

---

# Settling Civil Cases: What Lawyers Want From Judges

The results of this JAD-sponsored survey will surprise you



Litigators, responding to a Judicial Administration Division survey, overwhelmingly indicate that they want federal judges to actively participate in settlement discussions. Moreover, they want settlement judges—not trial judges—to offer explicit assessments of cases and have definite opinions on the best settlement techniques to use.

*Genigraphics*



The attorneys surveyed were asked whether courts should require settlement conferences, which approaches judges should use and what tones they should set when hosting such conferences, the propriety and relative effectiveness of techniques judges might use to facilitate negotiations, and, generally, what judges can do to contribute to the settlement dynamic.

The opinions reported here are from a diverse, randomly selected group of lawyers who have recently litigated matters in four federal district courts: 812 from the Northern District of California; 469 from the Western District of Texas; 374 from the Western District of Missouri; and 231 from the Northern District of Florida. Of these lawyers, 1,771 shared their views with us by returning a four-page mailed questionnaire. We interviewed an additional 115 attorneys by telephone, posing the same questions that comprise the written questionnaire. Based on the size and diversity of the sample group, and because the opinions expressed by lawyers in phone interviews closely paralleled the opinions of those who returned the mail questionnaire, we are confident that our data accurately represent the views of the whole spectrum of federal court litigators.

The articles here are but a part of the larger study that will be published by the ABA's Judicial Administration Division in fall 1984.

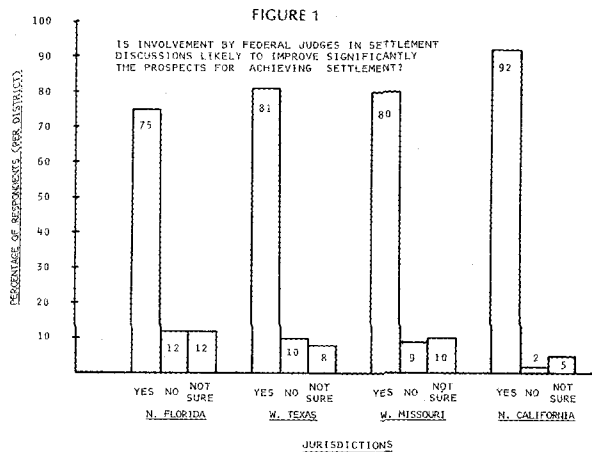
Lawyers, through their responses to our questions, are sending some dramatically clear messages to federal judges. Among these, perhaps the most significant is that lawyers, in a cross-district con-

**By Wayne D. Brazil**



**Wayne D. Brazil**  
is a United States  
magistrate and was  
a professor at  
Hastings College of  
the Law when the  
study was conducted

sensus, want federal judges to play a major role in the settlement process. A staggering 85 percent of our respondents agree that "involvement by federal judges in settlement discussions [is] likely to improve significantly the prospects for achieving settlement." Substantial majorities in all four districts also concur that judges should involve themselves in the settlement process, even when the lawyers have not asked for the court's help with settlement.



There also is remarkable agreement among lawyers about the kind of judicial involvement in settlement that is most likely to be productive. According to our respondents, the judge who contributes most to the settlement dynamic is active rather than passive; analytical rather than emotional or coercive; learns the facts and law involved in the dispute instead of relying on superficial formulas or simplistic compromises; and, after listening and learning with an open mind, offers explicit assessments of parties' positions and specific suggestions for ways to reach solutions.

A majority of the attorneys surveyed believe that the judiciary's status and unique perspective converge to create a special potential for assisting in this sensitive business. That potential, however, can be realized only by judges who, first, do their homework and then muster the courage to express their views tactfully.

