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Judicial Authority in the Settlement of Federal Civil Cases

JUDICIAL AUTHORITY IN THE SETTLEMENT OF FEDERAL CIVIL CASES

In the past few decades, the role of the federal district court judge has evolved from that of a reticent dispenser of justice merely presiding over trial proceedings to one of an active case manager involved in the formulation and direction of civil litigation.[1] An ever-increasing caseload, coupled with more complex litigation, has served as a catalyst for this evolution.[2] The growth in litigation is especially noticeable in federal district courts, where in the last fifteen years the number of cases filed has more than doubled and the number of trials lasting more than one month has more than tripled.[3] The expanding role of the federal district judge has elicited debate regarding the authority of the trial judge to control the preparation and presentation of civil cases tried before him.[4]

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1. *See* Kozinski, *Ten Principles for the New Federal Practice*, 31 FED. BAR & NEWS J. 16, 16 (1984) (description of transformation from feudal justice to modern justice). In thirteenth century England, the King served as trial court judge. *Id.* Plaintiffs and defendants would make their pleas to the King under an oak tree and the King swiftly would render his decision. *Id.* Although the early American federal court system involved a slightly more complex procedure, modern pretrial procedure did not surface until the advent of compulsory pretrial conferences in 1929. *See* Oesterle, *Trial Judges in Settlement Discussions: Mediators or Hagglers?*, 9 CORNELL L. FORUM 7, 7 (1982) (discussion of history of settlement conferences) [hereinafter cited as Osterle]. In that year, the Circuit Court of Wayne County, Michigan had a backlog of forty-five months. *Id.* In an effort to alleviate this problem, the court introduced a system of mandatory pretrial conferences in which discussion of settlement was a principal issue. *Id.* The system succeeded in reducing the waiting time for trial from twelve to fifteen months. *Id.* Other courts in large cities soon adopted similar systems. *Id.*

In 1938, rule 16 of the newly enacted Federal Rules of Civil Procedure established a system of federal pretrial procedure. *Id.; see* FED. R. CIV. P. 16 (rule establishing pretrial conference and pretrial order); *see also infra* notes 31-38 and accompanying text (discussion of role of rule 16 in settlement conferences). Although rule 16 did not mention settlement discussions as a part of pretrial procedure, the rule nevertheless established the groundwork for an increased judicial role in case management. *See* FED. R. CIV. P. 16.

2. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770, 770 (1981) (discussion of impact of increased caseload on judicial management).

3. *Id.*

4. *See generally* Oesterle, *supra* note 1, at 7 (discussion of contrasting views between those who encourage court to take active role in trial preparation and those who advocate separation of judge from pretrial proceedings). A judge's role in settlement negotiations is in some ways analogous to the judge's role in criminal plea bargain negotiations. *See* Frank v. Blackburn, 646 F.2d 873, 894 (5th Cir. 1980) (Hill, J., dissenting), *cert. denied* 454 U.S. 840 (1981). In *Frank v. Blackburn*, the United States Court of Appeals for the Fifth Circuit stated that while federal courts must insure the voluntariness of a defendant's guilty plea, the judge may not actively negotiate that plea. 646 F.2d at 880. In his dissent in *Frank*, Judge Hill described the similarities between civil and criminal settlement negotiations. *Id.* at 894-95. In both civil and criminal cases, the offended party first states an *ad damnum* or claim of injury. *Id.* at 895. The offended party does not expect to receive his full claim for damages, but the defendant is not certain that the

One method of control that reduces the federal district judge's caseload is judicial participation in settlement negotiations.[5] A settlement is an out-of-court agreement in which a party withdraws pending litigation from the court in exchange for a compromise with the other party.[6] The American judicial system favors such settlements as a means of resolving disputes between parties.[7] However, because judicial participation in settlement negotiations constitutes a form of judicial control in the preparation and presentation of civil cases,

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offended party will not receive his full claim. *Id.* The defendant's uncertainty motivates the defendant to bargain for a reduced penalty. *Id.* At settlement, the defendant in both civil and criminal cases is willing to admit liability, but only when the other party agrees to place limitations on that liability. *Id.* Thus, through negotiation, both civil and criminal actions utilize the adversary nature of the American judicial system to achieve a just result. *See id.* at 901; Frank v. Blackburn, 646 F.2d 902, 904 (5th Cir. 1981) (Hill, J., dissenting), *cert. denied* 454 U.S. 840 (1981).

In contrast to the view that civil and criminal settlements are similar, Judge Rubin, in a separate dissent in *Frank*, pointed out distinctions between the two systems. *See* Frank v. Blackburn, 646 F.2d 873, 901 (5th Cir. 1980) (Rubin, J., dissenting). Plea bargaining involves an admission of guilt and a compromise of an individual's liberty. *Id.* While both civil and criminal settlements are negotiated, the societal and individual stakes and interests are different. *Id.*

Based on the desire of the framers of the Federal Rules of Criminal Procedure to limit the authority of judges in criminal settlement negotiations, rule 11(e)(1) of the Federal Rules of Criminal Procedure has banned the trial judge's participation in plea bargaining. *See* FED. R. CRIM. P. 11(e)(1). Rule 11(e)(1) states in part that although the prosecutor and the defendant may engage in plea bargaining, the court should not take part in the plea bargain negotiations. *Id.* In citing support for the rule, Professor Albert W. Alschuler states several reasons for the ban on judicial participation in plea bargaining. *See* Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1104-20 (1976) (discussion of rationale underlying rule 11). First, while attorneys may advise the defendant to accept a plea bargain, a judge giving the same advice will appear to be giving his "best offer" and, in effect, force the defendant to accept the bargain or face a potentially longer sentence. *Id.* at 1104-05. Another concern is that a judge who has participated in negotiations may be unable to conduct a fair trial if the defendant refuses the offer. *Id.* at 1108. Since the judge knows background facts and testimony, his exposure provides enough information to tempt him to "prejudge the case". *Id.* Finally, some scholars have argued that plea bargaining is beneath the judge's dignity and creates bad perceptions of the judicial office. *Id.* at 1119-20.

Several cases have delineated the boundaries for judicial involvement in criminal plea bargaining. In *United States v. Werker*, the government petitioned the United States Court of Appeals for the Second Circuit for a writ of mandamus to prohibit a trial judge from disclosing the sentence he would impose if the defendant pleaded guilty. 535 F.2d 198, 205 (2d Cir.), *cert. denied*, 429 U.S. 926 (1976). The Second Circuit issued the writ, holding that a trial judge should refrain completely from speaking with the defendant about possible plea bargains. *Id.* In addition, in *United States v. Adams*, the United States Court of Appeals for the Fifth Circuit held that since the trial judge had participated in plea bargaining, the defendant was entitled to a new sentencing hearing when the defendant pleaded not guilty and later was convicted. 634 F.2d 830, 832 (5th Cir. 1981). In so holding, the Fifth Circuit stated that rule 11(e) of the Federal Rules of Criminal Procedure served as an absolute ban on judicial involvement in plea bargaining. *Id.* at 835.

5. *See* Wall and Schiller, *Judicial Involvement in Pre-Trial Settlement: A Judge is Not a Bump on a Log*, 6 AM. J. TRIAL ADVOC. 27, 28 (1982) (description of role of settlement in reducing judicial caseload) [hereinafter cited as Wall and Schiller].

6. BLACK'S LAW DICTIONARY 993 (5th ed. 1979) (definition of out-of-court settlement).

7. *See* Wall and Schiller, *supra* note 5, at 29 (settlement is favored means of dispute resolution). Consistent with the notion of settlement as a favored means of dispute resolution, rule

the notion of judicially encouraged settlements has evoked mild controversy.[8]

Nebraska Public Power District v. Austin Power, Inc. represents a recent example of the controversy surrounding the judge's role in the settlement process.[9] *Austin Power* involved a claim and counterclaim for breach of contract in the construction of an electric power plant.[10] In a pretrial order, the district judge for the United States District Court for the Nebraska District required the attendance of the boards of directors of both parties during the trial proceedings.[11] The judge based the order on the need for the presence of those individuals who were most capable of resolving the dispute.[12] The court reasoned that only by their physical presence could the boards continuously re-evaluate their case and insure proper disposal of the proceedings.[13]

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408 of the Federal Rules of Evidence attempts to increase the possibility of out-of-court settlement. *See* FED. R. EVID. 408. Rule 408 states that evidence of previous settlement negotiations or offers is inadmissible at trial. *Id.* The purpose of rule 408 is to encourage the settlement of cases before trial. *See* McHann v. Firestone Tire and Rubber Co., 713 F.2d 161, 166-67 (5th Cir. 1983) (discussion of purpose of rule 408); Zenith Radio Corp. v. Matushita Elec. Indus. Co., Ltd., 505 F. Supp. 1125, 1183 (E.D. Pa. 1980) (discussion of purpose of rule 408). If the trial court admitted evidence of settlement offers in court, attorneys would be unwilling to speak with each other out of fear that such communications would surface at trial. *See* 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE 272 (1978) (discussion of attorney's reliance on exclusion of settlement offers as evidence).

