The Role of Federal Court Judges in the Settlement of Disputes

ANNESLEY H DEGARIS*

Introduction

The function of the judiciary is to dispense justice as defined by law. As the prime components in this allocation system, the manner in which judges participate in this process is outlined largely by the laws and traditions of their country. Although judges' roles are defined for them, there remain many subtle ways in which judges can influence the resolution of disputes other than by issuing a decision. The most obvious means is by effectuating a settlement. While a judge's role in dispensing justice is usually specifically defined, a judge's role in the settlement of disputes is often determined by that judge's own conceptions of his or her role in the settlement process. Thus, by examining judges' perceived role in the settlement process, one can better understand the workings of the judiciary and, if desirable, gain insight as to how best to assist judges in settling disputes.

This article examines the perceptions that Australian Federal Court judges have of their role in the settlement of disputes. Examination of the judges' attitudes and perceived role in settlement of disputes is important because, where judges have discretion to affect the outcome of litigation, it should be known how they exercise their discretion and for what reasons. To determine how and why judges exercise their discretion, a questionnaire was devised and distributed to the judges of the Australian Federal Court as well as to judges in five other countries.[1] While the underlying research

---

* BS *magna cum laude* 1985 (Samford University); JD *magna cum laude* 1988 (Cumberland School of Law); LLM 1992 (Melbourne). Mr DeGaris is an associate of the Birmingham, Alabama, law firm of Johnson & Cory. He is a former Staff Attorney with the United States Court of Appeals for the Eleventh Circuit and a former United States District Court law clerk.

This article draws on research conducted while a LLM candidate at the University of Melbourne. The writer wishes to thank the numerous Federal Court judges who by completing a questionnaire or by correspondence, contributed to this research.

1 Approximately 286 questionnaires were distributed to 182 judges in Australia, Brazil, England, Germany, Japan, and the United States. A

material is multinational, this article focuses on the attitudes of the judges of the Federal Court. However, comparisons are occasionally made to the other judicial attitudes which were surveyed.

The Questionnaire

The primary research material for this article comes from the questionnaire which was designed to evaluate judges' perceived role in the settlement process. The questionnaire, entitled 'Attitudes of Judges Towards Their Role in the Settlement Process' (Appendix), was distributed to the judges of the Federal Court.[2] To encourage participation, respondents were assured anonymity and that responses would be attributed only by country and type of court.

The questionnaire comprises five sections and consists of 42 questions. Section One consists of five questions which seek general background information from the judge, such as the number of years on the bench and whether or not his or her country's law provides for settlement conferences. The original version of the survey asked for name, address, position, and country of each respondent. On subsequent versions of the questionnaire, the former two were dropped or designated as optional. After this modification a marked increase in responses occurred.[3]

Questions 6 through 13 (Section Two), are multiple choice. Each question has three to five alternatives. The format of Section

---

total of 189 responses were received. By country the responses were: Australia 15; England 15; United States 27. Japanese judges were strongly opposed to the questionnaire, not wishing to be the subjects of any kind of 'sampling research,' and returned only one survey. The survey was also distributed to Brazilian judges at a conference in San Paulo, but none was returned. A total of 132 responses were received from Germany. At this writer's request, the questionnaire was photocopied and distributed by various courts in Germany. Hence, the actual number of judges who received a copy of the questionnaire is far greater than 182. This number more accurately represents the judges who were contacted directly. In the countries other than Germany, many judges were sent two questionnaires in an effort to encourage participation.

2 The questionnaire was distributed to United States District Court judges in Alabama, Florida, and Georgia. In England, the survey was distributed to judges of the Queen's Bench Division of the High Court. The questionnaire was distributed to civil and criminal judges in Brazil and Germany.

3 This is especially true among the English judges who participated in the survey. Australian Federal Court judges, without exception, identified themselves.

Three, questions 14 through 29, is based upon the Likert scale. The responses are on a five-point scale ranging from strongly agree to strongly disagree.[4] The Likert section repeats, in different form, several topics previously addressed in the multiple choice section in order to test the consistency of responses. This practice is duplicated throughout the questionnaire.

Section Four includes nine questions, 30 through 39; the choice of responses being 'yes,' 'no,' or 'not sure.' Section Five, questions 40 through 42, asks for comments about the judge's role in settlement and comments about the questionnaire. The majority of Federal Court judges did not answer these questions but rather made comments, if any, on cover letters returned along with the questionnaire. Additionally, comments were frequently made in the margins next to particular questions.

