TRUST: A SOCIOLOGICAL THEORY 25 (1999) (defining trust as a function of risk and a “bet about the future contingent actions of others”) (emphasis in original).

²⁰ See, e.g., Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982).

²¹ See Sander, *supra* note 18.

This point, however, does not necessarily condemn all judicial mediation. Parties may transfer critical information to an independent judicial mediator not assigned to the case.

One last definitional point concerns the term "settlement conference." Because case evaluation from a judge is the essence of both judicial mediation and a settlement conference, there is not a great deal of difference between these terms. As aptly put by Professor Hensler, "court mediation is a lot like a settlement conference."²²

B. Differences Between Judicial and Private Mediation

While the previous discussion demonstrates similarities between judicial and private mediation, there remain fundamental differences between evaluative mediation provided by judges and private mediators.

1. Time Constraints of Judicial Mediation

Judges who mediate operate under different time constraints than private mediators. Paid by salary and mediating from a set of institutional pressures rather than a profit motive, judges naturally can devote less time to mediation than private mediators. Private mediators, typically paid by the hour, have little or no incentive not to be deliberate when mediating. Leisurely and multiple mediation sessions are expected in private mediation. There is little pressure to cut caucus sessions short. In great contrast, the typical judge who mediates only can devote roughly two or three hours to mediating any one case.²³ Little opportunity for repeat mediation sessions exists in the contemporary culture of judicial mediation. Early Neutral Evaluation²⁴ has thrived because of the need to provide meaningful and accurate case evaluations to the litigants, and the

²² Hensler, *supra* note 6, at 18.

²³ See BURNS, *supra* note 5, at 21 (quoting a judge's lament that he had only two hours to mediate a case set for forty days of trial); D. MARIE PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES 84-85, 103 (Federal Judicial Center 1986) (reporting nature of settlement conferences held by Magistrate Judge Pat Irwin of the Western District of Oklahoma, who spends "between two to three hours on a case," and republishing judicial workload grid of Judge Robert Keeton (D. Mass.), estimating that a judge would spend one hour at a settlement conference); PLAPINGER & STIENSTRA, *supra* note 9, at 303-07 (reporting that settlement conferences held by magistrate judges of the Western District of Wisconsin "last anywhere from fifteen minutes to five hours"). Cf. Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 651-52 (2002) (in Ohio state court mediations study, seventy-seven percent of mediation sessions held by court-appointed attorney mediators employed half or full-time by the courts lasted between thirty-one minutes and three hours); Douglas A. Henderson, *Mediation Success: An Empirical Analysis*, 11 OHIO ST. J. ON DISP. RESOL. 105, 143 (1996) (concluding that data indicates that the length of mediation sessions "was positively related to settlement The longer the process lasted, the more likely the mediation would settle in full."); Thomas B. Metzloff, et al., *Empirical Perspectives on Mediation and Malpractice*, 60 LAW & CONTEMP. PROBS. 107, 118-19 (Winter 1997) (collecting data on court-ordered mediations before private mediators in North Carolina state courts, suggested 16% last 1.1 to 2.0 hours, 27% last 2-3 hours, 19.1% last 3-4 hours, 13% last 4-5 hours, 8% last 5-6 hours, 5.6% last 6-7 hours, and 5.6% last more than 7 hours).

²⁴ See, e.g., David I. Levine, *Early Neutral Evaluation: The Second Phase*, 1989 J. DISP. RESOL. 1.

inability of trial and magistrate judges to devote the time needed to meaningfully evaluate claims.²⁵

These same time constraints inhibit productive post-mediation contact between the judge and the parties to a dispute. When mediation ends without a settlement, it is very common for the private mediator to telephone and sometimes even visit each party to seek ways to continue the settlement process. While some judges who mediate might use the very same post-mediation procedure, most lack the time to engage in similar post-session conduct. Some judges may also feel it is improper or unseemly for the court to initiate out-of-court, *ex parte* contact with individual litigants.

2. *Mediators Wearing Black: The Contrasting Perceived Abilities of Judges and Private Market Mediators to Evaluate*

Judges and private mediators have contrasting abilities to evaluate disputes. Judges may have a built-in, natural advantage in case evaluation, since evaluation, in the form of constant decisions is the everyday task of a judge. At the same time, judges have institutional pressures that may prevent them from supplying a complete set of sessions that would allow a case to settle, or to settle most effectively.

While the private mediator with substantial specialty experience may possess similar expertise in case evaluation, a judge is viewed as having an innate perception of evaluative legitimacy unavailable to all but a few private market mediators. Judges who wear black have almost automatic authority when assessing a case.²⁶ Parties naturally respect judges, whether they are judging, sentencing, or mediating. Such institutional respect is simply absent in the market for most private mediators.

Hiring patterns for respected judges who leave the bench to enter the mediation market confirm this point. A bidding war among mediation providers erupted when former Chief Justice Armand Arabian of the California Supreme Court left the bench to mediate.²⁷ Joint ventures of retired judges appear to be successful and busy providers of mediation,²⁸ more so than mere litigation experts who may know a substantive area of law well but lack the credibility and respect that comes with prior judicial experience.

²⁵ See 3 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE*, § 16.53(5)(c) (3d ed. 2001) (Magistrate Judge Wayne Brazil asserts that Early Neutral Evaluators "can devote more time to the individual cases assigned to them than can busy district judges"); see also Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does – Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 *Emory L.J.* 83 (2002) (stressing time constraints that inhibit judges and lack of incentive to expend extra time on particular matters).

²⁶ My authority for this proposition is the seeming ease with which retired judges get ADR work. Taking off a black robe helps a neutral obtain business. Former judges wear a cloak of black even without a robe.

²⁷ See Margaret A. Jacobs, *Retired Judges Seize Rising Role in Settling Disputes in California*, *WALL ST. J.*, July 26, 1996, at A1, 5.

²⁸ *Id.*; BURNS, *supra* note 5, at 20 (describing merger of JAMS and ENDISPUTE and explaining that "popularity of early retirement by judges to work at JAMS or other ADR providers has given some commentators concern that these opportunities are enticing many knowledgeable and talented sitting judges away from the public courts").

Nonetheless, judicial mediators can lose their evaluative edge. Judges who evaluate or mediate in a way that decreases trust will not be able to mediate successfully.²⁹ The natural judicial advantage to evaluate issues is not automatic and can be lost through incompetence or indiscretion. Not every retired judge will be sought after to mediate. Respected retired judges with an ability to naturally evaluate a case appear to get the most mediation work. In addition, the perception of being unbiased helps former judges get mediation clients. Being typecast as pro-plaintiff or pro-defendant will not help a judge who wants to act as a neutral.³⁰

3. *Contrasting Types of Evaluative Mediation*

Not all evaluative mediation is the same. The evaluative mediator, whether privately hired or a judge, who arm twists and cajoles in an effort to reach settlement, will often suffer unpopularity. In the model of evaluative mediation, most disputants will anticipate and respect the evaluation process. In contrast, they may not appreciate an overly assertive mediator's attempts to coerce a settlement. A true "muscle mediator" may not be admired when he overly flexes the evaluative muscle. It is one thing for a mediator to evaluate, but quite another for the mediator to cajole or pressure a settlement.

There is no reason to assume that either private mediators or judicial mediators are more likely to cross the line to over-evaluative mediation. Yet, one can easily imagine some judges who are more than willing to arm-twist a settlement. The problem of pressuring a settlement was so great in *Dodds v. Commission on Judicial Performance* that a commission recommended a public censure of the court's self-described "assertive" judicial "style."³¹ In refusing to sanction the trial judge, the California Supreme Court nonetheless observed that the judge exceeded "his proper role and casts disrepute on the judicial office" when he "repeatedly interrupt[ed] a litigant and yell[ed] angrily and without adequate provocation."³² Private mediators who misbehave can easily be discharged and lose business. In contrast, sitting judges possess a degree of job security unavailable in the free market, regardless of their behavior.

