

# An Empirical Study of Settlement Conference Nuts and Bolts: Settlement Judges Facilitating Communication, Compromise and Fear

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## INTRODUCTION

### A. *Related Articles*

This article is part of a series which focuses on the myriad approaches taken by judges during settlement conferences. Each of the articles in this series offers an analysis of data submitted by judges regarding the methods they employ during these conferences. Encouraging settlement is increasingly being recognized as an integral aspect of the work for many judges. This trend is championed as both a path to superior justice and as a means to judicial efficiency. However, it is also criticized as an inappropriate blurring of roles and a

threat to the appearance of justice. Some critics have expressed concern that the need to manage dockets may cause judges to be coercive in encouraging settlements. One aspect of this concern is that the settlement efforts of judges are largely conducted in chambers and without the presence of a court reporter; as such, there is rarely a record of exactly how a judge encouraged a particular settlement.

These conflicting viewpoints necessitate further analysis of the judge's role in settlement conferences. This article seeks to contribute to this discussion by presenting empirical data on judges' perceptions regarding their influence on settlement. By understanding the techniques judges utilize in assisting parties to reach settlement, the practice may be further legitimized and some of the fears posited by dissenters may be laid to rest.

The first of the articles in this series is entitled "Adding Judicial Mediation to the Debate about Judges Attempting to Settle Cases Assigned to Them for Trial."<sup>1</sup> 82% of responding judges support the practice of judges conducting settlement conferences for their own cases.<sup>2</sup>

The article then offers the experiences of Judge E. Jeffrey Burke of San Luis Obispo County as an example of the successful implementation of judicial mediation.

The article then examines the difference of opinion related by judges when questioned about a "mediation" as opposed to a "settlement conference."<sup>3</sup> The survey revealed that it is more readily accepted that judges conduct *settlement conferences* on their own cases (82%) than for judges to *mediate* their own cases (71%).<sup>4</sup> Even though the number regarding mediation is relatively high, the survey revealed that in practice only 1.1% of the judges surveyed responded that they always use the label "mediation," and only 5% use the label of mediation half of the time or more.<sup>5</sup> In an attempt to question the "Label of Process" approach with empirical data, the survey included questions meant to establish the frequency of variation in techniques used in mediations as opposed to those in settlement conferences.<sup>6</sup> The conclusion was that 80% of the time, the techniques used in a

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1. Peter Robinson, *Adding Judicial Mediation to the Debate about Judges Attempting to Settle Cases Assigned to Them for Trial*, 2006 J. DISP. RESOL. 335, 347-51 (2006).

2. *Id.* at 344.

3. *Id.* at 355.

4. *Id.* at 356.

5. *Id.* at 358.

6. *Id.* at 374.

“mediation” occur with the same frequency as those utilized in a “settlement conference.”<sup>7</sup>

In a further effort to clarify mediation confidentiality, the applicable statute of the Uniform Mediation Act is considered.<sup>8</sup> The statute, however, specifically states that it does not apply to a *mediation* conducted by a judge who might later make a ruling on the case.<sup>9</sup> One result of this distinction is that if a judge labels the proceeding a settlement conference, the mediation confidentiality protections would not apply; if, however, a judge labels it a mediation, then the statute’s confidentiality protections would apply, even if the case was assigned to that judge for trial.<sup>10</sup>

The second article in this series is entitled “Settlement Conference Judge – Legal Lion or Problem Solving Lamb: An Empirical Documentation of Judicial Settlement Conference Practices and Techniques.”<sup>11</sup> This article focuses primarily on the judges’ perceptions of how they influence settlement conferences.<sup>12</sup> The questions in the survey were designed to enable researchers to determine the percentage of judges who adopt a “directive approach” versus a “problem-solving” approach to settlement conferences.<sup>13</sup> A judge who utilizes a directive approach will focus primarily on the legal strengths and weaknesses of the case before him, and those who take a problem-solving approach will primarily focus on the underlying issues giving rise to the conflict – the parties’ needs, goals, fears, and feelings.<sup>14</sup> The approach taken by a judge is then considered against the percentage of settlements achieved, thereby giving some indication of the effectiveness of one approach over another. From the responses to the surveys, several conclusions were reached.

First, judges who considered themselves to be highly influential reached settlements more often than those judges who felt they had a low level of influence.<sup>15</sup> Second, high settling family law judges asked the parties for their input more often than low settling family law judges while high and low settling civil judges were substantially

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7. *Id.* at 375.

8. *Id.* at 378.

9. UNIF. MEDIATION ACT § 3(b)(3) (2001), available at <http://www.law.upenn.edu/bll/ulc/mediat/uma2001.pdf>.

10. Robinson, *supra* note 1, at 380.

11. Peter Robinson, *Settlement Conference Judge – Legal Lion or Problem Solving Lamb: An Empirical Documentation of Judicial Settlement Conference Practices and Techniques*, 33 AM. J. TRIAL ADVOC. 113 (2009).

12. *Id.* at 121.

13. *Id.* at 124-25.

14. *Id.*

15. *Id.* at 132-33.

the same).<sup>16</sup> Third, when it comes to expressing opinions on the likely outcome of the case at trial, high settling general civil judges possess starkly contrasting viewpoints - half of the judges who report being influential also report that they express opinions about the likely outcome at trial, and vice-versa.<sup>17</sup> Family law judges offer their opinions less frequently than those in general civil law, but high settling family law judges utilize this technique far more often than low settling family law judges.<sup>18</sup> Fourth, judges are relatively evenly divided about urging parties to accept a particular settlement proposal.<sup>19</sup> Fifth, when general civil judges utilize a problem-solving approach by choosing to focus on the parties' underlying needs, goals, fears, and feelings, roughly half of the judges will request that parties pursue creative solutions; one-third will give their advice about relating those underlying emotions; and one-fourth will express opinions about those needs, goals, fears, and feelings.<sup>20</sup>

The end result is that high settling judges tend to consider themselves more influential and make use of directive techniques, such as expressing opinions on likely trial outcomes and encouraging parties to accept a particular settlement proposal. Nevertheless, a significant number of high settling judges avoid those same techniques.<sup>21</sup> Most judges prefer to ask parties and attorneys what they think they should do, instead of telling those same participants what to do.<sup>22</sup>

## B. *Focus and Summary of this Article*

You now hold in your hands the third article in this series, which focuses on four areas: the emphasis the settlement judge places on costs and risks, the techniques employed by the judge to encourage compromise, the techniques utilized to facilitate communication between all those involved, and finally the effect of the judge's persona on the settlement conference.

When imagining a judicial officer, it is not uncommon to call forth an image of stoic reserve, stiff posture, a booming baritone, leather-bound tome clutched to chest, the flowing ebony robe, perhaps even the anachronistic powdered wig perched atop a noble brow. In keeping with these stereotypes, we imagine a mind moored firmly

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16. *Id.* at 134-35.

17. *Id.* at 135-36.

18. *Id.* at 136.

19. *Id.* at 136-37.

20. *Id.* at 138-41.

21. *Id.*

22. *Id.* at 141-42.

in the strictures of legal jargon; unflinching, perhaps unfeeling, viewing the conflict in terms of stark black-and-white fact, permitting influence only by legal precedent.

Reaching determinations about the effectiveness of judicial practices during settlement conferences is not a simple undertaking. The data is based on judges' responses to questions, some of the responses to which may be seen as more socially acceptable. Accordingly, the data contains the dangers of self-reporting bias. Also, the results of this survey are complex because the techniques a judge utilizes may be highly case dependent. Despite these challenges, judicial conduct in effecting settlement is an important area of investigation for several reasons; it is conducted out of view of public scrutiny and off the record. In addition, the current trend in the legal field suggests that overseeing settlement conferences will constitute an increasingly integral aspect of judges' responsibilities in the coming years.

The survey responses served to illuminate a reality that is in stark contrast to our presumptions regarding how judges approach facilitating settlement. A foundational aspect of studying judicial settlement conferences is to document which techniques are most likely to result in settlement.

There are four general conclusions of the survey. The first is that judges regularly encourage settlement by emphasizing costs and risks of litigation. The second is that judges are generally competent at encouraging compromise. The third general conclusion is that most judges can improve their effectiveness at facilitating communication in settlement conferences. The final conclusion is that most judges avoid an intimidating approach and, in contrast, attempt to be likeable.

### C. *Methodology for Surveying California Judges*

California's Administrative Office of the Courts ("AOC") allowed the author to survey the approximately 1,800 Californian trial and subordinate judicial officers<sup>23</sup> regarding judicial attempts to settle civil or family law cases. The data developed from this survey is suspect in that the judges were self reporting and thus prone to view and

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23. This includes all elected and appointed trial judges and commissioners.

interpret themselves in the best possible light.<sup>24</sup> The AOC<sup>25</sup> participated in developing the survey,<sup>26</sup> which asks judges about their views regarding their assistance in the settlement of cases and their practices during of the period of 2000 and 2004.<sup>27</sup>

The surveys were mailed out in an AOC envelope with other AOC correspondence.<sup>28</sup> The responses were returned to a Post Office Box in Winnetka, CA., a little known community in the San Fernando Valley, as part of a comprehensive commitment that participants should not know that a professor from the Straus Institute at Pepperdine University in Malibu, CA was the AOC's collaborator for this project.<sup>29</sup>

For this study, 368 out of approximately 1800 surveyed bench officers responded. While a little disappointing, the low response rate was not completely surprising because the survey was extensive, requiring about fifteen minutes to complete, and judges are notorious for not completing surveys. One weakness of the following analysis and conclusions is that they are based on a limited response. The 368 who responded stated that between 2000 and 2004 they had the most experience in conducting settlement conferences in the following areas:

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24. "[P]eople's assessments of their own abilities to meet various challenges exceed the best dispassionate analyses of those abilities. . . people's assessments of their own traits and abilities have been shown, time and time again, to be overly optimistic." Thomas Gilovich et al., *Shallow Thoughts About the Self: The Automatic Components of Self-Assessment*, in *The Self in Social Judgment* 67 (Mark D. Alicke et al. eds., 2005).

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

26. Survey attached as exhibit A.

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

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

29. The concern was that the responses from the approximately 200 judges who had completed the Straus training program might be positively biased because they appeared to appreciate the training and to like the faculty. In light of this concern, neither Pepperdine nor Malibu were identified in any of the correspondence, which contained the cover letter, return address envelope, postcard, and the questionnaire itself. The last question, which lists various training programs including JAMS, AAA, community mediation organizations, and Pepperdine, was the only exception.

•General Civil <sup>30</sup>	129 respondents
•Family Law <sup>31</sup>	72 respondents
•Limited Jurisdiction Civil <sup>32</sup>	22 respondents
•Complex Civil <sup>33</sup>	6 respondents <sup>34</sup>
•Marked more than one of the above	10 respondents
•Did not conduct settlement conferences in any of the above types of cases in the last four years	85 respondents
•Did not respond to this question	44 respondents

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

Determining the judicial assignments for the various judges is important because the customs and techniques may vary from one assignment to another. The nature of the dispute may explain why certain techniques are favored by judges with a designated assignment. The caseload volume will also vary by assignment. The survey determined that the average number of new cases assigned per year was 441 for general civil, 1317 for family law, 1287 for limited jurisdiction civil, and 235 for complex civil. The docket pressures and workflow for a complex civil judge with 235 new cases each year will be dramatically different than a family law judge with 1317 new

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

31. Black’s Law Dictionary defines family law as “[t]he body of law dealing with marriage, divorce, adoption, child custody and support, child abuse and neglect, paternity, juvenile delinquency, and other domestic-relations issues.” BLACK’S LAW DICTIONARY 638 (8th ed. 2006).