The survey questions were designed to solicit information in five areas:

(1) background;

(2) judicial attitudes toward settlement;

(3) the judge's role in the settlement process;

(4) techniques for participation in the settlement process; and

(5) propriety of judicial participation in the settlement process.

The questions were randomly mixed into each section. Some questions are used to make multiple points in discussing different issues. To the best of this writer's knowledge, no research of this type has ever been attempted in Australia.[5]

---

4 See R Likert, *A Technique for the Measurement of Attitudes* (Archives of Psychology, Columbia University, 1932).

5 However, the writer must acknowledge that this survey was influenced by one conducted by United States Magistrate Judge Wayne D Brazil. Judge Brazil distributed a survey to 1,900 litigators in the United States seeking their views on the proper role of United States District Court judges in the settlement of disputes. Specifically, Brazil's survey sought to identify the characteristics litigators found most effective in assisting the parties in resolving disputes. This writer modeled many of the questions on those of Brazil's survey, with the important difference of addressing judges rather than attorneys: W Brazil, *Settling Civil Suits* (American Bar Association, 1985).

The survey was multinational and its multinational use shaped its format.[6] This multinational approach also caused problems. Some questions lacked specificity but generalized questions facilitated the assembling of a questionnaire that could be distributed in one language to judges in six different countries. Additionally, many of the questions assumed the existence of some type of settlement conference or similar procedure in each country. The multiple choice responses limited respondents to a fixed number of choices and other questions assumed that the judge knew more about each party's case than he or she actually might. Many judges felt that the choice of answers was too limited and wrote their own responses or qualified their answers in the margin. These comments are reflected in the survey's results. Accordingly, in addition to the listed answers in the questionnaire, the results (in appropriate cases) also indicate the percentage of unanswered questions, questions unanswered with comments, and answers which were deemed unusable (typically where respondents circled more than one response). When a question was answered but a comment was written in the margin qualifying the answer, the answer was treated as valid but the fact that a qualifying comment was made was noted. As used herein, a 'qualified answer' means a comment was made but the comment was not such that it necessitated invalidating the answer. Other comments on individual questions which did not qualify the answer are also indicated in the results, because these comments tend to illustrate the respondents' interest in, or difficulty with, a particular question.[7]

Even with these qualifications, there were still ample data from which to make some very specific observations about the role Federal Court judges perceive for themselves in the settlement process. In many cases, the judges' comments in the margin or comments made on cover letters when returning the survey provided information superior to that of the questionnaire. These comments revealed the judges' willingness to discuss their role in the settlement process.

The statistical results of the survey are contained in the Appendix and are discussed below.[8] The results are supplemented

---

6 The questionnaire was distributed in English due to concerns that translation into Portuguese, German, and Japanese might affect the reliability of the results.

7 An example of this system is Question 9. Respondents were given four choices, but two other response types are reflected in the results due to the nature and variety of comments.

8 In the text, where possible, statistical results are rounded to the nearest whole number.

with comments made by responding and non-responding judges. In reading the following discussion, the reader is reminded of the exploratory nature of this research and encouraged to refer to the Appendix for the full range of responses to each question.

Results

As one might expect considering the common background of the English, Australian, and American legal systems, many similarities appear in the attitudes of these judges. For this reason, occasional comparisons are made between these groups. Australia's judicial system consists of elements found in both the English and American systems. It is English in personality, but more American in design. For example, the judges follow the English tradition of robes and wigs but the judicial system includes both State and federal courts. Furthermore, the perceived role of Australian judges in the settlement process appears to be a mixture of English and American attitudes.

In discussing the Federal Court judges' role in the settlement process, the remainder of this article is divided into the following sections: (A) Background; (B) Attitude of Judges Toward Settlement; (C) Judge's Role in Settlement; (D) Participation in the Settlement Process versus Encouraging Settlement; (E) The Judge's Role in Ensuring Settlements are 'Fair'; (F) Propriety of Judicial Participation in the Settlement Process; and (G) Analysis.

