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## Magistrate Judges, Settlement, and Procedural Justice

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# MAGISTRATE JUDGES, SETTLEMENT, AND PROCEDURAL JUSTICE

Nancy A. Welsh\*

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## INTRODUCTION

Federal magistrate judges, often referenced as the “face” of the federal courts,<sup>1</sup> are key players in the settlement of civil cases<sup>2</sup> in the federal courts.<sup>3</sup> The Administrative Office of the U.S. Courts reports that in the twelve-month period from October 1, 2013 to September 30, 2014, magistrate judges conducted 20,641 settlements sessions (also described as “mediations”).<sup>4</sup> During the same period in 2012–2013, they conducted 22,757 settlement sessions.<sup>5</sup>

<sup>1</sup> Michael J. Newman, *Introduction* to PETER G. MCCABE, *A GUIDE TO THE FEDERAL MAGISTRATE JUDGE SYSTEM* (2014), <http://www.fedbar.org/PDFs/A-Guide-to-the-Federal-Magistrate-Judge-System.aspx?FT=.pdf> [<https://perma.cc/N4PY-DT5S>].

<sup>2</sup> The focus of this Article will be on magistrate judges’ involvement in the settlement of civil cases, but it is important to note that magistrate judges also can be involved in settlement in the criminal context—i.e., plea bargaining. Indeed, there have been calls for judges to play a more active role in this ubiquitous process. *See, e.g.*, Memorandum from Sara Sun Beale & Nancy King to Rule 11 Subcommittee (Aug. 27, 2014), in ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE 135, 147–49 (Nov. 4–5, 2014), <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-criminal-procedure-november-2014> [<https://perma.cc/T5RE-96K8>] (citations omitted) (describing a proposal to amend Rule 11 to allow judges to conduct judicially-supervised criminal settlement conferences, noting that a 1979 survey of 3,000 judges found that 31 percent attended plea negotiations, and reporting the role played by judges in such negotiations in Florida, Connecticut, and Arizona).

<sup>3</sup> MCCABE, *supra* note 1, at 47.

<sup>4</sup> *See Table S-17—Matters Disposed of by U.S. Magistrate Judges During the 12-Month Periods Ending September 30, 2005 and 2010 Through 2014*, U.S. CTS. (Sept. 30, 2014), <http://www.uscourts.gov/statistics/table/s-17/judicial-business/2014/09/30> [<https://perma.cc/N9DZ-DAVF>] [hereinafter *Table S-17*]. Increasingly, judges and commentators perceive an overlap between judicial settlement sessions and mediation. *See, e.g.*, William Caprathe, *The Successful Road to Settlement*, A.B.A., [http://www.americanbar.org/content/dam/aba/uncategorized/dispute\\_resolution/just-resolutions/caprathe\\_successful\\_road\\_to\\_settlement.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/dispute_resolution/just-resolutions/caprathe_successful_road_to_settlement.authcheckdam.pdf) [<https://perma.cc/6QNP-ZLXS>] (describing discussion at January 12, 2015 A.B.A. roundtable entitled *The Successful Road to Settlement: The Intersection of Mediation and Judicial Settlement Conference*).

<sup>5</sup> *See Table S-17, supra* note 4 (also showing the following number of settlement conferences/mediations conducted by magistrate judges: 24,729 (2005), 20,592 (2010), 20,332 (2011), 21,095 (2012), 22,757 (2013)). Somewhat surprisingly, there was a 9 percent decline in the number of magistrate judge-conducted settlement sessions or judicial mediations in 2014 compared to 2013. *See Felix Recio et al., Who Is the Magistrate Judge? Litigating Before U.S. Magistrate Judges in District Courts*, 41 *ADVOCATE* 40, 42 (Winter, 2007) (noting

Meanwhile, the federal district courts disposed of 258,278 cases in 2013–2014, and 255,071 in 2012–2013.<sup>6</sup> The Administrative Office does not specifically identify the number of dispositions resulting from magistrate judges' settlement sessions.<sup>7</sup> It does report, however, that from October 1, 2013 to September 30, 2014, the disposition of 27,064 cases occurred “during or after pretrial”—i.e., primarily during or after a Rule 16 pretrial conference.<sup>8</sup> That number was

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decline in magistrate judge-facilitated settlement conferences between 2003 and 2006 and suggesting that mediation outside the courts is the primary cause for the decline).

<sup>6</sup> See *Table C-4A—U.S. District Courts Civil Cases Terminated, by District and Action Taken—During the 12-Month Period Ending September 30, 2014*, U.S. CTS. (Sept. 30, 2014), <http://www.uscourts.gov/statistics/table/c-4a/judicial-business/2014/09/30> [<https://perma.cc/KJ57-VY6Y>] [hereinafter *Table C-4A September 30, 2014*] (showing that of the 258,278 cases terminated during this period, termination occurred before pretrial in 176,363 cases and occurred during or after pretrial in 27,064 cases); *Table C-4—U.S. District Courts—Civil Cases Terminated, by Nature of Suite and Action Taken During the 12-Month Period Ending September 30, 2013*, U.S. CTS. (Sept. 30, 2013), <http://www.uscourts.gov/statistics/table/c-4a/judicial-business/2013/09/30> [<https://perma.cc/GU4X-FRA5>] [hereinafter *Table C-4 September 30, 2013*] (showing that of the 255,071 cases terminated during this period, termination occurred before pretrial in 171,973 cases and occurred during or after pretrial in 25,816 cases); see also *Table C—U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending December 31, 2013 and 2014*, U.S. CTS. (Dec. 31, 2014), <http://www.uscourts.gov/statistics/table/c/statistical-tables-federal-judiciary/2014/12/31> [<https://perma.cc/992M-Z77G>] (showing that in 2014, the federal district courts terminated a total of 260,629 civil cases while in 2013, the federal district courts terminated a total of 259,489 civil cases). The Administrative Office also provides potentially very important details regarding the composition of these dispositions. For example, the Office reported that in 2014, the greatest growth in the termination of civil cases occurred “in the Southern District of Illinois (IL-S), which terminated 4,892 cases, 3,330 of them personal injury/product liability multidistrict litigation (MDL) cases alleging injuries arising from birth control pills. The District of Arizona terminated 6,871 cases; more than 2,600 of these cases involved prison conditions, and most were filed by a single state prisoner.” *U.S. District Courts—Judicial Business 2014*, U.S. CTS., <http://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2014> [<https://perma.cc/GS9P-UY8>] (last visited Apr. 16, 2016).

<sup>7</sup> See *Table C-4A September 30, 2014*, *supra* note 6 (no specific category for dispositions as a result of settlement sessions); *Table C-4 September 30, 2013*, *supra* note 6 (no specific category for dispositions as a result of settlement sessions).

<sup>8</sup> See *Table C-4A September 30, 2014*, *supra* note 6 (showing that of the 258,278 cases terminated during this period, termination occurred before pretrial in 176,363 cases and occurred during or after pretrial in 27,064 cases). “During or after pretrial” means disposition occurred after an answer was filed and a Rule 16 pretrial conference was held before a judge or magistrate judge or if a request for trial de novo was made after arbitration; “before pretrial” means that disposition occurred before an answer was filed and before a motion was made by the plaintiff and before a hearing, or in the defendant’s absence and after a hearing was held but not on plaintiff’s motion, or upon plaintiff’s motion to terminate (including prisoner petitions), or after an answer or Rule 12 motion with some judicial action but not a pretrial conference, or when no other category applies. See CIVIL STATISTICAL REPORTING GUIDE VERSION 1.1 at 33–35 (2010); E-mail from Johnny Wiseman, to Nancy Welsh (Dec. 23, 2015, 19:37) (on file with the author).

25,816 for the same period in 2012–2013.<sup>9</sup> If every session conducted by a magistrate judge resulted in settlement, this would mean that approximately 8–9 percent of the federal courts’ dispositions—as well as the overwhelming majority of the dispositions occurring during or after Rule 16 pretrial conferences—result directly from magistrate judges’ settlement sessions.<sup>10</sup>

Importantly, magistrate judges generally do not work alone in facilitating settlement. They work in concert with other judicial officers or adjuncts. Most frequently, they coordinate their efforts with district judges or other “buddy” magistrate judges.<sup>11</sup> In these cases, the responsible district judge (or a “buddy” magistrate judge in some courts) will conduct a trial if the magistrate judge’s settlement session does not result in disposition.<sup>12</sup> Obviously, in many cases, the prospect of adjudication increases the likelihood of settlement. Magistrate judges also partner with another group of actors to achieve settlement in the federal courts: staff mediators and the private mediators who are on courts’ rosters. Magistrate judges may refer entire categories of cases, individual cases, or particular issues to these mediators.<sup>13</sup> The mediators are then responsible for facilitating settlement, with the understanding that if a trial is needed, it will be conducted by the magistrate judge (provided that the parties have consented to the magistrate judge’s jurisdictional authority to conduct a trial).<sup>14</sup> Although it appears that mediation is used more frequently than any other alternative dispute resolution (“ADR”) process in the federal courts, it is unclear exactly how many cases go to mediation or other dispute resolution procedures, because the Administrative Office does not make system-wide data available regarding such referrals.<sup>15</sup> However, in 2011, a subset of the federal courts reported 17,833 referrals to mediation and 4,222 referrals to a multi-option program that

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<sup>9</sup> See *Table C-4 September 30, 2013*, *supra* note 6 (of the 255,071 cases terminated during this period, termination occurred before pretrial in 171,973 cases and occurred during or after pretrial in 25,816 cases).

<sup>10</sup> This is, of course, entirely hypothetical. As noted *supra*, there is no available data regarding the number of dispositions resulting from magistrate judges’ settlement sessions. Even if there was such data, we would also want to know about how cause and effect were determined. For example, we would want to know whether dispositions occurred during the settlement session itself or in the weeks or months following the session. If the disposition occurred in the weeks or months following the session, we would want to know how the Administrative Office, or the individual district court staff responsible for inputting the data, determined whether or how the settlement session contributed to the disposition.

<sup>11</sup> See MCCABE, *supra* note 1, at 43–45; Wayne D. Brazil, *Judicial Mediation of Cases Assigned to the Judge for Trial: Magistrate Judges Celeste F. Bremer and Karen K. Klein*, 17 DISP. RESOL. MAG. 24, 25 (Spring 2011).

<sup>12</sup> See MCCABE, *supra* note 1, at 44–45.

<sup>13</sup> See *infra* Part I.D.

<sup>14</sup> See *infra* Part I.B–C.

<sup>15</sup> See DONNA STIENSTRA, *ADR IN THE FEDERAL DISTRICT COURTS: AN INITIAL REPORT*, FED. JUD. CTR. 14 (Nov. 16, 2011), [http://www.fjc.gov/public/pdf.nsf/lookup/adr2011.pdf/\\$file/adr2011.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/adr2011.pdf/$file/adr2011.pdf) [https://perma.cc/5ZQN-YKNZ].

included mediation.<sup>16</sup> They reported that another 1,571 referrals were primarily to judicially hosted settlement conferences.<sup>17</sup> In total, these referrals represented about 15 percent of the civil dockets of the reporting districts.<sup>18</sup>

On occasion, magistrate judges do work alone to offer *both* settlement assistance *and* adjudication in a case.<sup>19</sup> In these matters—and again, only if the parties have consented to the magistrate judge’s jurisdictional authority to conduct a trial—the magistrate judge manages the pretrial process, facilitates the settlement session, and if settlement is not achieved, presides over a bench or jury trial.<sup>20</sup>

To many, settlement is simply an expedient necessity that permits the courts to function,<sup>21</sup> and the involvement of magistrate judges may be understood as similarly expedient. The procedures and partnerships described above therefore may seem minor, and not worthy of examination. From the perspective of the parties involved in these processes, however—and the concepts of procedural justice, due process, and self-determination—the procedures and interactions among magistrate judges, district judges, and mediators matter tremendously.

We know that parties are more likely to perceive procedural justice, for example, if dispute resolution processes provide them with these elements: the opportunity to express what is most important to them, a demonstration by the third party or decision-maker that she is providing trustworthy consideration of what the parties said, and a neutral and dignified forum that treats the parties

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<sup>16</sup> See *id.* at 15.

<sup>17</sup> These federal districts reported referrals in order to seek supplemental funding to support their mediation programs. See *id.* at 14–15 (also observing that these numbers probably do not include all cases sent by all districts to mediation).

<sup>18</sup> *Id.* at 15.

<sup>19</sup> See *Ascom Hasler Mailing Sys., Inc. v. U.S. Postal Serv.*, 2010 WL 4116858 at \*4 (D.D.C. Oct. 19, 2010) (observing that magistrate judges in the U.S. District Court of the District of Columbia “are often called upon to try a case after they have presided over settlement discussions”); Brazil, *supra* note 11, at 24–25 (noting that in the U.S. District Court of North Dakota, Judge Klein has served as the judicial mediator in cases assigned to her for trial and views it as “perfectly acceptable for the trial judge to serve as the settlement judge if the practice is limited: (1) to situations in which the parties voluntarily consent to the trial judge’s involvement in settlement; and (2) to jury cases that are fact-driven, rather than driven by issues of law” and notes that hers is a “small court” and thus does “not have the luxury of multiple magistrate judges in the same location”); Jacob P. Hart, *Getting to “Settled.” Ten Suggestions for a Successful Mediation*, 1 SEDONA CONF. J. 71, 76 (2000) (referencing settlement in his own cases); Nancy A. Welsh & Bobbi McAdoo, *Eyes on the Prize: The Struggle for Professionalism*, 11 DISP. RESOL. MAG., 13, 14 (Spring 2005) (disclosing judge’s response to confidentiality concerns raised when judge is both mediator and adjudicator); see also James J. Alfini, *Risk of Coercion Too Great: Judges Should Not Mediate Cases Assigned to Them for Trial*, 6 DISP. RESOL. MAG., 11, 11 (Fall 1999) (supporting judges serving as mediators unless judge is presiding over parties’ trial); Frank E.A. Sander, *A Friendly Amendment*, 6 DISP. RESOL. MAG., 11, 11, 24 (Fall 1999) (concurring with Prof. Alfini).

<sup>20</sup> See Brazil, *supra* note 11.

<sup>21</sup> See, e.g., Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1073 (1984).

and their claims even-handedly.<sup>22</sup> Now consider the following variations in magistrate judges' involvement in the settlement procedures described above and their potential effect on parties' perceptions of procedural fairness:<sup>23</sup>

- *Magistrate Judge-Mediator Pairing.* A mediator facilitates the parties' settlement discussions in a case. The magistrate judge will conduct a trial only if the parties are unable to reach settlement in mediation. The court's local rules describe mediation communications as "confidential" but also require the parties' "good faith participation" in the process. The parties and their lawyers know that as a result of the court's "good faith participation" requirement, mediators have occasionally disclosed to judges what occurred during mediation, including what occurred in caucus.<sup>24</sup> Thus, the parties and their lawyers may worry that what they say or do in mediation, including in caucus, will be disclosed to the magistrate judge. The mediator begins with a joint session but conducts most of the mediation in caucus—or *ex parte* meetings—and learns information from each party that she does not disclose to the other party.

Are the parties more or less likely to perceive the settlement phase with the mediator as providing them with procedural justice? Are they more or less likely to perceive a subsequent adjudicative phase with the magistrate judge as providing them with procedural justice?

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<sup>22</sup> See *infra* Part III.

<sup>23</sup> This Article will not address procedural due process or self-determination, which also could apply here. More specifically, procedural due process certainly would apply to adjudicative processes, but it would not apply to voluntary settlements unless the state effectively coerced settlements that effected a deprivation of life, liberty or property. See Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 188 (2002). Procedural due process also might apply if something about the settlement procedure impermissibly heightened the risk of error in the adjudicative procedure. An example of such effect might be the disclosure of a mediation communication to the presiding judge. Regarding self-determination, it is unlikely that this concept will apply to most court procedures. See Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 6, 49 (2001) [hereinafter *Thinning Vision*]. One of the fundamental principles underlying mediation, however, is self-determination. Therefore, the concept might apply to a procedure described as "judicial mediation" and to parties' procedural and substantive decision-making. See James J. Alfini, *Mediation As a Calling: Addressing the Disconnect Between Mediation Ethics and the Practices of Lawyer Mediators*, 49 S. TEX. L. REV. 829, 831 (2008) (describing self-determination as "the one value that distinguishes mediation from other dispute resolution processes"); Peter Robinson, *Adding Judicial Mediation to the Debate About Judges Attempting to Settle Cases Assigned to Them for Trial*, 2006 J. DISP. RESOL. 335, 371–72 (2006) (describing Travelers Cas. & Sur. Co. v. Superior Court, 24 Cal. Rptr. 3d 751 (2005) and Advisory Committee Comment to California Rule 1620.1(d) and application of self-determination to judicial mediation).

<sup>24</sup> See Peter N. Thompson, *Good Faith Mediation in the Federal Courts*, 26 OHIO ST. J. ON DISP. RESOL. 363, 410–17 (2011) (describing cases involving claims of violation of obligation to participate in mediation in good faith).

- *Magistrate Judge-District Judge Pairing*. The magistrate judge facilitates the settlement session, and a district judge conducts a trial if needed. Like the mediator in the prior example, the magistrate judge meets *ex parte* with the parties and learns information from each party that the magistrate judge does not disclose to the other party. The parties and their lawyers know that the magistrate judge is not bound to keep what he learns confidential. Thus, he may make disclosures to the district judge about what occurred or was said during the settlement session, including in caucus. Again, this worries the parties and their lawyers.

Are the parties more or less likely to perceive the settlement phase with the magistrate judge as providing them with procedural justice? Are they more or less likely to perceive the adjudicative phase with the district judge as providing them with procedural justice?

- *Magistrate Judge Alone—and with Consent Sought Only Before Settlement Session*. The magistrate judge serves as both the facilitator of the settlement session and the trial judge (in the event that settlement cannot be achieved). The district's clerk of court seeks the parties' consent to the magistrate judge's adjudication of the case only before the commencement of the settlement phase, not after the completion of the settlement phase. The magistrate judge meets *ex parte* with the parties during the settlement phase and learns information from each party that the magistrate judge does not disclose to the other party. The case does not settle. Therefore the parties must go to trial before the magistrate judge. The parties and their lawyers worry about the effects of what was said or done during the settlement session, including what the *other side* said or did in caucus.

Are the parties more or less likely to perceive the settlement phase with the magistrate judge as providing them with procedural justice? Are they more or less likely to perceive the adjudicative phase with the magistrate judge as providing them with procedural justice?

As will be discussed in greater detail, each of these scenarios raises concerns that the *disclosure* to a presiding judge of "confidential" settlement communications or behavior is likely to undermine parties' perceptions of the procedural fairness of the adjudicative phase. Meanwhile, the *failure* to disclose to the parties the "confidential" communications or behavior occurring during *ex parte* sessions is likely to undermine the parties' perception of the procedural fairness of *both* the settlement *and* adjudicative phases. The scenarios also may raise concerns regarding due process and coercion. Structural reforms inspired by our knowledge of procedural justice research have, at the very least, the potential to reduce the likelihood of claims of coercion or violation of due process.<sup>25</sup> Due to the effects of procedural justice, these reforms also have the po-

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<sup>25</sup> See *infra* Part V.C.

tential to increase parties' trust in, and perceptions of the legitimacy of, magistrate judges and their courts.<sup>26</sup>

In addition, researchers and administrators are beginning to experiment with different tools to permit judges and other neutrals to solicit feedback from parties and attorneys regarding their perceptions of procedural fairness, engage in video review and self-reflection that focuses on procedural fairness, and participate in peer-to-peer dialogue on this issue and others.<sup>27</sup> This Article will discuss those tools, including a questionnaire that has been developed by the author and two colleagues. The questionnaire is designed to permit judges to receive feedback regarding whether they engaged in particular behaviors, whether those behaviors were perceived as helpful, whether the behaviors enhanced or detracted from perceptions of procedural justice, and whether such perceptions also were influenced by the context within which the behaviors occurred.

Ultimately, this Article will urge the following structural reforms to enhance the procedural justice provided by magistrate judges and settlement procedures in the federal courts:

- When different neutrals conduct the functions of settlement and adjudication (e.g., mediator and then magistrate judge, or magistrate judge and then district judge), and *ex parte* meetings are used during the settlement phase, the federal courts should provide for strict confidentiality regarding settlement communications and conduct that occurred during the *ex parte* meetings, with limited and explicit exceptions.
- When a single magistrate judge conducts the functions of both settlement and adjudication, the magistrate judge should be barred from using caucus or *ex parte* meetings during the settlement session, and the parties should be given the opportunity *after* the settlement session to elect whether or not the magistrate judge will conduct the trial using the confidential, "blind consent" procedures provided by 28 USC § 636(c)<sup>28</sup> and Rule 73 of the Federal Rules of Civil Procedure.<sup>29</sup>
- The Judicial Conference of the United States<sup>30</sup> should provide its magistrate judges<sup>31</sup> with the opportunity to receive feedback or engage in self-reflection or dialogue regarding parties' and attorneys' perceptions of the procedural justice of their settlement sessions. A sample tool appears as an appendix to this Article.

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<sup>26</sup> See *infra* Part III.

<sup>27</sup> See *infra* Part V.A.

<sup>28</sup> 28 U.S.C. § 636(c) (2012).

<sup>29</sup> FED. R. CIV. P. 73.

<sup>30</sup> "The Judicial Conference of the United States is the national policy-making body for the federal courts." *Governance & the Judicial Conference*, U.S. CTS., <http://www.uscourts.gov/about-federal-courts/governance-judicial-conference> [https://perma.cc/U3C2-5TS4] (last visited Apr. 20, 2016).

<sup>31</sup> It would be ideal if the same opportunity and mechanisms were extended to district judges, staff mediators, and roster mediators as well.

In addition, due to the significant role played by settlement in the disposition of federal matters, the Judicial Conference should require the Administrative Office of the U.S. Courts to report data regarding the number of dispositions that are the result of settlement generally, and more specifically, the number of such dispositions that are the result of: unassisted settlement by the parties, settlement sessions conducted by magistrate judges, settlement sessions conducted by district judges, mediations conducted by courts' staff or roster mediators, and mediations conducted by private mediators.

This Article begins, in Part I, with an overview of magistrate judges' history and role generally, including a discussion of the mechanism of "blind consent" that must be undertaken before a magistrate judge may conduct a trial. Part I then turns to magistrate judges' role in settlement and ADR, outlines the procedural and ethical rules governing judges' role in settlement, and highlights research revealing lawyers' concerns regarding judges' role in settlement. In Part II, the Article provides a brief overview of mediation in the federal courts and considers the relationship between judge-hosted settlement sessions and mediation. With this background regarding the magistrate judges' particular role in settlement and the procedural, ethical and dispute resolution-related contexts within which judicial settlement fits, the Article turns in Part III to an overview of the procedural justice literature and then, in Part IV, returns to the three scenarios described *supra* to consider whether parties are likely to perceive both the adjudicative and settlement phases as procedurally fair. This analysis reveals the need for structural changes, including enhanced clarity regarding the scope and limits of confidentiality, strict limits on magistrate judges' use of *ex parte* meetings, the need to insert a second opportunity for blind consent after a magistrate judge conducts a settlement session, and the need to provide magistrate judges with the opportunity to receive feedback and engage in self-reflection regarding the procedural fairness of their settlement efforts. In Part V, the Article reviews mechanisms currently used to provide judges with opportunities for feedback and self-reflection, and introduces a new tool that focuses particularly on the procedural justice of settlement sessions.

## I. MAGISTRATE JUDGES AND SETTLEMENT

### A. *Magistrate Judges' History and Role Generally*

In order to understand the functions of today's magistrate judges, it is helpful to examine a bit of their history.<sup>32</sup> Congress passed the Federal Magistrates

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<sup>32</sup> See MCCABE, *supra* note 1, at 7–17 (describing the evolution from early "commissioners" to "federal magistrates" to "federal magistrate judges," with changes in this position's required credentials, length of employment, compensation, functions, etc.); see also Tim A. Baker, *The Expanding Role of Magistrate Judges in the Federal Courts*, 39 VAL. U. L. REV. 661, 664 (2005) (citing Leslie G. Foschio, *A History of the Development of the Office of United States Commissioner and Magistrate Judge Systems*, 1999 FED. CTS. L. REV. 4, I.1

Act of 1968 to address several problems that had arisen with the system of “commissioners” that then existed: the impropriety of a fee-based compensation system for federal judicial officers; the failure to require commissioners to be lawyers; the part-time nature of most commissioners’ work; and the lack of sufficient legal or organizational support for the commissioners.<sup>33</sup> The Act significantly improved the role of magistrates—providing for expanded functions, multi-year contracts and salaries, and a change in title from “commissioner” to “magistrate.”<sup>34</sup> As will be described *infra*, permissive language in the Act also led some federal district courts to capitalize upon their magistrates’ reputations and expertise and make them responsible for facilitating settlements.<sup>35</sup>

Additional legislative enhancements followed. In 1976, Congress authorized magistrates to decide non-dispositive pretrial and discovery matters, with some exceptions, and clarified the standard of judicial review to be used by district court judges.<sup>36</sup> Just three years later, in 1979, Congress passed legislation permitting magistrates to conduct trials and order final judgment in civil matters, although only with the consent of the parties and with the opportunity for appeal.<sup>37</sup> Subsequent legislation improved federal magistrates’ salaries, provid-

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(1999)); R. Lawrence Dessem, *The Role of the Federal Magistrate Judge in Civil Justice Reform*, 67 ST. JOHN’S L. REV. 799 (1993).

