1990

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THE COSTS OF SETTLEMENT: THE IMPACT OF SCARCITY OF ADJUDICATION ON LITIGATING LAWYERS

Kevin C. McMunigal*

Vivid images exert a powerful influence on our thinking.1 The gripping televised images of John Hinckley’s shooting of Ronald Reagan and his highly publicized acquittal on insanity grounds provide an anecdotal instance of this phenomenon. The case spurred Congress and the legislatures of half the states to reshape the insanity defense.2 Vivid images often overshadow more accurate and representative data, such as statistics, which are in a pallid form.3

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2. The Hinckley trial crystallized public discomfort with the insanity defense and its administration, and triggered legislative activity throughout the country. . . . During the three-year period following the Hinckley acquittal, Congress and half of the states enacted changes in the insanity defense, all designed to limit it in some respect. Congress and nine states narrowed the substantive test of insanity; Congress and seven states shifted the burden of proof to the defendant; eight states supplemented the insanity verdict with a separate verdict of guilty but mentally ill; and one state (Utah) abolished the defense altogether.

P. LOWE, J. JEFFRIES, & R. BONNIE, THE TRIAL OF JOHN W. HINCKLEY, JR.: A CASE STUDY IN THE INSANITY DEFENSE 126–27 (1986). The Hinckley case was particularly vivid. The shooting was televised and Hinckley’s subsequent trial and acquittal were widely publicized. Id. at 1.

3. See R. NISBETT & L. ROSS, supra note 1, at 43–62. A psychology experiment exemplifies this differential impact. In forming opinions about the general character of welfare recipients, the experiment’s subjects gave great weight to a single vivid case history of a long-term welfare recipient. The case history was unrepresentative but rich.
Our thinking about lawyers is also shaped by vivid images. Lawyers try cases. They prove their clients' claims and challenge witnesses through cross-examination. They argue questions of law to judges and persuade juries in closing argument. Or so prevailing popular, theoretical, and professional conceptions of lawyers would have us believe. These conceptions reflect the influence of the concrete and emotionally compelling images generated by the process of adjudication, conveying that the lawyer's essential function is adjudicating legal rights and claims in an adversarial context. And trial is our most vivid form of adversarial adjudication.4

Images of lawyers in trial dominate popular media such as novels, films, and television.5 American legal theorists, though not focusing exclusively on trial, have tended to place adjudication at the center of our concept of law and legal process.6 Traditional legal education, with its emphasis on the case method, and traditional legal scholarship have reflected a similar preoccupation with...
the impact of legal rules on cases adjudicated in court. Adjudication also dominates the legal profession's self-image as reflected in the ethical codes drafted by the profession, which adopt the courtroom lawyer as the principal paradigm.

The image of the courtroom lawyer, however, has little in common with the personal experience of most of today's lawyers. This is true not only for the substantial number of non-litigating lawyers, but also for many lawyers who specialize in litigation. Traditional

7. Expansion of this focus to include the impact of legal rules on negotiation has been advocated by Professors Mnookin and Kornhauser. See Mnookin & Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 YALE L.J. 950 (1979). Mnookin and Kornhauser's approach departs from the traditional analytic preoccupation with the impact of legal rules on cases adjudicated in court. Their approach considers the "shadow" which legal rules cast over out of court negotiations and bargaining, "how the rules and procedures used in court for adjudicating disputes affect the bargaining process that occurs... outside the courtroom." Id. at 951 (emphasis in original).

8. C. WOLFRAM, MODERN LEGAL ETHICS 593 (1986):

[T]he litigating lawyer's role colors much of both the public image and the self-perception of the legal profession.

The image of the lawyer as litigator also dominates the lawyer codes. A reader of the Canons might be misled to the conclusion that as recently as 1908 most lawyers' work, or at least most legal ethical problems, occurred in the courtroom. The 1969 Code attempted to break out of a preoccupation with the lawyer—litigator, but with only slight success. The 1983 Model Rules attempted to sketch a broader domain, but again with indifferent results. . . . Whatever the cause, the domination is clear.

Id. See also Schwartz, The Professionalism and Accountability of Lawyers, 66 CALIF. L. REV. 669, 672 (1978) ("Although the current ABA Code of Professional Responsibility recognizes to a larger extent than did the Canons of Professional Ethics, which preceded it, that all lawyers are not constantly litigating, the advocate's role is still clearly the axis of the Code."); (footnote omitted).

9. C. WOLFRAM, supra note 8, at 593 ("Most lawyers spend little time in courtrooms, and a large percentage spend their entire practice without litigating a case. The dominance of litigation in the public mind reflects history, not present reality."). A number of legal historians have noted a shift in the emphasis of American legal practice from advocacy to counseling during the late nineteenth and early twentieth centuries. See J.W. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 302–05 (1950) ("the most basic change in the nature of lawyers' professional work was the shift in emphasis from advocacy to counseling."). Id. at 302.

The first reliable investigations of the economics of the profession were made in the 1930's. These studies tended to confirm the new picture of the lawyer as primarily advisor, counselor, administrator of affairs—in contrast to the image of the frock-coated Daniel Webster, which was the mid-nineteenth-century stereotype of the bar.

Id. at 305. See also L. FRIEDMAN, A HISTORY OF AMERICAN LAW 549 (1973) ("The slow estrangement from his old and natural haunt, the court, was an outstanding fact of the practice in the second half of the [nineteenth] century."); Gordon, The Ideal and the Actual in the Law: Fantasies and Practices of New York City Lawyers, 1870–1910, in THE NEW HIGH PRIESTS 59 (G. Gawalt ed. 1984) ("By the
adjudication in the form of trial and appeal appears to be an increasingly rare experience: the vast majority of cases are currently resolved by negotiated civil settlements and guilty pleas rather than by trials.\textsuperscript{10} For litigating lawyers, therefore, the role of negotiator is much more common than the role of advocate at trial. Negotiation is pervasive not only in litigation, but in virtually all areas of practice.\textsuperscript{11} Yet, the image of the lawyer as negotiator has not displaced the image of the trial lawyer as our primary conception of a lawyer's role.\textsuperscript{12}

The dichotomy between the vivid image of the trial lawyer and the reality of legal practice has a number of important implications. For nonlitigators, are ethical norms derived from the adjudication paradigm appropriate for guiding the many lawyers whose practices do not involve litigation? If not, then what ethical norms should apply to the lawyer in a nonadvocate role such as counselor? Some have argued that ethical norms based on an adjudication paradigm should not be applied outside the advocacy context, calling instead for a different and more restrained set of rules to govern the lawyer

\footnotesize{mid-1880's, the locus of the most elite practice had decisively shifted from the courtroom to the law office and conference room.

\textsuperscript{10} See infra text accompanying notes 15-17.

\textsuperscript{11} S. Gillers & N. Dorser, \textit{Regulation of Lawyers: Problems of Law and Ethics} 711 (2d ed. 1989) ("Although not every negotiator is a lawyer, virtually every lawyer is, at one time or another, a negotiator. It is practically impossible to have a legal career without some need to negotiate.").

\textsuperscript{12} The ethical codes, for example, give little recognition or guidance to the lawyer acting as negotiator. Rather, the subject of negotiation ethics has tended to produce "more heat than light" in recent years. Hazard, \textit{The Lawyer's Obligation To Be Trustworthy When Dealing With Opposing Parties}, 33 S.C.L. Rev. 181, 192 (1981) (discussing the rejection of the Kutak Commission's 1980 proposal of an ethical rule of fairness in negotiations that encompassed a duty to disclose material facts); see also Lowenthal, \textit{The Bar's Failure to Require Truthful Bargaining By Lawyers}, 2 Geo. J. Legal Ethics 411 (1988).}
in a nonadvocate capacity. Others have focused on the question of standards for the lawyer as negotiator.

This Article, by comparison, focuses on the implications of lack of trial experience for litigating lawyers. Does lack of trial experience affect the way lawyers function in litigation? Does it influence their performance as advocates? As negotiators settling cases? Does it affect adherence to existing ethical standards such as those regarding competence and conflict of interest? Can one expect lawyers to understand, respect, and adhere to the values of an ethical and legal system premised, as ours is, upon a process of adjudication lawyers seldom, if ever, experience? Do the answers to these questions yield any insight for guiding reform of our adjudicatory process and the creation and use of alternatives to that process?

This Article concludes that lack of trial experience in a legal and ethical system premised on adjudication threatens the effective functioning and ethical conformity of litigating lawyers. Lack of such experience may already impair that functioning and contribute to some of the current practical and ethical problems in litigation, such as frivolous filings and discovery abuse. Contrary to many critiques of our present legal system, this Article suggests that we should worry about having too little rather than too much adjudication. Lawyers frequently speak of clients deserving their “day in court.” This Article suggests that litigating lawyers need their “day in court” as well.

Although the lawyer serves the administration of justice indispensably both as advocate and as office counselor, the demands imposed on him by these two roles must be sharply distinguished. The man who has been called into court to answer for his own actions is entitled to a fair hearing. Partisan advocacy plays its essential part in such a hearing, and the lawyer pleading his client’s case may properly present it in the most favorable light. A similar resolution of doubts in one direction becomes inappropriate when the lawyer acts as counselor. The reasons that justify and even require partisan advocacy in the trial of a cause do not grant any license to the lawyer to participate as legal adviser in a line of conduct that is immoral, unfair, or of doubtful legality.

Id. at 1161. See also, e.g., Schwartz, supra note 8, at 678-90 (arguing that the lawyer in the nonadvocate role should be guided by more restrained principles than the lawyer as advocate in an adversarial setting).

Part I briefly reviews statistical data and other indicia which point to increasingly limited opportunities for adjudication by trial. To provide a context for the arguments set forth in Part II, it then surveys the major lines of argument in the debate over the comparative virtues and vices of settlement and adjudication as means of resolving litigation.

The implications of scarcity of adjudication for litigating lawyers are analyzed in Part II. It maintains that if trials are infrequent, costly, and subject to great delays, we should expect to incur a number of costs relating to lawyers: decreased advocacy skills, distorted settlements, frivolous claims, discovery abuse, and increased psychological strain on lawyers. Scarcity of trial experience threatens to exact these costs by undermining the abilities of lawyers and by creating incentives that make lawyers more likely to disserve both clients and the legal system. In other words, trials and their associated processes generate a number of benefits in terms of the competence of lawyers as well as the incentive structure under which they operate.

Part III proposes that these benefits of trial experience be included in any assessment of the value of adjudication and alternatives to it. It suggests a number of insights on the debate between the proponents of settlement and the proponents of adjudication. This Article seeks not to resolve the debate over the merits of adjudication versus settlement, but to broaden it by introducing new grounds for assessing the degree of our reliance on settlement.

I. THE DEBATE: SETTLEMENT VS. ADJUDICATION

This Part provides a brief review of the vigorous and continuing debate over the comparative virtues and vices of settlement and adjudication. This debate furnishes a useful frame of reference for the arguments which follow.

A. The Backdrop

Despite its traditional position as the focal point of our legal system, adjudication in the form of trial and appeal presently resolves only a small portion of the total volume of cases in both federal and state courts. Statistics show that trials are by far the exception rather than the rule in both civil15 and criminal16 cases.

