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TIMING SETTLEMENT

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by

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> *The true objective of war is peace*.
> -Sun Tzu

FORWARD

These notes focus on the efficient timing of mandatory settlement conferences. I review some of the technical literature, as well as a few empirical studies. These notes add to those sources by including a third one: The perspective of a judge who handles settlement conferences. I hope this presages future work in the area, which will benefit from all three perspectives.

As importantly, this note suggests, by its example, that the results of research and theoretical analysis must be harnessed to practice. Researchers should use their results to offer recommendations to judges, mediators, and parties on effective settlement timing, structure, and techniques.

I. Introduction

If a case will settle—and over 90 % of civil cases will—then it's best to settle the case as early as possible. Early settlements involve lower transactional costs for the parties and courts, and they free up court resources for the cases which must go to trial. The advantages found in a 2004 AOC study are probably typical, including

> substantial benefits to both litigants and the courts. These benefits included reductions in trial rates, case disposition time, and the courts' workload, increases in litigant satisfaction with the court's services, and decreases in litigant costs in cases that resolved at mediation in some or all of the participating courts.[1]

Also, there may be more flexibility in early settlements, because the parties can use the projected savings on litigation costs in effect to fund the settlement. That is, a plaintiff make take less, and a defendant be willing to pay more, on account of the foregone litigation costs. A predicted $100 verdict is worth $90 to a plaintiff who spends $10 on litigation costs, and it is worth $110 to a defendant who spends the same on costs. A

* Judge of the Superior Court of California, County of San Francisco.
[1] AOC, Evaluation of the Early Mediation Pilot Programs (February 27, 2004) http://www.courtinfo.ca.gov/reference/documents/empprept.pdf

rational settlement before fees are expended is thus somewhere between $90 and $110, the 'settlement envelope.' The earlier the settlement, the higher the fees saved, and so the larger the settlement envelope.[2]

But some cases will not settle early. There is, in each case, a minimum amount of information a party needs before it is comfortable engaging in settlement talks.[3] This is simply a truism. Consider a limiting example: where one knows nothing at all about the case, including the nature of the claims, one cannot discuss settlement. Defendants need to know enough to believe that they have not been taken for too much, and plaintiffs wish to believe that they haven't left much on the table.

It is also often true that, at any stage of the case, there are serious material uncertainties. All settlements are done without perfect knowledge, even those done just before trial and after all the discovery is complete. No one can be sure how a trial will turn out. And even after verdict one does not know for sure what an appellate court will do, nor the precise time and money to be spent on the appeal, and possible re-trial. Indeed, uncertainty is an important *facilitator* of settlement, because it helps to generate a grey area within which reasonable minds can differ on the value of the settlement, and in this way uncertainty actually expands the settlement envelope.

Too, cases may not settle early not so much because of imperfect knowledge, but because a party seeks assurance that he has roughly the *same* knowledge as the other side; that is, parties desire to reduce the asymmetry of knowledge. We should distinguish this factor, which we may term "belief in asymmetry," with a distinct factor, i.e., asymmetry itself, which too can make it difficult to settle. For example, if plaintiff in a car accident case knows he has solid medical proof of his injuries, but defendant does not, then the parties will have incompatible valuations of the case, inhibiting settlement.

Both of these asymmetries in theory decline as discovery and other proceedings go forward, enabling settlement at a later time.

A court-ordered settlement conference is handicapped when parties are not ready to settle, or when, for some other reason, they believe the settlement conference is unlikely to bear fruit. Lawyers display this cynicism when they are just going through the motions; we see this with lawyers who (i) are unprepared, (ii) made no offers and demands, (iii) have not discussed settlement with the client, (iv) provide useless mediation statements, (v) take frivolous and contemptuous positions at the conference. This is not unusual behavior.

What, then, is the difference between those cases which settle earlier and those which settle later? How should courts schedule and conduct conferences to induce the parties to take them seriously? This note collects some empirical research on the issues, then extrapolates factors which appear to correlate with early and late settlements. I conclude by discussing techniques courts may use to (i) push cases from the 'late' settlement phase towards the 'early' phase, and (ii) encourage settlement generally. I

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[2] For more on settlement envelopes and how they are affected by various strategies, *see* C. Karnow, "Conflicts of Interest and Institutional Litigants," 32 *Journal of the Legal Profession* 7 (2008)(hereafter *Institutional Litigants*).

[3] *E.g.,* Oren Bar-Gill, "The Success and Survival of Cautious Optimism: Legal Rules and Endogenous Perceptions in Pre-Trial Settlement Negotiations," Harvard Law and Economics Discussion Paper No. 375; Harvard Law School, Public Law Research Paper No. 35 (May 2002). Available at SSRN: http://ssrn.com/abstract=318979 or doi:10.2139/ssrn.318979 (classically, asymmetric information explains failure to settle).

hope further research will confirm or disprove both the impact of the factors I discuss below and the efficacy of the court actions I recommend, as well as others.