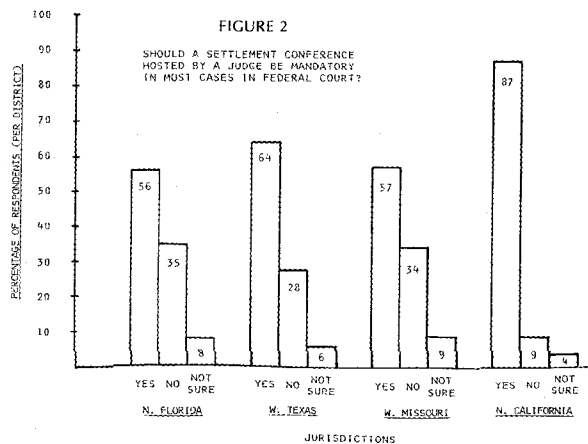
Another important message from our data is that lawyers want judges to use specific settlement techniques. They prefer that judges express opinions, offer suggestions, or analyze situations much more than they value judges asking the attorneys to make a presentation or conduct an analysis. Our respondents consistently give higher effectiveness ratings to settlement

conference procedures that revolve around inputs by judges than those that feature exposition by counsel. Thus the lawyers' assessments of specific techniques reinforce the major theme that what litigators want most from judges in settlement conferences is *an expression of analytical opinion*.

Not surprisingly, the data also suggest that the specific settlement facilitation tools most likely to be helpful vary with the type of case involved. For example, requiring counsel to meet with a judge shortly after a case is at issue, for the purpose of identifying undisputed facts and law, is a much more popular idea among lawyers who typically handle smaller cases than among attorneys who usually are involved in large, complex matters. Similarly, a settlement judge articulating what he or she believes to be the dollar range of a reasonable agreement is apt to be deemed more useful by small case lawyers than by their big case counterparts.

On the other hand, big case attorneys are more interested in a judge suggesting what concessions their clients should consider making and are more likely to value an aggressive judicial approach in settlement conferences. By comparison, small case litigators as a group give higher effectiveness marks to the more relaxed, informal judicial style. It also appears that who the settlement facilitator is, i.e., what skills and attributes of personality he or she brings to the process, grows in importance with the size and complexity of the litigation. Big case lawyers are much more likely than their smaller case colleagues to favor the suggestion that courts permit the litigants to select the judicial officer who will help attempt to work out a settlement.

There is another element of the settlement dynamic whose importance seems to vary with the size of the case

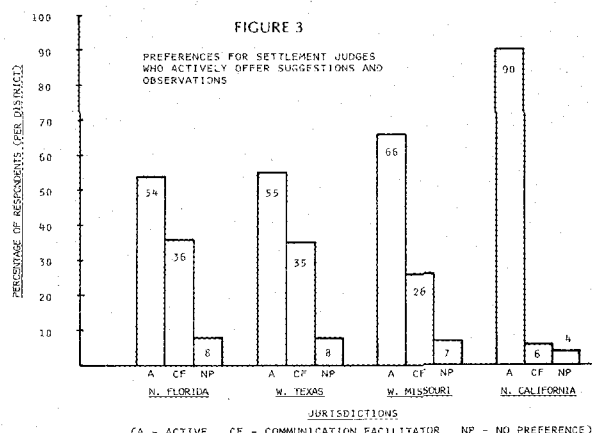


# What litigators want most from judges is an expression of analytical opinion

involved. Our data indicate that the problem of the unreasonably recalcitrant client—the client who balks at accepting an offer his own lawyer recommends—is much more likely to arise in small cases than in big ones. While the reported incidence of this problem is not staggering in either setting, it is appreciably lower among big case litigators than among attorneys most commonly involved in matters with lesser dollar values. Predictably, difficulty with balking clients also is reported more frequently by relatively inexperienced lawyers than by veterans. Thus, judges should be more alert to the possibility that it is often a stubborn client who is blocking progress toward settlement when the cases are small or counsel are young.

Federal judges also should appreciate, however, that their views, at least about the reasonableness of a pro-

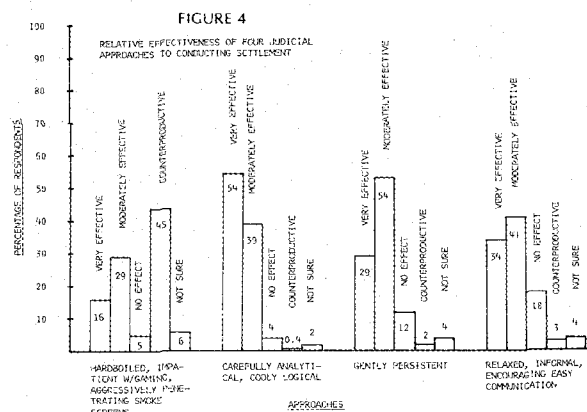
ily represent plaintiffs and those who work in small firms tend to be more enthusiastic about active judicial intervention in the settlement arena than lawyers who



