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SETTLEMENT IN THE ABSENCE OF ANTICIPATED ADJUDICATION

*Howard M. Erichson**

INTRODUCTION

As an ethical matter, the litigator's role is defined largely by reference to the push and pull of zealous advocacy. The lawyer owes an affirmative duty to advocate for the client's objectives, and the lawyer faces constraints premised largely on concerns that lawyers may overzealously pursue those objectives. The lawyer's role as settlement negotiator meshes with and flows from the lawyer's role as the client's advocate: by advancing the client's position in litigation, the lawyer-as-advocate strengthens the client's bargaining leverage, and in discussing settlement on the client's behalf, the lawyer-as-negotiator pursues the client's objectives.

But this view of the lawyer's role in settlement as naturally complementary to the lawyer's role in litigation assumes that the client has a path to adjudication. What if the path to adjudication is obstructed? In the era of the "vanishing trial,"[1] does the lawyer's role as negotiator remain a complementary outgrowth of the lawyer's role as advocate? The phenomenon of vanishing trials takes too many forms to be coherently understood as a singularity, but in several of its forms, it involves developments that place adjudication out of reach either as a legal matter or as a practical matter. The unavailability of adjudication not only shifts the

* Professor of Law, Fordham University School of Law. My thanks to the *Fordham Law Review*, the Stein Center for Law and Ethics, and all of the participants in the colloquium entitled *Civil Litigation Ethics at a Time of Vanishing Trials* held at Fordham University School of Law. For an overview of the colloquium, see Judith Resnik, *Lawyers' Ethics Beyond the Vanishing Trial: Unrepresented Claimants, De Facto Aggregations, Arbitration Mandates, and Privatized Processes*, 85 FORDHAM L. REV. 1899 (2017).

1. *See, e.g.*, SUJA A. THOMAS, THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CIVIL, CRIMINAL, AND GRAND JURIES (2016); Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399 (2011); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); Patricia Lee Refo, *Opening Statement: The Vanishing Trial*, LITIG. ONLINE, Winter 2004, at 2, http://www.americanbar.org/content/dam/aba/publishing/litigation_journal/04winter_openingstatement.authcheckdam.pdf [https://perma.cc/RV9H-GTS3]; Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. TIMES (Aug. 7, 2016), https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html [https://perma.cc/X7VA-WZ2F].

parties' bargaining positions vis-à-vis each other, it also shifts the lawyer's position vis-à-vis the client in the negotiation of a settlement.

Conditions of unlikely adjudication take several forms. First, the cost of litigation or a litigant's resource disadvantage may leave the litigant unable to sustain the claim or defense through adjudication.[2] Second, judicial pressure, including court-annexed alternative dispute resolution (ADR), may push parties away from adjudication.[3] Third, crowded dockets may slow the road to trial,[4] and in mass civil litigation in particular, there may be little prospect of adjudication in the foreseeable future for all but a handful of plaintiffs.[5] Fourth, in settlement class actions, lawyers pursue settlements on behalf of classes that have not been certified for litigation and thus, as constituted, have no power to pursue claims to adjudication.[6]

In each of these circumstances, the faded prospect of adjudication does not merely reduce one party's bargaining power; it alters the lawyer's incentives in pursuing a negotiated resolution. This Article explores the relevance of the unavailability of adjudication to the lawyer's role in settlement, with particular attention to lawyer-client conflicts of interest created or exacerbated by the unavailability of adjudication.

I leave aside, for purposes of this discussion, other manifestations of the vanishing trials phenomenon. For example, arbitration clauses remove disputes from the judicial system and thus eliminate the prospect of adjudication, at least insofar as adjudication is defined as the rendering of a binding judgment by a public court. Private arbitration differs from public adjudication, and courts have gone too far in the enforcement of arbitration clauses in contracts of adhesion, even when those clauses contain class action prohibitions and other problematic constraints.[7] But at least for purposes of this discussion of lawyer-client conflicts in the absence of anticipated adjudication, the prospect of an arbitral award resembles the prospect of adjudication nearly enough to be treated differently from situations in which adjudication is out of reach.

Similarly, this Article does not address the aspect of the vanishing trials phenomenon that distinguishes pretrial adjudication from trial adjudication, or the related distinction between the power of the judge and the jury.[8] Although there are important differences between judge and jury as well as between pretrial and trial adjudication, this Article focuses on a more basic

2. *See* AM. COLL. OF TRIAL LAWYERS, THE "VANISHING TRIAL": THE COLLEGE, THE PROFESSION, THE CIVIL JUSTICE SYSTEM 15–18 (2004); Burbank & Subrin, *supra* note 1, at 409–12 (proposing a streamlined discovery regime for simple cases as a way to preserve the availability of trial in cases that litigants otherwise might abandon as too costly); Galanter, *supra* note 1, at 517 (noting costliness of litigation as one explanation of vanishing trials).

3. *See* Galanter, *supra* note 1, at 514–15, 517.

4. *See* Refo, *supra* note 1, at 3.

5. *See generally* Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399 (2014).

6. *See* Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951, 957–58 (2014).

7. *See generally* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015).

