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## Other Judges' Cases

Melissa B. Jacoby

*University of North Carolina School of Law*, [mjacoby@email.unc.edu](mailto:mjacoby@email.unc.edu)

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# OTHER JUDGES' CASES

MELISSA B. JACOBY\*

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INTRODUCTION

Picture a judge at work. What do you see? If you have studied or worked in courts, you might envision the judge laboring on educational, administrative, or other professional obligations. Federal judges do a great many things, after all. If your image involves work on a specific case, though, you likely assume the judge presides over that case.

In today’s federal judiciary, that assumption is sometimes incorrect. It has become popular for a presiding judge to assign settlement oversight responsibilities to another sitting judge, often under the label of mediator.<sup>1</sup> Decades of academic federal courts work that dissects judicial obligations, including “managerial” work designed to close cases and control dockets, have not given this stripe of activity its fair share of attention.<sup>2</sup>

This lack of attention is a mistake because sitting judges as mediators present a puzzle. The Federal Rules of Civil Procedure authorize presiding judges to actively manage their own cases, including by holding pre-trial conferences about settlement.<sup>3</sup> Additionally, Congress has encouraged court-annexed alternative dispute resolution that enlists the services of private neutrals.<sup>4</sup> Why, then, would judges oversee negotiations in other judges’ cases?

One possibility is that judges take on mediation work as a reform measure. The practice reduces overinvolvement of presiding judges and increases access to justice for litigants who cannot afford to pay private mediators.

But the practice also implicates judicial power. Using judges as mediators can not only present separation-of-powers problems and introduce dynamics that may strike some participants as coercive,

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1. See *infra* Part I(A).

2. For the typical foundational examples, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982).

3. FED. R. CIV. P. 16(c)(2).

4. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5093; Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993, 2993-95.

but can also undercut key justice system values like transparency and impartiality.

Resolving these issues is not merely an academic exercise. Discussions of judicial legitimacy too often focus on formal opinions of the United States Supreme Court.<sup>5</sup> Yet, litigants are far more likely to encounter the lower courts (including the bankruptcy court) than the high courts, which hear few appeals and issue even fewer opinions.

Some readers might contend it is too narrow to focus on judges mediating in other judges' cases when modern federal court practice involves many other models of delegation.<sup>6</sup> Yet mediating judges have received far less attention than other delegations in recent decades. Furthermore, existing scholarship has focused on the judge as a *delegator* far more so than on the judge as a *delegatee*. This configuration affects how well existing judicial accountability measures apply. For example, while some judges are known to be proactive as presiding judges,<sup>7</sup> accountability mechanisms are likely to be more germane as applied to presiding judges than as to mediating judges.

Every project has caveats, and this one has several. First, this article focuses on federal rather than state courts. Within the federal judiciary, the focus is primarily on Article III judges, but some observations apply to bankruptcy judges and magistrate judges as well. Administrative law judges are not considered.

Second, this article does not focus on explicit Congressional directives for federal judges to work on other judges' cases. For example, a magistrate judge works on a district judge's cases.<sup>8</sup> Similarly, in multidistrict litigation, a panel of judges consolidates cases assigned to other judges with a single district judge.<sup>9</sup> Although

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5. Tara Leigh Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. 1555, 1563–66 (2021) (critiquing that focus).

6. See Order Appointing Settlement Master, Concerned Pastors for Social Action v. Khouri, No. 16-10277 (E.D. Mich. Dec. 28, 2016) (appointing Paul Mancatti in Flint toxic water cases).

7. See, e.g., RICHARD SOBEL, BENDING THE LAW 23–48, 60–68 (1991) (discussing the presiding district judge in A.H. Robins); Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 348–51 (1986) (discussing the presiding district judge in Agent Orange); Jennifer D. Oliva, *Opioid Multidistrict Litigation Secrecy*, 80 OHIO ST. L.J. 663, 673 (2019) (discussing methods of the judge presiding over National Prescription Opioid multidistrict litigation).

8. 28 U.S.C. §§ 631, 636.

9. 28 U.S.C. § 1407. However, MDL judges outsource to a wide range of other parties, including mediators who mostly are private neutrals. See Elizabeth Cham-

these contexts are mentioned, this article's primary focus is on cross-judge delegation of negotiation oversight absent an act of Congress, with many examples drawn from cases in which Article III judges are the mediators.

Third, the distinction between the terms mediation and settlement conferences can be slippery when used in federal courts. I use the term "mediating judge" expansively to include both, even though a traditional settlement conference may be quite different from the more wide-ranging activities associated with mediation.

The analysis proceeds as follows. After documenting the role of mediating judges in today's federal courts, Part I considers both reform narratives and power narratives explaining their use. To add context and specificity, Part I presents case studies based on original research. While these examples have unusual features, they illustrate the breadth of potential mediating judge activities and offer more of a citable record than can be found for other cases. The first involves the largest municipal bankruptcy in American history.<sup>10</sup> The second starts with the bankruptcy of a founder of a nationwide assisted living facility enterprise, who also solicited retirees to make "can't miss" financial investments.<sup>11</sup> Part I expressly disaggregates the cases' routine and exceptional elements. Finally, Part I highlights the separation-of-powers considerations that the case studies invite. It also shows how the Supreme Court's vague guidance on separation of powers yields conflicting messages about how mediating judges should go about their business.

Part II considers the impact of prominent judicial accountability measures on mediating judge practices.<sup>12</sup> The discussion illustrates why these systems do not operate effectively with respect to mediating judge practices. One of the biggest reasons is founda-

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blee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation*, 120 COLUM. L. REV. 2129, 2154, 2159 (2020).

10. See *infra* Part I(D). See generally Melissa B. Jacoby, *Federalism Form and Function in the Detroit Bankruptcy*, 33 YALE J. REG. 55, 55–108 (2016).

11. See *infra* Part I(D).

12. This discussion excludes impeachment as too far afield and already the subject of considerable high-profile scholarship. The mechanisms reviewed in Part II are somewhat different in composition and scope than those featured in other scholarship. See, e.g., CHARLES GARDNER GEYH, *COURTING PERIL: THE POLITICAL TRANSFORMATION OF THE AMERICAN JUDICIARY* (2016); Frederic Bloom & Christopher Serkin, *Suing Courts*, 79 U. CHI. L. REV. 553, 558–64 (2012) (reviewing appeals, mandamus and habeas corpus); Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 52–60, 85–86 (1995) (identifying precedent, limiting jurisdiction to case or controversy, appellate review, juries, impeachment, prosecution for criminal law violations, informal discipline, and judicial misconduct laws).

tional to the mediation task: lack of a record of what transpired in behind-the-scenes negotiations. Another reason is an unduly restrictive definition of what constitutes extrajudicial activity.

Part III prescribes an agenda to preserve the virtues of the mediating judge model while managing the risks. It directs the work to institutions that make rules and policy for the federal judiciary, particularly within the powerful Judicial Conference of the United States. In addition to targeted queries arising from the research this article reflects, the agenda should address big questions, including the application of separation-of-powers principles and whether judges act in a judicial capacity when they mediate.

## I.

### THE FUNDAMENTALS

#### A. *Mediation's meaning*

Judges often use the term “mediator” when delegating negotiation oversight to a colleague. Do they mean what mediation theorists mean by the term? Likely not. Then again, even private neutrals have strayed from the original concept.<sup>13</sup>

Scholarship on mediation offers an idealized model that highlights process values and party autonomy.<sup>14</sup> While time, place, and methods can be molded for the situation, alternative dispute resolution (ADR) theorists expect that “[e]ach party can walk out at any time without any explanation or reason and without any sanction being levied, in contrast to the obligatory nature of the legal process, which does not allow unilateral departure.”<sup>15</sup> In addition to promoting free exchange in negotiation, mediators are not supposed to threaten to report a lack of progress to a presiding judge due to coercion concerns.<sup>16</sup> Facilitative mediation generally is premised on the belief that the parties will generate better solutions

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13. See Lela Love & Ellen Waldman, *The Hopes and Fears of All the Years: 30 Years Behind and the Road Ahead for the Widespread Use of Mediation*, 31 OHIO ST. J. DISP. RESOL. 123 (2016); Jacqueline Nolan-Haley, *Does ADR's "Access to Justice" Come at the Expense of Meaningful Consent?*, 33 OHIO ST. J. DISP. RESOL. 373, 374–76 (2018); Charles Bultena, Charles Ramser & Kristopher Tilker, *Mediation Madness V: Misfit Mediators*, 11 S. J. BUS. & ETHICS 53 (2019).

14. Ronit Zamir, *The Disempowering Relationship Between Mediator Neutrality and Judicial Impartiality: Toward a New Mediation Ethic*, 11 PEPP. DISP. RESOL. L.J. 467, 470 (2011).

15. *Id.* at 469–70 (party control and voluntariness as hallmarks).

16. Timothy Hedeon, *Coercion and Self-Determination in Court-Connected Mediation: All Mediations Are Voluntary, but Some Are More Voluntary than Others*, 26 JUST. SYS. J. 273, 273 (2005).

than the neutral mediator.<sup>17</sup> The facilitative mediator enables a principally party-driven process.<sup>18</sup> Evaluative mediation is a contested category among those who worry its proactivity is inconsistent with basic mediation premises.<sup>19</sup> Nonetheless, the mediator's assessment of the strengths and weaknesses of the parties' claims is ostensibly grounded in party autonomy.<sup>20</sup>

Federal courts do not necessarily contemplate a powerless mediator model when they order parties to mediate with any type of mediator (whether or not parties have requested the court to order mediation). Local rules of procedure routinely authorize mediators to control the time, location, and duration of mediation and instruct parties to attend until released by the mediator. Some commentators find the mere act of requiring that parties mediate inconsistent with mediation theory.<sup>21</sup> In addition, whereas mediation literature traditionally reflects warm themes—reconciliation, community building, flexibility—courts often pursue a cool theme, efficiency, in judicial administration.<sup>22</sup>

The American Bar Association and the American Arbitration Association have promulgated model standards for mediation, but it is not obvious that mediating federal judges consider this a key resource by which to abide. The Model Standards define mediation as “a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.”<sup>23</sup> Here again, party autonomy is a key theme: parties determine the procedures, the duration of mediation sessions, and the substance of any settlements.<sup>24</sup> The Model Standards' constraints on matters such as confidentiality tend to be directed toward the mediator.<sup>25</sup>

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17. Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 *ALTS. TO HIGH COST LITIG.* 9 (1994).

18. James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 *HARV. NEGOT. L. REV.* 43, 73 (2006).

19. See Love & Waldman, *supra* note 13, at 138.

20. Hedeem, *supra* note 16, at 274 (“The centrality of self-determination in the mediation community cannot be overstated.”).

21. *Id.* at 278–79 (discussing whether mandatory mediation is an oxymoron).

22. Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 *JUDICATURE* 257, 257 (1986).

23. American Arbitration Association, American Bar Association & Association for Conflict Resolution, *MODEL STANDARDS OF CONDUCT FOR MEDIATORS* (2005) [hereinafter “MODEL STANDARDS”].

24. See Hedeem, *supra* note 16, at 274; Peter N. Thompson, *Good Faith Mediation in the Federal Courts*, 26 *OHIO ST. J. DISP. RES.* 363, 381, 401 (2011).

25. MODEL STANDARDS, at Standard V.

B. *The empirical claim*

The federal judiciary does not publish statistics about mediating judges.<sup>26</sup> Given the examples and footnotes that follow, it should not be considered controversial to say that it has become common for presiding judges to select other judges to “mediate” in their cases.

Article III judges are among the many who serve as mediating judges in a variety of cases.<sup>27</sup> Magistrate judges regularly serve as mediating judges at the request of district judges and each other.<sup>28</sup> The mediating judge model is popular in bankruptcy courts too: more than a decade ago, 82% of bankruptcy judges reported that

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26. Nancy A. Welsh, *Magistrate Judges, Settlement, and Procedural Justice*, 16 NEV. L.J. 983, 986 (2016). *But see* Charlotte S. Alexander, Nathan Dahlberg & Anne M. Tucker, *The Shadow Judiciary*, 39 REV. LITIG. 303, 353, tbl.10 (2020) (reporting the category of non-case ending magistrate judge activity from United States courts).

27. *See, e.g.*, Order for Mediation, *Grigoryants v. Safety-Kleen Corp.*, No. 11-267 (W.D. Pa. Dec. 20, 2013) (appointing District Judge Hornak); Order on Motions to Enter Alternative Dispute Resolution, *In re River City Towing Servs., Inc.*, No. 04-291-C-1 (M.D. La. July 19, 2005) (appointing District Judge Brady); Order, *Lowe v. Moskal Gross Orchosky Inc.*, No. 1:09-CV-1890 (N.D. Ohio Feb. 26, 2010) (appointing District Judge Polster); Order, *Vincze v. Robinson*, No. 2:02-CV-01719-LKK-KJM (E.D. Cal. Mar. 10, 2010) (appointing District Judge England); *see also* Andrew Marshall, *Microsoft Faces Prospect of Death by Lawyer*, INDEP. (London), Apr. 3, 2000, at 15 (in antitrust case, district court ordering parties to mediation with Seventh Circuit Judge Posner, who withdrew after finding party differences “too deep-seated to be bridged”); Eric D. Green, *Re-Examining Mediator and Judicial Roles in Large, Complex Litigation: Lessons from Microsoft and Other Megacases*, 86 B.U. L. REV. 1171, 1181 (2006) (Judge Posner served as mediating judge for 4 months); Steven J. Miller, *Judicial Mediation: Two Judges’ Philosophies*, 38 LITIG. 31, 38 (2012) (quoting district Judge Polster: “I have frequently mediated cases for my colleagues”); David A. Katz, *Mediation – A Judge’s Views on Judicially Monitored Settlement Conferences*, 35 LITIG. 3 (2009) (district judge explaining reasons for involvement in settlement, including as mediating judge, and how he addresses ethical issues).

28. *See, e.g.*, Robert J. Niemic, *Mediation in Bankruptcy – Results of FJC Survey*, 18 AM. BANKR. INST. J. 1, 31 (1999) (identifying as a possibility and presenting potential pitfalls); Judge Judith Gail Dein, *Wearing Two Hats: Being a Mediator and a Trial Judge*, BOS. B.J. (Dec. 19, 2012), <https://bostonbarjournal.com/2012/12/19/wearing-two-hats-being-a-mediator-and-a-trial-judge/> [<https://perma.cc/52J3-E393>] (magistrate judge identifying benefits of mediating judges); Ellen E. Deason, *Beyond “Managerial Judges”: Appropriate Roles in Settlement*, 78 OHIO ST. L. REV. 73, 98 (2017); Karen K. Klein, *A Judicial Mediator’s Perspective: The Impact of Gender on Dispute Resolution: Mediation as a Different Voice*, 81 N.D. L. REV. 771, 771 (2005) (has conducted mediations in hundreds of civil cases); Welsh, *supra* note 26, at 984; Patrick E. Longan, *Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators*, 73 NEB. L. REV. 712, 745 (1994); Order on Motion for Sanctions, *Sherwin v. Infinity Auto Insurance Co.*, No. 2:11-cv-00043-MMD-GWF (D. Nev. March 19, 2013) (one presiding magistrate judge appointing another magistrate judge as a mediating judge).



their courts had used non-presiding judges for settlement or mediation.<sup>29</sup>

Some cases featuring mediating judges have distinctive features: national forests and environmental groups,<sup>30</sup> civil war in Papua New Guinea,<sup>31</sup> voting rights and redistricting,<sup>32</sup> and the Commonwealth of Puerto Rico's debt crisis.<sup>33</sup> Federal judges also have mediated criminal plea bargaining, a controversial practice.<sup>34</sup>

Mediation assignments in bankruptcy cases likewise reflect sensitive topics. Examples include sexual abuse claims in Catholic diocese cases,<sup>35</sup> disputes in the Purdue Pharma bankruptcy between

29. Ralph Peeples, *The Uses of Mediation in Chapter 11 Cases*, 17 A.B.I. L. REV. 401, 419 (2009); see also Niemic, *supra* note 28, at 1, 30–31 (bankruptcy judges ordered mediation sua sponte in a quarter of matters sent to mediation).

30. See, e.g., Order Referring Case to Mediation, *Alaska v. Village of Kake*, No. 09-cv-00023-JWS (9th Cir. Dec. 13, 2012).

31. See, e.g., *Sarei v. Rio Tinto, PLC*, 625 F.3d 561 (9th Cir. 2010) (Judge Leavy appointed to explore the possibility of mediation); Claudia L. Bernard, *Is a Robe Ever Enough? Judicial Authority and Mediation Skill on Appeal*, 17 DISP. RESOL. MAG. 16 (2011).

32. See, e.g., Rebecca Green, *Mediation and Post-Election Litigation: A Way Forward*, 27 OHIO ST. J. ON DISP. RESOL. 325 (2012); Miya Shay, *Harris County, Plaintiffs at Mediation over Redistricting Map Lawsuit* (Nov. 14, 2011, 4:57 PM), <https://abc13.com/archive/8431056/> [<https://perma.cc/PU5L-PPB6>]; *Talks on Redistricting Held*, AUGUSTA CHRON., Mar. 11, 1997.

33. See, e.g., Order Appointing Mediation Team, *In re Fin. Oversight and Mgmt. Bd. for P.R.*, No. 17-3283 (D.P.R. June 23, 2017), Dkt. No. 430 (five mediating judges—two bankruptcy judges and three Article III judges—from outside Puerto Rico); *Puerto Rico Governor Meets with Fiscal Board in Texas to Discuss Debt Mediation*, CARIBBEAN BUSINESS (Aug. 21, 2017), <https://caribbeanbusiness.com/puerto-rico-governor-meets-with-fiscal-board-in-texas-to-discuss-debt-mediation/> [<https://perma.cc/6JMG-ZD23>].