15. In 1988, only 5.3% of the civil cases terminated in the federal courts ended in trial. See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS Table C1 at 176, Table C8 at 229 (1988) (percentage
Rather, most litigation ends through settlement. A number of jurisdictions have experienced a decreasing reliance on trials. In the federal system, for example, the percentage of civil cases terminated by trial has dropped by more than fifty-five percent over the past twenty years. Civil trials in the federal courts have recently declined in absolute numbers as well.

extrapolated). Tables C1 and C8 reveal that 12,536 out of 238,753 terminated cases were terminated through trial, resulting in a 5.3% civil trial rate. Id. While authoritative figures for state courts are harder to obtain, trial rates appear to be quite low in state civil cases as well. A recent study of Florida courts revealed a jury trial disposition rate between 1.0% and 1.6% for each of the years from 1979 through 1985. Gifford & Nye, Litigation Trends in Florida: Saga of a Growth State, 39 U. FLA. L. REV. 829, 855 (1987). The Civil Litigation Research Project (CLRP), a study of federal and state cases terminated in 1978 from jurisdictions in five geographic areas, revealed a trial rate of 9%. Galanter, Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. REV. 4, 28 (1983). The national average for federal civil cases terminated by trial in 1978 was 9%. See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS Table C1 at 358, Table C8 at 400 (1978) (percentage extrapolated). Since the CLRP’s sample, which included state courts, did not reveal significantly different trial rates than the national average for federal courts, trial rates in the state courts sampled probably were not dramatically different than those in the federal courts.


17. The CLRP revealed an 88% settlement rate in civil cases in the federal and state jurisdictions studied. Galanter, supra note 15, at 28. For statistics on the prevalence of guilty pleas in federal and state criminal cases, see GUILTY PLEAS, supra note 16.

18. Trial as a means of civil case termination dropped from 12.6% of all terminations in 1968 to 5.3% in 1988 (percentages extrapolated from Tables C1 and C8 in the 1968 and 1988 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS). Civil trial percentages for the period 1945 through 1984 are tabulated in Appendix B to Resnik, supra note 4, at 558. In Florida, jury trial disposition in civil cases decreased from 1.6% to 1.0% of civil dispositions from 1979 to 1985. Gifford & Nye, supra note 15, at 854–55.

19. The absolute number of completed civil trials in the federal courts steadily decreased from 1982 through 1988. In 1982, 14,433 civil trials were completed in the federal courts. In each of the subsequent years for which statistics are available, there has been a steady decline, to 14,391 in 1983 and most recently to 12,536 in 1988 (numbers taken from Table C8 in the 1982, 1983, and 1988 ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS). Although the data for state courts is sketchier, a similar trend seems to exist in some jurisdictions. For example, “from the early 1960s to 1980—a period of increased filings and larger jury awards—
Nonstatistical indicia also point to increasingly limited opportunities for adjudication by trial. Current legal vernacular, for example, favors the term “litigator” rather than “trial lawyer” for one who specializes in the prosecution or defense of lawsuits. The shift in vocabulary reveals a shift in function:

The last two decades have seen a population explosion in the legal profession, and much of the new manpower is employed exclusively in work related to lawsuits. These lawyers are usually not trial lawyers. They are called “litigators.” Few of them have had jury experience, and if they participate in a bench trial it would be as “second chair” to a trial lawyer. It is important to understand that the litigator is not simply a young lawyer acquiring experience that will equip him to start trying cases. Litigators are now a separate specialty. There are many 50-year old litigators whose trial experience has been negligible. They are highly regarded in their specialty and conduct seminars attended by those who wish to improve their own skills as litigators. And they are in charge of training the new generation of litigators.20

The existence of this new breed of lawyers who litigate but seldom try cases has been frequently noted.21 Its emergence may be due to a number of factors, such as the procedural opportunities created by the Federal Rules of Civil Procedure,22 the staffing needs of large-

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21. See, e.g., Levy, Discovery—Use and Abuse, Myth and Reality, 17 Forum 465, 470 (1981); McElhaney, The Pit Bull, A.B.A. J., July 1989, at 88 (in a fictional conversation between two lawyers, one explains that lawyers engage in discovery abuse “because they are able to make it pay. And until clients become educated enough to know that these so-called ‘litigators’ are not real trial lawyers and that discovery abuse keeps the meter running, the problem will continue.”); Resnik, supra note 4, at 522.
22. Resnik, supra note 4, at 522 (“With the new procedural opportunities [created by the 1938 Federal Rules of Civil Procedure] came a new set of lawyers, ‘litigators,’ who did their work (motions, depositions and interrogatory practice) during the pretrial process and who were to be distinguished from ‘trial lawyers,’ who actually conducted trials.”).
scale litigation,\textsuperscript{23} and the simultaneous decline in trial rates and expansion of the ranks of lawyers.\textsuperscript{24}

The tone of some recent scholarship provides a further indication of the scarcity of trials. One commentator describes a "shortage of adjudicative services" such as trial and appeal because "[i]n response to growing caseloads and perceptions of administrative crisis, judges, lawyers, and legal scholars have embraced a host of nonadjudicative shortcuts. They have invented innumerable rationalizations for not doing the job and innumerable ways to avoid it."\textsuperscript{25} Another speaks of the need to ration access to adjudicative services.\textsuperscript{26} Still another voices the "fear that . . . adjudication may be in danger of ceasing to be."\textsuperscript{27}

A shift away from adversarial adjudication has been seen in many quarters as highly desirable. Our legal system's reliance on an adversarial form of adjudication has long been criticized. As early as 1906, Roscoe Pound challenged the premises of what he referred to as our "sporting theory of justice."\textsuperscript{28} Some recent critics have focused primarily on the adversarial premises of our present system and argued for modifications which would result in a less adversarial form of adjudication.\textsuperscript{29}

\textsuperscript{23} It is generally believed that the combination of liberal discovery rules and complex litigation has led to a new breed of litigators, the 'discovery lawyer,' as distinguished from the trial lawyer. Large scale, massive, multi-party litigation frequently involves extremely complex and detailed factual disputes. Such cases have spawned a generation of lawyers who have spent years engaged in reviewing documents, litigating motions about the scope of discovery and answering interrogatories. These discovery lawyers know the ins and outs of the Federal Rules of Discovery. But these discovery lawyers seldom try cases and, unfortunately, often do not know how to try a case effectively. Their skills are not the skills of the experienced trial lawyer.

Levy, supra note 21, at 470.

\textsuperscript{24} See infra notes 83–91 and accompanying text.


\textsuperscript{27} Resnik, Managerial Judges, 96 HARV. L. REV. 376, 445 (1982).

\textsuperscript{28} Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 29 A.B.A. REP. 395, 417 (1906).

Other critics of the present system have urged an increased reliance on settlement. During the last decade in particular, judges, lawyers, and academics have expressed widespread enthusiasm for settlement as an alternative to trial. From the ranks of the judiciary, former Chief Justice Burger has championed the negotiated resolution of both civil and criminal cases. From the ranks of legal educators, Derek Bok has called for a new direction in legal education which would prepare students in the “gentler arts of reconciliation and accommodation” rather than for “legal combat.” Probably the most visible index of the interest in settlement as an alternative to adjudication has been the degree of recent support for devices used to promote settlement, loosely grouped under rubrics such as “alternative dispute resolution,” or simply “ADR,” and “managerial judging.” They include, among others, negotiation, mediation, nonbinding arbitration, panel evaluation, summary jury trial,

30. Support for settlement as an alternative to litigation has long been with us. In 1850, Abraham Lincoln advised “[d]iscourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peace-maker the lawyer has a superior opportunity of being a good man.” A. LINCOLN, Notes for Law Lecture (July 1, 1850), in 2 COMPLETE WORKS OF ABRAHAM LINCOLN 142 (J. Nicolay & J. Hay eds. 1894).


33. Techniques aimed at settling lawsuits through negotiated compromises of factual and legal claims are a dominant theme of the ADR movement. “The purpose behind most forms of alternative dispute resolution techniques is to expedite the prompt and efficient negotiation of claims.” D. GIFFORD, LEGAL NEGOTIATION: THEORY AND APPLICATIONS 202 (1989). The ADR movement, though, also encompasses mechanisms for resolving disputes before they become lawsuits as well as mechanisms for resolving litigation which appear closer in form to adjudication than settlement, such as California’s “rent-a-judge” option. See CAL. CIV. PROC. CODE §§ 638–45 (West 1976 & Supp. 1990). See also Note, The California Rent-a-Judge Experiment: Constitutional and Policy Considerations of Pay-As-You-Go Courts, 94 HARV. L. REV. 1592 (1981).

34. Promoting settlement has become the dominant theme of managerial judging. Although originally conceived as a set of techniques for narrowing issues for trial, managerial judging is “evolving rapidly” from issue narrowing “to a set of techniques for settling cases.” Elliott, Managerial Judging and the Evolution of Procedure, 53 U. CHI. L. REV. 306, 322–23 (1986). For a description and critical analysis of managerial judging and its techniques, see id. and Resnik, supra note 27. For the arguments of the proponents of managerial judging, see Costantino, Judges as Case Managers, TRIAL, Mar. 1981, at 56, and Peckham, The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition, 69 CALIF. L. REV. 770 (1981). Managerial judging still encompasses the use of techniques, such as summary judgment, which are aimed at adjudication rather than at settlement.
mini-trial, and the settlement conference.\textsuperscript{35} Advocates of settlement have even defended plea bargaining as a form of alternative dispute resolution.\textsuperscript{36} This enthusiasm for settlement and a concomitant loss of faith in adjudication have been broadly based:

During the past fifty years, discussions about the function of the Federal Rules [of Civil Procedure] have undergone a substantial transformation. We have moved from arguments about the need to foster judicial decisions "on the merits" by simplifying procedure to conversations about the desirability of limiting the use of courts in general and of the federal courts in particular. Today's programs feature "alternative dispute resolution" techniques, advertised as preferable to trials, judges, and litigation. From the left, court processes are criticized as empty and formalistic, a facade of procedural regularity in an unfair world. From the right, judges are depicted as "running amok," lured (in part) by procedural license into decisions beyond their ken. Whether the cry is for more therapeutic methods of dispute resolution or for "managerial judges" to control wayward attorneys and to stabilize a malfunctioning process, the requests are often the same: \textit{limit opportunities for adjudication by judges and for trial by jury and offer different mechanisms for the disposition of disputes.}\textsuperscript{37}

Despite our already heavy reliance on settlement, interest in even greater reliance on settlement continues to mount. The ADR movement has generated its own journals and a growing bibliography of articles and books.\textsuperscript{38} It has fostered its own American Bar Association standing committee and American Association of Law Schools section, as well as a growing number of institutes and pro-

\begin{itemize}
\item \textsuperscript{35} For definitions and explanations of these mechanisms, see S. Leeson \& B. Johnston, \textit{Ending It: Dispute Resolution in America} (1988).
\item \textsuperscript{37} Resnik, \textit{supra} note 4, at 497-98 (footnotes omitted) (emphasis added).
\item \textsuperscript{38} Journals with a focus on ADR issues include the \textit{Ohio State Journal of Dispute Resolution} and the University of Missouri-Columbia's \textit{Journal of Dispute Resolution}.
\end{itemize}
Almost every month, bar journals address and promote the use of ADR mechanisms and other settlement techniques.

B. The Debate

Two related questions have generated considerable debate in recent years: Is the degree of our present reliance on settlement desirable? Should that reliance be encouraged and increased? Proponents of settlement answer "yes" to both questions, offering various arguments in favor of settlement and devices aimed at its promotion. Prominent among the proffered merits of settlement are savings of time and money. Settlement, its advocates argue, avoids much of the delay and financial cost increasingly associated with trial and appeal. These savings are viewed not just as virtues, but as necessities in an era of limited adjudicative resources and expanding court caseloads.