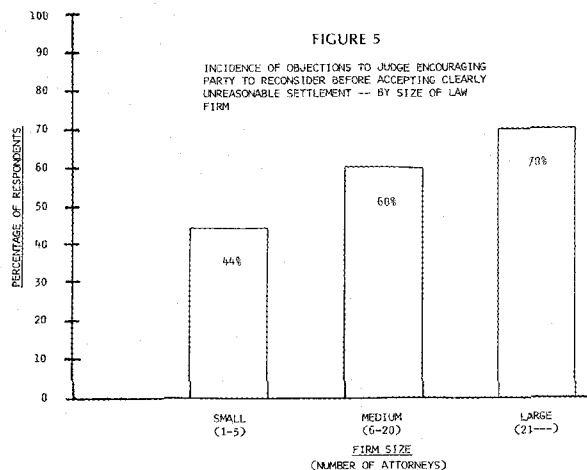
posed settlement, are likely to have a greater effect on small case litigants than on their counterparts in complex litigation. Along the same lines, it appears that judges' opinions are likely to carry much more weight with plaintiffs than with defendants, and with clients represented by solo practitioners or lawyers practicing in small firms than with clients represented by big firm litigators.

All of this data indicates that: (1) the kind of client most likely to resist a settlement the lawyers deem reasonable is an individual or small business, and (2) it is this same kind of litigant who is most receptive (and vulnerable) to judicial influence. Settlement judges need to be especially sensitive when dealing with these litigants, the more so if a lawyer in the case is relatively inexperienced.

Our research also indicates that lawyers who primar-



primarily represent defendants and who work in large firms. This greater interest in participation by judges extends to most forms of activism but is especially dramatic in one area. Small firm and plaintiffs' lawyers are much more likely than big firm and defense attorneys to endorse the proposition that "a judge who believes that a party is about to accept a settlement that clearly is unreasonable should take some step to encourage that party to reconsider its position." From this and other data it appears that members of the plaintiffs' bar and of small firms are generally more likely to perceive

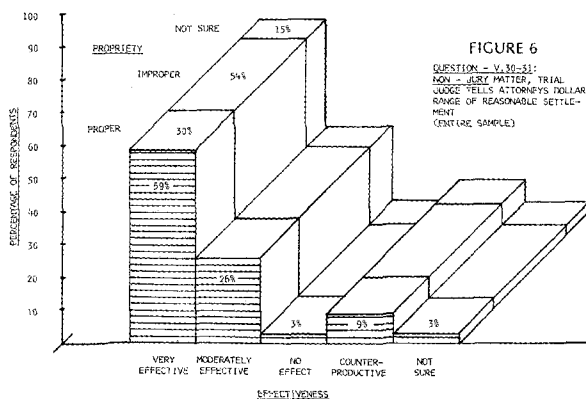


judges as allies in the settlement arena, or at least more likely to expect to benefit from judicial participation in the negotiation process.

Keen interest in assertive judicial involvement in settlement is by no means confined, however, to plaintiffs' and small firm lawyers. One of the most intriguing results for our study is the pattern of views that emerge from the "company lawyers" (attorneys employed directly by private companies, e.g., as in-house counsel or in the legal department of an insurance carrier).

The opinions of these lawyers are especially interesting because only through them can we obtain clues from our data about what corporate clients might want from federal judges with respect to settlement. The message is clear. The company lawyers are more enthusiastic about activist judicial involvement in settlement than any other group we identified. The percentage of lawyers who respond positively to most of the forms of judicial participation we asked about is higher by a considerable margin in this group than in any other. It also is significant that the company people feel most strongly that settlement conferences are significantly more likely to be productive if clients are required to attend.