<sup>33</sup> See MCCABE, *supra* note 1, at 10 (citing *U.S. Commissioner System: Hearings Before the Subcomm. on Improvements in Judicial Mach. of the S. Comm. on the Judiciary*, 89th Cong., Part 1 (1965)).

<sup>34</sup> See *id.* at 10–12. It is interesting to note the flurry of important procedural developments that occurred during this time, particularly those focusing on the importance and need to protect the impartiality of adjudicators. As described above, Congress passed the Federal Magistrates Act in 1968 and ended the fee-based system of compensation for magistrates. The Supreme Court’s 1970 decision in *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) specifically described an impartial decision-maker as a key element of procedural due process. In 1972, the Supreme Court decided *Ward v. Village of Monroeville*, 409 U.S. 1241 (1972), finding a violation of procedural due process when an Ohio mayor responsible for his village’s finances also served as a judge and assessed criminal fines that represented a substantial portion of his village’s budget; it did not matter that the mayor did not receive personal income from the fines he assessed. See Nancy A. Welsh, *What Is “(Im)Partial Enough” in a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 395, 442–46 (2010) (describing series of cases involving Ohio mayors serving as judges). The Supreme Court has recently returned to the need to establish procedural safeguards to protect judges’ impartiality. See *e.g.*, *Williams v. Pennsylvania*, No. 15-5040, slip op. (St. Ct. June 9, 2016) (constitutionally impermissible risk of bias exists when appellate judge had earlier, personal involvement as district attorney in critical decision regarding defendant’s case).

<sup>35</sup> See MCCABE, *supra* note 1, at 19.

<sup>36</sup> See *id.* at 15–16 (codified at 28 U.S.C. § 636(b) (2012)); see also *United States v. Radatz*, 447 U.S. 667 (1980); Kevin Koller, *Deciphering De Novo Determinations: Must District Courts Review Objections Not Raised Before a Magistrate Judge?*, 111 COLUM. L. REV. 1557 (2011); Richard J. Pierce, Jr., *District Court Review of Findings of Fact Proposed by Magistrates: Reality Versus Fiction*, 81 GEO. WASH. L. REV. 1236 (2013).

<sup>37</sup> See MCCABE, *supra* note 1, 16–17 (codified at 28 § U.S.C. 636(c)); see also *Federal Courts Improvement Act of 1996*, Pub. L. No. 104-317, §§ 201, 202, 207, 110 Stat. 3847

ed for a retirement system and merit selection process, and enhanced the prestige of the office with the title of “United States magistrate judge.”<sup>38</sup>

Today, the number of magistrate judges nearly equals the number of Article III district judges. In 2014, the Judicial Conference authorized 534 full-time magistrate judgeships, thirty-six part-time judgeships, and three combination clerk/magistrate judge positions,<sup>39</sup> while Congress authorized 677 district court judgeships.<sup>40</sup> Some suggest that the expansion of magistrate judges is the result of the magistrate judges’ ability to perform most of the functions of Article III judges, while also providing greater flexibility and ease in terms of both ap-

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(1996) (removing right to appeal final judgment in civil consent cases to district court). *See generally* Dessem, *supra* note 32.

<sup>38</sup> *See* McCABE, *supra* note 1, at 12–14; Dessem, *supra* note 32, at 805–10 (observing that the Federal Courts Study Committee Implementation Act of 1990, enacted as Title III of the Judicial Improvements Act of 1990, permitted judges to remind the parties of their right to consent to magistrate judges’ jurisdiction and changed their title from “magistrate” to “United States magistrate judge” and also describing the recommendations of the 1989 report of the Brookings Institution Task Force on Civil Justice Reform and the 1990 report of the Federal Courts Study Committee).

This Article is not detailing the history of magistrate judges’ institutionalization in the federal courts. Commentators have expressed concerns over the years, however, about the federal courts’ increasing reliance on magistrate judges; others have praised the development and the enhanced flexibility that it provides to the courts in responding to changes in their dockets. *See id.* at 838 n.180 (citing to Richard A. Posner, *Coping with the Caseload: A Comment on Magistrates and Masters*, 137 U. PA. L. REV. 2215, 2215–16 (1989); then citing Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581 (1985); then citing Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2132–33 (1989); then citing Jack B. Weinstein & Jonathan B. Wiener, *Of Sailing Ships and Seeking Facts: Brief Reflections on Magistrates and the Federal Rules of Civil Procedure*, 62 ST. JOHN’S L. REV. 429, 437 (1988); and then citing REPORT OF THE ADVISORY GROUP APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, U.S. DIST. COURT FOR THE E. DIST. OF P.A., *reprinted in* 138 F.R.D. 167, 278 (1991)); *see also* Baker *supra* note 32, at 666–67 (analogizing federal courts’ embrace of magistrate judges to states’ embrace of legalized gambling; though there is visceral resistance, “the heavy demands of the federal court docket have forced Congress and the district courts to search for new ways to manage the workload, and magistrate judges provide a potent and available source for this task”).

Similar concerns have been raised about arbitrators and mediators essentially becoming “judicial adjuncts”—and with even fewer protections and less oversight than are provided for magistrate judges. *See, e.g.*, Nancy A. Welsh, *Mandatory Predispute Consumer Arbitration, Structural Bias, and Incentivizing Procedural Safeguards*, 42 SW. L. REV. 187, 205 (2012); Nancy A. Welsh, *Musings on Mediation, Kleenex, and (Smudged) White Hats*, 33 U. LA VERNE L. REV. 5, 5–6 (2011) [hereinafter *Musings on Mediation*]; Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 132 (2004).

<sup>39</sup> *See Appointments of Magistrate Judges – Judicial Business 2014*, U.S. CTS., <http://www.uscourts.gov/statistics-reports/appointments-magistrate-judges-judicial-business-2014> [https://perma.cc/K9DR-PT7Z] (last visited Apr. 21, 2016).

<sup>40</sup> *See U.S. DISTRICT COURTS ADDITIONAL AUTHORIZED JUDGESHIPS*, U.S. CTS., <http://www.uscourts.gov/file/393/download> [https://perma.cc/DRC4-XBMD] (last visited Apr. 21, 2016).

pointment and removal.<sup>41</sup> Indeed, because district judges' available time is limited by their obligation to meet the requirements of the Speedy Trial Act in criminal cases,<sup>42</sup> some urge that magistrate judges have become the "face of the federal courts" in many districts, particularly for civil matters.<sup>43</sup>

The districts vary considerably, though, in their use of magistrate judges.<sup>44</sup> While in some districts, the district judges are personally involved in the early and active management of their cases,<sup>45</sup> other districts regularly delegate initial pretrial conferences, case scheduling, motions, discovery disputes (especially those involving e-discovery), settlement, and even the final pretrial conference to their magistrate judges.<sup>46</sup> Magistrate judges also may hold hearings on dispositive motions in civil matters and propose findings of fact and recommendations, with final disposition reserved to the district judges.<sup>47</sup> In many districts, the Clerk's Office randomly assigns a district judge and magistrate judge to

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<sup>41</sup> Baker, *supra* note 32, at 670 ("Although the process for selecting magistrate judges is highly competitive and can be grueling in its own right, the lack of a requisite presidential and congressional blessing makes the ordeal less onerous than for the district judges."); *see also* Felix Recio et al., *supra* note 5, at 44–46 (describing the advantages of using a magistrate judge based on the steps in the appointment process, required qualifications for the position, confidentiality of the application process, and the interest of district judges in ensuring the competence of magistrate judges).

<sup>42</sup> *See* Dessem, *supra* note 32, at 823–24 (generally describing the roles played by magistrate judges); James R. Knepp II, *A Magistrate Judge Reflects on Settlement*, FED. LAW., May/June 2014, at 104 (explaining that district judges may have less time to prepare for settlement sessions than magistrate judges, due to the "calendar urgency" of felony trials and the burden of felony sentencing).

<sup>43</sup> One commentator has noted that a magistrate judge often is "the first federal judge a party sees when first coming to federal court." Michelle H. Burns, *U.S. Magistrate Judges: The Breadth and Depth of Their Service*, FED. LAW., May/June 2014, at 65 (quoting Dist. Judge and Fed. Bar Ass'n President, Gustavo Gelpi); *see also* Baker, *supra* note 32, at 661. *But see* Steven S. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 KAN. L. REV. 849, 849–54 (2013) (summarizing concerns that have been raised regarding the lack of live interaction between federal trial judges and litigants and lawyers, and calling for trial judges to undertake several initiatives to renew such contact including holding early and live Rule 16 conferences so that the lawyers—and to some degree, the parties—see the face and hear the voice of the court).

<sup>44</sup> *See* Dessem, *supra* note 32, at 799, 804–05 (describing the varying roles of magistrate judges based on the Civil Justice Reform Act advisory group reports and the expense and delay reduction plans adopted in thirty-four early implementation district courts—and using previously-established categories of team player, specialist, and additional judge).

<sup>45</sup> *See* Gensler & Rosenthal, *supra* note 43, at 852–54 (urging generally that federal trial judges should hold an early Rule 16 conference, rather than waiting for the lawyers to hold a Rule 26(f) conference, and should engage in active case management and also urging that the lawyers need to cooperate with the judge's efforts to expedite the case).

<sup>46</sup> *See* MCCABE, *supra* note 1, at 43.

<sup>47</sup> 28 USC § 636(b) (2012); *see also* Elizabeth French, *Respecting the Linchpin: Why Absentee Consent Should Limit Magistrate Judge Jurisdiction*, 3 STAN. J. COMPLEX LITIG. 32, 38–39 (2015).

each case.<sup>48</sup> In those districts, magistrate judges' responsibilities are likely to vary from case to case, depending on the district judge who has been assigned.<sup>49</sup> In many other courts, however, district judges and magistrate judges are paired and regularly work together as a team.<sup>50</sup>

The districts also vary in the types of cases assigned to magistrate judges. In many districts, the magistrate judges are responsible for certain categories of cases<sup>51</sup>—e.g., Title VII cases in which the magistrate judge is appointed as a special master;<sup>52</sup> appeals from the denial of Social Security benefits, especially disability benefits;<sup>53</sup> *pro se* matters;<sup>54</sup> and prisoner petitions, which are also often *pro se*.<sup>55</sup> This situation seems to mimic a 1977 Department of Justice proposal to make magistrate judges responsible for trying smaller federal benefit claims.<sup>56</sup> The proposal was rejected at that time, in part due to concerns that it would establish a separate *de facto* federal small claims court and offer second-class justice.<sup>57</sup>

More than a quarter of the districts take a very different approach in assigning cases to magistrate judges, treating them just like district judges, including placing magistrate judges on the “wheel” to receive direct assignment of civil cases.<sup>58</sup> It is reported that this system of direct assignment has successfully re-

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<sup>48</sup> MCCABE, *supra* note 1, at 44; *see, e.g., Case Assignment and Numbering*, U.S. DISTRICT CT., E. DISTRICT OKLA., <http://www.oked.uscourts.gov/case-assignment-and-numbering> [<https://perma.cc/4ZDX-GHNY>] (last visited March 7, 2016).

<sup>49</sup> MCCABE, *supra* note 1, at 44.

<sup>50</sup> *Id.*

<sup>51</sup> *See* Dessem, *supra* note 32, at 818, 821 (describing the magistrate judge's role as “specialist” and also referencing Employment Retirement Income Security Act (“ERISA”) cases).

<sup>52</sup> MCCABE, *supra* note 1, at 50.

<sup>53</sup> *Id.* at 50.

<sup>54</sup> *See* Morton Denlow, *Magistrate Judges' Important Role in Settling Cases*, FED. LAW., May/June 2014, at 103 (describing *pro se* settlement program in the Northern District of Illinois, that involves magistrate judge as facilitator of settlement session and *pro bono* attorney whose representation is limited to advising the client for purposes of settlement). *See generally* Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475 (2002) (describing customized, less adversarial procedures developed by a magistrate judge in the Eastern District of New York to handle *pro se* complaints, and considering ethics of offering such procedures).

<sup>55</sup> MCCABE, *supra* note 1, at 51 (including state habeas corpus proceedings, federal habeas corpus proceedings, and petitions challenging conditions of confinement).

<sup>56</sup> *Id.* at 16; *see also* Baker, *supra* note 32, at 681 (noting that a senior judge of the Eighth Circuit Court of Appeals proposed establishing a federal drug court, with magistrate judges presiding); Dessem, *supra* note 32, at 808–09 (describing one of the recommendations of the 1990 report by the Federal Courts Study Committee to establish a federal small claims procedure for claims of less than \$10,000 and suggesting that magistrate judges could handle such claims).

<sup>57</sup> *See* MCCABE, *supra* note 1, at 16.

<sup>58</sup> *See* Aaron E. Goodstein, *The Expanding Role of Magistrate Judges: One District's Experience*, FED. LAW. May/June 2014, at 78.

duced the time to disposition.<sup>59</sup> In addition, because these districts require the parties to affirmatively opt out of trial before a magistrate judge rather than opt in to the provision of such jurisdiction, this system of assignment has increased the number of blind consents to magistrate judges' full case-disposition authority under 28 USC § 636(c).<sup>60</sup>

Because this Article will consider the potential use of "blind consent" to improve the procedural fairness of magistrate judges' facilitation of settlement sessions or adjudication, a few words are in order regarding the history, reasons for, and mechanics of such consent.

### B. Magistrate Judges and "Blind Consent"

As noted *supra*, in 1979, Congress provided magistrate judges with the authority to conduct trials and enter judgment in civil matters.<sup>61</sup> In order to avoid running afoul of Article III, Congress made the exercise of this jurisdiction contingent on the consent of the parties. Specifically, 28 USC § 636(c)(1) provides that:

[u]pon the consent of the parties, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves.<sup>62</sup>

Note that the statute requires *both* special designation by the district court *and* the consent of the parties before a magistrate judge may conduct a trial and enter judgment.<sup>63</sup>

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<sup>59</sup> See MCCABE, *supra* note 1, at 44.

<sup>60</sup> See Dessem, *supra* note 32, at 821, 824–25 (describing the various mechanisms used to encourage consent, based on Civil Justice Reform Act ("CJRA") reports and plans, and categorizing them as: "(1) providing the parties with more information concerning their right to consent to magistrate judge jurisdiction; (2) requiring that counsel explicitly address the question of magistrate judge jurisdiction; (3) providing incentives for parties to consent to magistrate judge jurisdiction [e.g., earlier trial date]; and (4) redefining the manner in which party consent to magistrate judge jurisdiction is manifested").

<sup>61</sup> 28 U.S.C. § 636(c)(1) (2012); *see also* French, *supra* note 47, at 39.

<sup>62</sup> 28 U.S.C. § 636(c)(1). The statute further provides:

Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate judge may exercise such jurisdiction, if such magistrate judge meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate judge is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

*Id.*

<sup>63</sup> *Id.*; *see also* Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 498–99 (2007) (describing why parties consent to trials before magistrate judges).

Although Congress sought to encourage parties to consent, it also sought to protect their constitutional right of access to an Article III judge. In particular, Congress established procedures to insulate the parties from the judge in order to protect the voluntariness of the parties' consent.<sup>64</sup> Thus, the concept of "blind consent" came into being. Congress specified in the statute that the clerk of court, not the judge, is responsible for notifying the parties of a magistrate judge's availability to exercise civil jurisdiction, and the statute further requires that parties communicate their decision to the clerk of court, not the judge.<sup>65</sup> While a 1990 amendment to the statute permits a district judge or magistrate judge to "again advise the parties of the availability of the magistrate judge," it also requires that "in so doing, [the judge] shall also advise the parties that they [the parties] are free to withhold consent without adverse substantive consequences."<sup>66</sup> The statute also requires, "[r]ules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent"<sup>67</sup> and "[t]he court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate judge under this subsection."<sup>68</sup>

Rule 73 of the Federal Rules of Civil Procedure provides further detail regarding the procedures to be used to protect the voluntariness of the parties' consent.<sup>69</sup> Specifically, the judge will learn of an individual party's response "only if all parties have consented to the referral."<sup>70</sup> In addition, Rule 73 repeats and thus reinforces some of the protections contained in the statute.<sup>71</sup> Rule 73(b) thus further emphasizes the importance of the voluntariness of the parties' consent,<sup>72</sup> as well as the importance of maintaining the confidentiality of any party's refusal to consent.<sup>73</sup>

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<sup>64</sup> See French, *supra* note 47, at 39–43 (describing the history of the provision for blind consent and subsequent jurisprudence).

<sup>65</sup> 28 U.S.C. § 636(c)(2).

<sup>66</sup> *Id.*; see also *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1947–48 (2015) (observing that while consent to adjudication by an Article I bankruptcy court may be implied rather than express, such consent also must also be knowing, voluntary, and preceded by notification of the right to refuse consent).

<sup>67</sup> 28 U.S.C. § 636 (c)(2).

<sup>68</sup> § 636 (c)(4).

<sup>69</sup> FED. R. CIV. P. 73.

<sup>70</sup> *Id.* at 73(b)(1).

<sup>71</sup> Rule 73(b) provides that although "[a] district judge, magistrate judge, or other court official may remind the parties of the magistrate judge's availability," such a reminder must also include the advice that the parties "are free to withhold consent without adverse substantive consequences . . . [o]n its own for good cause—or when a party shows extraordinary circumstances—the district judge may vacate a referral to a magistrate judge under this rule." *Id.* at (b)(2)–(3).

<sup>72</sup> *Id.* at (b)(1).

<sup>73</sup> *Id.* at (b)(2).

The 1983 Advisory Committee Notes on Rule 73 provide for deference to each district court's local rules on the logistics of seeking the parties' consent:

The rule opts for a uniform approach in implementing the consent provision by directing the clerk to notify the parties of their opportunity to elect to proceed before a magistrate and by requiring the execution and filing of a consent form or forms setting forth the election. However, flexibility at the local level is preserved in that local rules will determine how notice shall be communicated to the parties, and local rules will specify the time period within which an election must be made.<sup>74</sup>

Certainly, the logistics of implementation matter. As noted *supra*, some districts' local rules now require parties to "opt out" of an otherwise-automatic assignment of their cases to magistrate judges for trial. Due to the power of the "endowment effect" or "status quo bias,"<sup>75</sup> parties are very likely to accept this assignment and fail to opt out. In contrast, parties are much less likely to "opt in" to such assignment. Thus, there is some tension between the voluntariness that is emphasized in the provisions described *supra* and the "opt out" requirement now imposed in some districts.<sup>76</sup> Nonetheless, the 1993 Advisory Committee Notes on Rule 73 again affirm that the parties must be advised that the withholding of consent will have no "adverse substantive consequences" although the parties may be advised of "a potential delay in trial."<sup>77</sup>

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<sup>74</sup> FED. R. CIV. P. 73 advisory committee's note to 1983 amendment.

<sup>75</sup> See Maurits Barendrecht & Berend R. de Vries, *Fitting the Forum to the Fuss with Sticky Defaults: Failure in the Market for Dispute Resolution Services?*, 7 CARDOZO J. CONFLICT RESOL. 83, 93, 109, 112 (2005) (hypothesizing that as a result of the status quo bias and other psychological and cognitive biases, "the majority of disputes will be dealt with by application of the default" dispute resolution approach); see also Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1228–29 (2003) (examining the relationship between the status quo bias and the endowment effect and describing the effect of the status quo bias as "individuals tend[ing] to prefer the present state of the world to alternative states, all other things being equal"); Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 625–30 (1998) (examining the application of the status quo bias to contract rules).

<sup>76</sup> See Philip M. Pro & Thomas C. Hnatowski, *Measured Progress: The Evolution and Administration of the Federal Magistrate Judges System*, 44 AM. U. L. REV. 1503, 1528 n.203 (1995) (referencing Local Rule 105-2(d) of the U.S. District Court for the District of Montana); T. Michael Putnam, *The Utilization of Magistrate Judges in the Federal District Courts of Alabama*, 28 CUMB. L. REV. 635, 645 (1998) (describing opt out in the District Court of the Southern District of Alabama). There are also parallels between this evolution and the evolution of court-connected mediation, which began as a voluntary process but became mandatory in response to underutilization. See, e.g., *Thinning Vision*, *supra* note 23, at 23–27; Nancy A. Welsh & Andrea Kupfer Schneider, *The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*, 18 HARV. NEGOT. L. REV. 71, 126–27 (2013) (describing opt-out schemes).

<sup>77</sup> FED. R. CIV. P. 73 advisory committee's note to 1993 amendment (internal quotations omitted).

*C. Magistrate Judges' Role in Settlement*

As described *supra*, civil case management is one of the primary responsibilities of magistrate judges in many courts, and the facilitation of settlement often represents a significant part of that responsibility.<sup>78</sup> Many commentators and judges urge the particular value of utilizing magistrate judges to facilitate settlement.<sup>79</sup> In a document entitled *Suggestions for Utilization of Magistrate Judges*, No. 3, for example, the Magistrate Judges Committee of the Judicial Conference explained that “referring a case to a Magistrate Judge for a settlement conference capitalizes on the unique authority and credibility that another judge can bring to the settlement process. By facilitating settlement, Magistrate Judges can reduce the number of cases that require disposition of case-dispositive motions and trial.”<sup>80</sup>

Former Magistrate Judge Morton Denlow also has written about the valuable role that magistrate judges can play in facilitating settlement generally, but especially in smaller cases.<sup>81</sup> After Magistrate Judge Denlow realized that almost 60 percent of the cases he settled in his last three full years on the federal bench had settled for less than \$50,000 and more than 70 percent had settled for less than \$100,000,<sup>82</sup> he began arguing that the parties would benefit more from the services of magistrate judges than private mediators who would charge for their services and thus were likely to increase the parties' costs.<sup>83</sup> He suggested that magistrate judges could be even more helpful when they were: (1) supervising discovery and thus could discern when both sides had sufficient information to make settlement discussions appropriate<sup>84</sup> or (2) in districts that had

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<sup>78</sup> See MCCABE, *supra* note 1, at 43; Burns, *supra* note 43, at 64 (based on number of settlement conferences conducted by magistrate judges, asserting that “mediation is part of the regular duties of most Magistrate Judges”); Dessem, *supra* note 32, at 819–20 (describing some districts' use of magistrate judges to facilitate settlement); Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 OHIO ST. J. ON DISP. RESOL. 271, 278–79 (2011) (noting that magistrate judges in Ohio district generally conduct settlement sessions, but some district judges conduct their own settlement sessions in the cases to which they are assigned for trial). McCabe notes, however, that Federal Rule of Civil Procedure 11(c)(1) limits district courts' involvement in settlement in criminal cases. MCCABE, *supra* note 1, at 46 n.171. The rule provides that “the court must not participate” in plea negotiations between the government and the defendant. FED. R. CIV. P. 11. Some courts apparently permit a judge who is not taking the defendant's plea to serve as a facilitator in the plea negotiations between the government and the defendant. See MCCABE, *supra* note 1, at 46 n.171.

<sup>79</sup> See Denlow, *supra* note 54, at 101.

<sup>80</sup> See MCCABE, *supra* note 1, at 46.

<sup>81</sup> Denlow, *supra* note 54, at 101.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*; see also Cecelia G. Morris & Mary K. Guccion, *The Loss Mitigation Program Procedures for the United States Bankruptcy Court for the Southern District of New York*, 19 AM. BANKR. INST. L. REV. 1, 59 (2011) (urging that use of mediation in bankruptcy context may reduce funds available to pay creditors).

<sup>84</sup> See Denlow, *supra* note 54, at 102.

developed jurisdiction-specific settlement databases that permit magistrate judges and parties to compare their valuations of cases to settlements reached in similar matters.<sup>85</sup>

Former Magistrate Judge Denlow also has urged that involvement in settlement represents one of the most efficient uses of magistrate judges' time. Specifically, he points out that the time required from a magistrate judge to settle a matter is much less than the time required to prepare a report and recommendation on a summary judgment or dismissal motion (which is only advisory).<sup>86</sup> Consistent with this view, the Northern District of Illinois (and perhaps other districts) have stopped referring motions for summary judgment or dismissal to magistrate judges for reports and recommendations, and instead refer more cases to magistrate judges for settlement.<sup>87</sup>

Importantly, magistrate judges' involvement in settlement varies dramatically from district to district. The Administrative Office of the U.S. Courts reports that for the twelve-month period ending September 30, 2014, magistrate judges held 20,641 settlement conferences/mediations.<sup>88</sup> In some districts, magistrate judges handled huge numbers of settlement sessions during this twelve-month period. For example, the magistrate judges in each of five federal districts held settlement conferences/mediations that numbered in the thousands.<sup>89</sup> Other districts assign very few settlement sessions to their magistrate judges. In each of eleven districts, magistrate judge-hosted settlement sessions numbered in only single digits.<sup>90</sup> Of course, this means that in the majority of districts, the

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<sup>85</sup> See *id.* at 103; John Lande, *How Much Justice Can We Afford?: Defining the Courts' Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice*, 2006 J. DISP. RESOL. 213, 235–36 (2006) (citing Morton Denlow & Jennifer E. Shack, *Judicial Settlement Databases: Development and Uses*, JUDGES J., Winter 2004, at 19–21 (who also wrote about settlement databases)). See generally J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713 (2012).