A second theme among settlement advocates is the avoidance of psychological and emotional costs to litigants. Settlement and related processes, with their emphasis on compromise, exact less of a toll on the parties. Some view the process of encouraging settlement as motivated by a spirit of personal reconciliation which rests on values of "religion, community, and work place." Settlement techniques may also "personalize" the process of resolving disputes

39. The July, 1989 issue of the ABA Journal reports that a Pennsylvania ADR program for mediation of disputes over the functioning of computer equipment: [I]s one of many programs in what is now a burgeoning dispute-resolution arena. A recent survey by the ABA Standing Committee On Dispute Resolution shows that a wide range of cases—including family-custody battles, criminal complaints and condominium and automobile misunderstandings—are being referred to over 600 dispute-resolution entities. Meanwhile, dispute resolution is also being considered to resolve disputes involving bankruptcy, AIDS in the workplace and insurance. Ray, More on ADR, A.B.A. J., July 1989, at 35.

40. Treatment of ADR, for example, dominates the June 1989 issue of the ABA Journal, which contains three separate articles on the topic. A.B.A. J., June 1989, at 66, 70, 73.

41. The July 1989 issue of the ABA Journal reports on a Seventh Circuit en banc opinion providing an expansive reading of a trial court’s powers to promote settlement through Rule 16 settlement conferences. See Reidinger, Then It’s Settled, A.B.A. J., July 1989, at 92 (discussing G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989)).

42. See, e.g., Burger, supra note 31.

43. For a critical review of the literature on the perceived “litigation explosion” and the resulting need for changes to our system of adjudication, see Galanter, supra note 15.

44. See, e.g., Burger, supra note 31.

by allowing more direct participation by the parties than would the
formal processes of adjudication.46

Finally, settlement outcomes are seen as superior to those of
adjudication, in part because settlement avoids the "zero-sum" as-
pect of adjudication.47 Moreover, settlement proponents argue that
parties are more likely to comply with a resolution they consented
to and had a role in shaping than one imposed by a neutral third
party.48 Other advantages claimed for some ADR mechanisms are
privacy,49 procedural flexibility, and the ability of the parties to
choose someone with substantive expertise in the area of dispute to
facilitate settlement.50

These arguments have not gone unchallenged. One critic of
settlement captures some of the tone and substance of the opposition
in the following passage:

I do not believe that settlement as a generic practice is preferable
to judgment or should be institutionalized on a wholesale and
indiscriminate basis. It should be treated instead as a highly
problematic technique for streamlining dockets. Settlement is for
me the civil analogue of plea bargaining: Consent is often co-
erced; the bargain may be struck by someone without authority;
the absence of a trial and judgment renders subsequent judicial
involvement troublesome; and although dockets are trimmed,
justice may not be done. Like plea bargaining, settlement is a
capitulation to the conditions of mass society and should be
neither encouraged nor praised.51

Critics of settlement respond to its efficiency claims by arguing
that settlement, though often producing speedier and less expensive

46. See, e.g., Susskind & Madigan, New Approaches to Resolving Disputes in the
47. Lieberman & Henry, Lessons from the Alternative Dispute Resolution Move-
48. See, e.g., McEwen & Maiman, Mediation in Small Claims Court: Achieving
49. See, e.g., Christensen, Private Justice: California’s General Reference Procedure,
Legal Disputes 44 (1985).
resolutions than adjudication, does not solve the problems of cost and delay. If distributional inequalities exist between the parties, the cost and delay of adjudication tend unfairly to distort the terms of the settlement in favor of the party with greater resources, preventing the settlement from reflecting the merits of each party's position. 52 Second, the voluntariness of many settlements is subject to question; driven by the costs and delays of adjudication, parties may be coerced to settle. In addition, authoritative consent may be lacking because of conflicts of interest between the party and the lawyer conducting the settlement negotiations or because organizations and groups often lack procedures for generating authoritative consent. 53 Since settlement derives its authority from the consent of the parties, potential coercion or absence of authoritative consent undermines the legitimacy of settlement. 54

Also open to question is the ability of a settlement to control the parties' future conduct. Settlement advocates argue that negotiated resolutions are more consistently adhered to than those produced by adjudication. But this may simply reflect the fact that settlement, because of its reliance on compromise, often asks less of the parties than does adjudication. 55 Moreover, a court may be both less likely and less able to enforce the terms of a settlement as opposed to its own judgment, since a settlement is essentially a private agreement. Thus, it is argued that settlement "trivializes" the remedial dimensions of a lawsuit. 56 In addition, some critics view as a flaw the privacy which settlement proponents claim is a virtue. 57 Because settlement is private and involves the compromise of

52. Id. at 1076–78; Alschuler, supra note 25, at 1822–24.
53. Fiss, supra note 51, at 1078.
54. Fiss, supra note 51, at 1078–82.
55. Id. at 1086 n.35.
56. Id. at 1082–85.
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claims, it fails to produce a number of the benefits to society which accompany public adjudication, such as the generation of factual and legal precedents to aid settlement, deter wrongful conduct, and encourage aggrieved parties to seek the resolution of disputes through resort to legal process rather than self-help.58

Perhaps the most fundamental argument against settlement is that overreliance on it both undervalues and undermines the rule of law, because it makes compromise rather than enforcement of factual and legal claims the ascendant value. It elevates peace over our traditional idea of justice.59 Settlement may compromise not only the rule of law, but also respect for our entire system of justice, since adjudication is basic to a civilized society and is "the means by which society keeps the promises of its substantive law."60

The previous paragraphs provide a brief overview of the major lines of debate between the proponents of settlement and the proponents of adjudication. One area which remains largely unexplored is the impact of trial and settlement rates on lawyers, the topic addressed in the following section.

C. The Unexamined Impact on Lawyers

In the story Silver Blaze, Sherlock Holmes unravels a murder case in which the perpetrator entered a house guarded by a dog at night to commit the crime.61 The story provides an object lesson in the human tendency to overlook the significance of nonoccurrences.62 Holmes directs the unimaginative Inspector Gregory's attention to "the curious incident of the dog in the night-time." Inspector Gregory replies simply: "The dog did nothing in the night-time." "That was the curious incident," remarks Holmes.63 If the dog had barked at the intruder, it would have furnished little useful evidence. The dog's failure to bark, however, signified that the intruder was someone the animal knew.

Many proponents of settlement have been influenced by vivid anecdotal information about abuse of adversarial litigation.64 And,

58. Alschuler, supra note 25, at 1816.
60. Alschuler, supra note 25, at 1816.
62. R. NISBETT & L. ROSS, supra note 1, at 48–49.
63. A.C. DOYLE, supra note 61, at 32.
64. Galanter, supra note 15, at 62–65 (noting the lack of attention to statistical data and the predominance and reappearance of dramatic "horror" and "atrocity" stories in the literature concerning the supposed "litigation explosion").
like Inspector Gregory, they have tended to be insensitive to the implications of the fact that trials in recent decades have been occurring at a low and decreasing rate. In part this insensitivity may reflect a failure to accord pallid statistical information its appropriate weight. It may also reflect the tendency to give slight weight to information of nonoccurrences, or "null" information, the extreme form of pallid information. In short, anecdotes of litigation abuse present vivid images which have drawn the attention of the critics, while the unavailability of adjudication and its consequences have tended to be ignored by them. As the previous section demonstrates, the critics of overreliance on settlement, like Holmes, have drawn the less obvious inferences from the "nonoccurrence" of adjudication.

In particular, the proponents of settlement have ignored the negative ramifications of reduced adjudication on professional participants in the legal process. Critics of the settlement movement have responded in part by examining the impact of increased settlement and devices for promoting settlement on the role of judges. They warn that an increased role for judges as settlement brokers threatens the traditional values associated with judging by giving judges vast new unchecked powers and by undermining their impartiality. Just as the movement toward increased reliance on settlement threatens the traditional values associated with judges, it may also threaten those associated with lawyers.

II. THE COSTS OF SCARCITY OF TRIAL EXPERIENCE

What are the costs of limited trial experience for litigators? The following analysis begins with the most certain costs and then moves to those more difficult to assess.


One of the most striking aspects of our study of litigation was that bargaining and settlement were the prevalent and, for plaintiffs, perhaps the most cost-effective activity that occurs when cases are filed. This will come as no surprise to litigators, but it is remarkable how seldom this fact is taken into account in discussions of the litigation crisis, costs of litigation, and the need for "alternatives to litigation."

Id. See supra notes 15-19.

66. R. Nisbett & L. Ross, supra note 1, at 48-49.

A. Advocacy Skills

Perhaps the most obvious impact one would expect from scarcity of trial experience is a diminution in lawyer competence in the forensic skills used to try a case, such as cross-examination and closing argument. The task of accurately assessing the quality of advocacy is mired in the difficulties of defining standards for quality and gathering hard data to measure performance against such standards. Nonetheless, the quality of advocacy of American trial lawyers has attracted a great deal of attention. The ABA termed lawyer competence “the single dominant issue” for the legal profession in the 1980s.68 This concern was sparked by the criticisms of a number of prominent judges who decried a lack of competence among trial lawyers.69 Their complaints gave rise to numerous investigative committees,70 empirical studies,71 and a growing literature on the subject.72


69. See, e.g., Burger, Some Further Reflections on the Problem of Adequacy of Trial Counsel, 49 FORDHAM L. REV. 1, 1 (1980) (“a broad consensus has now emerged that a significant problem concerning the quality of a substantial number of lawyers’ performances in the trial courts does indeed exist”); Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?, 42 FORDHAM L. REV. 227, 234 (1973) [hereinafter Burger, Special Skills] (based on anecdotal evidence and his own personal experiences on the bench, the former Chief Justice suggested acceptance of the “working hypothesis that from one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation”); Kaufman, Attorney Incompetence: A Plea for Reform, 69 A.B.A. J. 308 (1983); Kaufman, The Court Needs a Friend in Court, 60 A.B.A. J. 175, 176 (1974) (“Judges have been exceedingly troubled by the increasing number of instances of poor legal representation that come to our attention. . . . I shall not hazard a guess as to the exact percentage of cases that have suffered from inadequate advocacy, but I can say that in my view it is not insubstantial.”); Wilkey, A Bar Examination for Federal Courts, 61 A.B.A. J. 1091, 1091 (1975) (commenting on “the inability of a startling percentage of lawyers to try a lawsuit”).

70. In 1977 the Clare Committee was formed to study advocacy quality in the trial courts of the Second Circuit. In 1978 the Devitt Committee was appointed to address the issue for all federal trial courts. In 1980 the King Committee took over the work of the Devitt Committee. See A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 640–41 (3d ed. 1989).


Critics of the quality of trial advocacy have proposed a broad array of remedies, including the reform of law school curricula to include advocacy training, specialization and certification in trial work, continuing legal education, and stricter bar admission requirements, such as examinations in certain subjects and prior trial experience requirements. These calls for reform, however, have been received with skepticism by some, who have noted that professed concern for competency has long been a standard part of bar association rhetoric. These skeptics have challenged the existence of a crisis of competency in the trial bar, pointing out the absence of empirical evidence and attacking proposed remedies as inappropriate and ineffective.

Conclusive proof of deterioration in the skills of our trial bar is beyond the scope of this Article. The point is simply that logical inference leads to the conclusion that we should expect a scarcity of trials to result in a scarcity of skilled trial lawyers. Scarcity of trials may compromise lawyer forensic skills in two distinct ways.

1. Reduced Opportunities

First, such a scarcity reduces the opportunities for lawyers to obtain and retain basic advocacy skills by actually trying cases. A premise of our present approach to teaching advocacy skills in simulation and clinical courses is that one learns best by actually engaging in the activity one seeks to learn or in a close approximation of that activity. The Devitt Committee, appointed by the Chief Jus-

73. Proposed solutions to the trial lawyer incompetence problem are reviewed in Blair, Trial Lawyer Incompetence: What the Studies Suggest About the Problem, the Causes, and the Cures, 11 CAP. U.L. REV. 419, 434-42 (1982).