32. In this context, “Limited Jurisdiction Civil” means that a court has [pecuniary] restrictions on the cases it can decide. See BLACK’S LAW DICTIONARY 869 (8th ed. 2006). Small claims is a court of *limited jurisdiction*, because it can only hear cases that claim damages of \$5,000 or less. CAL. CIV. PROC. CODE § 116.220 (West 1998). In 2004, California’s Limited Jurisdiction Courts handled cases that claimed damages up to \$25,000. CAL. CIV. PROC. CODE § 85(a) (West 1998).

33. “Complex Civil” cases are “cases that require exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants,” and “may involve such areas as antitrust, securities claims, construction defects, toxic torts, mass torts, and class actions.” CAL. ADMIN. OFFICE OF THE COURTS, COMPLEX CIVIL LITIGATION FACT SHEET 1 (2008), <http://www.courts.ca.gov/documents/comlit.pdf>

34. While this number is small, at the time of the survey there were only seventeen Complex Civil judges in the entire state of California.

cases each year. Clearly, the settlement conference technique and practices need to be analyzed for each type of judicial assignment.

#### D. *Percentage of Settlements and Template for Presenting Data*

This paper will present one of the survey's questions, an explanation of its significance, the judges' responses to that question, and then the author's analysis and conclusions.

One of the early questions presented in the survey asks judges to fill in the following blank:

"The percentage of cases that settle at my settlement meetings is about \_\_\_\_."

This data identifies which judges report high and low settlement rates; this is important because the responses from the other questions can be presented to isolate the more and less effective techniques according to their reported settlement rate.

The responses for this question reveal the following percentages of judges reporting the corresponding frequency of accomplishing settlement at settlement conferences<sup>35</sup>:

	<b>All Judges</b>	<b>General Civil</b>	<b>Family</b>	<b>Limited Jurisdiction</b>	<b>Complex Civil</b>
<25%	5	7	9	15	0
25-49%	14	12	14	10	0
50%	19	19	20	38	17
51-74%	18	22	10	10	17
>75%	49	42	52	30	66

The data reveal that for all judges 49% report accomplishing a settlement in 75% or more of their settlement conferences and that 38% report accomplishing a settlement in 50% or less of their settlement conferences. This data can isolate the responses for different judicial assignments. Thus the third column establishes that 42% of general civil judges report accomplishing a settlement in 75% or more of their settlement conferences and 38% report accomplishing a settlement in 50% or less of their settlement conferences. The results for general civil judges can be compared to family judges in the fourth column where 52% report accomplishing a settlement in more than

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35. Many of the columns add up to more than 100% because throughout the study, the investigators rounded up for results that were 0.5 or higher and rounded down for results that were less than 0.5. This raw data for many of these columns had results higher than 0.5, creating an outcome greater than 100%.

75% of their cases and 43% report accomplishing a settlement in 50% or less of their settlement conferences. Columns five and six provide the data for limited jurisdiction and complex civil judges.

While this data alone is interesting, it also allows the organization of other data into sub-categories for high and low settling judges.<sup>36</sup> Thus some distinctions in the data will be reported in graphs using the following columns across the top to indicate the groupings of judges whose results are being reported.

<b>General Civil All</b>	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
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The first column reflects the percentages for the 129 general civil judges who completed the survey.<sup>37</sup> The second and third columns are subsets of the first column. The second column isolates the survey results for judges settling 75% or more of their cases. Similarly, the third column isolates the survey results for judges reporting that they settle 50% or less of their cases. General civil judges intent on increasing their settlement rates should be interested in comparing the second and third columns.

The fourth column reports the results for the 72 family law judges who completed the survey. The fifth and six columns are subsets of the fourth column and reflect the survey results for the family law judges who report settling 75% or more of their cases (column five) and 50% or less of their cases (column six). Column seven reports the results for the 22 limited jurisdiction civil judges; subset analysis was not conducted because of the small number of limited jurisdiction judges completing the survey. The last column reports the results for the six complex civil judges who completed the survey; while the small number of complex judge responses raises statistical analysis issues, the results are reported because there are less than 20 such judges in California.

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36. The usage of high and low settling judges carries two connotations that should be addressed. First, the phrases suggest that judges settle or fail to settle cases; it must be remembered that settlement is up to the parties and that the judge merely facilitates the parties' decision. Second, the phrases suggest that settlement is better than not settling; there are many scenarios where observers would agree that not settling is better than settling. The phrases are only utilized to facilitate the presentation of the data.

37. Note that not every participating judge responded to every question. Thus, the percentages for a given question reflect responses for the judges that answered the particular question.

## I. SETTLEMENT JUDGES' EMPHASIS ON COSTS AND RISKS

Choosing to try a case instead of settling is inherently risky and involves a variety of costs. The risk arises because litigants transfer control over the outcome of their dispute to the judge and/or jury. The outcome of a trial is unpredictable, especially compared to settlement where the requirement of party consent provides a measure of control over the solution. The variety of costs associated with trial can include financial, emotional, relational, and opportunity costs. Settlement judges are thought to encourage parties to settle by emphasizing the costs and risks of proceeding to trial.

This emphasis on the “transaction costs” and risks of proceeding to trial could be criticized as encouraging acceptance of less than a participant’s legal entitlement. Some question whether settlement accomplishes superior justice under these circumstances.<sup>38</sup> Others may counter that considering the potentially high costs and unpredictability of trial as factors in the settlement decision supports the conclusion that settlement provides superior justice.<sup>39</sup>

### **Summary of Data Regarding Settlement Judges’ Emphasizing Costs and Risks:**

The data regarding settlement judges emphasizing costs and risks can be summarized by the following conclusions:

1. Settlement judges emphasize the risks of trial compared to the certainty of settlement.

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38. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (“[C]ourts are reactive institutions. They do not search out interpretive occasions, but instead wait for others to bring matters to their attention. They also rely for the most part on others to investigate and present the law and facts. A settlement will thereby deprive a court of the occasion, and perhaps even the ability, to render an interpretation. A court cannot proceed (or not proceed very far) in the face of a settlement. To be against settlement is not to urge that parties be ‘forced’ to litigate, since that would interfere with their autonomy and distort the adjudicative process; the parties will be inclined to make the court believe that their bargain is justice. To be against settlement is only to suggest that when the parties settle, society gets less than what appears, and for a price it does not know it is paying. Parties might settle while leaving justice undone.”).

39. Paul Steven Miller, *A Just Alternative or Just an Alternative? Mediation and the Americans with Disabilities Act*, 62 OHIO ST. L.J. 11, 14 (2001) (“Mediation, as a process in which the parties control the outcome, avoids reliance on the vagaries, expense, and unpredictability of a court and jury judgment.”). See also Lisa A. Lomax, *Alternative Dispute Resolution in Bankruptcy: Rule 9019 and Bankruptcy Mediation Programs*, 68 AM. BANKR. L.J. 55, 74 (1994) (“Some see mediation as an attractive alternative to litigation where the parties have not incurred substantial discovery expense . . . or where a great degree of uncertainty or unpredictability regarding the outcome exists.”).

2. The vast majority of judges emphasize the finality of settlement compared to the possibility of appeals and challenges of enforcing a judgment, but this technique is not as common as emphasizing the risks of trial and is not as prevalent in family law cases.

3. Settlement judges emphasize the financial costs of continuing the litigation.

4. Settlement judges are divided about using the “net to client” technique, with family law judges using it less than general civil judges and general civil judges evenly divided between using it a lot and using it sparingly. Surprisingly, limited jurisdiction judges use it sparingly even though their docket often consists of many small personal injury cases where the technique can be very useful.

5. Settlement judges often emphasize the non-financial costs, such as the emotional, relational, and opportunity costs of continuing the litigation, with high settling family judges doing so more often than low settling family judges.

The extent that judges emphasize costs and risks was measured by asking the judges to report their frequency of the following techniques:

*“I emphasize the risks of trying the case compared to the certainty of settling.”*

This question requires litigants to consider their risk tolerance for trying a case. Judges and mediators use a variety of techniques to emphasize the risk of trial. Some ask the trial attorneys to predict the range of outcomes if the case was tried ten times. The client might be surprised to learn the degree of the spread. A similar technique is to ask the party to view the lawsuit as an investment and point out that he has an undiversified portfolio; the trial attorney will try this case ten times and get the spectrum of outcomes, but the party will only have this experience once and have one outcome. The follow-up question asks whether the party can afford one of the less desirable outcomes.

The judges’ responses are:

	<b>General Civil All</b>	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisd.	Complex Civil
<10% (rarely)	1	2	0	5	3	7	5	0
10-40% (occasionally)	3	4	2	3	3	4	0	0
41-60% (regularly)	6	2	2	12	12	11	9	17
61-90% (often)	27	22	35	34	30	39	32	0
>90% (usually)	64	69	61	46	52	39	55	83

The data confirms the expectation that this technique is highly utilized. Avoidance of risk is one of the greatest incentives for settlement. It should not be surprising that emphasizing this incentive is commonly used across all kinds of judicial assignments. However, it is interesting that 64% of general civil judges usually used this technique compared to 46% of family law judges. This difference could be explained by the bench trials in family law. It would seem to be much easier to allude to the unpredictability of a jury than to your own unpredictability or the unpredictability of another judge. It is also interesting that among family law judges, 52% of high settlers usually use this technique compared to 39% of low settling judges. The variance is minor because in both categories, about 80% of the judges use it more than 60% of the time.

*“I emphasize the finality of settlement compared to the possibility of appeals and challenges of enforcing a judgment.”*

Emphasizing the finality of a settlement is thought to be a common technique in settlement conferences. In addition to the risk of whether a litigant will prevail at trial, even a confident party still needs to consider the possibility of appeals and the challenges of enforcing a judgment against the other side.

The judges’ responses are:

	<b>General Civil All</b>	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10% (rarely)	4	2	5	15	19	14	9	0
10-40% (occasionally)	11	12	2	13	16	10	41	0
41-60% (regularly)	16	12	21	21	19	28	9	33
61-90% (often)	36	37	37	24	16	31	23	17
>90% (usually)	34	37	35	27	31	17	18	50

It is not surprising that this technique is heavily utilized by general civil judges. The frequencies are very similar for both high and low settling general civil judges so it is not a factor in differentiating effectiveness in accomplishing settlements. However, it is surprising that family law judges use it substantially less than general civil judges. Family judges may have some hesitancy to use this technique because it acknowledges that there are realistic limits to the courts' powers. The challenges of enforcing judgments in family law are documented by the high frequency of contempt motions. It is interesting that almost one-third of the high settling family law judges usually use this technique.

It is also interesting that this technique is not as uniformly embraced as the prior technique of emphasizing the risks associated with trying the case. Judges might be focusing on the challenges of prevailing at trial, because that is the immediate task at hand and that is the judges' domain. It would seem that judges who are willing to emphasize the challenges of winning at trial would be equally willing to emphasize that sometimes winning at trial can be a hollow victory.