34. See, e.g., Order, *United States v. Lee*, No. 1:99-cr-01417 (D.N.M. Dec. 10, 1999) (Judge Leavy selected by defense counsel and DOJ to mediate). The Advisory Committee on the Federal Rules of Criminal Procedure rejected a proposal to expressly permit mediating judges in plea discussions due to the potential for a “coercive effect on defendants, who will be reluctant to reject plea concessions endorsed (or even suggested) by any judge.” Memorandum from Professors Sara Sun Beale & Nancy King to Criminal Rules Advisory Committee, Re: Background for Sept. 9, 2014 Conference Call at 19 (Aug. 27, 2014) (citing concerns that “counsel and defendants will be needlessly and inappropriately pressured when settlement conferences do not initially result in a plea agreement”); see also John Paul Ryan & James J. Alfani, *Trial Judges’ Participation in Plea Bargaining: An Empirical Perspective*, 13 L. & SOC’Y REV. 479, 482 (1979) (judicial involvement “may induce the defendant to plead guilty even if he is innocent”).

35. See, e.g., Rose Krebs, *Retired Del. Bankruptcy Judge to Join Richards Layton*, LAW360 (Mar. 13, 2020), <https://www.law360.com/articles/1253058/retired-del-bankruptcy-judge-to-join-richards-layton> [<http://perma.cc/AT7C-FCMP>] (judge appointed as mediator in “emotionally, politically and financially charged bankruptcy dispute” involving sexual abuse allegations); Kevin Parrish, *Diocese Bank-*

the Sackler family and state attorneys general regarding responsibility for the opioid crisis,<sup>36</sup> and allegations of undisclosed conflicts of interest by high-profile restructuring professionals.<sup>37</sup> Sitting judges have mediated in most large municipal bankruptcies, cases that inherently carry political and social ramifications. Presiding judges delegated to mediating judges in the bankruptcies of Stockton,<sup>38</sup> San Bernardino,<sup>39</sup> the Town of Mammoth Lakes,<sup>40</sup> and the City of Detroit, to provide a few prime examples. These cases did not use the term “mediator” in a consistent way; some exercised considerably more authority than others.<sup>41</sup> Nonetheless, courts seem to find

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*ruptcy Case Mediator Named*, THE REC. (Stockton), Feb. 8, 2014 (Judge Zive appointed as mediating judge in Stockton diocese bankruptcy); Tom Corrigan, *Diocese of Duluth, Abuse Victims to Enter Mediation in July*, WALL ST. J. (May 26, 2016), <https://www.wsj.com/articles/BL-BANKB-22022> [<https://perma.cc/93EF-L2W3>] (Judge Zive appointed as mediating judge in Duluth diocese bankruptcy).

36. *See, e.g.*, Order Appointing the Hon. Shelley C. Chapman as Mediator, *In re Purdue Pharma, L.P.*, No. 19-23649 (Bankr. S.D.N.Y. May 7, 2021), Dkt. No. 2820; Order Establishing the Terms and Conditions of Mediation Before the Hon. Shelley C. Chapman at 3, *In re Purdue Pharma, L.P.*, No. 19-23649 (Bankr. S.D.N.Y. May 18, 2021), Dkt. No. 2879.

37. *See, e.g.*, Tom Corrigan, *Bankruptcy Judges Send Jay Alix, McKinsey to Mediation*, WALL ST. J. PRO, Jan. 15, 2019 (presiding judges in separate districts jointly sent parties to a mediating judge); Gretchen Morgenson & Tom Corrigan, *McKinsey Broke the Rules, Now It Wants to Rewrite Them*, WALL ST. J., Apr. 11, 2019; Mediator's Notice to Court, *In re Westmoreland Coal Co.*, No. 18-35672, (Bankr. S.D. Tex. Feb. 19, 2019), Dkt. No. 1406.

38. *See, e.g.*, Order Appointing Mediator and Setting Mediation Conference, *In re City of Stockton*, No. 12-32118-C-9 (Bankr. E.D. Cal. July 11, 2012), Dkt. No. 384.

39. *See, e.g.*, Order Appointing the Hon. Gregg W. Zive as Mediator, *In re City of San Bernardino*, No. 6: 12-bk-28006 MJ (Bankr. C.D. Cal. Aug. 12, 2013), Dkt. No. 742; Stipulation to Submit to Nonbinding Mediation Between City of San Bernardino and SBCPF, *In re City of San Bernardino*, No. 6: 12-bk-28006 MJ (Bankr. C.D. Cal. Nov. 21, 2012), Dkt. No. 220; Tim Reid, *Bankrupt U.S. City to Dispute Debt with California Pension Fund*, REUTERS, Nov. 25, 2013, <https://www.reuters.com/article/us-usa-municipality-berardino/bankrupt-u-s-city-to-dispute-debt-with-california-pension-fund-idUSBRE9AO0CO20131125> [<https://perma.cc/DWG6-MWZF>]; Opinion at 6, *San Bernardino City Prof. Firefighters Local 891 v. City of San Bernardino*, No. 5:14-cv-02073-ODW (C.D. Cal. May 7, 2015), Dkt. No. 47.

40. *See, e.g.*, Order Appointing Mediator and Setting Mediation Conference, *In re Town of Mammoth Lakes*, No. 12-32463-B-9 (Bankr. E.D. Cal. July 17, 2012), Dkt. No. 98.

41. In Stockton, the court deferred to the parties on issues to be mediated and preserved the parties' power to select a mediator. The Mammoth Lakes mediation order reserved the parties' right to select private mediators. In San Bernardino, the parties affirmatively requested mediation, identified their preferred mediator, and submitted the issues they wished to be mediated. *See supra* notes 38–40. As Part I(D) will detail, the City of Detroit mediation took a different approach.

municipal bankruptcy cases to be a welcome context for a mediating judge.<sup>42</sup>

Whatever the readers' views on the virtues and costs of mediating judges at this point, it is a practice sufficiently pervasive to warrant closer examination.

### C. *The puzzle*

The popularity of mediating judges in federal courts presents a puzzle. Assuming that trained private neutrals are ready, willing, and able to serve in court-annexed alternative dispute resolution, why would a presiding judge instead delegate to a mediating judge *sua sponte* or strongly encourage the parties to prefer a judge to a private neutral? What drives lawyers to request a mediating judge rather than a private neutral?

#### 1. The reform narrative

One way to think about the mediating judge phenomenon is as a reform measure. It could be a response to a range of perceived problems.

##### a. Avoiding too much information (for presiding judges)

Existing scholarship has fleshed out the incentives for judges to actively manage cases.<sup>43</sup> Among the well-known byproducts is the use of a pretrial conference with the presiding judge for settlement purposes.<sup>44</sup> Settlement conferences with presiding judges run the risk of coercion.<sup>45</sup> To the extent a settlement conference is not lim-

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42. Federal Judicial Center, *Navigating Chapter 9 of the Bankruptcy Code*, 48–49 (2017).

43. See, e.g., Resnik, *supra* note 2, at 378; Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257, 261 (1986) (commenting on judges' "forthright and ardent embrace of active participation in settlement negotiations"). To compare case management in district courts and bankruptcy courts, see generally Melissa B. Jacoby, *What Should Judges Do in Chapter 11?*, 2015 U. ILL. L. REV. 571 (2015). For an important recent contribution on the virtues of actually litigating cases, see ALEXANDRA LAHAV, IN PRAISE OF LITIGATION (2017) (arguing that litigation promotes democracy through enforcing legal rights, information disclosure, and participation in self-government).

44. FED. R. CIV. P. 16.

45. See Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079, 2085–86 (1993); Hon. Michael M. Baylson, *Are Civil Jury Trials Going the Way of the Dodo? Has Excessive Discovery Led to Settlement as an Economic and Cultural Imperative: A Response to Judge Higginbotham and Judge Hornby*, at 7 (2010), [https://www.uscourts.gov/sites/default/files/judge\\_baylson\\_are\\_civil\\_jury\\_trials\\_going\\_the\\_way\\_of\\_the\\_dodo.pdf](https://www.uscourts.gov/sites/default/files/judge_baylson_are_civil_jury_trials_going_the_way_of_the_dodo.pdf) [https://perma.cc/6J4K-7836] (examples of aggressive settlement promotion);

ited to information already on the record, a judge exposed to informal discussions cannot readily discard that information when later asked to preside over a trial.<sup>46</sup>

Bifurcation of roles is somewhat responsive to this conflict: the presiding judge handles adjudicative responsibilities and designates someone else to oversee settlement negotiations.<sup>47</sup> Indeed, academics concerned about the excesses of case management suggested bifurcation.<sup>48</sup>

b. Evaluative capacity

As suggested earlier, giving private neutrals an evaluative role is contested among alternative dispute resolution experts. Yet, parties and lawyers may want some evaluation of their legal arguments and may think it especially useful to get that evaluation from someone in the business of ruling on legal disputes. A mediating judge there-

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Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 OHIO ST. J. ON DISP. RESOL. 271, 302–03 (2011); see also Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985) (vacating district judge's imposition of penalty, stating "pressure tactics to coerce settlement simply are not permissible").

46. See, e.g., James Alfini, *Risk of Coercion Too Great: Judges Should Not Mediate Cases Assigned to Them for Trial*, DISP. RESOL. MAG., Fall 1999, at 11; Daisy Hurst Floyd, *Can the Judge Do That? The Need for a Clearer Judicial Role in Settlement*, 26 ARIZ. ST. L.J. 45, 62 (1994); Hedeem, *supra* note 16, at 280; Peter Robinson, *Settlement Conference Judge—Legal Lion or Problem Solving Lamb: An Empirical Documentation of Judicial Settlement Conference Practices and Techniques*, 33 AM. J. TRIAL ADVOC. 113 (2009).

47. See Jennifer W. Reynolds, *Judicial Reviews: What Judges Write When They Write About Mediation*, 5 Y.B. ARB. & MEDIATION 111 (2013) (meta-analysis of scholarly writings about mediation by sitting and retired state and federal judges, including the lateral hand-off of settlement responsibilities); Welsh, *supra* note 26, at 986 (role of magistrate judges in settlement); Michal Alberstein, *Judicial Conflict Resolution (JCR): A New Jurisprudence for an Emerging Judicial Practice*, 16 CARDOZO J. CONFLICT RESOL. 879, 900–01 (2015) (taxonomy of judicial roles related to conflict resolution includes short section on separate settlement judges); Wissler, *supra* note 45, at 302–03 (discussing settlement efforts by both presiding and non-presiding judges).

48. Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 643 (2005) (proposing "national rules should prohibit the judge assigned to try a case from participating in the negotiations about its disposition"); Edward Brunet, *Judicial Mediation and Signaling*, 3 NEV. L.J. 232 (2003) (documenting shift to bifurcated model); Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2029 (1997) (splitting settlement and adjudication roles would address some critiques of active presiding judge oversight such as in Agent Orange); Peterson, *supra* note 12, at 81 (litigators are more comfortable with judicial settlement oversight by a non-presiding judge); Deason, *supra* note 28, at 75, 139 (bifurcation as a solution to coercion and partiality problems).

fore may offer a credible and valuable reality check to clients with unrealistic expectations about a trial. Due to their experience evaluating debt restructuring plans, bankruptcy judges are thought to be especially valuable as mediators of multilateral disputes in that context.<sup>49</sup> Relatedly, bifurcation of presiding and negotiation oversight may foster a sense among parties that a real (and neutral) judge has looked at their case closely.<sup>50</sup>

c. Access to justice

If a presiding judge believes she should not oversee in-depth negotiations and orders parties to mediate, the identity of the mediator will affect how much the parties will pay. When a judge mediates, the public, not the parties, pays for the mediator's time. Given that private neutrals typically expect payment for their services, mediating judges can therefore be seen as an access-to-justice measure.<sup>51</sup> While pro bono mediation programs and staff mediators exist, they are not prominent in federal trial courts.<sup>52</sup> Court-or-

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49. See AMERICAN BANKRUPTCY INSTITUTE, THE ABI GUIDE TO BANKRUPTCY MEDIATION, at Chapter IV \*16 (2d ed. 2009); Edward L. Schnitzer, *Bankruptcy Mediation*, 28 J. BANKR. L. & PRAC. 6 (2019).

50. See Miller, *supra* note 27, at 33 (quoting Judge Polster: “there is something about wearing the robe that creates an aura of credibility. . . . It’s a profound experience for people . . . to sit in a room talking with a federal judge one-on-one and to know that the judge is spending all this time just on their case.”); Brunet, *supra* note 48, at 237 (“Institutional respect for judges helps to make judicial mediation effective. Parties may respect an individual judge for reasons unrelated to an independent judiciary – namely, positive prior interactions or a general positive personal reputation.”); *id.* at 239 (“Parties naturally respect judges, whether they are judging, sentencing, or mediating.”); Louis Otis & Eric H. Reiter, *Mediation by Judges: A New Phenomenon in the Transformation of Justice*, 6 PEPP. DISP. RESOL. L.J. 351, 365–66 (2006) (discussing the “perception of the judicial office as one of impartiality, which confers on judges a degree of moral authority,” knowledge of the law, and a commitment to dispensing justice).

51. For concerns about outsourcing to paid private actors in the MDL context, see Burch & Williams, *supra* note 9, at 2187, 2214 (discussing lack of transparency about non-magistrate mediator compensation). See also *In re Atlantic Pipe Corp.*, 304 F.3d 135, 145–47 (1st Cir. 2002) (district judge abused discretion by failing “to set reasonable limits on the duration of the mediation;” cost “should not be left to the mediator’s whim;” “[a] court intent on ordering non-consensual mediation should take other precautions as well”).

52. See Anne M. Burr, *Building Reform from the Bottom Up: Formulating Local Rules for Bankruptcy Court-Annexed Mediation*, 12 OHIO ST. J. ON DISPUTE RES. 311, 346 (1997); Hon. Alan S. Trust, *Is My Neutral Neutral?*, 34 AM. BANKR. INST. J. 28, 28 n.5 (2015) (discussing E.D.N.Y. bankruptcy court pro bono mediation program); Welsh, *supra* note 26, at 1016 (pro bono mediation programs in federal districts are not the majority); Schnitzer, *supra* note 49 (discussing two districts that require registered mediators to do small amounts of pro bono mediation in order to get

dered mediation with private neutrals can therefore generate distributional consequences when one or more parties have limited resources, especially if others in the same case are blessed with deep pockets.<sup>53</sup> This is especially pertinent in bankruptcy cases, given that typically at least one party has severe financial difficulties.<sup>54</sup>

I should not overstate the cost argument. Even if a presiding judge orders mediation with a sitting judge, parties still pay the mediator's expenses,<sup>55</sup> as well as their lawyers for the time spent on the mediation.<sup>56</sup> In addition, it does not feel right to characterize the time and efforts of mediating judges as "free." Federal judge time is a precious commodity; when they are working on other judges' cases, they are necessarily deferring or discarding other activities. Some might find this loss acceptable in the name of access to affordable resolution services, while others might prefer options such as staff mediators and expanded pro bono programs.

d. Diversity, equity, and inclusion considerations

A growing body of evidence suggests that demographic diversity generates better solutions to problems and enhances legitimacy.<sup>57</sup> Existing data on private neutrals used in complex litigation

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paid mediation work). ROBERT J. NIEMIC, *MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS* FEDERAL JUDICIAL CENTER 13 (2d ed. 2006) (use of retired judges as in-house appellate mediators).

53. See generally Brunet, *supra* note 48 (sua sponte appointments); Coben & Thompson, *supra* note 18, at 105 ("Courts are inclined to order mediation on their own initiative."); ROBERT J. NIEMIC, DONNA STIENSTRA & RANDALL E. RAVITZ, *FED. JUD. CTR., GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR* 70 (2001) (if parties are going to pay, they want to pick).

54. See, e.g., Tresas Baldas, *Detroit Mediator Pick Viewed as Ideal Negotiator*, DETROIT FREE PRESS (Aug 15, 2013), <https://www.usatoday.com/story/news/nation/2013/08/14/judge-picked-as-detroit-mediator-viewed-as-ideal-negotiator/2658099/> [<https://perma.cc/VLQ3-NJTL>] ("He's free — unlike private mediators.").

55. See Welsh, *supra* note 26, at 999 (magistrate judge said that "parties would benefit more from the services of magistrate judges than private mediators who would charge for their services and thus were likely to increase the parties' costs").

56. *In re Smith*, 524 B.R. 689, 704 (Bankr. S.D. Tex. 2015) (cost of lawyer time to participate in potentially unnecessary mediation); *id.* at 703 ("Mediation is not free. The parties must pay . . . their respective counsel for participating in the mediation.").

57. See, e.g., Sheen S. Levine et al., *Ethnic Diversity Deflates Price Bubbles*, 111 *PROC. OF THE NAT'L ACAD. OF SCI.* 18524 (2014); Nancy Scherer & Brett Curry, *Does Descriptive Race Representation Enhance Institutional Legitimacy? The Case of the U.S. Courts*, 72 *J. POLS.* 90, 90–101 (2010). For more background, see Brooke Coleman, *A Legal Fempeire? Women in Complex Civil Litigation*, 93 *IND. L.J.* 617, 617 (2018); Melissa B. Jacoby, *Corporate Bankruptcy Hybridity*, 166 *U. PA. L. REV.* 1715 (2018).

suggest less diversity than on the federal bench.<sup>58</sup> It therefore is possible that the shift to mediating judges has diversity, equity, and inclusion (DEI) benefits.