II. Empirical Research

Some studies show that trial delay, i.e., courts in which it takes a long time to go to trial, create a delay in settlement.[4] Other studies suggest that settlement is actually accelerated by long trial delays.[5] Studies also show that delay in settlement is caused by fee shifting provisions (i.e. loser pays winner's fees),[6] although the findings are susceptible to conflicting conclusions.[7] Generally, the likelihood of settlement is reduced by an increase in the stakes of a case, and increased by an increase in the costs of litigation.[8] As our intuition suggests, expensive litigation is more difficult to settle, and a fee shift device may make it more difficult still.

> Other things being equal, the likelihood of a trial goes up as the marginal cost of case preparation increases, goes down as the marginal return of case preparation increases, and goes down as the cost of going to trial increases.[9]

"Cases were more likely to settle if mediation was held sooner after the case had been filed…. Cases were *less* likely to settle if a motion to dismiss or for summary judgment was pending and if other motions were pending."[10] Some studies are ambivalent or give mixed results on the relationship between the status of discovery and settlement,[11] with

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[4] Thomas J. Miceli, "An Equilibrium Model of Lawmaking," 5-1-2008 http://digitalcommons.uconn.edu/cgi/viewcontent.cgi?article=1355&context=econ_wpapers, *citing* K. Spier, "The Dynamics of Pretrial Negotiation," 59 *Review of Economic Studies* 93-108 (1992).

[5] "In short, cases filed in jurisdictions with relatively long trial delays tend in most instances to have greater probability of settlement." G. Fournier, et al. "The Timing Of Out Of Courts Settlements," 27 *RAND Journal of Economics* 310, __(1996) (hereafter *Fournier*).

[6] Thomas J. Miceli, "Settlement Delay As A Sorting Device," 19 *Int'l Rev. L. & Econ*. 265, 265-266 (1999)(hereafter *Miceli*). See also *Fournier,* above n. 5. More particularly, and again as our intuition might suggest, the impact of the difference between the English and American rules is reduced as the trial stakes increase and as uncertainty about the defendants' liability increases. The English-American Rule distinction has a more pronounced effect on inhibiting settlement as the trial costs (i.e. the fees) increase. *Fournier*, *op. cit*. (reporting results from other studies).

[7] Fournier reports that the difference between the impact of the American and English rules (i) *increases* as trial costs increase and (ii) *diminishes* as the trial stakes increase, as uncertainty about defendant's liability increases. He concludes that the English rule generally discourages settlement, an effect which diminishes with the duration of the litigation. But it would seem that as the ligation goes on (reducing settlement possibilities under the English rule), uncertainty about the defendant's liability also should be reduced (as more information is uncovered) and trial costs would increase. These factors would *augment* the impact of the English rule.

[8] *"Settlement Delay As A Sorting Device," op. cit.*

[9] Bruce L. Hay, "Effort, Information, Settlement, Trial," 24 *J. Legal Stud.* 29, 50 (1995).

[10] Roselle L. Wissler, "Court-Connected Mediation In General Civil Cases: What We Know From Empirical Research, " 17 *Ohio St. J. on Disp. Resol*. 641, 677-678 (2002)(notes omitted); also in Wissler, Roselle L, "Civil Mediation: Which Cases Will Settle," 8 *Disp. Resol. Mag*. 28 (2001-2002). *See also*, R. Wissler, "The Effectiveness of Court Connected Dispute Resolution in Civil Cases," at 68-69 http://www.settlenow.org/files/Wissler_CRQ_2004_Mediation_Review.pdf

[11] "The Effectiveness of Court Connected Dispute Resolution in Civil Cases," above n.10 at 68-69.

other reviews being somewhat more precise, noting that settlement was twice as likely not to occur if there had been no discovery at all, whereas settlement was more likely if there had been *some* discovery, probably because the parties need to believe they are on a level playing field (reducing what I termed above the 'belief in asymmetry').[12]

Other work confirms our intuition that early settlements can be highly efficient where the parties have little need for formal discovery, such as in family law (divorce and custody) cases.[13] The private arbitration entity JAMS also recommends timing of settlement conferences as a function of the amount of discovery needed to allow the parties to have roughly symmetric knowledge about the case, including the identity of parties who may be brought in on future cross complaints.[14] Settlement is usually more difficult when there are multiple litigants.[15]

III. Rational, Irrational, and A-rational Factors

The literature on factors affecting settlement include both (i) empirical studies and observations, such as those referred to above, and (ii) game theory based academic papers.[16] Often, papers move between the two approaches, producing interesting insights into the reasons for both the timing and nature (amount) of settlements. But a brief look at one of these papers will lead me to suggest a third set of factors—the a-rational.

In his 1995 paper,[17] Hay starts by noting conventional wisdom- settlement is inhibited by asymmetric information. Then he asks why, after all discovery is complete, settlement is not readily reached by then, since by definition the information asymmetry has been removed. He concludes that a second, different type of asymmetry causes the two sides to differently estimate the settlement value of the case, "endogenous" factors

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[12] Henderson, Douglas A., "Mediation Success: An Empirical Analysis," 11 *Ohio St. J. on Disp. Resol*. 145 (1996).