*"I emphasize the financial costs of continuing the litigation."*

In addition to emphasizing risks, judges are thought to often encourage settlement by emphasizing the costs of continuing the litigation. Continuing to litigate a case can be remarkably expensive, due to the substantial costs of hiring attorneys and expert witness. Litigants who have limited their costs by entering into contingency fee agreements with their lawyer can still have significant financial exposure if they proceed to trial. California Code of Civil Procedure

Section 998 requires either party to pay the other's costs and attorney's fees if they go to trial and fail to accomplish a more advantageous verdict than a designated settlement offer from the other side.<sup>40</sup> Also, contract terms sometimes require the loser at litigation to pay the prevailing party's attorneys fees. These fee-shifting provisions create situations where many litigants cannot afford to "roll the dice" at trial because if they lose (or don't win enough), they could be financially ruined. Avoiding additional financial costs is a significant incentive to settle a lawsuit. Thus, it should be expected that a settlement judge would frequently emphasize this incentive.

The judges' responses are:

	<b>General Civil All</b>	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10% (rarely)	3	4	2	8	9	7	9	0
10-40% (occasionally)	5	2	2	8	3	14	0	0
41-60% (regularly)	9	10	9	9	9	7	23	0
61-90% (often)	25	25	28	27	21	29	18	33
>90% (usually)	59	59	58	49	58	43	50	67

The data confirms the expectation that this technique is highly utilized. The incentive is so compelling that the main question it

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40. CAL. CIV. PROC. CODE § 998 (West 2006) (“(c)(1) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant’s costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant . . . . (d) If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover post offer costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the plaintiff, in addition to plaintiff’s costs. (e) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the costs under this section, from the time of the offer, shall be deducted from any damages awarded in favor of the plaintiff. If the costs awarded under this section exceed the amount of the damages awarded to the plaintiff the net amount shall be awarded to the defendant and judgment or award shall be entered accordingly.”)

raises is why such a technique is not being utilized with greater frequency. On a purely conjectural note, some judges may avoid this emphasis because it is so obvious that it is unnecessary and even insulting. Nevertheless, this factor should be considered by litigants and it is heavily emphasized by judges.

It is interesting that 59% of general civil judges usually use it compared to 49% of family judges. The bench trial differentiation does not apply for this technique so this difference might be explained by the undocumented perception that family law may have more self represented litigants than general civil cases, and thus the costs of continuing the litigation may not be as extensive. Family law has a greater percentage of cases that do not require expert witnesses, so those costs also are inapplicable. A second family law comparison is that 58% of high settling judges usually use the technique compared to 43% of low settlers. This result seems to suggest that it is an effective technique.

*"I provide the parties with a "net to client" analysis comparing the amounts received by the client after fees and costs from a settlement offer to that from a likely judgment after trial."*

Since the dynamic of how financial costs are calculated is often different for settlements compared to trials, some judges provide parties with a "net to client" analysis. The "net to client" technique allows the judge assisting the parties to compare the net amount a client would receive if she were to accept the settlement offer with the net amount the client would receive if she were to accomplish a designated judgment amount after trial.

For example, consider a settlement offer of \$60,000 compared to a projected judgment of \$100,000 for a personal injury case with an attorney representing the plaintiff in exchange for a contingency fee. In many instances, the attorney's fee would be 33% of a settlement, but 40% if it goes to trial. Typically there are additional costs if a case goes to trial, such as fees for expert witness testimony or additional deposition fees. This kind of case could have \$10,000 in costs at the time of serious settlement discussions compared to \$20,000 of total costs if the case must be tried.

When contemplating acceptance of a settlement offer, the informed client should compare the amount they will receive in either situation. For settlement, that amount is the \$60,000 offer, less \$20,000 in attorney fees (33%), less \$10,000 in costs for a net to client of \$30,000. If the case is tried and produces the targeted judgment of \$100,000, the amount is \$100,000 less \$40,000 in attorney fees (40%),

less \$20,000 in costs for a net to client of \$40,000. The net to client technique is used to focus the client on only a \$10,000 differential between the amount she would receive from a successful trial outcome and the settlement offer. In addition, the client will only receive the \$40,000 if she is successful at trial; if not, she will end up with nothing. Accordingly, the settlement offer has advantages of certainty and immediacy. If the technique is not used, the unsophisticated client might believe she is foregoing \$40,000 by accepting the settlement offer.

The judges' responses are:

	<b>General Civil All</b>	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10% (rarely)	22	25	17	33	38	36	46	0
10-40% (occasionally)	21	20	21	17	19	18	18	50
41-60% (regularly)	17	14	26	29	19	32	27	0
61-90% (often)	26	31	26	12	13	11	0	50
>90% (usually)	13	10	10	9	13	4	9	0

It is surprising that this technique is only moderately utilized. It is utilized less in family law than in general civil, likely as a result of several factors: in family law, contingent fee agreements are rare, more people are self-represented, the litigated issues may not be financial, and one party could be ordered to pay the other's attorney's fees. The frequency among general civil judges runs the full gamut of about 40% using it often or usually and about 40% using it occasionally or rarely. The data suggests that the utilization rate is similar between high and low settling judges, with 25% of general civil and 38% of family law high settling judges eschewing this technique.

The low utilization of this technique is especially surprising because it is a tool for emphasizing costs and risks of continuing the litigation. One of the questions above previously established that 64% of general civil judges usually emphasize risks. The survey question after that established that 59% of general civil judges usually emphasize costs. It is a mystery why more judges do not use a "net to client" analysis more often. Possible explanations are that the judges are unfamiliar with it, that judges believe it intervenes too much in the attorney-client relationship, or that it is the plaintiff's

attorney who should inform their clients of these realities before or during a settlement conference.

It is surprising that limited jurisdiction judges don't use this technique more often. It is especially useful in small personal injury cases, which constitute a significant percentage of the limited jurisdiction caseload.<sup>41</sup>

*"I emphasize the non-financial costs (including but not limited to emotional, relational, and opportunity) of continuing the litigation."*

In addition to risks and financial costs, litigants face non-financial costs of continuing the litigation.

Settlement judges are typically expected to focus on the obvious financial costs and risks of continuing the litigation. This question inquires as to the frequency that they emphasize the more nuanced non-financial costs of litigation such as the emotional toll of litigation, how the litigation will likely damage the relationship between the litigants, and the costs of investing time in the litigation compared to investing time in other pursuits. These could be important factors in a case between family members litigating over the control of a family-owned business who are emotionally upset by the litigation and would like to reconcile. These costs could be even greater if continuing the litigation would damage the reputation or good will among the clients of the enterprise. Also, if a new business opportunity arises, those parties embroiled in litigation will be unable to focus their time solely on developing it.

Emphasizing these types of costs requires the settlement judge to be sensitive to extra legal considerations that are related to the legal proceedings, which judges might not necessarily be comfortable doing.

The judges' responses are:

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41. Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 327 (1988) ("Settlement is more efficient for the parties, giving them more of what they hoped to gain at less cost.").

	<b>General Civil All</b>	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10% (rarely)	4	4	0	4	6	3	9	17
10-40% (occasionally)	7	8	5	7	6	10	18	0
41-60% (regularly)	15	12	17	10	3	21	18	0
61-90% (often)	27	27	29	32	33	24	18	33
>90% (usually)	47	49	50	46	52	41	36	50

The data establishes that this technique is frequently utilized by settlement judges in all assignments. In nearly every category, almost half of the judges usually use it and 75% of judges use it more than 60% of the time.

This is somewhat surprising because it reveals that judges frequently discuss the human and business costs of litigation in settlement conferences. The image of the settlement conference judge who sticks to the facts and law is continuing to fade.<sup>42</sup> However, the high utilization of this technique is not that dramatic because the human and business costs are only brought up to discourage continuing the litigation, not necessarily to attempt to satisfy the human or business needs or to solve those problems. The question in Section III(C) below explicitly asked how often judges' primary focus was on satisfying the parties' underlying needs, goals, fears, or feelings; the judges reported a lower frequency of utilization there than for this question.

It is surprising that the frequency of this technique is substantially the same between general civil and family law judges. Family law necessarily involves parties who have had a significant relationship, and most parties will need to relate to each other as parents after the litigation. The non-financial costs of the well-being of their children and their own mental health are significant. In comparison, general civil calendars include some cases between a claimant and an insurance company, which generally do not carry the same degree of emotion, past relationship, and future relationship. The subject matter in family law would seem to lend itself much more to this technique, but the frequency of utilization was almost the same.

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42. Forty-eight percent of general civil judges and 41% of family judges responded that in more than 60% of their settlement conferences, they focus primarily on satisfying the underlying needs of the parties, instead of solely considering the legal strengths and weaknesses of the arguments. See Robinson, *supra* note 11, at 127.

Granted, the utilization was high in both categories, but there was room for this technique to be utilized more in family law than in general civil cases.

Another interesting comparison is that 52% of high settling family law judges usually used this technique compared to 41% of low settling family law judges. The trend is more dramatic when comparing 85% of high settling family law judges using this technique often or usually compared to 65% of low settling family law judges. This data suggests this technique is effective in helping to settle family law cases.

### *Summary of Costs and Risks Data*

In both family and general civil law, almost 80% of responding judges reported emphasizing the risk of trial in more than 60% of their settlement conferences, establishing that judges regularly utilize risk avoidance as a tool when leading parties to a settlement. The 80% utilization rate drops to 50% for family law judges, probably because the judges will often be the decision-maker at trial; some judges are evidently reluctant to emphasize the risks which accompany the decision they will make.

Judges had a disparate reaction to the technique of emphasizing the finality of settlement as a means of encouraging the parties toward settlement. Both high and low settling general civil judges reported using this technique in more than 60% of their settlement conferences. The utilization of this technique by family law judges was evenly dispersed – about 20% reported using it in more than 90% of their settlement conferences, with 20% using it in less than 10% of their settlement conferences.

Most judges almost always encourage settlement by emphasizing the financial costs of continuing litigation. This technique is more common among family law judges who settled most of their cases compared to family law judges with substantially lower settlement rates.

A net-to-client analysis consists of a judge offering the parties a comparison of the net proceeds they would receive from settlement versus the net proceeds they will likely receive with a successful trial. It is a specific technique for itemizing the financial costs of continuing the litigation. While a potential judgment at trial may be a larger number, this analysis allows the parties to understand that the additional costs of litigation may result in the party's receiving a final amount that is only slightly more than if they had accepted the settlement offer. Family law judges utilize it less than general civil

judges. Less than 50% of general civil judges use it more than 60% of the time; 25% of high settling general civil judges and 38% of high settling family law judges reported that they avoid the technique altogether. Surprisingly, this technique was not as frequently utilized as the general concept of “emphasizing the financial costs of continuing litigation.”

Most judges almost always emphasize the non-financial costs of continuing litigation. This data reinforces earlier findings that judges regularly explore underlying needs, goals, fears, and feelings. Although it would seem that the personal nature of family law would lend itself readily to use this technique, family law judges reported using it with the same frequency as general civil judges. Family law judges with high settlement rates used this technique substantially more frequently than family law judges with low settlement rates.

Regarding risks and costs, as expected, judges were very accepting of encouraging settlement by emphasizing the financial and non-financial costs of proceeding to trial. Judges also regularly emphasized the risks of trial and the finality of settlement.

## II. JUDICIAL ACUMEN AT ENCOURAGING COMPROMISE

The next area of inquiry probes the judges’ frequency and acumen in using a compromise approach to settlement negotiations. The compromise model of negotiation is prominent in litigation and in its simplest terms is characterized by:

Narrow framing of the issue as an allocation of scarce resources (time with the children or the amount of money that will be exchanged);

Both negotiators anticipate being asked to compromise so they both exaggerate their initial offers; and

Negotiators move towards more moderate offers through a series of concessions.

