Settlement : An Empirical Documentation of Judicial Settlement Conferences Practices and Techniques

Peter R Robinson
Settlement Conference Judge: Legal Lion or Problem Solving Lamb: 

An Empirical Documentation of Judicial Settlement Conference Practices & Techniques

Peter Robinson*

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Introduction

Encouraging settlement is increasingly being recognized as an integral aspect of the work for many judges\(^1\). This trend is championed as a path to superior justice and as a means to judicial efficiency. It is also criticized as an inappropriate blurring of roles and threat to the appearance of justice. Some critics have expressed concern that the need to manage dockets may cause some judges to be coercive in their efforts to encourage settlements. One aspect of this concern is that the settlement efforts of judges are largely conducted in chambers and without the presence of a court reporter, so there is rarely a record of exactly how a particular judge encouraged a particular settlement.

This article seeks to contribute to this discussion by presenting empirical data on how judges perceive they encourage settlement. This article intends to be useful to those interested in this debate by documenting a comparatively rare perspective on how judges encourage settlement. Data from surveys on perspectives of parties or attorneys are more readily available. The debate over the appropriateness of this role should be enriched by information on the judges’ perspective of what they do when they are in this role.

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

The contrast in the title of “Legal Lion” or “Problem Solving Lamb” forecasts two of the variables discussed in this article. The first contrast investigates the extent that settlement judges focus on the legal strengths and weakness compared to solving an underlying problem. The second contrast regards the degree of directiveness in the settlement judges’ technique: lion or lamb.

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

\(^1\) For a summary of the literature documenting this phenomenon and the criticisms and support for it, see Peter Robinson, *Adding Judicial Mediation to the Debate about Judges Attempting to Settle Cases Assigned to Them for Trial*, 2006 J. of Disp. Res. 335, at 337-341 (2006).
A. Methodology for Surveying California Judges

California’s Administrative Office of the Courts (“AOC”) allowed the author to survey the approximately 1800 Californian trial and subordinate judicial officers regarding judges attempting to settle civil or family law cases. The data developed from this survey is suspect in that the judges were self reporting and thus prone to view and interpret themselves in the best possible light. The AOC participated in developing the survey, which asks judges about their views regarding judges assisting in settling cases and their practices during of the period of 2000 and 2004.

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

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

- General Civil
  - 129 respondents

---

2 This includes all elected and appointed trial judges and commissioners.
3 “[P]eople’s assessments of their own abilities to meet various challenges exceed the best dispassionate analyses of those abilities.” Thomas Gilovich et al., Shallow Thoughts About the Self: The Automatic Components of Self-Assessment, in The Self in Social Judgment 67 (Mark D. Alicke et al. eds., Psychology Press 2005). “[P]eople’s assessments of their own traits and abilities have been shown, time and time again, to be overly optimistic.” Id.
4 Special appreciation is expressed to AOC staff attorneys Karene Alvarado, Heather Anderson, and Alan Wiener, and Judge E. Jeffrey Burke.
5 Survey attached as exhibit A
6 The instructions stated that participation was completely voluntary and that respondents were free to not answer any question for any reason. The judges were told that participation would assist in documenting judicial norms and they could receive a composite summary of the responses by returning a separate postage paid postcard, even if they chose to not complete the survey.
7 The judges were informed of the AOC’s partnership with a law school professor on this research project to insure the anonymity of their responses. The judges knew that even the law school professor would not know which judges responded and only the aggregate compilations of the data would be provided to the AOC.
8 The concern was that the responses from the approximately 200 judges who had completed the Straus training program might be positively biased because they appeared to appreciate the training and like the faculty. In light of this concern, neither Pepperdine nor Malibu were identified in any of the correspondence which contained the cover letter, return address envelope, post card and the questionnaire itself. The last question, which lists various training programs including JAMS, AAA, community mediation organizations, and Pepperdine, was the only exception.
9 The California Rules of Court define “General Civil Case” as “all civil cases except probate, guardianship, conservatorship, family law (including proceedings under the Family Law Act, Uniform Parentage Act, and Uniform Child Custody Jurisdiction Act; freedom from parental custody and control proceedings; and adoption
Family Law 72 respondents
- Limited Jurisdiction Civil 22 respondents
- Complex Civil 6 respondents
- Marked more than one of the above 10 respondents
- Did not conduct settlement conferences in any of the above types of cases in the last four years 85 respondents
- Did not respond to this question 44 respondents

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

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


In this context, "limited jurisdiction" means that a court has [pecuniary] restrictions on the cases it can decide. See Black's Law Dictionary 869 (8th ed. 2006). E.g., small claims is a court of limited jurisdiction, because it can only hear cases that claim damages of $5,000 or less. In 2004, California’s Limited Jurisdiction Courts handled cases that claimed damages up to $25,000. C.C.P. § 85 (a).

Complex civil cases” are “cases that require exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants,”; and “may involve such areas as antitrust, securities claims, construction defects, toxic torts, mass torts, and class actions.” CALIFORNIA ADMINISTRATIVE OFFICE OF THE COURTS, COMPLEX CIVIL LITIGATION FACT SHEET 1 (2006), available at http://www.courtinfo.ca.gov/reference/documents/comlit.pdf.

While this number is small, at the time of the survey there were only 17 Complex Civil Judges in the entire state of California.
B. Percentage of Settlements and Template for Presenting Data

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

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

“The percentage of cases that settle at my settlement meetings is about ____.”

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

The responses for this question reveal the following percentages of judges reporting the corresponding frequency of accomplishing settlement at settlement conferences: 14

<table>
<thead>
<tr>
<th></th>
<th>All Judges</th>
<th>General Civil</th>
<th>Family</th>
<th>Limited Jurisdiction</th>
<th>Complex Civil</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt;25%</td>
<td>5</td>
<td>7</td>
<td>9</td>
<td>15</td>
<td>0</td>
</tr>
<tr>
<td>25-49%</td>
<td>14</td>
<td>12</td>
<td>14</td>
<td>10</td>
<td>0</td>
</tr>
<tr>
<td>50%</td>
<td>19</td>
<td>19</td>
<td>20</td>
<td>38</td>
<td>17</td>
</tr>
<tr>
<td>51-74%</td>
<td>18</td>
<td>22</td>
<td>10</td>
<td>10</td>
<td>17</td>
</tr>
<tr>
<td>75% (+)</td>
<td>49</td>
<td>42</td>
<td>52</td>
<td>30</td>
<td>66</td>
</tr>
</tbody>
</table>

The data reveal that for all judges 49% report accomplishing a settlement in 75% or more of their settlement conferences and that 38% report accomplishing a settlement in 50% or less of their settlement conferences. This data can isolate the responses for different judicial assignments. Thus the third column establishes that 42% of general civil judges report accomplishing a settlement in 75% or more of their settlement conferences and 38% report accomplishing a settlement in 50% or less of their settlement conferences. The results for general civil judges can be compared to family judges in the fourth column where 52% report accomplishing a settlement in more than 75% of their cases and 43% report accomplishing a settlement in 50% or less of their settlement conferences. Columns five and six provide the data for limited jurisdiction and complex civil judges.

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14 Many of the columns add up to more than 100% because throughout the study, the investigators rounded up for results that were 0.5 or higher and rounded down for results that were less than 0.5. This raw data for many of these columns had results with higher than 0.5, creating an outcome greater than 100%.
While this data alone is interesting, it also allows the organization of other data into sub-categories for high and low settling judges. Thus some distinctions in the data will be reported in graphs using the following columns across the top to indicate the groupings of judges whose results are being reported.

<table>
<thead>
<tr>
<th>General Civil</th>
<th>General Civil</th>
<th>General Civil</th>
<th>Family</th>
<th>Family</th>
<th>Limited Jurisdiction</th>
<th>Complex Civil</th>
</tr>
</thead>
<tbody>
<tr>
<td>All</td>
<td>Top</td>
<td>Bottom</td>
<td>All</td>
<td>Top</td>
<td>Bottom</td>
<td></td>
</tr>
</tbody>
</table>

The first column reflects the percentages for the 129 general civil judges who completed the survey. The second and third columns are subsets of the first column. The second column isolates the survey results for judges settling 75% or more of their cases. Similarly, the third column isolates the survey results for judges reporting settling 50% or less of their cases. General civil judges interested in increasing their settlement rates should be interested in comparing the second and third columns.

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

Chapter I MECHANICS

The timing and length of settlement conferences could have a significant impact upon the likelihood of settlement. The number of settlement conferences per week combined with their length reveals the extent to which they are dominating judges’ calendars. The first section of analysis focuses on these metrics.

Chapter 1. A When the Settlement Conference Occurs

The survey asked judges to fill in the blank for the following question:

“I most typically schedule the settlement meetings ____ days before trial. (use 0, if it is the day of trial)”

---

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

16 Note that not every participating judge responded to every question. Thus, the percentages for a given question reflect responses for the judges that answered the particular question.
The responses in percentages of judges reporting various ranges of days are:

<table>
<thead>
<tr>
<th>Days Before Trial</th>
<th>General Civil All</th>
<th>General Civil Top</th>
<th>General Civil Bottom</th>
<th>Family All</th>
<th>Family Top</th>
<th>Family Bottom</th>
<th>Limited Jurisdiction</th>
<th>Complex Civil</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>6</td>
<td>8</td>
<td>5</td>
<td>16</td>
<td>13</td>
<td>16</td>
<td>9</td>
<td>50</td>
</tr>
<tr>
<td>1-10</td>
<td>17</td>
<td>29</td>
<td>9</td>
<td>26</td>
<td>32</td>
<td>16</td>
<td>14</td>
<td>0</td>
</tr>
<tr>
<td>11-29</td>
<td>28</td>
<td>30</td>
<td>29</td>
<td>20</td>
<td>12</td>
<td>24</td>
<td>32</td>
<td>50</td>
</tr>
<tr>
<td>30</td>
<td>26</td>
<td>13</td>
<td>34</td>
<td>18</td>
<td>17</td>
<td>24</td>
<td>23</td>
<td>0</td>
</tr>
<tr>
<td>More than 30</td>
<td>27</td>
<td>27</td>
<td>25</td>
<td>24</td>
<td>22</td>
<td>20</td>
<td>26</td>
<td>0</td>
</tr>
</tbody>
</table>

The most common response for general civil judges was 30 days before trial, but notice that the high settling judges favored having them closer to, but not on, the day of trial. More family judges had settlement conferences on the day of trial than general civil judges and the high settling judges with both assignments seemed to prefer for them to occur 1-10 days before trial.

