

**ADMINISTRATIVE CONFERENCE OF
THE UNITED STATES**

**Report for
RECOMMENDATION 88-5**

**BREAKING THE SETTLEMENT ICE:
THE USE OF SETTLEMENT JUDGES IN
ADMINISTRATIVE PROCEEDINGS**

by

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May 20, 1988

INTRODUCTION

Litigation is sufficiently expensive and distasteful to parties that they generally favor settlement as an idea. However, settlement negotiations before litigation or between opposing counsel in litigation are frequently unsuccessful, and in many cases never even begin. Litigating lawyers and judges know that many such failures are due to conditions of the adversary process itself, such as the hardening or inflexibility of adversary positions, the growth of a combative attitude, the development of the feeling that unshakeable principle is at stake, personal dislike between opposing counsel and parties, and enjoyment of the battle for its own sake. There is also the problem of sheer inability of counsel or client to appreciate the flaws in a position.^{1/}

An otherwise achievable settlement should not fail for such a reason. What can be done to prevent it? Of course, counsel can be better prepared and educated about the process of negotiations in the context of litigation. There are also mediation, arbitration, and other non-judicial means to resolve disputes. Historically, particularly as crowded dockets have created the incentive, the adjudicators can help bring about settlement. Many trial judges take an active role in facilitating and even urging settlement. Their intervention can be a powerful aid and spur to settlement. But there are limits on what the judge who will decide the case can properly do. The trial judge must avoid anything resembling prejudice and must not engage in off-the-record substantive discussions, particularly *ex parte*, even though most mediators find these to be a very frequent and useful technique. Moreover, the trial judge's workload creates his own independent interest in settlement, an interest that in several ways may make one or both parties discount his efforts.

These limitations can be avoided by having someone who is not the judge attempt to facilitate settlement. This is not a perfect solution, for although a non-involved mediator can deal much more openly and fully with the parties individually or together, and frequently come to the negotiation table with

^{1/} The various barriers to settlement inherent in litigation have been recognized and discussed by proponents of alternative dispute resolution techniques. See, e.g., T.D. Lambros, The Summary Jury Trial and Other Alternative Methods of Dispute Resolution at 468 (1984); Edwards, Alternative Dispute Resolution: Panacea or Anathema, 99 Harv. L. Rev. 668, 670 (1986); Susskind & Madigan, New Approaches to Resolving Disputes in the Public Sector, 9 Just. Sys. J. 171, 179-80 (1984) (recognizing that the "adversary nature of litigation tends to polarize disputants, discouraging open communication, the sharing of information and joint problem solving").

special negotiating skills, such a person nonetheless lacks the authority and experience of the judge.^{2/}

An ingenious device seeking to obtain some of the best from both worlds is the use of "settlement judges." A settlement judge, in this parlance, is a judge who will not try or have any formal decisionmaking authority in the case, but who is the same kind of judge, and is from the same bench,^{3/} as the trial judge, and who generally hears the same or similar kinds of cases. The Federal Energy Regulatory Commission, under the guidance of its Chief Administrative Law Judge, Curtis Wagner, has used settlement judges to great benefit for about ten years. The Occupational Safety and Health Review Commission has more recently promulgated regulations instituting the practice. The Administrative Conference has called in agencies to explore its use.

We urge that the settlement judge device deserves much wider consideration and application as a means of actually settling matters, or convincing the parties to undertake other means of dispute resolution. Settlement judges are not a panacea, but one means of facilitating settlements that, in appropriate circumstances, may be of great value. We first provide a brief historical look at the use of settlement in judicial and administrative proceedings (Part I). We then describe FERC's and OSHRC's regulations (Part II), and how the settlement judge device works compared to trial judges in attempting to facilitate agreement (Part III). We then seek to examine the sources of settlement judges' powers and the kinds of disputes in which those powers are most and least likely to be effective (Parts IV and V). Finally, we recommend that federal agencies who wish to encourage and facilitate settlement of adjudicatory proceedings give favorable consideration to the use of settlement judges (Part VI). We believe this can most fruitfully be done where dockets are crowded, where cases tend to present fact-bound issues of relatively little importance or policy or precedent,

^{2/} See Cooley, Arbitration v. Mediation, 69 *Judicature* 263, 268-69 (1986) (discussion of impact that different levels of power wielded by third party negotiators, such as an arbitrator or mediator, has on achieving resolution of conflicts). It has been suggested that the more aligned with the court that a third party negotiator is perceived to be, the greater "power" the negotiator has and consequently, the greater the likelihood of settlement is. See Susskind, Court-Appointed Masters as Mediators, *Negotiation Journal* 295-300 (Oct. 1985).

^{3/} Given the ever-increasing workload of certain administrative law judges and possible limited availability for appointment as a settlement judge, an alternative source of settlement judges would be the currently retired ALJs who have notified the Office of Personnel Management that they would accept temporary appointment, pursuant to 5 U.S.C. § 3323(b), enacted in 1984.

and where remedy is flexible enough to be the subject of negotiation. We also suggest procedures for implementation of the device, including tie-ins to mediation and other types of alternate dispute resolution, balancing gains in efficiency against possible abuses that may result from an increasing reliance on settlement in administrative proceedings.

I.

THE DEVELOPING USE OF SETTLEMENT
AS A MEANS FOR RESOLVING DISPUTES IN
JUDICIAL AND ADMINISTRATIVE PROCEEDINGS

Since court dockets first became crowded, settlement has been a popular and much utilized means for disposing of disputes.^{4/} In the early twentieth century, with the explosion in industrial and commercial activity, courts in the United States utilized conciliation procedures as a means for "producing harmony among the parties and resolving disputes with communitarian values."^{5/} In the 1920s, as court calendars became more congested and delays in reaching a judicial resolution of a conflict became longer, settlement increasingly was viewed as a tool of efficiency.^{6/} One means by which settlement was promoted by the courts was through the establishment of a "conciliation" docket.^{7/}

This process has proceeded so far that a party's actual right to refuse to consider settlement and insist on a court actually deciding his case has come into doubt. Rule 16(c) of the Federal Rules of Civil Procedure was amended in 1983 to

4/ See Menkel-Meadow, For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference, 33 U.C.L.A. L.Rev. 485, 490 (1986) (hereinafter "For and Against Settlement").

5/ See id.

6/ Id. (citing M. Vallanta, The Emergence of The Judge As a Mediator in Court Cases (1984); see also, Cooper, Pre-Trial Procedures in the Wayne County Circuit Court in the Sixth Annual Report of the Judicial Conference of Michigan at 61, 72 (1936) (pretrial hearings were first utilized in the Wayne County Circuit Court in 1929 when trial docket was approximately 45 months behind).