A Background

(1) Distribution of the Questionnaire

A total of 61 questionnaires were distributed to 35 members of the Federal Court. When the initial mailing failed to produce an adequate sample group, non-responding judges received a second questionnaire which accounts for a total distribution of 61.[9] The two mailings resulted in 15 completed questionnaires and a substantial amount of correspondence from both responding and non-responding judges.[10] The correspondence of both groups is included in this discussion.

---

9 The United States had the highest response rate (40 percent) followed by Australia (37 percent) and England (26 percent).

10 The response from Federal Court judges to second mailings was mixed; however, Federal Court judges had the highest rate of initial responses and the second highest percentage of total responses.

(2) Background of the Sample Group

The Federal Court of Australia is a recent addition to the Australian legal system.[11] Created in 1976, the Federal Court is a trial court but also handles minor appellate matters in multi-judge panels.[12] Increasingly, it functions as an intermediate court of appeal in many federal cases.[13]

The responding Federal Court judges had served less time 'on the bench' as compared to their English and American counterparts; 47 percent had served for only 1-5 years.[14] Their responses indicate that Australian law provides for settlement conferences in Federal Court cases[15] and 80 percent of judges said they may require the attendance of the parties at a settlement conference.[16]

B Attitude of Judges Toward Settlement

A positive attitude toward settlements increases the likelihood of judicial participation in the process, but as discussed below, it is not synonymous with active participation.

---

11 For a complete discussion of the Australian judicial system see J Crawford, *Australian Courts of Law* (2nd edn, OUP, 1982).

12 R Tomasic, 'The Courts of Australia' in J Waltman and K Holland (eds), *The Political Role of Law Courts in Modern Democracies* (Macmillan, 1988) p 33. Formerly this trial and minor appellate work was handled by the High Court.

13 Ibid.

14 Appendix, Question 2. Twenty percent had served for 5-10 years.

15 Question 3. Also note *Federal Court Rule* 0 10 R 1(2)(g) which provides:

1(2) Without prejudice to the generality of sub-rule (1) the Court may -

(g) order that the parties attend before a Registrar or a Judge in confidential conference with a view to reaching a mediated resolution of the proceedings or an issue therein or otherwise clarifying the real issues in dispute so that appropriate directions may be made for the disposition of the matter or otherwise to shorten the time taken in preparation for and at the trial.

Quoted from Hon Mr Justice French, 'Hands-On Judges, User-Friendly Justice,' a paper presented at the Ninth Annual Australian Institute of Judicial Administration Conference (August 18-19, 1990).

16 Appendix, Question 5. One judge commented, in response to Question 5, that while the judges have the power to require attendance 'it would not be usual for this to be done unless both [parties] consented or at least did not oppose the holding of a conference.' Twenty percent of judges responded that they could not require the attendance of parties at a settlement conference.

Eighty-seven percent of the judges said the best outcome of most cases is a settlement rather than a trial.[17] Seventy-three percent of judges also 'agree' or 'strongly agree' that a settlement produces a 'higher quality of justice' than the 'all-or-nothing, black-or-white end result of a trial.'[18]

When asked what effect their involvement has in *settlement negotiations*, 47 percent of Federal Court judges responded that it 'assists the parties in reaching a settlement.'[19] However, when asked the most effective way a judge can participate in the settlement process, 40 percent responded: 'allowing the parties to engage in settlement discussions without judicial interference.'[20] Thus, while the judges have a positive attitude toward settlement, this attitude does not mean that they actively participate in the settlement process itself.

Questions 5 and 25 reveal judicial attitudes toward a specific aspect of settlement: settlement conferences. A majority of Federal Court judges (80 percent) agree that they may require parties to attend a settlement conference.[21] Furthermore, 73 percent either 'strongly agree' or 'agree' that clients should be *required* to attend settlement conferences.[22] From these data it can be implied that the importance of settlement conferences requires the attendance of the person the judges found to be the most important to the settlement process.[23] Arguably, client participation in settlement conferences increases the possibility of settlement; hence, the judicial interest in their attendance.

While judges value settlement and mediation conferences, they do not view these conferences as formalities that a party must endure to be entitled to a judgment of the court. As noted by one

---

17 Appendix, Question 30.

18 Appendix, Question 20. This question is quoted from M Galanter, '"...A Settlement Judge, not a Trial Judge": Judicial Mediation in the United States' (1985) 12 *J L & Soc* 1, 3 which, in turn, is quoting from an outline given to recently appointed United States District Court judges at a training session.