While rule 408 does not affect directly a judge's role in pretrial negotiations, the rule nonetheless reflects a general policy that American jurisprudence seeks to encourage settlement of civil actions. *See* Advisory Committee's Note, FED. R. EVID. 408. Similarly, rule 68 of the Federal Rules of Civil Procedure states that any party may offer to have a judgment entered against him, and if the opposing party does not accept the offer, evidence of the offer is inadmissible in determining liability. FED. R. CIV. P. 68. Like rule 408, the purpose of rule 68 is to encourage settlement. *See* 7 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 68.02 (2d ed. 1984).

8. *See supra* note 4 (description of controversy over judicial activism).

9. Nebraska Pub. Power Dist. v. Austin Power, Inc. No. 83-2702, slip op. (8th Cir. Jan. 11, 1984) (per curiam).

10. *See* Appellant's Brief at 2, Nebraska Pub. Power Dist. v. Austin Power, Inc., No. 83-2702, slip op. (8th Cir. Jan. 11, 1984) [hereinafter cited as Appellant's Brief]; Appellee's Brief at 2, Nebraska Pub. Power Dist. v. Austin Power, Inc., No. 83-2702, slip op. (8th Cir. Jan. 11, 1984) [hereinafter cited as Appellee's Brief]. In *Nebraska Public Power District v. Austin Power, Inc.*, Nebraska Public Power District (N.P.P.D.) had contracted with Austin Power, Inc. to construct a 650 megawatt, coal -fired power plant near Sutherland, Nebraska. *See* Appellee's Brief at 2. During the four years in which the plant was under construction, the project experienced cost overruns and delays. *Id.* Each of the parties to the lawsuit placed blame for the overruns on the other party. *Id.*

11. *See* Memorandum and Amendatory Order at 3, Nebraska Pub. Power Dist. v. Austin Power, Inc., CV80-L-56 (Neb. Dist. Dec. 23, 1983) (order requiring attendance of boards of directors).

12. *Id.* at 2.

13. *Id.; see also* Memorandum and Order at 2, Nebraska Pub. Power Dist. v. Austin Power, Inc. CV80-L-56 (Neb. Dist. Dec. 16, 1983). While the district court in *Austin Power* stated that it had no interest in forcing a settlement, the court alluded to its busy docket and the expenditure of time by the judge, jury, and staff. *See* Memorandum and Order at 2, Nebraska Pub. Power Dist. v. Austin Power, Inc. CV80-L-56 (Neb. Dist. Dec. 16, 1983). The court further stated that

On appeal of the pretrial order, Nebraska Public Power District (N.P.P.D.) argued that such an order amounted to an attempt by the judiciary to coerce settlement, and therefore constituted an abuse of discretion.[14] The United States Court of Appeals for the Eighth Circuit agreed and reversed the trial judge's pretrial order.[15] Nevertheless, because of the complexity of the case, the Eighth Circuit allowed the lower court to require the attendance of one member of N.P.P.D.'s board of directors and one of its senior management officials.[16] The *Austin Power* court, however, neglected to comment on their rationale for modifying the order of the trial judge.[17]

While the Eighth Circuit in *Austin Power* ignored the opportunity to discuss the basis for a trial court's power to promote settlement, an analysis of federal court decisions and academic commentary suggests that the federal judiciary derives such power from several sources. Among the sources of a court's power to promote settlement are rules 1, 16, and 83 of the Federal Rules of Civil Procedure.[18] Rule 1 of the Federal Rules of Civil Procedure provides the broadest authority over trial procedure granted to the federal district courts.[19] Rule 1 states that courts should construe liberally the Federal Rules of Civil Procedure to achieve the "just, speedy, and inexpensive determination of every action."[20] The language of rule 1 reflects the notion that placing rigid restrictions on the procedural powers of a federal district court would hamper the court's efforts to achieve a just resolution of cases brought before it.[21] Instead,

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a failure to settle would leave the question of liability to a judge and jury, and thus create an all-or-nothing proposition for the parties. *Id.* at 1. However, the language of the court's memorandum indicated that the judge appeared to be attempting to compel a settlement. *See* Appellant's Brief at 26.

14. Appellant's Brief at 25-26.

15. Nebraska Pub. Power Dist. v. Austin Power, Inc., No. 83-2702, slip op. (8th Cir. Jan. 11, 1984) (per curiam).

16. *Id.* at 2. The public had an interest in the outcome of the *Austin Power* case because N.P.P.D. constituted a quasi-governmental body with publicly elected directors. *Id.* Because of this public interest, the *Austin Power* court reasoned that a representative from the N.P.P.D. board of directors should be present during trial. *Id.* The actual Eighth Circuit order requiring attendance of the board affected only a member of N.P.P.D. *Id.* Presumably, the order did not affect Austin Power because Austin Power did not appeal the order. *See generally* Appellee's Brief. Rather, Austin Power supported the trial court's order requiring attendance of both parties. *Id.*

17. *See generally Austin Power*, No. 83-2702, slip op. (court fails to explain reason for modification of pretrial order).

18. *See* Fox, *Settlement: Helping the Lawyers to Fulfill Their Responsibility*, 53 F.R.D. 129, 131 (1971) (rules 1, 16, and 83 of Federal Rules of Civil Procedure provide basis of district court judge's authority to require parties to attempt to reach settlement).

19. *Id.* (rule 1 is "polestar" of Federal Rules of Civil Procedure).

20. FED. R. CIV. P. 1.

21. *See* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1029 (1969) [hereinafter cited as WRIGHT & MILLER]. The import of rule 1 is that courts should resolve cases on the merits rather than on the basis of technicalities. *Id.* Courts must give the rules liberal construction to further the cause of justice. *Id.*

the law affords the trial court judge a broad range of discretion based upon the facts of each particular case.[22]

Balanced against the broad discretion granted under rule 1 is the countervailing consideration that a trial judge must exercise his discretion wisely.[23] A trial judge may not ignore the context of a procedural rule or refuse to apply a procedural rule without considering the general principles expressed in rule 1.[24] Thus, while the trial judge has the freedom to construe the Federal Rules of Civil Procedure liberally, a liberal construction that ignores the impact of the judge's decision on justice, speed, or efficiency is as improper as an unnecessarily strict interpretation of procedural requirements.[25]

In the context of a trial judge's role in encouraging settlement, the judge should feel comfortable in experimenting with novel ways of uniting the parties for settlement negotiations.[26] Early settlement of a case would further the goal of achieving a speedy and inexpensive determination of the subject matter.[27] However, the judge must realize that the goal of justice is as important as the goal of a speedy and inexpensive resolution of the case.[28] In *Austin Power*, the Eighth Circuit could have reasoned that the trial judge had sacrificed "justice" in favor of "speed" and "efficiency."[29] In so doing, the trial court

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22. *See* Skogen v. Dow Chemical Co., 375 F.2d 692, 704 (8th Cir. 1967). The United States Court of Appeals for the Eighth Circuit in *Skogen v. Dow Chemical Co.* held that the trial court's refusal to allow a witness to answer certain questions did not deprive plaintiffs of their right to cross-examine witnesses. *Id.* In upholding the trial court's action, the Eighth Circuit stated that since a trial judge has great responsibility for conducting trial, the judge must possess a broad degree of discretion in procedural matters. *Id.* Similarly in *Herbert v. Lando*, the Untied States Supreme Court held that all Federal Rules of Civil Procedure operated under the maxim of rule 1, which insures the "just, speedy, and inexpensive determination of every action." 441 U.S. 153, 177 (1978). In *Herbert*, the plaintiff brought a libel action in which the plaintiff sought to discover information concerning the defendant's editorial process. *Id.* at 155. Although the defendant claimed first amendment privilege, the court rejected the claim and ordered defendant to respond to plaintiff's interrogatories. *Id.* at 177. The court stated that under the broad authority of rule 1 and the specific authority of rule 26, a district court has the power to control the discovery process. *Id.; see* FED. R. CIV. P. 26 (general provisions governing discovery). Thus, while current libel law might encourage more discovery, federal courts have the power to place limitations on such discovery. *See* 441 U.S. at 177.

23. *See* WRIGHT & MILLER, *supra* note 21, at 129-30 (discussion of duty of judge to use proper discretion).

24. *Id.* at 130. To achieve justice, a judge must not abuse his discretion. *Id.* Were the judge to apply a federal rule without considering the context of the entire procedural system, the judge would fail to meet the mandate of the Federal Rules of Civil Procedure, and thus abuse his discretion. *Id.*

25. *Id.*

26. *See* text accompanying notes 19-22 (discussion of broad powers of federal judiciary).