74. See, e.g., Rhode, supra note 72, at 289 ("Demands for increased competence have an extended historical lineage. Since their inception, state, local, and national bar associations have intermittently agitated for measures to upgrade professional performance and status.").


76. See LEARNING AND TEACHING TRIAL ADVOCACY: MANUAL OF THE NATIONAL INSTITUTE FOR TRIAL ADVOCACY (R. Keeton ed. 1977) [hereinafter Keeton].

With respect to learning professional skills and developing competence for professional practice, as distinguished from a basic understanding of "the law"—the basic principles and rules and the nature of the legal system and the legal process—the tendencies expressed in the three-part aphorism ("tell me, show me, involve me") extend also to a separation of involvement into three sub-parts—discussion, supervised simulation, and supervised experience... [O]nce the basic foundation has been
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tice of the United States Supreme Court in 1976, conducted a three-year investigation of the quality of trial advocacy in the federal courts. In its final report, the Committee stated:

The data accumulated by the Federal Judicial Center studies revealed a correlation between the quality of trial performances and the prior experience of the attorneys evaluated. This correlation coincides with the common sense judgment of committee members and others, and with the oft-repeated truism that the way to learn how to try a lawsuit is to try lawsuits. 77

If the conventional wisdom summed up in this truism is as wise as it is conventional, then scarcity of trial experience may compromise advocacy skills by depriving lawyers of an important vehicle for learning and retaining those skills.

The intuitive appeal of a positive correlation between experience and quality invites exaggeration and needs to be qualified in several respects. First, no amount of experience alone guarantees quality. 78 Second, after some threshold amount of trial experience has been reached, the learning curve may level off. Third, quantity of trials may in fact have a negative impact on quality if the quantity of cases being handled prevents adequate preparation or if the pressures of high volume caseloads lead to lawyer “burn out” and cynicism. With these qualifications in mind, though, the idea that some threshold level and regularity of experience is a necessary condition for advocacy quality is logically compelling. This view is reflected in the recommendations of several committees studying the quality of advocacy in federal courts that a threshold amount of trial experience in state court be required before admission to federal practice. 79

acquired, the most promising educational techniques for learning and teaching trial advocacy are those that involve the students intensively in well supervised experience or well designed and well executed simulated exercises.

Id. at 45 (emphasis added).


78. Probably the most often emphasized additional condition for quality advocacy is preparation. Experience may help in this area as well, in terms of knowing how to prepare and recognizing the importance of preparation.

79. See, e.g., S. GILLERS & N. DORSEN, supra note 11, at 196–97 (discussing implementation of experiential requirements by some federal courts); Devitt Report, supra note 77, at 221–22 (recommending a prior trial experience requirement for admission to practice in the federal courts); Report of the Judicial Conference Implementation Committee on Admission of Attorneys to Federal Practice 12–16 (1985). This committee oversaw and monitored pilot projects in thirteen United States District Courts aimed at improving the quality of trial advocacy, some of which included use of a trial experience
2. Reduced Incentives

Scarcity of trials may threaten advocacy skills in a second and different way. Actual trials are not the only way to obtain trial skills. Lack of opportunity to learn through real trials can in part be remedied by providing substitute learning experiences, such as trial simulation courses. Yet, such programs are not perfect substitutes for real trials since they cannot reproduce all of the pressures inherent in a real trial. Nevertheless, certain characteristics which make them unrealistic, such as the opportunity for videotaping and critiquing student performances, actually make them better teaching devices than real trials. One might expect, then, that lack of opportunity to try real cases might be compensated for in good measure through increased use of other means of acquiring advocacy skills.

An increasingly time and cost conscious legal environment, however, threatens to undermine the incentives for lawyers to use such alternatives. As trials become scarcer, incentives for a lawyer to invest resources in forensic training mechanisms may actually decrease rather than increase. Advocacy courses are often time consuming and expensive, and as the opportunities for using trial skills become more infrequent and remote, devoting money and precious billable hours to the development of those skills may increasingly appear an unsound investment. If the lawyer practices in a group setting such as a firm, these disincentives may be reflected in group or organizational norms devaluing seldom used skills. One wonders, for example, whether a law firm in which “litigators” rather than “trial lawyers” are the dominant breed would place a high value on trial skills.

80. See Keeton, supra note 76, at 45 (“Current professional opportunities for well supervised experience in representing clients in court are too limited to perform alone the function of developing an adequately trained, professionally responsible trial bar. They must be supplemented by well developed and well executed simulated exercises.”).


82. An article in the March 1989 issue of California Lawyer, the California State Bar magazine, reports on the phenomenon of California firms using outside consultants for training in trial skills. See Freeman, Teach the Associates Well, CAL. LAW., Mar. 1989, at 77. Although the articulated justification for the use of such consultants is
Despite the threatened disincentives pointed out in the previous paragraph, other incentives nonetheless remain for maintaining trial skills, even in a world of scarce trials. The trial process and its related skills may simply appeal to some lawyers, particularly those who enter the profession with the intention of becoming trial lawyers, as interesting regardless of how infrequently those skills may actually be used. There also remains for litigators the possibility, however remote, that any one case may actually go to trial, a possibility which may be sufficiently unnerving to motivate some litigators to stay prepared for that eventuality. In addition, as discussed in detail in Part II-B, infra, both the lawyer's actual and apparent trial skills provide important strategic advantages in the bargaining environment of the settlement process, which litigators do regularly experience. If the lawyer or her client is sufficiently cognizant of these bargaining advantages, they provide an additional incentive for maintaining trial skills. The question remains, however, whether these incentives will provide clear and powerful enough motivation for litigators to invest time and money in maintaining trial skills which may appear to have little direct use.

3. The Impact of Demographics

Largely overlooked in the modern debate about trial lawyer competence have been lawyer demographics, statistics on the decreased incidence of trials, and the logical inferences which these two groups of data together suggest. Examination of their interplay suggests several factors which increase the likelihood of a decline in the quality of advocacy.

efficiency, another justification may be that partners in such firms, the traditional mentors for younger lawyers in firms, lack the necessary trial skills to provide guidance. One could interpret the use of such outside consultants as reflecting a high valuation of trial skills, citing the firm's willingness to pay for outside expertise as evidence of that valuation. One could also interpret this phenomenon as reflecting just the opposite, citing the partners' unwillingness personally to perform this traditional mentoring function as evidence of a low valuation of trial skills. It may be difficult to determine whether a firm's trial practice program, like a firm's pro bono work, truly reflects the values of the partnership, or is simply offered to attract and retain associates who are interested in such things.

83. Although criticism of the advocacy skills of attorneys is not new, the modern wave of criticism, associated with its most prominent spokesperson, former Chief Justice Warren Burger, began in the 1970s. This modern wave of criticism is often traced to Burger's 1973 Sonnett lecture at Fordham Law School, the text of which was published in the Fordham Law Review. See Burger, Special Skills, supra note 69. In fact, Burger had sounded the same criticisms in an address several years earlier at the annual convention of the American College of Trial Lawyers. See Burger, Remarks on Trial Advocacy: A Proposition, 7 Washburn L.J. 15 (1967).
During the 1970s and early 1980s, the American bar underwent tremendous growth both in absolute numbers and in relation to the size of the American population.\textsuperscript{84} Obviously, this growth was not evenly spread through all experience and age levels. Rather, the growth was accounted for by repeated large influxes of young and inexperienced lawyers.\textsuperscript{85} The resulting drop in the median age and experience level of lawyers was dramatic.\textsuperscript{86} In many of these same years a steep increase in the number of court filings in federal and in some state courts took place.\textsuperscript{87} While statistics are not available on the percentage of young lawyers going into litigation, the increase in the number of filings suggests that litigation

\textsuperscript{84} In 1970 there were 355,242 American lawyers. In 1984 there were an estimated 649,000 American lawyers. The population to lawyer ratio during that same time period went from 572:1 to 364:1. Curran, \textit{supra} note 81, at 20. For other thoughtful discussions of recent developments in lawyer demographics, see Abel, \textit{The Transformation of the American Legal Profession}, 20 \textit{LAW \& SOC\'Y Rev.} 7 (1986); Halliday, \textit{Six Score Years and Ten: Demographic Transitions in the American Legal Profession, 1850-1980}, 20 \textit{LAW \& SOC\'Y Rev.} 53 (1986); Lewis, \textit{A Comparative Perspective on Legal Professions in the 1980s}, 20 \textit{LAW \& SOC\'Y Rev.} 79 (1986).

\textsuperscript{85} Curran, \textit{supra} note 81, at 23. The escalation of bar admissions starting in 1964 and continuing into the 1980s coincided with the maturation of people born during World War II and the post-war 'baby boom.' Yet the magnitude of the rise in admissions after 1964 is only partly explained by the growth of the young adult population. . . . [A]ctual admissions in each year after 1963 not only exceeded expected admissions, but the discrepancy between the two substantially widened after 1971.

. . . Between the end of 1960 and the beginning of 1984, an estimated 481,200 new lawyers entered the profession. During the same period, mortalities among lawyers totalled about 118,000, resulting in a net increase of 363,000.

\textit{Id.}

\textsuperscript{86} \textit{Id.} at 23–25.

The influx of large numbers of young lawyers into the profession, particularly since 1970, materially altered its composition with respect to the age and experience of its membership. The median age of lawyers dropped from forty-six years in 1960 to thirty-nine years in 1980. Lawyers under thirty-six made up 24% of the lawyer population in 1960 and 39% in 1980. Such striking shifts in the age distribution of the lawyer population are not surprising, however, in view of the fact that 50% of all lawyers in the 1980 population had been admitted after 1967 and 42% had been admitted after 1970.

\textit{Id.} "Because the number of lawyers admitted since 1970 already exceeds the number in practice at that time, both the average age and the average experience of the legal profession are the lowest they have been in many years." R. Abel, \textit{American Lawyers} 83 (1989).

\textsuperscript{87} See Galanter, \textit{supra} note 15. Filings in United States District Courts, for example, increased from 89,112 in 1960 to 198,710 in 1980. \textit{Id.} at 37.
absorbed a fair share of the new and less experienced lawyers.\textsuperscript{88} An influx of young and inexperienced lawyers alone may well have caused a decline in the quality of trial advocacy.\textsuperscript{89}

Other developments in litigation practice may have compounded this problem by making trial experience harder to come by for these legions of new and inexperienced lawyers. While statistically the increase in filing rates indicates there was clearly more litigation than in past years, the opportunity actually to try cases in many jurisdictions appears to have decreased dramatically.\textsuperscript{90} While other factors, such as more effective trial skills training in law schools, may have softened the impact, it would seem remarkable if such a steep increase in the number of inexperienced litigators accompanied by such a steep decline in trial rates did not result in poorer performance when those litigators actually went to trial. Nor is this phenomenon purely historical. Projected demographics indicate that the American bar will continue to absorb large numbers of new lawyers,\textsuperscript{91} while the prevailing rhetoric of reform promises no increase in opportunities for trial experience.

4. The Significance of Competence in Advocacy

The issue of competence in advocacy skills poses an ethical concern which implicates both the interests of individual clients and
broader systemic concerns as well. In an adversary system, the
skill of lawyers in developing factual and legal issues is critical to
the system's functioning. As long as we retain a system of adjudica-
tion which relies on lawyers and their forensic skills to define and
develop the issues for adjudication, lack of advocacy skills not only
diserves clients, but also inhibits the system's ability to perform,
reducing the quality of the results it produces. If there is an im-
balance in trial skills between the lawyers on each side of a case, this
asymmetry can compound the problems generated by poor trial
skills.