8. *See* THOMAS, *supra* note 1, at 235–37; Burbank & Subrin, *supra* note 1, at 401–03.

aspect of the vanishing trials phenomenon—the difference between cases in which adjudication of any sort is realistically available and cases in which it is not.

This Article begins with an account of the lawyer's role in settlement in what we might call the traditional litigation scenario—that is, litigation in which settlement negotiations are conducted in the shadow of anticipated adjudication. This Article then considers four scenarios in which the anticipation of adjudication is altered—resource inadequacy, judicial settlement pressure, lengthy calendar, and class actions not certified for litigation—and asks what effect we should expect each scenario to have on the interests of lawyers and clients regarding settlement. The final part asks what light this analysis sheds on the phenomenon of vanishing trials and concludes with a comment on the importance of anticipated adjudication to achieving justice in litigation settlements.

The conclusion can be summed up simply: fair settlement of disputes requires a path to adjudication. A viable path to adjudication obviously does not assure a fair settlement; it is a necessary condition, not a sufficient one. The problem is not the lack of trials per se but rather that a disputant cannot obtain a fair negotiated resolution if she lacks the ability to opt for an adjudicated resolution. This problem results not only from the bargaining disadvantage of any party seeking to change the status quo who lacks a path toward legal compulsion of that result but also from the less obvious problem that hard-to-get adjudication exacerbates lawyer-client conflicts in the negotiation of settlements.

I. LAWYERS, CLIENTS, AND SETTLEMENT IN THE SHADOW OF ANTICIPATED ADJUDICATION

We begin with a standard account of the lawyer-client relationship in litigation and settlement. A lawyer representing a plaintiff files a complaint on that client's behalf. A lawyer representing a defendant responds to the complaint by answer or motion. The litigation process moves forward, with each lawyer working to advance the client's objectives in litigation—in general presumably the maximization of remedies on behalf of the plaintiff and the minimization of liability on behalf of the defendant. At any point along the way, the disputants may attempt to reach a negotiated resolution. This may occur on the eve of trial or appeal or at the opposite end of the timeline—before the defendant has responded to the complaint or even before the complaint is filed—or anywhere in between. In the attempt to reach a settlement, the lawyers often negotiate on behalf of their clients.[9]

As an ethical matter, the litigator's duty is defined largely in terms of what many still refer to as "zealous advocacy."[10] Although rules of

9. *See, e.g.*, AM. BAR ASS'N, ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS § 2.1 (2002) ("During settlement negotiations and in concluding a settlement, a lawyer is the client's representative and fiduciary, and should act in the client's best interest and in furtherance of the client's lawful goals.").

10. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT pmbl. (AM. BAR ASS'N 2016) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary

professional conduct have largely dropped the language of zeal, focusing instead on the lawyer's duties of diligence and loyalty,[11] the concept remains that the lawyer owes a duty to the client to pursue the client's objectives in litigation. Ethics rules define the lawyer's affirmative duty in terms of diligently pursuing the client's goals,[12] and they define the lawyer's constraints in advocacy largely in terms of competing duties (such as duties of candor toward the tribunal,[13] prohibitions on baseless claims and defenses,[14] and duties of honesty to adversaries and third parties[15]) that are meant to pull lawyers back from their inclination toward overzealous advocacy on the client's behalf.[16]

The lawyer often serves as negotiator, but ultimately the settlement decision belongs to the client. Few things are as unequivocal in the Model Rules of Professional Conduct ("the Rules") as the client's authority over settlement: "A lawyer shall abide by a client's decision whether to settle a matter."[17] This makes sense both in terms of Rule 1.2(a)'s distinction between ends and means[18] and in terms of who owns the claim and who faces liability.[19] The claim belongs to the plaintiff, not to the plaintiff's lawyer. Liability is imposed on the defendant and often its insurer, not on

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system."); *see also id.* ("[W]hen an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.").

11. *See* Paul C. Saunders, *Whatever Happened to 'Zealous Advocacy'?*, N.Y. L.J., Mar. 11, 2011, at 4. *Compare* CANONS OF PROF'L ETHICS Canon 15 (AM. BAR ASS'N 1908) ("The lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights"), N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY Canon 7 (2007) ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law"), *and id.* EC 7-1 ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law"), *with* MODEL RULES OF PROF'L CONDUCT r. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."), *and id.* r. 1.3 cmt. 1 ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client.").

12. *See* MODEL RULES OF PROF'L CONDUCT r. 1.3; *id.* r. 1.3 cmt. 1.

13. *See id.* r. 3.3.

14. *See id.* rr. 3.1, 8.4(d); *see also* FED. R. CIV. P. 11.

15. *See* MODEL RULES OF PROF'L CONDUCT rr. 3.4, 8.4(c).

16. *See* Susan Michmerhuizen & Peter Geraghty, *Ethics Tip: What's the Big Zeal?*, A.B.A. (May 2016), http://www.americanbar.org/groups/professional_responsibility/services/ethicssearch/ethicstipmay2016.html [https://perma.cc/4CVK-JZ2H].