27. *See* Fox, *supra* note 18, at 132 (settlement is tool of active judicial administration which furthers goals of rule 1 of Federal Rules of Civil Procedure).

28. *See* WRIGHT & MILLER, *supra* note 21, § 1029, at 131 (goals of speed and inexpensive cost are as important as goal of justice).

29. *See supra* notes 9-17 and accompanying text (discussion of *Austin Power*).

had encouraged a procedure which violated the broad mandate of the Federal Rules of Civil Procedure.[30]

Premised on the goals of justice, speed, and efficiency embodied in rule 1, rule 16 of the Federal Rules of Civil Procedure expands the role of the trial judge in the prompt resolution of legal disputes.[31] In the years immediately following the adoption of the Federal Rules of Civil Procedure, most authorities believed that parties should not discuss the topic of settlement in the presence of the trial judge.[32] Nevertheless, the topic of settlement began to enter pretrial conferences under the auspices of rule 16(c)(11);[33] which states that parties to a pretrial conference may discuss any matters pertinent to resolution of the dispute.[34] Recent amendments to rule 16[35] have extended further the trial judge's role in pretrial activities and have provided clear justification for judicial

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30. *See supra* notes 19-22 and accompanying text (discussion of broad powers of the judiciary under rule 1).

31. *See* Kozar v. Chesapeake & Ohio Ry., 320 F. Supp. 335, 373 (W.D. Mich. 1970) (purpose of pretrial conference is to achieve mandate of rule 1), *modified*, 449 F.2d 1238 (6th Cir. 1971). *Kozar v. Chesapeake & Ohio Ry.* involved a claim for wrongful death. *Id.* at 338. At trial, the judge refused to allow the defendant's mechanical engineering expert to testify because the defendant had not listed the expert on the pretrial order. *Id.* at 373. On motion for retrial, the United States District Court for the Western District of Michigan held that the purpose of the pretrial conference was to aid in achieving the mandate of rule 1. *Id.* The *Kozar* court stated that open discussion during the pretrial conference would help achieve a just and efficient resolution of the case. *Id.* The court concluded that exclusion of the expert's testimony was a proper sanction under the circumstances of the case. *Id. See also* Orsterle, *supra* note 1, at 7 (rule 16 adds legitimacy to increased role of trial judge in encouraging settlement).

32. *See* Oesterle, *supra* note 1, at 7. The drafters of the original version of rule 16 believed that settlement negotiations had no place in the pretrial conference. *Id.* The only purpose of pretrial conferences was to narrow issues for trial. *Id.* The drafters believed that although settlement might be the result of such preparation, settlement should constitute only a by-product, and not a goal, of the pretrial conference. *Id.* In the 1940's and 1950's, most judges believed that the only context in which a judge should mention settlement was in an inquiry by the judge of whether the parties had discussed the possibility of settlement. *Id.* In the 1960's, a substantial number of judges began to favor an increased role by the trial court in achieving settlement. *Id.* This change in perspective culminated in the recent amendments to rule 16. *See infra* notes 35-36 (discussion of recent amendments to rule 16). *See generally* Fox, *supra* note 18, at 139 (discussion of impact of changing views of judicial involvement on amendment of rule 16). The modern version of rule 16 encourages settlement as a tool of good judicial management. *See* Fox at 139; FED. R. CIV. P. 16 (recent changes specifically mentioning settlement as topic for pretrial conference).

33. *See* Oesterle, *supra* note 1, at 7 (rule 16(c)(11)) adds legitimacy to increased role of trial judge in encouraging settlement); *see also* FED. R. CIV. P. 16(c)(11) (parties may discuss at pretrial conference any matter that might aid in disposition of litigation).

34. *See* FED. R. CIV. P. 16(c)(11).

35. *See id.* In 1983, the advisory committee substantially altered rule 16 of the Federal Rules of Civil Procedure. *Id.* One relevant amendment included the committee's change of the title from "Pre-Trial Procedure; Formulating Issues," to "Pretrial Conferences; Scheduling; Management" to reflect the changing scope of the rule. *See* FED. R. CIV. P. 16(a). In addition, the committee added the phrase "facilitating the settlement of the case" as an objective of the pretrial conference. *See* FED. R. CIV. P. 16(a)(5). The 1983 amendment recognized the changing history of the role of the pretrial conference in judicial case management. *See supra* note 32 (discussion of rule 16 and changing role of trial judges). Finally, the committee added "possibility

involvement in settlement negotiations.[36] Rule 16 now expressly mentions settlement as an item which parties may discuss at the pretrial conference.[37] The notion of judicial involvement in settlement negotiations, therefore, has become an important part of the pretrial process.[38]

In addition to rules 1 and 16, rule 83 of the Federal Rules of Civil Procedure also provides a basis for judicial involvement in settlement negotiations.[39] Rule 83 gives federal district courts the authority to create local rules that are not inconsistent with the Federal Rules of Civil Procedure.[40] Standing alone, rule 83 does not answer the question of whether a judge's involvement in a particular settlement is inconsistent with the Federal Rules of Civil Procedure.[41] However, rule 83 does reflect the willingness of the drafters to give district court judges wide latitude to implement the Federal Rules of Civil Procedure on a case-by-case basis.[42] Appellate courts may review local court rules issued under the authority of rule 83 only to the extent that the trial court abused its discretion in promulgating the rule.[43] Because of the desire of appellate courts to refrain from overturning a district court's ruling, and thereby creating

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of settlement" as a topic for discussion at the pretrial conference. *See* FED. R. CIV. P. 16(c)(7).

36. *See* Advisory Committee Note to the 1983 Amendments, 97 F.R.D. 165, 207 (1983) [hereinafter cited as Advisory Committee Note]. The 1983 amendments to the Federal Rules of Civil Procedure shift the focus of the pretrial conference away from the trial itself and toward the entire pretrial phase. *See* White Mountain Apache Tribe v. United States, 5 Ct. Cl 288, 291 (1984) (statement of Chief Justice Burger that 1983 amendments give judges important controls at pretrial stage).

37. *See* FED. R. CIV. P. 16(c)(7); *see also supra* note 35 (discussion of amendments to rule 16(c)(7)).

38. *See* Advisory Committee Note, *supra* note 36, at 207.

39. *See* FED. R. CIV. P. 83 (district courts may regulate cases before it in any manner not violative of Federal Rules of Civil Procedure).

40. *Id.*

41. *See generally* FED. R. CIV. P. 83 (freedom of trial court to establish local rules).

42. *See* MOORE, *supra* note 7, at ¶ 83.02 (under rule 83, trial judge has power to implement his own rules so long as rules are not inconsistent with Federal Rules of Civil Procedure); *see also* Miranda v. Southern Pac. Transp. Co., 710 F.2d 516, 521 (9th Cir. 1983) (trial court possesses discretion in creating and applying local rules). In *Miranda*, the trial court fined both parties for failing to comply with local rules concerning a pretrial conference. *Id.* at 519. Specifically, the trial court stated that the plaintiff's memorandum of facts and contentions "rambled," and that both parties had failed on several occasions to identify evidence and expert testimony. *Id.* at 518. On appeal, the United States Court of Appeals for the Ninth Circuit held that the trial judge possessed the authority to impose sanctions on the attorneys. *Id.* at 522. The Ninth Circuit stated that trial judges possess broad discretion in creating and applying local rules. *Id.* at 521; *see also* Lance, Inc. v. Denco Serv., Inc., 422 F.2d 778, 784 (9th Cir. 1970) (court has broad discretion in interpreting and applying local rules because purpose of local rules is to increase efficiency of judicial arrangement).