Chapter 1.B  Length of Settlement Meetings

The survey asked judges to fill in the blank for the following question:

“My settlement meetings most typically last about ____ minutes”

The responses in percentages of judges reporting various ranges of minutes are:

<table>
<thead>
<tr>
<th>Minutes</th>
<th>General Civil All</th>
<th>General Civil Top</th>
<th>General Civil Bottom</th>
<th>Family All</th>
<th>Family Top</th>
<th>Family Bottom</th>
<th>Limited Jurisdiction</th>
<th>Complex Civil</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt; 30</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>21</td>
<td>19</td>
<td>19</td>
<td>15</td>
<td>0</td>
</tr>
<tr>
<td>30</td>
<td>5</td>
<td>4</td>
<td>7</td>
<td>22</td>
<td>7</td>
<td>41</td>
<td>15</td>
<td>0</td>
</tr>
<tr>
<td>31-59</td>
<td>15</td>
<td>12</td>
<td>12</td>
<td>16</td>
<td>13</td>
<td>19</td>
<td>35</td>
<td>0</td>
</tr>
<tr>
<td>60</td>
<td>15</td>
<td>6</td>
<td>27</td>
<td>21</td>
<td>23</td>
<td>15</td>
<td>20</td>
<td>0</td>
</tr>
</tbody>
</table>
The key markers were 30, 60, and 120 minutes, but many judges reported numbers in between those markers. It is interesting that very few general civil judges reported comparatively short sessions. By contrast, a significant number of family judges reported sessions lasting less than 30 minutes. 75% of high settling general civil judges report sessions lasting longer than 60 minutes, with 28% reporting sessions longer than 120 minutes. The high settlers in both general civil and family had longer sessions than the low settlers.

Chapter 1.C Number of settlement meetings per week

The survey asked judges to fill in a blank estimating the number of settlement conferences they conducted each week.

The responses in percentages of judges for various frequencies of conferences per week are:

<table>
<thead>
<tr>
<th></th>
<th>General Civil All</th>
<th>General Civil Top</th>
<th>General Civil Bottom</th>
<th>Family All</th>
<th>Family Top</th>
<th>Family Bottom</th>
<th>Limited Jurisdiction</th>
<th>Complex Civil</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt;1</td>
<td>13</td>
<td>7</td>
<td>21</td>
<td>9</td>
<td>7</td>
<td>11</td>
<td>5</td>
<td>20</td>
</tr>
<tr>
<td>1-2.5</td>
<td>48</td>
<td>54</td>
<td>46</td>
<td>26</td>
<td>22</td>
<td>30</td>
<td>45</td>
<td>60</td>
</tr>
<tr>
<td>3-5</td>
<td>29</td>
<td>32</td>
<td>22</td>
<td>37</td>
<td>41</td>
<td>33</td>
<td>45</td>
<td>20</td>
</tr>
<tr>
<td>6-10</td>
<td>7</td>
<td>2</td>
<td>9</td>
<td>11</td>
<td>12</td>
<td>15</td>
<td>5</td>
<td>0</td>
</tr>
<tr>
<td>&gt;10</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>17</td>
<td>19</td>
<td>11</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Note that family law judges reported conducting more settlement conferences than general civil judges. This could be explained by a nearly three times as large caseload for family law judges compared to general civil judges. However this contradicts the author’s previous anecdotal information that some family law judges do not conduct as many settlement conferences.

17 The survey revealed that judges reported being assigned an average of 1,317 new family law cases per year compared with 441 new general civil cases.
18 Author’s conversations with Judge Francisco Firmat, Presiding Family Law Judge for Orange County California, September 2004 and with Judge E. Jeffery Burke in 2003, who after a vigorous and successful settlement judicial
The most common practice for general civil judges seems to be to only conduct 1-2.5 settlement conferences per week, each of which last between one and two hours. About half of the general civil judges report that settlements occur in 75% or more of these meetings. Thus, the most frequent practice for a general civil judge is to expend about five out of 40 hours in a normal work week conducting settlement conferences that are largely successful in settling the case. This may assuage the concerns of anyone questioning whether judges are wasting too much of their limited time in settlement conferences.

CHAPTER 2  FOCUS AND DIRECTIVENESS IN SETTLEMENT CONFERENCES

A primary goal of the survey is to identify the judges’ perceptions on what they actually do in settlement conferences. Sometimes dispute resolution scholars and practitioners simplistically characterize judicial settlement conferences as focused on legal rights and highly directive. This study documents the extent to which this is a fair characterization.

The approach in the settlement conference may impact some of the concerns about the trial judge also serving as settlement judge. For example, concerns about pre-judging the case will be ameliorated if the trial/settlement judge avoids discussing legal issues and is facilitative while utilizing a facilitative creative problem solving approach based on underlying interests. Alternatively, concerns about exposure to information inadmissible at trial are ameliorated if the trial/settlement judge limits discussion to legal strengths and weaknesses.

Documenting primary focus and degree of directiveness also serves the purpose of establishing norms of judicial practice. The “behind closed doors” nature of settlement conferences make them especially difficult to study and document. Chronicling judicial norms allows judges to determine whether their settlement conference practices are typical or unorthodox.

To quantify judges’ primary focus, degree of directiveness, motivations for directiveness, and bases for directive recommendations, the survey presented nineteen statements and asked the judges:

“Based on your typical practice in … settlement conferences you have conducted in the last four years, please provide your best estimate of the percentage of … settlement conferences in which the following statements apply.”

Judges were then asked to circle the following number to indicate the corresponding frequency of occurrence:

1 if the statement applied less than 10% of the time;

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\(^{19}\) Document with references to Riskin, Zeta Zuma… etc.

\(^{20}\) See for example, Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of Mandatory Settlement Conferences*, 33 UCLA L. Rev. 485 at 511.
2 if the statement applied 10% - 40% of the time;
3 if the statement applied 41% - 60% of the time;
4 if the statement applied 61% - 90% of the time; and
5 if the statement applied more than 90% of the time.

This approach was used because it recognized that different techniques are utilized in each case depending on a multitude of factors including the personalities of the parties and lawyers, the subject matter of the dispute, and the pre-existing relationship of the parties. Asking how often a judge uses a particular technique should reveal trends, but also allow for a more complicated understanding.

The following chart will be used to report the results of the survey for the nineteen questions that inquire about the frequency in which judges use various techniques.

<table>
<thead>
<tr>
<th>General Civil All</th>
<th>General Civil Top</th>
<th>General Civil Bottom</th>
<th>Family All</th>
<th>Family Top</th>
<th>Family Bottom</th>
<th>Limited Jurisdiction</th>
<th>Complex Civil</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt;10%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>10-40%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>41-60%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>61-90%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>90% (+)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The far left hand column indicates the frequency the technique is utilized: the first row presents the percentages of various groupings of judges who reported using the specified technique in less than 10 per cent of their settlement conferences; the second row presents the percentages of various groupings of judges who reported using the technique in 10 to 40 percent of their settlement conferences; the third row presents the percentages of judges reporting using the technique in 41-60 percent of settlement conferences; the fourth row presents the percentages of judges reporting using the technique in 61-90 percent of settlement conferences; and the fifth row presents the percentage of judges reporting using the technique in more than 90 percent of their settlement conferences. Thus the larger the numbers in the bottom rows, the more prevalent that technique is in settlement conferences.
The survey statements often reflect the mediation stylistic variables described by an esteemed colleague and leader of the academic dispute resolution field, Professor Leonard Riskin. This data is significant because it provides the judges’ perspective about what they do in settlement conferences and provides an opportunity to analyze how techniques differ in civil and family assignments as well as how techniques differ between judges who report a high and low settlement rate. This data might be especially helpful to new judges with little civil or family experience interested in what is normal and effective when judges conduct settlement conferences.

The data are organized into clusters along the following themes:

1. What is the settlement judge’s primary focus?
2. How directive are settlement judges?
3. What are the judges’ motivations for encouraging settlement?
4. On what bases do settlement judges make directive recommendations?

Chapter 2.A What is the settlement judge’s primary focus

The survey includes two questions that address this issue.

9A. I focus primarily on explaining to the parties the legal strengths and weaknesses of the case; and

9Q. I focus primarily on satisfying the parties’ underlying needs, goals, fears, or feelings.

This first question combines Professor Riskin’s “narrow framing of the issues” (focus on legal strengths and weaknesses) and “directive” qualities (the judge explaining). The focus on legal strengths and weakness allows the parties to seek similar views on predicting the anticipated trial

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21 Leonard Riskin in his first article, Mediator Orientations, Strategies and Techniques, 12 ALTERNATIVES TO HIGH COST LITIG. 111, 111 (1994), developed his framework to classify mediator orientations in order to address the divide between mediation theory and practice. Riskin’s original framework included a dual-spectrum grid which sought to analyze the degree to which mediators defined problems narrowly, focusing on the legal issues of the case, or broadly, including other issues outside of the legal dispute. The second axis sought to identify whether the mediator takes an evaluative approach in advising the parties as to their approach to settlement, versus a facilitative approach in guiding the communications among the parties as they work toward settlement. In his follow-up article, Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed, 1 HARV. NEGOTIATION L. REV. 7, 23-24 (1996), Riskin modifies the second axis, by replacing the term evaluative with directive and facilitative with the term illicitive, in order to illustrate and focus upon the impact of a mediator’s behavior upon part autonomy, the process, and outcome of the mediation. In subsequent articles, following outside debate over which approach or style was best, Riskin re-evaluates his grid system and proposes that mediators determine within the mediation which style will be most effective to help the parties reach their goals; Who Decides What? Rethinking the Grid of Mediator Orientations, 9 No.2 Disp. Resol. J. 22 (2003). Thus, the new–new Riskin system considers whether the mediator is using a strategy, style, technique, approach, or orientation and whether the behavioral decision is their own choice or due to party influence. See also Leonard Riskin, Replacing the Mediator Orientation Grids, Again: Proposing a New, New Grid System 23 ALTERNATIVES TO HIGH COST LITIG. 127-132 (2005), and Leonard Riskin, Decision Making in Mediation: The New Old Grid and the New New Grid System, 79 Notre Dame L. Rev. 1 (2003).
outcome of the case and then “bargain in the shadow of the law”. In Professor Riskin’s model, the combination of a focus on legal outcomes with an authoritative mediator is the epitome of a judicial settlement conference, and thus it would be expected to elicit a high rate of frequency.