Without the federal judiciary keeping statistics on mediation, we do not know how the demography of *mediating* judges compares to the judiciary overall. In addition, at least until there is greater heterogeneity on the federal bench, there is a risk of unduly burdening the fraction of judges who are not white men with more uncompensated labor. Thus, while it is premature to say that DEI considerations help explain preferences for mediating judges, it is a possible consideration.

## 2. The power narrative

The reform narrative, standing alone, does not consider the inherent authority of a sitting judge, no matter the nature of the activity or the intentions of the judicial actor. This section turns to the dynamics that arise when judges oversee negotiations in other judges' cases.

### a. Resituating the role of consent and party autonomy

The American adversarial system is built on the premise of party autonomy constraining judicial power.<sup>59</sup> Mediation, in theory, is based even more heavily on party autonomy. Yet, few who en-

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58. White men are significantly overrepresented in life-tenured federal judge positions relative to the general population. See *The Importance of a Diverse Federal Judiciary: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 117th Cong. (2021) (written testimony of Professor Maya Sen, comparing data from Federal Judicial Center to Census data). Yet, they appear to be overrepresented even more in alternative dispute resolution. See NEW YORK BAR ASSOCIATION, *IF NOT NOW, WHEN? ACHIEVING EQUALITY FOR WOMEN ATTORNEYS IN THE COURTROOM AND IN ADR* (2017); James Jenkins, *Arbitrators and Mediators Should Reflect Society's Diversity*, LAW360, Jan. 16, 2019, at 1; Reynolds, *supra* note 47 (reporting on judges' articles that have identified an expanding range of voices in the dispute resolution process as an advantage of court-connected mediation). But see Stephen B. Goldberg, Margaret L. Shaw & Jeanne M. Brett, *What Difference Does a Robe Make? Comparing Mediators with and Without Prior Judicial Experience*, 25 NEGOT. J. 277, 279 (2009) (in a study of private mediation, with a large composition of *retired* judges, finding roughly analogous gender breakdown to the contemporaneous federal judiciary). Data on AAA arbitrators (who may not also be certified as mediators) indicates that they are overwhelmingly straight white men. AM. ASS'N FOR JUST., *WHERE WHITE MEN RULE: HOW THE SECRETIVE SYSTEM OF FORCED ARBITRATION HURTS WOMEN AND MINORITIES* 2–3 (2021).

59. Marian Neef & Stuart Nagel, *The Adversary Nature of the American Legal System from a Historical Perspective*, 20 N.Y.L. F. 123, 155 (1974) (adversarial system respects individual autonomy by granting the individual control over the "basic mode of his participation in the adjudicatory process").

counter the legal system are unaware that federal judges have special authority. To the extent that a mediation's success is measured by whether and how quickly a settlement is reached, that may be a byproduct of this authority rather than mediation per se. If a judge proposes a mediating judge *sua sponte*, or strongly encourages it (by mentioning multiple times that "one of my colleagues down the hall is available"), lawyers and parties may feel less than free to object, particularly if the issue arises early in a case or if they are likely to see either judge in future cases. Even when presiding judges give parties and their lawyers an opportunity to respond to a proposed mediating judge, consent may be impaired if parties believe one or both judges will be offended or disappointed by their replies.<sup>60</sup> In other words, although a bifurcated model was thought to have the potential to promote party autonomy within the settlement process, judges as mediators run the risk of *increasing* pressure to reach a resolution without trial.<sup>61</sup>

Lawyers and parties sometimes request both mediation and a sitting judge to be the mediator. Perhaps they perceive opposing parties as being unreasonable and hope that a judge will help them see the light. Perhaps they see a mediator as bolstering leverage for a particular party or position that otherwise is lacking. The implicit power of judges may be at play when a presiding judge appoints a mediating judge after negotiations overseen by private neutrals have stalled. The evaluative capacity of a sitting judge might be part of the explanation, but there also could be a sense that someone

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60. Jacoby, *supra* note 10, at 57–58 (explaining the difficulty of evaluating the quality of the party consent to soft judicial power).

61. Reynolds, *supra* note 47, at 126 (recognizing the theme of "efficiency-centric" articles in judicial writing on mediation, resulting in "thinning vision of [party] self-determination"); *id.* at 132 (finding, even in personal-narrative-driven articles, an association of judicial identity with facilitating settlement, which outweighs other dispute resolution values); Hedeem, *supra* note 16, at 277 (pressure to settle in court-annexed mediation); Peeples, *supra* note 29, at 401–02 ("Settlement mediation need not, but often does, have a more coercive flavor . . . . [P]arties mediate because they have been ordered to do so, usually by a court."); *id.* at 419–20 (sitting judge involvement "seems to up the stakes for the parties. There may be new risks for being reluctant to settle"); Brunet, *supra* note 48, at 234 ("muscle mediation" is when a judge "presents a rough case evaluation to the parties, and seeks to extract settlement offers that mirror the judge's analytical perception of the dispute"); *id.* at 248 ("The judge who evaluates a case, whether or not assigned to her, is often an arm-twister by nature."); *id.* at 251 ("A national survey of trial judges revealed that over two-thirds thought their intervention in the settlement process was subtle. . . ."). See generally Terry A. Maroney, *Judicial Temperament Explained*, 105 JUDICATURE 48 (2021) (analyzing human temperament on axes of emotional reactivity and self-regulation, and inability "to fundamentally reorient or transcend them").



with more power and authority can close a deal that private neutrals could not.<sup>62</sup> For example, the Purdue Pharma bankruptcy was meant to preclude diffuse and protracted opioid crisis litigation. The debtor's lawyer endorsed the presiding judge's offer to appoint a fellow judge as the mediator after some of the toughest matters, involving protection of the Sackler family from state court lawsuits, remained unresolved after mediation with private neutrals. In some cases, perhaps lawyers are trying to give their own clients a reality check, hoping that someone who owns a robe and holds stature in society can convey what they could not.<sup>63</sup> The potential divergence of motives and interests between lawyer and client might raise professional responsibility issues outside of the scope of this article.<sup>64</sup>

In the Detroit case study that lies ahead, the mediating judge sought to resolve the fractious bankruptcy case by raising money for a global settlement from foundations, governments, and private parties. When the head of a foundation, among the first solicited for funds, quipped to a reporter that "I was always scared to death of those guys,"<sup>65</sup> referring to federal judges, she might have been joking, but likely not entirely.

b. Use of formal judicial powers when not the presiding judge

The prior subsection referred to implicit power and authority. Sitting judges have many formal powers. Can they use them even if they are not presiding over a case? A common example is signing and entering orders on the docket that control aspects of media-

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62. In addition, some believe that judges, on the whole, are less patient mediators, perhaps expecting that parties will come around more readily because of their status. BRYAN CLARK, *LAWYERS AND MEDIATION* 132 (2012) (mediating judges "tend to cut to the quick in mediation compared to others" and spend less time in mediation); Brunet, *supra* note 48, at 238 ("Paid by salary and mediating from a set of institutional pressures rather than a profit motive, judges naturally can devote less time to mediation than private mediators."); Harold Baer, Jr., *Mediation-Now Is the Time*, 21 *LITIG.* 5, 6 (1995) ("sitting judges are often poor mediators" because they are busy and lack patience); Steven S. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 *KAN. L. REV.* 849, 856-61 (2013) (identifying and responding to judges' concern that they do not have time for live Rule 16 conferences even in their own cases).

63. Miller, *supra* note 27, at 34 (Judge Dan Polster: "I get requests from attorneys saying they have a difficult client and need some help in getting them to see what's at stake and what the risks are. One side contacts me for a settlement conference but doesn't want it to become known that they had requested it. I'm open to that.").

64. See generally Michael Moffitt, *Settlement Malpractice*, 86 *U. CHI. L. REV.* 1825 (2019).

65. NATHAN BOMEY, *DETROIT RESURRECTED: TO BANKRUPTCY AND BACK* 137 (2016) (quoting Mariam Noland).

tion sessions.<sup>66</sup> A less well-documented, but more concerning, example is fear that the mediating judge will threaten or impose sanctions for reluctance to settle.<sup>67</sup> A third example involves a mediating judge granted power by stipulation to preside over disputes with no possibility of appeal.<sup>68</sup> Using judicial powers as a non-presiding judge generates a confusing mixture of roles.

c. Information leakiness as a source of (unintentional) leverage

Private neutrals operating under official mediation standards, such as those described earlier, are themselves bound to confidentiality.<sup>69</sup> Federal judges typically are not. Parties and lawyers might reasonably worry about the extent to which a mediating judge and presiding judge talk amongst themselves about the case and the behavior of lawyers and parties.<sup>70</sup> If judges are colleagues in the same district and known to trade off mediating responsibilities (as well as to get together for a meal a few times a week), lawyers might be even more likely to suspect dialogue between the judges absent explicit efforts to manage that impression.<sup>71</sup> Some judges explicitly endorse private dialogue, including about substantive matters, to move along the cases.<sup>72</sup> Lawyers and parties likely suspect it hap-

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66. *See, e.g.*, AMERICAN BANKRUPTCY INSTITUTE, *supra* note 49, at Chapter VI \*34 (discussing as a benefit that sitting judges can issue orders in aid of mediation).

67. *See infra* Part I(D).

68. *See id.*

69. MODEL STANDARDS, at Standard V.

70. Wissler, *supra* note 45, at 286–87 (lawyers felt more confident in private mediators' assurances of confidentiality than in mediating judges'); Burch & Williams, *supra* note 9, at 2159 (discussing leverage-related concerns about back-channel judge-mediator communications, regardless of the identity of the mediator).

71. For example, in the debt restructuring case of the Commonwealth of Puerto Rico, the presiding judge and lead judicial mediator committed to communicating through appearances in open court and public docket entries. *See, e.g.*, Order Appointing Mediation Team at 3, *In re Fin. Oversight and Mgmt. Bd. for Puerto Rico*, No. 17-3283 (D.P.R. June 23, 2017) (no information sharing between judges about party positions or substance of mediation); Notice of Submission of Written Remarks, *In re Fin. Oversight and Mgmt. Bd. for Puerto Rico*, No. 17-3283 (D.P.R. Nov. 15, 2017) (Judge Houser submitting written remarks on the docket); Notice of Breach of Mediation Confidentiality at 2, *In re Fin. Oversight and Mgmt. Bd. for Puerto Rico*, No. 17-3283 (D.P.R. Nov. 20, 2017) (Judge Houser: “imperative . . . that the mediation process proceed on an entirely separate track from the litigation”).

72. *See infra* Part I(D) (2). This dynamic may occur in cases even if the mediator is not a sitting judge. *See, e.g.*, Order Establishing Mediation Protocol at 6, *In re LTL Mgmt. LLC*, No. 21-30589 (Bankr. D.N.J. Mar. 18, 2022), Dkt. No. 1780 (“The Co-Mediators are permitted, at their discretion, to speak *ex parte* with the Court . . . [a]bout the Mediation Issues.”).

pens even when judges do not expressly signal willingness to engage in back-channel communication.<sup>73</sup> Lawyers may not want to exit even those mediations they perceive as futile, worried the presiding judge will learn who walked out first.

The same standards that discourage certified private neutrals from talking to a presiding judge *ex parte* also apply to talking to the public or the press about the case. As illustrated below, some judges may not feel so constrained. Perhaps it is not formal power, but rather a perceived exemption from the rules and norms of private neutral alternative dispute resolution, that shifts the dynamics.

#### D. Case studies

The following examples demonstrate a range of acts that mediating judges might take in multi-party cases where a global non-litigated resolution is perceived as particularly desirable. The mediating judges were outspoken about their methods, creating more of a citable record than is typically available. The mediating judges were life tenured and have since retired from the bench to engage in private ADR practice. The case studies draw on primary sources to the maximum extent, drawn particularly from court dockets. I do not claim these cases are representative or randomly selected. They were selected for their rich array of examples and access to information. Although these examples involve bankruptcy, the activities could be used in a wide array of multi-party federal litigation.

##### 1. City of Detroit

###### a. Backstory

The City of Detroit bankruptcy has received no shortage of attention. This discussion focuses on the mediation overseen by Chief District Judge Gerald Rosen of the Eastern District of Michigan. The City of Detroit's bankruptcy filing in July 2013 was large and contentious, with no obvious path to a successful reorganization at the outset.<sup>74</sup> Complicating the landscape were wildly disparate creditors with complicated and contested legal rights, including public pensioners, a paucity of essential services for residents, and a distrust among residents of a bankruptcy initiated by Governor Rick

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73. Lawyers have reported "deep concerns" about being forthcoming with mediating judges. See Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001).

74. See Jacoby, *supra* note 10, at 56.

Snyder and his hand-selected Emergency Manager, Kevyn Orr, who displaced local elected officials for many key purposes.

b. Perception of litigation and the master mediation order

Both the presiding judge and the mediating judge recognized that many of Detroit's legal disputes were uncharted waters. Yet, both also believed that the city and its residents could not handle prolonged litigation.<sup>75</sup> Accordingly, the ink on Detroit's bankruptcy petition was barely dry when the presiding judge, the Honorable Steven Rhodes, announced he intended to select Chief Judge Rosen to whip this case into shape behind the scenes as a mediator.<sup>76</sup>

The master mediation order delegated broad authority to the mediating judge, including the power to appoint additional mediators, to "enter any order necessary for the facilitation of mediation proceedings," and to "direct the parties to engage in facilitative mediation on substantive, process and discovery issues."<sup>77</sup> The substantive scope of the mediation was vast. The first order referring matters to mediation encompassed dozens, if not hundreds, of legal questions regarding the treatment of creditors' claims and the renegotiation of collective bargaining agreements.<sup>78</sup> Subsequent orders referenced mediating a dispute over terminating an interest-rate-swap contract, matters pending with twenty unions, the creation of a regional water authority (this time, at the request of an outlying county), and the City's residential water shutoff policy.<sup>79</sup> Hundreds of constitutional and state law tort actions were also directed to arbitration under Chief Judge Rosen's umbrella.<sup>80</sup> Even after the City's restructuring plan was approved, mediation contin-

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75. Brookings Institute, *The Muni Market in the Post-Detroit and Post-Puerto Rico Era: Panel Discussion*, YOUTUBE (July 15, 2016), <https://www.youtube.com/watch?v=6wLUxzf8sdA> [<https://perma.cc/M7XX-XFVJ>] (Rosen: "we could've had scorched earth litigation for a decade with the many cert. worthy, cert. worthy for those who aren't lawyers, issues that could've gone up to the Supreme Court, but there would have been nothing left of Detroit but dust. And who would have profited from that?").

76. Unlike in *Harder*, discussed later, the City of Detroit had not asked the court to appoint a mediator. If parties had objections to the identity of the mediator, they were to be delivered to chambers in sealed envelopes. Jacoby, *supra* note 10, at 82 (quoting primary sources).

77. Mediation Order, *In re* City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Aug. 13, 2013), Dkt. No. 322. For information about the other mediators, see Jacoby, *supra* note 10.

78. First Order Referring Matters to Facilitative Mediation, *In re* City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Aug. 16, 2013), Dkt. No. 333.

79. See Jacoby, *supra* note 10, at 83 nn.201 & 203.

80. *Id.* at 83 n.202.

ued, including over professional fees<sup>81</sup> and the regional water authority.<sup>82</sup>

It was not a foregone conclusion that the presiding judge would automatically approve settlements with the mediating judge's stamp of approval. Judge Rhodes rejected an early settlement brokered by Chief Judge Rosen for failing to meet the legal standards for settlements in bankruptcy cases. But Judge Rhodes also made clear to lawyers in the case that he never again wanted to be in a position where he had to override Chief Judge Rosen's handiwork.<sup>83</sup> From then on, rather than seeking court approval of subsequent individual settlements, Chief Judge Rosen announced settlements via press release. The settlements were not brought to the presiding judge until they were incorporated into the restructuring plan, raising the stakes of rejecting a settlement part and parcel of the broader deal.

c. Channels of communication

The master mediation order prohibited parties from disclosing anything "incident to the mediation," but the presiding and mediating judges neither promised nor delivered a strict wall of separation between them. The presiding judge indicated that he sometimes adjusted the case's pace or held hearings to accommodate requests from Chief Judge Rosen or his team; sometimes the presiding judge refrained from issuing a ruling because, "Judge Rosen, my mediator, kept saying 'you can't do that Steve! If you do that you'll ruin my mediations!'"<sup>84</sup>

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81. See Scheduling Order Regarding Process to Determine the Disclosure and Reasonableness of Fees under 11 U.S.C. § 943(b)(3), *In re City of Detroit*, No. 13-53846 (Bankr. E.D. Mich. Dec. 15, 2014), Dkt. No. 8710.

82. See Nolan Finley, *Judge's Gag Order Is Gagging Democracy*, DETROIT NEWS (June 4, 2015), <https://www.detroitnews.com/story/opinion/columnists/nolan-finley/2015/06/03/finley-hackel-bucks-gag-order/28426647/> [<https://perma.cc/CG97-3HE7>] ("[O]nce that public board was in place, the private backroom dealing should have stopped and the gag order lifted.")

83. Jacoby, *supra* note 10, at 87 n.229 (after the court cleared the room of non-attorneys, the court said, "[g]uys, don't ever do that to me again with Rosen").