43. *See* Greyhound Lines, Inc. v. Miller, 402 F.2d 134, 144-45 (8th Cir. 1968) (creation of local rules regulating discovery is not abuse of discretion because court has authority to control time of discovery under rules 16 and 82); *see also* Wirtz v. Hooper-Holmes Bureau, Inc., 327 F.2d 939, 943 (5th Cir. 1964) (Appelate courts should not overturn local rules except for compelling reasons). In *Wirtz v. Hooper-Holmes Bureau, Inc.*, the United States District Court for the Northern District of Georgia dismissed the plaintiff 's case for failure to provide a list of witnesses. *Id.* at 940. On appeal, the United States Court of Appeals for the Fifth Circuit

conflict with the lower courts, the "abuse of discretion" standard permits the trial judge to exercise unfettered creativity and ingenuity unless his order violates the goals of other Federal Rules of Civil Procedure.[44]

Notwithstanding the willingness of the drafters of the Federal Rules of Civil Procedure to grant district courts broad powers under rule 83, the United States Court of Appeals for the Fourth Circuit in *McCargo v. Hedrick*[45] limited the exercise of broad judicial involvement in pretrial proceedings.[46] In *McCargo*, a local rule required parties to a litigation to submit a complex pretrial order.[47] Upon the plaintiff's failure to meet the presiding magistrate's request for an amendment to the pretrial order, the trial court dismissed the case under a local rule for failure to prosecute.[48] In reversing the trial court, the Fourth Circuit held that the local rule violated the intent of rule 16 of the Federal Rules of Civil Procedure, because the requirements of the local rule made the procedure more complex and lengthy than the trial itself.[49] Because the local rule violated the intent of a Federal Rule of Civil Procedure, the Fourth Circuit declared the local rule invalid under the authority implicit in rule 83.[50] The Fourth Circuit's decision in *McCargo* has removed some of the flexibility of trial courts to fashion their own procedural rules.[51] The *McCargo* court thus has undermined the policy of allowing the district courts broad latitude in implementing the goals of the Federal Rules of Civil Procedure.[52]

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affirmed, holding that local rules were desirable and necessary for a federal district court to control the conduct of trials. *Id.* at 943. Appellate courts, therefore, should not declare local rules invalid except for compelling reasons. *Id.* Since the appellants were unable to show that the trial judge abused his discretion, the Fifth Circuit affirmed the trial judge's dismissal of the action. *Id.; see also* National Hockey League v. Metro Hockey Club, 427 U.S. 639, 642-43 (1976) (definition of abuse of discretion in pretrial procedure). In *National Hockey League v. Metro Hockey Club*, the appellants sought reversal of the dismissal of their suit for failure to answer interrogatories timely. *Id.* In describing the "abuse of discretion" test, the Supreme Court stated that an appellate court must not ask itself whether the appellate court would have dismissed the action, but whether the trial court abused its discretion in so doing. *Id.*

44. *See* MOORE, *supra* note 7, at ¶ 83.02 (discussion of desire to minimize conflict between circuit and district courts).

45. 545 F.2d 393, 402 (4th Cir. 1976).

46. *Id.*

47. *Id.* at 399. In *McCargo v. Hedrick*, the pretrial order required under local rule 2.08 was thirteen pages in length. *Id.* The rule also required the parties to submit complete pretrial briefs with the pretrial order. *Id.*

48. *Id.* at 395 (local rule 2.09 allowed dismissal for failure to prosecute); *cf.* FED. R. CIV. P. 41(b) (provision enables court to involuntarily dismiss plaintiff's case when plaintiff fails to prosecute).

49. *Id.* at 401.

50. *Id.* at 402.

51. *See* McDermott, *The Pretrial Order and* McCargo v. Hedrick: *Effective Management or Unproductive Formalism?*, 4 JUST. SYS. J. 245, 248 (1978) (discussion of effect of *McCargo* on authority of court to control pretrial procedure).

52. *Id.* at 254. While McDermott states that the Fourth Circuit in *McCargo* has narrowed a trial court's authority to control pretrial procedures, McDermott sharply criticizes the *McCargo* opinion and questions its significance. *Id.* McDermott states that since the Fourth Circuit merely substituted its judgment for that of the trial judge, the appellate court did not address fully the real object of controversy; that is, the role of the pretrial order in litigation. *Id.*

In addition to those judicial powers expressly provided in the Federal Rules of Civil Procedure, appellate courts traditionally have recognized that trial judges possess certain inherent powers which derive from the very nature of the judicial system.[53] To perform their judicial function, courts must possess powers that provide judges with the latitude and authority to resolve disputes in a just manner.[54] Over the years, appellate courts have expanded the reach of these inherent powers to include, among other things, the authority to dismiss a case sua sponte for lack of prosecution,[55] to award attorney's fees to an opposing party for bad faith litigation,[56] and to impose monetary penalties on counsel for violations of local rules.[57] Although no court ever has used the doctrine of inherent powers to justify the authority of a trial judge to

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53. *See* United States v. Hudson and Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812) (Supreme Court's original recognition of inherent powers of judiciary). In *United States v. Hudson and Goodwin*, the Supreme Court held that trial courts possess certain inherent powers, based on the nature of the judicial institution. *Id.* These inherent powers exist to enable the trial court to perform its functions. *Id.* While inherent powers are not derived directly from statute, such powers are essential nonetheless. *Id.* Among the court's inherent powers are the power to fine for contempt, to imprison for contumacy, and to enforce the observance of order in the court. *Id.* In recent years, the breadth of powers inherent to the judiciary has expanded greatly. *See infra* notes 55-57 (description of modern examples of inherent powers).

54. *See* Note, *Protective Orders Against the Press and the Inherent Powers of the Court*, 87 YALE L.J. 342, 349-50 (1977) (discussion of internal checks on inherent powers) [hereinafter cited as *Inherent Powers*]. Since the judiciary itself determines the breadth of inherent powers, courts theoretically could grant themselves very broad authority in performing judicial functions. *Id.* However, since the judiciary itself defines its inherent powers, the public is especially critical of broad inherent powers. *Id.* at 351. Thus, the greatest check on the court's inherent powers is the court system's fear that it will lose respect and legitimacy. *Id.* at 350.

55. *See* Link v. Wabash R.R., 370 U.S. 626, 628 (1962). In *Link v. Wabash Railroad*, the plaintiff's attorney relayed a message that he would be unable to attend a pretrial conference scheduled for later in the day. *Id.* at 628. Two hours after the time of the scheduled conference, the trial judge, exercising what he termed his "inherent powers", dismissed the action for the plaintiff's failure to appear at pretrial. *Id.* at 628-29. The Supreme Court affirmed, ruling that authority to dismiss sua sponte derives from the inherent power of the judiciary. *Id.* at 630. Such authority did not evolve from statute, but from the power of the court to manage its affairs in a way that achieves prompt and orderly resolution of disputes. *Id.* at 630-31.

56. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980). In *Roadway Express Inc. v. Piper*, the plaintiff brought a civil rights action alleging employment discrimination. *Id.* at 754. After filing and answering one set of interrogatories, the plaintiff refused to cooperate further in discovery. *Id.* Furthermore, the plaintiff refused to submit a brief, in direct violation of a request by the trial court. *Id.* at 755. The trial court dismissed the case and awarded the defendant attorney's fees. *Id.* at 756. The Fifth Circuit reversed, holding that an award of attorney's fees was not proper under the circumstances of the case. *Id.* On appeal, the Supreme Court held that courts possess the inherent power to assess attorney's fees when the plaintiff files suit in bad faith or conducts the litigation in bad faith. *Id.* at 766.

57. *See* Miranda v. Southern Pacific Trans. Co., 710 F.2d 516, 522 (9th Cir. 1983). In *Miranda v. Southern Pacific Transportation Company*, the United States District Court for the Central District of California fined both opposing counsel in a civil case $250 for failing to obey local rule 9. *Id.* at 518-19. Local rule 9 provided a procedure for submitting pretrial briefs. *Id.* at 518. The district court requested that counsel amend their briefs to reflect a concise statement of the facts and to reflect information concerning expert witnesses. *Id.* When both attorneys failed to satisfy a second request by the district court, the court imposed monetary sanctions. *Id.* at 519. On appeal, the United States Court of Appeals for the Ninth Circuit remanded the

encourage settlement, the inherent powers doctrine provides justification for judicial intervention in the settlement process.[58] Consistent with the expanding role of the trial judge as case manager, the judge must inherently possess effective tools to fulfill that role.[59]

Although a trial court possesses the inherent power to control the disposition of cases, the court's inherent power is not without limitations.[60] Courts should not use their inherent powers in the absence of reasonable necessity.[61] In other words, a court may not utilize its inherent powers simply on the basis of convenience.[62] An additional requirement is that courts may not use their inherent powers to serve any function other than controlling cases that litigants bring before the court.[63] Finally, a court may not exercise power that would disrupt the balance between other branches of government.[64] The court may not use its inherent powers to usurp power from the legislative and executive branches.[65]

With the possible exception of the reasonable necessity requirement, none of the above limitations appear applicable to the question of judicial authority to encourage settlement.[66] However, two major limitations which are relevant to the issue of judicial involvement in settlement negotiations are the rule 83 requirement that a local rule may not contradict the Federal Rules of Civil Procedure,[67] and the limitation imposed by the due process clause of the fourth

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case for a proper hearing on the sanctions, but stated that a district court possesses the inherent authority to impose sanctions against attorneys for failure to obey local rules. *Id.* at 520.

In addition to the inherent powers mentioned above, one commentator has argued that a trial court also possesses the inherent authority to issue protective orders against the press during trial. *See Inherent Powers, supra* note 54, at 348. The goal of the court to provide fair trials gives the court inherent authority to issue protective orders against the press. *Id.; see also* Sun Co. v. Superior Court, 29 Cal. App. 3d 815, 824-25, 105 Cal. Rptr. 873, 880 (1973) (court's power to issue protective orders arises from inherent power of the court). Although the *Sun* court held a pretrial order against the press violative of first amendment protections, the court held that the authority to issue protective orders in general arises from the inherent powers of the court. *Id.*

58. *Sees supra* notes 53-57 and accompanying text (discussion of trial court's inherent powers).