4. *Contrasting Risks*

Judges who mediate cases assigned to them take greater risks than private mediators. Those who hire a respected litigator to mediate understand that there will be no subsequent contact between the attorney or her client and the mediator as it relates to the trial phase of the dispute. Those litigants assigned

²⁹ See Fox, *supra* note 6, at 152 (urging judicial mediators to "never breach a confidence" and cautioning that misuse of confidential information "will result in a serious loss of confidence in the judge's good faith and impair his future effectiveness").

³⁰ See William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 239-40 (1979) (noting that private market "[j]udges will tend to promulgate vague standards which give each party to a dispute a fighting chance" and reasoning that clear rules that indicate how a private market judge is "likely to decide a case will assure that no disputes subject to the rule are submitted to that judge since one party will know that it will lose").

³¹ 906 P.2d 1260, 1270 (Cal. 1995).

³² *Id.*

to a judge who mediates have no such guarantee. Professor Sander terms this a problem of "role confusion," and considers such confusion a major concern regarding "judges doing mediation."³³

A judge who mediates another judge's case also faces some reputational risk. If she erroneously evaluates a case, she could lose face and suffer considerable damage to her reputation. Since, by definition, a mediator's evaluation of a case is based on incomplete information, errors are bound to occur from time to time. These errors will effect the mediation judge in a different way than the private mediator who does not routinely decide cases following a mediation.

II. THE ORIGIN AND DEVELOPMENT OF THE TRADITIONAL VIEW

The traditional view permitting unregulated judicial mediation was an outgrowth of the Rule 16 pretrial conference, combined with the increasing, and now routine, use in the federal courts of the individual calendar system.³⁴ The growth of the individual calendar system in which "judges are assigned a case at the time of its filing and assume responsibility for shepherding the case to completion,"³⁵ created a sense of judicial accountability for each assigned case.³⁶ As dockets became more crowded, this sense of individual responsibility may have increased. With the advent of efficiency-minded court clerks, judges received written report cards, in the form of memoranda, listing their mean disposition rates.³⁷ A typical judge felt peer pressure to dispose of assigned cases while working in a context involving "a spirit of competition."³⁸

In an important article, Professor Judith Resnik set forth a type of cultural explanation for promotion of settlement and avoidance of trial by federal

³³ Sander, *supra* note 18, at 11. Accord Judith Resnik, *Trial as Error, Jurisdiction as Inquiry: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 1002 (2000) (describing "role-blurring" of judges as their job has shifted from "adjudicator to manager to settler to dealmaker").

³⁴ In the individual calendar system, a case is assigned to an individual judge at the time it is filed and remains the responsibility of that judge for the remainder of the case. See, e.g., STEVEN FLANDERS, *CASE MANAGEMENT AND COURT MANAGEMENT IN THE UNITED STATES DISTRICT COURTS* (1977); Note, *The Assignment of Cases to Federal District Judges*, 27 STAN. L. REV. 475, 476-81 (1975) (describing individual calendar system as one in which "each judge is responsible for his own calendar," and urging adoption of a system that pre-assigns complex and criminal cases to appropriate judges).

³⁵ Resnik, *supra* note 20, at 378.

³⁶ Cf. Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1456-58 (1983) (theorizing that responsibility of judges is a good thing, and that increasing bureaucratization of the judiciary tends to reduce this important sense of responsibility).

³⁷ See, e.g., Resnik, *supra* note 20, at 404 (noting that "[w]ith the individual calendar system, the publication of each judge's case load, and comparative data on judges' performance, judges can learn which of their colleagues dispose of the most cases") (footnote omitted); Eve Lieber, *Maximum Case Management with Minimum Judge Time*, JUDGES' J., Fall 1986, at 4, 16 ("Effective case management begins by defining general time standards for the disposition of cases.").

³⁸ See FLANDERS, *supra* note 34, at 13. See also Resnik, *supra* note 20, at 404 (concluding that "peer pressure tends to generate more vigorous [judicial] management").

judges.³⁹ Professor Resnik first described the federal judge sitting in 1915 as a “solo player,” noting that there were only 120 district judges at that time who sat “with few shared practices.”⁴⁰ The early twentieth century federal judge toiled in isolation. Resnik points out that the twentieth century growth of the American Bar Association led to procedural reforms such as passage of the Federal Rules of Civil Procedure.⁴¹ In the pre-Federal Rules period, the lack of uniform procedures undoubtedly contributed to a culture of judging that excluded pressures to settle rather than to try cases.

Resnik sees the passage of the Federal Rules as part of a more significant trend toward unifying the federal judiciary.⁴² According to this view, the trend towards a more bureaucratic federal court system includes the authorization of the Administrative Office of the United States Courts,⁴³ the development by the Judicial Conference of the 1960 *Handbook for Protracted Cases*,⁴⁴ the shift from a master calendar system to an individual calendar that focused the responsibility of case management upon the assigned judge,⁴⁵ and formal judicial education.⁴⁶

Professor Resnik describes these factors as transforming the federal court system into an agency in the broad sense of the word.⁴⁷ The court system has a set of collective interests to advance, bureaucratic machinery at its disposal, and, obviously, considerable power.⁴⁸ The net result today is a federal judicial system that functions with substantial discretion and raw power in the hands of its judges.⁴⁹

The succinct, two paragraph, original 1938 version of Rule 16, which provided that the court could hold a discretionary pretrial conference, said nothing

³⁹ See Resnik, *supra* note 33, at 925 (explaining a federal judge’s statement that trial cases evidence a “lawyers’ failure”). See also WOLF HEYDEBRAND & CARROLL SERON, RATIONALIZING JUSTICE: THE POLITICAL ECONOMY OF THE FEDERAL DISTRICT COURTS 185 (1990) (describing a shift in the federal trial courts from a culture of adjudication to one of administration).

⁴⁰ Resnik, *supra* note 33, at 933-34.

⁴¹ *Id.* at 934.

⁴² *Id.* at 937-38.

⁴³ See Peter Graham Fish, *Crises, Politics, and Federal Judicial Reform: The Administrative Office Act of 1939*, 32 J. POL. 599 (1970) (detailing historical origin of Administrative Office of the U.S. Courts).

⁴⁴ See *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351 (1960).

⁴⁵ See Resnik, *supra* note 33, at 940-43 (stressing that the switch from a master calendar to an individual assignment system was a business-like effort designed to embrace every case, not just so-called complex cases).

⁴⁶ *Id.* at 943-49.

⁴⁷ *Id.* at 949.

⁴⁸ See, e.g., HEYDEBRAND & SERON, *supra* note 39, at 30-31 (describing a bureaucratic “court rationalization” that has occurred in the federal judiciary by “systematization, codification of procedures, simplification, and routinization of work” in the face of new judgeships and court reorganization).

⁴⁹ See, e.g., Stephen B. Burbank, *Procedure and Power*, 46 J. LEGAL EDUC. 513 (1996) (setting forth a historical vision of a “power grab by the judiciary”); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987) (setting forth a history of federal procedure in which a tradition of judicial equity and discretion becomes the modern norm).

about settlement in its list of subjects for consideration.⁵⁰ In its original form, the pretrial conference was held “to *prepare* for, not to avert, trial.”⁵¹ Professor Marc Galanter has written that “the relationship between pre-trial and settlement was ambivalent.”⁵² The purpose of the 1938 pre-trial conference was to “sharpen cases for trial, making litigation more effective.”⁵³ Under the original Rule 16, settlement was, at most, a useful “‘by-product’”⁵⁴ of the pretrial conference.