84. Ford School, *Detroit Grand Bargain Panel*, YOUTUBE (Oct. 21, 2015), <https://www.youtube.com/watch?v=OSMKun3hP9U> [<https://perma.cc/4UEA-Q3GU>]. At this event, Judge Rosen followed up to explain that "if we had told the DIA at the outset that it wasn't going to be monetized that would have been game, set, match. . . . I would have had nothing to do." *Id.* ABI Videos, *Saturday Lunch Panel with Judge Rhodes*, VIMEO (Apr. 18, 2015), <https://vimeo.com/126086212> [<https://perma.cc/FF73-9PZA>] (Judge Rhodes explaining how "my mediators" would ask him to slow the pace of the case due to settlement developments, and other times,

d. Thumbs on the scale and more

No one was likely to forget that the mediator was an Article III judge, with strong powers and the willingness to exercise them.<sup>85</sup> He regularly signed orders in the Detroit bankruptcy case even though he was not the presiding judge.<sup>86</sup> Through such orders, he controlled the parties' ability to exit mediation sessions—participants were made to stay, potentially for days, “until released by the mediators,” they stated.<sup>87</sup>

The deal known as the Grand Bargain illustrates the breadth of what a creative mediating judge might do. Although Detroit's Emergency Manager had expressed openness to selling the city's valuable art collection to pay creditors and to support other initiatives, the mediating judge did not believe that Detroit should do that.<sup>88</sup> Instead, he sought to save the art museum from sale while also limiting cuts to public retiree pensions.<sup>89</sup> To achieve this, he asked non-profit foundations, which were not parties in the bankruptcy case, to contribute hundreds of millions of dollars.<sup>90</sup> He solicited the Governor of the State of Michigan and members of the

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mediators said, “we need you to hold a hearing and ask very hard questions’ . . . and then the case settled”).

85. Jacoby, *supra* note 10, at Part III(C); Dep't of Emergency Manager Kevyn D. Orr at 41, *In re City of Detroit*, No. 13-53846 (Bankr. E.D. Mich. Dec. 31, 2013), <https://www.detroitmi.gov/Portals/0/docs/EM/Reports/OrrDeposition123113.pdf> [<https://perma.cc/7AUG-ZYVX>] (Orr testifying that Chief Judge Rosen said he would hold creditors in contempt if they did not agree to particular settlements).

86. Jacoby, *supra* note 10, at Part III(C).

87. See, e.g., Order for Continuing Mediation, *In re City of Detroit*, No. 13-53846 (Bankr. E.D. Mich. Sept. 11, 2014), Dkt. No. 7419 (ordering mediation for eleven parties “continuing day-to-day thereafter as deemed necessary, until released by the mediators”).

88. See Ford School, *supra* note 84 (“If we liquidated [the DIA] I thought it would be like dropping a bomb in the middle of midtown [Detroit], a hydrogen bomb, it would just suck the life out of midtown.”); Steven W. Rhodes & Gerald E. Rosen, *From a Doodle to the Grand Bargain: How the Bankruptcy in Detroit Was Resolved Through Mediation*, MICH. L. WKLY., May 1, 2017 (selling the art “would be an exclamation point on a Detroit obituary that many were already writing”).

89. BOMEY, *supra* note 65, at 130; Tresa Baldas, *Gerald Rosen, the Judge Who Helped Save Detroit, Retires*, DETROIT FREE PRESS (Jan. 22, 2017, 6:13 PM), <http://www.freep.com/story/news/local/detroit-reborn/2017/01/21/gerald-rosen-judge-detroit-retirement/96850154/> [<https://perma.cc/W6PS-ABYC>].

90. Jim Lynch, *Rosen Gives Behind-the-Scenes Look at Bankruptcy Case*, DETROIT NEWS (Nov. 10, 2014, 11:08 AM), <https://www.detroitnews.com/story/news/local/wayne-county/2014/11/09/rosen-gives-behind-scenes-look-bankruptcy-case/18761871/> [<https://perma.cc/TM6P-BHX5>].

state legislature,<sup>91</sup> while also making sure to be on hand at the state capitol when the legislature voted on related matters.<sup>92</sup>

We also know that Chief Judge Rosen remained in close contact with Detroit's Emergency Manager, Kevyn Orr, throughout the case. For example, he encouraged Orr to put extra effort and resources into convincing retirees to support the settlement, seeking a "coordinated media blitz."<sup>93</sup>

By securing retiree support, Chief Judge Rosen's Grand Bargain altered the leverage of everyone else. Like dominoes, each financial creditor group fell into a deal—"People who buy the last tickets get run over by the train," the Chief Judge warned.<sup>94</sup> Although some creditors who had not been at the negotiating table opposed the plan, the major voting blocs supported it, as it contained the settlements they had signed onto. The parties and lawyers understood that trying to negotiate outside of Chief Judge Rosen's mediation program was not a viable option. Insisting on litigation ran the risk of disfavor with both judges.<sup>95</sup> For the most part, grumbles about the mediation were leaked to the press without attribution.<sup>96</sup> In a few instances, parties integrated concerns about mediator activities into other pleadings, which generally gained no traction.<sup>97</sup>

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91. "I think we'll get to \$350 [million] and I think you should match it," Chief Judge Rosen said to the governor. Daniel Howes, Chad Livengood & David Shepardson, *Bankruptcy and Beyond for Detroit*, DETROIT NEWS (Nov. 13, 2014, 10:13 AM), <https://www.detroitnews.com/story/news/local/wayne-county/2014/11/13/detroit-bankruptcy-grand-bargain/18934921/> [<https://perma.cc/T3LR-NT8N>]; see also BOMEY, *supra* note 65, at 149–50 ("'It's time to go back to the governor,' [Rosen] said. Rosen and Driker, armed with good news, drove to Lansing to ask Snyder for money a second time."); *id.* at 198 ("Rosen, who had been trekking to Lansing for private meetings with legislators about the grand bargain, pressed the city's labor creditors for support too."); Press Conference, Governor Snyder (Jan. 22, 2014) (summary on file with author) (Michigan Senate Majority Leader stating that lead mediator asked to meet with him on or around Christmas Eve 2013).

92. See Kathleen Gray, *State Approves Historic \$195M Deal for Detroit*, DETROIT FREE PRESS (June 4, 2014) (reporting Chief Judge Rosen "met with senators" and "stayed to witness the bill[']s passage").

93. BOMEY, *supra* note 65, at 200 ("You don't know what you're doing. You're not treating it like a political campaign.").

94. *Id.* at 204.

95. Jacoby, *supra* note 10, at 87.

96. Matthew Dolan & Emily Glazer, *Mediator in Detroit Bankruptcy Walks Fine Line Between City, Creditors*, WALL ST. J. (Feb. 14, 2014, 7:32 PM), <https://www.wsj.com/articles/SB10001424052702304703804579383124012396700> [<https://perma.cc/M6V5-P49R>].

97. Hearing Re. Status Conference on Plan Confirmation Process at 34–37, *In re City of Detroit*, No. 13-53846 (Bankr. E.D. Mich. June 26, 2014), Dkt. No. 5697

In expressing appreciation for getting the case across the finish line in just eighteen months, Judge Rhodes acknowledged the range of activities Chief Judge Rosen undertook: “The mediator’s job is to resolve disputes between parties. But here, Judge Rosen and his team did much more than that. They went outside of their roles as mediators and brought money to the table to help solve the problem.”<sup>98</sup>

In light of the miraculously quick bankruptcy resolution, the distributional consequences of the Grand Bargain can get lost in the shuffle. The money was raised for, and dedicated to, protecting the prized collection of Detroit’s art museum and limiting pension cuts for public workers. Disappointed capital markets creditors were vocal about the consequence: more money flowing to other parties meant less for them. While a different mediator might have prioritized arguments for satisfying capital market expectations over art and retirees, less frequently discussed is whether a different judicial mediator would have raised money instead for police brutality victims, or for low-income residents whose overpriced water had been cut off in the heat of summer. As is true in many cases, a mediator’s thumb on the scale for one group means less for another.

e. Public statements

We know more about this case than might be typical because Chief Judge Rosen spoke publicly during and after the case, including while the appellate process was nominally still in play. Chief Judge Rosen praised the Grand Bargain participants for easing pension cuts and protecting the Detroit Institute of Arts.<sup>99</sup> In a “Big Three” press conference, he applauded the auto companies:

[Y]ou are very much the face of not just Detroit but of Michigan and to have come forward in this way speaks volumes

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(For example, in a discovery dispute, creditors pointed to press reports of Chief Judge Rosen’s remarks in connection with the mediation’s confidentiality); *id.* at 38 (“I didn’t quite hear what the relevance is to any of your objections.”). Objecting to a memo that the mediating judge filed endorsing a settlement, creditors questioned whether this activity qualified as facilitative in addition to breaching confidentiality. Objection to Mediators’ Recommendation at 6–7, *In re City of Detroit*, No. 13-53846 (Bankr. E.D. Mich. June 26, 2014), Dkt. No. 2365. The court rejected that settlement but did not mention these issues.

98. Ford School, *supra* note 84.

99. *See, e.g.*, Press Conference at 9:59–13:12 (June 3, 2014) (transcript on file); Karen Pierog, *Detroit Hold-out Creditor Lashes out at Courts*, REUTERS (June 11, 2014, 3:00 PM), <https://www.reuters.com/article/usa-detroit-bankruptcy-syncoraidUSL2N0OS1B320140611> [<https://perma.cc/DQ6D-TNXA>].



about the commitment that all three of you have to Detroit and to Michigan.<sup>100</sup>

He also paid homage to the retiree association leaders:

I've saved the best for last and none of this would be possible without all of us keeping a clear vision firmly in mind about who this is really about. It's about Detroit's retirees who have given decades and decades of their lives devoted to Detroit.<sup>101</sup>

Moments after Judge Rhodes announced his decision to confirm Detroit's debt restructuring plan—which Chief Judge Rosen viewed privately from his chambers with Governor Snyder<sup>102</sup>—Chief Judge Rosen spoke at a courthouse press conference, lauding elected officials, including Governor Snyder (a Republican),<sup>103</sup> and Mayor Mike Duggan (a Democrat).<sup>104</sup> Two days later, at an event in the suburbs, he spoke about the negotiations.<sup>105</sup> He later participated in a law-firm-sponsored panel discussion of bondholders and other creditors in Chicago.<sup>106</sup> At a Brookings Institution event, he characterized his impression of how financial creditors felt about retirees and the importance of this mediation assignment to him personally.<sup>107</sup> In a newspaper interview about his retirement, Chief Judge Rosen described his role in Detroit's bankruptcy as to “pro-

100. Press Conference, Gerald Rosen, C.J. E.D. Mich., at 5:00–6:58 (June 9, 2014) (transcript on file).

101. *Id.* at 6:58.

102. BOMEY, *supra* note 65, at 137.

103. *See* Press Conference, Gerald Rosen, C.J. E.D. Mich., at 3:44 (Nov. 7, 2014) (saying thanks to good friend, longtime friend, Rick). *See generally* Howes, Livengood & Shepardson, *supra* note 91 (“Rosen and Snyder go back more than 30 years. As a student at the University of Michigan, Snyder worked as a volunteer on Rosen’s unsuccessful bid for Congress in 1982.”).

104. Press Conference, Gerald Rosen, C.J. E.D. Mich., at around 6:09–6:44 (Nov. 7, 2014) (“I am going to editorialize a little bit here, but Detroit has a great mayor. I have known Mike for many years. He’s the son of one of my colleagues, so part of the extended court family. Knowing Mike is at the helm makes me more confident. . .”).

105. Lynch, *supra* note 90. Speaking about Ford Foundation President, Chief Judge Rosen apparently said, “‘Darren, if you’re going to do this . . . it shouldn’t be a token connection, you should make a statement. Little did I know . . . he was already thinking big,’ Rosen said. ‘Darren called me and said, ‘I have good news for you, the Ford Foundation is going to come in,’ Rosen recalled. ‘He said, ‘I’ve been talking to the board. We believe we need to make a statement, and we are prepared to make the largest single contribution we’ve ever made in our history to Detroit’s future.’ He said, ‘That’s \$125 million.’ I almost fell out of my chair. That was the first moment when I thought, you know, this thing may get some legs.” *Id.*

106. Jacoby, *supra* note 10, at 101 n.334.

107. Brookings Institute, *supra* note 75.

tect the pensions, the art collection, and most importantly, ‘it was about saving the City of Detroit.’”<sup>108</sup>

Chief Judge Rosen’s commentary about the mediation continued after his retirement from the bench. For example, he discussed how Detroit was an “assetless bankruptcy” and described the settlement he brokered as “trying to figure out a way to monetize the art without liquidating it, and giving the proceeds to the retirees. Neat trick.”<sup>109</sup>

Near the end of the case, a creditor cited the ABA-AAA Model Standards for mediators in an objection to the city’s restructuring plan, taking note of Chief Judge Rosen’s public statements in favor of the primary beneficiaries of the Grand Bargain: art and retirees.<sup>110</sup> The pleading contended, among other things, that this approach was in “violation of basic standards of conduct for mediators.”<sup>111</sup>

The presiding judge found that the “highly personal attack on Chief Judge Rosen in the Objection was legally and factually unwarranted, unprofessional and unjust.”<sup>112</sup> The court opinion does not discuss the Model Standards in its decision explaining why it struck the pleading, but suggests that mediation is categorically incapable of fitting the creditor’s objections:

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108. Baldas, *supra* note 89.

109. Kirk Pinho, *Rosen Talks About Detroit’s Grand Bargain, the City’s Future and Kwame Kilpatrick*, CRAIN’S DETROIT BUS. (Jan. 22, 2017, 12:01 AM), <http://www.craigslist.com/article/20170122/NEWS/170129969/rosen-talks-about-detroit-grand-bargain-the-citys-future-and> [<https://perma.cc/9C3D-EANC>]; *see also* Daniel Howes, *Five Years After Bankruptcy, Detroit Shows Real Gains*, DETROIT NEWS, (July 18, 2018, 9:04 AM), <https://www.detroitnews.com/story/business/columnists/daniel-howes/2018/07/17/five-years-later-detroit-bankruptcy/792784002/> [<https://perma.cc/6U65-USDQ>] (speaking of a panel commemorating five-year anniversary of bankruptcy filing, “[I]t’s probably safe to say Chief Mediator Gerald Rosen . . . will recount the ‘grand bargain’ that helped speed a consensual settlement of the largest municipal bankruptcy in American history.”).

110. Supplemental Objection to Chapter 9 Plan Syncora Guarantee Inc. and Syncora Capital Assurance Inc.’s Second Objection to the Debtor’s Plan of Adjustment, *In re City of Detroit*, 2014 WL 8396419 (Bankr. E.D. Mich. Aug. 12, 2014) (No. 13-53846), Dkt. No. 6651 [hereinafter “Syncora’s Stricken Objection”] (copy on file with author); Syncora Guarantee Inc. and Syncora Capital Assurance Inc.’s Objection to the City’s Motion to Strike at 26–27, *In re City of Detroit*, 2014 WL 8396419 (Bankr. E.D. Mich. Aug. 22, 2014) (No. 13-53846), Dkt. No. 7007 [hereinafter “Syncora’s Objection to City’s Motion to Strike”]. The “record shows it was Judge Rosen . . . who hatched the idea of marrying up the twin imperatives.” Syncora’s Stricken Objection at 17.

111. Syncora’s Stricken Objection at 22–23.

112. *In re City of Detroit*, 2014 WL 8396419, at \*11 (Bankr. E.D. Mich. Aug. 28, 2014).

[The mediators] were in no position to “collude” with anyone, to “orchestrate” or “engineer” anything, to “execute a transaction,” or to “pick winners and losers.” These allegations misunderstand the nature of mediation. Even assuming that the mediators are as powerful as Syncora argues . . . and even assuming that the mediators did suggest solutions and compromises during their mediation sessions, as their role requires, it is nevertheless the parties who decide whether and how to resolve their disputes. . . . [T]he [mediators] could not impose their will, their plans, their agenda or their bias upon the parties through the mediation process, assuming they had any of those.<sup>113</sup>

If it were indeed impossible for any mediator to be partial or to be coercive, then official mediation standards would not have to discuss those dangers as much as they do. Under this rationale, the *concept* of facilitative mediation, rather than the actual activities and statements of a mediating judge, does the heavy lifting.

Chief Judge Rosen has since retired from being a judge and moved onto the alternative dispute resolution business.<sup>114</sup> His current biography lists his role as “Chief Judicial Mediator” in the Detroit bankruptcy as one of his signature achievements.<sup>115</sup>

## 2. Harder/Sunwest Management

### a. Backstory

Jon Harder was a cofounder and officer of Sunwest Management, which at its height managed almost three hundred assisted living facilities across the country. Harder held interests in special purpose entities that owned each facility. Each facility borrowed money on its own behalf from lenders, although Harder personally guaranteed some of those debts. As an investment broker, Harder sold investments in these facilities to older people planning their retirements, promising a stable tax-deferred investment. Among the

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113. *Id.* at \*8.

114. *Neutrals*, JAMS DETROIT MEDIATION, ARBITRATION AND ADR SERV., <https://www.jamsadr.com/detroit#neutrals> [<https://perma.cc/CE3Z-YA22>] (last visited May 12, 2022). Judge Rhodes originally joined this JAMS office upon retirement as well, as did one of Detroit’s lead bankruptcy attorneys, David Heiman. Neither is listed currently.