<sup>86</sup> Denlow, *supra* note 54, at 101–02 (observing that settling an employment, civil rights, or personal injury case often requires three to five hours of the magistrate judge's time in comparison to the days that may be required to prepare a report and recommendation on a summary judgment or dismissal motion in an employment case—which can then require additional time from the district judge, and perhaps even an appellate court).

<sup>87</sup> *Id.* at 102.

<sup>88</sup> See TABLE M-4A—U.S. DISTRICT COURTS—CIVIL PRETRIAL MATTERS HANDLED BY U.S. MAGISTRATE JUDGES UNDER 28 U.S.C. 636(B) DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2014, U.S. CTS., (Sept. 30, 2014) [hereinafter TABLE M-4A], <http://www.uscourts.gov/statistics/table/m-4a/judicial-business/2014/09/30> [<https://perma.cc/CZ3W-83WY>].

<sup>89</sup> *Id.* The five districts were the Eastern District of New York, Southern District of New York, District of New Jersey, Eastern District of Pennsylvania, and Northern District of Illinois. *Id.*

<sup>90</sup> *Id.* The eleven districts were the District of Rhode Island, District of Vermont, Middle District of North Carolina, Western District of North Carolina, District of South Carolina, Southern District of West Virginia, Eastern District of Tennessee, Northern District of Iowa, Northern District of Mariana Islands, Middle District of Georgia, and Southern District of Georgia. *Id.*

number of settlement conferences/mediations conducted by magistrate judges ranged between ten and 999.

The Administrative Office of the U.S. Courts conducts on-site and telephone interviews with magistrate judges<sup>91</sup> when gathering information to evaluate a district court's need for its current magistrate judge positions or a court's request for an additional magistrate judge position.<sup>92</sup> Although the interviews have nothing to do with evaluating the performance of the magistrate judge, or the quality or effectiveness of the settlement conferences, they do reveal useful

<sup>91</sup> Although the Administrative Office does not follow a rigorous script of questions on a given topic, the following subjects have arisen:

- Whether the magistrate judge holds settlement conferences.
- The type/style of settlement conference the magistrate judge holds (i.e., full mediation involving caucuses, etc., abbreviated mediation, some other type of conference aimed at settlement).
- Whether magistrate judge holds conferences *sua sponte*.
- Whether magistrate judge holds conferences (a) in all cases, (b) in certain types of cases.
- Whether conduct of conference by the magistrate judge is at behest of district judge or magistrate judge.
- Whether magistrate judge holds conference when requested by parties.
- Estimated typical frequency of settlement conferences (e.g., how many times per week/month).
- Estimated typical duration of settlement conferences.
- If a settlement conference does not produce a settlement, whether the magistrate judge holds follow-up conferences (in person, by phone?).
- The amount of time usually involved in preparing for a settlement conference.
- Whether the magistrate judge requires parties to submit to him/her position papers before the settlement conference.
- Where the settlement conferences usually are held (in chambers, in courtroom, in conference room).
- Whether the magistrate judge ever uses videoconferencing for settlement conferences.
- Whether the magistrate judge travels in district to hold settlement conferences.
- Whether the magistrate judge holds conferences in prisoner cases.
- Whether the magistrate judge can explain any changes in the frequency/number of settlement conferences over a given period.
- Whether the court has any other ADR policies/practices.

Email from Thomas Davis, Senior Attorney, Judicial Servs. Office, Admin. Office of the U.S. Courts, to Nancy Welsh (Oct. 16, 2015, 17:58) (on file with author).

<sup>92</sup> 28 U.S.C. § 633 (2012) authorizes these surveys. § 633(a)(1) required the Director of the Administrative Office to make initial surveys of all districts to permit the Judicial Conference (with input from the district courts and circuit councils) to determine the number of magistrate positions to be initially authorized for each district court in the early 1970s. § 633(a)(1) further says that: "[t]hereafter, the Director shall, from time to time, make such surveys . . . as the conference shall deem expedient." The Judicial Conference decided in the 1970s that after the initial surveys, the Director of the Administrative Office would continue to do cyclical surveys of all district courts (called "district-wide surveys") on a regular basis, currently every five years, and submit magistrate judge survey reports to the Judicial Conference Committee on the Administration of the Magistrate Judges System (Magistrate Judges Committee). See Email from Thomas Davis, Senior Attorney, Judicial Servs. Office, Admin. Office of the U.S. Courts, to Nancy Welsh (Dec. 3, 2015) (on file with author).

information about magistrate judges' perceptions of their settlement sessions.<sup>93</sup> For example, the interviews suggest that a "heavy" settlement workload for a magistrate judge involves two to three settlement sessions per week, while a "lighter" workload involves one settlement session per week.<sup>94</sup> Most magistrate judges' settlement sessions appear to last a half-day (or three to four hours).<sup>95</sup> In addition, many report that they spend one to one-and-a-half hours preparing for each settlement session and often set up follow-up calls.<sup>96</sup> Further, the interviews suggest that many magistrate judges begin their settlement sessions (or mediations) with a joint session but then make significant use of *ex parte* meetings (or caucuses) before concluding with another joint session.<sup>97</sup> Less frequently, magistrate judges keep the parties in joint session throughout and engage only in general discussion of the case.<sup>98</sup> Finally, although magistrate judges may hold settlement sessions entirely in their chambers or conference rooms, the interviews reveal that magistrate judges also use courtrooms for their initial joint sessions and at the conclusion of the settlement session, and may even wear their robes for settlement sessions.<sup>99</sup>

While the insights gained from these interviews are helpful in beginning to develop a "picture" of magistrate judges' settlement sessions, the interviews do not provide details regarding the particular techniques that magistrate judges use routinely in their settlement sessions,<sup>100</sup> the effectiveness of these tech-

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<sup>93</sup> These interviews also have nothing to do with formal evaluation or reporting regarding the training needs of magistrate judges. At the same time, it is within the scope of the interviews to ask magistrate judges whether they have attended Federal Judicial Center training programs and to provide information about such programs. *See* Email from Thomas Davis, Senior Attorney, Judicial Servs. Office, Admin. Office of the U.S. Courts, to Nancy Welsh (Dec. 17, 2015, 11:55 P.M.) (on file with author).

<sup>94</sup> Telephone Conference with Thomas Davis, Senior Attorney, Judicial Servs. Office, Admin. Office of the U.S. Courts, and Nancy Welsh (Nov. 24, 2015).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> As noted in D. MARIE PROVINE, FED. JUDICIAL CTR., SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES 35–36 (1986), lawyers prefer a settlement judge who points out evidence or law that lawyers misunderstand or are overlooking (*citing* Wayne D. Brazil, *Settling Civil Cases: Where Attorneys Disagree About Judicial Roles*, 23 TRIAL JUDGES J. 20, 20–24 (1984) (reporting primarily that the overwhelming majority of lawyer-respondents in Northern California preferred judges who made suggestions and offered observations during settlement sessions, but lawyers in Florida, Texas, and Missouri were more ambivalent about such a judicial role)); Dale E. Rude & James A. Wall, Jr., *Judicial Involvement in Settlement: How Judges and Lawyers View It*, 72 JUDICATURE 175, 176 (1988) (reporting that lawyers prefer judges to inform them regarding how similar cases have settled and to argue logically for concessions); *see, e.g.*, Peter Robinson, *An Empirical Study of Settlement Conference Nuts and Bolts: Settlement Judges Facilitating Communication, Compromise and Fear*, 17 HARV. NEGOT. L. REV. 97, 98 (2012). Case law and disciplinary proceedings also reveal par-

niques in producing settlements, or litigants' and lawyers' perceptions of the procedural fairness of settlement conferences. This Article will return to the need for more information on these topics, *infra*.

#### *D. Magistrate Judges' Role in ADR*

Rule 16 of the Federal Rules of Civil Procedure, in combination with a district's local rules or a statute, specifically authorizes judges to refer matters to mediation or another ADR procedure for settlement, rather than facilitate a settlement session themselves.<sup>101</sup> As will be discussed in greater detail, many district courts have established rosters of mediators, and a few have staff mediators.<sup>102</sup> Many magistrate judges refer cases to these mediators for assistance with settlement.<sup>103</sup>

Indeed, pursuant to 28 U.S.C. § 651(b) and (d), each district court is required to have local rules establishing an ADR program.<sup>104</sup> The statute demands the designation of "an employee, or a judicial officer, who is knowledgeable in alternative dispute resolution practices and processes to implement, administer, oversee, and evaluate the court's alternative dispute resolution program."<sup>105</sup> In some districts, magistrate judges play this role.<sup>106</sup>

Finally, magistrate judges may serve as mediators or ADR neutrals themselves. In 1997, the Federal Judicial Center began to offer consultations and mediation training to district, magistrate and bankruptcy judges.<sup>107</sup> In a few districts, the mediation rosters now explicitly include judges,<sup>108</sup> and as noted *supra*, federal districts seeking supplemental funding for their ADR programs have reported that some of their referrals are to judicial settlement conferences.<sup>109</sup> One commentator asserts that magistrate judges "serve regularly as mediators in many courts."<sup>110</sup> In addition, by 2011, a little over a third of the federal districts specifically included settlement sessions in their ADR authori-

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ties' perceptions of and conclusions regarding certain judicial settlement behaviors. *See, e.g., Thinning Vision, supra* note 23, at 64–78.

<sup>101</sup> FED. R. CIV. P.16(c)(2)(I).

<sup>102</sup> *See infra* Part II.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> 28 U.S.C. § 651(d) (2012).

<sup>106</sup> MCCABE, *supra* note 1, at 46.

<sup>107</sup> STIENSTRA, *supra* note 15, at 3.

<sup>108</sup> *Id.* at 10; *see also* Robinson, *supra* note 23, at 347–51 (describing San Luis Obispo and other court programs that train their judges in mediation skills and then offer judges as mediators).

<sup>109</sup> *See* STIENSTRA, *supra* note 15, at 14–15.

<sup>110</sup> MCCABE, *supra* note 1, at 46.

zation or rules,<sup>111</sup> and 10.6 percent of the federal district courts authorized *only* settlement sessions as a form of ADR.<sup>112</sup>

Regarding magistrate judges' service in ADR procedures besides mediation, the Administrative Office of the U.S. Courts reports that in 2013–2014, magistrate judges participated in 735 summary jury trials, early neutral evaluations, or other ADR procedures.<sup>113</sup> It should be noted, however, that magistrate judges in a single federal district court—the Southern District of California—were responsible for 721 of the 735 procedures.<sup>114</sup>

This Article will return to magistrate judges' involvement in the federal districts' provision of mediation and the relationship between settlement sessions and mediation, *infra*.

#### E. *Procedural and Ethical Rules Governing the Judicial Role in Settlement*<sup>115</sup>

As described *supra*, magistrate judges began to be involved in settlement with the passage of the Federal Magistrates Act of 1968.<sup>116</sup> In some ways, this development was surprising. At that time, Rule 16 of the Federal Rules of Civil Procedure did not even list settlement as a subject for consideration at pre-trial conferences, and this exclusion apparently was intentional.<sup>117</sup> The drafters of the federal rule anticipated that settlements would result naturally from access to discovery and judicial case management.<sup>118</sup> They worried that mischief could result if settlement was described as an independent goal of pre-trial conferences.<sup>119</sup> Many judges nonetheless routinely viewed pre-trial settlement conferences as permissible under the language of Rule 16(6) providing for consideration of “such other matters as may aid in the disposition of the action.”<sup>120</sup>

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<sup>111</sup> STIENSTRA, *supra* note 15, at 4–5.

<sup>112</sup> *Id.* at 5.

<sup>113</sup> See TABLE M-4A, *supra* note 88.

<sup>114</sup> *Id.*

<sup>115</sup> The text of this part (i.e., Part I.E.) was, in substantial part, first published in Nancy Welsh et al., *The Application of Procedural Justice Research to Judicial Actions and Techniques in Settlement Sessions*, in THE MULTI-TASKING JUDGE: COMPARATIVE JUDICIAL DISPUTE RESOLUTION (Archie Zariski & Tania Sourdin, eds., 2013).

<sup>116</sup> 28 U.S.C. §§ 631–639 (2012); see *supra* Part I.A.

<sup>117</sup> See Charles E. Clark, *Objectives of Pre-trial Procedure*, 16 OHIO ST. L.J. 163, 167 (1956) (explaining that the original drafters deliberately omitted mentioning settlement from their version of Rule 16 because while “settlement will come naturally in many cases as the issues are defined and made clear and simple,” it would be “dangerous to the whole purpose of pre-trial to force settlement upon unwilling parties”); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 486 (1985) (providing a comprehensive examination of the evolution, goals, and bases for evaluation of judicial settlement conferences).

<sup>118</sup> See Clark, *supra* note 117.

<sup>119</sup> See *id.*

<sup>120</sup> FED. R. CIV. P. 16. At least as early as 1950, judges were meeting separately with lawyers for the various parties as a means to overcome impediments to settlement. See Marc Ga-

Also, the Federal Magistrates Act of 1968 did not specifically identify settlement as one of the responsibilities to be assigned to magistrate judges.<sup>121</sup> Instead, Congress provided that magistrate judges could be “assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.”<sup>122</sup> In the 1970s, several district courts interpreted that rather vague language to permit assigning responsibility for settlement to their magistrate judges.<sup>123</sup> These courts probably recognized the opportunity to leverage their magistrate judges’ reputations and experience as respected lawyers and state court judges (and at the state level, both the lawyers and judges may have been regularly involved in pretrial settlement).<sup>124</sup>

By 1983, the tide had clearly turned regarding any questions about the legitimacy of judicial encouragement of settlement. Although some judges<sup>125</sup> and commentators<sup>126</sup> objected, Rule 16 was amended that year to specify that “set-

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lanter, *The Emergence of the Judge As a Mediator in Civil Cases*, 69 JUDICATURE 257, 259–61 (1986) (describing judges’ different views regarding settlement, with federal judges’ embracing the goal of settlement by the 1970s); Menkel-Meadow, *supra* note 117, at 490–93 (history of evolution of judicial settlement conferences); Lawrence F. Schiller & James A. Wall, Jr., *Judicial Settlement Techniques*, 5 AM. J. TRIAL ADVOC. 39, 46 n.42 (1981) (discussing a publication of H. NIMS, PRETRIAL 239 (1950)).

<sup>121</sup> See MCCABE, *supra* note 1, at 11.

<sup>122</sup> 28 U.S.C. § 636(b)(3) (2012).

<sup>123</sup> See MCCABE, *supra* note 1, at 19.

<sup>124</sup> *Id.*

<sup>125</sup> These judges objected that judicial settlement activities might run afoul of the ethical obligations of judges. See Harold Baer, Jr., *History, Process, and a Role for Judges in Mediating Their Own Cases*, 58 N.Y.U. ANN. SURV. AM. L. 131, 144 (2002) (explaining “another central criticism of judicial mediation argues that . . . it is also unethical for a judge to mediate a case that appears on his own docket.”); James A. Wall, Jr. & Dale E. Rude, *The Judge’s Role in Settlement: Opinions from Missouri Judges and Lawyers*, 1988 J. DISP. RESOL., 163, 164 (1988) (discussing the controversy that existed among judges concerning their role in settlement, including extensive footnotes to other authors). The problem of the potential loss of judicial impartiality when a judge facilitates settlement has been a constant refrain. See Daisy Hurst Floyd, *Can the Judge Do That?—The Need for a Clearer Judicial Role in Settlement*, 26 ARIZ. ST. L.J. 45, 66 (1994); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 426–31 (1982) (expressing concern that impartiality is threatened when the trial judge, in a case manager role, meets with parties for informal settlement sessions and learns information that could cause the judge to pre-judge the case); Leroy J. Tornquist, *The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry*, 25 WILLAMETTE L. REV. 743, 752–56, 773 (1989) (explaining the risk to impartiality that occurs when a judge, striving for settlement, punishes a party who fails to co-operate and recommending “[t]he judge who is to try the case on the merits should be barred from participating in settlement negotiations.”). For advice provided to judges and lawyers, see generally WAYNE D. BRAZIL, *EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES* (1988).

<sup>126</sup> See Resnik, *supra* note 125 (regarding potential for coerced settlements). *But see* Steven Flanders, *Blind Umpires—A Response to Professor Resnik*, 35 HASTINGS L. J. 505, 507–14 (1984); *see also* Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 75 (1995) (raising concerns regarding coerced settlement); *Thinning Vision*, *supra* note 23, at 64–78 (describing parties’ claims of coercion by judges involved in facilitation or encouragement of settlement).

tlement” was one of the “[s]ubjects to [b]e [d]iscussed at [p]retrial [c]onferences.”<sup>127</sup>

Judicial codes of ethics similarly evolved in their acknowledgement of judges’ settlement functions. The ethical codes’ handling of *ex parte* meetings with judges, meanwhile, remains a work in progress. The original 1972 Code of Judicial Conduct for United States Judges<sup>128</sup> (which was developed by the American Bar Association and then adopted by the Judicial Conference of the United States in 1973)<sup>129</sup> required judges to uphold the “integrity and independence of the judiciary,”<sup>130</sup> to “avoid impropriety and the appearance of impropriety in all activities”<sup>131</sup> and to “perform the duties of the office fairly, impartially and diligently.”<sup>132</sup> These key principles for judicial *decision-making* did not, however, give guidance to judges about which *settlement* activities were allowed under the Code. Consistent with the principle of impartiality, for example, the 1972 Code of Judicial Conduct explicitly prohibited *ex parte* communications as part of adjudication and did not recognize private meetings as a settlement technique:

A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law,<sup>133</sup> neither initiate nor consider *ex parte* or other communications, concerning a pending or impending proceeding.<sup>134</sup>

Today, the Code of Conduct for United States Judges—which, at this point, is distinct from the American Bar Association Model Code of Judicial Conduct (“ABA Model Code”)—continues to provide, as part of judges’ “[a]djudicative [r]esponsibilities,” that a judge “should not initiate, permit, or consider *ex parte* communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers” and further provides that “[i]f a judge receives an unauthorized *ex parte* communication bearing on the substance of a matter, the judge should promptly

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<sup>127</sup> Relevant subjects for discussion included in amendments to Rule 16 in 1983 included “(6) the advisability of referring matters to a magistrate or master” and “(7) . . . settlement or the use of extrajudicial procedures to resolve the dispute.” FED. R. CIV. P. 16 (1983). “Clause (7) explicitly recognizes that it has become commonplace to discuss settlement at pretrial conferences.” FED. R. CIV. P. 16 advisory committee’s note to 1983 Amendment.

<sup>128</sup> CODE OF JUDICIAL CONDUCT FOR UNITED STATES JUDGES (1972). The name of this Code of Judicial Conduct was changed in 1990 to the Model Code of Judicial Conduct.

<sup>129</sup> See WARREN BURGER, COMMUNICATION FROM CHIEF JUSTICE OF THE UNITED STATES TRANSMITTING PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, APRIL 5–6, 1973 10 (1973), <http://www.uscourts.gov/file/1973-04pdf> [<https://perma.cc/EK5J-9A8Y>].

<sup>130</sup> CODE OF JUDICIAL CONDUCT FOR UNITED STATES JUDGES Canon 1 (1972).

<sup>131</sup> *Id.* at Canon 2.

<sup>132</sup> *Id.* at Canon 3.

<sup>133</sup> There was no exception relevant to settlement activities.

<sup>134</sup> CODE OF JUDICIAL CONDUCT FOR UNITED STATES JUDGES Canon 3(A)(4) (1972).

notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested.”<sup>135</sup>

However, the current Code of Conduct for United States Judges also specifically permits *ex parte* communications in the context of settlement. It provides that a judge may, “with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.”<sup>136</sup> The Commentary to Canon 3A(4) provides an important caution: “A judge may encourage and seek to facilitate settlement but should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts.”<sup>137</sup> That standard—encouraging the facilitation of settlement but discouraging coercion—has been described as “a difficult one to apply.”<sup>138</sup> Of course, one of the concerns about judges’ involvement in settlement discussions, including discussions held *ex parte*, is the potential for coercion to occur—or at least to be perceived as occurring. While the current Code of Conduct for United States Judges acknowledges this potential, it does not provide concrete guidance to federal judges—including magistrate judges—regarding how to avoid conditions that are likely to heighten the potential for coercion.

In contrast, the current ABA Model Code (which, again, is now distinct from the Code of Conduct for United States Judges) has placed a mandatory prohibition against coercion in the black letter of the canon, in a new section entitled “Ensuring the Right to Be Heard.”<sup>139</sup> The rule reads, “A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.”<sup>140</sup> This section of the ABA Model Code also provides considerably more guidance to judges—albeit in Comments—about what to consider in determining whether or not *ex parte* communications are “coercive.” Specifically, Comment 2 to Rule 2.6 includes the following:

The judge should keep in mind the effect that the judge’s participation in settlement discussions may have, not only on the judge’s own views of the case, but also on the perceptions of the lawyers and the parties if the case remains with the judge after settlement efforts are unsuccessful. Among the factors that a judge

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<sup>135</sup> CODE OF JUDICIAL CONDUCT FOR UNITED STATES JUDGES Canon 3(A)(4) (2014), <http://www.uscourts.gov/file/2908/download> [<https://perma.cc/9W6C-DNNQ>].

<sup>136</sup> *Id.* at Canon 3(A)(4)(d), <http://www.uscourts.gov/file/2908/download> [<https://perma.cc/XZ8P-DUWS>]. How party consent is to be signalled is not defined, which, of course, can be problematic. *See* Floyd, *supra* note 125 at 90 (“Judges must be willing to struggle with the fact that the judge’s position, as opposed to the particular action of the judge, may have coercive effect”).

<sup>137</sup> *Id.* at Canon 3(A)(4), <http://www.uscourts.gov/file/2908/download> [<https://perma.cc/R5G8-S2FM>].

<sup>138</sup> Floyd, *supra* note 125, at 89.

<sup>139</sup> MODEL CODE OF JUDICIAL CONDUCT r. 2.6 (AM. BAR ASS’N 2007).

<sup>140</sup> MODEL CODE OF JUDICIAL CONDUCT r. 2.6(B) (AM. BAR ASS’N 2007).

should consider when deciding upon an appropriate settlement practice for a case are . . . (3) whether the case will be tried by the judge or a jury . . . .<sup>141</sup>

Comment 3 to Rule 2.6 includes:

Judges must be mindful of the effect settlement discussions can have, not only on their objectivity and impartiality, but also on the appearance of their objectivity and impartiality. Despite a judge's best efforts, there may be instances when information obtained during settlement discussions could influence a judge's decision making during trial, and, in such instances, the judge should consider whether disqualification may be appropriate.<sup>142</sup>

The ABA Model Code's revisions likely were informed by the significant literature that had developed by the mid-1990s regarding judicial settlement conferences,<sup>143</sup> including research on the techniques that lawyers perceived judges as using, lawyers' preferences among these techniques, and techniques lawyers found troublesome. In general, lawyers preferred judges to assist them in being realistic regarding the application of the law to their cases and the likely outcomes.<sup>144</sup> In other words, they appreciated judicial "signaling."<sup>145</sup> They

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<sup>141</sup> MODEL CODE OF JUDICIAL CONDUCT r. 2.6 cmt. 2 (AM. BAR ASS'N 2007). *See generally* Committee on Codes of Conduct Advisory Opinion No. 95: *Judges Acting in a Settlement Capacity*, in GUIDE TO JUDICIARY POLICY, Vol. 2B, Ch. 2, at 160–62 (2009), <http://www.uscourts.gov/file/1903/download> [<https://perma.cc/69T8-Q99A>] (served as the basis for comment).

<sup>142</sup> MODEL RULES OF JUDICIAL CONDUCT r. 2.6 cmt. 3 (AM. BAR ASS'N 2007); *see also* John C. Cratsley, *Judicial Ethics and Judicial Settlement Practices: Time for Two Strangers to Meet*, 21 OHIO ST. J. ON DISP. RESOL. 569, 585–87 (2006) (advocating for several revisions to the 2007 Model Code: barring judges from trying any cases in which they had engaged in settlement activity; making parties' written consent a precondition to judicial settlement efforts; judicial disclosure of the settlement techniques to be used; and mandatory training for judges in mediation or settlement facilitation); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1323 (2005) ("Taken together, our studies show that judges do not disregard inadmissible information when making substantive decisions in either civil or criminal cases"). Given their findings, Wistrich et al. advocate for a "divided decision making" model whereby the settlement judge and the trial judge are not the same individual. *Id.* at 1325. The Reporter's comments to the 2007 revisions indicate that this idea was considered and rejected in 2007 because of the view that the issue was "better left for rules of practice and procedure than ethics." MODEL RULES OF JUDICIAL CONDUCT r. 2.6 app. B (AM. BAR ASS'N 2007).

<sup>143</sup> JONA GOLDSCHMIDT & LISA L. MILORD, JUDICIAL SETTLEMENT ETHICS: JUDGES' GUIDE 1 (1996). ("The literature regarding settlement conferences is vast (see Appendix E for a selected, annotated bibliography) and includes both 'how-to' articles by judges and empirical studies regarding participant satisfaction and the impact of settlement conference programs on case processing. In many jurisdictions, settlement conferences have become institutionalized and their operational procedures are now codified in court rules."); *see also* Judicial Conference of the United States, Adv. Op. 95 (Jan. 14, 1999).