The typical use of the original Rule 16 was as a discretionary conference with the judge on the very eve of trial. As set out by Professor Tidmarsh, “[m]y own early experience showed me that judges rarely invoked Rule 16 until they held a final pretrial conference a few days in advance of trial.”⁵⁵ While discussion of settlement certainly was within the broad discretion granted the court in the original Rule 16(b)(6),⁵⁶ it was not until the important 1983 revision to Rule 16 that settlement became a textual component of federal pretrial conferences.⁵⁷

Despite the prevailing tendency to downplay settlement, under the original pretrial conference rule, leading federal judges began to openly stress the settlement and evaluative function of the pretrial conference in the decades before the 1983 revision of Rule 16. In 1962, Judge Skelly Wright recommended that

⁵⁰ See MOORE, *supra* note 25, at § 16 App.01(1) (listing, as subjects to consider at a pretrial conference, simplification of the issues, amendment, using admissions of fact or documents to avoid unnecessary trial proof, limiting expert witnesses, use of masters, and the catchall “such other matters as may facilitate the just, speedy, and inexpensive disposition of the action”). *Id.* at 16.01(c)(16). For discussion of the historical analog to Rule 16, the settlement conference that began in the state courts, see Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 490-92 (1985).

⁵¹ *Padovani v. Bruchhausen*, 293 F.2d 546, 548 (2d Cir. 1961) (emphasis added). *Accord* Nancy A. Welsh, *Court-Ordered ADR: What are the Limits?*, 12 HAMLIN J. PUB. L & POL’Y 35, 43-44 (1991) (pretrial conference not designed to explore settlement but, instead, to insure an efficient trial).

⁵² GALANTER, *supra* note 1, at 5.

⁵³ *Id.*, citing Edson R. Sunderland, *Theory and Practice of Pre-Trial Procedure*, 21 J. AM. JUD. SOC’Y 125, 131 (1937) (describing pre-trial as designed to prevent concealment of issues and to improve public confidence in litigation).

⁵⁴ See, e.g., PROVINE, *supra* note 23, at 21; GALANTER, *supra* note 1, at 6 (terming perception of settlement as a by-product of the pretrial conference, a view that lasted “well into the 1950s”); Edson Sunderland, *Procedure for Pretrial Conferences in the Federal District Courts*, 28 AM. J. JUDICATURE SOC’Y 46, 49 (1944) (purpose of pretrial conference to designate and eliminate issues, with settlement playing a secondary role).

⁵⁵ Jay Tidmarsh, *Civil Procedure: The Last Ten Years*, 46 J. LEGAL EDUC. 503, 506 (1996).

⁵⁶ See FED. R. CIV. P. 16(b)(6) (authorizing pretrial conference to consider “any other matters appropriate in the circumstances of the case”); 6 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §1522 (1971) (noting that, under original 1938 Rule 16, the pretrial conference had improved and facilitated the settlement process); Lawrence F. Schiller & James A. Wall, Jr., *Judicial Settlement Techniques*, 5 AM. J. TRIAL ADVOC. 39, 42 (1981) (concluding that courts “have been willing to become involved in settlement discussions at the [Rule 16] conference under the umbrella of subsection (6) of the Rule”).

⁵⁷ See MOORE, *supra* note 25, at § 16 App.03(1) (setting out 1983 revision of rule and Advisory Committee Note).

judges put a value on a case at a pretrial conference.⁵⁸ In 1975, Judge Renfrew asserted that "judicial activism in the settlement process appears to have received quasi-official sanction within the judicial family."⁵⁹ In 1977, a widely respected district judge, Hubert Will, wrote that the court should act as a mediator.⁶⁰ Because these positions were stated in speeches before other judges, an activist, pro-settlement intervention philosophy began to pervade the federal courts.

The stage was set for the 1983 revision to Rule 16, which made it clear that settlement could take center stage in the pretrial process. Revised Rule 16(a)(5) transparently listed as an objective "facilitating settlement of the case."⁶¹ Revised Rule 16(c)(7) set forth as a subject of discussion at pretrial "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute."⁶² Rule 16(c)(10) permitted the judge to employ special pretrial procedures to aid in managing complex cases. It is important to acknowledge that the 1983 revision of Rule 16 was made at a time when the individual calendar assignment system was fully entrenched in the federal courts. The listing of settlement as a major part of the new pretrial conference rule must have increased the sense of individual responsibility felt by the trial judge to be actively involved in prompting consideration of settlement.⁶³

The Advisory Committee's Note to the 1983 revision set forth a number of factors relevant to the transition from the traditional view to the modern view. The Committee asserted that, because settlement "obviously eases crowded dockets and results in savings to the litigants and the judicial system, . . . [it] should be facilitated at as early a stage of the litigation as possible."⁶⁴ The Committee Note reasoned that providing a neutral forum might foster settlement, and observed that it was not the purpose of the revised rule "to impose settlement negotiations on unwilling litigants."⁶⁵

It is interesting that the Advisory Committee Note foresaw the transition to the modern view of judicial mediation. It observed that "a judge to whom a case has been assigned may arrange, on his own motion or at a party's request,

⁵⁸ Skelly Wright, *The Pretrial Conference*, 28 F.R.D. 141, 145 (1962).

⁵⁹ Hon. Charles B. Renfrew, *Negotiation and Judicial Scrutiny of Settlements in Civil and Criminal Antitrust Cases*, CHI. BAR REC., Nov.-Dec. 1975, at 130, 131.

⁶⁰ Hubert L. Will et al., *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203, 205 (1977).

⁶¹ FED. R. CIV. P. 16(a)(5).

⁶² FED. R. CIV. P. 16(c)(7).

⁶³ See, e.g., *Guillory v. John Deere Indus. Equip. Co.*, 95 F.3d 1320, 1334 (5th Cir. 1996) (affirming sanctions against defendant Deere for negotiating at settlement conference in bad faith); *Newton v. A.C. & S., Inc.*, 918 F.2d 1121, 1126 (3rd Cir. 1990) (affirming trial court authority, under Rule 16(f), to impose sanctions for failure to comply with a settlement deadline); *Hess v. N.J. Transit Rail Operations, Inc.*, 846 F.2d 114, 115 (2nd Cir. 1988) (overturning district court contempt sanction for failing to submit a "bonafide" pretrial settlement offer where trial court ordered party at a Rule 16 pretrial conference to submit offer or be subject to sanction, and where party in previous case before same judge had been unwilling to make a settlement offer until trial); *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 652 (7th Cir. 1989) ("The wording of the rule and the accompanying commentary make plain that the entire thrust of the amendment to Rule 16 was to urge judges to make wider use of their powers and to manage actively their dockets.").

⁶⁴ FED. R. CIV. P. 16 App.03(5) advisory committee note.

⁶⁵ *Id.*

to have settlement conferences handled by another member of the court or by a magistrate.”⁶⁶ This important sentence showed a permissive and entirely voluntary acceptance and transition to the modern view. The assigned trial judge could refer the matter to another settlement judge, in its discretion, and would not be forced to make this move.⁶⁷ In the context of 1983, at the time of the Rule 16 revision, this grant of discretion seems entirely understandable. It is not surprising that this sentence was drafted in a way to maximize judicial discretion. However, it is surprising that by 1983, the Advisory Committee already perceived the need to provide the option that this essay calls the modern view.