17. *See* MODEL RULES OF PROF'L CONDUCT r. 1.2(a); *see also* Peter Geraghty & Susan J. Michmerhuizen, *Settlement Offers: The Client Is Always Right*, A.B.A.: YOURABA (March 2016), http://www.americanbar.org/publications/youraba/2016/march-2016/settlement-offers--the-client-is-always-right.html ("This principle of client control is near absolute; no matter the degree to which the lawyer disagrees with the client or thinks the settlement is too low or predicated on poor information, he is ultimately bound to abide by the client's wishes.") [https://perma.cc/H7T5-49LZ].

18. *See* MODEL RULES OF PROF'L CONDUCT r. 1.2(a) ("Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.").

19. *See* Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 313 (2011) ("To lose the right to decide whether to settle one's claim, and on what terms, is to lose control of that claim in a very real sense.").

the defendant's lawyer. The decision to release the claim in exchange for something of value therefore belongs to the plaintiff, and the decision to pay something in exchange for release of the claim belongs to the defendant. As the ABA Ethical Guidelines for Settlement Negotiations put it, "While a lawyer can and often should vigorously advise the client of the lawyer's views respecting proposed settlement strategies and terms, that advice should not override or intrude into the client's ultimate decision-making authority."[20]

In this traditional scenario, the lawyer's work as negotiator differs from the lawyer's work as litigator but not for the most part in ways that alter the lawyer's basic ethical position. Vis-à-vis the adversary, the lawyer-as-negotiator may well take on a more cooperative and less adversarial role, but vis-à-vis the client, the lawyer's duty remains one of diligence and loyalty in pursuit of the client's objectives and deference to the client's authority over settlement.

Depending on the fee structure, different lawyer-client conflicts of interest in here in the lawyer's role as settlement negotiator. Hourly fees, contingent fees, flat fees, and court-awarded fees each have the potential to give lawyer-negotiators economic interests that deviate from their clients' interests and preferences.[21] The differences in these incentives may be summarized briefly as follows.

In general, hourly fees give lawyers an economic incentive to disfavor settlement as compared with their clients and for similar reasons give lawyers an interest in settling later rather than earlier.[22] A risk-averse client—as plaintiff or as defendant—may prefer to avoid trial, but the hourly fee lawyer does not share equally in the risk. Thus, as between lawyer and client, an hourly fee arrangement should be expected to make

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20. AM. BAR ASS'N, *supra* note 9, § 3.2.4 committee notes. The Notes go on to say:

> Lawyers should be particularly sensitive to the risk that the client's practical dependency on the lawyer may give the lawyer immense power to influence or overcome the client's will respecting a proposed settlement. . . . Efforts to persuade should be pursued with attention to ensuring that ultimate decisionmaking power remains with the client.

Id.

21. Interestingly, the Rule of Professional Conduct that governs lawyer-client conflicts in transactions between lawyers and clients does not generally apply to fee agreements. *See* MODEL RULES OF PROF'L CONDUCT r. 1.8(a) cmt. 1 ("It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee.").

22. *See* Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 202–03 (1987); *see also* Peter Melamed, Note, *An Alternative to the Contingent Fee?: An Assessment of the Incentive Effects of the English Conditional Fee Arrangement*, 27 CARDOZO L. REV. 2433, 2452–53 (2006) (analyzing settlement incentives generated by hourly fee arrangements, and concluding that lawyers without other paying work would indefinitely delay settlement, whereas lawyers with a steady stream of paying work would be indifferent as between settlement and trial).

the lawyer less inclined toward settlement and particularly less inclined toward settling early.[23]

Contingent fees, by contrast, give lawyers an interest in settling earlier rather than later.[24] Contingent fees should be expected to increase lawyers' aversion to trial because the lawyer shares fully in the client's risk of getting paid nothing if the trial results in a negative verdict. Indeed, if a lawyer has expended significant resources in pursuing litigation for a client, the lawyer may be more risk averse than the client when it comes to a decision whether to accept a settlement or go to trial. Thus, as between lawyer and client, a contingent fee arrangement should be expected to make the lawyer more inclined toward settlement and more inclined to settle early.[25]

In terms of their impact on lawyer interests as opposed to client interests, flat fees resemble contingent fees in that they give lawyers an interest in settling earlier rather than later, but the conflict is even greater because the lawyer does not share in the additional recovery that may be generated by additional work.[26] Unlike contingent fees, however, flat fees do not give the lawyer a fee incentive to avoid trial due to risk aversion.

Court-awarded fees share a combination of these attributes. To the extent lawyers expect a judge to award fees based on a lodestar method—multiplying the number of hours by a reasonable hourly rate[27]—court-awarded fees generate similar incentives to hourly fees, at least in terms of the timing of settlement.[28] To the extent lawyers expect a court to award

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23. Thus, it is incorrect to suppose that the only fee structures that entail conflicts of interest are non-time-based fees. *See, e.g.*, Mark A. Neubauer, *Attorney Fees: How to Avoid a Conflict with Your Client*, A.B.A.: GP SOLO (March 2011), http://www.americanbar.org/publications/gp_solo/2011/march/attorney_fees_how_t0_avoid_a_conflict_with_your_client.html ("Any departure from an hourly rate creates a potential conflict between lawyer and client.") [https://perma.cc/CKS4-K34W].