<sup>144</sup> *See* PROVINE, *supra* note 100 (noting that lawyers prefer a settlement judge who points out evidence or law that lawyers misunderstand or are overlooking); Rude & Wall, *supra* note 100, at 176–77 (reporting that lawyers prefer judges to inform them regarding how similar cases have settled and to argue logically for concessions); *see also* Brazil, *supra* note 100, at 22–24 (reporting primarily that the overwhelming majority of lawyer-respondents in Northern California preferred judges who made suggestions and offered observations during

did not, however, prefer judicial evaluations of the case in the presence of their clients or discussions in which judges discussed the high risk of going to trial.<sup>146</sup> They also expressed concerns regarding the ethics of judicial settlement techniques that were heavy-handed and potentially coercive.<sup>147</sup>

The revisions that led to the current language of the ABA Model Code also followed the American Judicature Society's (AJS) 1996 publication of a judicial education module (book, study guide, and videotaped scenarios) addressing the subject of judicial settlement ethics.<sup>148</sup> In the introduction to *Judicial Settlement Ethics*, the AJS authors wrote:

Despite [the popularity of judicial settlement conferences], the project that led to this educational module was prompted by the lack of adequate guidelines for judges and others who host settlement conferences. The most recent ABA *Model Code* (1990) merely cautions that "parties should not feel coerced into surren-

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settlement sessions, but lawyers in Florida, Texas and Missouri were more ambivalent about such a judicial role). See generally WAYNE D. BRAZIL, A.B.A., *SETTLING CIVIL SUITS: LITIGATORS' VIEWS ABOUT APPROPRIATE ROLES AND EFFECTIVE TECHNIQUES FOR FEDERAL JUDGES* (1985). More recently, researchers have discovered that lawyers similarly prefer mediators who assess the merits of cases (sometimes called "reality testing") and even value the case. See, e.g., Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 *HAMLIN L. REV.* 403, 429 (2002) (reporting that the top factors motivating lawyers to voluntarily choose mediation include saving litigation expenses (67.9 percent), making settlement more likely (57.4 percent), providing a needed reality check for opposing counsel or party (52.2 percent), and providing a needed reality check for own client (47.7 percent)); Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 *MO. L. REV.* 473, 524 *tbl.* 33 (2002) (reporting that 87 percent of lawyers indicated that a mediator should know how to value a case); Thomas B. Metzloff et al., *Empirical Perspectives on Mediation and Malpractice*, 60 *LAW & CONTEMP. PROBS.* 107, 116 (1997) (reporting that almost 70 percent of attorneys wanted mediators to provide opinions on the merits of medical malpractice cases); Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 *OHIO ST. J. ON DISP. RESOL.* 641, 685 (2002) (showing that lawyers perceived the mediation process as fairer if mediators suggested possible settlement options; helped the parties evaluate the merits of the case by using reality testing, risk analysis, or asking other questions; or assisted the parties in assessing the value of the case).

<sup>145</sup> Edward Brunet, *Judicial Mediation and Signaling*, 3 *NEV. L.J.* 232, 252-54 (2003).

<sup>146</sup> Rude & Wall, *supra* note 100, at 176-77.

<sup>147</sup> James A. Wall Jr. et al., *Judicial Participation in Settlement*, 1984 *J. DISP. RESOL.* 25, 38-39 (1984) (explaining that 17 of 70 techniques identified were thought to be unethical, including penalizing a lawyer for not settling [for example, with dismissal or mistrial], threatening the lawyer for not settling [for example, with dismissal or mistrial], threatening to declare a mistrial if a decision was not returned by a certain time while the jury was deliberating, and transferring the case to another district on the day of the trial to force settlement); see also *Thinning Vision*, *supra* note 23 at 64-78, (summarizing case law in which parties alleged coercion by judges in their settlement efforts).

<sup>148</sup> Floyd, *supra* note 125, at 84 ("[T]he problem with the existing ethical rules is that they are too vague to effectively prevent judicial abuse or bias during settlement. The rules need to give clearer guidance about the distinction between facilitation and coercion of settlement.").

dering the right to have their controversy resolved by the courts.” See Canon 3B(8) (Commentary). The *Model Code* goes no further to guide judges in their use of the wide range of available settlement techniques.<sup>149</sup>

The AJS publication included a thoughtful compendium of judicial settlement techniques categorized by “acceptability” or “inappropriateness,”<sup>150</sup> with a clear caution that any one acceptable technique could become inappropriate in particular circumstances. One such circumstance is if the settlement judge becomes the trial judge if the case fails to settle.<sup>151</sup> In addition, the “acceptable” technique of caucus, or *ex parte* discussions, which had generated debate among judges and was addressed in the 2007 revisions to the ABA Model Code, is followed by an asterisk as well as this sentence: “The context of this situation is especially critical in this instance, i.e., whether judge is settlement judge or trial judge.”<sup>152</sup>

This brief overview of the procedural and ethical rules governing the judicial role in settlement certainly highlights long-standing concerns regarding settlement-related judicial practices that have a strong potential to be, or to be perceived as, coercive and inconsistent with neutrality and impartiality. This overview reveals special concerns regarding: (1) the effects of a presiding judge’s direct involvement in settlement and (2) the effects of a presiding judge’s use of the technique of caucus or *ex parte* meetings during settlement discussions.

#### F. *Lawyers’ Continuing Concerns Regarding Magistrate (and Other) Judges’ Role in Settlement*

Despite the practicality and acceptance of settlement and its clear acknowledgement in both the Federal Rules of Civil Procedure<sup>153</sup> and the Code of Conduct for United States Judges,<sup>154</sup> judges, lawyers and commentators continue to express reservations about which judges should facilitate settlement discussions and under what circumstances. Recently, for example, Judge Lee Rosenthal (who is former Chair of the Judicial Conference Committee on Rules of Practice and Procedure) and Professor Steven Gensler (who is a former mem-

<sup>149</sup> Goldschmidt & Milord, *supra* note 143.

<sup>150</sup> *Id.* at ix. AJS did not use “ethical” and “unethical” to describe techniques because the AJS materials “were not intended to supplant existing ethical codes”, and there were concerns that the use of these terms would “discourage judicial settlement, which has now become an integral part of the judicial function.” *Id.*

<sup>151</sup> *Id.* at 70. The AJS publication uses an asterisk and footnote to indicate techniques that call for caution, such as to “call a certain figure reasonable” or to “note, for the litigant, the rewards of a pretrial settlement, and/or emphasize to the litigant the risks of a trial”. The footnote states, “Judges having trial responsibilities must be more circumspect than settlement judges when using techniques marked by an asterisk”.

<sup>152</sup> *Id.*

<sup>153</sup> FED. R. CIV. P. 16(a)(5).

<sup>154</sup> CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3A(4).

ber of the United States Judicial Conference Advisory Committee on Civil Rules) authored an essay in which they urge federal trial judges to take an earlier, more active and live role in case management, but are very careful to clarify that they are *not* encouraging judges to take a more active role in facilitating or encouraging settlement.<sup>155</sup> Rather, they observe:

Case management has suffered from misconceptions about what it is and what it is not. One misconception is that case management is a process by which judges push reluctant parties to settle. We do not think that judges view settlement as the *purpose* of case management. To the contrary, effective case management means tailoring the pretrial work to what is reasonable and proportional to the case. Effective case management may provide a faster and less expensive way of getting the parties information they need to value the case, which may in turn facilitate settlement. But that is not pushing the parties to settle; that is allowing settlements that likely would have occurred later to get done earlier, with less work and less cost.<sup>156</sup>

Indeed, the authors later suggest that effective judicial case management, if accompanied by cooperation from the lawyers, may reduce parties' transaction costs (especially the amount of attorneys' fees) to such a degree that the economic incentives pushing parties to settle cases could soften, with the ultimate effect of *increasing* the likelihood of trial and *reducing* the likelihood of settlement.<sup>157</sup> At one point, the authors say quite simply: "[I]f you [judges] want to increase the number of cases that reach trial, reduce the cost of getting there."<sup>158</sup>

Recent empirical research indicates that lawyers continue to have deep concerns about their ability to be candid and fully discuss settlement with judges facilitating settlement, regardless of whether they are presiding or non-presiding.<sup>159</sup> While the lawyers in this research study perceived judges as having greater credibility than mediators regarding settlement<sup>160</sup> and as more helpful in managing difficult parties,<sup>161</sup> they nonetheless preferred mediation with the court's staff mediator rather than a settlement session with either a presiding or non-presiding judge.<sup>162</sup>

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<sup>155</sup> Gensler & Rosenthal, *supra* note 43, at 856.

<sup>156</sup> *Id.* at 855–56.

<sup>157</sup> *See id.* at 866–74; *see also* E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 325–26 (1986) (“[I]f there is a pronounced difference in the economic resources available to the parties to a lawsuit, a judge might very well promote a more just solution by restricting the ability of the wealthier parties to use their economic resources to tactical advantage.”).

<sup>158</sup> Gensler & Rosenthal, *supra* note 43, at 872.

<sup>159</sup> *See* Wissler, *supra* note 78, at 284–87.

<sup>160</sup> *Id.* at 292–93 (also noting that staff mediators had more credibility than volunteer or private mediators).

<sup>161</sup> *Id.* at 295.

<sup>162</sup> *See id.* at 319; Roselle L. Wissler, *Judicial Settlement Conferences and Staff Mediation*, 17 DISP. RESOL. MAG. 18, 18 (Summer 2011); *see also* Claudia L. Bernard, *Is a Robe Ever Enough? Judicial Authority and Mediation Skill on Appeal*, 17 DISP. RESOL. MAG. 16, 18 n.2

The lawyers indicated that they feared that candid settlement discussions might prejudice the ongoing litigation or adjudication of their clients' cases,<sup>163</sup> or that judges would become biased.<sup>164</sup> While the lawyers expressed their greatest concerns when the presiding judge was facilitating settlement, they expressed concerns even when the judge was not going to preside at trial.<sup>165</sup> Obviously, the lawyers' concerns regarding their and their clients' ability to be candid would be likely to affect their participation in settlement sessions with judges.

Dr. Roselle Wissler, who conducted this research study, has hypothesized the following primary reasons for lawyers' hesitation to be fully forthcoming

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(Spring 2011) (citing Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715, 759–60 (1999)) (observing that because federal circuit staff mediators “are employed directly by the court, and are highly identified with it, we share in the respect and authority with which the institution is imbued”).

<sup>163</sup> See Wissler, *supra* note 78, at 285–86. Judges recognize this concern. Sandra S. Beckwith, *District Court Mediation Programs: A View from the Bench*, 26 OHIO ST. J. ON DISP. RESOL. 357, 360 n.13 (2011) (noting that even though judges are confident of their ability to avoid bias, lawyers and clients may not be so sure). Academics have also raised it. See, e.g., Alfini, *supra* note 19 (supporting judges serving as mediators unless judge is presiding over parties' trial); Menkel-Meadow, *supra* note 117, at 511–12 (raising similar concerns while also acknowledging likely effectiveness of settlement efforts by trial judge); Sander, *supra* note 19, at 11 (“To be effective, the mediation process must inspire candor by both parties, something that is unlikely to happen if the mediator can later don his judicial robe and render a decision, perhaps based in part on confidential information that was imparted to him in the mediation session.”). Indeed, the ABA Section of Dispute Resolution proposed a revision to the Judicial Code of Ethics to make it clear that, ordinarily, judges should not adjudicate after facilitating settlement discussions. See Robinson, *supra* note 23, at 364–65 (describing Section initiative and reasons for it). *But see* Brunet, *supra* note 145, at 253–54 (asserting judicial mediation permits parties to learn judge's evolving views of case, enhancing capacity for informed decision-making regarding settlement); Dessem, *supra* note 32, at 839 (suggesting that magistrate judge will be more effective in assisting settlement if he is also the trial judge).

<sup>164</sup> Wissler, *supra* note 78, at 287–88 (2011) (hypothesizing that “[p]erhaps judges assigned to the case were more likely than other neutrals to recommend a settlement range or predict the trial outcome” or “[l]awyers might be concerned that judges assigned to the case would form views of the parties and opinions about the case based on limited evidence or one-sided information provided by the opposing party during a private caucus, and that those views would affect the judge's open-mindedness and impartiality at trial.”); see also Brazil, *supra* note 100, at 23; James A. Wall, Jr. & Dale E. Rude, *Judges' Mediation of Settlement Negotiations*, 72 J. APPLIED PSYCHOL. 234, 235, 238 (1987) (finding that though judges said they would be reluctant to “mediate” their own cases, their responses to scenarios regarding how they would try to facilitate settlement were the same regardless of whether they were or were not supposed to adjudicate the case).

<sup>165</sup> Wissler, *supra* note 78, at 285–86 (2011) (reporting that lawyers perceived they could be more candid with all mediators—staff, volunteer or private—than with judges; lawyers reported that they could discuss settlement most fully and be most candid with private mediators; hypothesizing that lawyers might perceive “that judges would be more likely than mediators to talk to the trial judge about the case” or were reassured “because the mediators had explicit confidentiality provisions and reporting limitations.”).

even when non-presiding judges facilitate settlement sessions: (1) they may fear that their disclosures could influence the judges' non-substantive decisions in the instant case; (2) they may fear that their disclosures could influence the judges' substantive and non-substantive decisions in future cases; and (3) they may not be confident that non-presiding judges will keep settlement communications confidential and, instead, anticipate that non-presiding judges will intentionally or unintentionally share information or perceptions with trial judges.<sup>166</sup> Lawyers reported that they could discuss settlement most fully and be most candid with private mediators perhaps because they were reassured by the mediators' "explicit confidentiality provisions and reporting limitations."<sup>167</sup>

Echoing some of the concerns and goals reflected in revisions to judges' ethics codes as described *supra*, Dr. Wissler observes:

[R]ationales underlying policies involving mediation confidentiality and limiting communication between mediators and the court include enhancing settlement discussions, preventing pressure to settle in order to avoid a bad report to the court, and protecting the integrity of the trial process and the impartiality of the judge from the perception that information revealed in mediation was subsequently used to decide the case. Although to date there is a lack of empirical evidence that these provisions have these effects, lawyers appear to believe that they do and are likely to act in accord with their beliefs.<sup>168</sup>

She adds, "The candid and full exploration of settlement contributes to the fairness and quality of the settlement process."<sup>169</sup>

Of course, the devil is in the details. Dr. Wissler acknowledges that the context of this study—a single federal district court, with a single and well-respected staff mediator—likely influenced its outcomes:

The extent to which lawyers view these two models [judicial settlement conferences vs. staff mediation] as different is likely to vary across courts. Views of settlement conferences with judges not assigned to the case are likely to depend on the nature of their decisionmaking authority, their relationship to the trial judge, and the proportion of their workload devoted to settlement conferences. Views of staff mediation are likely to vary depending on whether the mediators are lawyers or are retired judges or magistrate judges. And if lawyers' primary experience with the staff mediation model in the present study was with the single staff mediator in the district in which the survey was conducted, views of staff mediation based on different staff mediators might be different.<sup>170</sup>

Nonetheless, because this Article will advocate for certain structural changes when magistrate judges are involved with settlement, it is also important to highlight Dr. Wissler's observations that: 1) lawyers' "views of both settlement procedures might depend on whether there are explicit provisions

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<sup>166</sup> *Id.* at 317.

<sup>167</sup> *Id.* at 286.

<sup>168</sup> *Id.* at 317–18.

<sup>169</sup> *Id.* at 318; *see also* Brazil, *supra* note 11, at 26–27.

<sup>170</sup> Wissler, *supra* note 78, at 319.

regarding confidentiality or limitations on what may be reported to the trial judge” and 2) even if judges adopt mediation-like approaches to settlement, lawyers will remain aware of “the fundamental structural differences between judges and staff mediators, including differences in their decision-making roles and proximity to the trial judge.”<sup>171</sup>

Because of the comparison of lawyers’ perceptions of judges’ and mediators’ involvement in settlement, as well as the partnering relationship that can exist between magistrate judges and mediators and the rather confusing relationship between settlement sessions and mediation, this Article will now turn briefly to the role of court-connected mediation in the federal courts.

## II. BRIEF OVERVIEW OF COURT-CONNECTED MEDIATION IN THE FEDERAL COURTS

### A. *General*

In the late 1970s and 1980s, U.S. federal district courts began to institutionalize mediation and other “alternative” dispute resolution (ADR) procedures,<sup>172</sup> and in 1990, Congress passed the Civil Justice Reform Act, requiring the federal courts to develop plans to reduce costs and delay.<sup>173</sup> The statute required courts to consider the adoption of several case management principles, one of which involved the use of ADR.<sup>174</sup> The statute also offered financial incentives to encourage implementation.<sup>175</sup>

In response, many of the federal district courts developed ADR procedures, and some even hired professional staff to run their ADR programs or provide direct services.<sup>176</sup> Although some courts established court-connected arbitration programs, many more courts opted to offer mediation. As of 2011, 28.7 percent of the district courts had only authorized the use of mediation; another 36.2 percent had authorized multiple procedures, with mediation very likely to be

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<sup>171</sup> *Id.*

<sup>172</sup> See STIENSTRA, *supra* note 15, at 1.

<sup>173</sup> 28 U.S.C. §§ 471–482 (2012).

<sup>174</sup> See *id.* The CJRA provides for a four-year sunset provision. 28 U.S.C. § 471 note (1994) (Pilot Program). The Authorization of Alternative Dispute Resolution Act was passed in 1998 and mandated the provision of ADR in civil cases. 28 U.S.C. §§ 651–658 (1998).

<sup>175</sup> See 28 U.S.C. § 482(c) (establishing an Early Implementation Program designed to create incentives for early compliance by all district courts with the CJRA’s mandate to formulate civil justice expense and delay reduction plans).

<sup>176</sup> STIENSTRA, *supra* note 15, at 2 (also noting that the ADR Act of 1998, 28 USC §§ 651–658, mandated that the federal district courts provide ADR services to civil litigants); see Dessem, *supra* note 32, at 835 n.172 (noting that the U.S. District Court of the Northern District of California sought funding for two law-trained professionals to administer its ADR program, rather than relying on a magistrate judge to do so).

among them.<sup>177</sup> Overall, a little more than two-thirds of the courts authorized referral to mediation,<sup>178</sup> and mediation represents the dominant ADR process used in the federal courts.<sup>179</sup>

The number of cases referred to mediation depends upon the referral mechanism authorized by each of the district courts. Many districts permit individual judges to mandate the use of mediation.<sup>180</sup> Some districts have adopted programs that automatically refer all cases of a certain type to the process.<sup>181</sup> For example, some districts have authorized automatic referral of civil rights, employment discrimination, and police abuse cases.<sup>182</sup> A minority of districts require the parties' consent to mediation.<sup>183</sup> For the twelve-month period ending June 30, 2011, districts seeking supplemental federal funding for their ADR programs reported that 17,833 cases had gone to mediation; another 4,222 went to a multi-option program that included mediation; and 1,571 cases were referred to a category that primarily included judicial settlement sessions.<sup>184</sup> It has been suggested, meanwhile, that some districts may have reduced their use of magistrate judges to conduct settlement sessions in order to make more referrals to their mediators.<sup>185</sup>

Most districts rely on rosters of mediators for their programs; very few have staff mediators.<sup>186</sup> By 2011, though, the line between mediation and judicial settlement sessions had blurred. As described *supra*, the mediation rosters

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<sup>177</sup> STIENSTRA, *supra* note 15, at 7. Nearly a quarter authorized the use of early neutral evaluation, while no courts authorized only arbitration as a form of ADR.

<sup>178</sup> *Id.* at 6.

<sup>179</sup> See KATHERINE GREENBERG, SHRIVER CENTER, FEDERAL PRACTICE MANUAL FOR LEGAL AID ATTORNEYS 6.4 (2014), <http://federalpracticemanual.org/book/export/html/36> [https://perma.cc/XP32-BTB7].

<sup>180</sup> See STIENSTRA, *supra* note 15, at 8–9 (reporting that forty-six districts authorize the judge to order mediation without party consent).

<sup>181</sup> See *id.* (reporting that twelve districts mandate referral for all or specified cases).

<sup>182</sup> See Rebecca Price, *An Alternative Approach to Justice: The Past, Present and Future of the Mediation Program at the U.S. District Court for the Southern District of New York*, 6 Y.B. ON ARB. & MEDIATION 170, 171 (2014) (describing automatic referral to mediation for employment discrimination and selected § 1983 cases).

<sup>183</sup> See STIENSTRA, *supra* note 15, at 9.

<sup>184</sup> *Id.* at 14–15 (also observing that these numbers probably do not include all cases sent by all districts to mediation, and that these numbers represent about 15 percent of the civil dockets of the reporting districts).

<sup>185</sup> See Telephone Conference with Thomas Davis, Senior Attorney, Judicial Serv. Office, Admin. Office of the U.S. Courts, and Nancy Welsh (Nov. 24, 2015); Email from Thomas Davis, Senior Attorney, Judicial Serv. Office, Admin. Office of the U.S. Courts, to Nancy Welsh (Dec. 28, 2015) (on file with author).

<sup>186</sup> See STIENSTRA, *supra* note 15, at 10 (reporting that forty-two districts—or more than two-thirds of those authorizing the use of mediation—have established panels of mediators); Wissler, *supra* note 78, at 273.

in some districts now explicitly include judge, and some courts' ADR programs include referrals to "judicial mediation."<sup>187</sup>

Many different types of cases are resolved through mediation—e.g., contract, employment discrimination, civil rights claims, property damage, personal injury, etc.<sup>188</sup> As of 2011, twenty-one district courts also had authorized the referral of *pro se* cases to mediation—including both prisoner *pro se* cases and non-prisoner *pro se* cases.<sup>189</sup>

In most districts, the parties pay the mediators for their services,<sup>190</sup> based on a market rate or in a tiered arrangement that includes some *pro bono* service.<sup>191</sup> There are still a few districts that offer mediation on a purely *pro bono* basis. In a comprehensive report regarding the status of ADR in the federal district courts, Federal Judicial Center Senior Researcher Donna Stienstra makes the following observation regarding the relationship between court-ordered (or "mandatory") referrals to mediation and mediators' compensation:

The majority of districts . . . authorize both party compensation of ADR neutrals and required use of ADR—for example, by giving judges discretion to order ADR without party consent and requiring parties to pay the neutral's market rate. This approach is especially common for mediation procedures, where thirty-eight districts authorize judges to order parties to mediation without party consent and also require parties to compensate the mediator. Another eleven districts mandate use of mediation and require parties to compensate the mediators. . . . We do not know how often judges exercise their discretion to refer cases without full consent of the parties, or how many cases are mandated to mediation . . . and therefore we do not know how often parties face fees they would otherwise not incur.

Note that a surprising number of districts do not provide fee information in their ADR rules or plans, which may make it difficult for parties to estimate what their monetary obligation will be. The absence of this information is also at odds with Judicial Conference policy to "establish a local rule or policy regard-

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<sup>187</sup> See *id.* at 10; see also Robinson, *supra* note 23, at 347–51 (describing San Luis Obispo and other court programs that train their judges in mediation skills and then offer judges as mediators).

<sup>188</sup> See STIENSTRA, *supra* note 15, app. 5.

<sup>189</sup> See STIENSTRA, *supra* note 15, at 7 (reporting that eighteen districts had authorized the use of mediation for non-prisoner *pro se* cases, while eleven districts had authorized mediation for prisoner *pro se* cases); see also Bloom & Hershkoff, *supra* note 54, at 511 n. 179 (considering advantages and disadvantages of using mediation).

<sup>190</sup> See *Statistical Summary: Use and Benefits of Alternative Dispute Resolution by the Department of Justice*, U.S. DEP'T OF JUSTICE (Oct. 27, 2015), <http://www.justice.gov/olp/alternative-dispute-resolution-department-justice> [<https://perma.cc/7M7W-3HN8>]. The Department of Justice indicates that its 2015 expenditures for mediation services totaled \$2,274,607 and there were 542 cases authorized for ADR funding; this suggests an average expenditure of \$4,196 per case. In 2014, the DOJ authorized 504 cases for ADR spending and the expenditures for mediation services totaled \$2,504,010; this suggests 2013 expenditures of \$4,968 per case on average.

<sup>191</sup> See STIENSTRA, *supra* note 15, at 12.

ing the compensation, if any, of neutrals . . . (see Guide to Judiciary Policy, Ch. 5, § 520.40).<sup>192</sup>

Ultimately, based on the circumscribed information available to her, Ms. Stienstra concludes:

We know that some ADR programs are actively used and others are not, as reflected in the referral numbers submitted by forty-nine districts. We know that these referrals represent a fairly small, but not insignificant, portion of the civil cases filed in these districts. We do not know, however, whether this referral rate is representative of the district courts generally or might be lower if referrals in the other forty-five districts were counted. Nor do we know the number of cases disposed of by ADR, and therefore we cannot calculate a settlement rate or get a sense of the impact of ADR on court caseloads or judicial workloads.<sup>193</sup>

As noted *supra*, there is much that is unknown regarding magistrate judges' settlement sessions and their role in the disposition of federal cases. But much *more* is unknown about court-connected mediators, their involvement in settlement and their impact on dispositions or perceptions of the federal courts. Meanwhile, neither the federal courts nor Congress collects data regarding parties' self-initiated and private use of mediation to resolve pending federal civil actions<sup>194</sup> The Federal Judicial Center currently is conducting research, however, that may provide some insights into this issue.<sup>195</sup>

#### *B. Guidance Regarding ADR Program Quality*

In 1997, as part of a review required by the Civil Justice Reform Act, the Federal Courts' Court Administration and Case Management Committee produced a list of "attributes of a well-functioning court ADR program" and "ethical principles of neutrals."<sup>196</sup> Although none of these guidelines were adopted as policy by the Judicial Conference, and have not even been officially distrib-

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<sup>192</sup> *Id.* at 14.