The second question is meant to provide a contrast with question 9A, “I focus primarily on explaining to the parties the legal strengths and weaknesses of the case.” The “bargaining in the shadow of the law” approach to constructing a settlement can be contrasted with a problem solving approach that focuses on satisfying the parties’ underlying needs, goals, fears or feelings.

The problem solving approach takes the incident that has been translated into a legal cause of action and seeks to reinterpret it back into a non-legal paradigm. Settlement judges try to resolve the legal dispute by finding solutions for the needs, goals, fears or feelings behind the monetary demand. For example, a company that refuses to pay certain charges associated with a contract because it would create a problematic precedent with other clients, might be willing to make other commitments that would offer even greater value.

The problem solving approach is a recognized technique for mediators, but one that is considered under-utilized by settlement judges. For settlement judges to have an anticipated preference for the “shadow of the law” approach is understandable because the parties have chosen to utilize legal norms as the basis for resolving their dispute by filing their lawsuit. Judges attempting to probe the area of emotions and underlying needs might experience resistance by the parties’ attorneys who expect the application of a legal paradigm.

The data and analysis for these two questions are:

**Chapter 2.A.1.** I focus primarily on explaining to the parties the legal strengths and weaknesses of the case:

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The results are surprising. This technique was thought to be a defining characteristic of a settlement conference, but only about 23% of judges reported using it in more than 90% of their settlement conferences. Granted, about half of the judges report using it in more than 60% of their settlement conferences, but roughly 20% report using it in less than 40% of their conferences. On one hand the data confirms the stereotype about judges using this approach, but on the other hand it reveals that many judges defy this expectation.

Notice that high settling general civil judges are fairly polarized about this approach. About one fifth report using it more than 90% of the time and about one fifth report using it less than 10% of the time. This suggests that general civil judges can successfully settle cases by either embracing or avoiding this approach. Since these judges can successfully settle cases with very different approaches, it may prove challenging to isolate the method of judges with high settlement rates.

A comparison of general civil judges with higher and lower settlement rates who report using this technique less than 10% of the time provides one puzzle piece regarding the technique of successful settling judges. General civil judges with high settlement rates report using this technique sparingly 21% of the time compared to judges with low settlement rates who reported using it sparingly only 5% of the time. This could suggest that among those judges with low settlement rates, there might be some who might settle more cases if they elected to avoid this approach.

It is also interesting that the frequency of usage of this technique is fairly constant between all categories of judges. The reported frequency of this technique is very similar between the high and low settling family judges.

An alternative to explaining the legal merits and weaknesses of a case is to focus on satisfying underlying “interests.” 24 To investigate the prevalence of this approach, the survey asked how often the following statement is true:

**Chapter 2.A.2.** I focus primarily on satisfying the parties’ underlying needs, goals, fears, or feelings:

The judges responses are:

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The responses to this question establish that 48% of general civil judges and 41% of family judges focus primarily on satisfying underlying needs in more than 60% of their cases. This data is surprising in that it contradicts the stereotypic settlement conference approach of focusing on the legal strengths and weaknesses and trying to extract compromises from both sides. The response to the prior question establishes that judges focus on legal strengths and weaknesses in a little more than half the cases; now this question complements that data by establishing that judges focus on satisfying the parties’ underlying needs, goals, fears, or feelings in about 40% of the cases.

It is important to observe that when comparing the high settling and low settling judges in both general civil and family assignments, about half of high settling judges do not frequently use this technique, but the percentages of judges who report using this approach in more than 90 percent of their cases is significantly higher for high settling judges.

It is interesting to note that about 50% of judges report using this approach more than 60% of the time and about 50% of the judges reported using the explaining the legal merits less than 60% of the time. Since these two questions essentially approach the same issue from different perspectives, the careful observer might suspect that the judges who reported largely avoiding the legal merits approach are the same judges who reported a high utilization of the underlying interests approach. This suspicion was refuted statistically suggesting that judges did not tend to rely on one or the other approach. There were fifteen questions in the survey between these two questions, so the judges would not have perceived that they were choosing one or the other approach.

It is important to observe that when comparing the high settling and low settling judges in both general civil and family assignments, about half of high settling judges do not frequently use this technique, but the percentages of judges who report using this approach in more than 90 percent of their cases is significantly higher for high settling judges.

Having determined that judges are mixed about primary focus of the settlement conference, the author was suspicious regarding whether there was a relationship between the primary focus and the length of the session. It would seem a consistent for shorter settlement conferences (identified as those lasting less that less than 60 minutes) to primarily focus on explaining legal strengths and weaknesses. Likewise, the author suspected that longer settlement conferences (identified as those lasting more than 60 minutes) to have a higher utilization of the underlying interests approach.

The statistical data program SPSS was used to investigate whether there was a statistically significant relationship between the primary focus and the length of the session. It would seem a consistent for shorter settlement conferences (identified as those lasting less that less than 60 minutes) to primarily focus on explaining legal strengths and weaknesses compared to focusing on satisfying the parties’ needs, goals, fears, and feelings. If judges chose one or the other approach, there would be a negative correlation in their responses to these questions. The comparison of data for these two questions did not reveal any statistical pattern.

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(identified as those lasting longer than 60 minutes) had a primary focus of satisfying underlying needs, goals, fears, or feelings.

Surprisingly, there were no statistically significant relationships between the length of a settlement conference and its primary focus. Judges have shorter settlement conferences primarily focused on feelings and other judges have longer settlement conferences primarily focused on explaining legal strengths and weaknesses. The variation in focus challenges the expectation of a classic settlement conference. The lack of correlation between a settlement conference’s length and focus confirms how little is known about judges’ settlement conference method and technique.

Chapter 2.A.3 Summary of the Data on Focus

Enough judges focus on explaining legal strengths and weaknesses to justify that this is what stereotypically occurs in a settlement conference. Surprisingly, a significant percentage of judges also report primarily focusing on satisfying underlying needs, goals, fears or feelings. The result substantially disproves the perception that settlement judges discard the parties’ emotions in favor of legal realities. It is surprising that the frequency of focusing on underlying needs and feelings is the same in family law as general civil. The author had anticipated that family law judges would focus more on emotions than general civil judges because of the reputedly more emotional nature of those disputes.

The polarization about focusing on the law among high settling general civil judges establishes that judges can settle cases with and without this focus. High settling judges are more likely to frequently focus on the human aspect of the dispute compared to low settling judges. While this should not be surprising, the data confirms that a significant number of judges rarely escape from the tunnel vision focus on the law.

There is no statistically significant relationship between the focus and length of a settlement conference. Short conferences may be primarily focused on satisfying underlying needs, goals, fears, or feelings. Longer conferences may be primarily focused on explaining legal strengths.

The first plot points for judicial settlement technique genetic mapping are surprisingly complicated.
Chapter 2.B  Judicial Directiveness

A significant question in settlement conference technique is the extent to which settlement judges are directive. The concept of mediator “directiveness” evolved from the descriptor of being evaluative.26 This is an important area of investigation because one of the fears is that a judge’s inherent power could create a coercive experience when a judge seeks to facilitate settlement. This could be intentional or unintentional on the part of the judge.

A second area of focus is the judges’ motivations for encouraging settlement. The concern here is that the need to manage their dockets could create situations in which judges push too hard for settlements. Whatever extent of judicial directiveness is determined, some may view it differently depending on the settlement judge’s motivation.

A third area of investigation regards the bases for a settlement judge’s recommendation. One extreme manifestation of directiveness is when a judge makes recommendations to the parties. The bases for those recommendations could provide important information about the quality of those recommendations and the integrity of the process.

To investigate the degree and context of directiveness, the survey asked judges to report the frequency of the truthfulness of the following seventeen statements in their settlement conferences.

**Directiveness**

9L. I am very influential helping parties determine the terms of a settlement;

9X. I tell the attorneys and parties what I think they should do;

9Y. I ask the attorneys and parties what they think they should do;

9B. I express my opinions on the likely outcome of the case at trial;

9M. I urge the parties to accept a particular settlement proposal;

9R. I express my opinion of the parties’ needs, goals, fears, and feelings;

9V. I give advice that addresses the underlying needs, goals, fears and feelings arising out of the dispute, e.g., that settling a lawsuit is not abandoning the memory of a loved one;

9T. I encourage the parties to generate creative solutions that would address the underlying needs, goals, fears, and feelings arising out of the dispute;

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Judicial motivations for encouraging settlement

14. To the extent that I encourage parties to settle, my motivations are that:

14A. I like the sense of accomplishment from being able to settle difficult cases:

14B. I don’t want the time I invest in settlement discussions to be wasted;

14C. I rely on settlements to manage a busy docket;

14D. I think settlement is in the best interests of both (or all) parties.

Bases for recommendations

To the extent that I appraise or recommend terms of settlement, I base my appraisal or recommendation on:

11A. documents, testimony, or other evidence that would be admissible at trial;

11B. statements from parties not under oath;

11C. attorney summaries of evidence;

11D. confidential information that has not been disclosed to the other party(s);

11E. what I believe will be acceptable to all parties.

Assessing the degree of directiveness of settlement judges is a critical aspect of studying the dynamics and technique in settlement conferences. The judge is an unavoidable authority figure. Participants are required to defer to a judge’s perspective throughout litigation, with the possible exception of the settlement conference. Do judges and/or participants in settlement conferences perpetuate the deferential dynamic?

Deference to the settlement judge could be attributed to the judge’s role as an experienced person with wisdom. Litigants are likely to respect the settlement judge’s technical expertise in predicting likely outcomes if the case goes to trial. A more subtle perception is that judges are the modern metropolitan equivalent of a “wise village elder” competent to give counsel about non-legal matters based on significant life experience. A settlement judge’s technical expertise results in a recommendation to accept a particular settlement offer because the judge perceives it is equal to or better than the party would receive if the case went to trial. A settlement judge’s “wise village elder” role could result in a recommendation to accept a particular settlement offer because of the collateral damage to innocent third parties affected by the litigation.

The section on directiveness documents whether, how, and why settlement judges might influence participants to settle. Since the parties must consent to any settlement, they are empowered at the settlement conference. Do judges seek to exert influence on the parties by
direct pressure and advice, capitalizing on the normal deferential dynamic? In contrast, do settlement judges resist the temptation to exercise influence or use a more subtle technique?