24. *See* Miller, *supra* note 22, at 198–202; Melamed, *supra* note 22, at 2447–51.

25. Peter Melamed illustrates the point with graphs and explains "why the contingent fee attorney who maintains control over his client's case will rationally choose to settle for an amount that is lower than what his client might choose to settle for. For each successive hour that the attorney works, he receives a marginally smaller return." Melamed, *supra* note 22, at 2451. Turning to the client's point of view, he notes, "His client, meanwhile, would prefer that the attorney work as long as possible on the case, since the client has no incentive to limit his attorney's hours. Therefore, the attorney has an incentive to settle much earlier than his client would have him settle." *Id.*

26. *See* Neubauer, *supra* note 23 ("A lawyer on a fixed fee has an economic incentive not to take that extra deposition—the lawyer gets the savings. The contingency fee accommodates that conflict because the lawyer and client are aligned and both are paid if success is achieved. . . . No one has yet come up with a solution for this conflict, but it merits a full discussion with the client and carefully spelled-out terms in an initial fee agreement and as the litigation progresses.").

27. *See* Perdue v. Kenny A., 559 U.S. 542, 551–52 (2010) (embracing the lodestar approach as the dominant method for determining fees under 42 U.S.C. § 1988 (2012)); Laffitte v. Robert Half Int'l, Inc., 376 P.3d 672, 677–82 (Cal. 2016) (discussing the history of both the lodestar and percentage approaches for awarding class action fees).

28. *See Laffitte*, 376 P.3d at 677 (noting that the lodestar method has been "criticized for discouraging early settlement").

fees based on a percent-of-outcome method,[29] court-awarded fees generate similar incentives to contingent fees.[30] As to risk aversion, court-awarded fees—because they depend upon prevailing party status or the creation of a common fund—resemble contingent fees in giving lawyers an economic incentive to prefer settlement.

Because every variety of fee arrangement has the potential to give lawyers different incentives from clients when it comes to settlement, it would be wrong to think that a path to adjudication could ever guarantee perfect alignment of lawyer and client interests in settlement. But the path to adjudication matters. It is not simply that the path to adjudication sets the basis for achieving fair value in settlement. It is also that the path to adjudication reduces the problems of lawyer-client conflicts of interest in settlement negotiation. As long as litigation is marching expeditiously toward adjudication, most of the conflicts described above are kept in check. In terms of settlement timing, the longer the path to adjudication, the greater the conflict between those who benefit from a shorter path and those who benefit from a longer path. In terms of risk aversion, the more unrealistic the prospect of adjudication, the greater the conflict between those who have expended significant resources and those who have not.

II. LAWYERS, CLIENTS, AND SETTLEMENT WHEN ADJUDICATION IS HARD TO GET

Situations that pull litigants and litigators out of adjudication's shadow—even if the situations increase the *likelihood* of settlement—tend to reduce the likelihood of achieving settlements that reflect the merits of claims and defenses.

Before turning to the problems such situations create by exacerbating attorney-client conflicts of interest, it is worth acknowledging the more basic problem that removing the shadow of adjudication disadvantages the party seeking to alter the status quo, generally the plaintiff. The threat of legal compulsion to force a defendant to pay damages or alter its conduct—that is, the threat of adjudication—is the only thing that gives plaintiffs meaningful leverage in settlement. In the absence of realistic anticipated adjudication, a defendant may nonetheless happily pay some amount to avoid the nuisance and expense of protracted litigation or may pay some amount to gain widespread protection against liability in the case of widespread harms. But without anticipated adjudication, there is no reason to expect that the amount would reflect the value of the claims on the

29. *See id.* at 679 (noting that "[c]urrently, all the [federal] circuit courts either mandate or allow their district courts to use the percentage method in common fund cases; none require sole use of the lodestar method"); *see also id.* at 686 (permitting the percentage method for awarding class counsel common fund fees under California law); Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27 (2004).

30. *See Laffitte*, 376 P.3d at 677 ("[A] percentage award may also provide incentives to attorneys to settle for too low a recovery because an early settlement provides them with a larger fee in terms of the time invested." (quoting Rawlings v. Prudential-Bache Props., Inc., 9 F.3d 513, 516 (6th Cir. 1993))).

merits.[31] As Stephen Burbank and Stephen Subrin put it, "Although most cases settle, some trials are essential, if only to ensure informed settlement."[32] "Without the realistic possibility of a trial," they write, "some plaintiffs receive less than the value of their cases if tried on the merits, while some defendants settle non-meritorious cases in order to avoid transaction costs."[33]

This aspect of the problem applies directly to litigants. In other words, it does not depend upon the existence of a lawyer-client relationship. Even in the case of a pro se plaintiff against a pro se defendant, obstacles to adjudication alter the settlement dynamic in favor of the defendant.[34] When litigation and negotiation involve lawyers, however, the problem of stepping out of the shadow of adjudication has another layer. We now turn to the effect of obstacles to adjudication on lawyer-client conflicts of interest in settlement negotiation.