115. *Gerald E. Rosen*, JAMS, <https://www.jamsadr.com/rosen/> [<https://perma.cc/3SXG-YWXE>] (last visited May 12, 2022) (“Notably, he served as the Chief Judicial Mediator for the Detroit Bankruptcy case—the largest, most complex municipal bankruptcy in our nation’s history—which resulted in an agreed upon, consensual plan of adjustment in just 17 months.”).

twelve hundred people who accepted Harder's invitation to invest in his teetering enterprise, the average age was sixty-eight.<sup>116</sup>

By 2007 Sunwest Management was falling into disarray. As some facilities bled money, Harder shifted funds from one place to another, one investor to another, one business entity to another. He stopped paying investors in July 2008, just when the Global Financial Crisis would make it difficult for them to find other means to support themselves.<sup>117</sup> Individual entities within the Sunwest enterprise defaulted on mortgages. By late 2008, sixty-five foreclosure sales were pending, with some nearly complete.

While Harder would eventually go to prison for financial crimes, he first tried to use his own bankruptcy case to alter the rights and obligations of Sunwest entities and their lenders. An Article III judge would be instrumental to making that happen, initially as a mediator.

b. Harder's bankruptcy

Harder wanted to use his bankruptcy to stop lenders from exercising their rights against separate entities, namely the assisted living facilities. Prior to filing for bankruptcy, Harder had consulted with a federal district judge from Oregon, the Honorable Michael Hogan, about serving as a mediating judge.<sup>118</sup> Upon filing, Harder quickly asked the bankruptcy court to appoint Judge Hogan as a mediating judge and also to direct lenders to individual facilities (not part of the bankruptcy) to participate.<sup>119</sup> Lenders to these non-bankrupt entities opposed these requests.<sup>120</sup>

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116. Sentencing Memo at 17, *United States v. Harder*, No. 12-485 (D. Or. Nov. 10, 2015), Dkt. No. 201.

117. *Id.* at 13.

118. Plaintiff's Motion for Mediation at 2–3, *In re Harder*, Case No. 08-37225, Adv. No. 08-03265 (Bankr. D. Or. Dec. 31, 2008), Adv. Dkt. No. 3; Reply Brief for Appellants at \*13, *SEC v. ING USA Annuity and Life Ins. Co.*, 360 F. App'x 826 (9th Cir. July 1, 2009) (No. 09-35250), Dkt. No. 47 (reporting that Judge Hogan had a 3.5-hour meeting on December 19, 2008 with the chief restructuring officer of Sunwest to discuss a strategy for obtaining a bankruptcy injunction against lenders and that Harder filed for bankruptcy on December 29).

119. Plaintiff's Motion for Mediation, *supra* note 118, at 2–3; *see also* Declaration of Stephen English in Support of Plaintiff's Motion for Mediation at 2–3, *In re Harder*, Case No. 08-37225, Adv. No. 08-03265 (Bankr. D. Or. Dec. 31, 2008), Adv. Dkt. No. 4 (arguing that doing so would be in best interests of facility residents while protecting interests of creditors to facilities).

120. *See, e.g.*, Joint Objection of Lenders to Harder's Motion for Court-Annexed Mediation, *In re Harder*, Case No. 08-37225, Adv. No. 08-03265 (Bankr. D. Or. Jan. 16, 2009), Adv. Dkt. No. 99; Joinder by LTC Properties, Inc. to Joint Lender Group Opposition to Debtor's Motion for Order Referring Case and Ad-

The presiding bankruptcy judge made mediation available with willing Article III judges: Judge Hogan and Senior Ninth Circuit Judge Edward Leavy.<sup>121</sup> But the bankruptcy judge emphasized that mediation was voluntary, and she also declined Harder's request to use his bankruptcy to protect a broader range of nonbankrupt special purpose entities.<sup>122</sup>

The mediating judge nonetheless would have a big impact on this case. As one early example, when Judge Hogan mediated the allocation of proceeds from a sale of multiple properties, the settlement result was "a new governance structure for the [assisted living facility special purpose entities]."<sup>123</sup> Among other things, the agreement gave Judge Hogan the right to rule on disputes about the settlement, with no appellate process.<sup>124</sup>

c. Securities fraud

A few months after Harder filed for bankruptcy, the United States Securities and Exchange Commission (the "SEC") sued Harder and Sunwest Management (but not most of the individual special purpose entities) for civil securities fraud in the District of Oregon.<sup>125</sup> The SEC sought a temporary restraining order to freeze the assets of Harder and related parties and to halt allegedly fraudulent activities.<sup>126</sup> The federal district court clerks' office assigned

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versary Proceeding to Mediation, *In re Harder*, Case No. 08-37225, Adv. No. 08-03265 (Bankr. D. Or. Jan. 16, 2009), Adv. Dkt. No. 95. For example, Charter Bank had already received appointment of a receiver for its retirement home debtor; because Harder already had resigned from his management position, Charter Bank argued it had nothing to mediate with Harder. Objection by Charter Bank to Plaintiff's Motion for Mediation at 4-5, *In re Harder*, Case No. 08-37225, Adv. No. 08-03265 (Bankr. D. Or. Jan. 16, 2009), Adv. Dkt. No. 93; *see also* Defendant Tennessee Commerce Bank's Objection to Plaintiff's Motion for Mediation, *In re Harder*, Case No. 08-37225, Adv. No. 08-03265 (Bankr. D. Or. Jan. 16, 2009), Adv. Dkt. No. 104 (lender to three non-debtors in Georgia and Kentucky).

121. Order Appointing Mediator at 1-2, *In re Harder*, Case No. 08-37225, Adv. No. 08-03265 (Bankr. D. Or. Jan. 30, 2009), Adv. Dkt. No. 297.

122. Amended Order Appointing Mediator, *In re Harder*, Case No. 08-37225, Adv. No. 08-03265 (Bankr. D. Or. Feb. 6, 2009), Adv. Dkt. No. 324 ("Participation in such mediation shall be purely voluntary, and no party shall be compelled to mediate, except to the extent that this Court may subsequently order otherwise.").

123. Reply Brief for Appellants, *supra* note 118.

124. Memorandum in Support of Motion to Recuse the Hon. Michael R. Hogan at 6, SEC v. Sunwest Mgmt., Inc., No. 09-6056 (D. Or. Mar. 9, 2009), Dkt. No. 30.

125. *See* Complaint at 2-7, *Sunwest Mgmt., Inc.*, No. 09-6056 (D. Or. Mar. 2, 2009), Dkt. No. 1.

126. *See* Ex Parte Application for Temporary Restraining Order, *Sunwest Mgmt., Inc.*, No. 09-6056 (D. Or. Mar. 02, 2009), Dkt. No. 2.

the request to Judge Hogan.<sup>127</sup> Instead of holding a public hearing on a request for a temporary restraining order, Judge Hogan oversaw a full day of negotiations on the issue of whether the SEC should get a preliminary injunction and its impact on a variety of other parties, including lenders to the individual special purpose entities that were not named in the SEC complaint.<sup>128</sup>

Perhaps on a safety-in-numbers theory, lenders banded together to request that Judge Hogan disqualify himself from presiding over the SEC case as well as substantive challenges to the injunction Judge Hogan entered in the SEC case.<sup>129</sup> The involvement of the same federal judge in two overlapping cases, as a mediating judge and as a presiding judge, might raise appearance issues at the very least, they explained. Even if he had no personal bias or expectation of personal gain, having an opinion on how things should go based on information obtained through informal mediation should itself be grounds for recusal.<sup>130</sup> Judge Hogan's early involvement mediating in the Harder bankruptcy exposed him to factual assertions and party positions related to the SEC matter. On a broader theory of partiality, he had exposure to facts outside of the ordinary evidentiary process. The lenders also documented ex parte communications, such as private conversations between Judge Hogan as mediator and parties associated with Harder, and how Judge Hogan, as mediator, had urged lenders to participate in his global settlement process.

Judge Hogan and a magistrate judge both rejected the lenders' request for recusal or disqualification.<sup>131</sup> The magistrate judge used reasoning found throughout recusal opinions relating to settlement activity: Judge Hogan could not have the kind of bias at issue in the disqualification statute because the mediation was not an "extrajudicial

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127. Magistrate judges and district judges were assigned cases on the same civil wheel. The SEC matter landed with a magistrate judge, but parties did not consent to a non-Article III judge hearing and deciding the request for injunctive relief. The backup Article III judge was Judge Hogan. *See SEC v. Sunwest Mgmt., Inc.*, No. 09-6056, 2009 WL 1065053, at \*1 (D. Or. Apr. 20, 2009).

128. Memo. in Support of Motion to Recuse the Hon. Michael R. Hogan, *supra* note 124, at 10.

129. Motion to Recuse the Hon. Michael R. Hogan and Dissolve the Order Issued Mar. 2, 2009, *Sunwest Mgmt., Inc.*, No. 09-6056 (D. Or. Mar. 9, 2009), Dkt. No. 29. Lenders argued the relief gave individual entities that owned assisted living facilities the benefits of bankruptcy without its obligations.

130. *See* Memo. in Support of Motion to Recuse the Hon. Michael R. Hogan, *supra* note 124.

131. Transcript of Proceedings at 9–10, *Sunwest Mgmt., Inc.*, 2009 WL 10700899 (D. Or. Mar. 10, 2009) (No. 09-6056), Dkt. No. 77.

dicial” source.<sup>132</sup> That might not have been accurate in this case, however, if the mediating judge was already in communication with a party *before* the commencement of any federal judicial proceeding.<sup>133</sup> Still, by this reasoning, knowledge obtained from negotiations in a mediation within a federal case could not be used to disqualify a judge from presiding over a closely related case.

d. Combining the cases

With Judge Hogan presiding over the SEC matter implicating a broader range of parties, Harder’s next big move was to ask Judge Hogan to take over his bankruptcy, requesting that the district court withdraw his bankruptcy case from the presiding bankruptcy judge.<sup>134</sup> The stated logic was that the bankruptcy and the SEC matter overlapped, creating an interplay between federal statutes. The conventional wisdom is that district judges, plenty busy with other things, are not eager to preside over bankruptcies. Yet conventional wisdom always has exceptions.

The lenders objected, citing the facts Judge Hogan had gathered from overseeing negotiations in both the bankruptcy and the SEC matters.<sup>135</sup> The government watchdog for the bankruptcy system also harbored “serious concerns” about whether Judge Hogan could preside over the bankruptcy after having been an active mediating judge behind the scenes.<sup>136</sup>

Judge Hogan nonetheless agreed to withdraw the reference from the bankruptcy court and preside over Harder’s bankruptcy himself.<sup>137</sup> Lenders renewed requests to disqualify Judge Hogan in the SEC matter based on his prior information access and related

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132. SEC v. Sunwest Mgmt., Inc., 2009 WL 10700899, at \*1–2 (D. Or. Mar. 10, 2009).

133. See *supra* note 118.

134. Technically, that requires filing a request to “withdraw the reference” of the case from the bankruptcy court. See Debtor-In-Possession’s Motion for Withdrawal, *In re* Harder, Case No. 08-37225 (Bankr. D. Or. Mar. 17, 2009), Dkt. No. 412.

135. Motion for Order of Recusal at 2–3, *In re* Harder, Case No. 08-37225 (Bankr. D. Or. Apr. 1, 2009), Dkt. No. 467 (referring to a judge having negotiated and executed a settlement and then presiding over the decision whether to approve the settlement).

136. Transcript of Proceedings on April 6, 2009 at 58, *Sunwest Mgmt., Inc.*, No. 09-6056 (D. Or. Apr. 9, 2009), Dkt. No. 159; see also U.S. Trustee’s Memorandum in Support of Motion to Dismiss, *In re* Harder, Case No. 08-37225 (Bankr. D. Or. Mar. 17, 2009), Dkt. No. 409.

137. Order, *In re* Harder, No. 08-37225, No. 09-6074, Adv. No. 08-03265 (Bankr. D. Or. Apr. 8, 2009), Adv. Dkt. No. 382.

matters, but these efforts failed.<sup>138</sup> In an unpublished opinion, the Ninth Circuit resisted the notion that his active mediation of the bankruptcy precluded impartiality, calling it speculation.<sup>139</sup> According to the Ninth Circuit, there “was no authority for the proposition that judges must recuse themselves if they served as mediators in a related proceeding.”<sup>140</sup> Another judge declined to let the lenders present their recusal arguments in open court, declaring that “quite enough time and money [had] been spent on this issue.”<sup>141</sup>

Upon switching from mediating to presiding judge in the Harder bankruptcy, while also helming the SEC matter, Judge Hogan could order all sorts of people to participate in status conferences, change deadlines, appoint more mediators, and do what the bankruptcy judge would not: corral the Sunwest lenders to participate in some sort of global resolution that disregarded corporate boundaries.<sup>142</sup> Judge Hogan made clear these cases should be on a fast track: if big companies like Chrysler and General Motors could financially restructure in a just a few weeks, why couldn't this case go quickly, too?<sup>143</sup>

e. Outcome

The ultimate resolution to the SEC matter and the bankruptcy, approved over objections, stemmed from Judge Hogan's combination of the two matters and involved the creation of a new consolidated enterprise using federal equity powers. In the process of getting over the finish line, Sunwest press releases touted the input of stakeholders in the mediation and the increased efficiency of the case by avoiding litigation.<sup>144</sup> The court influenced many elements of the resolution's structure and the behind-the-scenes path that

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138. SEC v. Sunwest Mgmt., Inc., No. 09-6056, 2009 WL 1065053, at \*2 (D. Or. Apr. 20, 2009); SEC v. ING USA Annuity and Life Ins. Co., 360 F. App'x 826, 828 (9th Cir. 2009).

139. *ING USA Annuity and Life Ins. Co.*, 360 F. App'x at 828.

140. *Id.*

141. *Sunwest Mgmt., Inc.*, 2009 WL 1065053, at \*5; see also Reply Brief for Appellants, *supra* note 114, at \*15 (citing the record of court suspending bankruptcy for several months at a time and staying all pending deadlines).

142. See Record of Order, *In re Harder*, No. 09-6074 (D. Or. Apr. 21, 2009), Dkt. No. 520; Scheduling Order, *In re Harder*, No. 09-6074 (D. Or. May 19, 2009), Dkt. No. 751; Order, *Sunwest Mgmt., Inc.*, No. 09-6056 (D. Or. Oct. 7, 2009), Dkt. No. 893.

143. See Transcript of Proceedings (Mediation) at 4, *Sunwest Mgmt., Inc.*, No. 09-6056 (D. Or. July 20, 2009), Dkt. No. 456.

144. Press Release, Sunwest Receiver and Chief Restructuring Officer File Plan with Court: Mediated Plan Expected to Win Wide Support (Aug. 27, 2009).



got them there.<sup>145</sup> Unfortunately, the contested resolution seems inconsistent with core bankruptcy principles and stretched the limits of federal court power. For example, the resolution mixed assets and liabilities of separate legal entities, many of which were not bankruptcy filers. The resolution allowed Harder to retain an equity interest even though higher priority claimants did not get paid in full or consent to the deal.<sup>146</sup> Objections in court and on appeal were to little avail.

The prosecutors acknowledged that victims of securities fraud received greater recovery because Judge Hogan took “extraordinary” steps in the bankruptcy and SEC actions to control assets outside of the bankruptcy estate and compel lender participation in his process.<sup>147</sup> Essentially, the deal brokered by Judge Hogan had transferred value from secured lenders to shareholders. The prosecutors also characterized the settlement as generous to Harder, who retained an interest in the reorganized enterprise and received debt forgiveness from Sunwest and related entities.<sup>148</sup>

This story had a twist ending: Jon Harder, the original bankruptcy debtor, went to prison for having committed the biggest investment fraud in Oregon history.<sup>149</sup> Playing no part in these

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145. See, e.g., SEC v. Sunwest Mgmt., Inc., 524 F. App’x 365, 367 (9th Cir. 2013) (citing 2011 district court order: “the court proactively created the trust and through settlement resolved the issues rather than through protracted motions and procedural practice”).

146. See Declaration of Professor Robert Rasmussen in Support of Coordinating Lenders’ Opposition to Proposed Distribution Plan at 26, *Sunwest Mgmt., Inc.*, No. 09-6056 (D. Or. Sept. 22, 2019), Dkt. No. 813 (explaining that the bankruptcy plan “erroneously treats all of the assets of the Sunwest entities as being part of a single entity or single pool of assets”). Rasmussen concluded that the plans brokered by Judge Hogan through this blended process of SEC action and some entity bankruptcies violated bankruptcy law. *Id.* at 28.

147. Sentencing Memo, *supra* note 116, at 43 (“It was only because of the extraordinary remedy that Judge Hogan ordered (a stay on all secured creditors) and requiring mandatory mediation of all claims that defendant’s interest in all the Sunwest assets weren’t quickly liquidated at various foreclosure auctions.”).

148. *Id.* at 45; see also *id.* at 46 (“Defendant has received much for his participation and cooperation in the SEC and Bankruptcy Proceedings.”).