The modern version of Rule 16 has transformed the role of the federal judge, as compared to the role sought in the original draft of the rule. The rule now mandates an early case management role for the judge by requiring the court to enter scheduling orders.⁶⁸ The rule also encourages judges to hold multiple pretrial conferences at various stages of litigation.⁶⁹ More important, the current Rule 16 has transformed the federal judge into “an active player in the litigation.”⁷⁰ In this context, it is understandable that courts routinely address the status of settlement with counsel and are willing to suggest settlement conferences.

The traditional view that a judge may mediate her own cases appears consistent with the existing rules that govern present judicial conduct. While the Code of Conduct for federal judges has the standard requirement of disqualification where the court’s “impartiality might reasonably be questioned,”⁷¹ it also provides that a sitting trial judge “may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle” pending matters.⁷²

The most recent Federal Judicial Center publication relevant to court-annexed ADR takes the position that the assigned judge may serve as an ADR neutral.⁷³ It relies heavily on an advisory opinion published by the Judicial Conference’s Committee on Codes of Conduct, which interprets the federal Code of Conduct to permit a judge to first act to settle a case, and then later preside over the trial of the same litigation.⁷⁴ This opinion appears to provide a clear validation of the traditional view. The opinion reasons that the Code of Conduct’s authorization for judges to meet *ex parte* to discuss settlement with

⁶⁶ *Id.*

⁶⁷ *Id.* (the judge “*may* arrange”) (emphasis added).

⁶⁸ See FED. R. CIV. P. 16(b).

⁶⁹ See Tidmarsh, *supra* note 55, at 506.

⁷⁰ *Id.*

⁷¹ CODE OF CONDUCT FOR UNITED STATES JUDGES (1990) [hereinafter CODE OF CONDUCT], Canon 3.

⁷² *Id.* at 3(B)(7)(d).

⁷³ See ROBERT NIEMIC ET AL., GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR 78-79 (Federal Judicial Center 2001).

⁷⁴ 2 Guide to Judiciary Policies and Procedures, (Administrative Office of the U.S. Courts 1999), Advisory Opinion No. 95.

one party demonstrates support for judges to meet with both parties to facilitate settlement.⁷⁵

The same opinion, however, raises concerns about several issues associated with the traditional view. It stresses that such cases need to be analyzed on a case-by-case basis, and that specific attention should be awarded to whether the parties accompanied their attorney at the settlement conference, whether the case is a bench or jury trial, and whether the parties have specifically consented to a later trial by the settlement judge.⁷⁶ The opinion raises a special concern about the court's ability to impartially preside over a bench trial following a settlement conference.⁷⁷

III. THE ASCENDANCY OF THE MODERN VIEW

With the growing popularity of private mediation, critics began to find fault with the traditional version of judicial mediation. The criticisms articulated were, for the most part, ones concluding that the traditional view caused several process failures. This section will catalog these criticisms.

A. *The Perception of Lack of Trial Court Neutrality Following Judicial Mediation*

Perhaps the simplest criticism of traditional mediation focuses on the potential loss of neutrality of the trial court that has earlier tried and failed to resolve the case through judicial mediation. According to this critique, the mediation effort will cause the court to inherently pre-judge issues during the adjudicatory phase of a case after learning critical facts during the earlier mediation phase. The important judicial characteristic of neutrality is deemed to be undermined by an earlier mediation effort. There is a chance that the court will be perceived as deciding a case based upon evidence and arguments presented at the mediation rather than at trial.⁷⁸ The parties may also believe the judge who unsuccessfully mediated a case may have had an emotional stake in the resolution of the case through the earlier mediation. These problems have led Professor Judith Resnik to conclude that, in order to preserve impartiality, we should "prohibit a judge who manages pretrial preparation or attempts unsuc-

⁷⁵ *Id.* ("Since the drafters of the Code believed it was necessary to expressly permit *ex parte* settlement discussions between judges and parties with their consent, it is reasonable to infer that joint settlement discussions do not contravene the Code.").

⁷⁶ *Id.* See also Local Rule 16.3(c), S.D. Cal. (mandating the parties to consent to a trial by a judge who previously presided over a settlement conference).

⁷⁷ See Local Rule 16.3(b), N.D. Tex. (prohibiting the assigned judge from discussing settlement figures with the parties in bench trials without the express consent of the parties).

⁷⁸ See, e.g., Resnik, *supra* note 20, at 385, citing *Krattenstein v. G. Fox & Co.*, 236 A.2d 466, 469 (Conn. 1967) (observing that when a court "persist[s] at settlement efforts and then to hear the case and render judgment . . . inevitably raises . . . suspicion as to the fairness of the court's administration of justice"); WAYNE D. BRAZIL, *SETTLING CIVIL SUITS: LITIGATOR'S VIEWS ABOUT APPROPRIATE ROLES AND EFFECTIVE TECHNIQUES FOR FEDERAL JUDGES* 85 (A.B.A. 1985) (finding that fifty-eight percent of lawyer respondents thought "it is 'improper' for the trial judge to get involved in settlement negotiations" in a bench trial, and thirty-three percent found it improper for the assigned trial judge to become involved in settlement in a jury trial).

cessfully to mediate disputes from later adjudicating contested issues.”⁷⁹ Professor Charles Craver concludes that parties who mediate before an assigned judge “may understandably fear the possibility of prejudicial trial rulings if they are unable to resolve their controversies amicably.”⁸⁰

In Lon Fuller’s terms, several of the chief conditions of adjudication are missing when a judge mediates a case over which she later presides at trial. Fuller theorized that a judge should: (1) “not act on his own initiative,” (2) have “no direct or indirect interest (even emotional) in the outcome of the case,” (3) decide the case “solely on the basis of evidence and arguments presented to him by the parties,” and (4) afford “[e]ach disputant . . . ample opportunity to present his case.”⁸¹ Fuller’s points, when combined, set forth a coherent theory of judicial neutrality that is challenged by a judge who mediates her own cases.

A judge’s decision to mediate rather than to try a case is an act of activism. Moreover, once the mediation process begins, the court has an appreciable interest in settling the case rather than trying it later. It is not uncommon for judicial mediations to commence with a boilerplate statement by the court that the parties have a right to try their case rather than settle through the mediation process. The judge who cares about the efficacy of her mediation efforts is prone to breach Fuller’s third and fourth points. If the case does not settle through mediation, the judge is very likely, consciously or unconsciously, to lean against any party to the mediation who, in the court’s opinion, caused the trial. The risk of judicial bias against a recalcitrant non-settler is palpably present. Even in cases where the mediation failed to settle without fault of either party, the loser of a later trial might feel that the court was biased against it and failed to consider the evidence in an even-handed fashion. This could create the appearance of partiality that undermines the judicial branch and, according to Fuller, prevents achieving a trial with maximum moral force.

The style of mediation provided by judges contributes to this problem. Judicial mediation is evaluative mediation. Courts, whether seeking to settle their own cases or those of a fellow judge, often use their “muscle” when mediating.⁸² This is far from the more lengthy “facilitative” mediations,⁸³ in which a mediator strives to remain neutral and avoids evaluation at all cost. In judi-

⁷⁹ Resnik, *supra* note 20, at 433-34. *Accord* James J. Alfini, *Risk of Coercion Too Great: Judges Should Not Mediate Cases Assigned to Them for Trial*, DISP. RESOL. MAG., Fall 1999, at 11 (concluding that judges should not mediate a case assigned to them for trial); BRAZIL, *supra* note 78. *Cf.* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 369-70 (1978) (referring to one judging and later mediating as “‘mixed forms’ of ordering”).