A. Resource Inadequacy

Perhaps the most common scenario in which adjudication remains out of reach is when a disputant, despite having a sound position on the merits, lacks the resources to pursue a claim or defense to adjudication.[35] That is, the person lacks the funds to hire a lawyer on an hourly fee, the stakes are too low to entice a lawyer to represent the party on a contingent fee, and the matter is too difficult or costly to pursue pro se. If the person is a potential plaintiff who neither files a complaint nor hires a lawyer, then very likely there will be no settlement. And if the person is a defendant who lacks the resources to respond to the complaint, then the likely result is default. But suppose a party has hired a lawyer and started down the litigation path but cannot invest the resources necessary to pursue the claim or defense to trial.

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31. *See generally* Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976) (comparing dispute-negotiation and adjudication and finding important similarities in terms of the invocation of norms); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979) (observing that anticipated trial outcomes give each party bargaining chips in negotiation.

32. Burbank & Subrin, *supra* note 1, at 401.

33. *Id.*

34. *Cf.* Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2029 (1999) (discussing the importance of the judge's role in helping pro se litigants develop a factual record and identifying claims and defenses before settling, and noting that "[o]nly by first assessing the merits of the case can the judge gain perspective as to what, if any, claims are being compromised or waived").

35. *See* Jed S. Rakoff, *Why You Won't Get Your Day in Court*, N.Y. REV. BOOKS (Nov. 24, 2016), http://www.nybooks.com/articles/2016/11/24/why-you-wont-get-your-day-in-court/ (noting that "most observers agree that the primary reason so many Americans are unrepresented in court is that even people of moderate means simply cannot afford a lawyer"; that "the fact that civil cases are being settled at an ever greater rate suggests that something else is bringing pressure to settle, and it is probably the great expense of litigation"; and that "the time-consuming nature of modern litigation means that most contingent-fee lawyers will simply refuse to take on a case that does not promise an award or settlement of at least several hundred thousand dollars, leaving those tort victims who cannot sue for large amounts unable to have a day in court") [https://perma.cc/22T2-TMRG].

It is this situation—the one in which a settlement negotiation may occur and one side lacks the ability to pursue the litigation to adjudication—on which we will focus.

One version is when the cost of the litigation, as things proceed, turns out to be higher than expected. A second is when the value of the claim, as things proceed, turns out to be lower than expected. A third is when a small claim would be litigable collectively with many similar claims, but a court enforces an arbitration clause with a prohibition on class actions and other collective litigation, making the individual claim unrealistic to litigate or arbitrate to a final decision. For all of them, the high cost of litigation poses a significant obstacle.[36]

A party's lack of resources alters the negotiating dynamic to that party's disadvantage. Perhaps less obviously, lack of resources also exacerbates lawyer-client conflicts of interest that inhere in settlement negotiations. If the lawyer is working on a contingent fee arrangement or in expectation of court-awarded fees that depend upon the outcome, the lawyer's interest in early and certain settlement becomes even greater as the anticipated return on investment declines. Even if the lawyer is working on an hourly or flat fee basis, resource constraints may leave a lawyer concerned about the collectability of a fee as a practical matter in the absence of a settlement. Thus, when a party cannot afford to pursue a claim to adjudication, the party's lawyer has an interest in pushing the client to accept a settlement even if it fails to reflect the value of the claim on the merits.

B. Judicial Pressure

A second type of obstacle in the path to adjudication is judicial settlement pressure. Properly deployed, judicial encouragement of settlement may provide a useful catalyst for parties to enter negotiations and may be seen as facilitative of a just resolution rather than an obstacle to it.[37] Court-annexed dispute resolution mechanisms such as mandatory mediation, mandatory nonbinding arbitration, early neutral evaluation, and summary jury trials may facilitate negotiation in a way that is advantageous to both parties. Even without formal ADR mechanisms, a judicial nudge may be exactly what the parties need to get started on productive negotiations.[38] But clumsily deployed judicial settlement encouragement may place obstacles in the path to adjudication without sufficient upside to justify the imposition.[39] If one or both parties is intent on getting a binding

36. *See* Burbank & Subrin, *supra* note 1, at 409–10 ("The high cost of litigation dissuades some potential litigants with meritorious claims from commencing suit and forces some of those who do sue, and some defendants, into settlements that do not truly reflect the merits.").

37. *See* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1345 (1994).

38. *Cf.* FED. R. CIV. P. 16.

39. *See* Campbell Killefer, *Wrestling with the Judge Who Wants You to Settle*, 35 LITIGATION 17 (2009); Megan M. La Belle, *Against Settlement of (Some) Patent Cases*, 67 VAND. L. REV. 375, 388–91 (2014) (discussing judges' roles in settlement, including

adjudication from the court, or if one party faces a significant resource disadvantage, time-consuming detours or judicial pressure may do more harm than good and may exacerbate lawyer-client conflicts with regard to settlement.