One factor that may play an especially important role in determining what attorneys think about how judges should behave is professional acculturation, i.e., the practices to which lawyers have grown accustomed and the assumptions about the system on which they have been reared. The power of such acculturation emerges when we compare responses to the questionnaire on a district-by-district basis. Compared to the group from northern California, our respondents from northern Florida tend to practice in smaller firms, litigate smaller cases, and spend somewhat more of their time on the plaintiffs' side. Despite these factors, the lawyers from northern California are substantially more enthusiastic about active judicial participation in settlement, in vir-

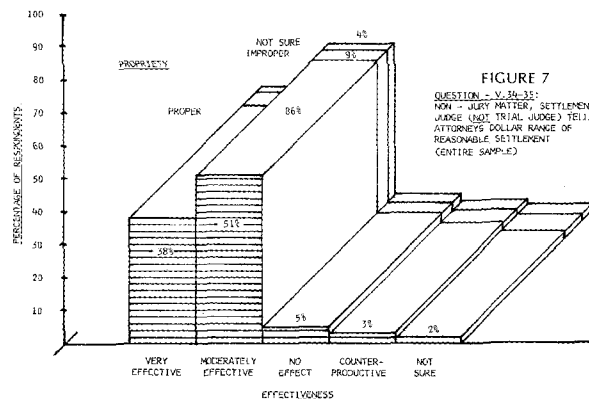


tually every form we probed, than are the litigators from northern Florida.

We suspect that the dramatic differences in views between lawyers in these two regions are largely attributable to the ways judges in the state courts handle

settlement. In northern California, the most populous and urbanized of our study districts,<sup>1</sup> state courts have responded to docket pressures by developing settlement programs that feature aggressive, mandatory judicial intervention in a wide range of cases. Litigators in northern California apparently have grown accustomed to this judicial role. In fact, if responses to our questions are any indication, they seem to have developed considerable appreciation for it.

Northern Florida, by contrast, is the least populous and most rural district of the four involved in our survey. Docket pressures apparently are not as great there and have not led the state or federal courts of the



region to develop mandatory settlement conference programs. Thus, many lawyers in northern Florida are accustomed to, and happy with, a more passive judicial role, which leaves most of the responsibility of the litigation process in the hands of counsel.

There is possibly a correlation between lawyers' views about judicial roles in settlement and the extent of the urbanization of a region. As compared to litigators who practice in major metropolitan centers, rural lawyers reportedly have fewer problems with each other in the discovery stage of litigation and therefore feel less need for judicial intervention in the process of developing cases for trial. Rural lawyers are more likely than their urban counterparts to know each other socially and to expect to see each other in subsequent lawsuits. These facts may temper their adversarial ardor and give them a greater incentive to work things out harmoniously with opposing counsel.<sup>2</sup> Moreover, rural courts generally do not suffer from the severe backlogs that plague many urban jurisdictions—and an early trial date may provide a substantial inducement to negotiate seriously toward settlement. Unfortunately, our data base does not permit us to test these hypotheses. To do so, we would need to explore the views of lawyers in an urban area that had not developed (as have state courts in northern California) aggressive judicial settlement programs. Perhaps such an exploration should constitute the next step in this area of research.

Whatever their sources, the interdistrict differences



of opinion reflected in our data are sharp and consistent. It is important to emphasize that when we compare response patterns between all four of the study districts we discover that the difference between the Floridians and the two mid-American groups usually is smaller than the difference between the Californians and the lawyers in the other three jurisdictions. In other words, the responses to any given question from the non-California districts are likely to cluster within a relatively short range on the percentage spectrum, while the responses from the California group to the same question sit by themselves 10 to 40 percentage points away. There are a few exceptions to this generalization, but the overall pattern is striking. Because these differences are so ubiquitous, we make no effort here to catalog them, but describe and attempt to account for them in later sections in this article.

There are a few additional generalizations that need explanation. If given a choice, a substantial majority of our respondents (except in northern Florida) would prefer that the officer who gets involved in settlement discussions *not* be the judge to whom the case is assigned for trial. The intensity of this preference seems to grow as the judge's role becomes more active. Lawyers are much more likely to feel that activist forms of judicial involvement in the settlement process are "proper" if the judge who hosts the settlement conference is *not* the judge who will preside at trial. And most of the attorneys we polled say that they are likely to be more open in settlement discussions with a judge who will not preside at trial than with the assigned judge. The data also suggest that a judge who will not preside at trial is

these lawyers oppose judicial involvement in settlement with great emotional intensity. A few lawyers responded to our questionnaire by passionately attacking the assumption that judges should enter this arena at all. Thus there are two important facts about those who dissent from the central themes: they constitute a small minority and they seem likely to hold their views with deep conviction. Judges who are interested in facilitating settlement should be sensitive to both of these facts. H

The articles that appear here on settling civil disputes are part of a larger study that will be published as a book by the American Bar Association later this fall.