Furthermore, the systemic impact of poor advocacy quality
will not be limited to those few cases which are adjudicated. A sys-
tem such as ours, in which settlement is the dominant mode of dis-
pute resolution, relies on the results of the adjudicatory processes of
trial and appeal to produce precedents which serve as guides to set-
tlement. It is in the "shadow" of these adjudicated cases that most
cases are resolved by settlement. If the adjudicatory process and
its results suffer from an inadequate supply of skilled advocates,
both adjudicated cases and those settled in their "shadow" suffer.

B. Settlement Distortion

Proponents of adjudication have criticized settlement on a
number of grounds. One point of attack has been the validity of the
assumption of settlement proponents that the terms of a settlement
accurately reflect the relative merits of each party's position. The
tendency of a settlement to reflect the likely outcome on the merits
at trial may be distorted, sometimes quite dramatically, by inequali-
ties between the parties in areas other than the strength of their
claims or defenses. Imbalance in financial resources, for example,
may impair one party's ability to conduct adequate investigation.
Consequently, one party's lack of knowledge may render it unable
to predict accurately the likely outcome at trial and to bargain on
that basis. Even if the party knows the likely outcome, the settle-
ment may be distorted by a different sort of resource imbalance: the

92. The Model Rules of Professional Conduct begin with the requirement of com-
pe tence: "A lawyer shall provide competent representation to a client. Competent rep-
resentation requires the legal knowledge, skill, thoroughness and preparation reasonably
necessary for the representation." Model Rules of Professional Conduct Rule
1.1 (1989); see also Model Code of Professional Responsibility Canon 6 and DR
93. See Mnookin & Kornhauser, supra note 7.
94. See, e.g., Fiss, supra note 51, at 1076.
95. Id.
ability to tolerate the delay and expense of adjudication. A plaintiff with a good case and aware of a very high chance of success on the merits at trial, for example, may choose to settle for a small fraction of the trial recovery because of either present financial need or a simple inability to finance the litigation. In either case, the resource imbalance results in discounting steeper than is warranted by the merits of the case. Terms of the settlement are thereby “distorted” from reflecting the merits. Lack of trial experience may impose settlement distortions analogous to those imposed by financial inequalities.

1. Prediction

The process of settling cases involves both evaluation and bargaining. The element of evaluation requires predictions about liability and damages involving factual issues and tactical considerations such as a jury’s likely reaction to particular witnesses, evidence, or arguments. One would expect a lawyer lacking in trial experience to operate at a disadvantage in assessing the prospects at trial in terms of both liability and damages. The broader the range of variation among individual juries, the broader the range of trial experience a lawyer would need to provide truly representative information about likely jury reactions. As in the area of advocacy skills, an ethical issue of competence arises, but this time in the form of competence to render advice on the advisability of settlement. Incompetence resulting in inaccurate predictions may


98. Judge Posner points to the correlation between a lawyer’s trial experience and the quality of the information provided by that lawyer for use in settlement about the likely outcome of a case at trial. Comparing the advisory verdict of a jury after a summary jury trial with the evaluation of an arbitrator, Posner notes:

Since arbitrators are less representative of jurors than summary jurors are, it might seem obvious that arbitrators’ decisions would produce less information about likely outcomes at trial, and hence fewer settlements, than a summary jury trial would do. But depending on the variance among juries, an arbitrator who is an experienced trial lawyer may render a decision more representative of what the average jury would come up with than the decision of any single jury.


99. Under the ethics codes, responsibility for the final decision about whether a case should be settled rather than tried rests with the client. Model Rules of Pro-
impose the same sort of settlement distortion as lack of financial resources to conduct adequate investigation. Both hinder accurate prediction of the outcome of a trial and thus hamper the ability of the settlement to reflect the relative merits of the parties’ positions.

2. Conflict of Interest

Impairment of the ability to predict outcome at trial might cause a lawyer lacking in trial experience to err either by being more optimistic or more pessimistic in predicting the outcome at trial than the merits of the case actually warrant. Which is the more likely direction of error?

Many factors unrelated to the merits of a case may influence an attorney’s outlook toward settlement.100 Some have noted that attorneys in an adversary system may adopt a “litigation mentality” in which they magnify the legal and factual aspects of the case favorable to their own position, making them more disinclined toward settlement than the merits of the case warrant.101 Some studies have shown that despite contingent fee arrangements, personal injury plaintiff lawyers often find it in their own economic self-interest to urge their clients toward early and relatively meager settlements.102 On the other hand, if a plaintiff’s lawyer has a portfolio of cases over which to distribute risk of loss at trial, she may be more prone to trial than her client’s interests dictate. Analysis of the work of criminal defense lawyers has highlighted the many factors which incline the defense attorney to prefer guilty pleas over trials, such as financial incentives, heavy caseloads, and pressure from prosecutors and judges to process cases efficiently.103

Lack of trial experience creates a similar potential for conflict of interest between attorney and client. Take, for example, a young

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100. Concern about attorney conflict of interest is one of the moving forces behind the managerial judging movement. See Resnik, supra note 4, at 523 ("one motivation for managerial judging is a concern that, without judicial 'guidance,' attorneys may grievously disserve their clients' interests.")


partner in the litigation section of a firm whose experience places her in the category of litigator rather than trial lawyer.\textsuperscript{104} Her firm handles exclusively commercial matters usually resolved by settlement. She has “second chaired” a few trials in her ten years of practice but has tried none by herself. She has significant litigation experience, but it has primarily involved discovery, motion practice, and negotiating the settlement of cases. One would expect that such a lawyer would be reluctant to put the client’s money as well as her own reputation, ego, and ability to attract future clients at risk on uncertain and untested trial skills and would thus urge settlement. Trial entails a public display of those skills, or the lack thereof, in front of the client, the judge, the firm’s associates, and possibly other partners.

It seems more likely that our hypothetical lawyer, confronted with the pressures inherent in this scenario, will evaluate a particular settlement offer by inflating both the advantages of settlement and the risks of trial than if the case were being handled by an experienced trial lawyer. She is more likely to recommend settlement for several reasons. First, she may simply think about the outcome at trial and quite consciously and rationally conclude that her lack of trial experience decreases the chances for success. Or she may unconsciously magnify the risks and uncertainties at trial because of fear of the unknown. In either case, the lawyer’s lack of trial competence introduces an additional element of risk unrelated to the merits and decreases the settlement value of the case.

Second, the lawyer may think about her own performance at trial. Fearing her own embarrassment in the process of trying the case—quite apart from an assessment of the likely outcome—she may either consciously or unconsciously inflate the attractiveness of a particular settlement. For a lawyer at any age, willingness to risk mistakes to gain trial skills will depend in part on one’s work environment. In a highly evaluative, competitive, and unforgiving work environment, even young lawyers may be reluctant to risk trying cases. As lawyers mature, they may be less dependent on the evaluation of peers, but more is expected of them from clients, judges, and those who work with and for them. As a lawyer becomes more senior and more highly paid, it may become harder to risk the inevitable awkwardness and mistakes inherent in gaining trial skills.

Here, the issue of competence is compounded by ethical issues of conflict of interest and loss of independence of judgment. As

\textsuperscript{104} See supra text accompanying notes 20–24.
with economic self-interest, a lawyer’s self-interest in avoiding the risk of trial because of embarrassment and exposure of lack of trial skills may conflict with the client’s interests. It also threatens the lawyer’s independence of judgment in assessing the desirability of settlement. The easiest way for the lawyer to resolve such a dilemma is to avoid the risks of trial and settle the case. The resulting settlement distortions are particularly insidious because many clients have at best a limited ability to assess a lawyer’s settlement advice and the basis for it, particularly given the lawyer’s apparent expertise.105

For a younger lawyer, the lack of trial experience may create a similar conflict between attorney self-interest and client interest, but one which pushes the lawyer to be less rather than more trial-averse than the client. Take, for example, a young lawyer at a large firm who knows that the opportunities for trial experience in her regular workload are limited. The firm, however, takes on small pro bono cases, partly to satisfy the firm’s ethical obligations but also to provide their younger lawyers with trial experience. In advising such a pro bono client about the relative advantages of accepting a settlement offer versus taking the case to trial, the young lawyer’s desire to gain trial experience may put her own self-interest in gaining trial experience at odds with the client’s interest in settlement, particularly since the case is one in which the monetary exposure and visibility of the case are much lower than in her regular paying work. This sort of conflict might also arise in a system in which trial experience was abundant, since small cases are an easy way to break into the field of trial practice. But scarcity of trial experience increases the premium put on taking small cases to trial and thus increases the likelihood that such a conflict will occur.

3. Bargaining Credibility

The previous two sections have focused on the impact of a lawyer’s lack of trial experience on the evaluation component of settlement. Yet settlement involves both evaluation and bargaining, and lack of trial experience may also disadvantage client interests when

105. Distortions in settlement resulting from lawyers deviating from their clients’ interests, illustrated by the hypotheticals posed in this section, are termed “agency costs” by economists. Agency costs include the expense of monitoring an agent and the residual loss resulting from divergence between an agent’s decisions and the decisions which would maximize the principal’s interests. See Jensen & Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 J. Fin. Econ. 305–10 (1976).
lack of trial experience diminishes the attorney's effectiveness in bargaining.

In settlement negotiations, fear of trial weakens one's bargaining position, since the strength of one's bargaining position is in part a function of one's willingness to try the case.\textsuperscript{106} Willingness to proceed with trial turns in part on a comparison of the potential risk and return of trial with the terms of settlement.\textsuperscript{107} Reluctance to try a case may stem from the weakness of one's position on the merits, the amount of damages at stake, or, as pointed out above, the cost and delay entailed in pursuing the case through trial and appeal. It may also stem, however, from a lawyer's lack of confidence in her own ability to try a case.

The discounting may be even steeper if the lawyer's opponent is aware of the lawyer's lack of trial experience and consequent reluctance to try the case. The lawyer's opponent may conclude that his own case is worth more since the lawyer's lack of trial experience increases the opponent's chances for success at trial. One experienced trial lawyer summed up the connection between advocacy skill and negotiating value as follows:

\begin{quote}
I have to maintain my advocacy in court on trial in order to keep up my settlement value. Let me lose two in a row, and the value for a case in current negotiations drops precipitously. Let me go into a low verdict center and be successful in achieving an adequate award and immediately, the value of cases, both on settlement and on trial, rises.\textsuperscript{108}
\end{quote}

Additionally, the opponent's awareness of the lawyer's reluctance to try the case may allow the opponent to drive a harder bargain because that reluctance weakens the lawyer's bargaining position.

\textsuperscript{106} See D. GIFFORD, supra note 33, at 36.

\textsuperscript{107} The extent of a negotiator's power over the other party depends largely on the alternatives available to the other party if an agreement is not reached. If the other party perceives that a negotiation breakdown produces severe detrimental consequences for him, then the negotiator has great leverage to dictate the terms of an agreement. Conversely, if the negotiator's counterpart has other viable options if negotiation fails, the negotiator has relatively little power.

\textsuperscript{Id.} (footnote omitted).

\textsuperscript{108} Belli, Pre-Trial: Aid to the New Advocacy, 43 CORNELL L.Q. 34, 44 (1957).
4. The Significance of Settlement Distortion

The previous sections have shown that lack of trial experience may impair the effective functioning of a lawyer in both the evaluation and bargaining aspects of settlement. This impairment may in turn disadvantage the client in relation to both the decision whether or not to settle and the terms of the settlement. In short, inaccurate prediction and fear of trial can mean the difference between settling and not settling. But it may also affect the amount of the settlement as well as other terms. Like inequalities in other resources, the quality of one's lawyer, including her trial skills, may result in a discounting of the settlement beyond that warranted by the merits of the client's case. Inaccurate predictions about outcome and risk assessments tainted by incompetence and conflict of interest may also undermine the knowledge and voluntariness of the consent which provides settlement with its authority.