[13] George C. Fairbanks, IV, et al., "Timing is Everything. The Appropriate Timing of Case Referrals to Mediation: A Comparative Study of Two Courts." State Justice Institute (2001). *See also,* McEwen, Craig, "Mediation in Context: New Questions for Research," 3 *Disp. Resol. Mag*. 16 (1996-1997)(early settlements most efficient when parties can quickly get the basic facts).

[14] "For instance, in a breach of contract case involving only two parties who are present in the litigation at its outset, most if not all necessary information is known pre-filing. The need for discovery is unlikely. Last, no expert evaluation or testimony will be required. This case is a prime candidate for almost immediate, if not pre-filing, mediation. [¶] A second hypothetical case illustrates how in employment or sexual-harassment cases, timing can be a bit more complicated. While we again have all parties present from the outset of the litigation, the information-gathering need is different in this case. Both sides may insist they have all the information they need. [¶] However, assuming the facts are hotly disputed, the testimony of witnesses will be vitally important for both sides. Until discovery of these witnesses is completed, mediation bears little likelihood of success. [¶] At the far end of the spectrum from the breach-of-contract case is a construction-defect case. Here we have numerous parties, many of which will enter the litigation by cross-complaints as the case moves forward. [¶] Much of the needed information is unknown until well after the initial filing and will come from a host of experts whose identity is unlikely to be known until much later. Apart from mediation involving admittedly peripheral parties, mediation of the main case, to be successful, must wait for a later day. Another possibility here might be mediation of parts of the overall dispute as the case progresses." Judicial arbitration and Mediation Services (JAMS), http://www.jamsadr.com/news/xpqPublicationDetail.aspx?xpST=PubDetail&pub=513

[15] *Fournier*, above n. 5.

[16] For further references on game theory in the context of settlement, see *Institutional Litigants, above* n. 2.

[17] Bruce L. Hay, "Effort, Information, Settlement, Trial," 24 *J. Legal Stud.* 29, 29-30 (1995).

(as opposed to the 'exogenous' factors, i.e. issues beyond the parties' direct control, such as facts uncovered in discovery). The endogenous factors have to do with the amount of time and effort invested in the case, exemplified by the lawyers' work product. Some lawyers will spend much and other little time preparing a case. Their estimate of the settlement value will likely rise as they increase their preparation not only because (as Hay calculates) a higher return is needed to compensate for the higher investment, but also (as I suggest) a better prepared lawyer may have more confidence in her case. In any event, the quantity and quality of work product investment is usually secret,[18] and this creates a new asymmetry which inhibits settlement.

I do not doubt endogenous factors inhibit settlement, but I doubt Hays' conclusion that parties' failure to settle even after information asymmetry has been eviscerated is primarily, or even often, attributable to this second (endogenous) type of asymmetry. Hayes has not, I warrant, sat in on many settlement conferences. By the time of a mandatory settlement conference in state court, about two to three weeks before trial, discovery is mostly done and the parties have a fair idea of the time and effort put into the case by the other side. The reason why cases fail to settle is often that the parties have a different view of the impact of the undisputed facts. They know for example, that witness X will testify and may even have a good sense from a deposition of how X will perform, but their evaluation of the impact of X on the jury may vary dramatically. So too with documents all parties acknowledge will be admitted at trial. Lawyers judge a case by squinting: they have a sense of how all the factors—witnesses, documents, their own presence and that of opposing counsel—will mesh and impress the tribunal. We sometimes call this the "optics" of the case, a term designed to express an overall judgment.

This sort of judgment, often based on what I term a-rational factors, is not handled well by game theory-based literature, perhaps because it is difficult to model.[19]

Even more difficult, there are entirely irrational case valuations, often evident when people (including lawyers) represent themselves and when lawyers have little or no control over their clients.[20] Classic game theory-based literature usually assumes economically rational players, but many are not.[21] A better understanding of settlement, and so the techniques needed to encourage and accelerate it, must also depend on a study of the cognitive fallacies which result in irrational behavior.[22]

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[18] C.C.P. §§ 2018.010-2018.080.

[19] Researchers have, however, modeled the impact of the American rule on lawyers' evaluation of the strength of their cases, and have concluded these lawyers are generally overly optimistic, which in turn inhibits settlement. Oren Bar-Gill, "The Success and Survival of Cautious Optimism: Legal Rules and Endogenous Perceptions in Pre-Trial Settlement Negotiations," above n. 3.

[20] *See* below, § IV (C)(v) (discussion of self represented litigants).

[21] *See e.g.,* Frank B. Cross, "In Praise of Irrational Plaintiffs," 86 *Cornell L. Rev*. 1 (2000-2001). Professor Cross discusses the important irrational factors, such as vengeance, vindication, anger, and others which inhibit settlement but which are not well treated by the literature on settlement. *See also*, John Bronsteen, "Hedonic Adaptation And The Settlement Of Civil Lawsuits," 108 *Colum.L.Rev.*1516, 1523-1525 (2008).