19 Appendix, Question 9. Forty percent responded 'not sure.'

20 Appendix, Question 10. Twenty percent responded 'persistently encouraging the parties to settle.'

21 Appendix, Question 5.

22 Appendix, Question 25.

23 Appendix, Question 13. Ninety-three percent of respondents chose the client as the 'most important individual in the settlement process.'

judge, 'the parties are entitled to the judgment of the court, even if they may be "unreasonable" in seeking it.'[24]

Discussing settlement conferences, another judge stated:

> Our experience is that not every case is suitable for mediation. It is often better to let a case run. Many cases settle without the need for any settlement or mediation conference. One needs to have an appreciation of which cases are likely to be helped by medication and which are not. If one sends cases indiscriminately for mediation, one will often impose on parties the burden of unnecessary and wasted expenditure. This is something of which judges in this Court are very conscious.[25]

The results of the survey in this area, as well as correspondence with judges, lead to the conclusion that Federal Court judges have a positive attitude toward settlement, but are not settlement activists.[26] As discussed below, settlement in the Federal Court takes place without substantial judicial involvement. The process is judge-sanctioned, but is conducted by other court officials. Judicial attitudes were consistent with these realities. For instance, 87 percent of the judges surveyed found it more appropriate for one judge to participate in settlement discussions while another, if necessary, preside at trial.[27] Thus, while the data support the conclusion that Federal Court judges have a positive attitude toward settlement, this view does not necessarily translate into extensive judicial participation in the settlement process.

C Judges' Role in Settlement

Before examining the role of Federal Court judges in the settlement process, it is necessary to discuss briefly the context in which this role is exercised. Typically, registrars, not judges, conduct settlement conferences in cases before the Federal Court.[28] Recently, the Rules of Court have been amended to allow appropriate cases to be referred to mediation before a registrar or judge[29] in what are

---

24 Correspondence with a judge.

25 Letter of a judge who did not participate in the survey.

26 Appendix, Question 23.

27 Appendix, Question 38.

28 One judge commented: 'Our court can send cases to Registrars to assist settlement. Some Registrars do it well, some less so, but it is largely a matter of the litigant's attitude to the perceived lack of sanctions of the Registrars that make most conciliations of this kind fail.' Quotation from a judge in response to Question 41.

29 French, note 15 above, at p 16.

'essentially pre-trial settlement conferences.'[30] However, judicial participation in settlement conferences and mediation conferences is limited. As discussed by one respondent, 'the bulk of pre-trial settlement work in the Federal Court is done by Registrars'.[31] Another commented: '[i]t is rare for judges to participate in a *formal* settlement conference'.[32]

Judicial involvement in mediation conferences is equally limited. In the Perth Registry, judicial involvement in mediation is limited to special cases and is conducted by a judge who will not hear the case at trial.[33] In the Sydney Registry, judges do not conduct mediation conferences. The conferences are 'either conducted by a registrar, who has undergone training in mediation, or by a private mediator away from the court.'[34] Thus, the settlement process in the Federal Court is judicially controlled, but has only limited direct judicial participation.

The two survey questions (14 and 18) intended to address directly the perceived role of judges in the settlement process produced results which were so mixed it is difficult to draw any conclusions from the data. However, in general, Federal Court judges do not perceive a prominent role for themselves in the settlement process,[35] nor do they perceive that they have no role at all.[36] They state, however, that compared to 20 years ago, they are more involved in the settlement process.[37] Furthermore, 13 percent say they 'actively encourage' settlement while 53 percent say they 'encourage settlement in appropriate cases.'[38]

The limited role of Federal Court judges is further illustrated by the following comments:

> Some of the answers may appear inconsistent. The reason for this is that I have tried to reflect my own philosophy that judges should

---

30 Id at p 11.

31 Cover letter of a judge responding to the survey.

32 Response to Question 4. Emphasis in original.

33 French, note 15 above, at Annexure D.

34 Letter of a judge who did not participate in the survey.

35 Appendix, Question 18.

36 Appendix, Question 14.

37 Appendix, Question 8. The writer speculates the respondents are referring to Australian judges as a whole, as the Federal Court is a recent development in the Australian legal system. See note 11 above and accompanying text.