59. *See* Fox, *supra* note 18, at 136 (discussion of tools needed to lead litigation to just and speedy settlement).

60. *See infra* text accompanying notes 61-66 (discussion of limitations on inherent powers).

61. *See Inherent Powers, supra* note 54, at 351-52 (while concept of reasonable necessity varies, reasonable necessity implies that rationale for court's action must be more than mere convenience or desirability).

62. *Id.* at 352.

63. *Id.* at 356-57.

64. *Id.* at 362.

65. *Id.*

66. *See supra* text accompanying notes 61-65. The restriction that a court may use inherent powers only to resolve cases and controversies is not applicable to the question of the inherent power to encourage settlement. *See Inherent Powers, supra* note 54, at 356. All matters in which the judge might encourage settlement are cases already in the court's files. *Id.* Similarly, the limitation of separation of powers is inapplicable as neither the legislative nor the executive branch has an interest in the control of settlement negotiations by the court. *Id.* at 362.

67. *See* FED. R. CIV. P. 83 (rule 83 states in part that district courts may control litigation in any manner that is not inconsistent with Federal Rules of Civil Procedure).

amendment to the United States Constitution.[68] Under rule 83 trial judges may issue only those orders that are not inconsistent with the Federal Rules of Civil Procedure.[69] While rule 83 provides justification for an increased judicial role in settlement negotiations, the requirement of consistency with the Federal Rules of Civil Procedure limits the power of judges to direct the settlement process.[70] Rule 83 applies not only to rules that local courts expressly adopt, but also to those rules based on the inherent powers of the court.[71]

A greater constraint on the judicial power of the trial court is the constitutional requirement of due process.[72] In a case similar to *Austin Power*,[73] the United States Court of Appeals for the Sixth Circuit held in *In re LaMarre*[74] that due process prohibited the trial judge from compelling a settlement of which one or both of the parties did not approve.[75] Although the Sixth Circuit held in *LaMarre* that a trial judge could require a party's attendance at a pretrial settlement conference, the court stated that the trial judge could not require an unwilling party to accept a settlement offer.[76] Similarly, the United States District Court for the District of Connecticut held in *J.M. Cleminshaw Co. v. City of Norwich* that the constraints of due process limited a trial judge's authority to impose a sanction for failure to follow pretrial discovery procedures.[77] The *Cleminshaw* court stated that the reasonableness

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68. U.S. CONST. amend. V. ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . "); *see infra* notes 72-82 and accompanying text (discussion of due process as limitation on court's inherent powers to conduct settlement negotiations).

69. *See supra* notes 39 & 67 and accompanying text (discussion of requirements of rule 83).

70. *See supra* notes 39-52 and accompanying text (discussion of rule 83 as justification for judicial participation in settlement negotiations).

71. *Id.*

72. *See supra* note 68 (discussion of due process clause of fifth amendment).

73. *See supra* notes 9-17 and accompanying text (discussion of *Austin Power*).

74. 494 F.2d 753, 756 (6th Cir. 1974).

75. *Id.* In *In re LaMarre*, the United States District Court for the Eastern District of Michigan ordered LaMarre, a claims adjuster for the defendant's insurance company, to attend a conference and explain why he was unwilling to accept a settlement offer. *Id.* at 755. On several occasions, LaMarre refused to attend such a conference. *Id.* After a full hearing, the district court held LaMarre in contempt. *Id.* at 754. On appeal, the United States Court of Appeals for the Sixth Circuit held that because the form of the request did not amount to an order, the trial court could not hold LaMarre in contempt. *Id.* at 759. Nonetheless, the Sixth Circuit stated that an order requiring the attendance of a party at pretrial is a proper exercise of judicial power. *Id.* at 756. However, the court stated that a judge could not force a settlement on one or both parties who found the offer unacceptable. *Id.*

76. *Id.*

77. *See* J.M. Cleminshaw Co. v. City of Norwich, 93 F.R.D. 338, 351-52 n.11 (D. Conn. 1981). *J.M. Cleminshaw Co. v. City of Norwich* involved a civil action in which a defendant failed to answer a set of interrogatories or produce documents that the plaintiff requested. *Id.* at 344. After one year, the plaintiff moved for and received an order compelling discovery. *Id.* at 345. When the defendant ignored the deadline of the court's order, the plaintiff moved for sanctions under rule 37(d) of the Federal Rules of Civil Procedure. *Id.* at 345; *see* FED. R. CIV. P. 37(d) (sanctions for failure to complete discovery). While the district court ultimately imposed sanctions on the defendant's attorney, the court held that any imposition of sanctions, including a fine, was subject to the requirements of due process. 93 F.R.D. at 351 n.11. The court must determine such due process requirements on a case-by-case basis. *Id.*

of constraints is ascertainable only on a case-by-case basis.[78] Thus, when defendant's counsel repeatedly disregarded discovery deadlines, the trial judge's imposition of discovery sanctions was proper so long as the sanctions met the requirements of due process.[79]

Due process also may limit a trail judge's involvement in settlement, because a judge who coerces parties into a settlement injects into trial a consideration outside the merits of the case.[80] Therefore, in making the decision to settle, a party must evaluate its case not only in terms of those facts arising from discovery and pretrial investigation, but also in terms of the judge's potential reaction to a decision not to settle the case.[81] By forcing a settlement, the judge may press one party into a situation which is not in that party's best interest, thereby violating that party's due process rights.[82]

One final legal factor that affects the behavior of judges in determining their role in settling civil actions is the statutory provision governing a trial judge's disqualification for partiality.[83] Based in part on the American Bar Association Code of Judicial Conduct,[84] section 455 of the United States Code places some restrictions on the participation of the federal judiciary in pretrial procedure.[85] Among the relevant sections, section 455(a) states that any federal judge must disqualify himself whenever a party reasonably might question the judge's impartiality.[86] In addition, under section 455(b), a judge should disqualify himself when he has a personal bias or when he has personal knowledge of disputed evidentiary facts in the litigation.[87] Since trial judges

78. 93 F.R.D. at 351 n.11.

79. *Id.*

80. *See* Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 425 (1982). Professor Resnik presents a hypothetical case in which a trial court judge issued pretrial directions before the parties had requested his assistance. *Id.* As such, the judge was not adjudicating an actual "case or controversy." *Id.*

81. *See id.* (parties may subject themselves to judicial hostility if parties anger or irritate judge).

82. *See id.* (discussion of judicial hostility); State *ex rel* Allen v. Board of Pub. Instruction, 214 So. 2d 7, 10 (Fla. Dist Ct. App. 1968) (parties have due process right to fair and impartial trial).

83. *See* 28 U.S.C. § 455 (1982) (regulation of disqualification of judges in civil and criminal actions).

84. *See* A.B.A. CODE OF JUDICIAL CONDUCT (1982). Among relevant sections of the A.B.A. Code, canon 1 states that "a judge should uphold the integrity and independence of the judiciary." *Id.* canon 1. Canon 2 states that judges should avoid impropriety or the appearance of impropriety at all times. *Id.* canon 2. Finally, canon 3 states that judges should perform the duties of their offices with diligence and impartiality. *Id.* canon 3.

While Congress has amended the United States Code to comply with these sections of the Code of Judicial Conduct, the Code of Judicial Conduct is not binding on the court. *See* Virginia Elec. & Power Co. v. Sun Shipbldg. and Dry Dock Co., 407 F. Supp. 324, 326 (E.D. Va. 1976) (Code of Judicial Conduct does not bind courts), *vacated* 539 F.2d 357, 369 (4th Cir. 1976) (agreeing with trial court that Code of Judicial Conduct may aid judge). However, a court should take notice of the Code of Judicial Conduct in interpreting the intent of Congress. *Id.* at 327.

85. *See infra* text accompanying notes 86-88 (discussion of judicial restrictions under 28 U.S.C. § 455).

86. 28 U.S.C. § 455(a) (1982) (judge must disqualify himself when party reasonably questions his impartiality).

87. 28 U.S.C. § 455(b) (1982) (judge must disqualify himself if he has bias or personal knowledge of evidentiary facts).

frequently pressure both parties without giving any appearance of partiality, section 455 often would not apply. However, if the judge does not apply even pressure to settle to both parties, or if he makes a pretrial ruling which pressures only one party to settle, the judge may create an appearance of bias.[88] Under these circumstances, a party might have grounds for appeal if the judge fails to remove himself from the trial proceeding.[89]

The controversy surrounding the legal and philosophical justifications and limitations for judicial involvement in the settlement process manifests itself in the debate between those advocating a managerial or active judge, and those advocating the traditional judicial role.[90] In her article, *Managerial Judges*,[91] Professor Judith Resnik discusses the erosion of due process at the hands of the "managerial judge."[92] Managerial judges are those judges who take an active role in the shaping of litigation prior to trial.[93] Such judges have assumed an increased responsibility in advancing cases to completion.[94] Because the managerial judge possesses far greater power than the traditional judge,[95] the managerial judge has far greater potential to abuse that power.[96] Moreover, since the managerial judge has substantial dealings with the parties before trial, he may develop personal feelings that interfere with his impartiality toward the litigants.[97] In addition, because the managerial judge often has exposure to information that may not constitute admissible evidence, the judge may have a tainted view of the facts before the trial begins.[98]

In opposition to this argument, one federal judge has stated that such "built in bias" does not exist in actual practice.[99] In this experience with pretrial

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88. *See supra* text accompanying note 86 (discussion of rule against judicial partiality).