To the extent judicially imposed ADR functions as an obstacle to adjudication, it may tax the parties' resources or delay recovery.[40] If so, it may give rise to a situation in which a lawyer worries that the only way to get paid is by obtaining a recovery, and the longer the process wears on, the less likely the lawyer will be able to recoup the costs of litigation.[41]

Further, when settlement pressure comes from a judge, a lawyer's reputation and relationship with the judge may become part of the cost-benefit analysis in the negotiation from the lawyer's perspective. Whereas any particular client is unlikely to be a repeat player before a particular judge, the same is not true for a lawyer who practices in the jurisdiction. Thus, even if a client is uninterested in the settlement offer on the table or uninterested in settlement at all and determined to obtain an adjudication from the court, the client's lawyer may nonetheless feel compelled to participate in the negotiation process out of concern for the lawyer's relationships and reputation. This is not to say that concern for relationships and reputation ought not play a role in attorney conduct. To a large extent, the legal profession relies on these mechanisms to insure civility and adherence to professional norms. On the question of settlement negotiation, however, where the law unequivocally gives the client rather than the lawyer the authority to decide whether to settle,[42] we should be wary of situations that create an interest on the part of the lawyer to deviate from the client's preferences.

C. Lengthy Calendars and Mass Disputes

Third, a lengthy calendar toward trial may function as an obstacle to adjudication.[43] There is truth in the cliché that justice delayed is justice denied, at least for a litigant who cannot afford to wait. Perhaps, because of the likelihood of settlement, it is more precise to say that justice delayed is justice diminished. A long wait for trial may result in a party's acquiescence in a settlement that the party would reject if prompt adjudication were possible. As with resource disparity, delay's basic skewing effect on settlement applies directly to litigants even without regard to tensions in the lawyer-client relationship. But again, this obstacle has the effect of exacerbating lawyer-client conflicts. Crowded dockets or

advantages and disadvantages). *See generally* Galanter & Cahill, *supra* note 37 (exploring the difficulty of assessing the positive or negative impact of judicial settlement promotion).

40. *See* Galanter & Cahill, *supra* note 37, at 1366 n.108 (citing findings of longer wait times for trial in courts with mandatory settlement conferences).

41. *See supra* notes 35–36 and accompanying text; *infra* notes 43–47 and accompanying text.

42. *See supra* notes 17–19 and accompanying text.

43. *But see* Galanter, *supra* note 1, at 519 (noting the argument that courts lack the resources to hold trials, but concluding that "it seems doubtful that lack of court resources is a major constraint on the number of trials").

procedural slowdowns that result in a long wait for trial exacerbate the conflicting interests connected to the timing of settlement.

The problem takes a particular form in mass disputes. Federal multidistrict litigation[44] (MDL) and consolidated state court litigation often lengthen the road to trial for individual litigants by making discovery and pretrial motion practice a gargantuan collective enterprise. In the case of MDL, litigants must wait until the completion of common pretrial discovery before obtaining remand to the transferor court for trial.[45] Moreover, judges overseeing MDL and state court mass litigation often schedule bellwether trials in individual cases.[46] The purpose of bellwether trials is to generate data points in the form of individual jury verdicts to give both sides a sense of likely outcomes so that they can reach a negotiated resolution on a wholesale basis.[47] Bellwether trials hold out the possibility of prompt adjudication for a few select claimants while lengthening the road to trial for hundreds or thousands of others. The benefits of such trials are clear, but a judge should recognize the downside if the court fails to accompany early trials with a viable path to adjudication for those who were not selected as bellwethers. Even if the judge assumes that the endgame of a mass dispute will be some sort of wholesale settlement process, the judge should understand that a wholesale settlement will offer a better reflection of the merits and entail less lawyer-client conflict of interest if the court offers a viable path to adjudication.

A separate problem arises in the negotiation of settlements in mass disputes, and it relates to the unavailability of adjudication in quite a different way from the timing problem. This problem relates to the identity of the lawyers negotiating the settlement and their lack of a lawyer-client relationship with some of the claimants whose interests they purport to represent in the negotiation. Lawyers in leadership positions—such as members of a plaintiffs' steering committee in MDL—sometimes take it upon themselves to negotiate with defendants for a resolution of all of the claims in the litigation, not only the claims of their own clients.[48] The lawyers, and often the court, view such work as part of the responsibilities of their leadership positions. When MDL leadership counsel negotiate on behalf of a mass of plaintiffs, many of whom they do not represent except indirectly through their appointment to leadership positions, the negotiating lawyers lack the power to bring those claims to adjudication because they do not represent those claimants for purposes of trial. The risk is that such

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44. *See* 28 U.S.C. § 1407 (2012).

45. *See* Burch, *supra* note 5.

46. *See* Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2324–26 (2008); Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576 (2008); Edward F. Sherman, *The MDL Model for Resolving Complex Litigation If a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2213–16 (2008).

47. Fallon et al., *supra* note 46, at 2332; Sherman, *supra* note 46, at 2213. For a variation on the theme, see Adam S. Zimmerman, *The Bellwether Settlement*, 85 FORDHAM L. REV. 2275 (2017).