<sup>193</sup> *Id.* at 16.

<sup>194</sup> See Gregory Todd Jones, *Fighting Capitulation: A Research Agenda for the Future of Dispute Resolution*, 108 PENN ST. L. REV. 277, 303 (2003) (commenting on the dearth of data regarding the number of mediations that take place); Herbert M. Kritzer, *To Regulate or Not to Regulate, or (Better Still) When to Regulate*, 19 DISP. RESOL. MAG. 12, 13 (Spring 2013) (noting that "unresolved is what mechanism or mechanisms might be designed to do the tracking of private dispute resolution processes that would be necessary for regulation to be effective"); see also Herbert M. Kritzer, *The Trials and Tribulations of Counting "Trials,"* 62 DEPAUL L. REV. 415, 437 (2013) (observing that if trials need to be counted, "is there any reason not to count hearings before adjudicators who are not employees of the government, which we typically label 'arbitration'?). *But see* STIENSTRA, *supra* note 15 (noting that each year, federal districts are invited to submit to the Administrative Office the number of cases referred to mediation in order to apply for an ADR staffing supplement).

<sup>195</sup> See *Dispute Resolution in Federal Courts: New Study to Look at How It's Working*, U.S. CTS. (Jan. 23, 2014), <http://www.uscourts.gov/news/2014/01/23/dispute-resolution-federal-courts-new-study-look-how-its-working> [<https://perma.cc/P68R-WTU7>].

<sup>196</sup> STIENSTRA, *supra* note 15, at 2; *id.* at app. 2.

uted, they were included as an appendix to a Federal Judicial Center publication, *Guide to Judicial Management of Cases* (2001).<sup>197</sup>

Several of the attributes in this Guide are particularly relevant for federal courts trying to determine the most appropriate relationships between magistrate judges and mediators, between settlement sessions and mediations, and between settlement sessions and adjudication. The guidelines recommend: “[d]efin[ing] ADR program goals and characteristics and promulgat[ing] them in written rules,” “[a]dopt[ing] written ethical principles for neutrals,” “[a]dopt[ing] a mechanism for receiving complaints and enforcing rules,” “[d]efin[ing] the scope of confidentiality,” and “[e]valuat[ing] and measure[ing] program success.”<sup>198</sup> Because there is no data being collected by the Administrative Office regarding the federal courts’ ADR or mediation programs, it is difficult to conclude that the final attribute—“evaluate and measure program success”—is being implemented in a manner that would help the entire federal court system make best use of its mediators. Indeed, such evaluation might even help the court system to judge how to make best use of its magistrate judges as they work in partnership with mediators, offer settlement sessions rather than mediation, offer mediations themselves, and occasionally conduct both settlement sessions and trial.

Regarding the ethical principles contained in these guidelines, a couple are especially relevant to the relationship between magistrate judges and mediators: the “[n]eutral should protect confidential information obtained during the ADR process” and the “[n]eutral should refrain from communicating with the assigned judge.”<sup>199</sup> The research described *supra* suggests that lawyers perceive mediators as more protective than magistrate judges of confidentiality and communication restrictions. At the same time, federal case law unfortunately demonstrates that mediators (and assigned judges) sometimes violate these principles, particularly when parties are accused of violating an obligation to mediate in good faith.<sup>200</sup>

### C. *The Relationship Between Judicial Settlement Sessions and Mediation*

As the foregoing demonstrates, the relationship between judicial settlement sessions and mediation is a confusing one. Research reported nearly twenty years ago indicated that lawyers tended to focus on differences between the

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<sup>197</sup> *Id.* at 2.

<sup>198</sup> *Id.* at app. 2.

<sup>199</sup> *Id.*

<sup>200</sup> Thompson, *supra* note 24, at 404–10, 413–15 (describing cases in which mediators have breached confidentiality, including “Girls Gone Wild” case, *Doe v. Francis*, 5:03cv260-RS-WCS (N.D. Fla. 2007)); see also Art Hinshaw, *Regulating Mediators* 21 HARV. NEGOT. L. REV. (forthcoming 2016) (on file with author).

processes.<sup>201</sup> They chose mediation for its flexibility, while they valued early settlement conferences with magistrate judges (and early neutral evaluation with experienced attorneys) for the opportunity to learn neutrals' opinions of their cases.<sup>202</sup> Former President and Dean of South Texas College of Law James Alfini has suggested more recently that mediators and judges may continue to be different in meaningful ways, with different inspirational "calling[s]."<sup>203</sup> Judges' ethics codes emphasize that "[t]he judiciary plays a central role in preserving the principles of justice and the rule of law" and "maintain[ing] and enhanc[ing] confidence in the legal system."<sup>204</sup> Due to the centrality of self-determination in mediation, Dean Alfini suggests that mediators' calling may be better understood as "foster[ing] democratic decision-making" by "reserv[ing] decision-making authority to the parties" which may have the effect of "enhancing party respect for both process fairness and outcome fairness."<sup>205</sup>

But in practice, it can be difficult to discern a bright line distinction between judicial settlement sessions and mediation. Participants in a recent ABA roundtable, for example, discussed the processes' similarity and identified a shared set of steps that participants can take to improve the likelihood of success in both procedures.<sup>206</sup> Similarly, judges, lawyers, and dispute resolution

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<sup>201</sup> See DONNA STIENSTRA ET AL., FED. JUDICIAL CTR., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 190 (1997).

<sup>202</sup> *Id.* at 178 (regarding Multi-Option Program in the U.S. District Court for the Northern District of California; also noting that lawyers perceived mediation as providing opportunity for client to tell story while judicial settlement clarified liability issues). See generally ROBERT A. LOWE ET AL., ST. JUSTICE INST., MIDDLESEX MULTI-DOOR COURTHOUSE EVALUATION PROJECT, FINAL REPORT (1992); Nancy A. Welsh, *The Importance of Context in Comparing the Worldwide Institutionalization of Court-Connected Mediation*, in 2 ADR IN BUSINESS: PRACTICE AND ISSUES ACROSS COUNTRIES AND CULTURES 119 (Arnold Ingen-Housz, ed., 2011) (contrasting the Dutch and U.S. approaches to mediation); Kenneth K. Stuart & Cynthia A. Savage, *The Multi-Door Courthouse: How It's Working*, 26 COLO. L. 13, 16–17 (1997) (regarding value of offering multiple dispute resolution options); Nancy A. Welsh, *You've Got Your Mother's Laugh: What Bankruptcy Mediation Can Learn from the Her/History of Divorce and Child Custody Mediation*, 17 AM. BANKR. INST. L. REV. 427, 427–29 (2009) (urging that mediation should be permitted to play its unique role, which is more likely if other dispute resolution processes are also available to litigants); Nancy A. Welsh, *The Future of Mediation: Court-Connected Mediation in the U.S. and The Netherlands Compared*, 1 FORUM VOOR CONFLICTMANAGEMENT 19 (2007) (contrasting the Dutch and U.S. approaches to mediation).

<sup>203</sup> See generally Alfini, *supra* note 23, at 837.

<sup>204</sup> *Id.* at 836 (quoting the Preamble of the Model Code of Judicial Conduct); *Id.* at 837 (proposing that "inspirational, higher purpose language" should be included in mediator standards of conduct which may lead mediators to behave in manners consistent with mediation's core values).

<sup>205</sup> *Id.* at 837.

<sup>206</sup> Caprathe, *supra* note 4. They developed the following set of steps:

neutrals have recommended that judges should behave more like mediators by consulting with litigators in determining whether to use joint sessions or caucuses, and being explicit about their settlement session-related policies or procedures by publishing them in standing orders, court rules or memos.<sup>207</sup> Judges and lawyers, meanwhile, often expect mediators to behave like judges, assisting the parties with knowledgeable and reasoned legal analysis.<sup>208</sup> Indeed, for many, it is not clear whether, or how, “judicial mediation” reliably differs from a “judicial settlement conference,”<sup>209</sup> or “non-judicial mediation.”

Consistent with this blurring of the lines between judicial settlement sessions and mediation, former Magistrate Judge Morton Denlow has urged magistrate judges facilitating settlement sessions to attend to the “Seven Cs,” including “client control of the outcome, control of future litigation and opportunity costs, certainty of the outcome, confidentiality, creative resolution possibility, preserving a continuing relationship, and closure.”<sup>210</sup> Again, this advice suggests a strong relationship between judicial settlement sessions and mediation. Note, for example, the suggestion that magistrate judges should be more like mediators in protecting the confidentiality of the parties’ communications and encouragement of creative resolutions.<sup>211</sup> Other judges have joined Magistrate Judge Denlow in advising judges to consider factors unrelated to the

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1. Playing fair, with professionalism, including civility and the willingness to listen.
  2. Preparation, preparation, preparation.
  3. Have a judge or mediator who will try to understand the facts and law, rather than just “splitting the baby.”
  4. Use some form of a settlement checklist, including demands, offers, or recommendations.
  5. Be prepared to look beyond just the money.
  6. Allow sufficient time to discuss all the interests and issues.
  7. Consider settlements and verdicts in similar cases.
  8. Let it be known that the case is ready for trial.
  9. Get any settlement in writing.

<sup>207</sup> *See Id.*

<sup>208</sup> *See* Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep On Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 409–10, 419–20 (2004).

<sup>209</sup> *See* Brazil, *supra* note 162, at 745–50; Robinson, *supra* note 23, at 367–72 (using two cases—one regarding application of the mediation privilege and the other regarding the limits of a neutral’s authority—to demonstrate the difficulty of determining whether a judge is acting as a mediator, special master, or judge facilitating a settlement conference); *see also* Craig McEwen, *Examining Mediation in Context: Toward Understanding Variations in Mediation Programs*, in THE BLACKWELL HANDBOOK OF MEDIATION: BRIDGING THEORY, RESEARCH, AND PRACTICE 81, 95 (Margaret S. Herrman ed., 2006). *See generally* STIENSTRA ET. AL., *supra* note 201, at 178–213 (comparing voluntary mediation with early settlement conferences, in the Multi-Option Program in the U.S. District Court for the Northern District of California).

<sup>210</sup> Judge Morton Denlow, *Settlement Conference Techniques: Caucus Dos and Don’ts* [sic], 49 JUDGES J. 21, 23 (2010); *see also* Caprathe, *supra* note 4 (also listing the Seven C’s).

<sup>211</sup> Denlow, *supra* note 210, at 22.

legal merits of a case because they can be as important, and sometimes more important, than the legal merits in helping parties move toward settlement.<sup>212</sup> Finally, Magistrate Judge Denlow has provided particular guidance to judges regarding the use of caucus that is very much like the advice that would be appropriate for mediators.<sup>213</sup>

Even if settlement sessions and mediations involve precisely the same stages and techniques, however, lawyers' and parties' perceptions are likely to differ precisely because one process involves a judge—a central and embedded actor in the traditionally adjudicative institution of the courts—and the other process involves a mediator—who is at least perceived as one step removed from adjudication and the courts.<sup>214</sup> Recall that the lawyers in one federal district clearly differentiated among a settlement session with a presiding judge, a settlement session with a non-presiding judge, mediation with the staff mediator, and mediation with a volunteer mediator.<sup>215</sup> Their differentiation did *not* appear to be based upon distinctively different behaviors exhibited by a judge in comparison to a mediator—although it must be acknowledged that it is not clear whether the researchers provided the lawyers with the opportunity to differentiate on that basis. Instead, the lawyers focused on structural differences—i.e., the strength (or likely porousness) of mediators' and judges' protection of confidentiality and the effect that disclosures in mediation could have at some point on judges' decision-making.<sup>216</sup>

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<sup>212</sup> See *id.*; see also Machteld de Hoon, *Judicial Conflict Management: What Brings Litigants to Court?*, in *THE MULTI-TASKING JUDGE: COMPARATIVE JUDICIAL DISPUTE RESOLUTION*, *supra* note 115, at 87, 98–99 (describing pilot project involving judge-mediator team in commercial cases); Machteld Pel, *The Need for Method and Structure in Settlement Conferences*, in *THE MULTI-TASKING JUDGE: COMPARATIVE JUDICIAL DISPUTE RESOLUTION*, *supra* note 115, at 203, 206 (indicating that the judge should provide a legal opinion, while a mediator should be used to address interests); Bernard, *supra* note 162, at 17–18 (reporting that Senior Ninth Circuit Judge Edward Leavy described the “beauty of mediation” as the opportunity “to think more holistically and creatively about a problem than you can as a judge;” also noting that Judge Leavy is unusual and generally recommending the pairing of a judge and mediator); Judith Gail Dein, *Wearing Two Hats: Being a Mediator and a Trial Judge*, 57 *BOS. B.J.* 7 (2013); Machteld Pel, *Referral to Mediation in the Civil Procedure: Extra Service or Professional Blurring?*, *TIJDSCHRIFT VOOR CIVIELE RECHTSPLEGING* (differentiating between roles of judge and mediator); Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: “The Problem” in Court-Oriented Mediation*, 15 *GEO. MASON L. REV.* 863, 909–21 (2008) (proposing that courts should solicit clients' input regarding the issues they would like to discuss in mediation).

<sup>213</sup> Denlow, *supra*, note 210, at 22.

<sup>214</sup> See *Thinning Vision*, *supra* note 23, at 78 (noting that reviewing courts are unlikely to conclude that either mediators or judges have coerced settlement as a result of evaluative behaviors; but also noting that if mediators and judges engage in precisely the same behaviors, mediators are less likely than judges to be perceived as being coercive, due to their different roles).

<sup>215</sup> See *supra* note 78 and accompanying text.

<sup>216</sup> See *supra* Part I.E.

Some judges similarly focus less on the uniqueness of their behaviors in settlement sessions and more on the attributes of their role, emphasizing the *gravitas* that the participation of a sitting judge can provide<sup>217</sup> and the ability of the judge to ensure enforcement of the agreement.<sup>218</sup> These judges acknowledge, meanwhile, that mediators may be able to devote more time to preparation for the process and greater customization to the needs of the parties, because the mediators are paid for all of the time that they spend.<sup>219</sup>

Ultimately, even if a mediator and a magistrate judge use *precisely the same approaches and techniques* in their two processes, their different identities and roles are very likely to have different effects on parties' and lawyers' perceptions, preferences and behaviors. The perceptions that are central to this Article are those regarding procedural fairness, and it is to this concept that the Article now turns.

### III. OVERVIEW OF PROCEDURAL JUSTICE RESEARCH<sup>220</sup>

Given the vast and nuanced socio-psychological literature regarding procedural justice,<sup>221</sup> this Article will be limited to a brief description of the procedural elements that reliably lead to perceptions of procedural justice and their powerful influence on litigants' perceptions.

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<sup>217</sup> See Knepp, *supra* note 42 (reporting that he prefers to use the term "settlement conference" rather than "mediation").

<sup>218</sup> See *id.* at 105. Magistrate Judge Knepp explains:

Where I spend considerable time participating in a negotiated settlement, and am convinced that the parties have intelligently and voluntarily agreed to its terms, I stand ready to enforce the agreement in the event that one of the parties gets cold feet. And, even in cases not on my consent docket, where part of the agreed remedy is injunctive or quasi-injunctive, I invite the parties, prior to entry of the consent judgment or dismissal entry, to consent to the case being transferred to my docket, and thus my continuing jurisdiction, to enforce the terms of the settlement. Assured by my understanding of the terms of the settlement agreement from my participation in its negotiation, the parties almost always accept that invitation.

*Id.*

<sup>219</sup> See *id.* (observing that in his experience, mediators' preparation allowed them to demonstrate understanding of nuances of parties' cases, in both joint session and caucus, and thus improved the "resona[nce]" of their suggestions for resolution—but also suggesting that magistrate judges may also be able to devote such time to preparation, in contrast to district judges); see also McAdoo & Welsh, *supra* note 208, at 410–11 (reporting research showing that Minnesota state judges value mediation's ability to foster client participation, thus making settlement more likely).

<sup>220</sup> The text of this part (i.e., Part III) was, in substantial part, first published in Welsh et al., *supra* note 115.

<sup>221</sup> See generally, E. Allan Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, in EVERYDAY PRACTICES AND TROUBLE CASES (Austin Sarat et al. eds., 1998); E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOLOGY 117 (2000). This *socio-psychological* literature is in addition to, and different from, the vast *philosophical* literature on procedural justice. See, e.g., Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004).

Research has shown that procedural justice has profound effects. If, for example, people perceive a dispute resolution or decision-making *procedure* as fair, they are more likely to perceive the *outcome* of the procedure as fair, even if that outcome is not favorable to them.<sup>222</sup> Also, if people perceive the procedure as fair, they are more likely to comply with the outcome.<sup>223</sup> Further, if people perceive the procedure as fair, they are more likely to perceive the institution providing the procedure as legitimate.<sup>224</sup> These effects obviously are significant for courts, whether judges are announcing decisions or facilitating settlements.<sup>225</sup>

Certain procedural elements reliably lead to perceptions of procedural fairness. Different scholars and researchers have categorized these elements in different ways over the years<sup>226</sup>—and judges have offered their own eloquent gloss<sup>227</sup>—but the following summary is sufficient for the purposes of this Article:

<sup>222</sup> See LIND & TYLER, *supra* note 221, at 66–70; Tyler, *supra* note 221, at 119.

<sup>223</sup> See Lind, *supra* note 221 at 192; Tyler, *supra* note 221 at 119; Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 660–70, 673–74 (2007) [hereinafter *American Public*] (describing procedural justice findings generally and research that has identified procedural justice and trust as the key antecedents of the willingness to defer to legal authorities); Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice*, 67 J. PERSONALITY & SOC. PSYCHOL. 850, 857 (1994) [hereinafter *Psychological Models*].

<sup>224</sup> See Lind, *supra* note 221, at 188; LIND & TYLER, *supra* note 221, at 209; DAVID B. ROTTMAN, ADMIN. OFF. CT., TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS 24 (2005); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 94–108 (1990); Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 885–86 (1997) (suggesting that the influence of procedural justice judgments supports the idea that “the public has a very moral orientation toward the courts” and “[t]hey expect the courts to conform to their moral values”, especially regarding “the fairness of the procedures by which the courts make decisions”); *American Public*, *supra* note 223, at 665.

<sup>225</sup> See Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 J. AM. JUDGES ASS’N 4 (2007) (advocating for the importance of procedural justice, distinct from concerns for substantive outcomes, in the court system).

<sup>226</sup> See, e.g., STEVE LEBEN, CONSIDERING PROCEDURAL-FAIRNESS CONCEPTS IN THE COURTS OF UTAH 3, 27–29 (2011), <http://www.proceduralfairness.org/Resources/~media/Microsites/Files/procedural-fairness/Utah%20Courts%20and%20Procedural%20Fairness%2009-2011.ashx> [https://perma.cc/S5CV-P9YF] (observing that the Utah Judicial Performance Evaluation Commission originally chose the following four criteria for assessing judicial behavior in the courtroom—neutrality, respect, voice, and trustworthiness—but has since dropped trustworthiness as a separate criterion).

<sup>227</sup> Judge James Knepp has written:

From my tenure on the bench, and from conversations with colleagues around the country, I am convinced there is great benefit to many litigants who have the opportunity to participate in a settlement conference with a judge. Being heard by someone in a position of authority facilitates their ability to rationally resolve the dispute. The conversation between the judge and the party or representative, plaintiff or defendant, paves the way for satisfaction with the end result, often making the settlement terms obvious to them, as opposed to some meet in the middle,

**Voice.** First and most important, people must perceive that they have the opportunity to express themselves, or that they “have voice.”<sup>228</sup>

**Respectful treatment from the decision-maker or authority figure.** Secondly, people must perceive that they were treated in a respectful and dignified manner.<sup>229</sup>

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compromise-for-the-sake-of-compromise result they feel pressured to accept. In many instances, litigants have firm personal convictions about particular aspects of the case, and I find such conversations help reconcile those strongly held feelings with the legal and evidentiary framework with which the dispute would ultimately be decided. My anecdotal observations about the psychological benefit of such conversations are confirmed by post-conference comments, as well as by the often-personal thank-you notes I receive from participants.

Knepp, *supra* note 42 at 104–05.

And, from Magistrate Judge Denlow:

Many clients are frustrated by our court system because they never have their day in court. Too often, their cases are terminated without the client even seeing a judge or appearing before a jury. Clients are frustrated by the expense and delay that often accompanies litigation, as well as its impersonal nature.

A Magistrate Judge–led settlement conference can make going to court a positive experience for clients. In the settlement conference, parties can work with their lawyers and the judge to settle their case. Clients have control over their decision to settle; they can, save money, and obtain certainty and closure regarding their dispute. Clients can walk out with a positive feeling toward our legal system if their case is settled. They also feel they have had their day in court because they actively participate in the process. At the conclusion of a successful settlement conference, I oftentimes request the parties to mark their calendars for a year from the settlement and to write me a letter if they regretted settling the case. In my years on the bench, I never received a letter from a client expressing regret that he or she settled.

Denlow, *supra* note 54.

<sup>228</sup> See LIND & TYLER, *supra* note 221, at 211–12; Lind, *supra* note 221, at 180; Tyler, *supra* note 221, at 121 (describing voice as the opportunity for people to present their “suggestions” or “arguments about what should be done to resolve a problem or conflict” or “sharing the discussion over the issues involved in their problem or conflict” and also noting that voice effects have been found even when people know they will have little or no influence on decision makers); Nourit Zimerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective* 37 *FORDHAM URB. L.J.* 473, 488–89 (2010); see also Lind, *supra* note 221 at 187 (reporting that voice “shapes evaluations about neutrality, trust, and respect” and has the “strongest influence, followed respectively by neutrality, trust, and respect.”) It should be noted, however, that people are also aware of their vulnerability to manipulation and if they perceive evidence of unfair treatment or perceive “false representations of fair treatment,” they respond with “extremely negative reactions.” See Tom R. Tyler et al., *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 *J. PERSONALITY & SOC. PSYCHOL.* 72, 73–74 (1985) (explaining that, under certain conditions, voice without decision control heightens feelings of procedural injustice and dissatisfaction with leaders, a result described as the “‘frustration’ effect”).

<sup>229</sup> See E. Allen Lind et al., *In the Eye of the Beholder: Tort Litigants’ Evaluations of Their Experiences in the Civil Justice System* 24 *LAW & SOC. REV.* 953, 958 (1990); Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 *J. PERSONALITY & SOC. PSYCHOL.* 830, 831 (1989); Tyler, *supra* note 221, at 122. While respectful treatment is described here as an essential element of procedural justice, it has also been described as an element of interactional justice, and even of distributive justice. See Robert J. Bies, *Are Procedural Justice and Interactional Justice Conceptually Distinct?*, in *HANDBOOK OF ORGANIZATIONAL JUSTICE* 85, 85–86 (Jerald Greenberg & Jason A. Colquitt eds., 2005).

**Trustworthy consideration from the decision-maker or authority figure.** Third, people seek reassurance that the decision-maker has heard, accurately understood<sup>230</sup> and sincerely considered<sup>231</sup> what they said and that they can trust the decision-maker.<sup>232</sup> People watch for “cues that communicate information about the intentions and character”<sup>233</sup> of the decision-maker—cues, for example, that the decision-maker has tried to apply objective standards carefully, fairly and in a well-meaning manner based on relevant facts.<sup>234</sup>

**Even-handed treatment, demonstrating the neutrality of forum.** The three elements above lead to the fourth element. People must perceive that they and their claims were treated in an even-handed manner, or that the forum is neutral. This element is both structural and interactional—that is, people need to know that the role of the decision-maker or authority (or, more broadly, the dispute resolution forum of which the decision-maker or authority is part) is to resolve disputes through fact-based application of objective standards, and they need to perceive that the decision-maker or institution is committed to treating them the same as others are treated, even if specific outcomes differ.<sup>235</sup> As Judge Steven Leben has explained:

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<sup>230</sup> “Social exchange” theory explains the importance of this perception. In part at least, people care about voice – and being accurately understood – because they wish to know that the decision-maker is fully informed regarding their perspective, in hopes that this will influence the outcome. See Lind, *supra* note 221, at 179.

<sup>231</sup> See Donald E. Conlon et al., *Nonlinear and Nonmonotonic Effects of Outcome on Procedural and Distributive Fairness Judgments*, 19 J. APPLIED SOC. PSYCHOL. 1085, 1095 (1989). The “group value” or “relational” theory helps to explain the importance of sincere consideration. People notice the psychological message that procedures convey regarding their value to the relevant social group. To receive sincere consideration signals the individual’s value and social standing. See *Psychological Models*, *supra* note 223, at 858.

<sup>232</sup> See Nancy A. Welsh, *The Reputational Advantages of Demonstrating Trustworthiness: Using the Reputation Index with Law Students*, 28 NEGOT. J. 117, 119, 133–36 (2012) (describing correlations among behaviors perceived as cooperative, procedurally fair and trustworthy and likely to encourage “voice”).

<sup>233</sup> *American Public*, *supra* note 223, at 664.