⁸⁰ CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* §16.13[2](a) (4th ed. 2001). Craver does note that the judge who mediates her own case should point out that “no settlement discussion disclosures would be considered during subsequent trial proceedings,” and should advise the parties that failure to settle would not disadvantage any party. *Id.*

⁸¹ *See* LON L. FULLER, *THE PROBLEMS OF JURISPRUDENCE* 706-07 (1949) (setting forth conditions for a decision having maximum moral force). *Accord* Resnik, *supra* note 20, at 376 (expressing “classical view” that “judges are not supposed to have an involvement or interest in the controversies they adjudicate”).

⁸² *See, e.g.,* *Dodds v. Comm’n of Judicial Performance*, 906 P.2d 1260 (Cal. 1996) (concluding that assertive judicial style in seeking settlement in a case involving alleged sexual misconduct by a physician was prejudicial, but not grounds for public censure of the judge).

cial mediation, the court, lacking the time of a private mediator who is usually paid by the hour, must quickly seek to settle the case. In a two or three hour period, the most the judicial mediator can hope to do is weigh the respective cases of the parties and try to find some level of overlap between the adversaries that can lead to a common evaluation of the litigation and settlement.

Following an evaluative judicial mediation, each party knows how the court has initially appraised the case, so the court no longer appears wholly neutral. The party who may have rejected a settlement offer characterized by the court as fair will remember this evaluation if the court later finds against the party at trial. The important appearance of neutrality can be lost by the judicial mediation process.

Parties who fear that the assigned judge who mediates may lose her neutrality may be less than candid with that judge during caucus sessions. When compared with Early Neutral Evaluation (ENE), "parties may be more forthcoming in an ENE session than they would be in the presence of the judge, because the ENE session is confidential and the evaluator has no power."⁸⁴ Effectively, the parties may share less information with a trial judge who mediates under the traditional view than they would with either private market mediators or a different "settlement judge" who will not later try the case.⁸⁵

B. *Criticism of Pressure Tactics and Time-Restricted Muscle Mediation*

Some members of the litigation bar now complain about the nature of formal mediation supplied by judges. This subsection contains several criticisms of the present process. It is largely anecdotal and is not based upon any empirical evidence. Nonetheless, these criticisms resonate with real world flavor.

The most common criticism is that the style of evaluative mediation used can be overly coercive. The judge who evaluates a case, whether or not assigned to her, is often an arm-twister by nature. Judges are accustomed to being on top of a hierarchical chain of command. Judges who mediate may project an attitude that attorneys should accept their view of what is a fair settlement. The tendency for judges to be evaluative when suggesting a substantive solution led Professor Menkel-Meadow to conclude that this judicial role may have shifted to that of "med-arb"⁸⁶ rather than pure mediation.⁸⁷ While this argument cannot be taken literally – the judge will not really arbitrate the case – it focuses correctly on a dynamic of judicial mediation that must be acknowledged. The fear of a subsequent trial can, and does, cause the

⁸³ See, e.g., PLAPINGER & STIENSTRA, *supra* note 9, at 65 (setting forth a model of mediation that calls for the parties to form their own positions and for the mediator to aid in this goal by being more of a "process expert" than a case evaluator or an expert).

⁸⁴ MOORE, *supra* note 25, at §16.53(5)(c) (commentary of Magistrate Judge Wayne Brazil).

⁸⁵ *Id.* (stressing the parties' unwillingness to be candid with a judicial mediator as compared with an early neutral evaluator).

⁸⁶ In med-arb, the parties mediate and, if unable to reach agreement, arbitrate. The mediator shifts roles and becomes the arbitrator. The theory of med-arb is that the parties will successfully mediate out of fear of the all or nothing result of a looming arbitration. See BRUNET & CRAVER, *supra* note 3, at 524-25.

⁸⁷ Menkel-Meadow, *supra* note 50, at 510-11.

parties mediating before a judge to consider her settlement options more carefully. In this way, judicial mediation does bear resemblance to med-arb.

Professor Nancy Welsh has recently expressed concern that settlements may lack self-determination where they follow a case evaluation by the assigned judge.⁸⁸ She posits that a party may be coerced into a settlement by fear that the court's subsequent rulings "will be influenced by the party's refusal to cooperate,"⁸⁹ and questions whether such settlements are "an expression of free will."⁹⁰

Another criticism of judicial mediation focuses on its duration. The evaluative mediations set by busy judges are generally one-shot events with little or no chance for follow-up meetings. When compared to the leisurely style of evaluative mediation offered by private mediators, judicial mediation is a time-restricted product.⁹¹ Private mediators, who are typically paid by the hour for their services, can afford to take whatever time is necessary to arrive at a fair and reasonable settlement. The parties often do not settle at the first mediation session, but may reach agreement after a second session or follow-up telephone conferences. There is evidence that longer mediations settle at a higher rate than shorter sessions.⁹² In private mediation, the mediator has the incentive to create a lengthy process in order to increase her fee.⁹³ While parties who closely monitor the mediator's time can mitigate this problem, the tendency of the parties to split the mediator's fee tends to decrease an optimal amount of fee monitoring. Nonetheless, there is every reason to believe that private mediations will last significantly longer than sessions held before sitting judges acting as mediators.

The economics of judicial mediation makes it a different process than private evaluative mediation. A busy and salaried federal judge may have only two or three hours set for a settlement conference. Numerous other trial and pretrial tasks prevent a federal judge from spending an unlimited amount of time mediating. Within the typical two-hour period, the judicial mediation process needs to start and finish. Judicial time for a subsequent session is often

⁸⁸ Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 67 (Spr. 2001) (concluding that "the potential for coercion remains" where a trial judge conveys an evaluation of any party's case).

⁸⁹ *Id.*, citing *Krattenstein v. G. Foy & Co.*, 236 A.2d 466, 469 (Conn. 1967) (questioning fairness of a trial court first expressing an opinion on monetary settlement values, then later trying and deciding a case).

⁹⁰ Welsh, *supra* note 88.

⁹¹ See generally PLAPINGER & STIENSTRA, *supra* note 9, at 66 (court annexed "mediation can involve a single session of several hours or multiple sessions over time").

⁹² See generally Henderson, *supra* note 23 (collecting and analyzing data in construction mediation and concluding that the "longer the process lasted, the more likely the mediation would settle in full").

⁹³ See Edward Brunet, *Seeking Optimal Dispute Resolution Clauses in High Stakes Employment Contracts*, 23 BERKELEY J. EMP. & LAB. L. 107, 134 n.98 (2002) (asserting that "the fact that most mediators are paid by the hour creates an incentive for the mediator to prolong the negotiations process"); Andrew K. Niebler, *Getting the Most Out of Mediation: Toward a Theory of Optimal Compensation for Mediators*, 4 HARV. NEGOT. L. REV. 167, 183-84 (1999) (concluding that use of a fixed fee for a mediator is more efficient than an hourly fee).

impossible to arrange. The judge's ability to informally caucus on the telephone with a disputant's attorney following the session is limited. Such calls take time that may be unavailable.