If stereotypic settlement judges are authoritative and focus on the law, then they:

- are very influential in determining the terms of the settlement;
- tell participants what they should do;
- express opinions on the likely outcome of the case at trial; and
- urge the acceptance of a particular settlement proposal.

Survey questions 9L, 9X, 9Y, 9B, and 9M document the prevalence of each of these phenomena.

The settlement judge who focuses on satisfying the parties’ underlying needs, goals, fears and feelings has a similar dilemma regarding directiveness. He can express opinions and give advice regarding parties’ fears and feelings. Alternatively, he can ask the parties to generate creative solutions that would address the underlying needs. Questions 9R, 9V, and 9T document the prevalence of directiveness when the settlement judge is focusing on satisfying underlying needs and feelings.

Questions 14 and 11 explore the motivations for judges encouraging settlement and the bases for judicial recommendations in settlement conferences.

### Chapter 2.B.1 Questions Determining the Extent of Directiveness

The first question investigates the judges’ perceptions of influence. The presented question is:
Chapter 2.B.1.a. I am very influential helping parties determine the terms of a settlement;

The judges’ responses are:

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The data for all general civil and family judges reveal that the pattern of judges being very influential is a standard bell curve. A few judges report that they are almost always influential and a few others report that they are rarely influential. Most judges report that they are influential between 41 and 60 percent of the time. Future analysis will characterize this bell curve as representing that this characteristic is present approximately half of the time. This standard bell curve is surprising because of the expectation that settlement judges are highly influential and that settlement conferences are successful in accomplishing settlements because the judge can influence participants in determining the terms of a settlement.

It is interesting to observe that high settling judges report a greater frequency of influence than low settling judges. Instead of a bell curve, for high settling judges there is a bias in favor of influence. 25% of high settling general civil judges report being very influential in more than 90% of their cases compared to only 5% of low settling judges. 54% of high settling family law judges report being very influential in more than 61% of their cases compared to only 21% of low settlers.

One way to be influential would be to tell participants what they should do.
Chapter 2.B.1.b  I tell the attorneys and parties what I think they should do;

This question goes straight to the dynamic of how directive the judge is with the attorneys and parties. The stereotype would predict a high utilization rate.

The responses are:

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It is surprising that settlement judges report substantially avoiding this dynamic. The picture of a settlement conference where the judge regularly gives her opinion about what attorneys and parties should do is substantially rebutted by this data. This is consistent with responses to other questions like the next question in which judges report their perceptions that they are more facilitative in settlement conferences.

The data from the last two questions establishes that about half of the judges are influential, but they must be more subtle than simply telling participants what they should do. The data shows that there is a highly significant positive correlation between the judge’s responses about having influence and telling parties what to do. That means that the half of the judges who reported being influential also reported that they told parties and attorneys what they should do and vice versa.

Instead of the directive approach of telling participants what they should do, a more facilitative approach is asking participants what they think they should do.

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27 The Pearson Correlation analysis was utilized to measure the degree to which one variable is associated with another. This analysis reveals when variables are statistically very significant at the .01 level, and when they are significant at the .05 level. Additionally, the direction of influence is indicated—if an increase in one variable is associated with an increase in another, the correlation is positive, whereas if an increase in one variable is associated with a decrease in another variable the correlation is negative. It’s important to note that greater sample numbers increase the strength of any one correlation.

28 These variables were positively correlated at a very high level of .01 for general civil and statistically significant .05 for family judges.
Chapter 2.B.1.c  I ask the attorneys and parties what they think they should do;

Asking instead of telling is sometimes described as the difference between a mediator and an arbitrator. This will help gauge the preference for directiveness compared to facilitative technique. Again, the stereotype is that judges are more inclined to tell people their views than ask attorneys and parties their opinions.

The responses are:

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It is surprising that more than 50% of general civil and family judges report using this technique in more than 60% of their settlement conferences. There are only slight differences between high and low settling general civil judges, but this technique was used significantly more often by high settling family law judges compared to low settling family law judges. It is important to realize that these techniques are not mutually exclusive. Thus a judge could report a high frequency of both, asking and telling participants what to do.

The picture created by the data so far is that judges are evenly split about being very influential in determining the terms of the settlement, but that it is more common for them to ask questions than tell people what to do. There was not a statistically significant correlation between asking questions and being influential.

Maybe settlement judges are influential by expressing their opinions on the likely outcome of the case at trial.

Chapter 2.B.1.d  I express my opinions on the likely outcome of the case at trial;

This technique is thought to be a staple of judges conducting settlement conferences and thus would expect to elicit a high utilization frequency rate. Judge’s extensive experience with trials and juries creates the expertise and credibility to forecast what will happen at trial. For a
settlement judge to share his opinion on this critical issue could be proposed as one of the more unique and beneficial contributions that a judicial settlement officer brings to the process.\footnote{See Edward Brunet, \textit{Judicial Mediation and Signaling}, 3 Nev. L.J. 232 (2003).}

The responses are:

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</table>

The data reinforces that judicial technique in settlement conferences is not as predictable as anticipated. Less than 20% of judges report using this technique more than 90% of the time and about 45% of judges report using this technique less than 40% of the time.

The high settling general civil judges report a more polarized reaction to this technique than the low settlement general civil judges. 21% of the high settlers report using it more than 90% (compared to just 5% of the low settlers), but 30% of the high settlers report using it less than 10% of the time (compared to 19% of the low settlers). The polarization among the high settlers suggests that judges can accomplish high settlement rates by either using or avoiding this technique. This slice of the data again suggests that documenting the technique of judges with high settlement rates will be complicated because judges can accomplish high settlement rates with different approaches.

It is surprising that there isn’t a greater contrast between general civil and family law judges on this technique. While family law judges appear to be slightly more hesitant about this technique, this technique is more controversial for them because family law trials are decided by the judge instead of a jury. A family law judge using this technique could be accused of pre-judging the case before hearing the evidence.

It also is noticeable that 45% of the high settling family law judges report utilizing this technique more than 61% of the time compared to 21% of the low settling family judges. The mirror of this data is that only 21% of high settling family law judges use this technique less than 10% of
the time compared to 35% of the low settlers. While it raises issues, the data for family law judges suggests that using this technique helps to settle cases.\textsuperscript{30}

There is a highly significant positive correlation between a judge’s responses about having influence and expressing an opinion on the likely outcome at trial.\textsuperscript{31} That means that the half of the judges who report being influential also report that they express opinions about the likely outcome at trial and vice versa.

Another measure of judicial directiveness is how often judges advocate for a particular settlement proposal. The next question for analysis is:

\textbf{Chapter 2.B.1.e.} I urge the parties to accept a particular settlement proposal;

Judges might become an advocate for a specific settlement proposal either because they perceive it is fair or because they believe that it is the amount most likely to produce a settlement. (The difference between these two reasons judges might advocate for a specific settlement are very important and will be addressed below.) The particular settlement proposal the judge is advocating could, but would not need to, be a compromise solution formulated by the judge. It is commonly expected for judges to encourage parties to split the difference between the last two offers if they are both in a reasonable range.

The responses are

\begin{table}
\begin{tabular}{|c|c|c|c|c|c|c|c|c|}
\hline
 & General Civil All & General Civil Top & General Civil Bottom & Family All & Family Top & Family Bottom & Limited Jurisdiction & Complex Civil \\
\hline
<10\% & 23 & 31 & 16 & 29 & 18 & 45 & 41 & 0 \\
\hline
10-40\% & 29 & 16 & 35 & 24 & 24 & 28 & 14 & 67 \\
\hline
41-60\% & 24 & 18 & 30 & 25 & 30 & 17 & 32 & 17 \\
\hline
61-90\% & 21 & 31 & 14 & 18 & 24 & 3 & 14 & 17 \\
\hline
90\% (+) & 4 & 4 & 5 & 4 & 3 & 7 & 0 & 0 \\
\hline
\end{tabular}
\end{table}

Since this technique is commonly associated with settlement conferences, the above data suggests a surprisingly low utilization frequency. The columns for all general civil and all

\textsuperscript{30} This could possibly be explained by Professor Brunet’s explanation that parties can make informed decisions to settle the case if the trial judge “signals” her leanings during the intermediate stages of the proceedings. Id at 253-254.

\textsuperscript{31} These variables were positively correlated at a very high level of .01 for general civil and statistically significant .05 for family judges.
family judges reveal that a very few judges use this technique in almost every case, but about 25% of the judges report each of the other categories of frequency.

The high settling general civil judges report that 31% use the technique in 61-90% of their cases and 31% use it in less than 10% of their cases. This technique is far from standard procedure and high settling judges are split between a very low and relatively high utilization rate. The comparison between high and low settling family law judges suggests that high settling judges use this technique more than low settling family law judges.

There is a highly significant positive correlation between the judge’s responses about having influence and urging the parties to accept a particular settlement proposal. That means that the half of the judges who reported being influential also reported that they urged the parties to accept a particular settlement proposal and vice versa.

The composite picture thus far is that settlement judges are very fairly evenly divided about being influential in helping parties determine the terms of a settlement by expressing opinions on the likely outcome of the case at trial and urging parties to accept a particular settlement proposal. The evidence suggests that those who are more likely to use these more directive techniques have a higher settlement rate, but that a significant percentage of high settling judges avoid these techniques.

A contrast to expressing an opinion on the likely outcome at trial is expressing opinions of the parties’ needs, goals, fears, and feelings. Expressing the settlement judge’s opinion is still a form of directiveness, but the focus is on the parties’ underlying needs, goals, fears, and feelings instead of on the outcome at trial.

**Chapter 2.B.1.f.** I express my opinion of the parties’ needs, goals, fears, and feelings;

The section above, documents that in a significant percentage of cases, settlement judges focus on satisfying the parties’ underlying needs, goals, fears, or feelings. This question is designed to identify how often judges judge the parties needs, goals, fears, and feelings. For example, when a party expresses resistance to settlement because of a desire for revenge, a judge might respond with an observation about the limits of the judicial system, that the party should let go of his desire for revenge, and that the party should make a rational business decision about risks and costs. Similarly, a judge might confront a divorcing wife who does not want the children to spend time with her soon to be ex-husband because he had an affair and is therefore a bad role model.