<sup>234</sup> Tyler, *supra* note 221, at 122; see also DEBORAH A. ECKBERG & MARCY R. PODKOPACZ, FAMILY COURT FAIRNESS STUDY 3, (Fourth Jud. Dist. [Minn.] Res. Div., 2004) (reporting that “[r]eceiving an explanation from the bench made the biggest difference in terms of satisfaction for litigants who had a full trial and this effect was even stronger for those who did not get what they asked for from the court” and “[l]itigants who did not receive a favorable outcome from a trial were more likely to say they would comply with court orders when they reported both fair treatment and having received a full explanation of the decision by the judicial officer in their case.”).

<sup>235</sup> See *American Public*, *supra* note 223, at 664 (“Transparency and openness foster the belief that decision-making procedures are neutral.”); see also Steve L. Blader & Tom R. Tyler, *A Four-Component Model of Procedural Justice: Defining the Meaning of a “Fair” Process*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 747, 749 (2003) (distinguishing between “formal” or “structural” aspects of groups that influence perceptions of process fairness, such as group rules, and the “informal” influences that result from individual authority’s actual implementation of the rules).

Most rulings should be understandable not only to attorneys but to parties and courtroom observers. If the parties and observers don't understand what has happened, they can't tell whether the judge was trying to be fair or not. Explaining decisions in clear language, while showing that the decision was made based on neutral principles (like a statute that might govern a landlord-tenant dispute), is important in showing neutrality and trustworthiness.<sup>236</sup>

Most frequently, researchers have examined perceptions of procedural justice in the context of adjudicative procedures, such as trials and arbitrations.<sup>237</sup> However, they have also found procedural justice elements and effects in consensual procedures, such as mediation. In studying mediation, researchers have examined what constitutes sufficient voice, how party and lawyer behavior affects perceptions of fairness, how parties react to mediators' evaluative interventions, and how parties are affected by the use of caucus. Researchers have found, for example, that parties are likely to perceive they have a voice if they have the opportunity to speak themselves *or* if they are present and can observe their lawyers speak on their behalf.<sup>238</sup> There is some suggestion, however, that the more the parties have the opportunity to speak themselves, the fairer they will find the mediation process.<sup>239</sup> Research has also found that parties' perceptions of procedural justice are influenced by opposing counsel's cooperation with each other,<sup>240</sup> and in some settings, parties' perceptions are influenced

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<sup>236</sup> LEBEN, *supra* note 226, at 9.

<sup>237</sup> See, e.g., Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 26–35 (2009) (summarizing procedural justice research); Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, 477–78 (2008) (describing the evolution of procedural justice research); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH. U. L. Q. 787, 817–38 (2001) (providing an overview of procedural justice research and findings). Some commentators suggest that procedural justice involves *only* adjudicative procedures. See, e.g., Solum, *supra* note 221 at 238 (“[P]rocedural justice is concerned with the adjudicative methods by which legal norms are applied to particular cases and the legislative processes by which social benefits and burdens are divided.”).

<sup>238</sup> See Roselle L. Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 FORDHAM URB. L.J. 419, 447–50 (2010); see also Donna Shestowsky, *Mediation? Negotiation? Arbitration? Trial?: A Multi-Court Study Looks at Litigants' Preferences*, 21 DISP. RESOL. MAG., 30, 30 (Summer 2015) (reporting research that shows that when litigants are asked about their *ex ante* procedural preferences, they most prefer mediation, negotiation by their lawyers with the clients present, and bench trial); Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637, 673–78 (2014).

<sup>239</sup> Wissler, *supra* note 238, at 450. Note that Dr. Wissler distinguishes between “voice” and “participation” in the give-and-take of the negotiation that occurs in mediation. “Participation” does not influence perceptions of procedural justice in the same way that “voice” does. *Id.*

<sup>240</sup> See Wissler, *supra* note 144, 686.

more by the behavior of the other party than by the actions of the mediator.<sup>241</sup> However, mediator interventions do matter; if a mediator recommends a particular settlement, for example, parties are less likely to perceive the process as fair.<sup>242</sup> Also, some research suggests that caucus is a particularly potent tool in mediation and that the mediator's management of the caucus can either enhance parties' perceptions of procedural justice or undermine such perceptions.<sup>243</sup>

While procedural justice perceptions generally influence parties' perceptions of substantive justice, this is less true for others. Judges', lawyers', and other repeat players' assessments of outcome fairness, for example, are influenced more by their expectations of the outcomes they should receive than by their perceptions of procedural justice.<sup>244</sup> This finding, coupled with research

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<sup>241</sup> See Tina Nabatchi et al., *Organizational Justice and Workplace Mediation: A Six-Factor Model*, 18 INT'L J. CONFLICT MGMT. 148, 164 (2007) (involving the transformative model of mediation).

<sup>242</sup> See Wissler, *supra* note 144, at 684; see also Welsh, *supra* note 237, at 838–58 (applying procedural justice research and theories to mediation).

<sup>243</sup> See Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 647–51, 661, 669–71 (2004); see also Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation* 80 VA. L. REV. 323, 325–36 (1994) (describing caucus as “uniquely mediative”); Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the USPS REDRESS Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L.J. 399, 413, 418 (2001) (noting that ADR specialists who observed transformative mediators expressed concerns regarding caucus and its potential to interfere with empowerment and recognition); Welsh, *supra* note 237, at 809 (raising concerns regarding the effects of marginalization of joint session and dominance of caucus); *Musings on Mediation*, *supra* note 38, at 13, 16 (raising concerns that confidentiality and mediation privilege have become defining features of mediation and describing use of caucus in a particularly problematic case). Professor Peter Robinson recently surveyed California judges to discover how frequently they meet exclusively with the parties in private caucuses during settlement conferences. Thirty-four percent of the responding general civil judges reported that they make exclusive use of caucus in less than 10 percent of their cases; 28 percent, meanwhile, reported that they make exclusive use of caucus in more than 90 percent of their cases. The exclusive use of caucuses was particularly striking in complex civil litigation (33 percent reported exclusive use of caucus in more than 90 percent of their cases) and in non-family, non-small claims general civil matters (37 percent reported exclusive use of caucus in more than 90 percent of their cases). See Peter Robinson, *An Empirical Study of Settlement Conference Nuts and Bolts: Settlement Judges Facilitating Communication, Compromise and Fear*, 17 HARV. NEGOT. L. REV. 97, 136–37 (2012); see also Peter Robinson, *Settlement Conference Judge—Legal Lion or Problem Solving Lamb: An Empirical Documentation of Judicial Settlement Practices and Techniques*, 33 AM. J. TRIAL ADVOC. 113, 159–65 (2009) (appendix containing survey questions).

<sup>244</sup> See JANE W. ADLER ET AL., *SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM* 76, 83 (1983) (unlike “unsophisticated individual litigants”, institutional litigants who made extensive use of the court-connected arbitration program “appear[ed] to care little about qualitative aspects of the hearing process . . . . They judge arbitration primarily on the basis of the outcomes it delivers.”); ROTTMAN, *supra* note 224, at 25 (reporting that the public's evaluations of procedural fairness have greater influence on

showing that lawyers' perceptions frequently vary from those of their clients,<sup>245</sup> makes it essential that researchers seek the perceptions of litigants themselves and not rely solely on lawyers' perceptions of clients' reactions.

Equipped with this brief overview, the Article will now apply the procedural justice literature to the three scenarios introduced *supra*.

#### IV. PROCEDURAL JUSTICE AND THE NEED FOR STRUCTURAL REFORMS

As described, magistrate judges may interact with other magistrate judges, district judges, and mediators as they try to assist parties in reaching settlement.<sup>246</sup> Procedural justice concerns are particularly likely to arise if "voice" is discouraged, or if the offer of "voice" in one setting (e.g., mediation) is likely to work to a party's disadvantage in another setting (e.g., trial), or if the management of "voice" (e.g., occurring exclusively in *ex parte* meetings or caucuses) makes it less likely that a decision-maker or authority will be able to be open-minded and even-handed in considering the information presented by the parties. The following three scenarios provide more concrete examples, followed by procedural justice analysis.

*Magistrate Judge-Mediator Pairing.* A mediator facilitates the parties' settlement discussions in a case. The magistrate judge will conduct a trial only if the parties are unable to reach settlement in mediation. The court's local

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their evaluations of the courts, while attorneys give more weight to outcomes; also noting that studies in other States indicate that judges are also more concerned about outcome fairness than procedural fairness); Diane Sivasubramaniam & Larry Heuer, *Decision Makers and Decision Recipients: Understanding Disparities in the Meaning of Fairness*, 44 J. AM. JUDGES ASS'N 62, 66 (2007–2008) (Court Review) (reporting several experiments demonstrating that those assuming the role of authority or decision-maker were more likely to define fairness in terms of outcome, while those who were decision recipients were more likely to be concerned with respectful, fair treatment); see also Jan-Willem Van Prooijen et al., *Procedural Justice and Intragroup Status: Knowing Where We Stand in a Group Enhances Reactions to Procedures*, 41 J. EXPERIMENTAL SOC. PSYCHOL. 664 (2005).

<sup>245</sup> See, e.g., HEATHER ANDERSON & RON PI, JUDICIAL COUNCIL OF CAL., EVALUATION OF THE EARLY MEDIATION PILOT PROGRAMS 62 (2004) (reporting that in contrast to lawyers, parties' satisfaction with the mediation process was moderately or strongly associated with "what happened within the mediation process—whether they felt heard, whether the mediation helped their communication or relationship with the other party."); TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS, AND GENDERED PARTIES 12 (2009) (observing that "when comparing what legal and lay actors liked" about mediators, lawyers focused on "advice and tactical assistance" while "disputants . . . spoke largely of mediators' human attributes"); Tamara Relis, "It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims, 68 U. PITT. L. REV. 341, 342, 345 (2006) (reporting research that demonstrates that in medical malpractice mediation, lawyers tend to focus on the achievement of financial objectives while "plaintiffs' objectives of obtaining admissions of fault, prevention of recurrences, retribution for defendant conduct, answers, apologies and acknowledgments of harm remain invisible to virtually all lawyers throughout the duration of the processing of their cases"); see also Wissler, *supra* note 78, at 324–25.

<sup>246</sup> See *supra* Introduction.

rules describe mediation communications as “confidential” but also require the parties’ “good faith participation” in the process. The parties and their lawyers know that as a result of the court’s “good faith participation” requirement, mediators have occasionally disclosed to judges what occurred during mediation, including what occurred in caucus. Thus, the parties and their lawyers may worry that what they say or do in mediation, including in caucus, will be disclosed to the magistrate judge. The mediator begins with a joint session but conducts most of the mediation in caucus—or *ex parte* meetings—and learns information from each party that she does not disclose to the other party. Are the parties more or less likely to perceive the settlement phase with the mediator as providing them with procedural justice? Are they more or less likely to perceive a subsequent adjudicative phase with the magistrate judge as providing them with procedural justice?

In this scenario, the parties have the opportunity for “voice” during the mediation and, in the *ex parte* sessions, the opportunity to witness the mediator’s trustworthy consideration of such voice. If the mediation is conducted entirely on an *ex parte* basis, however, the parties will have no opportunity to observe each other’s consideration of what was said. This matters because, in mediation, the parties actually are the decision-makers. The parties also will have no opportunity to observe and assess the even-handedness of the mediator’s treatment of the parties and their claims. Even if the mediation includes an initial joint session, and the remainder is then conducted on an *ex parte* basis, the parties will have a very limited opportunity to observe each other or the mediator’s even-handedness or commitment to the provision of a neutral forum. As a result, the procedural justice literature suggests that this mediation is less likely to be perceived as procedurally just.<sup>247</sup>

An equal or even greater concern arises regarding the procedural justice of the adjudicative phase. Recall that the mediator maintained the confidentiality of what she heard as between the parties.<sup>248</sup> The parties therefore do not know what information was shared in the *ex parte* sessions that excluded them, and there may never be an opportunity to test such information’s veracity or reliability.<sup>249</sup> While this untested information may be quite important in understand-

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<sup>247</sup> See Welsh, *supra* note 237, at 852–54; Welsh, *supra* note 243, at 647 (describing how the use of caucus had a particularly positive or a particularly negative effect on parties’ perceptions of procedural justice).

<sup>248</sup> Note that the Uniform Mediation Act “does not apply to a mediation conducted by a judge who might make a ruling on the case.” See UNIF. MEDIATION ACT § 3 (2001), [http://www.uniformlaws.org/shared/docs/mediation/uma\\_final\\_styled\\_draft.pdf](http://www.uniformlaws.org/shared/docs/mediation/uma_final_styled_draft.pdf) [<https://perma.cc/LUW5-28PC>].

<sup>249</sup> See Kimberlee K. Kovach & Lela P. Love, “Evaluative” Mediation Is an Oxymoron, 14 C.P.R. INST. DISP. RES. 31, 32 (1996); Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 362–63 (1986) (observing that party will not be aware of the need to rebut or rehabilitate); *Thinning Vision*, *supra* note 23. There is no necessary assumption here that a lawyer or client would intentionally and knowingly lie while in caucus. Under Rule 3.3 of the Model Rules of Professional Conduct, lawyers owe a duty of candor to the court, and it is especially clear that they owe such a duty

ing the parties' perceptions and preferences relevant to settlement,<sup>250</sup> the information also could be legally irrelevant, significantly slanted or even wholly inaccurate. If the case does not settle and the mediator then discloses to the magistrate judge the information that she learned in the *ex parte* sessions, the parties and their lawyers could reasonably fear the effect of such disclosures upon the magistrate judge. Significant influence would be particularly likely if the disclosed information was vivid, even if it was also legally irrelevant or even wrong.<sup>251</sup> The mediator's disclosures could keep the magistrate judge from being able to be open-minded and giving trustworthy consideration to the evidence presented at trial. Meanwhile, the parties would not even know what information had been disclosed. Once again, this raises concerns regarding the parties' perceptions of procedural justice.<sup>252</sup>

In light of these concerns, it is essential that mediators and courts protect the confidentiality of mediation communications, particularly those occurring during *ex parte* meetings or caucuses, from disclosure to the judge who will conduct the trial. If there are exceptions, they should be extremely limited and clearly defined.<sup>253</sup> It is beyond the scope of this Article to detail general exceptions to confidentiality, but judges and policymakers could look to the provisions of the Uniform Mediation Act<sup>254</sup> and even consider rules that have been

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to a presiding judge, since any representations made during the settlement session could influence the integrity of trial. MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR. ASS'N 2013). It is less clear, at least to this author, whether the duty also applies to non-presiding judges or mediators, particularly if the judge or mediator is bound by an obligation of confidentiality.

<sup>250</sup> See Denlow, *supra* note 210 (describing use of caucus and urging the discussion of many matters beyond the legal merits of the case).

<sup>251</sup> See Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 28 (2007) (finding that judges are "vulnerable to such distractions as absurd settlement demands, unrelated numeric caps, and vivid fact patterns"); Chris Guthrie et al., *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1523 (2009) (finding administrative law judges "relying on intuitive processing [that] allowed an irrelevant anchor to influence compensatory damage awards; the framing of payment options to influence evaluations of the appropriateness of a landlord's conduct; and the representativeness of a piece of information to influence evaluations of the likelihood of a defendant employer's conduct" and observing that the judges might have avoided judgment errors "by adopting a deliberative decisionmaking approach"); Jeffrey J. Rachlinski et al., *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227, 1256-57 (2006) (finding that bankruptcy judges were susceptible to some biases, but not others); Wistrich, *supra* note 142, at 1323-26 (finding that judges had difficulty disregarding inadmissible evidence when judicial review was unlikely and recommending separation of settlement and adjudicative functions).

<sup>252</sup> See generally Wissler, *supra* note 78, at 324.

<sup>253</sup> Allegations of failure to mediate in good faith generally should not be sufficient to breach the confidentiality of the mediation process. See Thompson, *supra* note 24, at 417-18.

<sup>254</sup> See UNIF. MEDIATION ACT, (2003), [http://www.uniformlaws.org/shared/docs/mediation/uma\\_final\\_03.pdf](http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf) [<https://perma.cc/SE4K-DQ64>].

adopted in the context of international med-arb (i.e., a process that combines mediation and arbitration) to address the problem of arbitrators' awareness of communications occurring during *ex parte* meetings in mediation.<sup>255</sup>

- *Magistrate Judge-District Judge Pairing.* The magistrate judge facilitates the settlement session, and a district judge conducts a trial if needed. Like the mediator in the prior example, the magistrate judge meets *ex parte* with the parties and learns information from each party that the magistrate judge does not disclose to the other party. The parties and their lawyers know that the magistrate judge is not bound to keep what he learns confidential. Thus, he may make disclosures to the district judge about what occurred or was said during the settlement session, including in caucus. Again, this worries the parties and their lawyers. Are the parties more or less likely to perceive the settlement phase with the magistrate judge as providing them with procedural justice? Are they more or less likely to perceive the adjudicative phase with the district judge as providing them with procedural justice?

While the identity of the third parties has changed, the dynamic described here is very similar to the dynamic in the Magistrate Judge-Mediator Pairing scenario. The most significant differences are that the parties are aware that their disclosures could affect the magistrate judge's decision-making in a future case, and the parties know that the magistrate judge has no duty to keep their communications confidential. Even if the magistrate judge does not make an intentional disclosure to the district judge, his experience with the parties could influence how he describes them or their lawyers in casual conversation with the district judge. Thus, the parties' concerns about the potential dangers of disclosure should be significantly heightened, with predictably negative effects on their perceptions of procedural justice. Just as Dr. Roselle Wissler's research demonstrated, *supra*, the parties and their lawyers should be hesitant to take full advantage of the opportunity for "voice" during the settlement session. Further, the parties should perceive less procedural justice at both the settlement phase and the adjudicative phase.

Even though the roles of magistrate judges and mediators differ—and, as Dean Alfani suggests, they may answer to different "callings"—both magistrate judges and mediators should share the duty to protect the confidentiality of settlement communications, particularly those occurring during *ex parte* meetings, and not make disclosures to the judge who will conduct the trial. Indeed, some

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<sup>255</sup> See Ellen E. Deason, *Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review*, 5 Y.B. ARB. & MEDIATION 219, 246–47 (2013) (observing that the CEDR Commission on Settlement in International Arbitration had recommended a no-caucus approach to mediation-arbitration and while the Hong Kong Arbitration Ordinance permits an arbitrator to serve as a mediator, it also provides that "[i]f the neutral obtains any confidential information during mediation and the case does not settle, before resuming arbitration he must disclose to all the parties 'as much of that information as the arbitrator considers is material to the arbitral proceedings'").

courts specifically bar such disclosures.<sup>256</sup> As is true for mediators, any exceptions should be limited and clearly defined.

- *Magistrate Judge Alone-and with Consent Sought Only Before Settlement Session.* The magistrate judge serves as both the facilitator of the settlement session and the trial judge (in the event that settlement cannot be achieved). The district's clerk of court seeks the parties' consent to the magistrate judge's adjudication of the case only before the commencement of the settlement phase, not after the completion of the settlement phase. The magistrate judge meets *ex parte* with the parties during the settlement phase and learns information from each party that the magistrate judge does not disclose to the other party. The case does not settle. Therefore, the parties must go to trial before the magistrate judge. The parties and their lawyers worry about the effects of what was said or done during the settlement session, including what the other side said or did in caucus. Are the parties more or less likely to perceive the settlement phase with the magistrate judge as providing them with procedural justice? Are they more or less likely to perceive the adjudicative phase with the magistrate judge as providing them with procedural justice?

As noted, on occasion, magistrate judges work alone to offer both settlement assistance and adjudication.<sup>257</sup> In these cases, the magistrate judge manages the pretrial process, facilitates the settlement session, and if settlement is not achieved, conducts the trial.<sup>258</sup>

In this situation, the parties and their lawyers reasonably may fear that the judge's involvement in the settlement session will color her rulings at trial. Indeed, Dr. Wissler's research graphically illustrates the prevalence of such concerns.<sup>259</sup> The parties and their lawyers thus are unlikely to perceive that the

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<sup>256</sup> See Brazil, *supra* note 11, at 24–25 (observing that the local rules for the U.S. District Court of the Southern District of Iowa provide that when a magistrate judge serves as settlement judge, the trial judge “should not be informed of any positions that parties take” also observing that if a magistrate judge is responsible for deciding discovery issues that could affect case value, she trades responsibility for settlement facilitation with another magistrate judge).

<sup>257</sup> See *id.* at 27.

<sup>258</sup> See *id.* at 24–25 (noting that in the U.S. District Court of North Dakota, Judge Klein has served as the judicial mediator in cases assigned to her for trial; she views it as “perfectly acceptable for the trial judge to serve as the settlement judge if the practice is limited: (1) to situations in which the parties voluntarily consent to the trial judge's involvement in settlement; and (2) to jury cases that are fact-driven, rather than driven by issues of law” and notes that hers is a “small court” and thus does “not have the luxury of multiple magistrate judges in the same location”); Hart, *supra* note 19, at 76–77 (referencing settlement in his own cases); Welsh & McAdoo, *supra* note 19 (disclosing judge's response to confidentiality concerns raised when judge is both mediator and adjudicator); see also Alfini, *supra* note 19 (supporting judges serving as mediators unless judge is presiding over parties' trial); Sander, *supra* note 19, at 21 (concurring with Prof. Alfini).

<sup>259</sup> See Wissler, *supra* note 78, at 285–97 and accompanying text.

judge truly will hear or give trustworthy consideration to their “voice,” or be able to be even-handed and offer a neutral forum during the adjudicative phase.<sup>260</sup> These concerns are heightened if the judge conducts the settlement session only or primarily in *ex parte* meetings. As noted, neither party knows what the judge has been told by the other side, and thus neither party has the opportunity to contest or refute inaccurate or slanted information.<sup>261</sup> Because the judge cannot “unlearn” what she has heard, she should be barred from the use of *ex parte* meetings.<sup>262</sup>

There is also the issue of consent. Both the United States Code<sup>263</sup> and Rule 73 of the Federal Rules of Civil Procedure<sup>264</sup> encourage parties to consent to having magistrate judges conduct civil trials, but also protect the voluntariness of such consent and the anonymity of any refusals. Clearly, however, the timing and the manner of seeking consent matter.<sup>265</sup> Rule 73’s deference to district

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<sup>260</sup> See Stephen G. Crane, *Judge Settlements Versus Mediated Settlements*, 17 DISP. RESOL. MAG. 20, 22 (Spring 2011) (describing parties’ likely perception of betrayal by the judicial system if the presiding judge facilitates settlement sessions). As a related point, if the parties reach a settlement and the magistrate judge then retains jurisdiction, this may result in the magistrate judge determining whether to set aside a settlement agreement or, in the class action context, conducting a hearing to assess the fairness of the settlement to absentee class members. In either case, an appellate court may reasonably fear that the magistrate judge has lost his or her ability to be sufficiently objective in assessing the fairness of the settlement that he or she had brokered. See Schuck, *supra* note 249, at 361 (describing risk of judicial over-commitment to the settlement that he or she helped to fashion); see also James R. Coben, *Creating a 21st Century Oligarchy: Judicial Abdication to Class Action Mediators*, 5 Y.B. ARB. & MEDIATION 162, 185–87 (2013). Coben raises concerns about deferring to the fairness assessments of judges or mediators or special masters who facilitated settlement and notes that:

[N]atural bias’ might well color a private mediator’s characterization of the virtues of the bargaining process he or she supervised, not to mention settlement quality. Indeed, the stakes are arguably even higher for the private mediator than for the reviewing judge: Only the former’s paycheck is potentially linked to settlement approval; class action mediators who do not successfully assist parties to settle cases are unlikely to be hired.

*Id.*

<sup>261</sup> See *supra* note 249.

<sup>262</sup> See Tania Sourdin, *Why Judges Should Not Meet Privately with Parties in Mediation But Should Be Involved in Settlement Conference Work*, 4 J. ARB. & MEDIATION 91, 96–101 (2013–2014) (identifying several reasons that judges should not hold meetings with one party in the absence of the other, including: potential alteration of the relationship between a judge and one party which may harm the integrity of the judicial system; the need to protect judges’ impartiality and avoidance of pre-judgment; the resulting outcome may not be “fair”; and transparency is a core feature of courts).

<sup>263</sup> 28 U.S.C. § 636(c)(1) (2012).

<sup>264</sup> FED. R. CIV. P. 73(b).