89. *See supra* text accompanying notes 86-88 (discussion of limitations on judiciary under 28 U.S.C. § 455).

90. *Compare* Resnik, *supra* note 80, at 376-448 (discussion of rationale underlying limited judicial role in case management) *with* Fox, *supra* note 18, at 129-58 (discussion of rationale underlying broad judicial involvement in case management). *See also infra* notes 90-119 and accompanying text (discussion of debate between Resnik and Fox concerning judicial activism).

91. *See generally* Resnik, *supra* note 80 at 376-448 (discussion of rationale underlying limited judicial involvement in case management).

92. *Id.*

93. *Id.* at 376-77 (definition of "managerial judge").

94. *Id.* at 378 (judges now assume responsibility for seeing cases to completion).

95. *Id.* (managerial functions of trial judge result in greater judicial power).

96. *Id.* at 425 (case manager has far greater potential to abuse power than adjudicator). According to Professor Resnik, one of the side effects of judicial management is that judicial managers have different goals and techniques than traditional judges. *Id.* at 424-25. Managerial judges tend to prefer the goal of speed of resolution over the goals of impartiality and fairness. *Id.* at 425. Therefore, managerial judges are more likely to abuse their power than traditional judges. *Id.*

97. *Id.* at 427 (by increased interaction with attorneys prior to trial, active judge increases opportunity for partiality and bias).

98. *Id.*

99. *See* Fox, *supra* note 18, at 144-45 (discussion of ability of trial judge to avoid partiality). Judge Fox believes that the threat of impartiality of managerial judges is more theoretical than real. *Id.* at 144. Fox suggests that while a built-in bias may exist in theory, in reality no such threat exists. *Id.*

procedure and settlement conferences, Judge Fox of the Federal District Court for the Western District of Michigan has found that perceptions of judicial bias have disappeared and that the local bar has endorsed the judge's requirement of a compulsory pretrial docket.[100] According to Judge Fox, the experience and integrity required of a United States district court judge enables the judge to divorce the pretrial stage from the actual trial proceeding, and thus avoid the threat of a distortion of justice that Resnik sees.[101]

In support of Judge Fox's argument for a judge's active role in pretrial negotiations, other commentators cite several policy reasons for a judge's participation in the settlement process.[102] First, since settlement avoids a trial proceeding, the parties save money by reducing court costs and eliminating the possibility of a costly appeal.[103] Second, settlements are flexible in their formulation.[104] A party is not faced with the "win or lose" proposition that he faces at trial.[105] Both parties may compromise, feeling that the proposed settlement is to their benefit, without risking a total loss at the hands of a jury.[106] Parties also gain from settlement a sense of certainty and finality in knowing that the opposing party may not appeal the case.[107]

From a judicial perspective, participation in settlement negotiations increases the efficiency of court administration.[108] As more cases settle sooner, courts save both time and money.[109] Moreover, while parties are reluctant to propose settlement and appear weak, judicial control of negotiations and pro-

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100. *Id.* at 144-45. In 1951, Judge Fox began a mandatory pretrial procedure in his district, the Western District of Michigan. *Id.* at 144. While the procedure initially met oppostion, that opposition has disappeared. *Id.* The local bar has appreciated the efforts of managerial judges and has recommended the adoption of Fox's compulsory pretrial procedure for all cases. *Id.* at 144-45.

101. *Id.* at 145. Judge Fox states that federal judges do not achieve their judicial position without experience. *Id.* Such experience allows a managerial judge to separate pretrial from the trial itself. *Id.* This process is no different from the judge's refusal, as trier of fact, to consider evidence that he has excluded. *Id.*

102. *See generally* Oesterle, *supra* note 1, at 7 (discussion of avoidance of trial as reducing costs of dispute resolution); Schiller and Wall, *Judicial Settlement Techniques*, 5 AM. J. TRIAL ADVOC. 39, 40 (1981) (discussion of policy reasons for judicial participation in settlement negotiations).

103. *See* Schiller and Wall, *supra* note 102, at 40 (discussion of settlement as reducing costs of litigation).

104. *See* Oesterle, *supra* note 1, at 8 (while court judgment often may be extreme in creating all-or-nothing situation, settlement can be flexible and can result in resolution of dispute that satisfies each party).

105. *Id.*

106. *Id.*

107. *See* Schiller and Wall, *supra* note 102, at 40 (certainty results from successful settlement negotiations because parties may not appeal settled case).

108. *See* Oesterle, *supra* note 1, at 8. Judicial activism in settlement negotiations increases the efficiency of the court. *Id.* Many cases are settled that parties might never settle otherwise. *Id.* Also, some parties who would settle eventually, settle earlier in the litigation. *Id.*

109. *Id.*

posals for settlement may encourage what both parties desired all along.[110] In addition, judicial participation in the settlement process may keep negotiations in perspective by preventing frivolous haggling or improper offers.[111] Finally, with the trial judge aiding the parties in the settlement of their case, the public has a better perception of the judicial process,[112] because justice comes swiftly, and settlements reduce the backlog of cases.[113]

Advocates of limited judicial participation in settlement negotiations cite studies which establish that judicial activity does not increase the likelihood of settlement.[114] In arguing against the idea that judicial involvement increases settlement, one authority has stated that the greatest aid in encouraging settlement is not activism by the court, but merely the court's willingness to set a trial date and to bring the case to trial.[115] Critics also argue that settlement negotiations often become "mini-trials" in which litigants present evidence, attorneys make opening and closing statements, and the judge issues his "decision."[116] The danger of this procedure lies in the possibility that the judge's decision at the "mini-trial" may carry over into the actual trial if negotiations fail to produce a settlement.[117] Preconceived notions may prejudice

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110. *Id.* Lawyers frequently are reluctant to propose settlement first, for fear of creating perceptions of weaknesses. *Id.* However, a judge may initiate settlement proposals without creating signs of weakness in either party. *Id.*

111. *See id.* (since judge lends air of dignity to negotiations, parties are more likely to take formal, dignified approach to negotiations).

112. *See* Schiller and Wall, *supra* note 102, at 41 (discussion of advantages of active judicial role in settlement negotiations). The early settlement of cases reduces both the time spent on a case and the backlog of pending cases. *Id.* Therefore, the public perceives a more efficient administration of justice. *Id.*

113. *Id.*

114. *See generally* Flanders, *Case Management in Federal Courts: Some Controversies and Some Results*, 4 JUST. SYS. J. 147 (1978). In a study by Flanders of six representative federal district courts, the court with the largest role in the settlement process had the fewest settlements per year. *Id.* at 161. In contrast, the court with the least judicial involvement in negotiations had the second largest number of settlements. *Id.; see also* Church, *Civil Case Delay in State Trial Courts*, 4 JUST. SYS. J. 166, 188-89 (1978). Church states that judges often find that in a large number of cases in which they participate in pretrial, litigants actually settle. Church, at 188-89. However, parties would have settled many of these cases anyway. *Id.* Thus, Church states that substantial judicial involvement in settlement negotiations is largely unproductive. *Id.* at 189.

115. *See* Church, *supra* note 114, at 189. According to Church's study, attorneys in every district surveyed stated that the threat of upcoming trial was one factor which encouraged settlement. *Id.* Extensive judicial activity thus may not settle cases as often as the reality of an approaching trial date. *Id.*

116. *See* Oesterle, *supra* note 1, at 10. Settlement negotiations in which the judge has a large role may take the appearance of a trial itself. *Id.* Such "mini-trials" can constitute a dangerous practice, because parties are unable to fully present their "case" in such a short time. *Id.* Therefore, a judge may become misinformed as to the full facts of the case. *Id.*

117. *See id.* (although judge may have no subjective intent to carry preconceived notions of merits to trial, human nature dictates that judge may enter trial without impartial mind). *But see* Fox, *supra* note 18, at 145 (discussion of judge's ability to avoid bias).

the judge in his control of the litigation.[118] Thus, those favoring a limited role for trial judges argue that if the trial judge must have a role in settlement negotiations, standards should exist which control the court's conduct during the negotiations.[119]

Several federal cases have addressed the debate between those advocating managerial judges and those advocating more traditional judges, particularly in the area of judicial participation in settlement negotiations.[120] In *In re LeMarre*, the Sixth Circuit held that a trial court could compel the claims manager of one party to attend a pretrial hearing in which settlement was the principal topic of discussion.[121] While the *LaMarre* decision gave trial judges wider latitude in managing cases toward resolution, the decision also limited that latitude by declaring that the trial judge could not compel settlement.[122] However, the *LaMarre* court apparently believed that requiring the attendance

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118. *See supra* text accompanying notes 97-98 (discussion of possibility of prejudicial behavior on part of trial judge after settlement conference).