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32 These variables were positively correlated at a very high level of .01 for general civil and statistically significant .05 for family judges.
The responses are

<table>
<thead>
<tr>
<th></th>
<th>General Civil All</th>
<th>General Civil Top</th>
<th>General Civil Bottom</th>
<th>Family All</th>
<th>Family Top</th>
<th>Family Bottom</th>
<th>Limited Jurisdiction</th>
<th>Complex Civil</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt;10%</td>
<td>33</td>
<td>27</td>
<td>33</td>
<td>22</td>
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<tr>
<td>10-40%</td>
<td>25</td>
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<td>30</td>
<td>20</td>
<td>25</td>
<td>19</td>
<td>9</td>
<td>17</td>
</tr>
<tr>
<td>41-60%</td>
<td>18</td>
<td>20</td>
<td>14</td>
<td>28</td>
<td>25</td>
<td>26</td>
<td>23</td>
<td>17</td>
</tr>
<tr>
<td>61-90%</td>
<td>15</td>
<td>10</td>
<td>16</td>
<td>25</td>
<td>25</td>
<td>22</td>
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<td>50</td>
</tr>
<tr>
<td>90% (+)</td>
<td>9</td>
<td>16</td>
<td>7</td>
<td>6</td>
<td>13</td>
<td>0</td>
<td>0</td>
<td>17</td>
</tr>
</tbody>
</table>

The data shows that overall judges largely refrain from expressing their opinions about extra-legal dimensions. There is a healthy spread on the frequency of the practice and high settling family judges use it with greater frequency than low settling family judges. The picture is largely one of restraint since only 24% of general civil judges report using this technique more than 60% of the time. These results are similar to the responses regarding expressing the judge’s opinions on the likely outcome of the case at trial, Section 2.B.d above. Even within their area of expertise, judges were largely reluctant to give their opinions.

Section 2.A.2 above documented that 48% of general civil judges focus primarily on satisfying the parties’ underlying needs, goals, fears, or feelings in more than 60% of their cases. This question documents that 24% of general civil settlement judges express their opinions about these underlying needs in more than 60% of their cases. It is somewhat surprising that only half of the general civil judges that often focus primarily on underlying needs seem willing to often express their opinions about those needs. The stereotypic characterization is that judges assume the authoritative role and express opinions freely.

Maybe judges are reluctant to express opinions about parties’ underlying needs, goals, fears, and feelings because they want to avoid judging parties’ subjective values or realities. Judges might be more willing to be directive about satisfying underlying needs and feelings by giving advice about meeting those needs.

**Chapter 2.B.1.g.** I give advice that addresses the underlying needs, goals, fears and feelings arising out of the dispute, e.g., that settling a lawsuit is not abandoning the memory of a loved one;

This technique is still directive because the settlement judge is giving advice, but this time the focus is on satisfying the underlying needs, goals, fears, or feelings.
The responses are:

<table>
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<th>General Civil All</th>
<th>General Civil Top</th>
<th>General Civil Bottom</th>
<th>Family All</th>
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<th>Limited Jurisdiction</th>
<th>Complex Civil</th>
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<tbody>
<tr>
<td>&lt;10%</td>
<td>15</td>
<td>10</td>
<td>21</td>
<td>16</td>
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<td>14</td>
<td>36</td>
<td>17</td>
</tr>
<tr>
<td>10-40%</td>
<td>29</td>
<td>35</td>
<td>26</td>
<td>22</td>
<td>15</td>
<td>35</td>
<td>32</td>
<td>17</td>
</tr>
<tr>
<td>41-60%</td>
<td>23</td>
<td>22</td>
<td>28</td>
<td>18</td>
<td>27</td>
<td>10</td>
<td>23</td>
<td>0</td>
</tr>
<tr>
<td>61-90%</td>
<td>22</td>
<td>20</td>
<td>19</td>
<td>32</td>
<td>30</td>
<td>31</td>
<td>9</td>
<td>50</td>
</tr>
<tr>
<td>90% (+)</td>
<td>12</td>
<td>12</td>
<td>7</td>
<td>12</td>
<td>9</td>
<td>10</td>
<td>0</td>
<td>17</td>
</tr>
</tbody>
</table>

Judges are marginally more willing to give advice on how to satisfy underlying needs than giving opinions of those needs. This behavior is utilized more than 60% of the time in 34% of general civil and 44% of family settlements conferences. Nevertheless, significant percentages of settlement judges avoid this practice.

This is not only surprising, but may be a source of concern. A family law judge who has experience with thousands of divorces may have insights about the predictable feelings in various stages of the proceedings, but forgoes sharing that perspective. It may be wise for a judge to ascertain when and how parties in emotional pain can receive advice about that pain, but it could be viewed as callous to choose to not provide objective insights on predictable emotional stages of a divorce.

The contrast to giving advice about underlying needs, goals, fears, and feelings is to encourage the participants to generate creative solutions to address those needs.
Chapter 2.B.1.h. I encourage the parties to generate creative solutions that would address the underlying needs, goals, fears, and feelings arising out of the dispute;

The responses are

<table>
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<th>General Civil Bottom</th>
<th>Family All</th>
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<th>Complex Civil</th>
</tr>
</thead>
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<td>14</td>
<td>0</td>
</tr>
<tr>
<td>10-40%</td>
<td>18</td>
<td>20</td>
<td>23</td>
<td>9</td>
<td>3</td>
<td>17</td>
<td>32</td>
<td>33</td>
</tr>
<tr>
<td>41-60%</td>
<td>26</td>
<td>22</td>
<td>37</td>
<td>15</td>
<td>16</td>
<td>17</td>
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</tr>
<tr>
<td>61-90%</td>
<td>30</td>
<td>29</td>
<td>23</td>
<td>42</td>
<td>44</td>
<td>38</td>
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<td>33</td>
</tr>
<tr>
<td>90% (+)</td>
<td>19</td>
<td>20</td>
<td>14</td>
<td>33</td>
<td>34</td>
<td>28</td>
<td>9</td>
<td>33</td>
</tr>
</tbody>
</table>

The data reveals that 49% of general civil and 75% of family law judges report using the empowering facilitative approach more than 60% of the time. This is surprising since the perception is that settlement conferences are judge centric. The high settlers used it slightly more frequently than the low settlers. The high utilization rate for this question confirms the results from the earlier questions that showed that judges preferred to ask participants what they think they should do instead of the judge telling participants what the judge thinks they should do.

The prevalence of this technique further complicates a debate regarding the difference between a judicial settlement conference and a private sector mediation. Some consider this technique to be the realm of mediation. Its prevalence in judicial settlement conferences suggests a blurring of the distinctions between these processes.

Chapter 2.B.1.i Summary of the Data on Directiveness

The combined results from the questions about directiveness reveal the following, surprisingly diverse, picture:

1. the frequency of settlement judges being very influential in helping parties determine the terms of a settlement is a bell curve; high settling judges report being influential more often than low settling judges.

2. the judges report asking more often than telling participants what they should do; while high and low settling general civil judges are the substantially the same in this area, high settling family law judges use the asking technique more than low settling family law judges.
3. the judges are fairly evenly divided about expressing opinions on the likely outcome of the case at trial; high settling general civil judges are polarized about expressing opinions on the likely trial outcome. Family law judges predict trial outcomes less frequently than general civil judges, but high settling family law judges do it dramatically more than low settling family law judges.

4. the judges are fairly evenly divided about urging parties to accept a particular settlement proposal, except that very few judges report using it in almost all their cases. Nearly one third of high settling general civil judges report using it in less than 10% of their cases, yet high settling general civil and family law judges use it more often than low settling judges.

5. when general civil judges focus on the parties’ underlying needs, goals, fears, and feelings:
   a. about half of them are likely to ask parties to generate creative solutions;
   b. about one third of them are likely to give their advice about addressing the underlying needs, goals, fears, and feelings; and
   c. about one fourth of them are likely to express opinions about parties’ needs, goals, fears, and feelings.

The same trends are even stronger for family law judges who report the above behaviors approximately ten percent more frequently than general civil judges.

The emerging picture regarding directiveness is surprisingly complicated. High settling judges tend to be more influential and use more directive techniques like expressing opinions on likely trial outcomes and urging parties to accept a particular settlement proposal. However, significant numbers of high settling judges avoid those techniques and most judges use “asking” techniques more frequently than “telling” techniques.

Correlations between the directive variables suggest that judges who use the more directive techniques are more influential.

This data suggests that many judges differentiate between their adjudicatory role of expressing their opinions and their settlement role that presents the option of being more facilitative. This data suggests that the image of the authoritative task master settlement judge does occur, but that settlement conference technique and approach is so diverse, that it disproves the anticipated stereotype.

**Summary of the Correlations within Directiveness**

The bell curve frequency of judges claiming that they are very influential encourages the exploration of correlations between influence and some of the other techniques. Is there a positive correlation between influencing the outcome and the other directive techniques? The data reveals a very strong correlation between the extent of reported influence and the use of the techniques of:
expressing opinions on the likely outcome;

urging the acceptance of a particular settlement proposal;

telling attorneys and parties what they should do;

expressing opinions about the needs, fears, and feelings; and

giving advice to address the needs, goals and feelings.33

This positive correlation means that those judges who claimed to be influential also claimed to use these more directive techniques. Likewise, judges who claimed to not be influential eschewed these techniques. It is important to remember that more influential judges had a higher settlement rate and that significant percentages of high settling judges reported they were not influential.

**Chapter 2.B.2 Motivations for Encouraging Settlement**

The phenomenon of directiveness is present in varying degrees for many settlement judges. It would be interesting to explore the relationship between a judge's tendency to be directive and her motivations for encouraging settlement. This section will document the prevalence of various reasons judges might encourage settlement and then explore the relationship between those motivations and the extent to which a judge is directive. The four motivations for encouraging parties to settle that were investigated are:

a. I like the sense of accomplishment from being able to settle difficult cases;

b. I don’t want the time I invest in settlement conferences to be wasted;

c. I rely on settlements to manage a busy docket; and

d. I think settlement is in the best interests of both (or all) parties.