7/ Id. (noting the establishment of a "conciliation" docket by the Wayne County Circuit Court in the late 1920s, followed by the establishment of similar dockets in city courts in Cleveland, Milwaukee, Boston and New Jersey).

provide that settlement and "extrajudicial procedures" for resolving disputes are desirable and may be a subject at pretrial conferences,^{8/} while subsection (f) of the rule provides for sanctions for failure to appear at, to be prepared for, and "to participate in good faith" at such conferences. While the advisory Committee's Notes state that "it is not the purpose of [the Rule] to impose settlement negotiations on unwilling litigants," but merely to provide "a neutral forum," few litigators would deny that the Rule now gives even greater power to courts to "suggest" that parties settle.

In addition to settlement conferences, courts have engaged in broad and growing use of other means for facilitating early disposition of cases, including arbitration, special masters, mediators, and the use of summary jury trials.^{9/}

As with the courts in earlier decades, the administrative process has sought to provide alternate mechanisms for disposing of the great number of cases that now arise.^{10/} Early history of administrative settlement activity parallels court experience. Agency pretrial conferences have historically been utilized where dockets are crowded as a means for either settling entire cases or narrowing the issues. An important model in use even prior to the enactment of the APA was the pretrial conference frequently employed in the administration of the District of Columbia's workmen's compensation claims. In its report to the Senate in 1941, the Attorney General's Committee on Administrative Procedure noted that every contested case of an employee's claim for compensation was set for conference before hearing, which was attended by a claim examiner, by the issuer's representative, the claimant and the claimant's counsel. The Committee noted that about 1,000 cases were "disposed of annually by agreements produced by the conferences, and only about 100 remain[ed] for

^{8/} Notes of the Advisory Committee on Fed. R. Cir. P. 16 explain that one of the considerations for amending Rule 16 was the recognition of the need for a means of relieving the condition of congested trial calendars and disposing of cases with less cost and delay.

^{9/} See Barnett, Practical, Innovative and Progressive Utilization of United States Magistrates to Improve the Administration of Justice in the United States District Courts; see also D. Marie Prwine, Settlement Strategies for Federal District Judges at 43-67, Federal Judicial Center (1986).

^{10/} See Administrative Procedures in Government Agencies, Report of the Committee on Administrative Procedure, 77th Cong. 1st Sess., Sen. R. (1941); see also Riggs and Dorminey, Federal Agencies' Use of Alternative Means of Dispute Resolution, 1 Ad. Law J. 125; Harter, Points on a Continuum, Dispute Resolution Procedures and the Administrative Process, 1 Ad. Law J. 141.

formal hearing." The Committee further noted that numerous other administrative bodies used pretrial conferences to speed the resolution of cases, such as the Board of Tax Appeals, the Social Security Board, the Civil Aeronautics Board, the Interstate Commerce Commission and the Securities and Exchange Commission.

Although the Committee generally recommended additional use of the pretrial conference by agencies to induce settlement, it noted certain inherent limitations on the extension of its use. A prerequisite to the success of such prehearing conferences, the Committee found, is that they be conducted by an "agency official of dignity and ability, and that counsel be willing to cooperate." It noted that such conferences are not as successful when agency heads fail to give adequate authority to the representatives of the agency. It is our conclusion, discussed at length herein, that this observation is correct and of great significance in devising means to induce settlement among counsel and parties. The Committee also noted that in circumstances in which an agency is being called upon to "administer its statute uniformly and according to law and the public interest" the administrative agency is not in the position to engage in the trading of concessions and that, as a result, the "scope of prehearing conferences is narrower in administrative proceedings than in private litigation." *Id.* at 67. The Committee concluded that "none of the difficulties are insurmountable, and that wider and more frequent use of the pretrial hearing in many agencies would be an advance over present administrative procedure." *Id.*

When, shortly thereafter (in 1946), the Administrative Procedure Act was enacted, the majority of hearings being conducted by administrative law judges (then called hearing examiners) involved economic regulatory matters. As the "policy" issues which typically arise in cases involving economic regulation became more and more subject to resolution by rulemaking,^{11/} rather than the more formal adjudicative proceedings, and the number of cases not presenting such issues continued to increase, the percentage of hearings presided over by ALJs on such regulatory policy issues decreased. Currently, the majority of cases over which ALJs preside do not involve broad regulatory issues and are more amenable to (or appropriately resolved by) settlement. One device that agencies may find useful in facilitating settlement is the "settlement judge" device, discussed below.

^{11/} See Lubbers, A Unified Corps of ALJ's: A Proposal to Test the Idea at the Federal Level, 65 *Judicature* 266, 268 (1981); Palmer, The Evolving Role of Administrative Law Judges, 19 *New Eng. L. Rev.* 755, 784 (1984).

II.

REGULATIONS GOVERNING THE USE OF SETTLEMENT JUDGES BY ADMINISTRATIVE AGENCIES

A. The Federal Energy Regulatory Commission's Settlement Procedures

The Federal Energy Regulatory Commission ("FERC"), which originally promulgated regulations governing settlement procedures in 1949, amended them on July 8, 1980 to provide for the appointment of a Settlement Judge to preside over settlement negotiations.^{12/} Sounding a theme consistently heard when an adjudicating body discusses settlement, the Commission noted that "one of the [its] most important and continuing objectives has been to reduce delay in the decisional process" and that the appointment of a Settlement Judge was intended to promote and encourage "the use of the settlement process as a means for expeditiously resolving cases." 45 Fed. Reg. 45902. "[T]he Settlement Judge, as a knowledgeable and neutral person of authority, would be in a position to lend a structure to the negotiations and reduce the adversarial nature of the process. In addition, the Settlement Judge will be able to control the pace of the negotiations and to objectively assess and report to either the Commission or the Chief Administrative Law Judge on whether settlement is in fact likely." Id.

FERC's procedure for facilitating settlement is well established.^{13/} It is important to point out that settlement is routinely considered by the parties in the area of natural gas regulation before or in connection with the prehearing conference

^{12/} In 1978, the Department of Energy Reorganization Act, 42 U.S.C.A. § 7101 et seq., transferred jurisdiction under the Natural Gas Act, the Natural Gas Policy Act, the Federal Power Act and the Public Utility Regulatory Policies Act from the Federal Power Commission to the Federal Energy Regulatory Commission.

^{13/} Rule 602 governs the submission of settlement offers and applies to all written offers of settlement filed in any proceeding pending before the Commission or set for hearing under subpart E. 18 C.F.R. § 385.602(a).