Since the law often frames issues as an allocation of scarce resources and lawyers experienced in litigation anticipate a compromise approach to negotiation, settlement judges are often perceived as needing to encourage compromise. Even if a judge attempted to use another methodology, the parties and their attorneys would probably expect the compromise approach to negotiation and would necessitate such an approach by conforming their behavior and strategies to their expectations. It would be very surprising if judges didn’t use this approach with overwhelming frequency. The interesting part of

the investigation might be the frequency that judges use nuanced techniques available to facilitate compromise.

### **Summary of Judicial Acumen in Encouraging Compromise Data:**

An overall summary of the frequency and acumen of settlement judges encouraging compromise is:

1. A preponderance of settlement judges regularly request concessions, but there is a significant percentage of judges who avoid this practice. The technique is more prevalent among general civil judges than family judges. High settling general civil judges do this more often than low settling general civil judges, but a significant number of high settling family law judges use this technique sparingly.

2. Settlement judges largely avoid explaining how size of concessions and the amount of time between concessions signal the degree of a party's flexibility in negotiations. High settling general civil judges do it more often than low settling general civil judges. Family law judges do it less often than general civil judges and high settling family law judges do it less often than low settling family law judges.

3. The frequency that settlement judges utilize conditional or hypothetical offers is evenly distributed. Judges in all types of civil assignments use it frequently, others moderately, and others sparingly.

4. General civil judges report the full range of utilization of the bracketing technique. High settling general civil judges are the most polarized with a large cluster reporting using it in more than 90% of their cases and a large cluster reporting using it in fewer than 10% of their cases. Family law judges significantly avoid using brackets, with high settling family law judges avoiding it more than low settling family law judges.

5. Settlement judges tend to avoid emphasizing time limits for settlement conferences. It is still the exception, but is done with more frequency in family law cases. High settling general civil judges avoid the practice more than low settling general civil judges.

The judges' skill at encouraging compromise was measured by asking the judges to report their frequency of the following techniques:

*“I request concessions from one or more parties in the negotiation.”*

The most obvious and direct way a settlement judge can encourage compromise is simply request the parties to make concessions. For example, if a personal injury plaintiff is demanding \$100,000 and the insurance company is offering \$10,000, a settlement conference judge with a facilitative style could simply observe that the case will only settle if both sides are flexible and ask them to move toward more moderate numbers. A more directive judge could “request concessions” by privately pointing out her opinion of the weaknesses in each of their cases and possibly suggesting the amount they should be offering/demanding. The data from this question is not indicative about whether a judge is more facilitative or evaluative, but it documents the prevalence of this dynamic.

The judges’ responses are:

	<b>General Civil All</b>	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10% (rarely)	3	2	3	10	18	3	18	17
10-40% (occasionally)	15	10	28	22	12	35	5	17
41-60% (regularly)	13	14	15	16	18	17	18	0
61-90% (often)	27	20	28	27	27	24	36	17
>90% (usually)	43	53	28	24	24	21	23	50

The data for general civil judges largely confirms that this is a frequently used technique. Even more interesting is that 53% of the high settling general civil judges report usually using this technique compared to only 28% of the low settling general civil judges. This suggests a positive correlation between this technique and settlement rates for general civil judges.

In comparison, the results for the family law judges are surprising. The profile for all family judges reveals that this technique is not as prevalent as in general civil. The role of a judge asking for compromise solutions is still possible, but even 18% of the high settling family judges report that they avoid this technique and rarely use it. Even more confusing is the datum that indicates that only 3% of the low settling family law judges rarely use this technique because this suggests that unsuccessful settling judges are using this standard technique more than the successful settling judges. The statistical argument in support of this technique among general civil judges is

not confirmed by the family law judge data. The emotional nature and “best interests of the child” principle in family law might be barriers to compromise or barriers to judges openly encouraging compromise.

Given the accepted legal framework and limited time available to judges, the expectation is that almost all the time the judge would inquire as to how much each side is willing to pay or receive to settle the case and then use some technique to request concessions. The fact that about 20% of all judges use this technique rarely or occasionally reveals that some judges have a different paradigm for their settlement conferences.

*“I explain to the parties that they are signaling their degree of flexibility in the negotiation by the size of each concession and the amount of time between concessions.”*

Asking parties to make concessions is an obvious technique for a settlement judge. More subtle, and debatable, is the issue of helping parties to make concessions intelligently.

Having anticipated that the concession/compromise approach to bargaining would be a more important aspect of judicial settlement conferences, this question probes the judges’ level of sophistication with this model. Using this technique, judges help parties understand how the size of concession and time between concessions sends a signal to the other negotiator regarding the degree of flexibility in the negotiation.<sup>43</sup>

Judges using this technique encourage each side to make concessions large enough to communicate a gradual willingness to explore a reasonable compromise if the other side will reciprocate. If a party suggests a very small concession, the judge has an opportunity to either suggest that a larger concession is needed or confirm that the party wants to communicate that he is reaching a point where he is becoming inflexible. For example, if a plaintiff who has already made a \$100,000 demand privately suggests to the settlement judge that she is willing to make a \$1,000 concession to \$99,000, the judge should let the plaintiff’s attorney know that such a move is signaling

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43. Gary Goodpaster, *A Primer on Competitive Bargaining*, 1996 J. DISP. RESOL. 325, 346-49 (explaining that concessions convey information both about a party’s wants, intentions, and about the party’s perception of the other party. Concessions are not only a means to narrow the difference between what one party wants and the other wants to give, but are also a way to gain a tactical advantage. A skilled negotiation utilizes concessions to affect not only the expectations of the other party but also the way that party perceives them).

that the plaintiff has little flexibility; the defense would probably not counter offer unless the defense is willing to pay more than \$80,000 and maybe even more than \$90,000. The judge should encourage the plaintiff's attorney to stay with the \$1,000 concession if they are not willing to settle below \$80,000 but if they are willing to settle at significantly lower numbers and want to try to settle the case that day, they should consider a significantly larger concession. The parties are communicating by the size of their concessions and the judge is making sure they understand the messages they are sending.

Judges using this technique are also conscious of the importance of the amount of time between concessions. This approach could be counterintuitive for judges under a heavy time pressure. Parties interpret the degree of flexibility in the negotiations by the promptness between concessions.<sup>44</sup> The most common mistake occurs when it takes 40 minutes for the plaintiff to make a concession (because they need to tell their story and have been personally traumatized) and then only five minutes for an insurance company to make its reciprocal concession (because there is less need to tell a story and the claims representative has not been personally traumatized). Since the judge is in a hurry, he is tempted to immediately relay the defendant's concession to the plaintiff. The experienced settlement judge appreciates the importance of timing the delivery of concessions and may discuss other issues with the defendant so that when the defendant's concession is delivered to the plaintiff, it will be more appreciated.

The judges' responses are:

	<b>General Civil All</b>	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10% (rarely)	43	41	43	66	79	52	43	17
10-40% (occasionally)	20	20	21	22	12	35	20	17
41-60% (regularly)	16	12	19	9	3	14	16	33
61-90% (often)	13	10	14	2	3	0	13	17
>90% (usually)	8	16	2	2	3	0	8	17

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44. *Id.* See also Charles B. Carver, *The Negotiation Process*, 27 AM. J. TRIAL ADVOC. 271, 304 (2003) (explaining that the timing of concessions is integral to an effective negotiation. Rapid or unprecedented concessions may damage the settlement process irrevocably. If tactfully used, a concession may indicate a cooperative attitude, and incite a counteroffer).

This technique is not highly utilized. It is used more in general civil than in family law, but only about 20% of general civil judges use it usually or often. It is significant that 16% of high settlers and only 2% of low settlers in general civil reported usually using this technique. One explanation for the sparse utilization of this technique is that some judges may not be comfortable with it. These patterns in negotiation are common in civil litigation, but many judges are appointed after an almost exclusively criminal law background. Another interpretation could be that all the judges do not include this technique because it violates the autonomy of the parties or puts the settlement judge in too active a role in the negotiations.

*“I use conditional or hypothetical offers to assist in bridging the difference between offers and demands.”*

Another way settlement judges could assist parties in compromising is by using conditional or hypothetical offers. This question, like the one before it, is a common technique among private sector mediators when facilitating the concession/compromise approach to negotiation. The technique allows each side to make a confidential conditional or hypothetical concession, but the mediator is allowed to disclose that concession, only if the other side agrees that it will settle the case. Thus a mediator can privately ask both parties if they will accept \$50,000, if the mediator can convince the other party to accept it. Each of them can safely reveal to the mediator that \$50,000 would be an acceptable outcome, but maintain their exaggerated positions for negotiation purposes if the other side is not ready to conclude the negotiations.

The judges' responses are:

	<b>General Civil All</b>	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10% (rarely)	12	18	7	22	18	21	14	0
10-40% (occasionally)	20	22	21	9	3	18	23	0
41-60% (regularly)	31	20	40	27	36	18	27	33
61-90% (often)	26	29	23	30	33	25	27	33
>90% (usually)	11	10	9	12	9	18	9	33

The utilization of this technique is evenly divided. This result is surprising because the stereotyped perception is that settlement conferences almost always focus on the allocation of a scarce resource, such as money. In such situations, the negotiations will often progress to a point where a plaintiff and defendant are closing in on an acceptable number. The hypothetical or conditional offer technique allows the parties to reveal an acceptable compromise with less of a likelihood of being exploited by the other party. The time pressure on judges suggests that this time-saving technique would have a higher frequency rating. As with the prior question about explaining signals, this technique may have the reduced frequency rating because it is unknown or considered to be too activist by some judges.

Even more surprising is that this technique appears to be more disfavored among general civil judges who are high settlers than those who are low settlers. The 18% of high settlers who rarely use this technique compares to only 7% of low settlers. This result is surprising because this technique is thought to be fairly common and effective among private sector mediators.

*“I use bracketing techniques [have both sides make a confidential offer to me in an attempt to get within a designated range] to assist in bridging the difference between offers and demands.”*

Another technique for assisting parties in compromising is the use of “brackets.” This technique is used to bring parties into a more moderate bargaining range. This technique can be helpful when both parties make unrealistic opening offers (\$1 and \$1,000,000) and then express a reluctance to make a meaningful concession because the other party is being so unreasonable. The settlement judge might jump start the settlement effort by privately asking each side where they think the other side should have started the negotiation, if the other side were genuinely trying to settle the case. The settlement judge must also ask, “If the other side had been more reasonable, what significant concession would you have been willing to make to show that you also are genuinely trying to settle the case?”

The answers to those questions from both sides might enable the judge to explore a hypothetical bracket. Thus the judge could privately ask plaintiff if he would be willing to lower his demand to \$500,000 if the defense made an offer of \$100,000. Of course the

same hypothetical bracket could be presented privately to the defense. If the mediator can get both of them to agree to the hypothetical bracket, it can be shared and the parties have narrowed their difference.<sup>45</sup>

The judges' responses are:

	<b>General Civil All</b>	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10% (rarely)	29	37	28	60	70	50	18	17
10-40% (occasionally)	14	14	14	12	9	14	23	17
41-60% (regularly)	16	14	14	16	15	14	9	17
61-90% (often)	23	14	33	10	6	18	37	17
>90% (usually)	19	20	12	2	0	4	14	33

This technique is not prevalent among the general civil judges and far less prevalent among the family law bench. Again, only about 40% of generally civil judges use it usually or often. Equally telling is that 37% of the high settling general civil judges and 70% of the high settling family law judges report that they rarely use it.