119. *See* Oesterle, *supra* note 1, at 11 (if legal community decides that judicial participation in settlement is productive, legal community at least should create guidelines for regulating judicial participation); *see also* Resnik, *supra* note 80, at 432-35 (discussion of methods for preserving litigants' rights to fair trial while allowing judge control of case management).

120. *See infra* notes 121-45 and accompanying text (discussion of federal cases addressing role of judge in pretrial activities). Judicial involvement in the settlement process is an active issue in state courts as well as federal courts. For example, in *Cropp v. Woleslagel*, the Kansas Supreme Court held that a trial judge had the power to require the defendant to disclose the policy limits of his liability insurance. 207 Kan. 627, ____, 485 P.2d 1271, 1276 (1971). The court held that because the encouragement of settlement was a goal of pretrial activities, the trial court properly could require disclosure of policy limits. 485 P.2d at 1276. The court reasoned that knowledge of the limits of the defendant's insurance policy would be necessary for settlement discussion. *Id.* However, the court stressed that a trial judge should never attempt to force settlement, but merely help to facilitate a settlement. *Id.*

Similarly, in a dissenting opinion in *Conachan v. Williams*, an Oregon State Supreme Court justice stated that if a plaintiff claims lost wages and medical expenses, the plaintiff must state these claims before trial begins. 266 Or. 45, ____, 511 P.2d 392, 404 (1973). The judge in *Conachan* reasoned that such early pleading would make settlement easier to negotiate, thereby fulfilling the desire of the court to encourage the settlement of cases. 511 P.2d at 404.

Finally, in *In re Marriage of Hitchcock*, the Supreme Court of Iowa held that a trial judge may not announce his views regarding a fair divorce settlement figure. 265 N.W.2d 599, 606 (Iowa 1978). The court stated that by announcing his view, the trial judge placed the parties in the position of either settling at the judge's price or trying the case before a judge who apparently had already decided on distribution of the parties' assets. *Id.* Therefore, the appellate court voided the earlier settlement and remanded the case for retrial. *Id.*

121. *In re* LaMarre, 494 F.2d 753, 756 (6th Cir. 1974); *see supra* note 75 (discussion of *In re LaMarre*); *see also* Curto v. Int'l Longshoreman's and Warehouseman's Union, 107 F. Supp. 805, 808 (D. Ore. 1952). *Curto v. International Longshoreman's and Warehouseman's Union* involved a labor dispute. 107 F. Supp. at 806. The United States District Court for the District of Oregon required the presence of all individual defendants and labor leaders at a pretrial conference. *Id.* at 808. The court justified this mandatory attendance by stating that such action expedited the case and reduced delays, as well as enabled the parties to correct factual errors and aid in the advancement of the case. *Id.*

122. *See supra* note 75 (*LaMarre* court held that trial court can require party's attendance at pretrial, but cannot compel settlement).

of a party at a pretrial conference did not operate to compel settlement.[123]

While the *LaMarre* court addressed the issue of required attendance at trial, the recent *"Agent Orange" Product Liability Litigation* addressed the question of judicial activism in encouraging settlement in several other contexts.[124] In one such case, the United States District Court for the Eastern District of New York had issued a ruling that restored the federal government as a party to the litigation.[125] The trial court judge stated that returning the government as a party to the litigation would facilitate settlement.[126] On interlocutory appeal, the Second Circuit upheld the district court's decision on other grounds.[127] However, the Second Circuit stated in dictum that the addition of a party to litigation merely to facilitate settlement was an abuse of discretion.[128] The Second Circuit, therefore, limited a tool of judicial management without providing a clear test of how such involvement amounts to an abuse of discretion.[129]

In an earlier *"Agent Orange"* action certifying a class of veterans and their families, the Untied States District Court for the Eastern District of New York stated that one reason for certification of the class was the increased possibility of settlement resulting from a single suit.[130] The district court stated

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123. *See generally In re* LaMarre, 494 F.2d at 753-59 (trial court may not compel settlement).

124. *See* "Agent Orange" Product Liability Litigation, No. 84-3021 (2d Cir. April 13, 1984) (available Sept. 5, 1984 on LEXIS, Genfed library, Cases file); "Agent Orange" Product Liability Litigation, 100 F.R.D. 718, 733 (E.D.N.Y. 1983).

125. *See In re* "Agent Orange" Product Liability Litigation, No. 84-3021 (2d Cir. April 13, 1984) (available Sept. 5, 1984 on LEXIS, Genfed library, Cases file). The *"Agent Orange"* litigation involved a claim by Vietnam War veterans and their families against the manufacturers of a certain defoliant known as "agent orange." *Id.* The veterans and their families also brought suit against the federal government, which purchased and used the chemical. *Id.* Early in the litigation, the United States District Court for the Southern District of New York removed the federal government from the litigation under the *Feres-Stencel* doctrine, which provided that servicemen could not file military claims against the government for injuries sustained in the line of duty. *Id.; see* Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 674 (1977) (federal government has not waived sovereign immunity to servicemen); Feres v. United States, 340 U.S. 135, 146 (1950) (federal government has not waived sovereign immunity to servicemen). On appeal the United States Court of Appeals for the Second Circuit upheld the decision of the district court to restore the government as a party to the litigation. *In re "Agent Orange"* No. 84-3021, slip op. The Second Circuit reasoned that the *Feres-Stencel* doctrine did not apply to the third-party claims of servicemen's families. *Id.* The Second Circuit, however, criticized the district court for its statement that the restoration of the government to the action would facilitate settlement. *Id.* The appellate court stated that if facilitation of settlement was the only reason for restoring the government to the lawsuit, the order would amount to an abuse of discretion. *Id.*

126. *Id.; see supra* note 125 (discussion of facts of *"Agent Orange" litigation).*

127. Id. In the *"Agent Orange"* litigation, the Second Circuit upheld the lower court's order reinstating the federal government as party to the action, because the Second Circuit found that the order represented a rational interpretation of an area of law not yet ruled on by the Supreme Court. *Id.* Specifically, the Second Circuit reasoned that until the Supreme Court extended the breadth of the *Feres-Stencel* doctrine, such an order by the district court was proper. *Id.*

128. *Id.*

129. *See id* (Second Circuit did not provide test for abuse of discretion).

130. *See In re* "Agent Orange" Product Liability Litigation, 100 F.R.D. 718, 721 (E.D.N.Y. 1983). In the *"Agent Orange"* litigation, the United States District Court for the Eastern District

that defendants could negotiate more easily with a single class of plaintiffs than with individual plaintiffs.[131] Moreover, the court noted that the case required strong case management because of its complexity.[132] The district court concluded that judicial maintenance of a class action suit would therefore constitute the best method of resolution.[133]

An issue related to the question of judicial involvement in settlement is the issue of judicial power to compel attendance at trial.[134] In *Steel, Inc. v. Atchison, Topeka, and Santa Fe Railway*,[135] the United States District Court for the District of Kansas held that one party could not compel the attendance of the other party at trial unless the court could subpoena the party's attendance under rule 45 of the Federal rules of Civil Procedure.[136] Although the *Steel* case involved a question of the court's subpoena power rather than judicial compulsion, *Steel* does illustrate the district court's recognition that a judge's interference with the presentation of a party's case constitutes improper case management.[137] Similarly, in *Dinsel v. Pennsylvania Railroad*,[138] the United States District Court for the Western District of Pennsylvania held that a trial court had no authority to compel a party's attendance during any part of the trial.[139] While an opposing party may subpoena the plaintiff as an adverse witness, the *Dinsel* court stated that the trial judge may not compel the plaintiff's attendance absent a proper subpoena.[140]

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of New York cited an increased possibility of settlement as one reason for its decision to certify a class. *Id.* at 723. The court stated that consolidation of all claims into a single action would facilitate settlement discussions and ultimately increase the chances of settlement. *Id.*

131. *Id.*

132. *See id.* at 723-24 (certification of class was only means of effecting judicial management of complex *"Agent Orange"* litigation).

133. *Id.*

134. *See Austin Power*, No. 83-2702 at 2 (court may not compel attendance of board of directors at trial); *see also Appellant's Brief, supra* note 10, at 25-26. The Appellants in *Austin Power* argued that forced attendance at trial operated to compel a settlement. *Appellant's Brief* at 26. When the court forces a party to attend trial, the court places substantial pressure on the party to settle. *See id.*

135. 41 F.R.D. 337, 339 (D. Kan. 1967).