Some settlement inducing devices, such as the summary jury trial or nonbinding arbitration, may alleviate some of these problems by providing the parties with an independent means to assess the likely outcome at trial. Advisory verdicts, for example, could provide a means of checking the lawyer's risk assessment. Indeed, the settlement promotion techniques advocated by the managerial judging movement appear to be motivated by a desire to avoid precisely the sort of conflict of interest problems set forth above. Trial experience would help check these problems on a system-wide basis.

C. Inflated Claims

The filing of unwarranted claims is perceived as a pervasive contemporary problem in civil litigation. A recent survey by the

109. In a summary jury trial, the lawyers present summaries of evidence and argument to a jury empaneled much like a regular jury. After being instructed, the jury deliberates and then renders a nonbinding verdict. Lambros, The Summary Jury Trial and Other Alternative Methods of Dispute Resolution, 103 F.R.D. 461 (1984). "The idea behind the summary jury trial is to facilitate settlement by giving parties and counsel a sense of how a jury is likely to evaluate their case." Posner, supra note 98, at 369. Similar information may be provided by lawyers or arbitrators to whom the parties present their case as part of non-binding "court-annexed arbitration." See E. Lind & J. Shepard, Evaluation of Court-Annexed Arbitration in Three Federal District Courts (1983).

110. See infra note 123.

111. Frivolous claims may be asserted by plaintiffs and defendants in various procedural forms, such as a claim, counterclaim, cross-claim, or an affirmative defense in an answer. The term "claim" is intended to encompass all of these.
New York State Bar Association, for example, revealed that ninety-three percent of judicial officers and seventy-seven percent of the responding lawyers felt that sanctions were needed to discourage meritless filings. Ethical rules impose a duty on lawyers to screen claims for factual and legal merit. This screening obligation is enforced by professional discipline, the tort of malicious prosecution, fee shifting mechanisms, sanctions, and injunctive relief or contempt for repeat offenders. Federal Rule of Civil Procedure 11, which allows the use of sanctions to curb unwarranted filings, is the most prominent of these remedies. The sheer volume of published opinions and other writing on Rule 11 suggests the mag-
ntitude of recent concern over the lawyer’s duty to act as “gatekeeper” to the legal process.

A primary focus of the rapidly expanding Rule 11 literature has been the consequences of sanctions and the comparative costs and benefits of their use. Proponents of sanctions suggest that the Rule discourages frivolous filings by making lawyers “stop and think” before filing.118 Others have warned of the possible negative effects of expansive Rule 11 sanctions, including the costs of the “satellite litigation” required for enforcement and the chilling effect on creative advocacy and the assertion and expansion of legal rights.119

There are doubtless numerous causes for the filing of unwarranted claims. Various financial pressures may play a contributing role. The amount at stake in the case may be too low to allow a substantial investment in thorough legal and factual investigation prior to filing. Alternatively, hourly fees may create pressures for lawyers to file meritless cases to generate hourly fee work in discovery and motion practice. However, scarcity of adjudication may also contribute to unwarranted filings.

1. Anticipation of Compromise

Prevalence of settlement and inaccessibility of adjudication create a number of pressures to inflate claims. The first source of inflationary pressure is the fact that settlement normally requires compromise. As noted before, the primary rationale behind Rule 11 is to make lawyers “stop and think.” But frivolous claims may have as much to do with what lawyers are thinking about before

118. See, e.g., Schwarzer, supra note 112, at 1011-14.
119. See, e.g., Nelken, supra note 117, at 1338-51.
filing as with their not thinking at all. In today's legal system, the process of negotiation, rather than trial, might quite reasonably be foremost in the minds of rational litigators when drafting claims. It is their most common experience and the fate of the overwhelming percentage of claims.

When drafting with negotiation in mind, the natural instinct is to inflate claims in anticipation of compromise. If claims will be compromised, it is typical negotiating strategy to build in extra demands in order to have something to bargain away. Sellers of real estate, for example, regularly list a price which is higher than their estimate of the property's true value so they have room to bargain down to their real price. Similarly in lawsuits, the prevalence of negotiated outcomes fosters strategic thinking which assesses claims not in terms of factual and legal viability—as Rule 11 and ethical rules require—but in terms of their value as bargaining chips. Anticipation of negotiation encourages a lawyer to be immodest rather than modest in drafting the allegations of a pleading. In short, the prevalence of negotiated resolutions in which the factual and legal merits of claims are inevitably compromised rather than adjudicated may well encourage the very behavior which Rule 11 seeks to check.

Some lawyers may consciously do this. Others may simply respond subconsciously to the pressures of the settlement-oriented system in which they operate. Nor is the problem likely to be confined only to worthless cases. Lawyers representing parties with valid claims are subject to the same pressure to inflate in order to avoid having to discount a valid claim in settlement.

2. Infrequency of Proof

A second source of inflationary tendencies is the infrequency with which claims are proven or disproven. In a system predominantly characterized by settlement and inaccessible adjudication, a lawyer rarely proves the merit of claims asserted, while opponents rarely have the opportunity to disprove their merit. Put simply, litigators who settle rather than try cases deal primarily in allegations rather than proof. Actually having to prove what one puts in a pleading, as one does at trial, with an opponent pointing out weaknesses in one's proof and bringing forth contrary evidence, is a chastening experience. It is an experience which enhances a lawyer's modesty in drafting the assertions made in a complaint or answer, and provides a natural check to the psychological tendency of
lawyers in litigation to exaggerate the strength of their own positions and the weakness of their adversaries' positions.120

In a system in which opportunities to adjudicate are scarce, not only does a litigator lack the experience of adjudication to curb the pressure to inflate, she also faces the prospect of inaccessible adjudication. The prospect of available adjudication works to deter frivolous claims in several ways. Deterrence is generally viewed as a function of the severity and certainty of the imposition of some negative consequence, such as punishment in the criminal law. In adjudication a party with insufficient proof is threatened with the consequence of a negative ruling on the merits. Additionally, it may also lead to other, collateral negative consequences, such as a suit for malicious prosecution. In settlement, by contrast, a lawyer is not called on to prove the validity of a claim or defense. On the contrary, meritless claims may well provide valuable bargaining chips in the settlement process. The more available adjudication is, the more certain is the imposition of negative consequences for filing meritless claims and therefore the greater the deterrence. In short, a lawyer who knows that her opponent can put her to her proof in a timely and cost effective manner has less incentive to file a frivolous claim than one who knows that she will never have to prove her claims and that her opponent's opportunity to disprove those claims is impaired by significant cost and delay. It is not settlement alone which generates these pressures for frivolous claims. Rather, it is settlement coupled with the unavailability of adjudication. The availability of cost-effective adjudication can have a prophylactic effect by deterring frivolous filings even if it is not used in every case.

One way to conceive of Rule 11 sanctions is as a form of deterrence which substitutes for that which accessible adjudication would provide. Viewed in this light, the developments in the Rule 11 area are consistent with the basic premise of much of the "managerial judging" movement: to overcome inappropriate behavior in litigation by relying on judges to detect it on a case-by-case basis and apply counteracting incentives after the fact.121 The problem with this approach in the Rule 11 context, as elsewhere, is that it "may actually make matters worse by imposing an additional layer of procedural resources that can be used by lawyers for tactical pur-

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120. See Schuck, supra note 101, at 356 (describing the tendency of lawyers in the Agent Orange case to exaggerate the strength of their own positions and discount their adversaries' positions).

121. Elliott, supra note 34, at 334.
This concern about strategic manipulation has surfaced in the debate about Rule 11 and its potential to generate "satellite litigation." A more efficient way to modify the behavior at issue, here frivolous filings, would be to change the underlying incentives or build counterincentives into the underlying system. Accessible adjudication, while it cannot cure the problem of frivolous filings, creates such built-in counterincentives.

D. Discovery Abuse

The abuse of civil discovery procedures has also attracted considerable attention in recent years. Although there is division of opinion regarding both the scope of the problem and appropriate steps for redress, concern over the issue is widespread. For example, three Supreme Court justices dissented from the adoption of the 1980 amendments to the federal discovery rules, which included a number of measures aimed at ameliorating discovery abuse, on the ground that the changes were insufficient to cope with the magnitude of existing problems. The following passage from Justice Pow-

122. Id. at 320.
123. [W]e should think about civil procedure less from the perspective of powers granted to judges, and more from the perspective of incentives created for lawyers and clients. Our current system of civil litigation creates perverse incentives for lawyers, and then relies on judges to police litigant behavior through techniques like managerial judging. If we are not satisfied with the results, we should redesign the system to provide direct incentives for appropriate behavior.

ell's dissent captures the tone of some of the recent debate over discovery:

Delay and excessive expense now characterize a large percentage of all civil litigation. The problems arise in significant part, as every judge and litigator knows, from abuse of the discovery procedures available under the [Federal Rules of Civil Procedure]. . . .

I reiterate that I do not dissent because the modest amendments recommended by the Judicial Conference are undesirable. I simply believe that Congress' acceptance of these tinkering changes will delay for years the adoption of genuinely effective reforms. The process of change, as experience teaches, is tortuous and contentious. Favorable congressional action on these amendments will create complacency and encourage inertia. Meanwhile, the discovery Rules will continue to deny justice to those least able to bear the burdens of delay, escalating legal fees, and rising court costs.125

The fact that the 1983 Model Rules of Professional Conduct brought lawyer conduct regarding discovery within the ambit of legal ethics is another demonstration of apprehension about discovery abuse.126

The causes of these problems appear to be varied. One commentator has suggested that abuse of discovery arises inevitably from the adversarial and competitive economic pressures generated by the legal system within which civil litigators operate.127 Another has suggested that the range and expense of discovery are the result of "new forms of action and new jurisprudential styles which have made the set of potentially relevant ‘facts’ almost limitless in some kinds of litigation."128 In addition, scarcity of trials may contribute to misuse of discovery in several ways.

1. The Focal Point of Adversarial Energy

The modern rules of discovery are based on the assumption that lawyers and the parties they represent would engage in a period of nonadversarial, open exchange of information prior to and in preparation for trial. The idea was that the competitive forces in-

126. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(d) (1983) ("A lawyer shall not . . . in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.").
127. Brazil, Adversary Character, supra note 124, at 1311-15.
128. Elliott, supra note 34, at 320.
herent in the adversary system would be contained within the court­room for the actual trial of the case, and that they would not spill over into the period of trial preparation.129

The adversary character of much of modern discovery makes this assumption seem naive. Even in a system in which most cases were tried rather than settled, it might be unrealistic to think that the pretrial period could be successfully insulated from the competitive pressures of the trial, since the results of discovery play a large role in determining whether cases are tried and how those that are tried will be resolved. In a system in which trials are scarce, however, this very scarcity increases the likelihood that the pretrial phase, including discovery, will become a substitute focal point for the adversary system rather than a prelude to it. Simply put, for many litigators trial never takes place. How could one hope then that trials would focus and contain the adversarial energy of these lawyers? Rather, as pretrial maneuvering, including discovery and settlement negotiations, have become increasingly the “main event” in litigation, it seems only natural, however regrettable, that they have become a focal point for adversariness in a legal and ethical system which is premised on and encourages adversariness. On a systemic level, then, scarcity of trials increases the importance of pretrial activities and makes them more likely to be influenced by adversarial pressures.

2. Ability and Confidence

In addition to depriving a lawyer of an alternate focal point for her adversarial energy, scarcity of trial experience may encourage overuse of discovery in another way. Discovery is ostensibly aimed at producing the evidence needed for trial. Its parameters are whether or not the information sought is “reasonably calculated to lead to the discovery of admissible evidence.”130 If trial experience is scarce, actually proving anything at trial is a foreign experience to litigators. Though the rules tell litigators that proof at trial provides the ultimate point of reference for discovery, their own experience leaves them unfamiliar with that point of reference. Moreover, lack of trial experience deprives a lawyer of the confidence to trust her own judgment in discriminating between what will be important at trial and what will not.