48. *See generally* Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67 (2017).

lawyer-negotiators may negotiate settlement terms that serve their own interests or the interests of their own clients rather than the interests of the entire group on whose behalf they are purportedly negotiating.[49] In this regard, the negotiation of comprehensive settlements by MDL leadership counsel resembles the negotiation of settlement class actions by putative class counsel and raises similar concerns.[50]

D. Class Actions Not Certified for Litigation

When a lawyer negotiates a settlement of plaintiffs' claims on a class action basis, the situation may or may not be one in which the negotiation takes place in the shadow of anticipated adjudication. If the class action is certified for purposes of litigation and then class counsel negotiates a settlement with the defendant, it would fall into what this paper called the traditional scenario of negotiation in the shadow of anticipated adjudication.[51] Although trial may be quite unlikely—which, after all, is true not only for class actions but for all litigation—the prospect of an adjudicated outcome drives settlement positions. If, however, the lawyer negotiates a settlement on a class action basis without having the class action certified for purposes of litigation, then the negotiation presents an example of settlement outside the shadow of anticipated adjudication.[52]

Settlement-only class actions present the most extreme version of the problem. A clogged docket or compulsory ADR mechanisms may make the path to adjudication longer, but they do not bar it completely. A resource disparity may make adjudication harder to obtain as a practical matter, but adjudication at least remains a theoretical possibility. The settlement class action, by contrast, involves the negotiation of a settlement by a lawyer who legally has no power to pursue the class claims to adjudication.[53]

Without the shadow of adjudication, one might ask, what exactly is the lawyer negotiating? And whom exactly is the lawyer representing? The lawyer presumably would respond that she represents a putative class for purposes of negotiating a resolution of the class claims. The lawyer may even have been named interim class counsel by the court pursuant to Federal Rule of Civil Procedure 23(g) and given the explicit direction to negotiate on behalf of the putative class.[54] Even so, to negotiate on behalf

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49. *See id.*

50. *See* Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 519–30.

51. Erichson, *supra* note 6, at 989 ("Armed with plenary class certification, class counsel could negotiate without the inherent disadvantage that accompanies the negotiation of a settlement class action under current law."); Alexandra D. Lahav, *Symmetry and Class Action Litigation*, 60 UCLA L. REV. 1494, 1510 (2013) ("If plaintiffs can certify a litigated class, they will have leverage in settlement negotiations and in the alternative can litigate the case to judgment.").

52. *See* Erichson, *supra* note 6, at 957–61.

53. *See id.* at 957–58; Lahav, *supra* note 51, at 1510–11.

54. *See* FED. R. CIV. P. 23(g)(3) ("The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.");

of a class that cannot litigate is to negotiate with an extraordinarily weak BATNA (best alternative to a negotiated agreement).[55]

This is why settlement class actions present a particularly troubling case of lawyer-client conflicts resulting from the absence of anticipated adjudication. Even if the claimants themselves might have a path to adjudication, either individually or collectively, the lawyer purporting to negotiate on their behalf lacks the authority to litigate on behalf of them as a class. Thus, to the negotiating lawyer, the only sure way to keep the position and earn fees is to reach a deal. The lawyer's personal interest weighs in favor of striking an agreement even if the terms would not be appealing to the claimants themselves.[56]

Now, one might ask whether the settlement class action scenario is any different from an individual settlement negotiation that occurs before a complaint has been filed. In each case, the claim has not yet been presented to a court in a form that the court may adjudicate, and in each case, a lawyer seeks to negotiate using the leverage that comes with the implicit or explicit threat to litigate if the negotiation proves unsuccessful.

The difference is twofold. First, in the individual scenario, even if no complaint has yet been filed, the defendant knows that the claimant and her lawyer will do so if the claimant is unsatisfied with the defendant's precomplaint settlement offer. For the lawyer negotiating a precomplaint settlement on behalf of a specific client, rejecting a final settlement offer simply means moving forward with the litigation. By contrast, in the settlement class action, the lawyer cannot realistically threaten to bring the class claims to adjudication because the lawyer does not know whether the class would be certified, and even if so, the lawyer does not know whether she would be class counsel. For the lawyer negotiating a settlement class action, rejecting a final settlement offer means giving up the franchise.

Second, in the individual scenario, even if the lawyer serves as negotiator, the client retains authority over the settlement decision.[57] The client's power to reject any settlement offer serves as a backstop. If a defendant treats a precomplaint negotiation as one outside the shadow of anticipated adjudication and thus offers too little to fairly compensate the claim, the claimant can simply say no and the litigation will move forward. In the settlement class action, by contrast, class members lack the power to say no. They have the right to opt out individually,[58] but that is very different, both doctrinally and practically, from the power to decline the

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see also Erichson, *supra* note 6, at 960–61 (commenting on interim class counsel as a partial solution to the problem of settlement class actions).

55. The term "BATNA" was coined by Roger Fisher and William Ury. Roger Fisher & William Ury, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 99 (3d ed. 2011). On its connection to settlement class actions, in which class counsel "has no viable alternative to a negotiated agreement, at least not if she wishes to represent the class," see Erichson, *supra* note 6, at 958 & n.27.

56. *See* Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. 859 (2016); Lahav, *supra* note 51, at 1506.

57. *See* MODEL RULES OF PROF'L CONDUCT rr. 1.2(a), 1.8(g) (AM. BAR ASS'N 2016).

58. *See* FED. R. CIV. P. 23(c)(2)(B).

settlement as a class. In the absence of client control over settlement, judicial authority to reject a proposed class settlement serves as a crucial protection.[59] As putative class counsel negotiating a settlement class action, a lawyer lacks the authority to take the claims to adjudication and lacks the backstop of client authority over the settlement decision.