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45. The author once settled a case without ever completing a mediator's opening statement by using three successive brackets. The parties complained at the beginning of a court ordered mediation that this was a waste of time because the offer and demand were so far apart. Plaintiff was demanding \$200,000 and the defense was offering \$10,000. The author shared that he was a volunteer and not interested in wasting their or his time. He suggested using a bracket to determine if we should invest the time to try to settle the case. He asked the parties how close they would need to be to merit the meeting. After a brief discussion, they agreed that if they were within \$90,000 the meeting would be worthwhile. Following the instructions, they each gave the mediator a paper with a revised offer on it attempting to get within \$90,000 of each other. Per the agreement, the mediator revealed that they had been successful at the task because the plaintiff had dropped his demand to \$100,000 and the defense had gone up to \$20,000. The mediator proceeded to commence his opening statement, but was interrupted. One of the attorneys said he didn't want to listen any more. Instead he wanted to do another bracket to see if the parties could get within \$40,000. The other attorney joined in this mutiny of the mediation, so the mediator agreed. This time the plaintiff dropped his demand to \$60,000 and the defense increased his offer to \$25,000, so again the parties were informed of the progress. The mediator attempted once again to complete the opening statement, when one of the attorneys objected and asked to do a final bracket to see if the parties could get within \$10,000 with an understanding that if they did, they would split the difference and be done. The other attorney agreed so the mediator consented. Plaintiff lowered his demand to \$40,000 and defense increased his offer to \$30,000. The mediator informed them that the case was settled for \$35,000 and complained that he never explained confidentiality.

Clearly judges can successfully settle cases without this technique, but it appears to have some usefulness for some judges. Somewhat generally, but especially among family law judges, it is utilized more by low settling judges.

*“I emphasize that I only have limited time for this settlement meeting.”*

Another technique for encouraging compromise is to force movement by creating time limitations. Emphasizing that time is a limited resource is a way for judges to pressure parties to bargain in earnest and make decisions. Especially when asking parties to accept a compromise, there is an element of a waiting game between the parties to test each other’s willingness to offer a better deal. The settlement judge is coaxing both sides to a reasonable compromise and might expedite the process by creating time pressure. These negotiation dynamics combined with the general sense that judges experience time pressure because of the volume of cases on their dockets create the expectation that judges would often utilize this technique.

The judges’ responses are:

	<b>General Civil All</b>	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10% (rarely)	59	69	44	35	39	31	59	50
10-40% (occasionally)	20	14	23	24	15	31	27	50
41-60% (regularly)	11	6	21	19	24	10	0	0
61-90% (often)	6	6	7	9	9	10	9	0
>90% (usually)	5	4	5	13	12	17	5	0

The low frequency usage of this technique for settlement conferences is surprising. Again, the classic image of a settlement conference is lots of arm-twisting in a context of lots of time pressure.<sup>46</sup> For

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46. JUDGE KENNETH E. CONN, *SETTLEMENT CONFERENCE: A HANDBOOK FOR JUDGES AND LAWYERS* 20 (1988) (“Patience and persistence are the sword and shield of the successful settlement conference lawyer. . . [a]ll too often, a lawyer will encounter a judge who simply wants to ‘handle’ the case, check it off his calendar, and go on to something else.”). See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 33-68 (1994) (finding there is evidence a majority of practitioners utilize arm-twisting, case evaluation, deal-making or problem-solving) [hereinafter BARUCH BUSH]. See also James A. Wall & Dale E. Rude, *The Judge as Mediator*, 76(1) *JOURNAL OF APPLIED PSYCHOL.*, 54 (1991); Louis Otis & Eric H. Reiter, *Mediation by Judges: A New*

a judge to rarely emphasize that she has allocated limited time for this meeting creates a different image. The question becomes is the judge not emphasizing his limited time for the settlement conference because he is not feeling time pressure, or is the judge feeling time pressure but not emphasizing that with the parties.

In either event, the data for high and low settling general civil judges suggests that judges generally avoid this approach because it is ineffective. While neither group embraced this technique, the low settling judges used it with more frequency than the high settling judges: 21% of low settling judges used regularly compared to only 6% of high settling cases. This data must be interpreted in light of the data that showed that high settling judges were more likely to have longer settlement conferences than low settling judges.<sup>47</sup> The explanation may be that low settling judges try to have quicker sessions and then need to emphasize limited time availability. The lower settlement rate suggests that a hurried approach is less likely to accomplish a settlement. The lower settlement rate could be attributed to not having dedicated enough time, but it also might reflect resistance to time pressure from the parties.

That family law judges use this technique a little more often is not surprising because those participants might have more of a felt and actual need to tell a longer story. When custody and visitation of children are concerned, the parents might want to inform the judge of enough negative behaviors to try to establish a pattern. In such instances there may be more of a need for the judge to let parties know that there is a limit to his time. Family law judges also reported dramatically greater caseloads to manage.<sup>48</sup>

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*Phenomenon in the Transformation of Justice*, 6 PEPP. DISP. RESOL. L.J. 351, 363-64 (2006) (explaining the significant impact a judge can have on the mediation process).

47. Robinson, *supra* note 11, at 120; John C. Crastley, *Judicial Ethics and Judicial Settlement Process: Time for Two Strangers to Meet*, 21 OHIO ST. J. DISP. RESOL. 569, 575-76 (2006); Otis & Reiter, *supra* note 46, at 364-71.

48. [48A] Question 16 of the survey asked judges to respond with the average number of civil or family cases assigned to them per year. Docket management is one of the factors that could affect the frequency with which trial judges utilize settlement conferences. The hypothesis is the higher the caseload, the greater the frequency that judges would conduct their own settlement conferences. Eighty-nine percent of the general civil judges responding to the question were assigned less than 900 cases per year, with 30-51% assigned less than 200 cases and between 200 and 550 respectively. This compares with 55% of family judges reporting more than 900 cases assigned each year. The phenomenon of 64% of family judges serving as settlement judge for cases when they also serve as trial judge (compared to only 32% of general civil judges) might be explained by the family judges' dramatically greater caseload, combined with an environment in which other judges are not available to receive a referral for settlement conferences.

*Summary of Judicial Acumen at Encouraging Compromise Data*

When a judge requests concessions, he is taking an active role in encouraging both parties to come away with a less advantageous outcome than they have demanded. Although it may seem that judges would be reticent to take such an active role in the settlement process, the technique is frequently used among general civil judges. More than half of high settling general civil judges report using the technique more than 90% of the time. That a small percentage of low settling judges reported using this technique confirms the conclusion that there is a positive correlation between utilization of this technique and leading parties to settlement in civil cases. Civil judges probably use this technique a great deal because of the common practice in civil litigation of plaintiffs demanding a much more advantageous outcome than the opposing parties are willing to accept.

Interestingly, family law judges are less likely to request concessions and almost 20% of high settling family law judges report using this technique sparingly.

Judges reported that they rarely engage in an explanation of the underlying significance of the size and timing of concessions. A minority of general civil judges reported using this technique in more than half of their settlement conferences. Almost all of the participating family law judges reported that they engage in this practice in less than 40% of their settlement conferences. Although more prevalent in general civil law than among family law judges, this technique is not highly utilized.

Both family law and general civil judges are evenly divided when it comes to suggesting conditional or hypothetical offers between parties. High settling general judges appear to engage in this practice less than low settling judges, which calls into question its effectiveness as a means of reaching settlement.

General civil judges rarely use bracketing techniques and family law judges utilize it with even less frequency. Among high settling judges, about 2/3 of family law and 1/3 of general civil judges reported that they use brackets less than 10% of the time.

Judges reported that they avoid emphasizing the limited time available for settlement conferences. A substantial majority of general civil judges use this technique in less than 10% of their settlement conferences. In family law, the majority use it less than 60% of the time. In both areas of law, low settling judges utilize this technique with more frequency than high settling judges, indicating that it is a method to avoid.

## III. JUDICIAL ACUMEN AT FACILITATING COMMUNICATION

One alternative to encouraging compromise in the shadow of the law is to encourage a creative problem solving approach to negotiation.<sup>49</sup> The problem solving approach depends on parties being willing to reveal their underlying “interests” like fears, goals, needs, principles, values, and feelings. The problem solving approach is advanced when the settlement judge or private sector mediator is especially good at facilitating communication. The judge begins by creating rapport so the parties are willing to confide in the settlement official. The mediator or settlement judge can then choose to either encourage communication between the parties or simply have the advantage of this inside-the-heart information as she attempts to assist the parties in crafting an acceptable agreement.

An emphasis on facilitating communication is the foundation of many mediation training programs.<sup>50</sup> This emphasis is sometimes identified as a basis for contrast between settlement conferences and mediation. Stereotypic settlement judges are perceived to be too obtuse or busy to be concerned with parties’ emotions. They are thought to be critically analytical to the point of excluding empathy. Their perceived goal is to accomplish a settlement (and take a case off their docket) rather than helping parties understand each others’ emotional needs. In short, it is anticipated that settlement judges might not have the personality or temperament for facilitating communication. Their legal education almost certainly failed to provide them with the relevant training.<sup>51</sup>

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49. See ROGER FISHER & WILLIAM URY TYLER, *GETTING TO YES* 65-80 (Houghton Mifflin Co. 1991).

50. See Stephanie A. Henning, *A Framework for Developing Mediator Certification Programs*, 4 HARV. NEGOT. L. REV. 189, 220 (1999) (“Mediation practitioners agree that all mediators need training in basic mediation process, communication, and conflict resolution”); see also Kathy Kirk, *Mediation Training: What’s the Point, Are the Tricks Really New, and Can an Old Dog Learn?*, 37 WASHBURN L.J. 637, 650 n.64 (1998) (“The major underpinnings [of mediation] are communication, negotiation, and problem solving”).

51. See WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 33-34 (Jossey-Bass 2007). The lack of relevant training to facilitate discussion can be attributed to multiple factors. In the broad scheme of things, this lack of training can be seen as another unfortunate result of law school pedagogy containing little real-world application, as the overwhelming majority of schools focus instead on “teaching to the test” to increase their rank in the annual *U.S. News & World Report* survey of law schools. *Id.* In addition, the modern student of law will learn how to “think like a lawyer” through application of the case-dialogue method, and this manner of thinking will bring with it a necessary distance from clients. *Id.* at 50-52. As with the medical student who must distance himself from the ever-present specter of suffering and death, this distance between a lawyer and his client is crucial

**Summary of the data regarding judicial acumen at facilitating communication in settlement conferences:**

A summary of the data regarding judicial acumen at facilitating communication in settlement conferences is:

Judges responded across the board about their encouragement of emotional involvement by the parties. About 20% of general civil judges report encouraging parties to express their emotions in settlement conferences in every category of frequency. Family law judges have more of a bias against this practice, but a significant number usually use it. There is limited difference in this technique between high and low settling general civil judges, but high settling family law judges use it with more frequency than low settling family law judges.

Most judges are empathetic. High settling judges express empathy through active listening techniques with greater frequency than low settling judges.

The frequency distribution of general civil judges helping parties to understand the other parties' needs, goals, fears, and feelings is a classic bell curve. This technique is utilized most frequently among family law judges, with nearly 70% using it more than 60% of the time.

General civil judges are polarized about meeting exclusively in private meetings with individual parties. Thirty four percent of general civil judges rarely do this and 28% usually do this. The contrast in utilization of this approach is maintained among the high settling general civil judges. In contrast with the general civil judges, the family law judges largely agree that this approach should be used sparingly.

Settlement judges rarely ask parties (rather than lawyers) to discuss the case directly with the other side.