<sup>265</sup> See Dessem, *supra* note 32, at 839 (citing Reinier H. Kraakman, Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 YALE L.J. 1023, 1051 (1979); then citing Claudia L. Psome, Note, *Magistrates: Constitutionality and Consent*, 36 N.Y.L. SCH. L. REV. 675 (1991); and then citing Christopher E. Smith, *From U.S. Magistrates to U.S. Magistrate Judges: Developments Affecting the Federal District Courts’ Lower Tier of Judicial Officers*, 75 JUDICATURE 210, 213–14 (1991))

courts' local rules may be problematic here. Some district courts' local rules fail to acknowledge the challenge presented for a party when a magistrate judge's facilitation of a settlement session causes the party to become concerned about the magistrate judge's impartiality at a subsequent trial. For example, the District of Guam's local rule provides that both district and magistrate judges may serve as neutrals in settlement conferences.<sup>266</sup> If the settlement conference is held before the trial judge, all parties must sign a written stipulation consenting to the trial judge's settlement role.<sup>267</sup> If the case does not settle, however, the parties do not have another opportunity to consent, specifically to whether to go to trial before this judge.<sup>268</sup> It is also unclear whether the stipulation process is one that protects the voluntariness and anonymity of the parties' consent to participate in a settlement conference with the judge.<sup>269</sup> Similarly, in the District of Hawaii, magistrate and district judges serve as neutrals in settlement conferences.<sup>270</sup> In a non-jury case, a written stipulation is required of all parties before the settlement conference may be held before the assigned trial judge.<sup>271</sup> There is no requirement that the parties sign another stipulation before going to trial before the judge who facilitated the settlement session.<sup>272</sup>

In contrast, some other districts have erected an apparently impenetrable barrier between the functions of facilitating settlement and presiding over trial. In the Western District of North Carolina, for example, the judge facilitating a settlement session may be any judge *other than* the one to whom the case was assigned.<sup>273</sup> The District of Utah similarly provides that both district and magistrate judges may facilitate settlement sessions, but the judge to whom the case is assigned is *required* to refer the case to another district or magistrate judge for settlement.<sup>274</sup> The Middle District of Alabama specifies that if a district judge is the presiding judge, a magistrate judge *must* serve as the mediator; if the magistrate judge is the presiding judge, the clerk of court *must* select a me-

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("[E]fforts must be made to 'protect the voluntariness of the parties' consent' to magistrate judge jurisdiction. This will require not merely appropriate consent procedures, but a determination on the part of judges and court personnel to administer such procedures to avoid the "velvet blackjack" problem' of coerced consent."). *But see* Roell v. Withrow, 538 U.S. 580, 581 (2003) (finding implied consent based on conduct during litigation); Warren v. Thompson, 224 F.R.D. 236, 238–39 (D.D.C. 2004) (discussing that plaintiff's acquiescence constituted voluntary consent).

<sup>266</sup> See D. GUAM CT. R. 16-2(b)(1)(B).

<sup>267</sup> See STIENSTRA, *supra* note 15, app. 5 at 8; see also D. GUAM CT. R. 16-2(b)(1)(B).

<sup>268</sup> The parties also do not appear to have the opportunity to opt out of appearing before the same judge for trial. D. GUAM CT. R. 16-2(b)(1)(B).

<sup>269</sup> See *id.*

<sup>270</sup> See D. HAW. LR 16.5(a); see also STIENSTRA, *supra* note 15, app. 5 at 9.

<sup>271</sup> See D. HAW. LR 16.5(a); see also STIENSTRA, *supra* note 15, app. 5 at 9.

<sup>272</sup> See D. HAW. LR 16.5(a); see also STIENSTRA, *supra* note 15, app. 5 at 9.

<sup>273</sup> See STIENSTRA, *supra* note 15, app. 5 at 20.

<sup>274</sup> See *id.* at 29.

diator.<sup>275</sup> These bright line rules acknowledge the dangers of combining settlement and adjudicative functions.<sup>276</sup>

At the very least, if a magistrate judge facilitates a settlement session and the parties do not reach agreement, the parties should be permitted to participate in a second “blind consent” procedure before that judge proceeds to conduct the trial.<sup>277</sup> Indeed, Former Magistrate Judge Karen Klein, of the District of North Dakota, had adopted informal variations of this approach. If she was the trial judge in a fact-driven jury case and facilitated settlement discussions, she “always assure[d] the parties that if their case d[id] not settle, we w[ould] reassess the propriety of my continued involvement as the trial judge.”<sup>278</sup> On the very rare occasions when Magistrate Judge Klein acceded to the parties’ request that she serve as the settlement judge in a nonjury case assigned to her for trial, she went even further and imposed a “strict condition that the case would be reassigned to another judge for trial if the parties could not reach a settlement.”<sup>279</sup>

These structural proposals—i.e., protecting the confidentiality of mediation communications, especially those occurring during *ex parte* meetings; narrowly delineating any exceptions; erecting a bright line separation of the settlement and adjudicative functions or, at the very least, permitting a magistrate judge to move from settlement facilitation to adjudication only after the parties have participated in a second blind consent procedure—will do much to address procedural justice concerns.

In addition, however, a magistrate judge’s management of a settlement session (or judicial mediation) also is likely to affect lawyers’ and clients’ perceptions of procedural justice. This Article therefore now turns to the third structural proposal: providing magistrate judges with opportunities for: (1) feedback regarding parties’ perceptions of the procedural fairness of their management of settlement sessions and (2) judicial self-reflection.

## V. PROCEDURAL JUSTICE AND THE NEED TO PROVIDE OPPORTUNITIES FOR

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<sup>275</sup> See *id.* at 1.

<sup>276</sup> See Wistrich, *supra* note 142, at 1323–28 (urging such separation of functions).

<sup>277</sup> But see Deason, *supra* note 255, at 243–44 (urging that “[t]he process concerns implicated by combinations of mediation and arbitration—potential coercion to agree in mediation, impairment of mediation confidentiality, decision-making based on *ex parte* contacts, and compromised impartiality—may justify a . . . limitation on parties’ discretion to waive basic rights in designing their own dispute resolution process.”).

<sup>278</sup> See Brazil, *supra* note 11.

<sup>279</sup> See *id.* Later in the article, Magistrate Judge Brazil observes that both of the interviewees agree that if parties agree to participate in a settlement conference hosted by the assigned judge, they “will have the right to have the case reassigned to another judge for trial if they do not reach a settlement.” *Id.* at 27.

FEEDBACK OR SELF-REFLECTION<sup>280</sup>A. *Models Provided by Judicial Performance Evaluation Initiatives*

At this point, the focus of this Article is on providing magistrate judges with opportunities for feedback and self-reflection, but the field of judicial performance evaluation (JPE) offers interesting models that have the potential for useful adaptation. Although JPE has existed since 1967, it has focused primarily on state court judges.<sup>281</sup> Some federal courts—including magistrate judges at those courts—have experimented with JPE but to a much lesser degree.<sup>282</sup>

The American Bar Association (ABA) developed guidelines for JPE in 1985,<sup>283</sup> and updated them in 2005.<sup>284</sup> At that time, the ABA recommended that all court systems implement a formal program to evaluate judicial performance with the goals of “promoting judicial self-improvement, enhancing the quality of the judiciary as a whole, and providing relevant information to those responsible for continuing judges in office.”<sup>285</sup> The ABA also proposed that JPE not be used for judicial discipline, that information developed in a JPE program not be provided to disciplinary authorities unless required by law or by rules of professional conduct,<sup>286</sup> and that JPE programs be structured to avoid impairing judicial independence and also avoid political, ideological and issue-oriented considerations.<sup>287</sup> The proposed guidelines used the following categories of evaluative criteria: legal ability, integrity and impartiality, communication skills, professionalism and temperament, and administrative capacity.<sup>288</sup> The

<sup>280</sup> The text of this part (i.e., Part V) was, in substantial part, first published in Welsh et. al., *supra* note 115.

<sup>281</sup> Alaska introduced the first program for performance evaluation of judges in 1967. See Nicholas H. Woolf & Jennifer MJ Yim, *The Courtroom-Observation Program of the Utah Judicial Performance Evaluation Commission*, 47 J. AM. JUDGES ASS’N 84 (2011) (citing Richard C. Kearney, *Judicial Performance Evaluation in the States*, 22 PUB. ADMIN. Q. 468 (1999)). The National Center for State Courts also provides resources regarding JPE. JUDICIAL PERFORMANCE EVALUATION RESOURCE GUIDE, NAT’L CTR. FOR ST. CTS., <http://www.ncsc.org/Topics/Judicial-Officers/Judicial-Performance-Evaluation/Resource-Guide.aspx> [<https://perma.cc/3MA5-9LLD>].

<sup>282</sup> See Rebecca Love Kourlis & Jordan M. Singer, *A Performance Evaluation Program for the Federal Judiciary*, 86 DENV. U. L. REV. 7, 15–19 (2008) (describing the history of JPE experiments in the federal judiciary).

<sup>283</sup> See ALAYNA JEHL & JAMES T. RICHARDSON, JUDICIAL EVALUATION AS A RESPONSE TO THE ABA GUIDELINES (2004) (referencing the 1985 Guidelines), <http://www.americanbar.org/content/dam/aba/migrated/jd/lawyersconf/performanceresource/reports/abaguidelines.authcheckdam.pdf> [<https://perma.cc/4TJB-8YT3>].

<sup>284</sup> See AM. BAR ASS’N, BLACK LETTER GUIDELINES FOR JUDICIAL PERFORMANCE EVALUATION (2005), [http://www.americanbar.org/content/dam/aba/publications/judicial\\_division/jpec\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/judicial_division/jpec_final.authcheckdam.pdf) [<https://perma.cc/JP5P-GWTR>].

<sup>285</sup> *Id.* at Guideline 2-1.

<sup>286</sup> *Id.* at Guideline 2-3.

<sup>287</sup> *Id.* at Guideline 4-4.

<sup>288</sup> *Id.* at Guidelines 5-1 to 5-5.

ABA Black Letter Guidelines also considered the methodology for JPE and recommended: evaluating judicial behaviors rather than general qualities, protecting the anonymity of those providing the evaluations, collecting data from multiple sources (but limiting such sources to those with current and personal knowledge of the judge), and using experts to develop the evaluation methods and collect and analyze data.<sup>289</sup>

For the purpose of this Article, it is important to note that the ABA Black Letter Guidelines' only explicit reference to judicial engagement in settlement falls under the evaluative criterion regarding administrative capacity: "The judge should be evaluated on . . . [u]sing settlement conferences and alternative dispute resolution mechanisms as appropriate."<sup>290</sup> This Article will return to the paucity of attention that JPE has given to judicial settlement activities.

State courts have used a variety of methods to conduct JPE. Some state courts have video-recorded their judges in the courtroom—and have then used the video-recordings to prompt groups of judges to discuss judicial behaviors and their likely impact on parties. The individual judges who were video-recorded also have used the recordings to engage in self-reflection and self-improvement.<sup>291</sup> A few states use trained volunteers to observe judges and record their experience in the courtroom.<sup>292</sup> Most courts, however, use question-

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<sup>289</sup> *Id.* at Guidelines 6-1 to 6-5. Careful design and implementation of JPE is essential. Researchers have raised very serious concerns about the influence of implicit bias upon lawyers' and parties' evaluations of judges. *See, e.g.,* Rebecca D. Gill et al., *Are Judicial Performance Evaluations Fair to Women and Minorities? A Cautionary Tale from Clark County, Nevada*, 45 L. & SOC'Y REV. 731, 737 (2011); Rebecca D. Gill, *Implicit Bias in Judicial Performance Evaluations: Why the ABA Guidelines Are Not Good Enough* (Mar. 11, 2012) (unpublished manuscript), <http://wpsa.research.pdx.edu/meet/2012/gillrebecca.pdf> [<https://perma.cc/Z8X7-YAB7>]. *But see* Stephen Colbran, *Judicial Performance Evaluation and Settlement Skills*, 11 J. JUD. ADMIN. 180, 200 (2002) (reporting no statistically significant difference between male and female judges in terms of judicial settlement skills). Meanwhile, there is research showing that for certain types of cases—e.g., those that make gender salient—female judges' decisions vary from male judges' decisions to a statistically significant degree. Interestingly, preliminary research suggests that the same statistically significant difference does not occur when the decision-makers are arbitrators selected by the parties. *See generally* Pat K. Chew, *Comparing the Effect of Judges' Gender and Arbitrators' Gender in Sex Discrimination Cases and Why It Matters* (Feb. 2, 2016) (unpublished manuscript) (on file with author).

<sup>290</sup> AM. BAR ASS'N, *supra* note 284, at Guideline 5-5(5.6).

<sup>291</sup> *See* LEBEN, *supra* note 226, app. A at 8 (describing videos of New Hampshire judges while on the bench that allowed for observation/discussion and self-reflection regarding likely procedural justice effects; also providing comments in the Appendix).

<sup>292</sup> *Id.* at 25–27 (describing Utah, Alaska, and Colorado as leaders in courtroom observation and explaining the process of training the volunteer observers). *See* Woolf & Yim, *supra* note 281 (providing substantial detail regarding the evaluation program and its evolution; also including criticism of such evaluations, particularly the harsher evaluations of women and minorities).

naires to provide lawyers' and litigants' feedback to judges and court administrators on various aspects of court operation.<sup>293</sup>

### B. *Procedural Justice in the Courtroom*

Two colleagues and I looked to the JPE literature for experience in asking about the procedural justice of judicial actions in settlement.<sup>294</sup> Overwhelmingly, we found that JPE initiatives focusing on procedural justice confine their inquiry to judicial behaviors in the courtroom. In Utah, for example, court observers report with respect to procedural justice principles, particularly neutrality, respect and voice. They also report whether they found the judge to be trustworthy and whether the observers would feel comfortable appearing before

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<sup>293</sup> See JUDICIAL PERFORMANCE EVALUATION RESOURCE GUIDE, *supra* note 281; Kourlis & Singer, *supra* note 282, at 18. My colleagues and I reviewed, for example, questionnaires from New Hampshire, Minnesota, New Jersey, Arizona, Kansas, Hawaii, Colorado and Utah, as well as a template developed for States by IAALS (Institute for the Advancement of Legal Systems) (on file with the author). These questionnaires typically solicit feedback from lawyers rather than clients. See LEBEN, *supra* note 226, at 21–23 (describing process used in Hennepin County, including written feedback and review with team of judges, attorneys and also describing the appellate judge process used by Kansas Commission on Judicial Performance, with evaluations available online more recently taken over by the Kansas Bar Assoc.); NAT'L CTR. FOR STATE COURTS, THE INTERNATIONAL FRAMEWORK FOR COURT EXCELLENCE, 16–18 (2nd ed. 2013), <http://www.courtexcellence.com/~media/Microsites/Files/ICCE/The%20International%20Framework%20E%202014%20V3.ashx> [<https://perma.cc/D3B4-UK4E>]; MARCY R. PODKOPACZ, REPORT ON THE JUDICIAL DEVELOPMENT SURVEY 16 (2005) (detailing Fourth Judicial District Of Minnesota and Hennepin County process); *Court Implementation, PROCEDURAL FAIRNESS FOR JUDGES & CTS.*, <http://www.proceduralfairness.org/Court-Implementation> [<https://perma.cc/MJV7-GUGW>] (last visited Apr. 27, 2016) (listing examples of courts that have conducted procedural justice evaluation).

<sup>294</sup> We also reviewed researchers' efforts to examine the judge's role in settlement. See the following for citations to some of the research: BRAZIL, *supra* note 144 (researchers surveyed lawyers in the mid-1980s regarding their general perceptions of judicial settlement behaviors); PROVINE, *supra* note 100 (noting that lawyers prefer a settlement judge who points out evidence or law that lawyers misunderstand or are overlooking); Brazil, *supra* note 100, at 22–24 (reporting primarily that the overwhelming majority of lawyer-respondents in Northern California preferred judges who made suggestions and offered observations during settlement sessions, but lawyers in Florida, Texas and Missouri were more ambivalent about such a judicial role); Rude & Wall, *supra* note 100, at 176–77 (reporting that lawyers prefer judges to inform them regarding how similar cases have settled and to argue logically for concessions); see also Jean-Francois Roberge, "Sense of Access to Justice" As a Framework for Civil Procedure Justice Reform: An Empirical Assessment of Judicial Settlement Conferences in Quebec (Canada), 17 CARDOZO J. CONFLICT RESOL. 323, 329–41 (2016) (surveying empirical research regarding judicial settlement behaviors as well as metrics that have been developed to assess access to justice). More recently, in a series of articles, Prof. Peter Robinson has reported the results of a survey of judges, who reported their perceptions of the techniques they use to effect settlement. See, e.g., Robinson, *supra* note 100, at 142–46 (Case law and disciplinary proceedings also reveal parties' perceptions of and conclusions regarding certain judicial settlement behaviors); *Thinning Vision*, *supra* note 23, at 64–78 (containing an extensive bibliography).

him or her.<sup>295</sup> The observers' narratives are coded, summarized and compiled into a two to three page report that identifies "widely agreed-upon themes, minority observations, and anomalous comments."<sup>296</sup> These observations involve judicial behavior in the courtroom. It does not appear that the observers evaluate settlement sessions.

Questionnaires that include procedural justice elements also tend to focus on judicial behaviors in the courtroom. Among the questionnaires that my colleagues and I examined, for example, was the National Center for State Courts' (NCSC) "Trial Court Performance Measures" (CourTools), which is perhaps the most widely used measure for state court assessments of judicial and court management practices.<sup>297</sup> Most relevant to our procedural justice analysis was the "Access and Fairness Survey."<sup>298</sup> The survey's "definition" and "purpose" sections suggest that it can be used to assess perceptions of several key procedural justice elements.<sup>299</sup> On a five-point scale (ranging from strongly disagree to strongly agree), however, only five Fairness Questions are suggested in CourTools:

- The way my case was handled was fair.
- The judge listened to my side of the story before he or she made a decision.
- The judge had the information necessary to make good decisions about my case.
- I was treated the same as everyone else.
- As I leave the court, I know what to do next about my case.<sup>300</sup>

<sup>295</sup> See Woolf & Yim, *supra* note 281, at 87.

<sup>296</sup> *Id.*

<sup>297</sup> See *Trial Court Performance Measures*, COURTOOLS, <http://www.courtools.org/Trial-Court-Performance-Measures.aspx> [<https://perma.cc/2XHW-LWMC>] (last visited Apr. 27, 2016) (follow "Overview Brochure" hyperlink) The NCSC performance measures include: "Access and Fairness, Clearance Rates, Time to Disposition, Age of Active Pending Case-load, Trial Date Certainty, Reliability and Integrity of Case Files, Collection of Monetary Penalties, Effective Use of Jurors, Court Employee Satisfaction and Cost Per Case." *Id.*

<sup>298</sup> See *Access and Fairness*, COURTOOLS (2005) [http://www.courtools.org/~media/Microsites/Files/CourTools/courtools\\_Trial\\_measure1\\_access\\_and\\_fairness.ashx](http://www.courtools.org/~media/Microsites/Files/CourTools/courtools_Trial_measure1_access_and_fairness.ashx) [<https://perma.cc/B2DM-XK7U>].

<sup>299</sup> *Id.* Specifically, the definition and purpose sections for the Access and Fairness Survey state:

Definition: Ratings of court users on the court's accessibility and its treatment of customers in terms of fairness, equality, and respect.

Purpose: Many assume that "winning" or "losing" is what matters most to citizens when dealing with the courts. However, research consistently shows that positive perceptions of court experience are shaped more by court users' perceptions of how they are treated in court, and whether the court's process of making decisions seems fair. This measure provides a tool for surveying all court users about their experience in the courthouse. Comparison of results by location, division, type of customer, and across courts can inform and improve court management practices.

*Id.*

<sup>300</sup> *Id.* Relevant questions in the "Access to the Court" section include: "Court staff paid attention to my needs" and "I was treated with courtesy and respect." *Id.*

Although some of these CourTools questions have the potential to apply to judicial settlement conferences, the overall frame assumes judicial decision-making.

States that engage in JPE efforts similarly frame most of their evaluation questions in terms of judicial performance in the courtroom. Colorado's JPE non-lawyer questionnaire, for example, which is used for retention purposes, requests feedback regarding the following:

- Treating participants in the case politely and with respect.
- Giving participants an opportunity to be heard.
- Giving each side enough time to present his or her case.
- Making sure participants understand the proceedings and what is going on in the courtroom.<sup>301</sup>

Kansas' lawyers also complete surveys in order to provide feedback to the state's appellate judges, with several questions focused on procedural fairness, including:

- Whether the judge is fair and impartial to each side;
- Whether the judge allows parties to present their arguments and answer questions;
- Whether the judge is courteous toward attorneys;
- Whether the judge participates in oral argument with good questions and comments;
- Whether the judge writes clear opinions; and
- Whether the judge writes opinions that adequately explain the basis of the court's decisions.<sup>302</sup>

Once again, the focus is on judges' courtroom demeanor and decision-making, not on the facilitation of settlement.

### C. *Procedural Justice in Settlement Sessions*

There are a few courts that are specifically creating opportunities for judges to reflect on the impact of their behaviors while in settlement sessions. In Alberta, Canada, for example, the court has video-recorded a small number of judicial settlement sessions for training purposes.<sup>303</sup> Specifically, three judges agreed to be video-recorded as they facilitated settlement of a hypothetical

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<sup>301</sup> COLO. OFF. JUD. PERFORMANCE EVALUATION, SURVEY OF JUDICIAL PERFORMANCE (on file with the author).

<sup>302</sup> See LEBEN, *supra* note 226, at 23. The Center for Court Innovation has also developed surveys to assess parties' procedural justice perceptions. See EMILY GOLD LAGRATTA & ELISE JENSEN, CTR. FOR CT. INNOVATION, MEASURING PERCEPTIONS OF FAIRNESS: AN EVALUATION TOOLKIT (2015), [http://www.courtinnovation.org/sites/default/files/documents/P\\_J\\_Evaluation.pdf](http://www.courtinnovation.org/sites/default/files/documents/P_J_Evaluation.pdf) [<https://perma.cc/GE56-BHVQ>].

<sup>303</sup> See Lawrence E. Susskind, *Judicial Dispute Resolution: An Approach Evolving to Suit Litigants' Needs*, 20 DISP. RESOL. MAG., (Spring 2014), [http://www.americanbar.org/publications/dispute\\_resolution\\_magazine/2014/spring/judicial-dispute-resolution--an-approach-evolving-to-suit-litiga.html](http://www.americanbar.org/publications/dispute_resolution_magazine/2014/spring/judicial-dispute-resolution--an-approach-evolving-to-suit-litiga.html) [<https://perma.cc/5L4W-KE47>].

case.<sup>304</sup> The recordings revealed quite different approaches to facilitating settlement.<sup>305</sup> A larger group of judges then viewed and discussed these differences as part of training they received in “judicial dispute resolution” skills.<sup>306</sup> Of course, the judges who were video-recorded also engaged in individual self-reflection.<sup>307</sup> In the U.S. District Court of the Northern District of California, meanwhile, the head of the mediation program regularly conducts “practicums” with interested magistrate judges regarding the facilitation of settlement sessions and appropriate use of other ADR processes.<sup>308</sup> This practice builds on the “brown bag” sessions that the Northern District has long held with its mediators,<sup>309</sup> and the “reflective practice groups” that mediators are beginning to form around the country.<sup>310</sup>

Meanwhile, some states’ judicial evaluation surveys include a few questions that address judicial settlement efforts. The New Jersey JPE process, for example, uses survey data to provide confidential information to individual judges, and one question specifically asks litigants to comment on settlement:

If settlement was appropriate in this case, please assess the judge’s settlement activities (whether or not the case was settled) with respect to:

- Thoughtfully exploring the strengths and weaknesses of each party’s case in settlement discussions with the attorney.
- Credibility of the judge’s settlement appraisals.
- Skills in effecting compromise.
- Absence of coercion, threat or the like in settlement efforts.<sup>311</sup>

The Hawaii Circuit Court Judicial Performance Evaluation Questionnaire asks for comments on these additional settlement-related points:

- “Appropriateness of the judge’s settlement/plea initiatives.”
- “Facilitation in development of options for settlement/plea.”
- “Ability to enhance the settlement process by creating consensus or to facilitate the plea agreement process.”<sup>312</sup>

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<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> See *Becoming a Neutral: Mediation Continuing Education Requirements*, U.S. DISTRICT CT. N.D. CAL., <http://www.cand.uscourts.gov/becomeaneutral> [<https://perma.cc/5A3Y-48UD>].

<sup>309</sup> *Id.*

<sup>310</sup> Kenneth H. Fox, *Mirror As Prism: Reimagining Reflexive Dispute Resolution Practice in a Globalized World*, 45 WASH. U. J.L. & POL’Y 41, 44–50 (2014) (describing reflective practice); David A. Hoffman, *Mediation, Multiple Minds, and Managing the Negotiation Within*, 16 HARV. NEGOT. L. REV. 297, 326 (2011).

<sup>311</sup> RICHARD J. YOUNG, N.J. ADMIN. OFF. CTS., *THE NEW JERSEY JUDICIAL PERFORMANCE EVALUATION PROGRAM: AN ASSESSMENT OF THE PROGRAM’S IMPACT ON JUDICIAL PERFORMANCE* (1997) (on file with author). Other questions asked about “Comportment”—e.g., listening skills, even-handed treatment of lawyers, courtesy, patience, etc.—but not specifically in a settlement frame. *Id.*

It is noteworthy that although these questions ask generally about judges' "facilitation" of settlement, the concrete interventions specifically referenced are largely limited to judges' provision of advice or assessments of parties' cases and settlement proposals. In other words, these questions either do not explain what is meant by judicial "facilitation" of settlement or tend to assume that such facilitation consists primarily of judicial evaluation.<sup>313</sup> The questions do not explore whether or not judges facilitate settlement by, for example, asking questions of the parties, encouraging the clients to speak, inviting discussion of both legal and non-legal issues that are important to the parties, explicitly demonstrating that they have heard and understood the parties' most important points, trying to ensure that the parties heard and understood each other, treating the parties even-handedly and with respect, or encouraging the parties to develop their own settlement proposals. These sorts of questions—regarding voice, trustworthy consideration, and even-handed, respectful treatment—are more likely to elicit feedback that will be useful to courts and individual judges interested in learning whether parties experience procedural fairness in settlement sessions.