38 Appendix, Question 6.

> not take part in settlement negotiations. That is not the role of the courts. By all means courts should endeavor to define the issues and assist the parties in the resolution of those issues, but the conduct of the litigation is for the parties themselves.[39]
>
> My role is limited to mediation conferences where I am not to take the trial of the action.[40]
>
> Settlement is a matter for the parties, not the court. Its role is to adjudicate and resolve disputes.[41]
>
> Very largely it is a matter of judgment based on experience that I use in deciding whether and to what extent to intervene. I usually ask for the parties to be present and give them a pep talk about the cost [sic] of litigation, including appeals. I especially emphasise what few of their lawyers tell them, that even if they win the case, they lose - because they can only recover a proportion of their cost and the further the case goes the larger is the amount they have to pay.[42]

Federal Court judges appear to be satisfied with their role in the settlement process. When asked whether they would favour legislation increasing their role in the settlement process 53 percent answered 'no' and 27 percent were 'not sure.'[43] However, 27 percent said that judges should have the power to approve settlements in 'all civil cases' and 7 percent said they should have approval power in 'cases involving constitutional rights.'[44] This indicates that some judges favour an increased role in the settlement process.

In contrast to their English and American counterparts, Federal Court judges appear confident that the barristers appearing before them do not desire more participation by the judge in the settlement process.[45] This perception may account for the finding that 73 percent of judges feel they should not become *involved* in the settlement process unless asked by the parties.[46] However, 60

---

39 Cover letter of a judge responding to the survey.

40 Response to Question 40.

41 Response to Question 40.

42 Response to Question 41.

43 Appendix, Question 39.

44 Appendix, Question 12.

45 Appendix, Question 19. Thirty-seven percent of American judges agreed that attorneys want more input by the judge, while 48 percent were undecided; 40 percent of English judges were undecided and the same number disagreed.

percent state that a judge should attempt to *facilitate* a settlement although not asked to do so by either party.[47]

The distinction between these seemingly contradictory findings appears to be based on the use of the word 'involved' (implying participation) in Question 26 and the word 'facilitate' (implying encouragement) in Question 31. Thus the results from these questions are not contradictory, but are consistent with the findings throughout the survey: Federal Court judges are willing to encourage or facilitate settlement, but do not feel that they should participate or become involved in settlement discussions.

Having theorized that judicial involvement in the settlement process seems to be based on the characterization of the action as participation as opposed to encouraging or facilitating settlement, it is necessary to define what acts amount to participation.

D Participation in the Settlement Process versus Encouraging Settlement

As discussed earlier, 47 percent of judges believe that their involvement in settlement negotiations assists the parties in reaching a settlement[48] and, as compared to 20 years ago, 47 percent say they are more involved in the settlement process.[49] This involvement, however, is not active participation in the settlement process.

When asked 'What is the most effective way a judge can participate in the settlement process?' 40 percent of judges responded 'allowing the parties to engage in settlement discussion without judicial interference' while 20 percent responded 'persistently encouraging the parties to settle.'[50] Notably, in Question 17, a

---

46 Appendix, Question 26. Forty percent of judges 'strongly agree' and 33 percent 'agree' that they 'should not become involved in the settlement process' unless asked by the parties. Twenty percent 'disagree' with this statement.

47 Appendix, Question 31.

48 Appendix, Question 9.

49 Appendix, Question 8. It should be noted that 33 percent responded they were involved to the same degree. As previously noted, the writer speculates the respondents are referring to Australian judges as a whole, as the Federal Court is a recent development in the Australian legal system. See note 12 above and accompanying text.

50 Appendix, Question 10. It should be noted that the responses may have been too restrictive for the Federal Court judges as they did not include the option of referring the case to a settlement or mediation conference.

substantial majority (66 percent) said a judge should emphasise the 'advantages of settlement and the disadvantages of litigation' in pretrial meetings.[51]

While willing to engage in activities that encourage settlement, Federal Court judges were unwilling to offer substantive assistance in settlement. For instance, when asked their level of agreement/disagreement with the statement, 'A judge, when the situation presents itself, should inform the parties of expected rulings on evidentiary matters, points of law and difficulty of burden of proof as a way of assisting the parties in reaching a settlement,' 27 percent responded 'agree,' 27 percent responded 'disagree' and 27 percent responded 'strongly disagree.'[52] The results were not as mixed in a similar question, where 86 percent disagreed with the statement: 'A judge should be willing to express an opinion about a case, comment on strengths and weaknesses of evidence and arguments and propose what he considers a reasonable settlement.'[53] The only situation in which a majority of judges were willing to intervene in such a way that could conceivably assist in settlement was presented in Question 29. Here, a majority of respondents agreed that 'A judge should point out law or evidence that an attorney is overlooking.'[54]