On May 3, 1982, FERC reorganized and revised its rules of practice and procedure, placing them in 18 C.F.R. Part 385. Subpart F of the final rule contains the provisions on conferences, offers of settlement and settlement judges, and the refusal to make admission. Rule 603 continues the existing rule on settlement negotiations before a Settlement Judge with certain technical corrections allowing for its use in cases not set for hearing.

in a FERC adjudication. Many cases settle in that fashion, without involvement even of the trial judge. Only cases that fail to settle in this way are set for hearing and even become possibilities for settlement judge treatment. Rule 603 specifically governs settlement negotiations before a Settlement Judge, who is defined to be "the Administrative Law Judge appointed by the Chief Administrative Law Judge to conduct settlement negotiations."^{14/}

The rule provides that a Settlement Judge may be appointed in several ways, including a request by a participant or a presiding officer or by an order by the Commission.^{15/} In an attempt to address concerns about unnecessary delays caused by separate settlement proceedings, when appointing a Settlement Judge, the Chief Administrative Law Judge must issue an order specifying whether, and to what extent, the proceeding is suspended pending termination of settlement negotiations. The order may also confine the scope of any settlement negotiations to specified issues.^{16/}

The powers and duties of the Settlement Judge are broad and include convening and presiding over conferences and settlement negotiations and assessing the practicalities of a potential settlement. As a practical matter, references to Settlement Judges are of brief duration, and the mechanism in the regulations for dealing with lengthy proceedings before a settlement judge is rarely used. The regulations provide that a Settlement Judge report to the Chief Administrative Law Judge or the Commission, as appropriate, describing the status of the settlement negotiations and evaluating settlement prospects. In

^{14/} 18 C.F.R. § 385.603(b). Rule 603 applies to any proceeding set for hearing under subpart E and to any other proceeding in which the Commission has ordered the appointment of a Settlement Judge.

^{15/} Under Rule 603, any participant may file a motion requesting the appointment of a Settlement Judge, or a presiding officer may request the Chief Administrative Law Judge to appoint a Settlement Judge. 18 C.F.R. § 385.603(c). The Commission may also, on motion or otherwise, order the Chief Administrative Law Judge to appoint a Settlement Judge. 18 C.F.R. § 385.603(d). The Chief Administrative Law Judge may appoint a Settlement Judge if requested by the presiding officer or if the presiding officer concurs with a motion by one of the participants. 18 C.F.R. § 385.603(e).

^{16/} See 18 C.F.R. § 385.603(f).

such a report, the Settlement Judge may recommend the termination or continuation of settlement negotiations.^{17/}

To ensure that proceedings are not unnecessarily interrupted, the regulations provide that any decision concerning the appointment of a Settlement Judge or termination of settlement negotiations is not subject to review or rehearing.^{18/} However, if settlement negotiations are terminated, the Chief Administrative Law Judge may subsequently appoint a settlement judge in the same proceeding to conduct further negotiations.^{19/}

B. The Occupational Safety And Health Review Commission's Settlement Procedures

Consistent with its general policy to encourage settlement at any stage of the proceedings, on December 5, 1979, the Occupational Safety and Health Review Commission ("OSHRC" or the "Review Commission") published a final rule extensively amending its prior rules governing settlement procedures.^{20/} On September 8, 1986, the regulations were amended to add a provision for settlement judges.^{21/}

^{17/} To protect against unnecessary delay, the regulations require that the first report be made not later than 30 days after appointment of the Settlement Judge (most such proceedings take far less than 30 days). The Commission or Chief Administrative Law Judge may order additional reports at any time. 18 C.F.R. § 385.603(g). Settlement negotiations will terminate upon order of the Chief ALJ issued after consultation with the Settlement Judge, unless the Commission's order appointing the Settlement Judge provides otherwise. 18 C.F.R. § 385.603(h).

^{18/} 18 C.F.R. § 385.603(i).

^{19/} 18 C.F.R. § 385.603(j).

^{20/} See 44 Fed. Reg. 70106 (Dec. 5, 1979).

^{21/} Section 2200.101 governs the new Settlement Judge procedure. Paragraph (a), entitled "Appointment of Settlement Judge," states that the procedure applies only to notices of contest by employers and to applications for fees under the Equal Access to Justice Act, 5 U.S.C. § 504, and 29 C.F.R. Part 2204.

A settlement judge may be appointed upon request by a party or upon assignment by the Chief ALJ or Chairman with the consent of the parties.^{22/}

To ensure that Settlement negotiations do not unnecessarily delay proceedings on the merits of the case, section 2200.101(a)(3) expressly limits the period for settlement negotiations to 45 days.^{23/}

Under the regulations, the Settlement Judge is provided broad authority to (1) confer with the parties on subject of whole or partial settlement, (2) suspend discovery during the time of assignment, (3) suggest privately to a party's representative what concessions his or her client should consider, and assess privately with each representative the reasonableness of the party's case or settlement position, and (4) seek resolution of as many issues in the case as is feasible.^{24/}

^{22/} Any party may move for the appointment of a Settlement Judge following the filing of the pleadings. In addition, the Chief Administrative Law Judge or the Chairman may assign a case to the Settlement Judge, with the consent of the parties at any time in the proceedings, whenever it is determined that there is a reasonable prospect of substantial settlement with the assistance of mediation by a Settlement Judge. The Settlement Judge procedure may not be imposed if either the Secretary or the employer objects to its use. 29 C.F.R. § 2200.101(a)(2).

^{23/} Paragraph (d) of the regulations, however, provides that, with the consent of the parties, the Settlement Judge may request from the Chief Administrative Law Judge an additional 120 days for settlement negotiations. If additional time is not required, upon expiration of a settlement period or at an earlier date the Settlement Judge shall notify the Chief Administrative Law Judge in writing of the status of the case. If a full settlement has not been approved, such report shall include written stipulations embodying the terms of such partial settlement as has been achieved. At the termination of the settlement period without full settlement, the Chief Administrative Law Judge shall promptly assign the case to a different Administrative Law Judge, unless the parties request otherwise. See 29 C.F.R. § 2200.101(d).