This section will first explore the reasons judges encourage parties to settle. Then it will discuss the correlation between those reasons and the degree of directiveness. The first question is:

14. To the extent that I encourage parties to settle, my motivations are that:

---

33 These factors were all positively correlated to a statistically very significant Pearson Correlation level of .01 for general civil and a significant level of .05 for family judges.
Chapter 2.B.2.a  I like the sense of accomplishment from being able to settle difficult cases;

The responses are:

<table>
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<th>General Civil All</th>
<th>General Civil Top</th>
<th>General Civil Bottom</th>
<th>Family All</th>
<th>Family Top</th>
<th>Family Bottom</th>
<th>Limited Jurisdiction</th>
<th>Complex Civil</th>
</tr>
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<tbody>
<tr>
<td>&lt;10%</td>
<td>12</td>
<td>11</td>
<td>13</td>
<td>15</td>
<td>16</td>
<td>19</td>
<td>14</td>
<td>20</td>
</tr>
<tr>
<td>10-40%</td>
<td>4</td>
<td>7</td>
<td>3</td>
<td>14</td>
<td>16</td>
<td>15</td>
<td>14</td>
<td>0</td>
</tr>
<tr>
<td>41-60%</td>
<td>13</td>
<td>11</td>
<td>17</td>
<td>15</td>
<td>13</td>
<td>8</td>
<td>18</td>
<td>0</td>
</tr>
<tr>
<td>61-90%</td>
<td>27</td>
<td>24</td>
<td>27</td>
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<td>13</td>
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<td>39</td>
<td>44</td>
<td>31</td>
<td>32</td>
<td>80</td>
</tr>
</tbody>
</table>

About 75% of judges related to this motivation. General civil judges embraced this more than family judges. The complex civil judges demonstrated the extreme views about this with four judges saying this was true in more than 90% of their cases and one judge saying it was true in less than 10% of her cases. The prevailing view is probably explained by the normalcy of feeling a sense of satisfaction about accomplishing a difficult task. The dissenting view may have been concerned about the propriety of urging parties to settle so the judge can have a sense of accomplishment. Overall, it is fair to say that this motivation is present in most settlement conferences.

The next question investigates the prevalence of the judicial motivation for settlement of:

Chapter 2.B.2.b.  I don’t want the time I invest in settlement discussions to be wasted;

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<th>Family All</th>
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<tr>
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<td>44</td>
<td>51</td>
<td>33</td>
<td>52</td>
<td>63</td>
<td>40</td>
<td>55</td>
<td>40</td>
</tr>
<tr>
<td>10-40%</td>
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<td>20</td>
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<td>20</td>
<td>6</td>
<td>32</td>
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</tr>
<tr>
<td>41-60%</td>
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<td>13</td>
<td>20</td>
<td>11</td>
<td>16</td>
<td>4</td>
<td>18</td>
<td>40</td>
</tr>
<tr>
<td>61-90%</td>
<td>8</td>
<td>7</td>
<td>13</td>
<td>6</td>
<td>8</td>
<td>5</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>90% (+)</td>
<td>9</td>
<td>9</td>
<td>7</td>
<td>11</td>
<td>9</td>
<td>16</td>
<td>0</td>
<td>20</td>
</tr>
</tbody>
</table>
The judges largely rejected this motivation for encouraging parties to settle.

On one hand, it is only natural for a judge who invests time in trying to settle a case to want to reap some return on that investment by having the case settle. On the other hand, there are concerns about compromising the administration of justice by the influences of “managerial judging.” Professor Peter H. Schuck explicitly voices concern about “judicial over-commitment” in a settlement conference.

This data document that an overwhelming majority of judges deny encouraging settlement because of the time the judge invests in the settlement conference. High settling general civil judges reject this motivation more prevalently than low settling general civil judges.

Docket management concern is a similar motivation. The next question inquires how often that is a reason for encouraging settlement.

**Chapter 2.B.2.c.** To the extent I encourage parties to settle, my motivations are that I rely on settlements to manage a busy docket:

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<tr>
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<th>General Civil All</th>
<th>General Civil Top</th>
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<th>Family All</th>
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<th>Complex Civil</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt;10%</td>
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<td>30</td>
<td>20</td>
<td>28</td>
<td>12</td>
<td>27</td>
<td>20</td>
</tr>
<tr>
<td>10-40%</td>
<td>22</td>
<td>13</td>
<td>27</td>
<td>14</td>
<td>19</td>
<td>4</td>
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<tr>
<td>41-60%</td>
<td>19</td>
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<td>17</td>
<td>28</td>
<td>22</td>
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<td>40</td>
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<tr>
<td>90% (+)</td>
<td>16</td>
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<td>12</td>
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<td>12</td>
<td>9</td>
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</tr>
</tbody>
</table>

This survey documents that the average number of new cases assigned per year for general civil and family law judges participating in the survey were 441 and 1317 respectively. California’s “fast track” law mandates that more than 80% of cases be resolved within one year of filing. The result is that general civil and family law judges must manage demanding dockets in the context of significant time constraints.

There is a slight bias against this motivation, but the data from the judges is fairly even. It is interesting that judges were more willing to acknowledge this dynamic than the motivation to not

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36 cite
waste time in the immediately preceding question. It is also interesting that high settling general civil judges are very polarized on this question, 27% reporting this is true in more than 90% of their cases and 31% reporting this is true in less than 10% of their cases. Notice also that 27% of high settling general civil judges reported this true in more than 90% of their cases compared to only 10% of low settling general civil judges. This may be statistical evidence of judges encouraging settlement because of the burden of their caseloads.

Note that family law judges have a substantially greater caseload, but report similar frequencies of being motivated by docket management pressures. Surprisingly, 56% of low settling family law judges admit this motivation in more than 60% of their cases compared to only 32% of high settling family law judges. A pragmatic observation for those concerned about judges pushing settlement for the sake of docket management, is that this comparison of family law judges suggests that those who are more sensitive to this dynamic are less effective in accomplishing a settlement.

A less sinister motivation for encouraging settlement is the argument that it accomplishes superior justice. The next question investigates a similar motivation.

Chapter 2.B.2.d. I think settlement is in the best interests of both (or all) parties;

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<th>General Civil All</th>
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<th>Family All</th>
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<td>16</td>
<td>19</td>
<td>23</td>
<td>40</td>
</tr>
<tr>
<td>90% (+)</td>
<td>68</td>
<td>80</td>
<td>63</td>
<td>78</td>
<td>81</td>
<td>73</td>
<td>59</td>
<td>60</td>
</tr>
</tbody>
</table>

This was clearly the most prevalent motivation for why judges encourage parties to settle. Ninety percent of judges report this motivation was present in more than 60% of their settlement conferences.

It is interesting that 80% of high settling general civil judges reported this motivation in more than 90% of their settlement conferences compared to 63% of low settling general civil judges. One possible reason for the higher settlement rate is the judge’s belief that settlement is in the

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37 Section 4.A.3, infra, documents that family law judges received an average of 1317 new cases each year compared to 441 for general civil judges.
parties’ best interest. This distinction was less pronounced between high and low settling family law judges.

Chapter 2.B.2.e. Correlation between Directiveness and Motivations

The relationship between directiveness and motives for encouraging settlement is important because a highly directive judge might be viewed differently if his motivation was the best interest of the parties compared to the management of his docket. Urging parties to accept a particular settlement proposal might be viewed more generously if the judge believes it is in the parties’ best interests as compared to the best that can be done after a full day settlement conference and the judge wants something to show for his effort. There is probably more concern if judges are influencing parties to settle so the judge can feel a sense of accomplishment, but less if she believes it was in their best interests.

This is investigated by exploring statistically relevant correlations between many of the more directive techniques and the motivations for directiveness, with the following findings:

- None of the four studied motivations have a statistically significant correlation for the techniques of, “I am very influential helping parties to determine the terms of a settlement,” “I express my opinions on the likely outcome of the case at trial” or, “I express my opinion of the parties’ needs, goals, fears, and feelings.”

- Judges who tell the attorneys and parties what they think they should do are likely to be motivated by concerns about not wasting time the judge invested in the settlement conference.  

- Judges who ask the attorneys and parties what they think they should do are likely to be motivated by a reliance on settlements to manage a busy docket.

- Judges who urge the parties to accept a particular settlement proposal are likely motivated by concerns about not wasting time the judge invested in the settlement conference as well as the sense of accomplishment from being able to settle difficult cases.

- Judges who give advice that addresses the underlying needs, goals, fears and feelings arising out of the dispute are likely motivated by the sense that settlement is in the best interests of the parties as well as the sense of accomplishment from being able to settle difficult cases.

39 These factors are positively correlated to a statistically very significant Pearson Correlation level of .01.

40 These factors are positively correlated to a statistically significant Pearson Correlation level of .05.

41 These factors are positively correlated to a statistically significant Pearson Correlation level of .05.

42 These factors are positively correlated to a statistically very significant Pearson Correlation level of .01.

43 Both of these motivations are positively correlated to a statistically significant Pearson Correlation level of .05.
Judges who encourage the parties to generate creative solutions that would address the underlying needs, goals, fears and feelings arising out of the dispute are likely motivated by the sense that settlement is in the best interests of the parties.44

Chapter 2.B.2.f. Summary of the data on the motivations for directiveness.

The following statements summarize the data on the motivations for directiveness.

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

2. To the extent they encourage settlement, the vast majority of judges are not motivated by concerns about not wasting the time the judge invested in the conference.

3. To the extent they encourage settlement, judges were fairly evenly divided regarding the motivation of relying on settlements to manage a busy docket.

4. To the extent they encourage settlement, almost all judges are motivated by the belief that settlement is in the best interests of both (or all) parties. Ninety percent of judges report this motivation was present in more than 60% of their settlement conferences.

Chapter 2.B.3. The Basis for Judges’ Directive Recommendations

A very rough summary of the data presented thus far is that about half of the settlement judges tend to be directive. Having confirmed that it occurs with some regularity, the next question for inquiry about directiveness is the basis for it. When a settlement judge makes an appraisal or recommendation for settlement terms, on what does she base that appraisal or recommendation?

The five bases for an appraisal or recommendation that are examined are:

a. documents, testimony, or other evidence that would be admissible at trial;
b. statements from parties not under oath;
c. attorney summaries of evidence;
d. confidential information that has not been disclosed to the other party(s); and
e. what I believe will be acceptable to all parties.

The objective of these questions is to explore how much judges rely on informal sources of information in making their assessments and how often their recommendations are based on

44 These factors are positively correlated to a statistically very significant Pearson Correlation level of .01.
pragmatism compared to the merits of the case. Settlement conferences are informal in nature in that participants are not under oath and evidence codes are not usually considered. Indeed, the judges who focus on creative problem solving might encourage the disclosure of information that would clearly not be relevant or admissible if the case proceeds to trial. There is also the possibility that a judge’s recommendation is her assessment as to the most likely mutually acceptable settlement point, in contrast to her opinion of the likely legal outcome. To what extent is the directiveness of judges based on suspect information or a different assumption about the meaning of the recommendation?