III. THE IMPORTANCE OF ANTICIPATED ADJUDICATION

In a well-functioning judicial system, negotiated resolutions of litigated disputes should reflect not only the interests of the disputants but also a reasonable approximation of the factual and legal merits of claims. Indeed, one of the best things about settlement is its potential to reflect the merits *better* than adjudication, given the uncertainty that accompanies factual and legal issues in the real world.[60]

If a plaintiff has, say, a 50 percent chance of prevailing on a claim because of uncertainty about breach, causation, or defenses, then a negotiated resolution of 50 percent of the harm would more accurately capture the merits than an adjudicated resolution of 0 or 100 percent. If a plaintiff has a small chance of prevailing, settlement has the potential to give the victory largely to the defendant while reflecting that the plaintiff's claim is not entirely without merit. And if a plaintiff has a large chance of prevailing, settlement has the potential to give the victory largely to the plaintiff while reflecting that the defendant's defenses are not entirely without merit. The all-or-nothing nature of adjudication makes it a poor way to achieve a nuanced reflection of the factual and legal merits in the absence of a clear-cut case for either the plaintiff or defendant. The same is true in terms of quantifying damages whenever the amount is uncertain or involves subjective compensation decisions. If a jury might reasonably award a plaintiff anywhere from X dollars to Y dollars on a particular

59. *See id.* 23(e) (requiring judicial approval of class action settlements); Erichson, *supra* note 56 (discussing the importance of judicial settlement review to protect class members from settlements that serve the interests of class counsel and defendants rather than the interests of class members).

60. *See* Eisenberg, *supra* note 31, at 654 ("Dispute-negotiation has a *graduated* and *accommodative* character: In reaching and rationalizing outcomes, any given norm or any given factual proposition can be taken into account according to the degree of its authoritativeness and applicability (in the case of a norm) or probability (in the case of a factual proposition)."); Howard M. Erichson, *Uncertainty and the Advantage of Collective Settlement*, 60 DEPAUL L. REV. 627, 643–45 (2011). To this extent, I disagree with one of Patricia Lee Refo's arguments about why we should be concerned about vanishing trials. As Chair of the Litigation Section of the American Bar Association, Refo wrote, "Settlement and compromise can be viewed as just another step toward moral relativism, where there are only shades of grey. Trials are about right and wrong, good and bad, innocence and guilt." Refo, *supra* note 1, at 4. She was making a broader point with which I agree: that trials serve valuable functions as public explorations of fact and public articulations of values. *See id.* ("Trials can be about catharsis and healing. Trials can educate and enlighten. Trials can be a catalyst for change. Trials can bring the light of public scrutiny into what would otherwise be the dark corners of our social landscape."). While I agree with Refo about these benefits of public adjudication, I cannot agree that the black and white of adjudication offers a truer reflection of the merits than the shades of grey offered by a fairly negotiated settlement, at least in the civil context.

claim, a settlement of halfway between X and Y may more accurately capture the merits than any particular jury verdict.

Negotiation in the shadow of anticipated adjudication can capture this benefit of settlement. The stronger the plaintiff's chance of success at trial, the stronger the plaintiff's negotiating position; the stronger the defendant's chance of prevailing by pretrial adjudication or at trial, the stronger the defendant's negotiating position. As long as each party knows that it can obtain the court's adjudication of the claim, the party may reject a settlement offer that fails to provide a reasonable approximation of what the party expects in an adjudicated outcome.[61]

Negotiated resolutions have numerous other virtues, including process advantages such as maintaining relationships,[62] and outcome advantages, such as the possibility of creative solutions that achieve non-zero-sum benefits.[63] These latter virtues exist independent of anticipated adjudication. The virtue of reflecting the merits by the mechanism of stronger and weaker bargaining positions, however, depends entirely on the prospect of adjudication.

The problem of lawyer-client conflicts of interest in settlement offers an additional reason to worry about situations in which adjudication is hard to get. On top of the concern that the absence of a realistic path to adjudication makes it harder for settlement to reflect the merits of disputes, it tends to exacerbate differences between lawyer interests and client interests in multiple scenarios. And in the most extreme example of lawyers negotiating without the ability to pursue claims to adjudication—putative class counsel negotiating settlement class actions—it raises the specter of lawyers negotiating in their own interest rather than in the interests of those they purport to represent.

Disputes are resolved mostly by settlement, and that is as it should be, given the advantages of negotiated resolutions. But if settlements are to reflect the value of claims on the fact and law, they must occur in the shadow of a judicial system that offers both sides the power to obtain a binding decision that resolves the dispute on the merits.

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61. *See* Burbank & Subrin, *supra* note 1, at 410 (proposing a separate procedural track for simple cases to "enhance the realistic prospects of a trial and thus the possibility that settlements will do justice to the parties"); Galanter & Cahill, *supra* note 37, at 1389 ("Power to achieve an attractive settlement may be dependent on having adjudication as a viable alternative.").

62. *See* Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1666 (1985).

63. *See* Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1200–02 (2009); *see also* Galanter & Cahill, *supra* note 37, at 1350–87 (exploring in detail a wide range of asserted benefits of settlement).