[22] *E.g.,* Jonah Lehrer, HOW WE DECIDE; Tavris, MISTAKES WERE MADE (BUT NOT BY ME); M. Gladwell, BLINK; L. Mlodinow, THE DRUNKARD'S WALK; N.N. Taleb, FOOLED BY RANDOMNESS; N.N. Taleb, THE BLACK SWAN; Chabris et al., THE INVISIBLE GORILLA; D. Ariely, THE UPSIDE OF IRRATIONALITY; D. Ariely, PREDICTABLY IRRATIONAL. Most of the lessons from these books apply to the conduct of the settlement conference itself, and less to the scheduling of the conference.

We know both from our experience and studies[23] that cases with prepared lawyers settle more frequently than when lawyers are not prepared. Whether or not it is rational for lawyers to prepare for these conferences depends on considerations such as the expected odds that the case will actually settle (a nice loop), but sometimes lawyers are unprepared because they are just sloppy, foolish, unprofessional, or too busy—none a rational cause as far as game theory is concerned. The failure to settle might thus be quite the opposite of the endogenous cause identified by Hays: not *enough* investment also generates failure at the settlement conference.

IV. Factors in Settlement Timing: Extrapolation

The studies mentioned above suggest a variety of factors affecting the timing of effective settlement conferences. These factors operate across a spectrum of efficient timing, but it would be a false precision to allocate them other than I do, simply with some factors suggesting early settlement and others suggesting settlement conference towards the end of the life of the case.

A. *Settlement efficient early in the case.*

The following cases should settle early in the litigation. Generally, there is a high degree of knowledge symmetry in these matters: most if not all the relevant facts are know early and to all parties, and often indeed before the complaint is filed. Also, the amount of money available for litigation costs and expected recovery are both low, diminishing the utility of litigation.

i. Family court cases, such as divorce and custody cases.

ii. Cases involving small partnerships, such as accounting, dissolution, and other partnership disputes.

iii. Other cases where parties have all the information they are likely to need before filing. To the extent the key information (documents and witnesses) are within a party's control, then to that extent the party will be ready for settlement *earlier*, but the other party also needs this information to allow for the earlier settlement.

iv. Attorney fees available (English rule). Some studies cited above suggest this factor inhibits early settlement, an influence which wanes as the case progresses. As I suggest (above, note 7), the studies' results are ambiguous. We know from experience that the availability of attorneys fees often blocks settlement late in the life of the case, especially when the fees expended outweigh the reasonable settlement of the case absent such fees. Parties reach this intolerable position late in the life of the case after expending fees putatively confident in the outcome—that is, ironically, earlier in the case when they have less information on which to base expectations of success. Thus I expect the existence of a mutual attorneys fees provision to support early settlement when the merits are relatively clear to both sides, to impede settlement at late stages when the

[23]Roselle L. Wissler, "Civil Mediation: Which Cases Will Settle," 8 *Disp. Resol. Mag*. 28 (2001-2002).

merits are clear, and to severely inhibit settlement at all stages of litigation when the merits are arguable.[24]

v. Small amount of money at stake.

vi. Neutral factual evaluation may be decisive. In some cases, the outcome depends on neutral fact finders, such as accountants in certain types of property disputes such as corporation or partnership dissolutions,[25] or structural engineers in some types of construction defects cases where the parties have agreed to rely on such reports. These sorts of cases are ideal for early resolution because by definition the same key information is in the hands of all parties.

vii. A party fears publicity as a result of the litigation.

viii. The result won't cost the defendant a lot of money, such as ADA accommodations, taking a simple step to accommodate the plaintiff, re-hiring an employee, or a letter of apology.

ix. If immediate injunctive relief is sought. These matters are often resolved early by the court, for practical purposes, at the stage of a temporary restraining order or preliminary injunction. Once the court has tipped its hand by the ruling, the parties are usually in a good position to resolve the dispute without much more litigation.

x. Defendant is judgment proof. This factor may have various effects, some in contradiction. On the one hand, it is waste of time for the plaintiff to pursue the case. On the other hand, the defendant has nothing to offer by way of settlement but by the same token cannot afford to sustain continuing legal fees. In practice these cases present a spectrum of defendants who can afford to pay more or less money, and either are representing themselves or have an arrangement with a lawyer (often to his everlasting regret) to continue with the representation for a nominal amount. In any event, nothing good comes of enduring litigation, and these case should settle early.

B. *Settlement efficient later in the case.*

Cases with the following features usually settle relatively late in the litigation.

i. Expert testimony is the *sina qua non* of case evaluation. Usually, experts must wait for the completion of fact discovery before they can do their work. But this is not always true; where the facts are commonly known and not subject to much dispute, experts may be able to render opinions early in the case. Too, some case which traditionally depend on expert testimony, such as medical and legal malpractice, can be resolved without experts at all, such as in cases of *res ipsa loquitor* when any lay person can make the evaluation.

ii. Substantial discovery is needed to have any sense of the merits.

iii. Complex and class action litigation, where virtually all the evidence is in the hands of one party and considerable recourses will be spent by the other party to winkle it out.

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[24] Contrast class actions, and other one-way fees statutes where fees may be available both as a function of (i) time spent and (ii) percentage of money paid in settlement. In these cases, plaintiffs' counsel have some incentive to extend the life of the litigation to increase the impact of at least the first factor.