129. The attitudes and assumptions underlying the current federal discovery rules are described in Brazil, Adversary Character, supra note 124, at 1299–1304.
130. FED. R. CIV. P. 26(b)(1).
The experienced trial lawyer understands the ultimate end of the discovery process. He knows that everything he does is directed to the single goal of convincing the judge or jury. When the experienced trial lawyer prepares a case, he never loses sight of the fact that he is structuring the case for trial. In a sense, he is constantly asking what do I need for the trial? how can I get it quickly? and how can I get the information without helping or instructing my adversary? The tendency of the trial lawyer is to constantly aim for the jugular.

All too often the discovery lawyer with little trial experience is uncertain and lacks direction. This is particularly so in large cases where the lawyer who prepares the case not only will not try it but may only be familiar with one small aspect of the case. In such a case the discovery tends to lack direction because the lawyer does not know where he is going or why he's doing certain things. More depositions are taken than needed. Witnesses are deposed who are not needed and who should not have been deposed at all. Objections and evasions are frequent because the discovery lawyer just isn't sure how the senior man will try the case and doesn't want to be criticized for not protecting the client.

The lawyer's lack of trial experience causes him anxiety and uncertainty. Because he is not confident all too often the tendency is to try to insure that absolutely nothing is left uncovered. The discovery goes on interminably as every conceivable stone is turned. The unfortunate result is misused discovery, overdiscovery, expensive discovery, and at times, harmful discovery. Thus, the lawyer who has limited trial experience may take a broad brush approach to discovery because she lacks the ability and the confidence derived from trial experience to focus on what will be important and unimportant at trial. Our system of civil procedure has been criticized as suffering from an imbalance in which procedural techniques for developing and expanding issues greatly outweigh techniques for narrowing and resolving issues. Not surprisingly, lawyers who operate in that system may reflect a similar asymmetry in their own abilities, in part due to their lack of trial experience.

3. Incentives

Scarcity of trials may also contribute to discovery abuse because of the incentives such a scarcity creates. The existence of settlement as an alternative to adjudication creates an incentive to use discovery not just to gain information about the merits of each case, but also to delay the trial or to force the other side to settle. The lawyer who is unwilling to settle at an early stage of the litigation may use discovery as a weapon to force the other side to settle. The lawyer who is unwilling to settle at an early stage of the litigation may use discovery as a weapon to force the other side to settle. The lawyer who is unwilling to settle at an early stage of the litigation may use discovery as a weapon to force the other side to settle. The lawyer who is unwilling to settle at an early stage of the litigation may use discovery as a weapon to force the other side to settle.

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132. Elliott, supra note 34, at 319.
side's claims, but also to increase the cost to one's opponent of pursuing claims to trial. Such an increase in cost may affect both the incidence and terms of settlement. As the cost of pursuing a claim or defense increases, settlement becomes a more attractive alternative to trial. In addition, as this cost increases for a party, the amount that party is willing to settle for varies. As costs increase, a plaintiff is likely to take less and a defendant to pay more. Since discovery often allows a party to increase her opponent's costs with little cost to herself, the rules create an incentive for one party to use discovery to bludgeon the other into a more favorable settlement posture. In the Supreme Court's graphic terminology, the incentive is to use discovery to gain an "in terrorem" increment in settlement value. Settlements reached by such strategic behavior reflect the sorts of distortions discussed previously in Part II-B.

The availability of adjudication cannot cure this tendency, but it does create pressures which may serve to limit it. First, early trial dates may operate to limit discovery abuse directly and somewhat crudely by simply limiting the amount of time for discovery. If trial and discovery cut-off dates loom earlier, there is simply less opportunity for abuse. Such a time limitation might provide a rough functional equivalent to reform proposals for curing discovery abuse by explicitly limiting the number of depositions or interrogatories a party may use.

One might well fear, though, that such time limits might simply result in more discovery abuse occurring in less time. But a trial date which looms near limits discovery abuse in a more subtle way as well by introducing opportunity costs for overuse of discovery. Early trial dates mean a limited amount of time for trial preparation and a consequent need to establish priorities for use of that limited time. Unless a party has tremendous resources, overuse of discovery as trial nears comes at the cost of foregoing other trial preparation tasks:

133. Comment, supra note 124 (discovery abuse occurs because parties can impose large costs on their opponents at small cost to themselves).

134. The impact of cost on the incidence and terms of settlement is derived from the economic model of settlement which is presently the "dominant theoretical account of settlement." See Bundy, supra note 97, at 337.

135. Comment, supra note 124.


137. See, e.g., ABA SECTION OF LITIGATION, REPORT OF THE SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE 18 (1977) (proposal to amend Rule 33 to limit to 30 the number of interrogatories a party could send without leave of court).
Limiting the amount of time before trial establishes a "zero-sum game," in which part of the cost of working on one issue is the opportunity cost of not being able to work on other issues within the limited time available before trial. This creates incentives for attorneys to establish priorities and "narrow the areas of inquiry and advocacy to those they believe are truly relevant and material" and to "reduce the amount of resources invested in litigation."\textsuperscript{138}

In short, the reality of a pending trial may force the trial lawyer to utilize his ability to focus on what is needed to try the case and to evaluate it for settlement, rather than diverting resources into skirmishing on marginal discovery issues.

E. Psychological Costs

The psychological and emotional impact of the practice of law on individual lawyers has received relatively scant attention in comparison with some of the topics treated above. The personal stress of law practice, though, is not a recent phenomenon. Biographical materials on the lives of John W. Davis and Charles Evans Hughes, two of the preeminent lawyers of the first half of this century, for example, contain repeated references to the psychological and emotional strains of law practice.\textsuperscript{139} Nor is attention to such problems new. In 1952, the sociologist Talcott Parsons addressed the strains inherent in the lawyer's role and the deviant behavior which such

\textsuperscript{138} Elliott, supra note 34, at 313-14 (citing Report to the President and Attorney General of the National Commission for the Review of Antitrust Laws and Procedures, 80 F.R.D. 509, 535 (1979) (footnote omitted)).


Although the White House eluded Davis and Hughes, virtually nothing that their profession could offer exceeded the reach of these supremely successful practicing attorneys. Nevertheless, the professional culture exacted its toll. Its elevation of craft as the ultimate criterion of value detached process from purpose and divided the psyches of its ablest practitioners. Although it sanctified these debilitating divisions, and rewarded as lawyers' lawyers those who submerged their personal lives in their professional careers, both Davis and Hughes displayed persistent symptoms of discomfort, avoidance, and repression. . . . Hughes and Davis personify the past from which any healthy future of the legal profession must be wrested.

\textit{Id.} at 1111.
strains may cause. In recent years, however, the topic has received increased attention.

In the debate over settlement and adjudication, one frequently voiced claim for settlement is that the processes which lead to it take less of a psychological and emotional toll on the parties to litigation. If this is true, then perhaps settlement may take less of a psychological and emotional toll on lawyers as well.

Some litigators complain that their professional lives are consumed by conflict and negativism, that litigation is, at heart, a relentlessly destructive enterprise, dominated by efforts to find and exploit vulnerabilities in others, while tenaciously warding off similarly driven efforts by opponents. The pursuit of reasonable grounds for settlement can offer litigators a break from all this. In settlement negotiation, a litigator can respond to the need most of us feel to construct something, to make a positive contribution, to help people launch new efforts or move into more productive stages in their lives. . . . Good lawyers take pride in a process in which reason, clear understanding and effective communication determine outcome. Thus a good settlement can be an important source of professional satisfaction.

This view has a great deal of both intuitive and logical appeal. Settlement and devices aimed at facilitating settlement do offer attorneys constructive roles for serving their clients well by avoiding the stress of traditional adversarial adjudication in cases in which compromise is appropriate and in contexts in which the forces which propel adjudication may be particularly damaging, such as divorce. Serving clients well brings psychic and emotional rewards, and so may involvement in processes, such as mediation, in which "[t]he lawyer seeks to resolve potentially conflicting interests

140. T. Parsons, A Sociologist Looks at the Legal Profession, in Essays in Sociological Theory 370, 376–77, 380 (rev. ed. 1954). This essay was originally presented at a symposium at the University of Chicago in 1952.


143. The trend toward an increased role for lawyers as mediators in divorce is discussed in Silberman, Professional Responsibility Problems of Divorce Mediation, 16 Fam. L.Q. 107 (1982).
by developing the parties' mutual interests" rather than pursuing the interests of one to the disadvantage of the other.

The intuitive appeal of the claim that settlement reduces stress on attorneys nonetheless invites exaggeration. Several factors work to introduce stress into the lawyer's role as settlement negotiator. First, settlement and other pretrial activities have become the "main event" in litigation, and thus the tendency for settlement negotiations to be the focal point of adversarial, competitive energy has increased. Second, because the state of current negotiation ethics is largely unshaped, definite ethical norms to constrain adversarial energy in settlement negotiations do not exist. Third, the role of the negotiator may have inherent aspects which are morally questionable, such as misleading one's opponent. Finally, if settlement becomes too prevalent and the pressures to settle too great, other psychological and emotional strains may be generated. In other words, too little adjudication in a legal and ethical system premised on adjudication may cause its own psychological strains, as detailed in the following sections.

1. Demoralization

Scarcity of adjudication may in several ways demoralize lawyers who litigate. First, each of the costs outlined in this Article may have a secondary demoralizing impact on lawyers. Lack of opportunity to gain trial experience, for example, may produce frustration and resignation among lawyers who want to gain trial skills but operate under a system with diminishing opportunities and incentives to gain such competence. Incompetence in trial skills and consequent ineffectiveness in settlement negotiations may likewise produce cynicism. The use of inflated claims and defenses and discovery abuse present a similar problem for the lawyers who succumb to the pressures to engage in such tactics as well as for those who resist engaging in such conduct but must witness and be subjected to it. The lawyers who resist will feel the "prisoner’s dilemma" pressure to engage in such tactics. They may fear that they and their clients will operate at a disadvantage if they refuse to engage in such tactics themselves. These lawyers may also experience the anxiety or reality of clients forsaking them for other lawyers.

144. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2, Comment 3 (1983).
Model Rule 2.2 explicitly recognizes the role of lawyer as intermediary.
145. See supra notes 15-27 & 94-99 and accompanying text.
146. See supra note 12.
147. See White, supra note 14, at 927.
willing to engage in such tactics. In short, the increased pressure and prevalence of problems arising from scarcity of adjudication may have a demoralizing effect on how lawyers feel about themselves, about lawyers in general, and about the system of justice in which they operate.\footnote{See Brazil, supra note 141, at 107.}

Demoralization may also result from the lawyer’s role as intermediary between the public and a system of justice which often cannot deliver what it promises if adjudication is scarce. Our substantive law speaks in terms of rights tenable in court, and our legal process promises vindication of those rights. Parties whose valid claims and defenses cannot be vindicated in a timely and cost effective way because of the scarcity of adjudication may suffer a degree of demoralization, as critics of settlement have noted.\footnote{See Alschuler, supra note 25.}

While the availability of settlement and devices to promote it undoubtedly give lawyers constructive alternatives for many cases not suited to trial, overreliance on settlement and restrictions on the availability of adjudication put the lawyer in the position of literally having to tell clients that although our system of justice promises vindication for valid claims, there is no cost-effective alternative open to them but to compromise. Being viewed as a representative of such a system may foster professional cynicism.\footnote{See Watson, Some Psychological Aspects of the Trial Judge’s Decision Making, 39 MERCER L. REV. 937, 942 (1988) (reporting the adoption of cynicism as a psychological coping mechanism by judges in reaction to situations they cannot tolerate or change).}

The demoralization problems resulting from scarcity of adjudication may run even deeper for lawyers. Litigating lawyers do not simply act as intermediaries between clients and the system of justice in the same way computer salespeople act as intermediaries between customers and the company. Lawyers and their value, under the conventional view, are much more interstitially connected to the system of adjudication. Under that view, the litigating lawyer’s role and function are tied to the process and results of adjudication since the cardinal tenets of legal ethics are most often justified in terms of the function of the adversary system of adjudication.\footnote{See, e.g., Fuller, The Adversary System, in TALKS ON AMERICAN LAW 30 (H. Berman ed. 1961); D. Luban, Lawyers and Justice: An Ethical Study 50–66 (1988); C. Wolfram, supra note 8, Ch. 10; Damaska, Structure of Authority and Comparative Criminal Procedure, 84 YALE L.J. 480 (1975); Schwartz, supra note 8, at 672–75.} The principles of partisan advocacy are seen under this view as a necessary...
means of promoting a fully informed and legally sound decision by the neutral decisionmaker who is the focal point of traditional adjudication. If the lawyer’s value and role are tied to the results of adjudication, then as adjudicated results become less frequent, the value and justifications for lawyers become more attenuated. With this attenuation may come a lessening of the lawyer’s ability to believe in the value of her own role. In short, the experience of adjudication may help lawyers to understand and respect the values embodied in our legal system and thus the value of their own roles as advocates.