**Chapter 2.B.3.a** The question presented asks, “To the extent that I appraise or recommend terms of settlement, I base my appraisal or recommendation on documents, testimony, or other evidence that would be admissible at trial.” The judges’ responses are:

<table>
<thead>
<tr>
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<th>General Civil All</th>
<th>General Civil Top</th>
<th>General Civil Bottom</th>
<th>Family All</th>
<th>Family Top</th>
<th>Family Bottom</th>
<th>Limited Jurisdiction</th>
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<tbody>
<tr>
<td>&lt;10%</td>
<td>17</td>
<td>20</td>
<td>10</td>
<td>3</td>
<td>0</td>
<td>7</td>
<td>10</td>
<td>0</td>
</tr>
<tr>
<td>10-40%</td>
<td>9</td>
<td>9</td>
<td>7</td>
<td>6</td>
<td>6</td>
<td>4</td>
<td>14</td>
<td>0</td>
</tr>
<tr>
<td>41-60%</td>
<td>11</td>
<td>11</td>
<td>14</td>
<td>16</td>
<td>13</td>
<td>19</td>
<td>10</td>
<td>60</td>
</tr>
<tr>
<td>61-90%</td>
<td>32</td>
<td>29</td>
<td>41</td>
<td>25</td>
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<td>33</td>
<td>43</td>
<td>20</td>
</tr>
<tr>
<td>90% (+)</td>
<td>31</td>
<td>31</td>
<td>28</td>
<td>50</td>
<td>63</td>
<td>37</td>
<td>24</td>
<td>20</td>
</tr>
</tbody>
</table>

This is the least controversial source on which to base an appraisal. If the appraisal is the judge’s prediction of what would occur if the case goes to trial, then it is best if that appraisal is based on evidence that would be admissible at trial. It isn’t surprising that more than 60% of judges report using this basis more than 60% of the time. Possibly more important is that this data document that a significant minority of judges report using this basis sparsely; 20% of high settling general civil judges report using this basis less than 10% of the time.

The quality of the recommendation will only be as reliable as the quality of the evidence on which it is based. Thus the report that judges’ recommendations are usually based on evidence that would be admissible at trial is comforting. At the same, it must be recognized that this approach must require disciplined effort by the judge because the informality of the settlement conference process usually exposes them to less credible evidence. One example of such evidence might be statements from parties not under oath.
Chapter 2.B.3.b  The next question presented asks, “To the extent that I appraise or recommend terms of settlement, I base my appraisal or recommendation on statements from parties not under oath.” The judges’ responses are:

<table>
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<th>General Civil All</th>
<th>General Civil Top</th>
<th>General Civil Bottom</th>
<th>Family All</th>
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<th>Limited Jurisdiction</th>
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<tr>
<td>&lt;10%</td>
<td>30</td>
<td>31</td>
<td>32</td>
<td>13</td>
<td>13</td>
<td>15</td>
<td>38</td>
<td>20</td>
</tr>
<tr>
<td>10-40%</td>
<td>21</td>
<td>27</td>
<td>21</td>
<td>19</td>
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<td>30</td>
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</tr>
<tr>
<td>41-60%</td>
<td>19</td>
<td>18</td>
<td>11</td>
<td>25</td>
<td>29</td>
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<td>61-90%</td>
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<td>4</td>
<td>21</td>
<td>25</td>
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<td>20</td>
</tr>
<tr>
<td>90% (+)</td>
<td>17</td>
<td>20</td>
<td>14</td>
<td>16</td>
<td>16</td>
<td>19</td>
<td>5</td>
<td>20</td>
</tr>
</tbody>
</table>

The dangers of this practice are obvious. Parties are not usually under oath at settlement conferences. Parties not under oath may be more likely to say things in settlement conferences that are not true. Judicial appraisals based on questionable information might be very influential, but also very inaccurate. The practice is fairly common; the data suggests that 29% of general civil and 41% of family judges rely on such statements in more than 60% of their settlement conferences.

It is probably more common for settlement judges to discuss matters much more with the attorneys than the parties. In such cases, it would be more likely for the attorney to summarize the evidence that would be presented at trial than for a party to make substantive statements to the judge. In such cases, rather than rely on party statements, it would be more likely for the judge to rely on the attorneys’ summary of the evidence.
Chapter 2.B.3.c. The next question presented is, “To the extent that I appraise or recommend
terms of settlement, I base my appraisal or recommendation on attorney summaries of evidence.”
The judges’ responses are:

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<th>General Civil All</th>
<th>General Civil Top</th>
<th>General Civil Bottom</th>
<th>Family All</th>
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<th>Family Bottom</th>
<th>Limited Jurisdiction</th>
<th>Complex Civil</th>
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<tbody>
<tr>
<td>&lt;10%</td>
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<td>4</td>
<td>3</td>
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<td>0</td>
<td>10</td>
<td>0</td>
</tr>
<tr>
<td>10-40%</td>
<td>9</td>
<td>9</td>
<td>7</td>
<td>10</td>
<td>9</td>
<td>15</td>
<td>5</td>
<td>0</td>
</tr>
<tr>
<td>41-60%</td>
<td>20</td>
<td>27</td>
<td>10</td>
<td>24</td>
<td>25</td>
<td>19</td>
<td>24</td>
<td>40</td>
</tr>
<tr>
<td>61-90%</td>
<td>40</td>
<td>29</td>
<td>59</td>
<td>37</td>
<td>41</td>
<td>30</td>
<td>43</td>
<td>20</td>
</tr>
<tr>
<td>90% (+)</td>
<td>26</td>
<td>31</td>
<td>21</td>
<td>28</td>
<td>22</td>
<td>37</td>
<td>19</td>
<td>40</td>
</tr>
</tbody>
</table>

The data confirms that this is the most prevalent practice out of all the options presented. More than 60% of judges from all civil assignments rely on this source in more than 60% of their settlement conferences and very few judges report using it in less than 10% of their conferences. This evidence should be more reliable than statements by parties because attorneys are ethically forbidden from lying to a judge and on a practical level, attorneys would be more likely than parties to guard their reputation and character with judges for future cases. Nevertheless, this source of information is still suspect because trial attorneys often entertain by sharing experiences where they were surprised by how witnesses testified at trial.

The common settlement conference approach of having the attorneys summarize the evidence for the judge is more complex in practice. Often attorneys have some aspect of the evidence that they might be hesitant to share in the presence of the other party. It is common for settlement judges to offer to meet alone with each side of the case, if the parties agree to these private caucuses. While this technique might empower the judge with access to information she may not acquire otherwise, it also creates a problem because the other side is unaware of the information presented to the judge in private.

For example, a defendant may have a very credible rebuttal witness they reveal to the judge, but do not wish to reveal to the plaintiff at the settlement conference. The plaintiff believes certain allegations are uncontested, but the judge believes that they are not only contested, they are substantially refuted. If the plaintiff knew about the secret rebuttal witness, they may be able to expose bias or other weaknesses in the credibility of the rebuttal evidence. Should the judge factor in the secret information when making an assessment, or only that information parties are willing to share with each other.

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45 The ABA’s Model Code of Judicial Conduct, Canon 3B(7)(d) states, “A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.”
Chapter 2.B.3.d. The next question presented is, “To the extent that I appraise or recommend terms of settlement, I base my appraisal or recommendation on confidential information that has not been disclosed to the other party(s).” The judges’ responses are:

<table>
<thead>
<tr>
<th></th>
<th>General Civil All</th>
<th>General Civil Top</th>
<th>General Civil Bottom</th>
<th>Family All</th>
<th>Family Top</th>
<th>Family Bottom</th>
<th>Limited Jurisdiction</th>
<th>Complex Civil</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt;10%</td>
<td>32</td>
<td>38</td>
<td>21</td>
<td>62</td>
<td>60</td>
<td>63</td>
<td>35</td>
<td>40</td>
</tr>
<tr>
<td>10-40%</td>
<td>21</td>
<td>18</td>
<td>21</td>
<td>12</td>
<td>7</td>
<td>19</td>
<td>40</td>
<td>0</td>
</tr>
<tr>
<td>41-60%</td>
<td>26</td>
<td>20</td>
<td>36</td>
<td>12</td>
<td>13</td>
<td>11</td>
<td>15</td>
<td>20</td>
</tr>
<tr>
<td>61-90%</td>
<td>15</td>
<td>18</td>
<td>18</td>
<td>9</td>
<td>17</td>
<td>4</td>
<td>10</td>
<td>20</td>
</tr>
<tr>
<td>90% (+)</td>
<td>6</td>
<td>7</td>
<td>4</td>
<td>5</td>
<td>3</td>
<td>4</td>
<td>0</td>
<td>20</td>
</tr>
</tbody>
</table>

The data document that basing a recommendation on confidential information that has not been disclosed to the other party is disfavored by many judges, and it also establishes that 47% of general civil judges and 26% of family judges do it in more than 40% of their settlement conferences. High settling family judges are most polarized by the practice with 60% stating that they do this in less than 10% of their cases and 20% stating they do it in more than 60% of their cases.

In addition to investigating the information that serves as the basis for an appraisal or recommendation, the survey also investigates the paradigm of the appraisal or recommendation.