These constraints limit the utility of judicial mediation. Some disputes just cannot be resolved in the small amount of time made available by judges. Some attorneys find this process frustrating, and they may agree to mediate more to placate the court than to settle. Under these conditions, judicial mediation may add a layer of procedure to a litigation process already cluttered with procedures of less than optimal value. Other attorneys may agree to mediate more from a need to obtain some discovery than from optimism that the case may settle in the brief time provided.⁹⁴

This is not to say that judicial mediation is unpopular. Professor Menkel-Meadow has concluded that "lawyers overwhelmingly seem to favor judicial intervention."⁹⁵ She cites Magistrate Judge Wayne Brazil's study of lawyers practicing in four different federal courts.⁹⁶ Brazil found a "staggering 85 percent of our respondents agree that 'involvement by federal judges in settlement discussion [is] likely to improve significantly the prospects for achieving settlement.'"⁹⁷ He also concluded that attorneys supported judicial efforts to activate a settlement process for other reasons, such as better quality settlements and settlements reached earlier in the litigation.⁹⁸ While these attorney conclusions seem subjective and based on intuition rather than data, they are nonetheless derived from informed sources having direct contact with the settlement process.

C. *Information Inefficiencies Inherent in the Traditional Method*

Information plays a critical role in mediation, with the mediator standing in the center of the information clearinghouse.⁹⁹ The mediator serves as a broker of information, seeking facts with probing questions and doling out facts to the disputants that may encourage settlement.

⁹⁴ See, e.g., *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1987) (reversing trial court finding of criminal contempt of plaintiff's attorney who refused to participate in a non-binding summary jury trial, where counsel feared that participation would disclose critical witness statements that earlier had been found to be non-discoverable work product).

⁹⁵ Menkel-Meadow, *supra* note 50, at 497.

⁹⁶ Wayne Brazil, *Settling Civil Cases: What Lawyers Want From Judges*, JUDGES' J., Summer 1984, at 14.

⁹⁷ *Id.* at 16. Of course, objective data would appear to the contrary – settlement conferences are not necessarily efficient docket-clearing devices. See, e.g., Hensler, *supra* note 6, at 15-16 (questioning claims of cost and time savings of ADR); JAMES S. KAKALIK, ET AL., JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996) (concluding that ADR techniques consume considerable resources and stressing costs of ADR in relation to benefits); Menkel-Meadow, *supra* note 50, at 504 (concluding that "[w]e have examined the efficiency argument and found it wanting").

⁹⁸ *Id.* Accord Menkel-Meadow, *supra* note 50, at 504 (articulating a "substantive justice" by-product of settlement that avoids a winner and loser, and often creates remedies and legitimacy unavailable in litigation).

⁹⁹ See Brunet, *supra* note 93, at 123.

By retaining some facts and distributing others, the mediator acts as a filter of factual data.¹⁰⁰ In order for the mediator to sift through information, the parties must, of course, be in a position to transfer facts to the mediator.

It is in this crucial act of information retrieval that the traditional view judge who mediates is at a comparative disadvantage. As Sander has argued, a party will be less likely to make candid disclosures to a judge who will later be in a position to decide the controversy.¹⁰¹ Trust is a scarce commodity, and is less likely to exist when a judge mediates her own case. Conversely, there will be little reason to distrust a judicial or private mediator who will not later decide the case. Such matters are truly “neutral” in a robust sense of the word.

A mediator who lacks a relationship of trust with the parties will retrieve less information than a neutral who has established trust, rendering him inefficient.¹⁰² Trust, in this mediation context, means that a disputant can rely upon the integrity of the mediator.¹⁰³

This inefficiency will not exist in every situation. The assigned trial judge may be in an ideal position to “rekindle previously unproductive settlement discussions”¹⁰⁴ by suggesting to the parties that they give settlement negotiations another try. If the disputants consent to another round of negotiation, the judge may simply leave the room, creating a settlement event.¹⁰⁵ Here, the assigned judge may play a useful role in restarting settlement. It may be the case that neither party is in a position to suggest another try at settlement without losing face. In contrast, a third party, the trial judge, may be in a structured position to reopen settlement in a way that leaves neither party at a tactical disadvantage.

D. *Mixed Reactions to Judicial Signaling*

The complicated and sometimes subtle practice of judicial signaling has received some criticism as well. The adage that judges not prejudge may be inconsistent with signals from the bench.¹⁰⁶ Critics also view judicial signaling as a potential denial of due process because it can evidence a judge’s conclusion made without specific notice or a hearing, as well as lack of neutrality.

Some initial attention to the difficulty of defining judicial signaling merits emphasis. A national survey of trial judges revealed that over two-thirds thought their intervention in the settlement process was subtle “through the

¹⁰⁰ See Posner, *supra* note 13 (describing the mediator as one who serves as a conduit of information between disputing parties).

¹⁰¹ See Sander, *supra* note 18.

¹⁰² See THOMAS R. COLOSI, ON AND OFF THE RECORD: COLOSI ON NEGOTIATION 8 (1993) (trust defined in negotiation as “being able to rely on the other party’s behavior and to be counted on by it in turn,” and described as deriving from reliability and leading to credibility).

¹⁰³ *Id.* at 108 (“When trust is low or nonexistent in a relationship, the parties find it difficult to reveal their expectation.”).

¹⁰⁴ CRAVER, *supra* note 80, at 16.13[5].

¹⁰⁵ *Id.*

¹⁰⁶ See, e.g., THE JUDGE’S BOOK: National Conference of State Trial Judges 49 (American Bar Association and the National Judicial College 2d ed. 1994) [hereinafter THE JUDGE’S BOOK] (urging judges to remain open-minded and asserting that the “judge should make an effort not to prejudge a case”).

use of cues/suggestions.’”¹⁰⁷ This percentage seems considerable, especially in light of the fact that the same study showed only ten percent of the judges surveyed rated their style as “aggressive” or using “direct pressure.”¹⁰⁸ Assuming the truth of this data yields the conclusion that far more judges signal their evaluations than offer more formal thoughts in mediation. Judicial mediation is much more time-consuming than signaling and creates risks that signaling may avoid. What this survey may tell us is that signaling, not mediation, is where most judicial evaluation of a case takes place.

It must be stressed that the voices criticizing judicial signaling are fewer than those criticizing other aspects of the traditional view. There are several possible explanations why attorneys may not be overtly critical of judges who signal. First, signaling may not be possible to detect. Signaling can come in many forms: it can be oral, through body language, or facial expressions; it can be so subtle (such as a scowl) that an advocate may fail to perceive it; or a judge’s blank look or raised eyebrow when confronted with a hard to understand argument can be ambiguous and misunderstood. The difficulty in detecting accurate signals has caused some potential critics to back off – an equivocal signal is simply more difficult to criticize.

Second, while much judicial signaling is transparent, signaling that is on the record is more difficult to condemn. Judges’ questions during oral argument of pretrial motions often show their leanings on issues beyond those presented by the motion being argued. Because these questions are on the record, the court’s leanings are transparent for all parties to see and analyze. Transparent, on the record signals can be considered a process in which the court solicits the parties to submit additional information that might change the judge’s tentative thinking. Signals constitute a form of helpful notice to the disputants of the court’s potential ruling. As such, on the record signals advance efficiency by providing new evidence that can aid the judge in reaching a more fully informed decision. An *ex parte* comment that is off-the-record is likely to cause more criticism than a comment made before all parties with a court reporter present.¹⁰⁹

Written signals present a few problems as well. Trial judges frequently send not too subtle signals when writing short opinions granting or denying pretrial motions. It is common for a judge to deny a motion for summary judgment because of the presence of an issue of fact, and to write in the opinion that “the movant’s evidence is substantial and that the non-movant’s proof looks slim.” This looks like a signal to the winning side that the court thinks that the trier of fact may decide the matter differently if the case is subsequently tried. This signal is perfectly transparent, on-the-record, and offers little or no impli-

¹⁰⁷ JOHN PAUL RYAN ET AL., AMERICAN TRIAL JUDGES: THEIR WORK STYLES AND PERFORMANCE 177 (1980).