149. See Bryan Denson, *Former Sunwest CEO Jon Harder Gets 15 Years for “Mass Financial Destruction”*, THE OREGONIAN (Nov. 17, 2015), [https://www.oregonlive.com/portland/2015/11/former\\_sunwest\\_ceo\\_jon\\_harder.html](https://www.oregonlive.com/portland/2015/11/former_sunwest_ceo_jon_harder.html) [<https://perma.cc/GMB6-MGTQ>]. Five years into the prison sentence, President Trump pardoned Harder, thus resulting in his release, on the president’s last full day in office. See Jeff Manning, *Trump Commutes 15-Year Sentence of Convicted Oregon Fraudster Jon Harder, Sunwest’s Founder*, THE OREGONIAN (Jan. 21, 2021, 4:42 PM), <https://www.oregonlive.com/business/2021/01/trump-commutes-15-year-sentence-of-convicted-oregon-fraudster-jon-harder-sunwests-founder.html> [<https://perma.cc/HN8M-W4NY>]. Harder’s restitution obligation was not affected.

criminal matters, Judge Hogan had already retired from the federal bench to open Hogan Mediation, a private dispute resolution business.<sup>150</sup>

### 3. Takeaways

Distinctive features of these stories may stoke doubt that they could happen again. Yet, extreme examples can be a valuable learning and teaching tool to help others identify their own boundaries and sources of disagreement.

In addition, although both examples involve bankruptcy, their lessons apply to a range of large and sprawling cases.<sup>151</sup> Bankruptcy is one of many forms of complex litigation.<sup>152</sup> These examples present some issues likely to be relevant to other cases. They include:

- Orders entered on the docket by the mediating judge, instructing parties and lawyers to appear, not to be released until the mediator says so;<sup>153</sup>
- Off-the-record communication (or suspected communication) between the mediating and presiding judges;
- Requirements that parties mediate in good faith, lest reports be made to the presiding judge;
- The role of the mediator as heavily evaluative and proactive, even if mediation is labelled as facilitative; and

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The United States government had issued an indictment for mail and wire fraud, among other things, associated with the same transactions and acts that were central in the bankruptcy and the SEC's civil action. Compounding the misdeeds through the bankruptcy, Harder had lied about assets and transactions in papers submitted to the bankruptcy court under penalty of perjury and in oral interviews with the government watchdog and creditors. *See* Sentencing Memo, *supra* note 116, at 15.

150. *See Judge Michael Hogan*, HOGAN MEDIATION, <http://hoganmediation.net/judge-hogan/> [<https://perma.cc/5LW9-4L4T>] (last visited June 25, 2021) (Judge Hogan “has led thousands of disputes to a fruitful settlement,” the bankruptcy cases he mediated had “billions of dollars in the balance,” and he was known for bringing “the gentle touch’ to successful settlements in civil cases”).

151. *See generally* Edward J. Janger, *Towards a Jurisprudence of Public Law Bankruptcy Judging*, 12 BROOKLYN J. OF CORP. FIN. & COMM'L L. 39 (2017).

152. *See* Troy A. McKenzie, *Internal and External Governance in Complex Litigation*, 84 L. & CONTEMP. PROBS. 207, 207 (2021).

153. *See, e.g.*, Mediator's Report at 1–2, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. July 7, 2021), Dkt. No. 3119 (145 telephone conversations between mediating judge and various parties, followed by 11.5-hour and 15-hour days of in-person negotiation).

- The concept of mediating judges affirmatively proposing elements of resolutions that have distributive effects.<sup>154</sup>

More exceptional features of the case studies include:

- Combining mediation of one case with oversight of a separate federal case;
- Outreach to non-parties to encourage participation;
- Granting mediator powers by stipulation to resolve disputed issues with no appeal;
- Fundraising for a settlement designed by the mediator;
- Involvement in the state or federal legislative or political process;
- Extensive public speaking by the mediator about the case; and
- The mediator commenting publicly about elected officials.

To characterize these features as exceptional does not mean that they will never happen again. The legal world has few one-offs.

#### *E. Separation of powers*

The case studies should activate imaginations on the range of things a mediating judge might do, especially with Article III protections. Considering the separation-of-powers implications of this arrangement is the next logical step. Might zealous acts of a mediating judge overstep the boundaries of the judicial branch?

Separation of powers refers to the Constitution's allocation of responsibilities to three distinct branches.<sup>155</sup> As conceded even by separation-of-powers formalists, "classifying government power is an elusive venture."<sup>156</sup> The boundaries on the judicial branch are likely the most slippery.

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154. *Id.* at 2 (referring to the judicial mediator's proposal and revised proposal to settle matters between non-consenting states and the Sackler family and other parties).

155. Although the Supreme Court and commentators associate separation of powers with a variety of justifications, *see, e.g.*, Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 *YALE L.J.* 346, 382–85 (2016) (identifying liberty, effective administration, democratic accountability, and rule of law as normative underpinnings of separation-of-powers jurisprudence), some find the individual liberty arguments particularly persuasive, *see, e.g.*, *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 450 U.S. 50, 57–60 (1982); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 *U. PA. L. REV.* 1513, 1514 (1991).

156. *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1246 (2015) (Thomas, J., concurring); *see also* Brown, *supra* note 155, at 1524 (calling it a "highly questionable premise" that "legislative, executive, and judicial powers are inherently distinguishable as well as separable"); Huq & Michaels, *supra* note 155, at 349 (noting the perception of case law as "unmoored and unprincipled"); Nikolas Bowie & Daphna Renan, *The Separation of Powers Counterrevolution*, 131 *YALE L.J.*

Article III of the Constitution says little about the scope of judicial power.<sup>157</sup> Separation-of-powers questions have been raised about a variety of judicial activities, including civil rulemaking,<sup>158</sup> rate setting for compulsory copyright music licensing,<sup>159</sup> and managerial judging.<sup>160</sup> It is worth asking a parallel question about creative practices of mediating judges that go well beyond mere settlement oversight.

The Supreme Court decision in *Mistretta v. United States* is a useful entry point. In that case, the defendants complained that the United States Sentencing Commission, an independent agency within the judicial branch, exercised legislative authority: the “quintessentially political work of establishing sentencing guidelines.”<sup>161</sup> The Court upheld the constitutionality of this activity. Although some responsibilities may be incompatible with Article III service, said the Court, the “ultimate inquiry” remains “whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch,” citing the Code of Conduct for United States Judges to indicate that the concern flows both from the Constitution and judicial ethics.<sup>162</sup> The Court resolved *Mistretta* by characterizing Sentencing Commission service as an “essentially neutral

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(forthcoming 2022) (observing longstanding dispute and arguing that separation of powers is “contingent political practice reflecting policy needs, governance ideas, and political struggles of the moment”).

157. See, e.g., Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1316 (1993).

158. See, e.g., *Sibbach v. Wilson & Co.*, 312 U.S. 655 (1941) (upholding as constitutional the allocation of rulemaking authority to the judiciary under the Rules Enabling Act); Robert G. Bone, *The Process of Making Process*, 87 GEO. L.J. 887, 896, 908, 917–18 (1999) (questioning judges’ abilities to determine optimal process through individual discretion as compared to legislatures or central rulemaking committees); Linda J. Rusch, *Separation of Powers Analysis as a Method for Determining the Validity of Federal District Courts’ Exercise of Local Rulemaking Power: Application to Local Rules Mandating Alternative Dispute Resolution*, 23 CONN. L. REV. 483, 502 (1991) (considering whether local rulemaking interferes with congressional judgments or usurps congressional power by allowing the district court to make a different judgment, and whether local rulemaking undermines the function of district courts); cf. Mullenix, *supra* note 157, at 1297–98, 1314 (arguing that the Civil Justice Reform Act, which requires courts to incorporate ADR, is a legislative encroachment on the judiciary).

159. See McKenzie, *supra* note 152, at 229 (discussing the role of the Southern District of New York in implementing ASCAP and BMI consent decrees).

160. See Peterson, *supra* note 12, at 78.

161. *Mistretta v. United States*, 488 U.S. 361, 384 (1988).

162. *Id.* at 404.

endeavor and one in which judicial participation is particularly appropriate.”<sup>163</sup> The Court’s opinion nonetheless reflects uncertainty:

We are somewhat more troubled by petitioner’s argument that the Judiciary’s entanglement in the political work of the Commission undermines public confidence in the disinterestedness of the Judicial Branch. While the problem of individual bias is usually cured through recusal, no such mechanism can overcome the appearance of institutional partiality that may arise from judiciary involvement in the making of policy. The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.<sup>164</sup>

These issues notwithstanding, “the Constitution, at least as a *per se* matter, does not forbid judges to wear two hats; it merely forbids them to wear both hats at the same time.”<sup>165</sup> Consistent with that premise, the Court emphasized that its holding in *Mistretta* was based in part on the authority to exercise sentencing guidelines being vested in a distinct Sentencing Commission, rather than within a court.<sup>166</sup>

Observing that the Sentencing Commission had no purpose beyond activity typically delegated to the legislature, Justice Antonin Scalia’s lone dissent recognized that policymaking might be okay when ancillary to the exercise of judicial power.<sup>167</sup> However, making criminal sentencing policy, he noted, is “heavily laden (or ought to be) with value judgments and policy assessments.”<sup>168</sup> Justice Scalia predicted that “in the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous.”<sup>169</sup> That point alone might be useful in thinking about policy choices embedded in the activities of mediating judges.

Challenging mediating judge practices on separation-of-powers grounds through a lawsuit would likely go nowhere. The *Mistretta* majority counseled that a law passed by Congress and signed by the

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163. *Id.* at 407.

164. *Id.*

165. *Id.* at 404.

166. *Id.* at 393.

167. *Id.* at 413, 417 (Scalia, J., dissenting).

168. *Id.* at 414 (Scalia, J., dissenting); *see also id.* at 420–21 (Scalia, J., dissenting) (calling the Sentencing Commission a “pure delegation of legislative power,” distinct from the exercise of judicial powers).

169. *Id.* at 425, 427 (Scalia, J., dissenting).

President “that confronts a vexing national problem” should be invalidated “only for the most compelling constitutional reasons.”<sup>170</sup> (This view ebbs and flows with Supreme Court composition, of course.) The activities that tax the boundaries of the judiciary are more likely byproducts of judicial creativity than of express Congressional authorization, and thus even more difficult to challenge in light of the vagueness of the *Mistretta* standard, that considers whether the activity “undermines the integrity of the Judicial Branch,”<sup>171</sup> coupled with broad recognition that federal courts have inherent powers to fulfill their case management responsibilities.

Separation of powers is thus better deployed here as an organizing principle to guide mediating judges. Readers will interpret mediating judge activity in light of their own leanings about the judiciary’s role and comparative institutional competence.<sup>172</sup> Some might see mediation oversight as a natural extension of judicial power. Others might interpret *Mistretta* as discouraging mediating judges from exercising *any* official power while mediating to avoid role-mixing.<sup>173</sup> Still others might doubt any serious implication of separation-of-powers issues due to the accountability measures noted below.<sup>174</sup> Wherever one falls on these questions, judges should consider separation-of-powers issues when deciding what they will do as mediators.

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170. *Id.* at 384; *see also* CFTC v. Schor, 478 U.S. 833, 844 (1984).

171. *Mistretta*, 488 U.S. at 397. For scholarship critiquing the vagueness of Supreme Court jurisprudence, see Mullenix, *supra* note 157 (“twin ills of indeterminacy and linguistic skepticism”); Brown, *supra* note 155, at 1517–18 (“Supreme Court’s treatment of the constitutional separation of powers is an incoherent muddle[.]” “It has adopted no theory, embraced no doctrine, endorsed no philosophy, that would provide even a starting-point for debate.”). *But see* Huq & Michaels, *supra* note 155, at 349 (offering an explanatory theory of cycling through rules and standards).

172. *See* McKenzie, *supra* note 152, at 228 (“Legislatures, it is often said, have greater access to expertise and more subtle levers of power to shape a response to a society-wide problem.”).

173. If mediating judge activities raise separation-of-powers concerns, consent cannot necessarily cure a constitutional problem. *See* F. Andrew Hessick, *Consenting to Adjudication Outside the Article III Courts*, 71 VAND. L. REV. 715, 715 (2018).

174. *See* Huq & Michaels, *supra* note 155, at 403 (the federal judiciary is more cloistered from external forces than other branches due to rules about *ex parte* communication and norms against political engagement).

## II. ACCOUNTABILITY MEASURES AND OTHER JUDGES' CASES

The next step is to review existing guidance and remedies for judicial activities, and to consider the impact of these accountability measures on mediating judge practices. In theory, the court system and Congress provide guidance and remedies for activities that exceed judicial authority. The prevailing oversight mechanisms, however, work more effectively for formal court acts that create a record than for activities in other judges' cases that happen behind the scenes.<sup>175</sup>

### A. *Judicial ethics*

The Code of Conduct for U.S. Judges reflects the judiciary's attempt to strike a delicate balance between independence and accountability.<sup>176</sup> Adopted by the Judicial Conference of the United States in 1973, and periodically updated, the Code of Conduct applies to all federal judges, including bankruptcy judges, but not Supreme Court justices.<sup>177</sup> The judiciary characterizes the Code as a behavioral guideline, a framework for judges to decide for themselves *ex ante* how to conduct themselves.<sup>178</sup> It accepts that judges may not agree amongst themselves how to apply the Code to particular situations: "Many of the restrictions in the Code are necessarily cast in general terms, and judges may reasonably differ in their interpretation."<sup>179</sup>

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175. For one example of the shortcomings of procedures outside of formal cases, see the failure of federal courts to protect employees from sexual harassment. See Leah M. Litman & Deeva Shah, *On Sexual Harassment in the Judiciary*, 115 *Nw. U. L. Rev.* 599 (2020); Olivia Warren, *Enough Is Not Enough: Reflection on Sexual Harassment in the Federal Judiciary*, 134 *HARV. L. REV.* 446 (2021); Heidi S. Bond, *Pride and Predators*, 119 *MICH. L. REV.* 1069, 1078–79 (2021).

176. See *CODE OF CONDUCT FOR UNITED STATES JUDGES*, Canon 1 commentary (last revised Mar. 2019) ("The Canons are rules of reason. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law, and in the context of all relevant circumstances. The Code is to be construed so it does not impinge on the essential independence of judges in making judicial decisions."); *id.* ("Although judges should be independent, they must comply with the law and should comply with this Code."); *id.* at Canon 2 (calling on judges to "avoid impropriety and the appearance of impropriety in all activities," applicable to professional and personal conduct).

177. *Id.* at Introduction.

178. See *RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS*, Rule 4 Commentary (last revised Mar. 2019).

179. *CODE OF CONDUCT FOR UNITED STATES JUDGES*, Canon 1 commentary.

Departures from the Code of Conduct are not actionable, strictly speaking.<sup>180</sup> It might be cited in connection with other accountability measures,<sup>181</sup> but the grounds for any resulting legal or equitable remedy come from a source other than the Code.

The Code of Conduct technically applies to mediating judges.<sup>182</sup> Yet, it says little about what that means. The following subsections explore specific issues.

### 1. Impartiality

After stating that “a judge should perform the duties of the office fairly, impartially and diligently,” Canon 3 divides responsibilities into “adjudicative” and “administrative.”<sup>183</sup> A judge “shall” disqualify himself if his “impartiality might reasonably be questioned.”<sup>184</sup> The Canon’s specific examples (e.g., personal prejudice, a relative, financial interest, has served as a lawyer in the matter) are quite far removed from a judge’s zeal for settlement.

In an advisory opinion, the Judicial Conference Committee on Codes of Conduct explicitly addressed judges acting in a settlement

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180. *Id.* (“[T]he Code is not designed or intended as a basis for civil liability or criminal prosecution.”); *see also* Arthur D. Hellman, *Judges Judging Judges: The Federal Judicial Misconduct Statutes and the Breyer Committee Report*, 28 JUST. SYS. J. 426 (2007); *In re Boston’s Children First*, 244 F.3d 164, 168 (1st Cir. 2001) (explaining that a judge can violate Canons without it being grounds for disqualification and a judge might have to be disqualified even if she has not violated a Canon).

181. For example, the Seventh Circuit cited the Code of Conduct when ruling that a district judge should have disqualified himself in a diocese bankruptcy matter involving a cemetery in which that judge’s parents were buried and whose plots he had bought. *Listecki v. Off. Comm. of Unsecured Creditors*, 780 F.3d 731, 751 (7th Cir. 2015). Objectors to a Flint water case settlement cited the Code of Conduct in a writ of mandamus asking the Sixth Circuit to require the presiding district judge to “cease holding off-the-record substantive ex parte meetings that exclude petitioners’ counsel” (among other things). *Petition for Writ of Mandamus at 30, In re Raymond Hall*, No. 21-2655 (6th Cir. June 25, 2021), Dkt. No. 1. In the section on disqualification, we will see the active use of Canon 3 by a Third Circuit panel majority and critique of that reliance by the dissent. *In re Kensington Int’l Ltd.*, 368 F.3d 289 (3d Cir. 2004); *see also infra* Part II(B)(2).

182. *See* CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(B)(2) (“A judge should not direct court personnel to engage in conduct on the judge’s behalf or as the judge’s representative when that conduct would contravene the Code if undertaken by the judge.”); *id.* at Canon 4(A)(4) (“A judge should not act as an arbitrator or mediator or otherwise perform judicial functions apart from the judge’s official duties unless expressly authorized by law”); *id.* at Canon 3(A)(4)(d) (limited exception to the prohibition on ex parte communication for mediation and settlement activities with parties’ consent).

183. *Id.* at Canon 3.

184. *Id.* at Canon 3(C)(1).



capacity.<sup>185</sup> It says a presiding judge who tries to settle a case need not necessarily recuse himself in later phases. Recusal is the right step “only where a judge’s impartiality might reasonably be questioned because of what occurred during the course of those discussions.”<sup>186</sup> The odds of impropriety, in the eyes of this committee, go down further in the event of a jury rather than a bench trial.<sup>187</sup> The opinion recognizes that “comments a judge makes in the course of settlement discussions may create an appearance of bias[,]” but emphasizes that “practices must be examined on a case-by-case basis to determine their ethical propriety.”<sup>188</sup> The opinion heavily emphasizes party consent.