^{24/} 29 C.F.R. § 2200.101(b). The regulations also set forth specific guidelines for how settlement conferences shall be conducted and who shall participate. First, it is generally expected that the Settlement Judge shall communicate with the parties by a conference call. However, a personal conference may be scheduled with the parties if: 1) the Settlement Judge can schedule three or more cases for conference at or near the same location in one day; or 2) the office of the attorneys or other representatives as well as that of the Settlement Judge are

To increase the likelihood of settlement, the regulations further provide that the Settlement Judge may recommend that the representative who is expected to try the case be present at a settlement conference and that the parties, or their agents having full settlement authority, be present. All parties and their representatives are required to be completely candid with the Settlement Judge so that he may properly guide settlement discussions. Failure to be present or the refusal to cooperate fully may result in termination of the settlement proceedings.^{25/}

To encourage the candor sometimes necessary to achieve a settlement, the regulations additionally provide that no evidence of statements or conduct in the settlement proceedings shall be admissible in any subsequent hearing, except by stipulation of the parties. Moreover, documents disclosed in a settlement process may not be used in litigation unless obtained by appropriate discovery or subpoena.^{26/}

Paragraph (d)(3) prohibits the Settlement Judge from discussing the merits of the case with any Administrative Law Judge or any other person and precludes the Settlement Judge from being called as a witness in any hearing of the case. This provision was inserted in response to concerns about the small number of Administrative Law Judges employed by the agency and the possibility of improper communications between two judges in the same office. Upon consideration of these concerns, the Review Commission deleted a provision in the proposed rule that encouraged assignment of a case for a hearing to another judge from the same office as the Settlement Judge.

Similar to FERC's regulations, OSHRC's regulations also provide that any decision concerning the assignment of a Settlement Judge or the decision by a party or Settlement Judge to terminate proceedings is not subject to review or rehearing. See 29 C.F.R. § 2200.101(e).

located in the same metropolitan area; or 3) a conference can be scheduled in a place and on a day that the Judge is scheduled to preside in other proceedings; or 4) any other suitable circumstances in which, with the concurrence of the Chief Administrative Law Judge, the Settlement Judge determines that a personal meeting is necessary for a resolution of substantial issues in a case and the holding of a conference represents a prudent use of resources.

^{25/} See 29 C.F.R. § 2200.101(c)(2). Paragraph (c)(2) further provides the Settlement Judge with flexibility to impose any additional requirements that seem proper to expedite an amicable resolution of the case.

^{26/} 29 C.F.R. § 2200.101(c)(2).

III.

SETTLEMENT JUDGES
COMPARED TO TRIAL JUDGES

A main thesis of this paper is that in broad classes of cases, a settlement judge can exercise much of, and in many situations more than, the settlement-inducing authority of the trial judge, without the drawbacks inherent in the trial judge's involving himself in attempts to induce settlement. It is therefore important for us to attempt to delineate the comparative powers of both types of officer in inducing settlement. While that is the main focus of this section, it is important to bear in mind that non-adjudicators have a different set of powers and limitations, and that any discussion of trial judge versus settlement judge should not ignore these.

The differences between a settlement judge and the trial judge attempting to facilitate settlement are very substantial and generally favorable to the settlement judge device. Those differences, however, are not all that obvious.

The clearest differences have to do with the major limitations or disadvantages of involving trial judges in settlement attempts. We note that many trial judges are exceptionally able, effective, and considerate at promoting settlement, and they do so without overstepping propriety. What follows is not an attack on this practice, but an attempt to speak frankly about some of its inherent limitations.

A suggestion of settlement by a trial judge is always a suggestion, no matter how slight, that the judge believes that there is some reason for a party to settle. Such a suggestion is interpreted by the party as meaning that if the case is not settled, the party will not obtain what he wants. Frequently--most typically when discovery or a trial is in the future--this suggestion can be made by a trial judge without impropriety because the judge is as yet unaware of all of the evidence or has not yet had received major briefing on important legal issues. When there is a jury, the trial judge may truthfully say that he is not sure of how the jury will decide. However, in cases with dispositive motions, heavy involvement of the judge in discovery, relatively simple facts, or other features that create the implication that the trial judge is already in a position to have views about all or a major portion of the case, the role that the trial judge can properly play in encouraging settlement without expressing some prejudice is constricted.

Similarly, the trial judge's flexibility in using techniques of persuasion, reasoning, and unvarnished discussion at any time in the case are limited by the court's obligation not to have off-the-record substantive discussion with the parties, and particularly not with fewer than all of the parties in an ex parte discussion.

These limitations on maneuvering ability almost, but not entirely, disappear with settlement judges.^{27/} In a properly created framework, the settlement judge cannot have any part in the disposition of the case in the event that it is not settled and should not have any discussion about the case with the trial judge in the event that settlement does not occur. This frees the settlement judge to engage in just the sorts of techniques to aid settlement that the trial judge is restricted from using.

As suggested earlier, however, this freedom is not unlimited. The settlement judge, by definition, is still a judge with a caseload similar to that of the trial judge. Accordingly, the settlement judge ought not to make statements in seeking to obtain a settlement in case A that might be regarded as prejudgment or other comment on issues in another case, case B, in which the settlement judge happens to be the trial judge. The risk of such error is multiplied where, as with the FERC and many other agencies, there is a well-defined set of regulated entities that are frequently parties in numerous proceedings before the agency and where there is a similarly well-defined bar that specializes in practice before that agency. Thus the settlement judge device, unlike use of mediators or other non-judicial personnel, has the inherent limitation of usefulness to cases that, for some reason, are very unlikely to have major precedential value.

The most likely identifying factor of cases amenable to the settlement judge process is fact-specificity. By the same token, the case that is least apt for settlement judge treatment is one turning upon a broad legal or policy question. Administrative agencies, to a greater extent than courts, have particular potential for entertaining cases of great precedential or policy importance. While it is today a commonplace that courts exercise some lawmaking function, agencies typically have Congressional mandates broadly to create and enforce regulatory programs. Many major issues consequently arise in agency adjudications.

It should be observed here that the limitations discussed above would not apply to a wholly independent mediator, or a settlement "judge" whose only job was facilitating settlements and who had no responsibility to try other cases. In this very important sense, the settlement judge technique is not a true alternative to mediation, arbitration, or other non-judicial means of dispute resolution.

Instead, as more fully discussed below, it is a means of drawing unique settlement-inducing ability from the settlement judge's status as an actual sitting judge with responsibility for

^{27/} See W. Brazil, The Judicially Hosted Settlement Conference: Pros & Cons, Inside Litigation, Vol. 2, No.3 (Jan. 1988) (recognition of litigation belief that a judge who hosts a settlement conference may lose his impartiality); For and Against Settlement, *supra*, at 511 (suggestion that settlement conference be hosted by someone other than the trial judge to avoid prejudicing later trial).

the same kind of cases as the trial judge. Therefore, the very factor that can make settlement judges attractive as facilitators of settlements--their judicial status--also limits the situations in which they can be useful.

Another series of differences between settlement judges and trial judges who seek to facilitate settlement springs from the more practical aspects of the detachment of the settlement judge from the trial process. Most obviously, the fact that the settlement judge is free of any responsibility to try a case means that his settlement proceedings should be on an independent track from that of preparation for trial, so that settlement negotiations cannot be used as part of the tactics of delay, discovery or other burdens. The Chief Judge can assign as settlement judges those judges who show a particular interest and aptitude for encouraging settlement, as not all judges do (although we believe that training in settlement-inducing techniques can and should be made available to all adjudicators). In addition, a settlement judge does not have to perform the burdensome tasks associated with preparing the case for trial and trying it, and thus has no incentive from his own schedule to induce settlement.