[25] *E.g.,* Corp. C. § 2000 *et seq.*

iv. Multiple parties, including those coming in via cross complaints, such as in construction defect litigation. It may take a year or more to simply have all the parties in the action, as one cross defendant brings in another (following interminable demurrers and motions to dismiss).

v. Sunk Costs. Parties with sunk costs present considerable impediments to early settlement. These include roughly three types of litigators: (1) people representing themselves, (2) parties represented by in-house counsel or (3) captive counsel (i.e. on a general retainer). Depending on how expensive discovery is, these sorts of parties incur very low marginal costs in continuing with litigation, and the strategy of refusing early settlement makes sense where the other side is a plaintiff with high demands or high attorneys fees.[26]

vi. Prepared lawyers. As noted above, prepared lawyers settle cases more easily than the unprepared, and lawyers tend to be more prepared when within e.g. two to three weeks before trial. Before this period, lawyers are generally involved in a variety of cases, but nothing focuses the mind more than an imminent trial. This criteria cuts across all case types, and it may that for this reason many judges default to setting settlement conferences "30 days before trial," with "high settling judges favor[ing] having them closer to, but not on, the day of trial."[27]

vi. Decisive Motions. While, as I have suggested, all sorts of uncertainties exist at any stage of the litigation, it is common to evaluate the impact of a forecast or impending decisive motion, such as a demurrer, motion to dismiss or for summary judgment. The research cited above shows that a pending (filed) decisive motions inhibits settlement, perhaps because the proponent is convinced of the power of the motion and has already invested all the resources necessary to have it decided. Unfiled but threatened motions, including potentially decisive pre-trial motions (motions *in limine*) such as those seeking the exclusion of experts or key documents, may have a substantial impact on settlement positions; but because these motions usually reflect the state of completed evidence and often depend for their power on the fact that discovery is closed, they too will not exact their influence until very late in the case. Decisive motions which do *not* depend on the state of completed evidence, but rather on facts easily ascertainable at the commencement of the case, such as demurrers on the basis of statute of limitations, capacity to sue, standing, *res judicata,* and the like too are unlikely to generate the basis for an early settlement, because the motion's proponent will usually be unwilling to pay the plaintiff much when relief from the court appears so certain.

In sum, the impact of the availability of decisive motions probably does not modify the calculation based on the need for discovery: if little or no discovery is needed, early settlement may be feasible, otherwise not.

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[26] Of course, for the plaintiff willing to account in his demand for the opponent's sunk costs, cases may settle earlier. The tables may be turned: highly experienced plaintiffs' lawyers may have sunk costs vis-à-vis a new defendant.

[27] Peter Robinson, "Settlement Conference Judge: Legal Lion or Problem Solving Lamb: An Empirical Documentation of Judicial Settlement Conference Practices & Techniques," 33 *Am. J. Trial Advoc.* 113, 120 (2009), http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=peter_robinson. I use the word "default" in the text advisedly because, obviously, courts should try to identify cases which may settle earlier. *See infra*, § V. The fact that cases have a high rate of settlement just before trial does not imply that a subset would not have settled earlier, with less expense to the parties and less wear and tear on the court system.

C. *Indeterminate factors.*

Some factors may play a significant role in the timing of a settlement conference, but are of indeterminate effect, probably because they interact with other factors to produce different results. Nevertheless, in any given case their impact should be assessed, and further empirical research may reveal tendencies.

i. Contingent fees. Contingent fees, at least outside the context of class actions, help ally the interests of lawyer and client. The express or implicit pressure counsel places on the settlement decisions of the client will likely tend to leach out non-economic issues, "principles,"[28] and some irrational positions, all of which inhibit settlement in favor of maximizing purely economic gain. For this reason, some cases may be easier to settle earlier. On the other hand, where wealthy plaintiff's counsel can sustain the expense of litigation in a case where the client could not—a usual case—the economic pressures to settle early will not be as effective, suggesting that contingent fees tend to push effective settlement towards the later end of the spectrum. But otherwise it is difficult to forecast the role of a contingent fee. See above, note 24.

ii. Institutional litigants. These are parties who litigate repeatedly, and where a settlement position (and verdict) in one case affects an unlimited number of future cases. With institutional litigants, the 'word gets out' to future opponents, reputations are created, and settlement postures accordingly are often not a function of the merits or other pressures of a given cases, but of a slew of cases including those (i) in other jurisdictions, (ii) with highly varying merit and, sometimes, (iii) yet to be filed. Insurance companies, district attorneys, public defender offices, city counsel and so on are institutional litigants. So too lawyers who routinely practice in a specialized field, known as such by her opponents, i.e. asbestos, personal injury, or criminal defense. Settlement dynamics in these matters often are only remotely driven by the merits of the specific case.

On the one hand, an institutional litigant's high level of experience suggests the ability to settle a case early, using knowledge gained from similar cases to fill in the gaps, as it were, of a new case early on in the process. In some of these cases, the lawyers are intimately familiar with the legal issues, and indeed with the precise testimony expected from the 'usual suspects' i.e., the repeating group of witnesses who testify in every such case.