One judge noted:

> I think a judge's role is to judge. I have no problem philosophically with a judge giving some tentative and provisional indication of his view of the factual and legal issues which might assist the litigants in assessing the probabilities and arriving at a settlement. But this has to be done very carefully. The judge has to retain a genuinely open mind, and be seen to do so. Anything that smacks of bullying (however suavely and politely done) in the cause of a settlement (however reasonable) is inconsistent with the judicial function.[55]

However, the position of the majority of Australian judges was best summarised by one respondent who wrote:

> I think that all Australian judges, certainly all members of this Court, are very much aware of the desirability of parties achieving settlements. The policy which I adopt is to foster the idea of settlement discussions as and when this seems appropriate. In

---

51 Appendix, Question 17.

52 Appendix, Question 15.

53 Appendix, Question 24. Seventy-three percent responded 'disagree' while 13 percent responded 'strongly disagree.'

54 Appendix, Question 29.

55 Correspondence with a responding judge.

> some cases it will be entirely pointless; it may be obvious that there is a substantial issue which has to be resolved by a court determination. In other cases the parties may be sophisticated and well represented; an enquiry or hint from time to time may be useful, but anything more may be counter productive. In other cases, it may be obvious that the parties have not addressed the matter of the settlement, have overlooked important problems or are not being competently advised. In those cases more direct intervention may be justified. I am not adverse to saying quite bluntly that I think that the parties ought to become more involved in negotiations. However, I would never get involved in the detail of those negotiations except with the consent of the parties and having first informed them that I would regard myself as being disqualified from hearing the case if it in fact proceeds . . . . There is a major difference between judicial activism in pretrial preparation, so as to ensure that the issues are clear and that the evidence is all on the table (a situation which is most conducive to meaningful negotiation) and activism which has the judge expressing opinions about the merit of the case, whether of fact or law, before those merits have been adequately canvassed. To take the latter course, will likely lead to the feeling by the litigant disadvantaged by the expressions of opinion that the matter has been prejudged. In my opinion, it should certainly disqualify the commenting judge from subsequently hearing the case.[56]

E The Judge's Role in Ensuring Settlements are 'Fair'

Federal Court judges are 'undecided' as to whether or not their participation in the settlement process produces a fairer resolution of disputes.[57] More importantly, the judges say they should 'take no action' in a situation where one party is about to accept an unreasonable settlement.[58] Even where the judge views a settlement unfair to a personal injury victim or a plaintiff in a constitutional rights case, the majority of judges respond that they should not inform the parties.[59] In fact, the majority of judges believe that no matter what type of case, and no matter which litigant is disadvantaged, the judge should not inform the parties if he or she considers the settlement agreement unreasonable.[60]

Accordingly, Federal Court judges perceive no role for themselves in ensuring that settlements are fair. This statement

---

56 Letter of a judge responding to the survey.

57 Appendix, Question 22.

58 Appendix, Question 11.

59 Appendix, Questions 35 and 36.

60 Appendix, Question 37.

should not be read to imply that the judges are disinterested in the fair allocation of justice, but rather it reflects the lack of judicial involvement in the settlement mechanisms utilised in the Federal Court. These mechanisms generally exclude judicial participation and therefore the judges may not have sufficient information to determine the fairness of a settlement. However, this does not completely explain the respondents' perception that judges have no role in ensuring settlements are fair, as these questions presuppose the judge has sufficient information to deem the settlement unreasonable.[61]

F Propriety of Judicial Participation in the Settlement Process

Propriety is a 'major concern' of Federal Court judges when they become involved in settlement discussions.[62] The respondents stated that it was generally unacceptable for a judge to become involved in settlement discussions where that judge will be the trier of fact.[63] Furthermore, a substantial minority responded that it was not proper for a judge to become involved in settlement negotiations even where the jury is the trier of fact.[64] Eighty percent of respondents found it improper for a judge to conduct ex parte settlement discussions with each barrister and the same percentage found it improper to suggest a reasonable amount of monetary recovery in a case.[65]

The Federal Court judges' responses to questions dealing with propriety are strikingly similar to those of their English counterparts. However, in contrast to mixed responses of the English judges, 87 percent of Federal Court judges said it was 'more appropriate for one judge to participate in settlement discussions and another preside at trial.'[66] This response is consistent with Federal Court settlement practice which uses registrars at settlement conferences and judges who will not hear the case at trial in mediation conferences.