In contrast to the relative lack of interest in evaluating judicial settlement efforts, court-connected consensual ADR procedures—especially mediation—have often and appropriately been subject to evaluation. Some have looked beyond their own court or research project and have called for standardized data collection across many types of courts and cases to facilitate nuanced and thoughtful analysis of what occurs in ADR procedures and, specifically, to learn what contributes to the perception of these procedures as substantively and procedurally just.<sup>314</sup>

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<sup>312</sup> HAW. JUD. DISTRICT CT., JUDICIAL DISTRICT COURT QUESTIONNAIRE (2010) (on file with the author); *see also* THE JUD., ST. OF HAW., JUDICIAL PERFORMANCE PROGRAM 2013 REPORT, (2013), [http://www.courts.state.hi.us/docs/news\\_and\\_reports\\_docs/judicial\\_performance\\_program\\_final.pdf](http://www.courts.state.hi.us/docs/news_and_reports_docs/judicial_performance_program_final.pdf) [<https://perma.cc/R4FV-L7DN>] (tables reporting evaluation results for judges).

<sup>313</sup> Within the field of mediation—and despite the prevalence of training that emphasizes a facilitative approach—many mediators tend to share their opinions regarding the strengths and weaknesses of parties' cases. Recent research suggests, however, that there may be significant geographic variation in mediators' use of this technique. *See* Thomas J. Stipanowich, *Insights on Mediator Practices and Perceptions*, 22 DISP. RESOL. MAG., 6, 10 (Winter 2016) (reporting empirical research and comparing responses to the statement "I assess and share my opinion regarding the legal strength of arguments made by parties and/or counsel").

<sup>314</sup> Much of the court-connected evaluation work has been done in the context of mediation programs, given their widespread use in the US courts. Several years ago, the ABA Section of Dispute Resolution's Research and Statistics Task Force, chaired by Professor Lisa Bingham, developed a list of key data elements every court should collect on mediation programs. This project led to a major effort on the part of the Resolution Systems Institute (RSI), in collaboration with the ABA Section of Dispute Resolution, to develop model post-mediation questionnaires (available at <http://www.abourtsi.org/publications.php?sID=12>). Over the years, numerous efforts have been undertaken—for example, by the ABA Section

Given this existing mediation research, the procedural justice literature and the lack of attention to procedural justice in judicial settlement, Bobbi McAdoo, Donna Stienstra and I decided to update and expand upon the evaluation and research questionnaires currently being used by court systems to ask questions regarding the effectiveness and procedural fairness of judicial settlement sessions. This Article will not go into detail regarding the specifics of our effort, which is reported elsewhere.<sup>315</sup> Rather, this Article will describe only briefly the approach that we used in the development of our questionnaire, which is directed at lawyers and can be administered by courts after formal judicial settlement sessions in individual civil, non-family cases.<sup>316</sup> The questionnaire is attached as an appendix. My colleagues and I hope our questionnaire will expand the current state of knowledge regarding judicial settlement efforts as a result of the questionnaire's:

- Specific focus on concrete judicial actions within settlement;
- Exploration of the relationship between these concrete judicial actions and lawyers' and litigants' perceptions of procedural and substantive justice;
- Simultaneous exploration of the relationship between these concrete judicial actions and lawyers' and litigants' perceptions of the actions' helpfulness;
- Importation into judicial settlement of some of the questions that have been used in the evaluation of mediation; and
- Exploration of contextual factors that appear likely to influence lawyers' and litigants' understanding of judicial actions and resulting perceptions, such as whether the judge is the presiding judge, whether the settlement actions occurred in joint session or caucus, and whether the litigants suggested or requested the settlement session.

We hope that use of our questionnaire will enable judges, courts, and researchers to "see" the connections among lawyers' perceptions of procedural

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of Dispute Resolution's Court ADR Committee, various law schools and university-related centers to encourage collection of standardized data.

<sup>315</sup> See Welsh et al., *supra* note 115 (providing substantial detail regarding the potential connections among particular judicial behaviors, the context in which they occurred, and the effects upon lawyers' and litigants' perceptions).

<sup>316</sup> My colleagues and I must note that in developing the questionnaire, we relied first and foremost on the procedural justice literature. We also turned to questionnaires that have been developed to evaluate mediation. In addition, we benefitted greatly from telephone conference calls with federal magistrate judges and state court judges to learn about the context in which settlement discussions occur and to identify specific settlement techniques used in these conferences. We also distributed the draft to several other state and federal judges, as well as to several members of a Law and Society Association-sponsored International Research Collaborative on Judicial Dispute Resolution and received extremely helpful written and oral comments. After publishing our draft as a work-in-progress in a book on judicial dispute resolution, we distributed it to practicing lawyers in the United States and researchers in procedural justice and court ADR. Again, we received helpful written and oral comments and have made substantial revisions. Next steps include developing instructions and testing protocols for the questionnaire and, of course, testing the instrument.

justice, particular judicial actions, and the context within which these actions occurred. The questionnaire also permits judges, courts and researchers to consider, simultaneously, lawyers' (and hopefully, in the future, parties') perceptions of the courts' achievement of two goals that often seem in tension: effectiveness in moving the parties toward settlement and attention to fairness, both substantive and procedural.

We also envision that data collected through use of this questionnaire could serve several purposes. Most relevant to this Article, the questionnaire could be used to provide feedback to individual judges. In addition, some individual courts or court systems might choose to use the questionnaire to assist with monitoring and evaluation efforts, and researchers might use it to support larger empirical research projects that seek to understand judicial settlement efforts and their effects.

My colleagues and I recognize that our comprehensive questionnaire might not be used in its entirety by any given court. Still, we hope the questionnaire will provide a starting point for others and will contribute to a concrete focus on the importance of procedural fairness to judicial settlement efforts, the collection of reliable data about judicial settlement, the development of comparable data across courts, and perhaps even the development of comparable data across different settlement procedures.

#### CONCLUSION

Federal magistrate judges play a key role in producing settlements, alone and in partnership with other magistrate judges, district judges, and mediators. However, magistrate judges' involvement in settlement occurs within the context of institutional evolution on several fronts. First, magistrate judges themselves represent a relatively recent addition to the federal courts, and their responsibilities vary dramatically among district courts. As a result, magistrate judges in some district courts conduct settlement sessions almost exclusively, while others do not conduct settlement sessions at all. Second, the procedural and ethical rules regarding judicial engagement in settlement continue to evolve as they respond to the tensions that inevitably arise when a traditionally adjudicative institution relies heavily on settlement in order to meet its dispute resolution and lawmaking obligations to the public. It is problematic that there is so little guidance provided to magistrate judges regarding the circumstances that are most likely to trigger perceptions of coercion and procedural unfairness. Third, although Congress clearly has directed the federal courts to offer ADR, and mediation has become particularly popular, these dispute resolution processes also are evolving—with variation in their use among the districts and blurring of the lines between judicial settlement sessions and mediation. And fourth, the gathering and analysis of data regarding the federal courts is in evolution. While much is reported about magistrate judges' functions, much more is unknown—e.g., how many dispositions actually result from magistrate judges' settlement sessions, how many cases go to mediation, how often magistrate

judges serve as mediators, how many dispositions result from mediation and other settlement procedures, and the terms of these dispositions.

There is no denying the state of flux in which the federal courts and magistrate judges currently operate. Nonetheless, they possess a clear and steady mandate—to provide people with a forum in which they can trust that they will receive procedural and substantive justice. The procedural justice literature described in this Article consistently counsels that the federal courts and magistrate judges should structure their settlement procedures to provide parties with the opportunity for voice, trustworthy consideration, and even-handed and respectful treatment (of them and their claims) in a neutral forum.

As this Article has demonstrated, the federal courts and magistrate judges are more likely to fulfill the demands of procedural justice, in both their settlement and adjudicative procedures, if they undertake the following structural reforms:

1) When different neutrals conduct the functions of settlement and adjudication (e.g., mediator and then magistrate judge, or magistrate judge and then district judge) and *ex parte* meetings are used during the settlement phase, the federal courts should provide for strict confidentiality regarding settlement communications and conduct, with limited and explicit exceptions.

2) When a single magistrate judge conducts the functions of both settlement and adjudication, the magistrate judge should be barred from using caucus or *ex parte* meetings during the settlement session, and the parties should be given the opportunity *after* the settlement session to elect whether or not the magistrate judge will conduct the trial (using the confidential, “blind consent” procedures provided by 28 USC § 636(c) and Rule 73 of the Federal Rules of Civil Procedure).

3) The Judicial Conference of the United States should provide its magistrate judges with the opportunity to receive feedback and engage in self-reflection regarding parties’ and attorneys’ perceptions of the procedural justice of their settlement sessions. Various models exist to engage in such feedback and self-reflection, and these models could be adapted to fit the needs of the federal courts. The author and her colleagues also offer a questionnaire in the Appendix that focuses particularly on the procedural justice of settlement sessions.

In addition, due to the significant role played by settlement in the disposition of federal matters, the Judicial Conference should require the Administrative Office of the U.S. Courts to report data regarding the number of dispositions that are the result of settlement generally and, more specifically, the number of such dispositions that are the result of: unassisted settlement by the parties, settlement sessions conducted by magistrate judges, settlement sessions conducted by district judges, mediations conducted by courts’ staff or roster mediators, and mediations conducted by private mediators.

This is an ambitious reform agenda. It is also an agenda that the federal courts’ magistrate judges are particularly suited to lead.

APPENDIX: MCADOO, STIENSTRA & WELSH,<sup>317</sup> ATTORNEY QUESTIONNAIRE ON JUDICIAL SETTLEMENT CONFERENCES<sup>318</sup>

Our records indicate that you represented a party in the following case filed in \_\_\_\_ court:

Court:

Case Name:

Docket Number:

Date Filed:

We would appreciate your taking a few minutes to fill out this questionnaire, which asks about the judicial settlement conference held in one of your cases on \_\_\_\_\_. Please answer all questions with reference to the case specified above.

**Confidentiality**

Your responses to this questionnaire will be confidential and reported only after being aggregated with results from many other questionnaires. No response you make will be reported in a way that identifies you. Your identity will be known only to the researchers administering this survey and will be removed upon completion of the study.

**Response time and date**

Testing of the questionnaire suggests that it should take you no more than 10–15 minutes to complete. Because we are asking only a sample of attorneys about the court's settlement conference procedures, every response is important. We very much appreciate your response. We hope to hear from you by \_\_\_\_.

**Returning to an incomplete questionnaire<sup>319</sup>**

If you do not complete the questionnaire in one sitting, you may come back to finish it later. When you do, you will be returned to the place in the questionnaire where you had stopped. Please navigate through the questionnaire by using the "Back" and "Next" buttons at the bottom of the page, instead of your browser's "Back" button.

**Contact information**

If you have any questions about the questionnaire or study, please contact: \_\_\_\_\_.  
If you have any questions about technical aspects of the questionnaire, please contact: \_\_\_\_\_.

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<sup>318</sup> It is presumed that this questionnaire will be completed online.

<sup>319</sup> Such an instruction is needed only for electronic questionnaires.

QUESTIONNAIRE FOR ATTORNEYS WHO PARTICIPATED IN A SETTLEMENT CONFERENCE  
FACILITATED BY A JUDGE

This questionnaire asks about your experience with a specific settlement conference conducted by a judge. The questionnaire does not ask about any informal settlement discussions the lawyers may have had with the judge in the context of other conferences or hearings.

Please recall the case referenced on the cover page and the settlement conference held in that case on \_\_\_ and conducted by Judge \_\_\_. It is critical that you complete this questionnaire for this particular settlement conference only.

The questionnaire begins with questions about actions the judge may have taken during the settlement conference and your assessment of those actions. The questionnaire concludes with some questions that ask for information about the case and yourself.

I. QUESTIONS ABOUT THE JUDGE'S ROLE IN THE SETTLEMENT CONFERENCE AND YOUR  
ASSESSMENT OF IT

1. In preparation for the settlement conference, did the judge, or someone on behalf of the judge, talk with and/or provide written guidance to the lawyers about how the conference would be conducted? *Please check one.*
  - Yes, the judge did
  - Yes, someone on behalf of the judge did
  - No
  - Don't recall
  
2. Was your client present at the settlement conference? *Please check one.*
  - Yes, in person.
  - Yes, by phone.
  - No.
  - Other. Please describe: \_\_\_\_\_  
\_\_\_\_\_
  
3. At the beginning of the settlement conference, did the judge explain to the clients how the conference would be conducted? *Please check one.*
  - Yes
  - No
  - Don't recall
  - Clients were not present at the beginning or did not attend the settlement conference

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4. At any point during the settlement conference, was your client excluded from discussions where the judge was present? *Please check one.*
- My client was present during all these discussions
  - My client was included in some of these discussions and excluded from others
  - My client was excluded from all of these discussions
  - Don't recall
  - My client did not attend the settlement conference
5. In the settlement conference, the judge may have kept all the attending lawyers and clients together in a **joint session**, or the judge may have met separately with smaller groups of lawyers and/or clients in private caucuses, or the judge may have done both. What percentage of your time did you spend in **joint sessions**—i.e., with the judge and all attending lawyers and clients present either in person or participating by telephone? *Please check one response.*
- More than 75% of my time
  - 50–74% of my time
  - 25–49% of my time
  - Less than 25% of my time

6. The questions below list techniques the judge may or may not have used in the settlement conference. We are interested in whether the judge used these techniques at all, and if so, was it during “joint sessions” (i.e., with all attending lawyers and clients present) or during “private caucus” (i.e., with some smaller group of clients and/or lawyers present). We are also interested in how helpful it was when the judge used a technique. *If the judge used a technique, please check column 2, column 3, or both, as appropriate.*

| Did the judge:   | Column 1<br>No<br>The judge <u>did</u><br><u>not</u> use this<br>technique | Column 2 <sup>320</sup><br>Yes<br>Used in a<br><u>joint</u> session | Column 3<br>Yes<br>Used in a<br><u>private</u><br>caucus |
|--|--|---|--|
| a. Ask the parties to state their legal arguments?   | [ ]  | [ ]   | [ ]  |
| b. Ask the parties if there were non-legal (e.g., personal, relational, financial) needs and concerns to discuss in order to reach resolution? | [ ]  | [ ]   | [ ]  |
| c. Interrupt the parties in a rude way?  | [ ]  | [ ]   | [ ]  |
| d. Encourage your client to speak during the settlement conference?  | [ ]  | [ ]   | [ ]  |
| e. Express displeasure with your client?   | [ ]  | [ ]   | [ ]  |
| f. Express confidence in the ability of the parties to resolve their dispute?  | [ ]  | [ ]   | [ ]  |
| g. Recommend a specific settlement figure or package?  | [ ]  | [ ]   | [ ]  |
| h. Demonstrate that he or she had both parties’ most important interests in mind in trying to reach a settlement?                              | [ ]  | [ ]   | [ ]  |

<sup>320</sup> When a respondent checks the box for columns 2 and 3, the following question and response options will appear:

How helpful or detrimental to reaching settlement was the judge’s use of this technique?

Very helpful

Somewhat helpful

Neither helpful nor detrimental

Somewhat detrimental

Very detrimental

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- |  |                          |                          |                          |
|--|--------------------------|--------------------------|--------------------------|
| i. Summarize his or her understanding of your client's legal arguments?  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| j. Summarize his or her understanding of what was important to your client in resolving the case?  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| k. Encourage the parties to develop their own settlement proposals?  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| l. Assess the strengths and weaknesses of your case?   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| m. Summarize his or her understanding of the other party's legal arguments?  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| n. Summarize his or her understanding of what was important to the other party in resolving the case?  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| o. Predict the outcome of the case?  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| p. Explain why he or she viewed the case as he or she did.   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| q. Express displeasure at the progress of the settlement negotiations?   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| r. Express disagreement with the position taken by your client?  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| s. Discuss the uncertainties of continued litigation for your case?  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| t. Tell you that he or she might make a procedural or substantive decision during the litigation process that would be adverse to your client's interests? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| u. Pressure your client to accept a proposed settlement agreement?   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| v. Pressure you to accept a proposed settlement agreement?   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
-

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7. The questions in this section ask for your overall assessment of the judge's understanding of the case. *Please check one response for each question.*

|  | Very accurate | More accurate than inaccurate | More inaccurate than accurate | Very inaccurate |
|--|---------------|-------------------------------|-------------------------------|-----------------|
| The judge's understanding of your client's legal position was:   | [ ]           | [ ]                           | [ ]                           | [ ]             |
| The judge's understanding of your client's non-legal (e.g., personal, relational, financial) needs and concerns was: | [ ]           | [ ]                           | [ ]                           | [ ]             |

8. The questions in this section ask for your overall assessment of the judge's treatment of the lawyers and clients during the settlement conference. *Please check one response for each question.*

|  | Fully sufficient | Moderately sufficient | Slightly sufficient | Not at all sufficient | Client not present or didn't wish to speak |
|--|------------------|-----------------------|---------------------|-----------------------|--|
| Did your client have sufficient opportunity to express what was important to him or her in resolving the case? | [ ]              | [ ]                   | [ ]                 | [ ]                   | [ ]  |

|  | Very respectful | Somewhat respectful | Somewhat disrespectful | Very disrespectful | Client not present |
|--|-----------------|---------------------|------------------------|--------------------|--------------------|
| The manner in which the judge treated your client was: | [ ]             | [ ]                 | [ ]                    | [ ]                | [ ]                |
| The manner in which the judge treated you was:         | [ ]             | [ ]                 | [ ]                    | [ ]                |                    |

|   | All of the time | Much of the time | Some of the time | Little of the time | None of the time | Unable to determine |
|---|-----------------|------------------|------------------|--------------------|------------------|---------------------|
| Was the judge even-handed in his/her treatment of your client and the opposing client(s)? | [ ]             | [ ]              | [ ]              | [ ]                | [ ]              | [ ]                 |

|  | All of the time | Much of the time | Some of the time | Little of the time | None of the time | Unable to determine |
|--|-----------------|------------------|------------------|--------------------|------------------|---------------------|
| Was the judge even-handed in his/her treatment of you and the attorney(s) on the opposing side(s)? | [ ]             | [ ]              | [ ]              | [ ]                | [ ]              | [ ]                 |

|  | Very high | High | Medium | Low | Very low |
|--|-----------|------|--------|-----|----------|
| As a result of the judge's involvement in the settlement process, my level of trust in the judge is: | [ ]       | [ ]  | [ ]    | [ ] | [ ]      |

|   | Not at all | To some extent | To a significant extent | To a very great extent |
|---|------------|----------------|-------------------------|------------------------|
| Did you feel rushed by the judge to conclude the settlement conference? | [ ]        | [ ]            | [ ]                     | [ ]                    |

|  | Very fair | Fair | Neither fair nor unfair | Unfair | Very unfair |
|--|-----------|------|-------------------------|--------|-------------|
| The process used by the judge to help the parties make progress toward settlement was: | [ ]       | [ ]  | [ ]                     | [ ]    | [ ]         |

9. The following questions give you an opportunity to provide your evaluation of the settlement conference in your own words.
- a. What happened in the settlement conference that was most helpful? Please specify whether it happened in joint session or caucus.
  - b. What happened in the settlement conference that was least helpful? Please specify whether it happened in joint session or caucus.

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II. QUESTIONS ABOUT THE STATUS OF YOUR CASE AT THE TIME OF THE SETTLEMENT  
CONFERENCE AND THE OUTCOME OF THE SETTLEMENT CONFERENCE

10. Which of the following were true at the time of the settlement conference?

*Please check all that apply.*

- Additional discovery was needed to have productive settlement discussions.
- We had had other settlement discussions with this judge or another judge.
- We had participated in mediation or arbitration with a non-judge neutral.
- A motion to dismiss or for summary judgment was pending.
- A motion to dismiss or for summary judgment had been decided.
- A trial date had been set.

11. Who initially suggested or requested the settlement conference? *Please check one.*

- I did.
- Another party, or other parties in the proceeding, did.<sup>321</sup>
- The judge assigned to the case did.
- Settlement conferences are required by the rules or procedures of this court.
- Other. Please describe. \_\_\_\_\_
- \_\_\_\_\_

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<sup>321</sup> If a respondent selects the 2nd, 3rd, or 4th option, a question will appear that asks whether participation was willing or not, using the following options:

And I participated willingly

And I participated unwillingly

12. How important was each of the following as a reason for participating in the settlement conference? *Please check one response for each statement.*

|  | Very<br>im-<br>portant | Moder-<br>ately<br>im-<br>portant | Slightly<br>im-<br>portant | Not at<br>all im-<br>portant |
|--|------------------------|-----------------------------------|----------------------------|------------------------------|
| I wanted to avoid leaving the outcome to a judge or jury.                  | [ ]                    | [ ]                               | [ ]                        | [ ]                          |
| I wanted a judge's opinion of the legal issues before proceeding to trial. | [ ]                    | [ ]                               | [ ]                        | [ ]                          |
| I felt the judge expected us to have a settlement conference with him/her. | [ ]                    | [ ]                               | [ ]                        | [ ]                          |
| I wanted my client to hear the judge's assessment of the case.             | [ ]                    | [ ]                               | [ ]                        | [ ]                          |
| Other. Please describe. _____  | [ ]                    | [ ]                               | [ ]                        | [ ]                          |

13. What was the gender of the settlement judge? *Please check one.*  
 \_\_\_ Female \_\_\_ Male

14. If this case goes/has gone to trial (*please check one response for each question*):

Would this judge preside? \_\_\_ Yes \_\_\_ No

Would the trial be: \_\_\_ A jury trial \_\_\_ A bench trial

15. For the purpose of settlement, the timing of the settlement conference was (*please check one*):

\_\_\_ Too early

\_\_\_ At the right time

\_\_\_ Too late

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16. How long did the settlement conference last? *Please check one response for each question.*

< 1 hour       1 to 2 hours       2.1 to 5 hours       5.1 to 8 hours       8.1 to 12 hours       > 12 hours

Was this a good amount of time?       Yes       No, too little time       No, too much time

17. Did this case have any of the following outcomes as a direct result of the settlement conference? *Please check one.*

The entire case settled as a result of the settlement conference (either during the conference or later).

A part of the case settled as a result of the settlement conference (either during the conference or later).

No part of the case settled, but the settlement conference improved the chances that the case would settle.

The settlement conference contributed little, if anything, to resolution of this case.

Other. Please specify. \_\_\_\_\_

\_\_\_\_\_

[Respondents will be routed to questions 18–20 only if the case settled.]

| <i>Please check one response.</i>                                       | Very fair | Fair | Neither fair nor unfair | Unfair | Very unfair |
|---|-----------|------|-------------------------|--------|-------------|
| 18. In your view, how fair to your client was the settlement agreement? | [ ]       | [ ]  | [ ]                     | [ ]    | [ ]         |

19. Could all the terms of the settlement agreement have been awarded by a judge or jury? *Please check one.*

- Yes, all the terms of the settlement agreement could have been awarded by a judge or jury.
- No, some or all the terms of the settlement agreement could not have been awarded by a judge or jury.

| <i>Please check one.</i>  | No, not at all | Yes, to some extent | Yes, to a significant extent | Yes, to a very great extent |
|---|----------------|---------------------|------------------------------|-----------------------------|
| 20. Did your client accept the settlement agreement because of pressure from the judge? | [ ]            | [ ]                 | [ ]                          | [ ]                         |

### III. QUESTIONS ABOUT THE CHARACTERISTICS OF THE CASE AND THE NATURE OF YOUR PRACTICE

21. Which of the following characteristics describe this case? *Please check all that apply.*

- There was a high level of anger/hostility between the clients.
- There was a large power imbalance between the parties.
- The opposing party's lawyer was not cooperative.
- The clients were interested in continuing, restoring or establishing a relationship with each other.

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22. What type of case is this? *Please check all that apply.*

- Personal Injury       Medical Malpractice       Product Liability  
 General Tort       Contract       Intellectual Property  
 Real Property       Employment       Other Civil Rights  
 Other. Please specify. \_\_\_\_\_

23. In what kind of setting do you practice? *Please check one.*

- Law firm of 1–10 lawyers  
 Law firm of 11–75 lawyers  
 Law firm of more than 75 lawyers  
 Government  
 Not-for-profit or non-profit entity  
 Other. Please describe. \_\_\_\_\_  
\_\_\_\_\_

24. What is your gender? *Please check one.*     Female     Male

25. In this case, what type of client are you representing? *Please check all that apply.*

- Private, individual client  
 Private, business client  
 Government  
 Not-for-profit or non-profit entity  
 Other. Please describe. \_\_\_\_\_  
\_\_\_\_\_

26. In the last two years, in how many civil cases has your client been a party?  
*Please check one.*

- Only this case  
 1–2 cases  
 3–5 cases  
 More than 5 cases  
 I don't know

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27. Considering this case and all cases in which you have been involved during the past two years, either representing a party or acting as a neutral and in this court or others, approximately how many times have you:

| <i>Please check one response for each question.</i>      | 0–2                      | 3–10                     | 11–20                    | >20                      |
|--|--------------------------|--------------------------|--------------------------|--------------------------|
| Participated in a settlement conference with a judge?    | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Participated in a settlement conference with this judge? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Participated in a mediation conducted by a mediator?     | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Tried a case to verdict or decision?                     | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Served as a mediator?                                    | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Served as an arbitrator?                                 | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

THANK YOU.

To ask questions and to return the questionnaire, please contact \_\_\_\_\_

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