It might well be argued that it is entirely appropriate that the pressures of preparation and trial on the trial judge, as well as the parties, should be among those factors that induce parties to settle. But these pressures are well known to the parties and their counsel, entirely apart from any settlement proceedings. They are thus pressured automatically. In fact one of the limitations on the ability of a trial judge to press for settlement is that a party may believe that the pressure of the trial judge's own docket may override what should be his concern about the substance of the settlement. This would cause a party either to discount the judge's advice or to settle anyway, with the decidedly unpleasant feeling that the settlement is compelled by the tribunal rather than voluntary.

A settlement judge carries much less of this baggage, and, accordingly, has less to obstruct his acceptance by the parties as a voice of reason and fairness. At the same time his presence does not detract from the parties' awareness of the costs and pressures of litigating rather than settling. Indeed, the settlement judge is in a good position to discuss these matters with counsel without himself being personally interested. Thus these considerations are at least equally likely to be received and weighed objectively.

IV.

The Power of the Settlement Judge

The chief advantage of the settlement judge is that he is both a visitor from outside the case, who will not judge the merits--or the counsel--or have any other impact on the formal decisionmaking, and, at the same time, is as knowledgeable and

authoritative on the merits (and on the trial judge) as anyone can be who is not part of that process.

Lawyers in negotiations frequently feel that someone associated with the process will not listen to reason--their opposing counsel, the opposing client, their own client. While lawyers perhaps only rarely accuse themselves of being unreasonable, we often wish we could understand how a factual or legal point we are contemplating will play in an adjudication; what we are wondering at such times is whether we will be seen to be unreasonable in asserting it. Negotiations can stick on such points.

The course of ordinary litigation is not helpful here. The posture required by the adversary process is a great enemy of bridging this gap. Then there is the chance that the adversary posture, held for long enough, will stiffen into belief. It can be extremely difficult for an advocate to unbend into the flexibility of ordinary discourse for settlement purposes. This is all the truer where the trial judge is attempting to facilitate settlement. Given that counsel feel, we may assume correctly, that in formal appearances before the trial judge they cannot unbend at all, it is very difficult for them to do so in informal appearances, perhaps because such an unbending would constitute an uncomfortable admission that the formal views were largely posturing.

In this connection the settlement judge device fights fire with fire. The deadlock on the trading of reasonable views is broken by use of another habit of litigation: the respect and deference that are due to a judge. In normal litigation, the judge's suggestions are followed, his suppositions are treated as reasonable, his jokes are laughed at--in public and on the record. Counsel may believe the suggestions unwise or jokes unfunny, but they keep those reactions to themselves. In a sense, the trial judge is the perfect person to suggest that the parties talk settlement in a reasonable manner, because counsel are in the habit of taking his suggestions. But, as pointed out above, the trial judge is constricted in approach because of the risk of the appearance of prejudice or other improprieties. Nor is this paradoxical, because without impartiality, trial judges in general would not get, or deserve, respect and deference.

The settlement judge, by being a judge but not the judge who decides the case, can command a similar degree of deference without the need to observe the due process commands that establish and maintain impartiality. The settlement judge can use his position (including such devices as off-the-record discussions, ex parte communications, prediction of outcome, and so forth) to suggest to the parties that they talk sense instead of posturing. Just as repetition of adversary views tends to lead counsel to think those views are correct, so repetition of reasonable views may break that habit. Most litigating lawyers are aware of a phenomenon that occurs when it becomes clear that a case will be settled. There is an attitudinal change, sometimes partially or wholly marked, when difficulties and disagreements become things to be understood and ironed out; from

then an effort is expended on resolving differences rather than developing them into adversary positions. The role of the settlement judge is to get the parties to drop the adversary pose and to expend efforts to reach that stage of accommodation.

Of course the settlement judge has no power in the case and thus does not wield the ultimate threat--of loss--that makes counsel so amenable to whatever the trial judge wants. Settlement is a voluntary, and not an imposed, process. The settlement judge cannot force the parties to settle and should not try. What is needed is something to get the parties over the stumbling block of excessive regard for their own positions. The habit of deference to a judge, we believe, can do this. It does not hurt the process, moreover, that the settlement judge is a trial judge in other cases, before whom counsel and parties must assume they will appear in the fullness of time. There is no need to appear to be unreasonable to such a personage while he is serving as a settlement judge.

The second major advantage of the settlement judge is that he speaks with authority, of two kinds. We note preliminarily that the classic rationale for settlement is the trading of the uncertainty of litigation, in which one might win or lose everything or reach some middle or completely unanticipated or even inapt result, for the certainty of a negotiated one, in which one knowingly receives a compromise. One might assume from this commonplace, and it is often said, that the greater the uncertainties, the greater the incentive to compromise. We believe that to be incorrect. The magnitude of what is at stake may induce compromise in those situations where one of the litigated outcomes may be disaster. But in most cases, disaster is not a possible outcome. In such situations, the less uncertainty there is in the parties' and counsel's minds about how particular factual or legal issues may be decided, the more apt the case is for settlement (as long as both sides believe that the case is not a certain winner for them). Clients, rather logically, always wish to know exactly what is the chance of success on each issue. If they had that information they could make the decisions necessary to arrive at a settlement. Their lawyers cannot supply it, because they do not know or do not agree (or do not know whether they agree) with the opponent's assessment.

Here is exercised one of the great advantages of the settlement judge. He is generally knowledgeable about the kind of case; he knows how such cases are handled, how much time and effort they take, and, frankly, what kind of a reception the trial judge will give the legal and factual issues they present. He knows the trial judge professionally and personally and he is a judge himself, whose daily work it is to resolve such disputes. He is just the person, therefore, to provide an authoritative estimate of such matters as how a particular approach would be received, how weighty particular facts are in decision of a particular issue, and how legal questions will be decided.