G Analysis

The Federal Court's system of handling settlements, through settlement and mediation conferences, to a large extent excludes

---

61 See Appendix, Questions 35, 36, and 37.

62 Appendix, Question 21.

63 Appendix, Question 28.

64 Appendix, Question 33.

65 Appendix, Questions 32 and 34.

66 Appendix, Question 38. One judge noted, in response to Question 38, that the lack of court resources would make such a practice difficult.

substantial judicial participation in the settlement process. However, the benefits of allowing other court officials or court-appointed individuals to handle settlement negotiations are numerous: judges are allowed to decide cases while other court officials attempt settlement, thus promoting an efficient use of judicial resources. Because judges usually do not take part in the process there is a reduced chance of overreaching, propriety need not be a primary concern, and the chance of a party feeling that a case has been prejudged is reduced. Such a system results in judges being promoters of settlement rather than active participants in the settlement process. But, it frees judges to do that which they ought to do: decide disputes.

Appendix

Section 1

Background

1 **Position:**

Country:

2 **Number of years you have been a judge:**

a) 1-5 years 47%

b) 5-10 years 20%

c) 10-20 years 27%

d) over 20 7%

3 **Does your country's law provide for settlement conferences?**

Yes 100% No 0% Not sure 0%

4 **If settlement conferences with judicial participation are not allowed in your country do you think the rules of procedure should be changed to allow for this type of conference?**

Yes 7% No 13% Not sure 7% Not applicable 53%

5 **May a judge in your country require the parties to attend a settlement conference?**

Yes 80% No 20% Not sure 27%

Section 2

Multiple choice

6 **As a judge do you:**

a) actively encourage settlement 13%

b) encourage settlement in appropriate cases 53%

c) participate in the settlement process only if asked to do so by the parties 0%

d) allow the parties to work out a settlement among themselves if they are able. 13%

unanswered or unusable answer 20%

7 **Most of my fellow judges are:**

a) too involved in the settlement process 0%

b) not sufficiently involved in the settlement process 20%

c) involvement in the settlement process is about right 47%

d) not sure 13%

unanswered/unusable 13%

8 **As compared to 20 years ago, judges in your country are:**

a) more involved in the settlement process 47%

b) less involved in the settlement process 0%

c) involved to the same degree in the settlement process 33%

d) not sure as to involvement in the settlement process as compared to 20 years ago. 13%

unanswered 7%

comments 7%

9 **Judicial involvement in settlement negotiations:**

a) assists the parties in reaching a settlement 47%

b) hinders the parties in reaching a settlement 0%

c) has little effect 0%

d) not sure 40%

unanswered/unusable 13%

comments 20%

10 **What is the most effective way a judge can participate in the settlement process:**

a) expression of an opinion as to the case 7%

b) stating the law for the parties 0%

c) persistently encouraging the parties to settle 20%

d) allowing the parties to engage in settlement discussions without judicial interference 40%

e) none of the above 7%

one response was qualified in both c) and e)

unanswered or unanswered with comment 27%

11 **In a case where it appears one party is about to accept an unreasonable settlement, the judge should:**

a) inform both parties 13% (one qualified response)

b) inform only the party about to accept the unreasonable settlement 0%

c) take no action 73% (two responses were qualified)

d) not sure 0%

12 **Judges should have the power to approve settlement in:**

a) all civil cases	27%*
b) cases involving constitutional rights	7%
c) judges should not have the power to approve settlements	40%*
d) not sure	7%
e) not applicable	13%
unanswered with comment	7%

* One response was qualified based on whether a party had capacity.