On the other hand, we have complex cases involving large numbers of institutional litigants, such as asbestos litigation, where we commonly see roughly the same hundred defendants named in the complaint—a complaint filed by the same plaintiff firm in scores or hundreds of cases. The dynamics of settlement in such cases is very complex, arguably more complex than the litigation of the case. As suggested above, extraneous factors may trump the factors specific to the case (such as its merits and costs).

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[28] By "principle" here I mean non-economic ("irrational") motivation for litigation such as revenge, a desire to punish or ensure the other side is not rewarded 'unjustly,' and so on. As irrational, but very common, is the settlement position premised on what I term the Viet-Nam Syndrome in which parties, having spent so much in litigation up to the point of the settlement conference, refuse to settle for a reasonable sum (as compared to what a jury might award).

Complex multiple party cases may be settled in groups, with lawyers throwing in cases with high and low potential recoveries to generate agreement on an overall sum and avoid dispute in a specific case. Such group settlements may include new *and* old cases, and cases from various jurisdictions. A specific case, while on its own ripe for settlement early, may not be attended to because the lawyers are in constant crisis mode, working only on cases which are about to be sent out to trial. Cases with many parties also settle across a *span* of time, with some parties settling early and others as trial approaches. The timing here is driven by many intersecting factors.[29] For example, (i) insurance limits may be close to being reached as a result of multiple cases, and the plaintiff may be willing to take a relatively small early settlement; (ii) a defendant may wait until other defendants have settled, hoping that any jury verdict suffered will be eviscerated by the earlier settlements;[30] (iii) by the same token, plaintiffs who have accumulated large settlements may not be willing to spend the money to take residual defendants to trial, and may dismiss them (or take very low settlements) but not until the eve of trial, again causing a delay in settlement; (iv) evidence taken in *other* cases may make it clear, very early in a new case, that a defendant is likely to be found liable, encouraging settlement earlier; (v) towards the end of a reporting period or fiscal year, companies which have set aside reserves may be more willing to settle if the reserve remains generously funded, and less (or entirely) unwilling to settle if the reserves are about to be exceeded.

It may be that one of a number of apparently fungible cases litigated by institutional litigants is more easily settled—that is, taken out of the complex calculation reflecting the litigant's overall posture—when it can be distinguished from that mass of cases. In practice, lawyers seeking settlement often take this tack, suggesting for example to the insurance company defending a car accident case that the company's usual tactic of offing no more than a set sum for a certain type of injury should be waived because of the unique features of the case. It can take time to discover unique factors, and it inevitably follows that the institutional knowledge of the institutional litigants cannot be used to "fill in" knowledge gaps early in the case to determine the unique factors.[31]

In brief, it is difficult to generalize with cases with institutional litigants, and especially those which are complex. Further research on the interplay of the relevant factors, only some of which are listed above, would be useful. Because general rules on timing settlement are not useful in these cases, they must be managed by a single judge.

iii. Expensive cases. The reports cited above suggest that high expenses in discovery and other pretrial work delays settlement and makes it more difficult. One must be careful here, though. While the difficulty and delay in settlement may well correlate with high litigation costs, it does not of course follow that high cost causes the delay. Instead, it is likely that some cases just take considerable effort—money and time—to find out about the merits. Here, 'high expense' is just a proxy for the factor of complex cases cited above at § IV B.

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[29] I am grateful to my colleague Judge Harold Kahn of this Court for his insight on these issues.

[30] Under California law, defendants suffering a judgment of economic damages are usually entitled to a credit of the settlements or other judgments recovered by the plaintiff. C.C. § 1431.2; C.C.P. § 877.

[31] For more on the dynamics of settlement in the context of intuitional litigants, see *Institutional Litigants,* above n. 2.

There are, unfortunately, cases involving very high cost where the merits can be discerned relatively cheaply; these are failures of the justice system. Where lawyers must wait for years for a courtroom, where judges never limit discovery based on undue burden, or never punish frivolous discovery responses, or fail otherwise to supervise litigation, where summary judgments are never granted or frivolous ones routinely entertained—where parties are, in short, permitted to grind their opponents into dust—there high costs alone may influence the timing of settlement, but with an unpredictable general effect.

iv. Case brought to establish new law. Some cases are brought to establish a new principle of law or for reasons external to the merits of the case. No generalizations on efficient settlement can be made about such cases.

v. Self represented litigants. It would be useful to have research on the impact of self represented litigants (or "pro pers") on the timing of effective settlement. I have seen pro pers towards the end of the process, a few weeks from trial, highly anxious, and deeply angry at the time, emotional toll, and sometime cost (they may have spend money on counsel previously) by the time I see them. This entrenches them in unreasonable settlement positions; regardless of the odds of success at trial, they sometime simply wish to get their 'day in court' and damn the consequences. This of course suggests settling as early as possible. On the other hand, pro pers cannot, early in the case, predict the costs, issues, and odds of success. A mediator does not have, early on, the powerful photograph, medical report, deposition testimony, or other evidence to suggest weakness in the pro per's case. On balance, an early settlement with an articulate and empathetic mediator who can help the pro per envision the likely progress of the case may be the best bet.