With a few exceptions, settlement judges rarely ask the parties (rather than the lawyers) to discuss the case with the judge.

General civil settlement judges are polarized about discussing the confidentiality of the settlement discussions with the participants. High settling general civil judges have strongly held, although

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to his effectiveness, such that the parties are not seen as people but abstractions, considered against the "backdrop of legal rights, jurisdictions, and doctrines." *Id.* at 54. Thus, learning to "think like a lawyer" and the resultant distance are in stark contrast with facilitating communication to lead the parties to settlement. In effect, the judge must "unlearn" that with which he was indoctrinated during law school – in order to facilitate discussion, he must not only relate to the parties as human beings, but also convince those parties to relate to one another as such.

conflicting, views about the practice and use it more than low settling judges. Among family law judges, there is a significant trend against discussing the confidentiality of the settlement agreement with the parties.

General civil settlement judges treat the lawyers' and parties' settlement communications as confidential. Most family law judges agree with this practice, but there is a significant dissenting group that rarely treats these communications as confidential.

Judicial acumen at facilitating communication was assessed by asking the judges to report their frequency of the following techniques:

*"I encourage the parties to express their emotions."*

The first area of inquiry seeks to determine the scope of the settlement conversation encouraged by the settlement judge. Is the conversation limited to arguing about legal rights or do feelings and emotions matter?

Encouraging parties to express emotions can assist in accomplishing settlements because it serves a cathartic purpose for the parties and the content of the emotions can be a source of information for the opposing party and the settlement judge. Many people in acute conflict express anger as a secondary emotion for pain or disappointment. Encouraging parties to express their emotions sometimes leads to an understanding of the deeper conflict that is more human and personal than the legal cause of action. Sometimes the more personal dimension of the conflict can lead to non-monetary elements of a settlement that attend to that personal dimension, like apologies or other forms of recognition and acknowledgement.

Stereotypically, judges are generally perceived as expert in the law and largely uncomfortable with emotions. This approach can also take time, which is often considered in short supply for judges. Thus in typical settlement situations, judges are expected to focus on the strengths and weaknesses of the legal case and not on encouraging parties to express their emotions. The approach of encouraging the expression of emotion is considered more of a typical characteristic of mediation.

The judges' responses are:

	General Civil All	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10% (rarely)	19	25	14	39	38	45	36	17
10-40% (occasionally)	24	22	28	15	13	21	23	0
41-60% (regularly)	16	10	19	19	28	7	18	17
61-90% (often)	21	16	19	9	6	14	5	33
>90% (usually)	21	27	21	18	16	14	18	33

The data shows that general civil judges are evenly divided between the five categories of utilization. The surprising aspect is that a significant percentage of judges use this approach with a significant frequency. General civil judges can effectively settle cases by embracing or avoiding it because about 25% of the high settling general civil judges report both extremes.

The family law judges do not use this approach as frequently and almost 40% report rarely using it. That might be attributable to a perception that encouraging emotions might lead to a never-ending saga in light of the emotional nature of most divorces. Even so, some family judges report using this technique with the higher frequencies. The utilization rate is similar for high and low settling judges so it cannot be deduced that this is a highly effective technique.

*“I show empathy and understanding of the parties’ concerns through active listening techniques.”*

Encouraging emotions may be a start, but many parties look for empathy and understanding through active listening techniques before they open up to a settlement judge or mediator.<sup>52</sup> This technique is to avoid or at least delay critical scrutiny of the parties’ concerns and replace it with understanding and empathy. Thus as the parties are presenting their gravamen, they feel understood and appreciated in their complaints. Parties who have brought a conflict to

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52. See John Lande & Rachel Wohl, *Listening to Experienced Users: Improving Quality and Use of Commercial Mediation*, 13 DISP. RESOL. MAG. 18, 20 (2007) (“Focus group participants said a mediator needs skills to establish trust and rapport, including enthusiasm, respectful and active listening, empathy, emotional detachment, sincerity, candor, sensitivity to confidentiality concerns, integrity, impartiality, fairness, humor and the ability to ask difficult questions sensitively”). See also Llewellyn J. Gibbons et al., *Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message*, 32 N.M. L. REV. 27, 36 (2002) (noting that an effective mediator demonstrates empathy and understanding by active listening).

litigation may have strong feelings of righteous indignation and often have a difficult time making the psychological shift to resolution unless they perceive that the settlement judge has understood them and appreciates their perspective. For many parties, obtaining the judge's understanding allows them to move beyond argumentation and justification of their case to consider solutions and settlement.

Active listening techniques are one way to show empathy and understanding. The non-verbal techniques of a listener appearing interested and supportive of the speaker include the following behaviors: leaning forward, eye contact, nodding of the head in an affirming manner as the speaker talks, and facial expressions conveying emotions appropriate to the story, i.e. smiling or concern. The verbal techniques consist of providing summaries to confirm the listener's understanding, statements acknowledging the difficulty the speaker has experienced, and requests for the speaker to give more details because the story is so interesting and important.

These empathy-through-active-listening techniques are usually time-consuming and thought of as prevalent in mediations and rare in settlement conferences. Again, the stereotypic settlement conference approach is that an emotionally distant judge will focus exclusively on the legal strengths and weaknesses of the case. The emotional needs of the parties are legally irrelevant.

The judges' responses are:

	<b>General Civil All</b>	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10% (rarely)	2	4	0	3	0	7	5	0
10-40% (occasionally)	2	0	5	8	13	3	5	0
41-60% (regularly)	12	4	12	5	6	3	14	0
61-90% (often)	25	22	37	31	25	41	32	33
>90% (usually)	60	69	47	54	56	45	46	67

That judges use this approach with such a high frequency is a very surprising result. Eighty-five percent of all general civil and family judges use it usually or often. Sixty percent of general civil judges usually use it. The high settling judges use it with even greater frequency. This technique is part of the classic training of private sector mediators and the data suggests it is also very prevalent in settlement conferences. This data could be influenced by the

self-reporting bias in which survey respondents are likely to report themselves in terms that are perceived as desirable.

It is interesting that settlement conference judges reported a significantly higher frequency for showing “empathy and understanding of parties’ concerns through active listening” (e.g. 60% of general civil judges usually using it-supra), compared to encouraging “parties to express their emotions” (e.g. 21% of general civil judges usually using it). One interpretation is that judges were understanding of “concerns” that were not emotional in nature such as legal or business costs and risks associated with the conflict. Another interpretation does not differentiate between “concerns” and “emotions,” but rather focuses on the responsive nature of active listening and the proactive nature of encouraging the expression of emotions. The second interpretation suggests that judges acknowledge extra legal concerns, including emotions, in settlement conference discussions if those topics are initiated by the parties, but that judges are more reluctant to initiate discussions on that level.

*“I help the parties understand each other’s underlying needs, goals, fears, and feelings.”*

Getting the parties’ to reveal their personal concerns is one measure of facilitating communication because the parties are communicating with the settlement judge. Another measure is whether settlement judges help parties understand each other.

This question seeks to establish how often judges focus on increasing the parties’ understanding of each other’s underlying needs, goals, fears, and feelings. The contrast would be an approach in which the judge might want to understand this aspect of the dispute to enable her to craft acceptable solutions, but not be concerned with assisting the parties in understanding each other. The approach of helping parties understand each other’s underlying needs, goals, fears, and feelings is the foundation of one school of thought in mediation.<sup>53</sup>

The judges’ responses are:

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53. DWIGHT GOLANN & JAY FOLBERG, *MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL* 23-25 (2006). See also Baruch Bush, *supra* note 46, at 16-17 (explaining that the distinct features of mediation, when compared to litigation can reduce both the economic and emotional costs to the parties. Mediation permits the disputants to preserve more for themselves, both economically and psychologically).

	General Civil All	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10% (rarely)	10	8	7	6	9	4	23	0
10-40% (occasionally)	21	25	22	19	13	30	14	17
41-60% (regularly)	27	27	32	19	9	26	46	33
61-90% (often)	25	22	24	35	38	30	14	17
>90% (usually)	18	18	15	22	31	11	5	33

The utilization pattern of this technique for general civil judges is a classic bell curve. Eighteen percent usually use it with 10% rarely using it. Family law judges use it with greater frequency than general civil judges, with nearly 70% of high settling family law judges using it usually or often. The higher utilization of this technique in family law is interesting. Although it might seem that parties who have been married would not need assistance in understanding each other's feelings, their marriages did not succeed so they probably do need that assistance and maybe there is implicit permission to consider the parties' needs, goals, fears, and feelings because the nature of the conflict is more personal.

*"I meet exclusively in private meetings with individual party(ies) – 'caucuses.'"*

One way to encourage communication between the parties is to have them meet together. Communication professors attribute more than 80% of meaning in a message to intonation and body language.<sup>54</sup> Joint meetings with all the parties allow participants to gauge the sincerity and nuanced meanings of speakers. One measure of the communication dynamic is whether the settlement judge keeps the parties segregated.

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54. See ALBERT MEHRABIAN, SILENT MESSAGES: IMPLICIT COMMUNICATION OF EMOTIONS AND ATTITUDES 43 (1971) (concluding that there are three elements which determine a listener's "liking" the speaker: the words themselves account for a mere 7% of the determination, tone of voice for 38%, and body language for 55%. Accordingly, as much as 93% of our appreciation for a speaker is determined by factors apart from the spoken word). See also Mimi Coffey, *Unjust Courtroom Practice: Always Seating the Prosecution Closest to the Jury*, CHAMPION, March 2010, at 44 ("80 percent of our decisions are influenced by nonverbal language, which includes body signals, gestures, mimicry, and actions"); JO-ELLAN DIMITRIUS & MARK MAZZARELLA, READING PEOPLE: HOW TO UNDERSTAND PEOPLE AND PREDICT THEIR BEHAVIOR – ANYTIME, ANYPLACE 110-112 (1999) (noting that it is the combination of body language, tone of voice, and word choice which indicates the truth underlying a statement).

Meeting privately with individual parties has value in settlement conferences. Parties are probably more willing to confide in and provide sensitive information to the settlement judge when their adversary is not present. These confidences may be personal in nature or require legal analysis.

Meeting privately is especially helpful when encouraging compromise by discussing the weaknesses in that parties' legal case. Such a technique is usually done in a series of private meetings because if one side heard the settlement judges' criticisms of the other side's legal case, they would become more confident and less likely to compromise. Thus the settlement judge has a series of private meetings in which he identifies the legal weaknesses of each side's case and asks for a concession. This approach has become known as "shuttle diplomacy."

Meeting privately is standard procedure in most commercial mediations and common in settlement conferences, but it does raise issues. Ex parte communications with a judge are extremely rare and strictly regulated.<sup>55</sup> California's judicial ethics allow a settlement judge to have such a meeting only with the consent of the parties.<sup>56</sup> This is especially problematic if the settlement judge will also be the trial judge.<sup>57</sup> The settlement judge usually will invite confidences in private meetings with an implicit understanding or explicit promise of not sharing the contents with the other party.<sup>58</sup> The settlement/

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55. Catherine A. Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime For International Arbitration*, 39 STAN. J. INT'L L. 1, 43 n.227 (2003) ("[E]thical rules impose almost absolute restrictions against ex parte communications between attorneys and judges, except in certain rare procedural contexts").

56. Robinson, *supra* note 1, at 362.

57. *Id.* at 364-65. See generally Molly McDonough, *Meddling in Settling: Pressure to Clear Caseloads Spurs Judges to Coerce Settlements*, Critics Say, 91 A.B.A. J. 14 (2005). (When judges feel burdened by their caseloads, they often turn to alternate dispute resolution methods, including mediation. ADR experts claim that when judges overreach or improperly meddle in the dispute to arrive at a settlement to avoid going to trial, the pressure to settle undermines the legitimacy of the litigation system.)