13 **Who is the most important individual in the settlement process:**

a) counsel	0%
b) client	93%
c) judge	0%
unusable answer	7%
comments	7%

Section 3

Scale: *SA = Strongly Agree*
A = Agree
U = Undecided
D = Disagree
SD = Strongly Disagree

Circle only one

Numbers of qualified answers are shown in superscript

	SA	A	U	D	SD
14 **Judges have no role in the settlement process; this is an area best left to the parties.**					
7 % comments	7%[1]	27%	0%	53%	13%
15 **A judge, when the situation presents itself, should inform the parties of expected rulings on evidentiary matters, points of law and difficulty of burden of proof as a way of assisting the parties in reaching a settlement.**					
7% unanswered with comments	7%	27%	7%	27%	27%
16 **The best means for a judge to approach a dispute is to actively participate in the case from the outset.**					
7% unanswered with comments	13%[1]	13%	0%	33%	33%
17 **In pretrial meetings a judge should emphasize the advantages of settlement and disadvantages of litigation.**					
7% unanswered with comments	13%	53%	7%	7%	7%
18 **Judges have a prominent role in the settlement process.**					
7% unanswered with comments	7%	13%	13%	40%	7%

	SA	A	U	D	SD
19 **The majority of attorneys/barristers that appear before your court desire more input by the judge to assist in the settlement of the dispute.**	0%	20%	13%	60%	7%
20 **'The highest quality of justice is not the all or nothing, black or white end result of a trial but is in the grey area - in most cases a freely negotiated settlement is a higher quality of justice.'**	13%[1]	60%	13%	13%	0%
21 **Propriety is a major concern with settlement discussions where a judge is involved.** 7% comments	33%	53%	0%	13%	0%
22 **Judicial participation in the settlement process produces a fairer/more equitable resolution of the dispute.**	7%[1]	0%	60%	27%	7%
23 **'The court must not neglect the effort to achieve a compromise at every opportunity.'** 7% unanswered with comments	13%	20%	13%	33%	13%
24 **A judge should be willing to express an opinion about a case, comment on strengths and weaknesses of evidence and arguments and propose what he[*sic*] considers a reasonable settlement.** 7% comments	0%	13%	0%	73%	13%
25 **Clients should be required to attend settlement conferences.** 7% unanswered with comments	33%	40%	13%	0%	7%
26 **Judges should not become involved in the settlement process unless asked to do so by the litigants.** 7% comments	40%	33%	7%	20%	0%
27 **In some situations, a judge should attempt to impose a settlement on the parties to ensure justice is done.**	7%	27%[2]	0%	40%	27%
28 **In cases where the trier of fact will be the judge it is acceptable for the judge to become involved in settlement discussions.** 7% unanswered with comments	0%	7%	13%	20%	53%
29 **A judge should point out law or evidence that an attorney is overlooking.** 7% unanswered with comment	7%	53%[1]	7%	20%	7%

Section 4

Numbers of qualified responses are shown in superscript

30 **The best outcome of most cases is a settlement of the dispute rather than a trial.**

Yes 87% No 0% Not sure 13%

31 **Should a judge attempt to facilitate a settlement although not requested to do so by either party?**

Yes 60%[3] No 33% Not sure 7%[1]

32 **Is it proper for a judge to discuss settlement privately with each attorney or barrister?**

Yes 13%[1] No 80%[1] Not sure 7%

33 **Is it proper for a judge to become involved in settlement discussions where the trier of fact will be a jury?**

Yes 40%[1] No 33% Not sure 13%

34 **Is it proper for a judge to suggest a reasonable amount of monetary recovery in a case?**

Yes 7%[1] No 80% Not sure 7%

35 **If a judge views a settlement agreement in a personal injury case unfair to the plaintiff he should inform the parties?**

Yes 27%[2] No 60%[1] Not sure 7%

36 **If a judge views a settlement agreement involving constitutional rights unfair to the plaintiff he should inform the parties.**

Yes 20% No 53% Not sure 20%

37 **If a judge views a settlement agreement in any type of case unfair to any litigant he should inform the parties.**

Yes 20%[1] No 67%[1] Not sure 7%

38 **Would it be more appropriate for one judge to participate in settlement discussions and another judge preside at trial?**

Yes 87% No 7% Not sure 7%

39 **I would favour legislation in my country increasing the role of the judge in the settlement process.**

Yes 20% No 53% Not sure 27%

Section 5

Comments

40 **Do you have any comments which you would like to make about your role in the settlement of disputes?**

53% responded

41 **Do you have any comments which you would like to make concerning this questionnaire?**

40% responded

42 **Any further comments?**

0% responded