¹⁰⁸ *Id.*

¹⁰⁹ Of course, candid comments by a judge at a mediation session are a necessary mode of providing case evaluation. See, e.g., THE JUDGE’S BOOK, *supra* note 106, at 189-90 (recommending in-chamber caucus sessions at settlement conferences and informal evaluative comments “such as ‘This case sure has its problems;’ or ‘This is really a dog;’ ‘You have good liability, but no damages;’ ‘You have all the damages in the world, but lousy liability’”).

cation of a lack of neutrality. Placing a judicial signal in a written order occurs regularly, and is normally good judicial practice.¹¹⁰

Third, some attorneys are all too happy to receive an unfavorable signal from the court for reasons relating to client management. The attorney may have reached similar negative conclusions about the case but might have difficulty communicating this fear to a client. The unfavorable signal, in this situation, may be viewed positively by counsel. No lawyer likes to pass on unpopular news of her own making to a client. The ability to pass on bad news from a third party, the trial court, is helpful to the fragile attorney-client relationship.

Fourth, some attorneys will disagree with a judge's signal but nonetheless appreciate receiving the bad news for a different reason. This sort of reaction can be labeled "at least we know where we stand." The negative signal is information that may prove helpful in several ways. It may be used to reevaluate a settlement offer that, in light of the signal, now seems fair. Alternatively, the negative signal may cause a claim or defense to be eliminated from the case earlier and enable counsel and the client to concentrate on more positive aspects of their case. The "bad news" evaluation should be seen as free information obtained from a knowledgeable and authoritative source.¹¹¹

Consider the oral signals sent by U.S. District Judge Colleen Kollar-Kotelly in the remedy trial *United States v. Microsoft*.¹¹² This remedy trial, which aired complaints by nine states that an earlier settlement between the United States and Microsoft was improper, included several major signals from the bench. The judge, presiding over a bench trial, characterized the states' remedy proposal – to remove the Microsoft code from Windows software – as a "Draconian" measure that would "destroy" Microsoft's operating system.¹¹³ Such a signal seems clear – the judge was leaning against the states' proposal and pragmatically decided to publicly air her inclinations. Her comment was, of course, on the record. The comment also indicated the judge's tentative position to the states, and afforded them an opportunity to adjust their trial strategy.

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

¹¹⁰ Telephone Interview with Judge Ellen Rosenblum, Circuit Court of Multnomah County, Oregon State Courts (Jan. 18, 2002).

¹¹¹ See Welsh, *supra* note 88 ("[T]here is substantial evidence that attorneys prefer judges who share their reasoned evaluations of each party's case."). Cf. PROVINE, *supra* note 23, at 35-36 (concluding that litigators prefer judges who candidly refer to legal doctrine that may have been overlooked).

¹¹² 2002 WL 31439450 (D.D.C. Nov. 1, 2002).

¹¹³ Kevin Galvin, *States Accused of 'Bait and Switch' Tactics*, SEATTLE TIMES, May 16, 2002, available at <http://archives.seattletimes.nwsource.com/>. . . (last accessed on January 22, 2003) (judge referred to "a lack of clarity" in the position taken by the objecting states).

and her lawyer know which way the judge is leaning and can adjust their settlement strategy accordingly.

For all these reasons, judicial signaling stands apart from other forms of judicial mediation. It is premised on pragmatic human behavior. Signaling, while sometimes problematic, is difficult to view in a wholly negative light, and is particularly difficult to regulate as some signaling is wholly inadvertent and unintentional. Most signaling occurs off the record and often takes place in private chambers. While uninformed and inaccurate signaling can be justifiably criticized, the force of these criticisms appears relatively weak when compared to other negative attributes regarding judicial mediation.

IV. RE-EXAMINING SIGNALING, A NORMAL AND SOMETIMES EFFECTIVE FORM OF DECISION-MAKING

Judicial signaling represents natural behavior. Decision makers do not wait until all the evidence relevant to a choice has been collected to begin their evaluations. It is normal for any person who must make a decision to think about the choices and evaluate information as it is received. The decision maker may “lean” one way or the other while continuing to assimilate information relevant to the decision. Such behavior is not at all aberrant and mirrors that of a typical individual, be that person a judge or juror.

A review of psychological theory and evidence confirms that signaling is a natural mode of behavior. First impressions are important and will undoubtedly occur.¹¹⁴ Nisbett and Ross stress the “primacy effect,” in which early information has “an undue influence on final judgment.”¹¹⁵ This research demonstrates that, rather than waiting until the very last unit of evidence is presented, a decision maker tends to make at least a tentative decision much earlier.¹¹⁶

The natural tendency to engage in judicial signaling is confirmed by legal doctrine. Judges have long used a precautionary instruction to jurors at the start of the case to caution the jury not to decide the case until it begins to deliberate at the close of all the evidence.¹¹⁷ The typical judicial charge, warning jurors against making up their minds before all of the evidence has been admitted, demonstrates that the law has long understood the tendency of decision makers

¹¹⁴ See generally RICHARD NISBETT & LEE ROSS, *Human Inference: Strategies and Shortcomings of Social Judgment* 172 (1980) (concluding that evidence supports that we heavily weigh first impressions).

¹¹⁵ *Id.* Solomon Asch, *Forming Impressions of Personality*, 41 J. ABNORMAL & SOC. PSYCH. 258 (1946) (suggesting that early information is processed differently than later-acquired information because it is processed holistically).

¹¹⁶ NISBETT & ROSS, *supra* note 114 (describing “recency effects, in which later-presented evidence has undue influence on final judgment,” but concluding that “these are rare”).

¹¹⁷ See, e.g., MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT § 1.9 (2001) (“[D]o not make up your mind about what the verdict should be until after you have gone to the jury room to decide that case and you and your fellow jurors have discussed the evidence.”); MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 1.05 (1995) (setting forth a precautionary instruction that jurors should not make up their minds when evidence is admitted); OREGON UNIFORM CIVIL JURY INSTRUCTIONS § 5.01 (2000) (setting forth a caution that jurors should not decide the issue until they commence deliberations).

to lean one way or the other before formalizing a choice. There would be no need to caution the jury if decision makers waited calmly until all information had been received before making a decision. This stock jury instruction should not be considered a general condemnation of bit by bit, sequential processing of evidence. Rather, it represents a caution for jurors to sift through all the evidence, whenever submitted, when deciding the verdict.

Trial advocacy strategies, acknowledging the importance of the opening statement, confirm a pattern of decision-making that evaluates information early in the decisional process. Trial attorneys rate opening statements as a crucial phase of the case.¹¹⁸ Their significance represents the tendency of a juror or judge to react quickly and early in a case. There appears to be some evidence that jurors make tentative decisions at the time of the opening statement.¹¹⁹ Waiting until closing argument risks underemphasizing critical arguments that some fact finders will have evaluated earlier in the case.

The realism writing of Karl Llewellyn supports this reasoning. Llewellyn's thought on judging requires the litigator and judge to engage in "realistic observation."¹²⁰ The realist school understood that judges had the power and human tendencies to decide cases based upon their instincts.¹²¹ The attorney who "observed" the judge to learn the court's leanings would be attuned to realism jurisprudence.

Focus on the "realistic observation" metaphor can be read to present a picture of the trial process that resembles a nine inning baseball game. The game is not over until the last inning, or the end of the trial. However, teams may score in early innings (e.g., the trial court denies a motion to dismiss but makes a disparaging comment about the plaintiff's case). Such early inning scores will be fully reflected in the final outcome. Moreover, early posted scores cause changes of trial strategy that also affect the final outcome.