vi Insurance. Insurance coverage is often the elephant in the room at settlement talks. If there is a reservation of rights and little or no chance the insurance company will pick up the indemnity, the insured has little incentive to pay early in the litigation, and so may threaten to use his funded defense to increase plaintiff's cost of litigation and so drive down plaintiff's demand. Of course, nothing prevents the wise plaintiff from reducing his demand in recognition of the costs of this potential delay, and wise insurance companies should offer some smaller settlement early on to reduce their defense cost. But at least two factors interfere with such an early settlement. First, the insured may have assets to pay a large judgment, and a plaintiff who believes the merits justify the large judgment will not settle for something like the cost of defense. A case with a strong claim for punitive damages, for example, will not settle early for the cost of defense where the insured has substantial assets. Secondly, even though there is a formal reservation of rights there may be some likelihood that the insurance company will in fact have to pay the indemnity (i.e. judgment). Here too the wise plaintiff will press claims which invoke coverage—indeed, will draft his complaint with coverage in mind—and probably will not reduce his early demand to induce the insurance company to pay to avoid the cost of defense.

A wasting policy (where there is a single coverage limit for defense costs and indemnity) will encourage an early settlement, but again only to the extent the insured does not appear to have the assets to respond to a high verdict. Other attempts by plaintiffs to secure settlement from the insurance company, such as making a (hopefully)

credible policy limit demand may be effective,[32] but does not favor any particular time for settlement as long as it is before the verdict.

V. Court Action

Many courts usually default to ordering settlement conferences about three weeks before trial.[33] By this time, almost all the money in pretrial preparation has been spent. This timing does not serve the goals suggested in § I of this note.

To be sure, late conferences are suitable for many sorts of cases, as noted above, but are counter-productive for other sorts of cases. The trick is to identify the cases suitable for earlier treatment and provide that early opportunity; and to shift the dynamics of the other cases so as to enable earlier settlement.

The judge's key tool in understanding a case is the case management conference (CMC). Among other things, a CMC helps the judge evaluate all the factors discussed so far in this note and determine where the case is on that spectrum of cases susceptible to early to late settlement conferences. In federal court, and in state single assignment (direct calendar) matters, there is usually enough time in a CMC for this review. But in other cases, many CMCs are held "on the papers" and en masse. Unless the lawyers speak up to suggest an earlier conference, or arrange it themselves, the case will default to the usual late settlement conference.

But the basic point here is that timing a settlement conference is a case management task.

There is another function of the CMC in relation to settlement conferences. When a judge in a CMC arranges future proceedings to enable settlement, the judge is sending a signal not only that the case is expected to settle, but that it will settle on a rational basis, i.e., based on calculations of the merits such as expected recovery at trial, the costs of litigation, and so on. The ground is laid to obviate the irrational bases that impede settlement; and the judge should be express about this contemplation. For this reason, it is beneficial to have clients attend CMCs.

A problem in state court is that CMCs are set for about 180 days from the filing of the complaint—the case is already ½ year old at that point.[34] Considerable expenses may have already been incurred in demurrers and early discovery. Thus courts should consider setting a CMC at the request of any party at any time. Even if the case is not ripe for settlement, the CMC can be used to shape the subsequent events in the case, as described below, to enable settlement sooner rather than later. Because the studies suggest that success at settlement is not related to the status of discovery (as long as *some* discovery has taken place), even some complex cases may be able to settle early.

There are some judges who routinely will see cases before the normally set CMC: i.e., law and motion judges. Using the factors discussed above they may be able to pick

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[32] If the insurance company unreasonably turns down a policy limit demand and the verdict is in excess of the policy limits, the insurance company (having failed to protect its insured) may be on the hook for the excess.

[33] E.g., San Francisco Local Rule 5.0.

[34] Contrast federal practice in e.g. the Northern District of California, where these conferences occur 90 days out from the filing of the complaint. Civil L.R. 16-2 (a).

out cases for an early CMC, and relay that to a CMC calendaring department. Even a 'one shot' CMC which is not repeated (as it would be with a direct calendar judge) may be useful.

The CMC is an opportunity not only to see if a case is ripe for settlement, but, more commonly, to shape the case to enable settlement. The parties and judge should usually opt to have preliminary discovery on the bare necessities, the facts needed to ready the case for settlement; and only if that fails to open the case to all discovery needed for trial.[35] At a CMC, the judge may be able to arrange for fast informal discovery of this preliminary material. The judge can also (on motion) order early expert discovery.[36] In California state courts where expert discovery is relegated by law to the last month or two of the case, this order can be crucial to setting up a case for early settlement discussions. Expert discovery should be taken early in the case when the facts are not in dispute, or are in the public domain.

The case may be susceptible to neutral fact finding by an agreed-upon expert or panel of experts. In some cases, the procedure is mandatory.[37] If the case is farmed out in this manner, the court should generally stay proceedings pending the result. The court may also recommend a court appointed expert whose findings are likely to be highly persuasive to both sides.

In complex cases or where for other reasons substantial discovery normally is taken before settlement is ripe, some considerations should be given to techniques which may substitute for this discovery. Experienced counsel in an area may be able to estimate settlement value from past cases. The case may be sent out for mediation before such an experienced lawyer, a mediator from the industry at issue, or a judge who has handled these sorts of cases.