58. 2010 California Rules of Court, Rule 3.854(b) says, "At or before the outset of the first mediation session, a mediator must provide the participants with a general explanation of the confidentiality of mediation proceedings." Rule 3.854(c) states, "If, after all the parties have agreed to participate in the mediation process and the mediator has agreed to mediate the case, a mediator speaks separately with one or more participants out of the presence of the other participants, the mediator must first discuss with all participants the mediator's practice regarding confidentiality for separate communications with the participants. Except as required by law, a mediator must not disclose information revealed in confidence during such separate communications unless authorized to do so by the participant or participants who revealed the

trial judge clearly is in a position to be exposed to information that could affect his perceptions of equity, without the other side even knowing what the information is or having an opportunity to rebut it. An entire section of this investigation focuses on concerns about trial judges serving as settlement judges for their own cases.<sup>59</sup>

The current question does not ask if the judge has such meetings because it is assumed that almost every judge does. Instead, the question asks if the settlement conference consists exclusively of such meetings. If the settlement conference consists exclusively of such meetings then it is unlikely the settlement judge is focusing on facilitating authentic communication between the parties. The parties are deprived of the opportunity to observe the other party's tone and body language and instead must rely on the judge's version of any messages intended to increase "understanding." Reliance on the judge's version allows the judge to edit and manipulate the message for his purpose: to accomplish settlement.

The stereotypical judge is thought to prefer to maintain control of the message and extract concessions rather than provide a forum for full expression. The expectation is that judges would report a high frequency of exclusive private meetings.

The judges' responses are:

	General Civil All	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10% (rarely)	34	33	29	67	69	73	41	17
10-40% (occasionally)	13	4	14	22	19	23	23	17
41-60% (regularly)	10	12	10	3	3	0	14	0
61-90% (often)	16	14	24	8	9	4	14	33
>90% (usually)	28	37	24	0	0	0	9	33

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information." Cal Rules of Court, Rule 3.854. *See generally* ROBERT J. NIEMIC ET AL., GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR 93-94 (Federal Judicial Center 2001) ("Confidentiality is generally considered a bedrock principle for most ADR procedures. . . participants in court-based ADR are usually assured at the outset of the process that their communications will be kept confidential. Some local rules go so far as to say that ADR communications will be treated as privileged").

59. Peter Robinson, *supra* note 1, at 338 (analyzing two of Professor Judith Resnik's works, *Trial as Error*, *Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 992-93 (2000), and *Managerial Judges*, 96 HARV. L. REV. 376, 407-408 (1982)).

Surprisingly, general civil judges are polarized about this approach. Thirty-four percent of general civil judges rarely use it and 28% usually use it. The contrast in utilization of this approach is maintained among the high settling general civil judges, which means that it is not determinative for accomplishing a settlement.

In contrast with the general civil judges, the family law judges largely agree that this approach should be used sparingly. This could be explained by the frequent need for the parties to work together to implement the settlement and by the opportunity for extensive direct communication before and after the settlement conference. Parties who work directly with each other to create a settlement might be more likely to support its implementation.<sup>60</sup> It is possible that family law judges rarely meet privately at all because they will preside over a bench trial if a settlement is not accomplished and they share the due process concerns discussed above.

*“I ask the parties (rather than the lawyers) to discuss the case directly with the other side.”*

Since a large amount of communication depends on intonation and body language, having the parties, rather than their lawyers, discuss the case directly with each other would provide the greatest opportunity for the most thorough understanding.

This question explores the frequency of settlement judges encouraging communication directly between the principal disputants. It could be controversial because it denies the principals the protection of their lawyers. A principal may not be articulate or may be so hurt and angry that their message, unfiltered by their lawyer, may not be conducive to settlement. Nevertheless, this technique is fairly common in community mediation programs and accomplishes a more thorough understanding between the principals.

Measuring the frequency of this technique provides more data about the extent that judges facilitate communication between the parties at settlement conferences. The expectation is that settlement

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60. See Samuel J. Imperati et al., *If Freud, Jung, and Beck were Mediators, Who Would the Parties Pick and What are the Mediator's Obligations?*, 43 IDAHO L. REV. 643, 652 (2007) (stating that parties who are actively involved in the resolution have a higher degree of satisfaction with the outcome, and accordingly “tend to be more committed to upholding the settlement than those who have had a judge decide for them.”). See generally Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH. U. L.Q. 787, 817-26 (2001) (offering an extensive analysis of procedural justice research, which concludes that when people believe that a procedure is fair, they are more likely to comply with the resulting decisions).

judges respect the role of the attorneys in the process and thus use this technique sparingly.

The judges' responses are:

	<b>General Civil All</b>	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10% (rarely)	83	82	81	83	81	82	90	83
10-40% (occasionally)	12	12	14	9	13	7	10	0
41-60% (regularly)	4	4	2	3	3	4	0	17
61-90% (often)	0	0	0	3	0	7	0	0
>90% (usually)	2	2	2	2	3	0	0	0

This low frequency rate confirms the expectation that it is rare for judges in settlement conferences to encourage parties (rather than lawyers) to discuss the case directly with the other side.

*"I ask the parties (rather than the lawyers) to discuss the case directly with me."*

A less threatening technique for encouraging principals' participation is to have them discuss the case directly with the judge.

This question is one measure of the extent of communication between the principal and the settlement judge. While it might make some lawyers nervous, many will support such an approach if it is done in the absence of their opponent. The value of such a technique is that the principal may feel like she had a chance to tell her story directly to an authority figure. She may need to have her day in court and feel heard before she is psychologically ready to process possible solutions. Especially when the judge is discussing the non-legal dimensions of the case, the principal is the person most knowledgeable.

The judges' responses are:

	<b>General Civil All</b>	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10% (rarely)	61	61	61	73	61	82	81	50
10-40% (occasionally)	17	12	28	9	15	4	19	17
41-60% (regularly)	11	16	7	11	12	11	0	0
61-90% (often)	4	2	2	5	6	4	0	17
>90% (usually)	7	8	2	3	6	0	0	17

The judges fairly uniformly agree that they should avoid this technique. There are a few who do it frequently, but the vast rule of thumb is to not ask parties, as opposed to their lawyers, to discuss the case with the settlement judge.

*“I discuss confidentiality of the settlement discussions with the participants.”*

One way to encourage participants to speak freely is to emphasize the confidential nature of a conversation.

California law provides that settlement discussions are confidential. Judges could emphasize this to encourage the parties to confide in the judge. This confidentiality has obvious limitations if the settlement judge is the same as the trial judge.

The judges’ responses are:

	<b>General Civil All</b>	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10% (rarely)	27	29	26	46	50	36	52	17
10-40% (occasionally)	17	6	23	18	16	21	19	0
41-60% (regularly)	9	8	7	14	16	11	5	0
61-90% (often)	10	8	12	12	13	14	10	33
>90% (usually)	37	49	33	11	6	18	14	50

The general civil judges are polarized about this practice, but the family law judges are in significant agreement against this approach. High settling general civil judges have starkly contrasting views about this technique, but use it more than the low settling judges. Family judges are more in agreement against it, probably because

they will conduct bench trials if the settlement is not accomplished and thus compromise any promise of confidentiality.

*“I treat the lawyers’ and parties’ settlement communications as confidential.”*

Emphasizing confidentiality is one thing, but treating the settlement communications as confidential is another. It is important for participants in settlement conferences to know whether they should reasonably expect that the settlement judge will not discuss their settlement conversations. Lawyers should have a special concern about the content of any communication between a settlement judge and a different trial judge. One fear is that the settlement judge might blame the failure to settle on one party or attorney and let the trial judge know in a way that would reflect poorly on that side.

The judges’ responses are:

	<b>General Civil All</b>	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10% (rarely)	0	0	0	16	23	11	10	0
10-40% (occasionally)	0	0	0	2	0	4	5	0
41-60% (regularly)	4	6	2	6	7	7	5	0
61-90% (often)	6	4	5	13	10	15	10	0
>90% (usually)	90	90	93	64	61	63	71	100

It is comforting to note that while the general civil judges are conflicted about discussing confidentiality with the participants, they are in strong agreement about treating those communications as confidential. Perhaps the judges chose to not discuss confidentiality in settlement conferences with attorneys because confidentiality is assumed by the sophisticated participants.

The lack of consensus among the family judges is concerning. While there were still a majority of judges who usually use this approach, there is a significant dissenting number who rarely use it. Whether the dissent about this technique had to do with the same judge trying the case or if the settlement judge was reporting to a referring trial judge is important, but undetermined. Not discussing this issue with participants is a matter of style. The response to this question could suggest that the family judges differ in handling a fundamental dimension of the process.

*Summary of Judicial Acumen at Facilitating Communication Data*

General civil judges are evenly divided about encouraging parties to express emotion. This division does not seem to affect their success in reaching settlement; among high settling general civil judges, the percentage who reported almost always using this technique is the same as those who reported almost never using it. Among family law judges, the utilization rate is similar for both high and low settling judges, indicating that a judge can reach settlement with the same regularity whether or not he chooses to encourage the parties to express emotion.

Judges engage in active listening in order to project empathy. Almost all of the general civil and family law judges responded that they use active listening to convey empathy in more than half of their settlement conferences. More than half of the general civil judges reported almost always using it. This technique appears to be an effective means of encouraging settlement, as high settling judges reported using it with greater frequency than low settling judges.

When considering whether judges help the parties to understand each other's goals, fears, and feelings, responses from general civil judges indicate a significant divergence in the utilization of this technique. Ten percent of those judges reported that they almost never use it, with only a slightly higher number using it in almost all of their settlement conferences. This disparity does not continue into the family law realm, as the majority of high and low settling family law judges use this technique more than half of the time.

General civil judges possess starkly contrasting viewpoints about meeting privately with individual parties – the number of judges who almost always use it was similar to the number of judges who never use it. This polarization is maintained among the high settling general civil judges; as such, it is not by itself demonstrative of accomplishing settlement. Family law judges use this approach sparingly.

It is unusual for judges in settlement conferences to encourage the parties (rather than the lawyers) to discuss the case directly with the other side. Almost all of the general civil and family law judges, both high settling and low settling, reported that they rarely, if ever, engage in this practice.

A significant majority of both general civil and family law judges refrain from asking the parties, instead of the lawyers, to discuss the case directly with the judge. Family law judges engage in this practice with even less frequency than their general civil counterparts,

with about 75% almost never asking the parties to discuss the case directly with them.

General civil judges are highly polarized about the practice of discussing confidentiality of the settlement discussions. One-fourth of the general civil judges responded that they discuss confidentiality less than 10% of the time, and a little less than half discuss it in more than 90% of their settlement conferences. On the other hand, the majority of family law judges respond that they rarely discuss confidentiality. While there is a stark contrast among high settling general civil judges, these judges engage in the practice more frequently than low settling judges.

Almost all general civil judges treat settlement communications as confidential. The responses of family law judges, on the other hand, failed to reach a consensus about keeping settlement communications confidential. Although a majority of judges reported that they almost always use this approach, a significant dissent responded that they rarely maintain the confidentiality of settlement communications.