The baseball analogy can be more fully developed in the context of judicial signaling. A judge who clearly signals throughout the litigation process places an identifiable score on a transparent scoreboard. To be sure, the early inning scores posted by a judge can be obscure or opaque. Yet, the observant litigator (and client) should be able to see the score. Identifying the score permits important adjustments in strategy and becomes critical to the opposing parties in developing late inning tactics.

¹¹⁸ See, e.g., William Lewis Burke, Ronald L. Poulson & Michael J. Brondino, *Fact or Fiction: The Effect of the Opening Statement*, 18 J. CONTEMP. L. 195, 201 (1992) (collecting materials stressing the significance of the opening statement but presenting data from a study of civil cases that thirty-eight percent did not change their minds after an opening statement); THOMAS A. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* 45 (2d ed. 1988) (asserting that jury verdicts are usually consistent with the tentative opinions reached by jurors).

¹¹⁹ See, e.g., Burke, *supra* note 118, at 204-05 (analyzing data showing the rate of changes in juror opinions during a case); IRVING YOUNGER, *THE ADVOCATE'S DESKBOOK: THE ESSENTIALS OF TRYING A CASE* 61-62 (1988) (in discussing the "enormous consequence" of opening statements: "At the end of the opening statements, the jurors cannot help but make up their minds, albeit tentatively.").

¹²⁰ See KARL N. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 144 (1962).

¹²¹ *Id.* at 145 (stressing that a judge is a man, not a "mechanical lawyer on a bench").

A disputant's ability to "know the score" advances economic efficiency. Decisional information becomes less asymmetrical as it is shared by the judge. Serious asymmetry exists where the judge knows how she may rule but refuses to share this information with the likely losing party. Where each disputant has the same information, the risk-reward calculus that drives settlement choices should lead to more efficient decisions to either settle or continue to trial.

All of the above tends to make judicial signaling normal and sometimes valuable. Nonetheless, I do not necessarily advocate systematically increased signals from the bench. Some signals are made with very little information or research and are inaccurate. Occasionally, signals manifest intemperate behavior. It can be argued that such signals are improper. On the other hand, a party potentially victimized by such a signal knows that the judge must be persuaded on the issue at hand.

Some might contend that signals can violate the judicial canon of neutrality and avoid pre-judging the issues.¹²² However, it is not at all clear that a judge's evaluative signal always shows partiality. The judge is merely expressing current leanings when signaling and may be more than willing to lean in a different direction if conditions change. There is also a neutral signal based upon the information received up to a particular point in the litigation. Nonetheless, signals may present an implication of prejudging and, hence, risk an appearance of impropriety in some contexts.¹²³

Signaling is an entirely discretionary practice and should remain so. While signaling may be efficient under the "scoreboard" theory of transparent leanings, no law should require it. A judge will know when there is a need and utility to signal. Signals cannot practically be banned. Some judges seldom or never signal; others signal frequently. Good mediation practice leaves the decision to signal up to the mediator.¹²⁴ We should treat sitting judges no differently.

I do advocate a pragmatic view of the reality of signaling. Signaling happens. It happens despite the canons regulating the behavior of judges. It will happen in the future despite developments in positive law that might ban or regulate it. Our task is to evaluate inevitable signaling fairly and to consider it as part of the settlement process.

V. CONCLUSION

The question of whether a sitting judge should openly evaluate her own cases and share this evaluation with the parties is complicated and may not be solved through clear, categorical rules.

Judicial settlement conferences and judicial mediation involve, at least, an evaluation by the judge. The evaluation is likely to be more fleshed out in a

¹²² See CODE OF CONDUCT, *supra* note 71, at Canon 3 (1990) (requiring a judge to "perform the duties of the office in partiality and diligently").

¹²³ *Id.* at Canon 2, entitled "[A] judge should avoid impropriety and the appearance of impropriety in all activities."

¹²⁴ See, e.g., Stempel, *Beyond Formalism*, *supra* note 10, at 973-74 (effective and sought-after mediators use evaluation as one technique); Lawrence Susskind, *Mediating Public Disputes: A Response to the Skeptics*, 1 NEGOT. J. 117 (1985) (use of evaluation techniques by a mediator can be necessary).

formal mediation context than in the off-the-cuff comment at a scheduling conference or a motion argument. Nonetheless, a theme of this article is that an evaluation is an evaluation, whether made at a motion hearing or at a more formal judicial mediation session.

The question of whether to allow the judge who presides at a trial to mediate the dispute earlier is not easily resolved. I remain troubled by the appearance of impropriety of a judge first evaluating a case at mediation and then later trying the case. The court's neutrality appears to be corrupted by this sequence of events. Professor Sander's fear that judges, during trial, may misuse information provided to them in confidence at an earlier mediation should be taken seriously.

I am unsure, however, if a categorical rule banning the assigned judge from mediating her case is the best answer. The assigned judge has a huge informational edge regarding a case compared to a different judge appointed merely to mediate. The judge may also have a legitimate advantage over an alternative neutral. These factors may urge the parties to allow the assigned judge to mediate and thereby risk a dual role for the judge.

Under such circumstances, my concluding comments regarding this problem may lie in very practical and incremental steps. One federal judge offers to hold settlement conferences in his own cases, but tells counsel that he will not preside over the trial if he holds a judicial mediation earlier.¹²⁵ In essence, the disputants have a choice of allowing the assigned judge to either mediate or try the case. Interestingly, this judge seldom has to pass a case on to a colleague following a judicial mediation, as she is usually able to successfully settle the mediated cases. This may simply measure the judge's prudence in selecting cases for possible mediation. By selecting disputes that are likely to settle, the court will avoid holding settlement conferences that reach impasse.

The obvious advantage of assigning the parties the option to select the judge's role is that it firmly separates the role of a judge as mediator from that of later judging. Moreover, if the parties know and respect the judge who takes this position, they will try to work harder to settle the litigation before a judge who is likely to be a capable mediator.

The dangers of a trial judge implementing an institutional memory to punish the recalcitrant, non-settling attorney may itself be a reason to rigidly separate the roles of judicial mediator and judge. Judging and mediating are, after all, very different tasks, and ones that cannot be easily separated by any rigid firewall. The role of judge requires binding evaluation, while the role of muscle mediator involves evaluation of a non-binding nature. As Professor Subrin has recently said, "the best way that judges can relate to mediation is to make themselves available to try cases. . . ."¹²⁶

¹²⁵ Telephone Interview with Judge Garr M. King, U.S. District Court, District of Oregon (Nov. 1, 2001).

¹²⁶ Stephen N. Subrin, *A Traditionalist Looks at Mediation: It's Here to Stay and Much Better Than I Thought*, 3 NEV. L.J. 196, 227 (2003) (arguing that judges should try cases because of the need to provide trials and the presence of "increasing numbers of capable [private] mediators"). See also *Evans v. Florida*, 603 So. 2d 15, 17 (Fla. Dist. Ct. App. 1992) ("The function of a mediator and a judge are conceptually different. . . . [M]ediation should be left to mediators and judging to the judges.")

Finally, there is reason to worry about a judicial system where courts are encouraged to openly signal their leanings throughout the litigation. Signals carry a message that a court has pre-judged an issue and imply a diminished impartiality. Nonetheless, most decision makers do not wait to decide until all the evidence is presented. Rather, decision makers, be they judges, juries or lay members of the public, begin to decide at early phases of a dispute. Early tentative decisions, or "leanings," are a fact of life for anyone facing a decisional choice and cannot be ignored. Accordingly, judicial signaling is a natural occurrence. Signaling is also difficult to regulate. A ban on signals, many of which are uttered in chambers, or may be non-verbal in nature, is plainly impractical and unrealistic.