Where questions about insurance coverage interfere with an early disposition, the lawyers litigating or negotiating the coverage dispute should be ordered into an early settlement conference to enable all the issues to be resolved simultaneously.

In cases with many parties, the 'smaller' parties should be encouraged to drop out of the case with relatively small, early settlements, coupled with finding that the settlements were entered into in 'good faith.' Such findings under state law preclude the settling parties from being brought back into the fray via others' cross complaints,[38] thereby assuring eternal peace from future involvement in the case on payment of a reasonable sum to the plaintiff.

VI. Court Action at Settlement Conferences

Judges handling mandatory settlement conferences operate under some handicaps. First, time is extremely limited. Unlike private mediation services which charge by the hour and where the mediator is generally open to long sessions, judges have very limited

[35] R.F. Peckham, "Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution, A Symposium: Reducing the Costs of Civil Litigation," 37 *Rutgers Law Review* 253 (1995).
[36] C.C.P. § 2034.230 (b).
[37] Corporations Code § 2000.
[38] C.C.P. § 877.6 (for equitable, not contractual, indemnity claims); *see also* CRC 3.1382.

time for their conferences, often fitting them in between hours reserved for trials and other work. Second, the mandatory conference is by definition not set by the parties, and judges routinely see lawyers who are simply going through the motions of complying with yet another court order. Their refusal to take the conference seriously is a self fulfilling prophecy.

With this as background, and considering the other issues raised above, there are a few actions judges can take to improve the efficiency of mandatory settlement conferences—aside, that is, from the important matter of proper timing.

First, judges must enforce the rules they have. These rules generally require the participation of people with full authority to settle the case, and the exchange of settlement demands and offers before the conference.[39] Local rules such as those in San Francisco require the previous exchange of demands of offers, service of a settlement conference statements, and for persons with authority to settle, including specifically insurers, as well as the lawyer who will try the case, to attend the conference. The demands and offers made in advance of the conference should be in writing and include a brief explanation for the position taken.[40] Many of these requirements are routinely ignored, which creates a vicious circle of ineffective conferences and inattention to the rules.

All judges of the court must be on the same page here, and must uniformly enforce these rules. It follows that highly predictable sanctions must be imposed when the rules are not followed. Well in advance of the settlement conference, a trial date should have been set to assist the parties in focusing on what might be termed the fierce urgency of the moment.

Finally, judges should consider pre-hearing conferences with the parties.[41] A phone call about a week or 10 days in advance of the conference will have many salutary effects. First, it sends the strong signal that the court takes the matter seriously, and intends to settle the case. The judge ensures that the local rules have been followed, for example that demands and offers have been exchanged. The judge signals that out of town participants should not e.g., have a flight reservation for the evening of the conference, since it might extend past that time, and that all necessary people will in fact attend. Occasionally, this call will result in a postponement of the conference if a necessary person is unavailable or a key issue needs first to be resolved. Occasionally, the judge finds out the case has already settled.[42]

VII. Conclusion

I have not discussed here settlement techniques, that is, the methods, generally specific to a case, designed to encourage settlement at the conference. But as important is the *timing* of the conference, and I have found few useful studies on how to calculate

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[39] CRC 3.1380.

[40] Helen W. Gunnarsson, "Making The Most Of Settlement Conferences" 94 *Ill. B.J.* 178 (April, 2006)(federal magistrate practice).

[41] I am indebted to my colleague Judge Jeffrey Ross of my Court for developing this approach.

[42] Astonishingly, some lawyers are unaware of CRC 3.1385 which requires prompt notice to the court of settlement.

this. It is clear, I suggest, that the issue is comprehended by the more general notion of case management. Ideally, litigation would be managed on a case by case basis, each matter the subject of careful consideration by the judge, with repeated conferences as needed. The case would then be selected for mediation at just the right moment.

But in most state courts this is not possible. In California, we had in the 2008-2009 fiscal year 1630 authorized trial judgeships[43] and over ten million cases filed.[44] Thus, we need to generalize, sorting cases into those likely to settle early or late. Required, therefore, is further work using not only empirical research and theoretical analysis but also the integration of the experience of mediators and judges, with the results parlayed to practical recommendations.

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[43] California Judicial Branch "Fact Sheet" (September 2010), found at http://www.courtinfo.ca.gov/reference/documents/factsheets/Calif_Judicial__Branch.pdf

[44] Of course this figure includes a very large number of cases not the subject of civil case management or mediation, because they are, for example, criminal cases. But by the same token, not all the judges do civil work: a large number are assigned to criminal and other divisions. These are the specific figures: Superior court case filings across all case categories totaled 10,255,360, and dispositions totaled 8,733,177. Within these aggregate numbers, we have (1) Civil filings totaled 1,731,135, and civil dispositions totaled 1,513,146; (2) Criminal filings totaled 8,356,478, and criminal dispositions totaled 7,072,372; (3) Juvenile filings totaled 137,960, and juvenile dispositions totaled 121,484. http://www.courtinfo.ca.gov/reference/documents/csr2010intro.pdf