We emphasize that it is not necessary for the settlement judge to predict how the entire case will be decided; all he need do, to greatly increase the chance of settlement, is reduce the

scope of the parties' and counsel's disagreement over the chance of the outcome on one or more issues.^{28/}

This authority with which the settlement judge speaks is not limited to his de facto knowledge based on experience. His position as a judge should add greatly to his effectiveness. Of course, the fact that he is a judge shows how he got his information and that its provenance is satisfactory. But he also speaks as a judge, not simply a lawyer or a lay person.^{29/}

A settlement is not simply a business deal allocating business risks. If that were all that was involved, the parties ought to have settled the matter without resort to litigation. We pointed out above that at the FERC, most settled cases are settled by the parties themselves, before or in connection with the preliminary conference. But many cases fail of settlement in this way, and we believe it a serious error to assume that parties can be asked to settle cases that get as far as actual litigation by treating the issues as business questions to be settled as other such questions are settled. The parties are in litigation because one or both of them have seen something more in the problem, and likely the decision to litigate was not made casually. The parties, in short, think that they have done enough to merit the attention of the adjudicatory system. Our system fosters the view that it is available for the resolution of disputes, and clients feel that they are entitled to an official resolution of their disputes--what is popularly called a day in court. If that official decisionmaking system meets them halfway with an official, authoritative, but still non-binding and non-prejudging review of the questions of whether settlement is appropriate, they may feel that their perceived need to invoke

^{28/} For example, the parties may disagree over such matters as whether it was relevant that one of them acted in good faith; whether particular facts showed good faith; whether a particular course of conduct was reasonably designed to bring about a desired end or be consistent with some statutory goal, etc. Such issues are frequently central, and yet parties and counsel may feel themselves unable to assess how their positions will be received or disagree with their opposition over their importance.

^{29/} Because he speaks as a judge with a judge's power and authority, parties also are less likely to be skeptical about the value of the informal settlement process and more likely to view it as a legitimate and potentially useful means for reaching an enforceable settlement. See Court-Appointed Masters, *supra*, at 485 (recognizing that parties' perceived value of mediation corresponds to parties' perceptions of authority wielded by mediator).

adjudication has been responded to.^{30/} In addition to facilitating settlements, the settlement judge device also can help maintain the feeling that the adjudicatory process is not so costly or otherwise demanding of time and effort, or so disregarding of persons, as to be effectively unavailable.

V.

WHERE THE SETTLEMENT JUDGE DEVICE
WORKS WELL

As we have emphasized, the settlement judge is most apt to be successful in particular kinds of cases--far from all of them--in which there is some obstruction to settlement upon which the settlement judge can exert his considerable powers. We discussed in general above that a settlement judge is well equipped to deal with and to derail adversary attitudes of client or counsel that have made it difficult to talk settlement. In detail, there are many attitudes and combinations of possibilities that the settlement judge is in a fine position to deal with. Most typically, as described above, the two sides have worked themselves into hardened adversary positions in which one or both feel that to raise the possibility of settlement is too much of a concession. This may be correct or incorrect. In either case, the settlement judge process can be invoked without making this concession.

This is illustrated by the story of how the settlement judge device was first used at the FERC (then the Federal Power Commission). Judge Wagner had presided over, and decided, Atlanta Gas Light Company v. Southern Natural Gas Company, Docket No. CP74-329, a case in which the position of the Public Service Commission of Georgia had been presented by the state's governor, Jimmy Carter, who was successful. On October 18, 1976, weeks before the election of Mr. Carter as President, the Commission modified and affirmed Judge Wagner's decision. 56 F.P.C. 2346 (1976). However, rehearing was sought and granted on December 17, 1976 (id. at 2346 n.*) with the Commission ordering new briefing. In the meantime, the election of President Carter, whose position had prevailed up until then, made matters somewhat awkward for the Commission. The possibility of settlement, a perfect solution to this situation, had been negated by several parties who "wanted to fight." The new governor of Georgia suggested that Judge Wagner, who was of course fully knowledgeable about the case but had no further responsibility in it, try to assist the parties to settle. Judge Wagner took up the suggestion, and using his unique knowledge and persuasive

^{30/} Other alternative dispute mechanisms, such as summary jury trials, also have been recognized as useful ways of breaking down barriers to settlement such as the litigant's emotional need for a "day in court." See The Summary Jury Trial, supra at 468.

abilities, was able to effectuate a settlement despite the insistence by several parties at the outset that they would never settle. Impressed by this success, the Commission promulgated its regulations establishing the settlement judge device and making it broadly available where settlement had not been achieved by other methods.

There are, moreover, many other kinds of situations in which parties or their counsel are unwilling or unable to proceed on settlement by themselves, in which a settlement judge may break the deadlock. For example, there is frequently an explicit or implicit disagreement between a lawyer and his client as to the strength of a position. Generally, lawyers think that this arises most where the client simply will not understand that his case is not perfect, and his counsel either cannot make him see that there is a good chance of losing or is reluctant to be emphatic enough. In our experience it happens the other way, too, when counsel who, having been bitten by the adversary bug, think that a particular legal issue is very strong or important, while the client, perhaps not caring for the beauty of the issue but more likely having a more down-to-earth approach, fears otherwise.

A closely related frequent occurrence is a feeling by parties or counsel that they are unaware of how their position will be received by the trial judge. This uncertainty occurs not only with novel issues, but with fact-specific situations where prior decisions do not provide clear guidance.

In these kinds of cases, the parties may want to settle but be unable to. It is very difficult for a lawyer to advise settlement or for a client to accept it wholeheartedly where they disagree over the strength of their position or where they are completely at sea over the strength of their position. A settlement judge can provide guidance as to how the trial judge would receive such questions. If the uncertainty of a party's or counsel's view of their own case can thus be diminished, settlement should be facilitated. This is, of course, also true where the deterrent to settlement is one side's (or both sides') unreasonable resistance to the proposition that it or they might be wrong. Most parties would like to settle, even those who, stubbornly adhering to an unreasonable position, are of course unlikely to be aware that they are being unreasonable. Therefore, there should be little resistance to the suggestion that a settlement judge be consulted on such issues.

This discussion suggests that agencies may find it profitable to institute use of settlement judges in areas in which settlements are not frequently reached by the parties or other means have not been successful. As we have stressed, a major benefit of settlement judges is their ability to break the ice in an awkward situation in which any of numerous kinds of problems may be inhibiting discussion of settlement. This is confirmed by the FERC's recent experience with cases arising not within its traditional natural gas jurisdiction (in which, we noted above, there is a well-established practice of settlement negotiation before the adjudicatory stage), but from cases from the Department of Energy's petroleum allocation and pricing

regulations, in effect from 1973 to 1981. In these cases, there is not the longstanding tradition of significant efforts by the parties at settlement before adjudication begins. The FERC has been able, using settlement judges, to induce negotiation and settlement of significant numbers of its DOE cases, breaking the ice, introducing the practice of negotiations and settlement on a case-by-case basis where it did not exist before.