136. *Id.* at 339; *see* FED. R. CIV. P. 45 (procedure for subpoena of witnesses). *Steel Inc. v. Atchison, Topeka and Santa Fe Railway* involved an action for repayment of excessive freight charges. 41 F.R.D. at 338. The defendants moved the United States District Court for the District of Kansas to require each of the plaintiffs to attend trial in order to give testimony. *Id.* at 338. Rule 45 of the Federal Rules of Civil Procedure delineated the process by which parties may subpoena witnesses. *See* FED. R. CIV. P. 45(a) (clerk of court shall issue subpoena stating name of court and title of action and commanding party to appear at trial).

137. *Steel*, 41 F.R.D. at 339. The *Steel* court stated that a party has the choice of whether or not the party will attend trial. *Id.* While the party may fail to meet its burden of proof by not attending trial, the party still retains the option of attending trial or remaining absent. *Id.*

138. 144 F. Supp. 883, 884 (W.D. Pa. 1956).

139. *Id.* In *Dinsel v. Pennsylvania Railroad*, the plaintiff sustained injuries while under the employ of Pennsylvania Railroad. *Id.* At trial, the defendant requested that the court call the plaintiff as a witness. *Id.* Since the defendant failed to subpoena the plaintiff properly, the court could not compel the plaintiff to attend trial absent some other court order. *Id.* Because the court could not find any authority for such a compulsory order, the trial judge upheld the right of the plaintiff to be absent from trial. *Id.*

140. *Id.*

In contrast to *Steel* and *Dinsel*, the United States Court of Appeals for the Third Circuit held in *Torino v. Texaco* that the district court's dismissal of the suit was proper in light of the plaintiff's failure to attend trial and other incidents illustrating the plaintiff's lack of interest.[141] The Court held that although a party may present its case as it chooses, that party nevertheless must act in a reasonable manner.[142] Under the circumstances of the case, the *Torino* court found that the plaintiff's failure to appear was not reasonable.[143]

While the *Torino* decision appears to be inconsistent with the decisions in *Steel* and *Dinsel*, courts generally recognize that a party's right to control the presentation of its case includes the right to choose whether or not the party will personally attend trial.[144] However, this right is not absolute. As the cases above illustrate, at times courts have held that the need for judicial control is superior to the party's right to control the presentation of its case.[145] Thus, while the Eighth Circuit in *Austin Power* ruled that requiring the attendance of both of the boards of directors was improper, the court reasoned that because of the complexity of the case, the compelled attendance of one director and one officer was proper.[146]

The formulation of standards controlling judicial conduct during settlement proceedings represents a compromise between those advocating an active managerial judiciary and those advocating a more traditional judicial role in settlement negotiations. The increase in judicial authority in recent years has placed the trial judge in a position of unprecedented power.[147] Today, the trend is toward increasing judicial involvement in all stages of pretrial activities,[148] and settlement resulting from this judicial involvement is one of the most practical by-products of the trial judge's expanding role.[149] However,

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141. *See* Torino v. Texaco, Inc., 378 F.2d 268, 270 (3d Cir. 1967). *Torino v. Texaco, Inc.* involved a civil action in which the plaintiff failed to attend trial. *Id.* at 269. In an earlier ruling, the court refused to dismiss the action provided that the plaintiff would sign a statement that he wished to try the case and would be present for trial. *Id.* When the plaintiff failed to appear at trial, the court dismissed the action sua sponte although the plaintiff's counsel was prepared to proceed with the case. *Id.* Citing *Link v. Wabash Railroad*, the Third Circuit on appeal stated that dismissal under the circumstances was within the inherent power of the court. *Id.* at 270; *see* Link v. Wabash Ry., 370 U.S. 626, 630-31 (1962) (court has inherent authority to dismiss case for failure to prosecute); *supra* note 55 (discussion of *Link*). Although a plaintiff may present his case as he wishes, the *Torino* court held that reasonable behavior on the part of the plaintiff served as a limitation to such freedom. 378 F.2d at 270.

142. *See* 378 F.2d at 270.

143. *Id.*

144. *See supra* notes 134-46 and accompanying text (discussion of required attendance of parties at trial).

145. *Id.*

146. *See* Nebraska Public Power District v. Austin Power, Inc., No. 83-2702, slip op. at 2 (8th Cir. Jan. 11, 1984) (per curiam).

147. *See supra* note 95 and accompanying text (judge who takes active role in case management acquires greater judicial power).

148. *See* Fox, *supra* note 18, at 132 (judge is responsible for insuring that cases move forward).

149. *Id.* at 139.

unless established guidelines delineate the role of the trial judge in settlement negotiations, the judge has the propensity to abuse his expanding authority. Despite his best efforts to the contrary, a judge's human nature prohibits him from remaining totally neutral and objective under the pressure of settlement negotiations.[150] The judge's human shortcomings are of most concern in cases involving unrestricted judicial involvement in settlement proceedings. Additionally, the American judicial system is primarily an adversary system in which each party is responsible for presenting its case as the party sees fit.[151] To allow the judge to coerce parties to settle their case would destroy the adversary nature of the judicial system.[152] Only with clear guidelines may the judge properly control certain facets of pretrial activities while protecting the adversary nature of the system.[153]

Professor Resnik proposes several suggestions for controlling judicial conduct in settlement negotiations.[154] Resnik advocates the formulation of a manual which would provide guidelines for judicial management.[155] Another possible remedy would be Congressional action under title 28 to create appellate review of judicial management decisions.[156] Finally, Professor Resnik advocates a system which would not permit a judge who mediates a settlement negotiation to try the case, if the attempt at settlement fails.[157]

Guidelines for effective judicial management should include mechanisms to aid the trial court judge in controlling settlement negotiations. First, a judge should possess the authority to inquire at any time as to the possibility of settlement or as to the potential benefits of further settlement discussion. Such

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150. *See supra* note 97 and accompanying text (pretrial activity increases likelihood of judicial bias at trial).

151. *See* McCargo v. Hedrick, 545 F.2d 393, 401 (1976) (principle of adversary relationships in which each party is responsible for preparing its case for trial is basis for trial system).

152. *Id.*

153. *See supra* note 119 and accompanying text (discussion of need for guidelines to control judicial involvement in pretrial procedure).

154. *See* Resnik, *supra* note 80, at 432-35 (discussion of safeguards for judicial management).

155. *Id.* at 433. Professor Resnik advocates the establishment of a manual for judicial management similar to the *Manual for Complex Litigation. See* MANUAL FOR COMPLEX LITIGATION (5th ed. 1982) (recommendations of Federal Judicial Center for judicial control of complex cases). Such a manual would provide detailed rules for participation in settlement negotiations. *See* Resnik, *supra* note 80, at 433.

156. *See* Resnik, *supra* note 80, at 433. According to Professor Resnik, constant appellate review of settlement procedure would allow the court system to refine continually the process of judicial management. *Id.* In this manner, appellate courts may synthesize current judicial philosophy with practical experience. *Id. See also supra* notes 83-89 and accompanying text (discussion of Congressional legislation concerning judicial activism).

157. *Id.* at 433-34. Professor Resnik suggests that judges who mediate settlement negotiations should not preside at a later trial. *Id.* at 433. Use of a master calendar system could achieve this goal. *Id.* at 434. Under such a system, different judges would preside at each stage of litigation. *Id.* Another solution would be to create one set of judges who would mediate and another set who would adjudicate. *Id.* at 436. Additionally, judges might achieve this result by swapping cases at each level of trial preparation. *Id.*

a guideline also should allow the judge to require that parties meet and discuss the possibility of settlement. Second, a judge should possess the power to suggest to the parties that he serve as mediator in the settlement negotiations. Third, the judge also should have the authority to suggest alternatives to litigation or to suggest innovative rulings that would assist both parties in reaching a beneficial settlement. However, a judge never should act in a manner that would suggest the possibility of future animosity toward a party if the party fails to reach a settlement. Finally, a judge never should discuss the case unless both parties are present.[158] Only by the elimination of *ex parte* communications can the court maintain the appearance of absolute impartiality.

Given the multiplicity of factors which affect the trial judge's role in the pretrial process, exact definition of the trial judge's role is difficult. However, a committee sponsored by the American Bar Association might make progress in creating clearer guidelines for successful judicial management. Although the breadth of judicial power tends to evade the confines of narrow specificity, an impartial committee under the auspices of the American Bar Association might well succeed in clarifying an ambiguous and rapidly developing area of the law.[159]

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158. *Id.* at 433. Professor Resnik favors the abolition of all *ex parte* communications. *Id.* Resnik also favors the proposal that the court make all meetings between the judge and parties a part of the court record. *Id.* at 433-34.

159. *See supra* note 4 and accompanying text (discussion of controversy surrounding judicially encouraged settlements).