If the Judicial Conference doubts that heavy settlement involvement creates a problem for a presiding judge, a mediating judge might interpret this as an invitation to be even more active.<sup>189</sup> Although mediation and settlement are not identical, the distinctions are slippery indeed.

## 2. Ex parte communication

Under Canon 3, partiality or unfairness may flow from ex parte communication, defined as communication in the course of a judicial proceeding undertaken outside the presence of all parties to that proceeding.<sup>190</sup> Discouragement of ex parte communication is not limited to substantive matters.<sup>191</sup> The Canon includes an excep-

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185. See *Advisory Opinion No. 95*, in 2 GUIDE TO JUDICIARY POLICY (2009) (discussing judges acting in a settlement capacity).

186. *Id.*

187. *Id.*

188. *Id.* This opinion “extends the discretion granted in [Federal Rule of Civil Procedure] Rule 16 from procedural rules to ethical rules.” See Deason, *supra* note 28, at 130.

189. See, e.g., *In re Complaint of Judicial Misconduct*, No. 17-90006 (9th Cir. Jud. Council Mar. 23, 2017) (rejecting the complaint about ex parte communications involving the magistrate judge assigned to oversee settlement: “a judge who is assigned to a case for settlement purposes only—as a neutral engaged in alternate dispute resolution—is permitted to hold ex parte communications, encourage settlement, or express views about the strength of a case”).

190. See CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(4) (“Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers.”).

191. See *id.* at Canon (3)(A)(4)(b) (scheduling and administrative matters should not be discussed ex parte unless “the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result”); see also GEYH ET AL., 1 JUDICIAL CONDUCT AND ETHICS § 5.03 (6th ed. 2020) (“[C]ommunications concerning drafting errors, admissibility of certain evidence,

tion for individualized ex parte discussions in a mediation or settlement context with party consent.<sup>192</sup> The commentary to Canon 3 recognizes awareness that a zeal to settle may cross a line, advising judges to “not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts.”<sup>193</sup>

The application of these precepts seems clearer for bilateral litigation than for multi-party actions. Who are the “parties to that proceeding” for any given segment of a big case? How should a judge, presiding or mediating, obtain consent for ex parte discussions in a case with hundreds or thousands of stakeholders?

### 3. Public commentary

Canon 3 also discourages judges from public commentary on “the merits of a pending or impending action.” The admonition against public comment about the merits continues until the appellate process is complete.<sup>194</sup> The goal is to avoid the risk of actual partiality, bias, or prejudgment, or the appearance thereof.<sup>195</sup> The Canon includes an exception, however, for the issuance of public statements “in the course of the judge’s official duties.”<sup>196</sup> If mediation is deemed to be within a judge’s official duties, more active mediating judges might not see this Canon as applicable guidance for their conduct.

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and attorneys’ fees” have been found to be violations. (internal footnotes omitted)).

192. See CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(4)(d). For skepticism about waivers in other judicial ethics contexts, see John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 L. & CONTEMP. PROBS. 43, 63 (1970) (discussing the ineffectiveness of waivers in the “conventional hometown court situation” when lawyers expect to regularly appear before the judge).

193. CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(4).

194. *Id.* at Canon 3(A)(6) Commentary.

195. See, e.g., *U.S. v. Microsoft*, 253 F.3d 34, 107, 115 (D.C. Cir. 2001) (“Judges who covet publicity, or convey the appearance that they do, lead any objective observer to wonder whether their judgments are being influenced by the prospect of favorable coverage in the media. . . . Appearance may be all there is, but that is enough to invoke the Canons and § 455(a).”).

196. CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(6) (any pending action, not applicable to “public statements made in the course of the judge’s official duties, to explanations of court procedures, or to scholarly presentations made for purposes of legal education”); see also *In re Boston’s Children First*, 244 F.3d 164, 168 (1st Cir. 2001) (calling for district judge to be disqualified after statements in press, acknowledging that the Canon recognizes public statements in official duties, but the commentary counsels that particular care be taken to prevent erosion of public confidence).

## 4. Extrajudiciality, fundraising, political activity

Canon 4 addresses “extrajudicial” activities—a term that deserves more unpacking than it gets.<sup>197</sup> Canon 4 discourages sitting judges from, say, engaging in the practice of law on the side. Putting aside such extreme examples (by modern standards anyway), other non-remunerative activities of judges to contribute to public life can be controversial however constructive they might be. The Code of Conduct does not apply to Supreme Court justices, but scholars have used examples, such as Justice Earl Warren helping investigate the death of President John F. Kennedy and Justice Robert Jackson serving on the Nuremberg War Crimes Trial, to illustrate the ethical tensions that arise with such service.<sup>198</sup> Judges may make attractive candidates to serve in such capacities due to their perceived impartiality, but “non-judicial service tends to erode the appearance of impartiality which is essential to judging itself.”<sup>199</sup>

Canon 4 also tells judges not to fundraise other than among other judges outside of their supervision. The concern relates to “the use of the prestige of judicial office for that purpose.”<sup>200</sup> “[J]udges must not be in the position of asking members of the community to support a cause by pledging monies, no matter how worthy that cause is.”<sup>201</sup>

The Code of Conduct does not address the challenges for mediating in cases that inherently carry strong political dimensions.<sup>202</sup> Focusing on political activity, however, Canon 5 states that “[a] judge should not . . . make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office.”<sup>203</sup> Canon 5 discourages federal judges from engaging in political activity more generally.<sup>204</sup> These tenets might call to mind the

197. See CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 4.

198. See, e.g., GEYH ET AL., *supra* note 191, at § 8.03[2] (“Although it is beyond question that these assignments were undertaken to advance the public good, they were not uncontroversial. . . . [E]ven the most selfless service on such commissions cannot help but tend to diminish the prestige of the court[.]”).

199. *Id.*; see Robert P. McKay, *The Judiciary and Non-Judicial Activities*, 35 L. & CONTEMP. PROBS. 9, 25, 28–29, 34 (1970) (“Participation in such a process by members of the judiciary is less likely to settle a troublesome public issue than to lend credence to the all-too-common charge that the courts are part of the political process.”).

200. CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 4(C).

201. Anthony M. Kennedy, *Judicial Ethics and the Rule of Law*, 40 ST. LOUIS L.J. 1067, 1072 (1996).

202. See *supra* Part I(A) (discussion of politically sensitive cases).

203. CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 5.

204. *Id.* at Canon 5(A)(2). Canon 4(F) discourages forms of government service if the judge’s governmental duties would tend to undermine the public confi-

comments made about the governor and the mayor at press conferences during the Detroit bankruptcy. Perhaps the term “candidate” is meant to distinguish between someone actively running for office versus someone already elected. In addition, some might argue that making favorable statements about both Democratic and Republican politicians might also counteract allegations of partisanship. Still, this is another dimension in which more guidance would be welcome when sitting judges serve as mediators in cases inherently intertwined with politics.

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The Code of Conduct was meant to help judges calibrate their own ethical compasses, which vary greatly based on individual philosophies. The discussion above suggests that the Code and its commentaries could support a judge’s justification to *refrain* from some activities as a mediating judge that we already have seen. And perhaps it has. There is no record of acts considered and rejected, the proverbial dog that does not bark. With flexible language and vague exceptions, however, the Code arguably offers cover for judges who believe the ends of resolving cases justify the means.

What about any effect of interaction among judges? Political scientists and ethicists agree: judges care what other people think of them, especially their peers.<sup>205</sup> As Judge Irving Kaufman wrote when opposing Congressional intervention in judicial oversight, “[p]eer pressure is a potent tool. It should not be underestimated because it is neither exposed to public view nor enshrined in law.”<sup>206</sup>

Given how much the federal judiciary favors case management and docket control, one might expect judicial peers to reinforce rather than discourage expansive mediation practices. Even if a judge would not endorse the full range of techniques we saw in the case studies, she might be reluctant to try to persuade a peer accordingly, particularly if the Code of Conduct is less than clear.

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dence in the integrity, impartiality, or independence of the judiciary. *See id.* at Canon 4(F); GEYH ET AL., *supra* note 191, § 9.03.

205. *See, e.g.*, LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 54 (2006); Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 277–309 (1993) (“a friendly, off-the-record chat in one case, a stern dressing-down in another, raising the specter of formal disciplinary action in a third, and a threatened disclosure to the press in a fourth”).

206. Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 709 (1979).

### B. Congressional constraints

Congress has authority over court structure, budgets, and judicial pay raises, as well as impeachment (which is not addressed in this analysis). Consistent with separation-of-powers principles, the application of and elaboration on some matters are left to the judiciary. The discussion below explores how three categories of oversight fall short of remediating particularly aggressive mediation activities.

#### 1. Structuring public trials and appellate review

Title 28 of the United States Code establishes the jurisdiction and venue of federal courts and elaborates on the Constitutional right to a jury trial. The structure of the adversarial system, with a public trial as the centerpiece, is itself a foundational check on judicial conduct.<sup>207</sup> In federal courts, “litigants have a due process right to an impartial judge.”<sup>208</sup> In addition, the First Amendment of the Constitution imposes limits on private case disposition,<sup>209</sup> highlighting the importance of law playing out in public. Appellate review of trial court decisions is expected to provide an additional check on case-related judicial conduct.<sup>210</sup> Beyond error correction, having more judicial eyes on a matter fosters confidence.<sup>211</sup> The appellate

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207. See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 925 (2000) (importance of public trials and danger of secrecy); *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (right of public access to criminal trials); *id.* at 585 (Brennan, J., concurring) (role of the public acting as a check on the system). Jury trials add another watchdog. Cassandra Burke Robertson, *Judicial Impartiality in a Partisan Era*, 70 FLA. L. REV. 739, 773 (2018) (watchdog function of the jury, reminding judge to consider a broader range of viewpoints).

208. CHARLES GARDNER GEYH, *FED. JUD. CTR., JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 1* (2d ed. 2010) (citing *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009)); see also Robertson, *supra* note 207, at 740.

209. See *Del. Coal. for Open Gov't v. Strine*, 733 F.3d 510, 521 (3d Cir. 2013) (striking down the use of sitting Delaware Chancery Court judges as arbitrators for a fee: “Because there has been a tradition of accessibility to proceedings like Delaware’s government-sponsored arbitration, and because access plays an important role in such proceedings, we find that there is a First Amendment right of access to Delaware’s government-sponsored arbitrations”).

210. See Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1263 (2013); John P. Sahl, *Secret Discipline in the Federal Courts—Democratic Values and Judicial Integrity at Stake*, 70 NOTRE DAME L. REV. 193, 204 n.230 (1994).

211. See Robertson, *supra* note 210, at 1272 (“[T]he value of the appellate system’s ability to increase public trust in judicial outcomes may exceed the amount of error correction actually accomplished.”).

process offers the public additional opportunities to participate in and witness the courts at work.<sup>212</sup>

The case management and settlement promotion world that judicial mediation inhabits is often aimed at public trial *avoidance*, or at least narrowing the issues tried.<sup>213</sup> Occasionally, a litigant will prevail in a challenge to mediation.<sup>214</sup> Yet, the lack of a citable record from mediation makes any such challenge an uphill battle.<sup>215</sup> For example, in one case where a plaintiff complained she was “harangued” by a mediator to settle, and was told she would otherwise “never see a dime” based partly on incorrect legal information, a court could do little more than say what happened in the mediation was “hotly contested and not verifiable on the record before us.”<sup>216</sup>

The Detroit case demonstrates the limits of the appellate process in a system that values alternative resolutions. Bankruptcy court decisions are generally appealed to the district court. Chief Judge Rosen’s colleague in the district court who had received appeals from the Detroit bankruptcy sua sponte stayed them all as a matter of course.<sup>217</sup> When the bankruptcy court endorsed a direct appeal to the Sixth Circuit regarding its ruling that Detroit was eligible for bankruptcy, the court also requested that the Circuit defer to the mediator, Chief Judge Rosen, on the optimal timing of any such

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212. See Robertson, *supra* note 207, at 766, 773.

213. See Resnik, *supra* note 207, at 925.

214. See, e.g., *In re A.T. Reynolds & Sons, Inc.*, 452 B.R. 374, 381 (S.D.N.Y. 2011), *rev’g* 424 B.R. 76 (Bankr. S.D.N.Y. 2010) (reversing bankruptcy court’s sanction, noting that “inquiry into the parties’ conduct in a mediation, backed by the threat of sanctions, may exact a coercive influence on the parties to settle”).

215. See Coben & Thompson, *supra* note 18, at 73 (“Successful challenges to judicially compelled mediation are rare.”). For cases about sanctions against parties who resist mediation or settlement conferences, see, for example, *Spradlin v. Richard*, 572 F. App’x 420, 422 (6th Cir. 2014) (vacating lower court decision on other grounds but affirming award of sanctions for party’s lack of preparation, late arrival, lack of full settlement authority, and failure to participate in good faith); *Pucci v. 19th Dist. Ct.*, No. 07-10631, 2009 U.S. Dist. LEXIS 20390, at \*12 (E.D. Mich. Mar. 6, 2009) (inherent authority to order nonconsensual mediation, and sanctioning party for failure to send representative with settlement authority); *Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 598 (6th Cir. 2006) (“unenviable position of arguing that a magistrate should not encourage settlements” and affirming denial of a Rule 60(b)(6) motion by the party subject to default judgment after failing to send a representative to settlement conference).

216. *Chitkara v. N.Y. Tel. Co.*, 45 F. App’x 53, 54 (2d Cir. 2002).

217. See Jacoby, *supra* note 10, at 86. One creditor successfully filed a writ of mandamus to compel that judge to rule on one matter. *In re Syncora Guarantee, Inc.*, 757 F.3d 511 (6th Cir. 2014). The district judge summarily affirmed shortly thereafter. *Syncora Guarantee Inc. v. City of Detroit*, No. 13-CV-14305, 2014 WL 12531519 (E.D. Mich. July 11, 2014).

appeal, and the Sixth Circuit agreed to do so.<sup>218</sup> Individual objectors to Detroit's restructuring plan appealed the bankruptcy court's approval of it. Over a dissent, the Sixth Circuit declined to rule on the merits, instead resorting to a doctrine known as equitable mootness.<sup>219</sup> The dissenting judge warned that the appellants' lack of access to substantive review of major issues in Detroit's bankruptcy plan threatened the constitutionality of the bankruptcy system.<sup>220</sup>

The appellate process may serve as a check on settlement promotion in unusual cases where, say, a district judge tries to write his own local rule.<sup>221</sup> But circuit decisions imposing limits on the informal power of mediating judges are likely to be few and far between. How to get the issue before a circuit judge is itself a challenge. If fewer disputes are litigated, fewer final orders can be appealed. A writ of mandamus, while possible, is a rarely granted, extraordinary step. Appellate courts may doubt parties' allegations of coercion if the parties already signed documents indicating that they freely agreed to a mediated resolution.<sup>222</sup>

In other words, there are limits on what the appellate process can do in a culture that tells judges they have the inherent right to control their dockets and promotes a public policy favoring settlement. Under such a system, public trials and the appellate process

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218. Jacoby, *supra* note 10, at 85–86 (quoting from the court order and letter from Sixth Circuit clerk). Settlements ultimately mooted the appeal of the eligibility decision, as well as other appeals. One issue that did not get mooted challenged the constitutionality of Detroit's residential water shutoffs. That appeal also was dismissed. *Lyda v. City of Detroit*, 841 F.3d 684 (6th Cir. 2016).

219. *See Ochadleus v. City of Detroit (In re City of Detroit)*, 838 F.3d 792, 795 (6th Cir. 2016). Because prior Sixth Circuit decisions had used equitable mootness only in chapter 11 cases, the Sixth Circuit was not required to follow those decisions for a municipal bankruptcy. *Id.* at 805.

220. *Id.* at 811–12 (Moore, J. dissenting).

221. *Tiedel v. Nw. Mich. Coll.*, 865 F.2d 88, 94 (6th Cir. 1988) (“Although we render no opinion on what mediation enforcement measures may be permissible, we do hold that a district court is not empowered to enact a local rule giving itself the authority to award attorneys’ fees.”).

222. *See Porter v. Chi. Bd. of Educ.*, 981 F. Supp. 1129, 1131–32 (N.D. Ill. 1997) (rejecting party's claim of being rushed and coerced into accepting settlement agreement); Jacqueline M. Nolan-Haley, *Judicial Review of Mediated Settlement Agreements: Improving Mediation with Consent*, 5 Y.B. ON ARB. & MED. 152, 154, 156 (2013) (reviewing failure of contract-based arguments challenging settlement agreements in a world where public policy favors settlement); Welsh, *supra* note 73, at 64 (“[I]t remains very difficult for parties who wish to rescind a settlement agreement to overcome the presumption that they exercised free will. It becomes even more difficult when a party claims that his or her free will was violated by the language or behavior of a judge in a settlement conference.”).

are not necessarily operating as a check on judges' activities in a mediation.

## 2. Disqualification

Due process requires that judges lack bias.<sup>223</sup> Congress provides two statutory paths to disqualifying a federal judge from working on a particular case. The less frequently used provision, 28 U.S.C. § 144, provides that a district court case shall be transferred to another judge when a party files a “timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of an adverse party.”<sup>224</sup>

Alternatively, 28 U.S.C. § 455, a more catch-all statutory provision, first calls for disqualification when “impartiality might reasonably be questioned.”<sup>225</sup> Due to the difficulty of proving actual bias and the importance of perception to the legitimacy of the judiciary, an *appearance* of partiality is sufficient.<sup>226</sup> The standard is the perspective of a disinterested observer, an objectively reasonable layperson, knowing all relevant circumstances.<sup>227</sup> Section 455 also offers specific grounds for disqualification, including personal knowledge of disputed evidentiary facts.<sup>228</sup>

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223. See *In re Murchison*, 349 U.S. 133, 136 (1955).