A generalization may be deduced from this with some assurance: that starting to use settlement judges may be a fine way for an agency to introduce the idea of settlement in proceedings in which settlement is not now frequently pursued. Where the presence of other factors seems to make particular kinds of proceedings apt for settlement but settlements in fact are not routinely sought or achieved, we would hazard the guess that lack of that achievement is attributable to absence of habits or procedures to break the adversary mold and facilitate settlement. In such circumstances, an agency could make the settlement judge procedure available, perhaps preceded by seminars or other devices to permit its administrative law judges to learn settlement-inducing techniques from others experienced in them. We further assume that in individual cases or classes of cases that one outcome of use of a settlement judge might be the acceptance of the parties that they turn to mediation or other non-adjudicatory means to work out the details of a settlement. The considerations inducing parties to settle being as weighty as they are, this should lead to an increase in settlements.

We have stated above that the settlement judge device works best when only unique issues, generally not of precedential significance, are involved. Reasons for this are several. Most clearly, unlike the normal settlement process involving only the parties reaching agreement, the settlement judge process does involve an adjudicator making statements on the issues, but off the record and, at least in some cases, *ex parte*. Unless those statements are utterly irrelevant to any other case, they can begin to constitute secret law, known only to one or more parties, useful to them in future disputes. Undoubtedly a certain degree of this is tolerable, since judges every day make remarks having implications beyond the cases in which they were uttered, which, while formally on the record, are as a practical matter available only to those parties to whom the statements were made. But a main difference is that the decisive judicial statements in an ordinary case are most likely to be recorded and preserved; the most important statements made by a settlement judge will almost always be a secret, like everything else he says.

Secret law, or law imperfectly known and developed, is undesirable for many reasons, but is especially injurious to the policy of getting controversies settled without adjudication. The clearer and better known the law is, the fewer disputes over it that will arise and the more readily they will be disposed of. For this reason alone, using the settlement judge procedure on issues of major precedential importance would be penny wise and pound foolish: formal and authoritative disposition of such

issues will squelch their arising in the future, but parties will continue to dispute unknown or imperfectly resolved issues.

The administrative law judges at FERC and OSHRC who were interviewed for this paper were unanimous in their belief that issues of significant precedential and policy import should be decided by the usual means for just these reasons (as well, of course, as their general feeling that their job is to make the law known and to create precedent rather than to keep it secret and unknown).

Therefore, from at least the point of view of dispute resolution, the settlement judge device is not a satisfactory way for a court or agency to avoid publicly resolving a point of precedential importance that affects others in addition to the individual litigant involved. Even if such a case could be settled (and as we have pointed out, great uncertainty as to the law does not promote settlement in particular cases), the issue would merely arise again just because its importance extends beyond the particular dispute settled.

We believe also that a settlement judge is less able to promote settlement of a case with major legal or policy issues. The effectiveness of the settlement judge depends in large part on his ability to speak authoritatively about the likely disposition of issues in the case. The more novel and policy-oriented the issues are, the less able anyone other than the agency itself will be able to pronounce credibly upon them, and the more that settlement may come, if at all, through the parties' own compromise or with a non-judicial technique such as mediation.

A settlement judge should also be able to do his work quickly, as it would be wasteful and inefficient to spend a great deal of time learning the circumstances of a case only to have it fail to settle. For this reason, cases of unfamiliar, complex, or arcane facts, or requiring unusual expertise, which would call for a substantial investment of time for the settlement judge to become familiar with, would not seem to be good candidates for this device. However, it may be that particular agency experience would show that the success rate with such cases is high enough to warrant the investment of time. Such judgments should be made by the Chief ALJ or presiding officer, whose knowledge and ability to deal with such questions should advance rapidly with experience.

All of these factors strongly suggest that the settlement judge device works best with cases presenting factual issues of minimal precedential value, where the basic applicable legal principles are clear. Given the changes in the types of hearings conducted by administrative law judges over the last forty years, use of the settlement judge device should prove to be a very useful tool.^{31/}

31/ See A Unified Corps, *supra*, at 268-69. As noted earlier, rulemaking hearings conducted by agencies in formulating policy occupy "a shrinking percentage of the federal administrative judiciary." Today an ALJ's function is much more judicial,

VI.

Limitations on Settlement Judge Use

The important, truly distinctive feature of the settlement judge device is the judicial status of the settlement judge. That status is the source of his power. But it must not be compromised. We are recommending a truly consensual process, in which with the agreement of the parties a settlement judge seeks to facilitate a voluntary settlement with which the parties are satisfied. We are not recommending a new judicial function intended to dampen ardor for litigation by dispensing justice in an informal, off-the-record way. The very potency of the judicial office means that its use must be limited to avoid abuse or compromise--limitations that do not burden other dispute resolution methods that are by their nature consensual, most notably mediation.

Several innocuous-sounding avenues would, we think, lead to misfortune for this reason. Most importantly, as we have already stressed, the settlement judge device should not be used in cases involving issues of significant importance beyond the case.

A less obvious point involves cases in which the remedy available is not susceptible of gradation. Sums of money, rates that may be chargeable, degrees of activity that are licensed or prohibited all can be negotiated and compromised. But where the question may be answered only yes or no, then settlement must merely be one side or the other giving in. While it is possible that a person in the position of a settlement judge could help convince one side or the other that it is to its benefit to surrender completely, this seems a relatively unlikely prospect. Moreover, if one side must take nothing if it does not prevail, then the system inspires the most confidence and respect if it assures a full adjudication, and the role of the settlement judge would not seem beneficial. Parties who were unhappy with the result or felt forced into it would in retrospect regard the settlement judge process as a bootleg, shortcut vehicle under which they had signed away their due process rights. Therefore, we believe, the device should not be used in situations where the legal remedy choices are so limited that one or the other party must give up entirely.

The settlement judge device should not be used, also, in any case in which it is not requested by a party or by the trial judge. In those situations in which the parties are already negotiating, they should be left to do as much of the work themselves as they can--all of it if possible. The settlement judge, again, is an aid to the parties' attempt to reach a true voluntary agreement. His presence where that aid had not been requested would be superfluous for that purpose and therefore subject to misconstruction. In this connection, we believe that

involving emphasis on hearing evidence and making findings of fact.

the trial judge should also be able to recommend that the parties consult a settlement judge, because the trial judge is in a perfect position to see the existence of conditions suggesting that a settlement judge may be useful. However, the trial judge's recommendation should not state any reasons.

Finally, in the event that the settlement fails, the settlement judge's report back should constitute only the unexplained and undetailed statement of that fact, without attributing any view to any party and without any assessment. Similarly the parties should be forbidden from making any reference to anything said by themselves or the settlement judge. The process will not be inviting if it is not fully confidential, and the settlement judge should in any event not be quoted as making any statement about the merits, the trial judge, the reasonableness of counsel, and so forth. Nor should the parties have to be concerned that the settlement judge will say anything on such subjects to the trial judge.