Chapter 2.B.3.e. The next question presented is, “To the extent that I appraise or recommend terms of settlement, I base my appraisal or recommendation on what I believe will be acceptable to all parties.” The judges’ responses are:

<table>
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<tr>
<th></th>
<th>General Civil All</th>
<th>General Civil Top</th>
<th>General Civil Bottom</th>
<th>Family All</th>
<th>Family Top</th>
<th>Family Bottom</th>
<th>Limited Jurisdiction</th>
<th>Complex Civil</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt;10%</td>
<td>12</td>
<td>11</td>
<td>14</td>
<td>6</td>
<td>7</td>
<td>8</td>
<td>14</td>
<td>20</td>
</tr>
<tr>
<td>10-40%</td>
<td>9</td>
<td>9</td>
<td>4</td>
<td>8</td>
<td>10</td>
<td>8</td>
<td>5</td>
<td>0</td>
</tr>
<tr>
<td>41-60%</td>
<td>20</td>
<td>13</td>
<td>25</td>
<td>26</td>
<td>19</td>
<td>28</td>
<td>29</td>
<td>80</td>
</tr>
<tr>
<td>61-90%</td>
<td>33</td>
<td>38</td>
<td>36</td>
<td>34</td>
<td>36</td>
<td>38</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>90% (+)</td>
<td>25</td>
<td>29</td>
<td>21</td>
<td>26</td>
<td>29</td>
<td>20</td>
<td>14</td>
<td>0</td>
</tr>
</tbody>
</table>
This question raises a nuance, but possibly very important distinction when judges offer an appraisal or recommend terms of settlement. Does the appraisal or recommendation represent their opinion of the approximate value of the case, or alternatively, does it represent the approximate value that the judge believes will be acceptable to all parties. For example, if a judge recommends both parties compromise and settle a case for $50,000, does that figure represent his independent evaluation of the most likely outcome at trial or does that figure represent a pragmatic assessment of the number both parties will need to accept if this case is to settle at this conference. The pragmatic assessment may be influenced by attorney or party stubbornness, client control issues, party or attorney risk aversion, or other sources of unreasonable expectations.

Using either approach is probably ethical and appropriate if the meaning is explained by the judge or somehow understood by the parties. There are ethical issues if judges recommend a particular settlement on the pragmatic basis, but one or both of the parties understand it to be her objective assessment of the value of the case.

This data documents that in a majority of settlement conferences, when a judge recommends particular terms of settlement, the recommendation is based on the pragmatic belief of what will be acceptable to all the parties. More than half of general civil and family judges reported using pragmatic settlement recommendations in more than 60% of their settlement conferences.

One of the conclusions that could be drawn from this data is that the judicial expertise with extensive trials is often not necessary to guide parties in settlement negotiations because recommendations are not based on values “in the shadow of the law,” but rather are based on assessments of pragmatic points of compromise. Consideration should be given whether the parties’ perceptions of judicial expertise is necessary.

**Chapter 2.B.3.f. Summary of the bases of settlement judge evaluations.**

The data on the bases of settlement judge evaluations can be summarized by:

1. When recommending particular terms of settlement, most settlement judges rely on documents, testimony, and other evidence that would be admissible at trial, but a significant percentage of judges avoid this practice..

2. When recommending particular terms of settlement, 29% of general civil and 41% of family judges usually base those recommendations on statements from parties not under oath.

3. When recommending particular terms of settlement, most judges base the recommendation on the attorneys’ summaries of the evidence.

4. When recommending particular terms of settlement, the vast majority of judges avoid basing the recommendation on confidential information that has not been disclosed to the other party, but this practice is done by a significant minority of judges.
5. When settlement judges recommend particular terms of settlement, a majority of them base the recommendation on the pragmatic belief of what will be acceptable to all the parties and compared to what they believe will be the outcome at trial.

III. Summaries and Conclusions

Documenting judges’ perspectives on norms and more effective practices in settlement conferences is not a simple undertaking. The data are suspect because of self-reporting biases. The results are complex because the techniques a judge might use are case dependent. Despite these challenges, judicial conduct in settlement is an important area of investigation because it is conducted out of view and off the record and may be an increasingly integral aspect of judges’ responsibilities and opportunities.

A foundational aspect of studying judicial settlement conferences is to document how often they result in settlement. The study documents the following findings regarding rates of settlement.

1. For all judges, 49% report accomplishing a settlement in 75% or more of their settlement conferences and 38% report accomplishing a settlement in 50% or less of their settlement conferences;
2. For general civil judges, 42% report accomplishing a settlement in 75% or more of their settlement conferences and 38% report accomplishing a settlement in 50% or less of their settlement conferences; and
3. The settlement rates for family law judges are more polarized with 52% reporting accomplishing a settlement in more than 75% of their cases and 43% reporting accomplishing a settlement in 50% or less of their settlement conferences.

The simplest aspect of settlement conferences to document is the mechanics. The data supports the following conclusions regarding settlement conference mechanics:

1. Regarding when to schedule a settlement conference:
   a. The most common time that general civil judges schedule settlement conferences is 30 days before trial, but higher settling judges favor having them closer to, but not on, the day of trial; and
   b. More family judges have settlement conferences on the day of trial than general civil judges and the higher settling judges schedule them 1-10 days before trial.

2. Regarding the length of a settlement conference:
   a. General civil judges dedicate more time to a settlement conference than family law judges. Only 7% of general civil judges, compared to 45% of family law judges, have settlement conferences lasting 30 minutes or less.
37% of general civil judges, compared to 8% of family law judges have settlement conferences lasting 2 hours or more; and
b. The general civil and family law judges with higher settlement rates tend to have longer settlement conferences.

3. Regarding the frequency of settlement conferences:
   a. the most common practice for general civil judges is to only conduct 1-2.5 settlement conferences per week; and
   b. The most common practice for family law judges is to conduct 3-5 settlement conferences per week.

The most surprising result is the complexity of the judges’ perspective on their primary focus in settlement conferences. The survey results complicate the expectation that settlement judges primarily focus on the law. Enough judges conform to this expectation to explain the stereotype, but significant percentages of judges report primarily focusing on satisfying underlying needs, goals, fears, or feelings. This polarization among judges is evident among high settling general civil judges, so judges can be effective settlers with or without this primary focus.

The percentage of judges focusing on underlying needs and feelings is the same in family law as in general civil assignments. The more personal nature of those disputes might have resulted in an approach that was more acknowledging of feelings, fears, and needs. High settling judges are more likely to focus on the feelings, fears, goals and needs than low settling judges. The data confirms that a significant percentage of judges primarily focus on the law almost all the time.

There is no statistically significant relationship between the focus and length of a settlement conference. Short conferences may be primarily focused on satisfying underlying needs, goals, fears, or feelings. Longer conferences may be primarily focused on explaining legal weaknesses.

Judicial settlement technique is surprisingly diverse regarding directiveness. The data supports the following statements:

1. the frequency of settlement judges being very influential in helping parties determine the terms of a settlement is a bell curve; high settling judges report being influential more often than low settling judges.

2. judges’ report asking more often than telling participants what they should do; while high and low settling general civil judges are the substantially the same in this area, high settling family law judges use the asking technique more than low settling family law judges.

3. judges are fairly evenly divided about expressing opinions on the likely outcome of the case at trial; high settling general civil judges are polarized about expressing opinions on the likely trial outcome. Family law judges predict trial outcomes less frequently than general civil judges, but high settling family law judges do it dramatically more than low settling family law judges.
4. judges are fairly evenly divided about urging parties to accept a particular settlement proposal, except that very few judges report doing this in almost all their cases. Nearly one third of high settling general civil judges report doing this in less than 10% of their cases, yet high settling general civil and family law judges do this more often than low settling judges.

5. when general civil judges focus on the parties’ underlying needs, goals, fears, and feelings:
   a. about half of them are likely to ask parties to generate creative solutions;
   b. about one third of them are likely to give their advice about addressing the underlying needs, goals, fears, and feelings; and
   c. about one fourth of them are likely to express opinions about parties’ needs, goals, fears, and feelings.

6. The same trends are even stronger for family law judges who report the above behaviors approximately ten percent more frequently than general civil judges.

The emerging picture regarding directiveness is surprisingly complicated. High settling judges tend to be more influential and use more directive techniques like expressing opinions on likely trial outcomes and urging parties to accept a particular settlement proposal. However, significant numbers of high settling judges avoid those techniques and most judges use “asking” techniques more frequently than “telling” techniques.

Correlations between the directive variables suggest that judges who use the more directive techniques are more influential.

These data suggest that many judges differentiate between their adjudicatory role of expressing their opinions and their settlement role that presents the option of being more facilitative. The image of the authoritative task master settlement judge does occur, but settlement conference technique and approach are so diverse, that they disprove the anticipated stereotype.

Summary of the Correlations within Directiveness

The bell curve frequency of judges claiming that they are very influential encourages the exploration of correlations between influence and some of the other techniques. The data reveal a very strong correlation between the extent of reported influence and the use of the techniques of:

- expressing opinions on the likely outcome;
- urging the acceptance of a particular settlement proposal;
- telling attorneys and parties what they should do;
expressing opinions about the needs, fears, and feelings; and
giving advice to address the needs, goals and feelings.\textsuperscript{46}

This positive correlation means that those judges who claimed to be influential also claimed to use these more directive techniques. Likewise, judges who claimed to not be influential eschewed these techniques. It is important to remember that more influential judges had a higher settlement rate and that significant percentages of high settling judges reported they were not influential.

The data on the motivations for directiveness can be summarized by the following conclusions:

1. To the extent they encourage settlement, the vast majority of judges are motivated by the sense of accomplishment from being able to settle difficult cases.
2. To the extent they encourage settlement, the vast majority of judges are not motivated by concerns about not wasting the time the judge invested in the conference.
3. To the extent they encourage settlement, judges were fairly evenly divided regarding the motivation of relying on settlements to manage a busy docket.
4. To the extent they encourage settlement, almost all judges are motivated by the belief that settlement is in the best interests of both (or all) parties. Ninety percent of judges report this motivation was present in more than 60\% of their settlement conferences.

The data on the bases of settlement judge evaluations can be summarized by:

1. When settlement judges recommend particular terms of settlement, they often rely on documents, testimony, and other evidence that would be admissible at trial;
2. When settlement judges recommend particular terms of settlement, judges sometimes base those recommendations on statements from parties not under oath. Twenty-nine percent of general civil and 41\% of family judges rely on such statements in more than 60\% of their settlement conferences;
3. When settlement judges recommend particular terms of settlement, they often base the recommendation on the attorneys’ summaries of the evidence;
4. When settlement judges recommend particular terms of settlement, the vast majority of them avoid basing the recommendation on confidential information that has not been disclosed to the other party, but this practice is done by a significant minority of judges;
5. When settlement judges recommend particular terms of settlement, a majority of them base the recommendation on the pragmatic belief of what will be acceptable to all the parties.

\textsuperscript{46} These factors were all positively correlated to a statistically very significant Pearson Correlation level of .01 for general civil and a significant level of .05 for family judges.
The investigation of settlement judge as legal lion or problem solving lamb documents a surprisingly complex conclusion. Settlement judges utilize a variety of foci and approaches. Hopefully, future investigations and discussions on topics that relate to settlement conferences by sitting judges will acknowledge the diversity of people and their approaches to this role.