This study would not have occurred without the support—both financial and in terms of actual assistance—of the Lawyers Conference and the National Conference of Federal Trial Judges of the ABA's Judicial Administration Division.

The project also would not have succeeded without the public support of four exemplary Chief Judges: Robert F. Peckham of the Northern District of California, William S. Sessions of the Western District of Texas, Russell G. Clark of the Western District of Missouri, and William H. Stafford, Jr., of the Northern District of Florida.

There are other people to whom I want to extend special recognition. Cynthia L. Arnold and Derek Wong worked long and hard on the manuscript and the graphics, respectively. The staff and clerks of the four federal courts mentioned above also provided valuable assistance.

Stephen Goldspiel, staff director of the Lawyers Conference, and his administrative assistants, Linda Goulding and Lee Bolger, committed countless hours to administering all phases of the project and to monitoring the return of completed questionnaires and the publication of the study in book form.

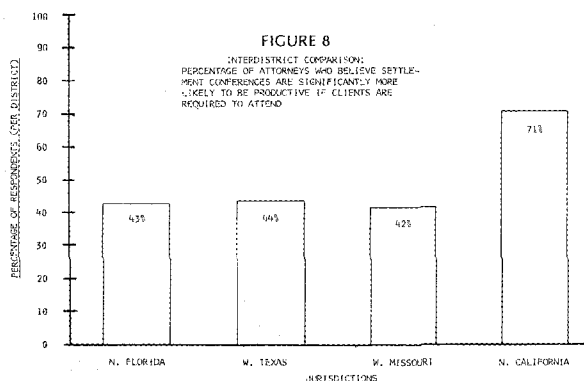
I would be remiss if I failed to add a special expression of gratitude to Alice L. O'Donnell, chair of the Committee on Federal Courts of the Lawyers Conference, who coordinated the process that led to the creation and funding of the study.

Finally, I would like to express my deep appreciation to Judge Robert F. Peckham, past chairman of the National Conference of Federal Trial Judges, and to Theodore A. Kolb and Leon Segal, past chairmen of the Lawyers Conference, who demonstrated their belief and support in making this study a success.

1. In 1980 the populations of the four study districts were: 1,051,008 in Northern Florida; 2,331,227 in Western Missouri; 3,376,293 in Western Texas; and 5,678,006 in Northern California. See *Annual Report of the Director of the Administrative Office of the United States Courts: 1982* (William E. Foley, Director).

2. See Donald F. Landon, *Lawyers and Localities: The Interaction of Community Context and Professionalism*, 1982 A.B.F. RES. J. 459 (Spring 1982).

3. See also Wall, Schiller and Ebert, *Should Judges Grease the Slow Wheels of Justice? A Survey of Effectiveness of Judicial Mediation Techniques*, to be published in the first issue of the *JOURNAL OF DISPUTE RESOLUTION*, University of Missouri, Columbia, late in 1984. The authors report that "some lawyers and judges strongly oppose any facilitation attempts due to ethical considerations, local customs or past courtroom experiences. Yet our results indicate that these are probably a minority, since a large portion of the responding judges indicate that they undertake at least some measures to aid settlement."



likely to be more effective as a settlement facilitator in cases scheduled to be tried to a court than in matters set to go to a jury.

Finally, it is important to point out that there are some lawyers who feel that no judge should ever participate in settlement discussions. It seems clear, however, that only a small minority of litigators hold this view.<sup>3</sup> Among all of our respondents, only about 10 percent deem all forms of judicial assistance with settlement improper, even when the judge who provides the assistance has no other contact with the case. Some of

#### FULL STUDY AVAILABLE SOON

The study on which these articles on attorneys' views of settling civil cases in federal courts are based will be published as a book later this year by the Judicial Administration Division.