VII.

Recommendation

In 86-3, the Administrative Conference of the United States called for greater use of settlement judges. The following are some recommendations that provide detail for that general notion. We recommend that agencies consider institution of the settlement judge device in the following situations, and with appropriate limitations:

A. Factors suggesting the use of settlement judges would be appropriate and fruitful.

We believe that unless any of these factors are present, the device will not be worth the effort, but that where one, and particularly more than one, are present, there is good ground to expect their efficient and successful use.

1. Crowded dockets with relatively few cases being settled. Where a large proportion of cases is being settled without the use of settlement judges, it may very well be that the availability of settlement judges would further increase the number of cases settled, but the effort of introducing a program would be proportionally greater.
2. Presence of a large proportion of factual issues which are not of major precedential importance. This is all the truer where the facts in those cases are relatively undisputed, and the primary issues concern the interpretation or characterization of them. Broad questions of fact or law are ill-suited to the settlement judge process.

3. Remedies susceptible to gradation and, thus, to compromise. Examples are sums of money, dollar rates, degrees of restrictions or activity, etc. The less flexible the remedy, the less apt is the settlement judge device to be successful.

B. Procedures.

We recommend that agency procedures providing for and implementing the use of settlement judges contain the following.

1. Who may suggest a settlement judge. The suggestion that a settlement judge be consulted may be made at any time to the agency's Chief Administrative Law Judge by any party or by the trial judge. At the FERC, the suggestions usually come from the trial judge, the parties having generally discussed settlement themselves before the adjudication began. An experienced trial judge can, and should, be quite insistent that the parties make an attempt before a settlement judge. Any party may veto such a suggestion.
 - a. The invocation of the device must be made easy to avoid the chance that routine posturing will defeat its use. This may lead to references to settlement judges of parties who do not think they are prepared to settle. But as long as settlement is possible, this attitude is grist for the settlement judge's mill.
 - b. It will generally be foolish for any party to veto the suggestion that a settlement judge be consulted, but the veto power is advisable to avoid utter waste of time.
 - c. Similarly it will be clear that there are many times when a settlement judge should not be requested.
 - d. The Chief Administrative Law Judge will develop great experience about such matters as which judges make good settlement judges for which situations, issues, personalities, and so forth. He will also be able to refuse to appoint a settlement judge in those situations--few, we believe--in which it is appropriate not to do so even though a request has been made.
2. "The Agency" should generally avoid recommendation. The "agency" in the sense of the agency's ultimate decisionmaking body

(see 5 U.S.C. § 551(1)) should ordinarily not retain authority to suggest a settlement judge. The agency is much less likely to know when a particular case is apt for settlement and much more likely to desire a case to be settled to avoid having to decide it. It is unwise to involve a settlement judge to achieve such ends, as it compromises his judicial status.

3. Nature and length of proceedings before settlement judge. Experience at the FERC has shown that proceedings before a settlement judge should not be lengthy or elaborate.
 - a. Start soon. The settlement judge should, within days after appointment, meet with the parties together and (usually) separately to determine what obstructs settlement.
 - b. Timing. The timing of a request or suggestion for a settlement judge should be flexible. A party or the trial judge may realize at any of a number of points during the prehearing proceedings (after the initial pleadings, after some or all discovery, in connection with a motion, etc.) that settlement may be feasible. There is no way to predict when this may occur or force those involved to make it occur at any particular point.
 - c. Techniques. There is no way to provide a road map of techniques to be applied, but in general the settlement judge should discourage unreasonable positions, suggest likely outcomes, suggest that the parties think about how to reach agreement rather than how to take adversary stances, and facilitate communications between the counsel and parties. The settlement judge should encourage and facilitate reaching these goals by reminding the counsel and parties that the proceedings are not on the record and cannot be cited or used in litigation.
 - d. Short duration. Generally, proceedings before a settlement judge should be short--a few sessions, concentrated in a few days. Particular agency experience may warrant lengthier proceedings, where the Chief Administrative Law Judge concludes that the chance of success warrants. The problem is generally one of breaking the ice; once the obstructive attitudes change or the

necessary information is supplied, the parties can continue to negotiate by themselves. If assistance in lengthy negotiations is necessary, a mediator or similar person may be useful. If deadlock again develops, a fresh reference to the settlement judge may later be made.

- e. No elaborate proceedings. What the settlement judge can supply he can supply quickly. It is not efficient for him to spend lengthy periods considering what would be evidence in a formal hearing when settlement judge removes any incentive to a party to use such proceedings for delay or other tactical advantage. If the parties genuinely need and wish some methods of presenting evidence in a settlement context, the settlement judge may refer them to a separate mini-trial process.
 - f. Parties have authority to settle. The parties who attend proceedings before a settlement judge should be required to have realistic authority to settle. In large cases this may be impossible, but in such cases the settlement judge should require the persons appearing to be in a position to recommend settlement and to obtain a quick decision from their principals.
4. Proceedings before the settlement judge off the record; sanctions. The agency must provide by regulation that all proceedings be off the record and not subject to citation or reference in any other proceeding. This includes the statements of the parties, their counsel, and the settlement judge. Participants must be assured going in that they may speak freely, as otherwise they will be tempted to adhere to their litigating positions. As to the statements of the settlement judge, this should not be waivable. Nor should such statements by the settlement judge or the parties be admissible or subject to consideration by the trial judge or on appeal or judicial review. There will be severe temptation of parties to quote statements of opponents or the settlement judge. The agency should provide sanctions to dampen this desire.
 5. Advice to trial judge of results of settlement judge proceedings. At the conclusion of the settlement procedures,

either the parties should tell the trial judge that they have settled, or the settlement judge should advise the trial judge, of the simple fact, with no elaboration of any kind, that settlement has not been reached. To assure confidentiality of the proceedings, the agency's regulations should dictate the formula by which the trial judge is advised that settlement has not been reached.

6. No stay, except by trial judge. Existence of proceedings before a settlement judge should not stay proceedings before the trial judge. Otherwise there would be too much temptation to feign interest in settlement. Moreover, as stated above, proceedings before a settlement judge should not be so lengthy as to make a stay of much pertinence, unless the case is close to trial or at some other such critical stage. Then the parties should ask the trial judge for a stay if they need it, with the settlement judge saying nothing about whether the stay should be granted, it being the trial judge's docket that would be affected by a stay. If the case is stayed, the settlement judge should be told.
7. Settlement like any other. A settlement arrived at with the help of a settlement judge should be treated like any other, with respect to such matters as approval by the trial judge or the agency, opportunity for public comment, and the like. Of course such further proceedings should not breach the confidentiality of the settlement process.