#### IV. THE SETTLEMENT JUDGE'S PERSONA

While most of the survey inquired about various techniques used in settlement conferences, a few inquired about the settlement judges' attitude and temperament. The stereotype is for the settlement judge to be strict, impatient, and highly invested in accomplishing a settlement. The survey explores the veracity of this image by asking the judges to report the frequency of the following:

I am indifferent as to whether a settlement is accomplished; I attempt to be congenial or likeable; I attempt to be strict or intimidating.

The second and third questions probe into how the judge is attempting to act. Clearly how others at the settlement conference perceive his behavior can differ, either because the judge has not been successful at his stated attempt or because his perception of congenial or intimidating may differ from the parties'. In any event, the data provides another slice of information about what judges perceive is occurring in their settlement sessions.

The data regarding settlement judges' persona is summarized by the following statements:

Most settlement judges are rarely disinterested in whether a settlement is accomplished.

Most settlement judges attempt to be congenial or likeable and rarely try to be strict and intimidating.

*“I am indifferent as to whether a settlement is accomplished.”*

The first question explores the extent the settlement judge is invested in accomplishing a settlement. One concern is that a judge’s motivation for docket management will drive judges to coerce parties into settling. This concern would be muted if judges were indifferent as to whether a settlement is accomplished.

The judges’ responses are:

	<b>General Civil All</b>	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10% (rarely)	64	67	58	38	47	32	46	83
10-40% (occasionally)	11	8	12	27	31	18	23	17
41-60% (regularly)	8	6	7	15	13	21	18	0
61-90% (often)	7	6	12	12	9	14	14	0
>90% (usually)	10	12	12	8	0	14	0	0

The results reveal that the vast majority of judges are not indifferent about whether a settlement is accomplished. The double negative between the results and the phrasing of the question confirms that settlement judges are motivated to accomplish settlements. General civil judges reported being invested in accomplishing a settlement in greater percentages than family, with 64% compared to 38% reporting rarely being indifferent. This is surprising because the family law judges have a larger caseload. Not surprisingly, the low settling judges in both general civil and family reported being more indifferent than the high settling judges. Evidently, indifference is not generally an effective technique to accomplish settlement. The data confirms that judges are invested in getting the case settled.

The sources for this motivation could be myriad and were explored in another question. The results of that question will be reference in a footnote here since they contribute to this discussion.<sup>61</sup>

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61. The following statements summarize the data on the motivations for directiveness (and maybe eventually the correlations between directiveness and the motivations for directiveness).

To the extent they encourage settlement, the vast majority of judges are motivated by the sense of accomplishment from being able to settle difficult cases.

*“I attempt to be congenial or likeable.”*

This question and the next test whether judges use carrots or sticks in their approach. The stereotype is that the judge’s authoritative position creates more of a strict and intimidating environment.

The responses are:

	<b>General Civil All</b>	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10% (rarely)	1	0	2	2	0	4	9	0
10-40% (occasionally)	5	0	9	5	9	4	0	0
41-60% (regularly)	11	10	14	22	21	25	5	0
61-90% (often)	28	22	30	12	12	14	36	33
>90% (usually)	56	67	44	60	61	54	50	67

This data reveals an overwhelming prevalence of a congenial or likeable approach. About two thirds of the high settling general civil and family judges usually use this approach.

*“I attempt to be strict or intimidating.”*

The judges’ responses are:

	<b>General Civil All</b>	General Civil Top	General Civil Bottom	Family All	Family Top	Family Bottom	Limited Jurisdiction	Complex Civil
<10% (rarely)	83	82	79	78	67	90	82	83
10-40% (occasionally)	14	14	19	15	18	10	18	17
41-60% (regularly)	2	0	2	6	12	0	0	0
61-90% (often)	1	2	0	2	3	0	0	0
>90% (usually)	1	2	0	0	0	0	0	0

To the extent they encourage settlement, the vast majority of judges are not motivated by concerns about not wasting the time the judge invested in the conference. To the extent they encourage settlement, judges were fairly evenly divided regarding the motivation of relying on settlements to manage a busy docket. To the extent they encourage settlement, judges are very often motivated by the belief that settlement is in the best interests of both (or all) parties. Ninety percent of judges report this motivation was present in more than 60% of their settlement conferences.

These responses are consistent with the contrasting question immediately preceding. When the question was put this way, the judges were even more uniform in rejecting this approach.

### *Summary of Judge's Persona Data*

A majority of general civil law judges reported that rarely are they indifferent to the outcome of a settlement conference. A little less than half of family law judges reported that they are almost never indifferent. When comparing high settling judges to those with low settlement numbers in both general civil and family law, there is a greater degree of indifference among low settling judges.

Judges attempt to be congenial or likeable. About 2/3 of the high settling general civil and family judges reported that they almost always attempt to be friendly and approachable during their settlement conferences. Low settling judges also attempt to be congenial, with slightly less than half of general civil and a little more than half of family law judges reporting that they almost always engage in this practice.

Both family law and general civil judges responded uniformly that they avoid being strict or intimidating, regardless of whether they qualify as high or low settling. Although the data weighed was the result of self-reporting, and it is unlikely that judges would respond that they engage in such negative practices, it is nevertheless refreshing to learn that judges do not actively engage in appearing overbearing or callous.

This investigation of settlement judges has offered a variety of surprisingly complex conclusions. Settlement judges utilize a variety of foci and approaches, some of which greatly impact their effectiveness, and other which seem to have little bearing on the outcome of the proceedings. Hopefully, the conclusions offered by this series of articles will provide a useful tool to not only the newly-appointed judge who anticipates overseeing his first settlement conference, but also the long-sitting judge who is interested in increasing the rate of settlement in his courtroom. While each judge, courthouse and case is unique, gaining an understanding of the practices of one's contemporaries can only serve to increase the effectiveness of our judicial officers.

## CONCLUSION

The responses regarding the emphasis the settlement judge places on costs and risks have elucidated several points. First, settlement judges prefer to emphasize the risks associated with trial more often than they highlight the certainty that arises from settlement. Second, although not as common as emphasizing the risk of trial, the majority of judges choose to call attention to the finality of settlement, instead of stressing the possibility of appeal or the challenges to enforcing a judgment which can arise. Third, significant emphasis is placed on the burgeoning costs of continuing litigation. Fourth, settlement judges are divided about using the “net to client” technique – the amount received by the client after fees and costs from a settlement offer compared to the amount received from a likely judgment at trial – with family law judges using it less than general civil judges, and general civil judges evenly divided between using it frequently and using it sparingly. Finally, the survey revealed that settlement judges readily emphasize non-financial costs, such as emotional and relational expenses, and the loss of opportunity that can occur as a result of continuing with litigation.

The next area of inquiry analyzed in this article is the competence of the settlement judges in effecting compromise. First, it was determined that a preponderance of settlement judges regularly request concessions, asking the parties to consider the opposing side’s offer and move toward that number. There is, however, a significant percentage of judges who avoid this practice. High settling general civil judges report requesting concessions more often than low settling general civil judges, but a significant number of high settling family law judges use this technique sparingly. Second, it was determined that settlement judges largely avoid an explanation of how the size of concessions and the amount of time between concessions serve to signal the degree of a party’s negotiating flexibility. High settling general civil judges report that they explain this underlying message more often than low settling general civil judges. The responses indicate that family law judges are less likely to explain the possibility of this interpretation than general civil judges, and high settling family law judges explain it less often than low settling family law judges. Third, the frequency with which settlement judges utilize conditional or hypothetical offers is evenly distributed - judges in all types of civil assignments use it frequently, others moderately, and others sparingly. Fourth, general civil judges are spread along the full range in their utilization of the bracketing technique. High settling general civil judges are the most polarized, with a large number usually using

it and a similarly large number rarely using it. A significant number of family law judges reported that they avoid using brackets, with high settling family law judges avoiding it more often than low settling family law judges. Fifth, settlement judges tend to avoid placing an emphasis on the time limits for a settlement conference. Although still the exception, setting strict time parameters occurs with more frequency in family law cases. High settling general civil judges report avoiding the practice more than low settling general civil judges.

The next section focuses on questions which reveal the settlement judge's effectiveness at facilitating communication in settlement conferences. The data revealed that roughly 20% of general civil judges report encouraging parties to express their emotions in settlement conferences in every category of frequency. The responses from family law judges suggest more of a bias against this practice, but a significant number usually utilize it. There is limited variation in the use of this technique between high and low settling general civil judges, but high settling family law judges use it with more frequency than low settling family law judges. Second, most judges reported that they show empathy and understanding of parties' concerns through active listening techniques, and high settling judges exhibit this empathy with greater frequency than low settling judges. Third, the frequency with which general civil judges reported helping parties to understand the other parties' needs, goals, fears, and feelings is indicative of a classic bell curve. Family law judges have much more of a tendency to use this technique, with nearly 70% using it usually or often. Fourth, when considering caucus, general civil judges are polarized about engaging exclusively in private meetings with individual parties. Thirty-four percent of general civil judges rarely separate the parties and 28% usually meet privately with the parties. The divergent results of the utilization of this approach are maintained among the high settling general civil judges. In contrast to the general civil judges, the family law judges largely agree that this approach should be used sparingly. Fifth, the survey revealed that settlement judges rarely ask parties (rather than the lawyers) to discuss the case directly with the other side, just as settlement judges rarely ask the parties (rather than the lawyers) to discuss the case with the judge. Sixth, general civil settlement judges are polarized about discussing the confidentiality of the settlement discussions with the participants. High settling general civil judges have strongly held, although conflicting, views about the practice and use it more than low settling judges. Among family law judges, there

is a significant trend against discussing the confidentiality of the settlement agreement with the parties. Seventh, general civil settlement judges treat the lawyers' and parties' settlement communications as confidential. Most family law judges agree with this practice, but there is a significant dissenting group that treats these communications as confidential less than 10% of the time.

The fourth section in this article considers the settlement judge's persona. Several of the questions in the survey focused directly on the style and temperament of the settlement judge. Although self-reporting (and therefore less likely to be disparaging), these questions generate an opportunity to understand the settlement judge's mindset as he approaches conferences. The conclusion contradicts the settlement judge's stereotype for being strict, impatient, overworked, emotionally distant, and highly invested in accomplishing a settlement at any cost. The responses generated by the survey indicate that most times a settlement judge is not impassive, but is genuinely interested in working with the parties to obtain a settlement, and most settlement judges attempt to be congenial or even likeable, and rarely try to be strict and intimidating.

Ultimately, by presenting empirical data on judge's perceptions regarding their influence on settlement, this series of articles seeks to contribute to the discussion of whether settlement conferences can provide superior justice and increase judicial efficiency. This article intends to be useful to those interested in this debate by documenting a comparatively rare perspective on how judges encourage settlement. The debate over the appropriateness of this role should be enriched by information on the judges' perspective of what they do when they are in this role.

This article also intends to be useful to practicing judges. Judges have commented on the insularity of the job and the benefit of documenting judicial norms regarding settlement practices. The presentation of the data is structured in such a way that sitting judges can compare their technique with the practices of judges with similar assignments. Some of the accepted settlement techniques among family judges may not be shared by judges with a general civil assignment. Limited Jurisdiction and complex civil judges would benefit from access to data from judges with the same assignment. The pressure and intricacies of these assignments are so diverse that the questionnaire about settlement technique sought to report the results for various groups of judges.

The purpose of the project was to confirm or refute a common expectation that settlement judges focus on the law and are very directive. The surprising results suggest that settlement judge behavior is much more complicated and situational. The complex and variable nature of judicial approaches to settlement work should not be surprising given the diversity of personalities, interests and views of the wide range of people serving as judges.