Demoralization may occur not only because adjudication is scarce, but may also result from the beliefs and attitudes that have accompanied and perhaps caused the scarcity. Doubts about the moral status of lawyers have long been with us. The recent wave of enthusiasm for settlement, however, has been marked by an extension of these doubts to within the pale of the legal profession, what some have termed a “failing faith” in adjudication and adjudicatory process.152 The original drafters of the Federal Rules of Civil Procedure, for example, evinced a faith “in adversarial exchanges as an adequate basis for adjudication, in adjudication as the essence of fair decisionmaking, and in fair decisionmaking as essential for legitimate government action.”153 Today considerable evidence demonstrates that such faith is failing, resulting in the devaluation of both the adversarial adjudicatory process and those lawyers whose role and value have been closely identified with adjudicatory process.154

2. Ethical Conformity

Part II of this Article demonstrates several specific ways in which scarcity of adjudication tends to undermine ethical norms in litigation. Lack of trial experience may compromise competence in the advocacy skills used in trial, the counseling and negotiating skills used in settlement, and the ability to conduct discovery which effectively and efficiently prepares a case for trial. Such scarcity also exerts pressure toward compromise of the lawyer’s loyalty to the client and independence of judgment through conflicts between attorney self-interest and client interest. It simultaneously increases the risk of the lawyer’s overstepping the bounds of zealous represen-
Scarcity of adjudication and consequent lack of trial experience may also affect ethical conformity in a broader and more diffuse sense by undermining a primary rationale for our ethical rules. As pointed out above, the lawyer's connection with our system of justice is much more interstitial than merely working in the system and being an intermediary between the system and individual members of society. The lawyer represents the system of justice with its premise of adjudication in a deeper way: the very essence of our traditional view of the meaning of lawyers is tied to adjudication. As our faith in adjudication fails, the ability of an ethical system premised on adjudication to command the respect and adherence of lawyers may diminish. Lawyers then may increasingly ignore both the ethical imperatives and limitations derived from such a system.

III. STRIKING A BALANCE BETWEEN SETTLEMENT AND ADJUDICATION

How does the assessment of the implications of lack of trial experience for litigating lawyers set forth above fit within the framework of the larger debate about settlement and adjudication? What insight does it bring to possible reforms of our adjudicatory process and the creation and use of alternatives to adjudication? The analysis above suggests several possible answers.

A. Strengthening the Case for Adjudication

The most obvious point to be drawn from the analysis in Part II is that its arguments reinforce many of the objections voiced by the critics of settlement. Some simply illustrate new forms of problems which the critics have already mentioned in the debate, such as settlement distortion and conflict of interest. Others provide new grounds for favoring adjudication by demonstrating benefits of adjudication previously overlooked. Although this Article has gauged the impact of lack of trial experience in terms of "costs," one might just as easily conceive of the same points as "benefits" which adjudication provides: competence in advocacy, trial preparation and negotiation skills, reduction of attorney-client conflict of interest, discouragement of frivolous filings and discovery abuse, and reduction of the psychological toll on lawyers. In short, then, these arguments provide additional reasons for public subsidization of adjudication services, such as trial and appeal, at a sufficient level.
to provide these benefits. They also provide additional reasons for caution about over-reliance on settlement alone to cure what may ail our system of civil procedure.

It could be argued that favoring increased adjudication on the grounds set forth above gives undue weight to the self-interest of the legal profession over the interests of clients and society. In other words, suggesting that we should try more cases in order to benefit lawyers is a bit like suggesting burning some perfectly good houses in order to give the fire department the opportunity to improve its fire fighting skills. It might be argued that such claims reflect professional myopia, a preoccupation with the self-interest of professionals to the detriment of the interests of the individuals and the public these professionals are supposed to serve.

There are a number of responses to this counterargument. First, the analogy is flawed. No one wants his house burned down. If filing rates are any indication, however, many people do want their day in court. The analogy inaccurately implies that providing more adjudication forces unwilling parties to adjudicate their cases. One of the premises of the pro-ADR movement is that people are too willing to adjudicate, a premise which is reflected in its many mechanisms which create disincentives to adjudication in order to promote settlement.

Second, the suggestion that litigants might be forced to adjudicate in order to provide these benefits to lawyers mischaracterizes the argument for increased adjudication. To favor increased adjudication does not imply that settlement is something which should be done away with altogether. As is pointed out below, settlement is the appropriate and probably inevitable outcome for many cases. Rather, the real issue is the proper balance that should be struck between adjudication and settlement. How much should we subsidize adjudication? How much should we encourage settlement? Should we create disincentives for those parties who would like to adjudicate their cases to make them more likely to settle, for example by the use of fee shifting mechanisms? In short, the suggestion is not that any set of litigants be forced to try a case when they prefer to settle, any more than that someone should burn his house to help the fire department hone its fire fighting skills. The point is simply that in deciding how available to make the opportunity to adjudicate, among the many criteria which we should consider are the benefits set forth in Part II.

Third, the characterization of the benefits outlined in Part II as involving no more than attorney self-interest is flawed. The benefits
discussed in Part II would accrue not only to lawyers, but also to clients and the public. Increased competence in such areas as advocacy, discovery, and negotiation, for example, should help lawyers better serve their clients and the justice system. Similarly, lawyers can better serve clients if sources of attorney-client conflict of interest are reduced. Even the reduction of emotional and psychological stress on lawyers may help them function more effectively on behalf of their clients. Thus, the claims advanced in Part II are not only in the self-interest of attorneys, but also are more broadly based in the interests of clients and the public interest in the effective functioning of our legal system.

Finally, some of the benefits articulated in Part II could be defended as worthwhile even if they did benefit only lawyers. Reducing the psychological and emotional costs of legal practice, for example, may be worthwhile simply because the psychological well-being of lawyers, like the psychological well-being of all human beings, is a worthwhile goal.

B. Directions for Reform

The analysis in Part II provides criteria for directing reform of our system of justice to preserve the basic functions, values, and benefits of adjudication. First, it suggests caution about simply relying on settlement as a remedial substitute for a system of adjudication which seems too costly and cumbersome. Instead of channeling reform efforts primarily into alternatives to adjudication, perhaps we should give equal attention to reforming adjudication to provide simpler and cheaper forms of adjudicatory process.155

Second, in choosing among alternatives to adjudication, the analysis in Part II provides support for giving preference to those mechanisms which tend to preserve the values and benefits of adjudication. For example, nonbinding arbitration, although essentially a settlement device, provides lawyers with some of the benefits derived from a trial, such as experience in forensic skills and having to prove one’s claims.

This analysis also provides some insight for the way we think about the supply or scarcity of adjudication. Although this Article has focused on trial as the classic form of adversarial adjudication,

155. Among the possibilities for reform which have been suggested to preserve basic adjudication values are a “two-tiered” system of adjudication, see Alschuler, supra note 25, and reforms modeled on West German civil procedure, see Langbein, supra note 29.
other forms of adjudication may provide some of the benefits associated primarily with trial experience, as surveyed in Part II.\textsuperscript{156} For example, summary judgment motions and motions to dismiss are forms of adjudication which may help check the inflationary pressures pointed out in Part II–C by making adjudication on the merits more accessible. Other alternative forms of adjudication, such as binding arbitration and administrative law trials, provide experience in the area of forensic skills. Thus, in measuring the supply of adjudication, we should take into account the use of these other forms of adjudication and their benefits.

C. \textit{Striking a Balance}

Finally, the analysis in Part II suggests that reform should be guided by the insight that both settlement and adjudication are essential parts of our present system of justice and that we need to seek an appropriate balance point between them. Settlement and adjudication are not simply separate dispute resolution mechanisms, but rather mutually interdependent, what a biologist would term symbiotic, systems of resolving disputes.\textsuperscript{157} Settlement, for example, benefits adjudication by freeing procedural resources from some cases and allowing those resources to be devoted to the adjudication of other cases. The cases adjudicated consequently can be handled with more care and attention than if all cases were adjudicated. However, settlement may also have a harmful impact on adjudication. For example, the existence of settlement as an alternative to adjudication may tempt the judge to pressure the parties to settle. If the case is not settled, the judicial neutrality upon which adjudication relies may be undermined. Similarly, adjudication casts a broad shadow over the realm of settled cases. Adjudication can benefit settlement by producing clear factual and legal precedents which provide incentives and guidance for settlement; adjudication can harm settlement when its costs and delays distort settlement terms.

\textsuperscript{156} For a discussion of the adjudicative alternatives to settlement other than trial, see Kritzer, \textit{Adjudication to Settlement: Shading in the Gray}, 70 JUDICATURE 161 (1986).

\textsuperscript{157} Galanter, \textit{The Quality of Settlements}, 1988 J. DISPUTE RESOLUTION 55, 82 ("Settlement is not an 'alternative' process, separate from adjudication, but is intimately and inseparably entwined with it. Both may be thought of as aspects of a single process of strategic maneuver and bargaining in the (actual or threatened) presence of the adjudicative forum, to which I have attached the fanciful neologism 'litigotiation.' ") (footnote omitted).
One of the facets of this interdependence which needs to be explored is the optimal balance between the two systems. More work remains in finding the proper balance point, in identifying which cases should be adjudicated and which settled, and in developing mechanisms which will channel cases to the appropriate system. As the previous paragraph makes clear, this Article is not against settlement. Settlement will and probably should continue to dominate as our means of resolving cases. Nor is this Article against alternative dispute resolution mechanisms. Even if we settle fewer cases than we presently do, ADR may well have a growing role to play in making settlements fairer and less costly to achieve. But if we rely on settlement too heavily and ignore reform of our adjudicative process, we risk encountering the problems described in this Article as well as those warned of by other critics of over-reliance on settlement.

CONCLUSION

The debate over settlement and adjudication raises many issues: efficiency, justice, fairness, coercion, psychological and emotional cost, and the proper role of the judiciary. This Article has sought to broaden that debate to include the impact of lack of trial experience on the skills, roles, and values associated with the lawyers on whom we rely to operate our system of justice. Undoubtedly the image of the trial lawyer should be less dominant in our ethical and legal system. We need to supplement that image with others, such as counselor and mediator, and develop ethical rules modeled on these roles. But unless we do away with adjudication entirely, we have much to gain by making the trial lawyer not just an image, but a part of the experience of all litigators.