224. 28 U.S.C. § 144. See generally GEYH, *supra* note 208, at 83–94 (analyzing both disqualification approaches and identifying reasons for section 144's lesser use). For an older and striking case applying this provision, see *Occidental Petroleum Corp. v. Chandler*, 303 F.2d 55, 56–57 (10th Cir. 1962) (district judge conducted closed-door hearings, meetings, and discussions where interested parties were not present, and was found to have hostility and bias against one of the key parties).

225. 28 U.S.C. § 455(a); see also *Liteky v. United States*, 510 U.S. 540, 541 (1994).

226. See John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 243 (1987) (appearance “saves face for the judiciary, because a judge may be removed while appellate courts continue to proclaim their confidence in her impartiality”). Appellate judges may go to great lengths to assure readers that the judge has had an illustrious career and has not committed any wrongdoing. See, e.g., *Haines v. Liggett Grp. Inc.*, 975 F.2d 81, 98 (3d Cir. 1992); *In re Kensington Int'l Ltd.*, 368 F.3d 289, 317–18 (3d Cir. 2004).

227. See, e.g., *United States v. Carlton*, 534 F.3d 97, 100 (2d Cir. 2008); *In re Kensington Int'l*, 368 F.3d at 302 (calling district judge's alternative interpretation to be without precedent).

228. Section 455(b) calls for disqualification when the judge “has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;” when the judge has previously served as a lawyer or witness concerning the same case or has expressed an opinion concern-



Although it is hard to get a reliable count, court decisions to disqualify a judge under either prong of section 455 seem rare.<sup>229</sup> And when the request is denied, “the moving party’s fate is left in the hands of a judge whom that party not only believes may not be impartial, but who may also have become biased, subconsciously or otherwise, by the fact of having his impartiality questioned in court.”<sup>230</sup> Asking a judge to disqualify himself for any reason, however well documented, is risky for parties and lawyers who appear in a court with any regularity.

Of course, disqualification is not supposed to be a substitute for the appellate process or a second bite at the apple for disappointed litigants,<sup>231</sup> or a method of judge shopping.<sup>232</sup> The impact of disqualification on judicial efficiency is also relevant. In rejecting a disqualification request, a district judge presiding over asbestos bankruptcies emphasized all the work he had done, including a four-week trial on which he had yet to rule, making disqualification a “consummate waste of untold proportions.”<sup>233</sup> Given these themes, courts often emphasize that their duty *not* to disqualify is as strong as their duty to disqualify.

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ing its outcome; or when the judge or a member of his or her immediate family has a financial interest in the outcome. 28 U.S.C. § 455(b).

229. See Robertson, *supra* note 207, at 765 (2018) (90% of disqualification motions are denied, usually without a formal written opinion); see also Leubsdorf, *supra* note 226, at 245 (hypothesizing that “the most biased judges” may be “the least willing to withdraw”).

230. Richard E. Flamm, *History of and Problems with the Federal Judicial Disqualification Framework*, 58 DRAKE L. REV. 751, 761 (2010); Deason, *supra* note 28, at 113 (in context of presiding judges seeking to settle their own cases, discussing the difficulty of pressing for a disqualification motion when one will later see that judge if their effort fails).

231. For recognition and a rare exception to this general principle, see *Rsrv. Mining Co. v. Lord*, 529 F.2d 181, 185 (8th Cir. 1976) (holding that the court cannot rely on the reversal process on the merits because the record demonstrates overt acts reflecting great bias and substantial disregard for prior mandate of the Eighth Circuit, raising concerns that judge has shed the robe and assumed the mantle of advocate).

232. *Carter v. West Publ’g Co.*, No. 99–11959–EE, 1999 WL 994997, at \*10 (11th Cir. Nov. 1, 1999) (“[I]t is likely that plaintiffs are seeking to avoid answering my well-known questions regarding class action certification in civil rights discrimination cases. But Congress has adamantly chosen to avoid the pitfalls of judge-shopping . . . ; parties in federal courts do not have carte blanche to disqualify a judge who is not to their liking.”).

233. *In re Owens Corning*, 305 B.R. 175, 220 (D. Del. 2004), *rev’d*, *In re Kensington Int’l Ltd.*, 368 F.3d 289 (3d Cir. 2004). The district judge offered an ominous statistic to combat his disqualification: fifteen asbestos victims would die every day; resolving the case would not save their lives, but presumably would bring closure to people who deserved it. *Id.*

One should not expect appellate courts to provide rigorous oversight of disqualification, even though it is technically possible for them to review on traditional appeal or mandamus.<sup>234</sup> Reversals of a refusal to disqualify are thought to be uncommon.<sup>235</sup> Appellate judges, like their trial court counterparts, may be skeptical about the motivations of those seeking disqualification.<sup>236</sup> Reviewing judges may ask why the motion wasn't made sooner.<sup>237</sup> And given the imperatives of judicial efficiency, reviewing judges may be influenced by the practical effect of disqualification, particularly in large and sprawling cases.<sup>238</sup>

Recently, the Sixth Circuit declined to disqualify the judge presiding over opioid multidistrict litigation who had been outspoken about the importance of settlement. The appellants emphasized the judge's public and private comments about prioritizing settlement and avoiding litigation. Stressing the extremely high standard a litigant must overcome to prevail on this issue, the Sixth Circuit declined to find that Judge Dan Polster had abused his discretion when he denied the request to step aside. Notably, for the purposes of this article, the Circuit rejected the argument that a strong push for settlement constituted bias for disqualification purposes.<sup>239</sup>

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234. See Robertson, *supra* note 207, at 766. For a high-profile, highly criticized exception, see *Ligon v. City of New York*, 538 F. App'x 101, 101 (2d Cir. 2013), *vacated*, 743 F.3d 362 (2014) (motions panel sua sponte removed Judge Scheindlin from stop and frisk case, citing Code of Conduct Canon 2 and Canon 3(c)(1), relating to press interviews).

235. See Sande L. Buhai, *Federal Judicial Disqualification: A Behavioral and Quantitative Analysis*, 90 OR. L. REV. 69, 98–109 (2011) (reporting on a study of appellate court review of district court decisions not to recuse themselves).

236. See, e.g., *In re Kensington Int'l*, 368 F.3d at 331 (Fuentes, J., dissenting) (characterizing request for review as a “guerrilla tactic timed to serve their own economic interests.”); *Omega Eng'g v. Omega S.A.*, 432 F.3d 437, 448 (2d Cir. 2005) (calling the delay in bringing recusal motion excessive, without explanation); *Apple v. Jewish Hosp. & Med Ctr.*, 829 F.2d 326, 334 (2d Cir. 1987) (motion was untimely, looked strategic, and failed to explain delay).

237. See, e.g., *In re Kensington Int'l*, 368 F.3d at 323; *U.S. v. Yonkers Bd. of Educ.*, 946 F.2d 180, 183 (2d Cir. 1991) (timeliness requirement meant to prevent waste of judicial resources). *But see* *Reed v. Rhodes*, 179 F.3d 453, 487 (6th Cir. 1999) (Cole, J., dissenting) (noting that declining disqualification based on the timing of the request amounts to impermissible burden-shifting).

238. *In re Kensington Int'l*, 368 F.3d at 330 (Fuentes, J., dissenting) (practical effect of disqualification at this point “catastrophic” to some constituencies).

239. *In re Nat'l Prescription Opiate Litig.*, No. 19-3935, 2019 WL 7482137 (6th Cir. Oct. 10, 2019) (“That Judge Polster believed that settlement was the best option does not display bias. He pushed for settlement not because he had prejudged the case, but because that was the most expedient way to conclude the dispute. . . . Judges in complex litigation are encouraged to pursue and facilitate settlement early in a variety of ways. . . . That he would recommend settlement as the best

Circuits occasionally do order disqualification. In a Third Circuit decision involving difficult asbestos bankruptcies, *ex parte* communications were central to the court's reasoning.<sup>240</sup> The presiding district judge had engaged in more than 325 hours of *ex parte* communication with attorneys for various parties, as well as spending many hours with advisors the court retained for substantive help.<sup>241</sup> The Third Circuit noted the lack of affirmative consent from parties.<sup>242</sup> How one might have obtained the requisite consent in such a sprawling case remains unclear.

The First Circuit disqualified a presiding district judge from a school reassignment case due to news media comments. She had written a letter to the editor and given a telephone interview after prior reporting had mischaracterized the case in her view.<sup>243</sup> The Circuit's reasoning focused on the high-profile and political sensitivity of the case and perceptions of partiality.<sup>244</sup>

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option in this case, or push its pursuit, does not evidence prejudicial attitudes on the merits that would require him to recuse himself.”).

240. *In re Kensington Int'l*, 368 F.3d at 294–305.

241. *Id.* at 297. Although the court's holding was based on the more general impartiality provision, the court also thought the § 455(b) criteria were met as well. *Id.* The court declined to decide whether *ex parte* communications provided separate grounds for disqualification, but nonetheless expressed “disfavor” about the communications: “Whatever value the *ex parte* meetings may have had in moving the [cases] along or creating a settlement-friendly atmosphere was outweighed by the attendant risks and problems.” *Id.* at 294–95; *see also* *Edgar v. K.L.*, 93 F.3d 256, 260 (7th Cir. 1996) (disqualifying the trial judge who met *ex parte* with a panel of experts appointed to investigate health institutions and programs). For a case coming out the other way, *see Reed*, 179 F.3d at 469 (declining to disqualify the judge who had been asked to take over the Cleveland school desegregation case after the original presiding judge had died, notwithstanding extensive *ex parte* communication on sensitive matters).

242. *In re Kensington Int'l*, 368 F.3d at 294; *see also* *Welsh*, *supra* note 26, at 1007; *Floyd*, *supra* note 46.

243. *In re Boston's Children First*, 244 F.3d 164, 165 (1st Cir. 2001) (district judge wrote a letter to newspaper about pending case about race and public schools and was interviewed in the press by telephone).

244. *Id.* at 170; *see also* *U.S. v. Microsoft Corp.*, 253 F.3d 34, 115 (D.C. Cir. 2001) (trial judge had conducted secret interviews with members of press intended for publication at conclusion of trial; appearance that trial judge coveted favorable publicity and perhaps a place in history created an appearance of bias); *U.S. v. Cooley*, 1 F.3d 985, 995 (10th Cir. 1993) (district judge should have disqualified himself after appearing on Nightline television show, unavoidably creating an appearance of becoming active participant). By contrast, the Sixth Circuit declined to disqualify a district judge who had talked to the press about an environmental case with a consent decree, including statements suggesting racial disparities in oversight capabilities. *In re City of Detroit*, 828 F.2d 1160 (6th Cir. 1987) (*per curiam*). The reasoning was based partially on the untimeliness of the request. *Id.* at 1165, 1168 (could have raised claims two to three years earlier). This matter also

The Sixth Circuit also has held that a district judge should have recused himself from a discrimination case against the United States Postal Service. At a pretrial hearing, the district judge called the postmaster an honorable man who would never discriminate intentionally against anybody.<sup>245</sup> The Sixth Circuit reasoned that the judge lauded someone closely connected with the personnel decisions at issue in the trial.<sup>246</sup>

As a last example, the Sixth Circuit ordered a new judge in a sex discrimination class action.<sup>247</sup> After the liability phase, the presiding district judge called the defendants “a bunch of villains . . . interested only in feathering their own nests at the expenses of everybody.”<sup>248</sup> When the defendant appealed the judgment, the Sixth Circuit not only ordered a rehearing on the preliminary injunction, but ordered that the injunction motion be heard by a different judge. The Sixth Circuit noted that the district court’s remarks were unsupported, suggested denial of a fair hearing and lack of impartiality, and placed in doubt the ability to conduct an unbiased proceeding.<sup>249</sup>

These examples reflect matters that could arise with mediating judges. The disqualification standards generally apply to mediating judges.<sup>250</sup> Some local rules apply the standards for judicial disqualification even to private neutrals.<sup>251</sup> But that doesn’t mean it would

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led to a disciplinary complaint, which was dismissed over dissent. *In re* Complaints of Judicial Misconduct, Nos. 84-6-372-08 & -10 (6th Cir. Judicial Council Mar. 11, 1985). In a school desegregation case, where the district judge had engaged in extensive ex parte communication, the Sixth Circuit declined to disqualify the presiding judge, but instructed that a new judge take over the case. *Bradley v. Milliken*, 620 F.2d 1143, 1145 (6th Cir. 1980).

245. *Roberts v. Bailar*, 625 F.2d 125, 127 (6th Cir. 1980).

246. *Id.* at 129 (“[I]t is clear that a reasonable person would question the impartiality of the District Judge.”). As is often the case, the court noted that its opinion was based on the appearance of partiality rather than actual partiality. *Id.* at 130.

247. *Nicodemus v. Chrysler Corp.*, 596 F.2d 152, 157 (6th Cir. 1979).

248. *Id.*

249. *Id.*

250. *See* NIEMIC, STIENSTRA & RAVITZ, *supra* note 53, at 68.

251. *See, e.g.*, E.D. Mich. LR 16.3(f)(1) (2015) (unless parties agree to the rules of an arbitration tribunal, a mediator is held to the “standards for disqualification of a judicial officer under 28 U.S.C. § 455”); W.D. Tenn. LR App. D.1(e)(3) (2016) (party required to file a motion detailing the disqualifying conflict, bias or prejudice either within fourteen days from the Court’s Order designating the mediator or as soon as possible if the ADR process has commenced); *see also* D. Ariz. Bankr. R. 9072-7(c)(1), (c)(3) (2009) (mediators may be disqualified for any event for which a judge would be disqualified, as well as conflict of interest); N.D.N.Y. Bankr. R. App. IV, 5.3.2 (2012) (party must first present the conflict to the media-

be easy or comfortable for a lawyer or party to seek disqualification of a mediating judge; if a mediating judge declines to disqualify himself, the party's next stop is likely the presiding judge, who sometimes hand-selects the mediating judge.<sup>252</sup>

The evidentiary barriers to a disqualification remedy are themselves notable. Large swaths of mediating activity generate little tangible record or evidence.<sup>253</sup> As discussed earlier, some courts say that statements and acts relating to an official court assignment of mediation cannot be "extrajudicial." That means access to information in a freewheeling mediation is off limits as a basis for disqualification.<sup>254</sup> In addition, both the mediating and presiding judges probably share a perceived need for efficiency, and thus a perception of disqualification as disruptive and distracting from the real work. Finally, if the mediating judge does not have adjudicatory responsibilities, the court might further discount the need for disqualification.

Notwithstanding the barriers for lawyers and parties bringing motions to disqualify, the relevance of the disqualification statute to mediating judges should not be written off entirely. For example, one might ask whether a mediating judge who later becomes a presiding judge is categorically distinct from, say, a lawyer who once worked on a case and later becomes a judge, warranting disqualification.<sup>255</sup>

### 3. Disciplinary system

The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 created the foundation for a formal judicial disciplinary system.<sup>256</sup> The 1980 Act authorizes each federal circuit's judicial council to review complaints against federal judges and to

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tor; if the mediator does not withdraw, notify the court). *See generally* Trust, *supra* note 52, at 29 (citing Southern District of New York and Western District of Texas rules, and observing "mediation procedures require that a mediator not agree to serve as a neutral in any circumstances in which a judge should not serve as a judge").

252. *See* Robertson, *supra* note 207, at 765; Jeffrey Cole, *Jilting the Judge: How to Make and Survive a Motion to Disqualify*, 34 *LITIG.* 48, 48 (2008).

253. *See* Campbell Killefer, *Wrestling with the Judge Who Wants You to Settle*, 35 *LITIG.* 17, 22 (Spring 2009).

254. 28 USC § 455(b)(1); *see also supra* Part I(D)(1) (Sunwest/Harder disqualification decisions).

255. *See* Williams v. Pennsylvania, 579 U.S. 1, 6–7, 14 (2016) (state supreme court justice who served as prosecutor decades earlier should have been disqualified on due process grounds).

256. Pub. L. No. 96-458, 94 Stat. 2035 (1980).

order sanctions for misconduct.<sup>257</sup> The 1980 Act, coupled with procedural rules revamped in 2006,<sup>258</sup> offers procedures concerning who can file a complaint (“any person”), what type of process should follow, and the remedies, which include restricting the cases assigned to a judge, and “censuring or reprimanding the judge” in private or public, or, in extreme cases involving bankruptcy judges, removal from office.<sup>259</sup> The disciplinary system does not apply to Supreme Court justices.<sup>260</sup> In addition, the process is terminated if the judge resigns.

The central focus of the 1980 Act is misconduct, defined as “conduct prejudicial to the effective and expeditious administration of the business of the courts.”<sup>261</sup> At the very least, that is broad enough to cover a variety of matters, including allegations of sexual misconduct or racial bias (although the judiciary’s handling of such matters remains a subject of much controversy).<sup>262</sup> Some other notable examples include improper *ex parte* communication with counsel for “one side” in a case, engaging in partisan political activity or making partisan statements, or soliciting funds for organizations.<sup>263</sup> Retaliation for a complaint is also cognizable misconduct, as is “treating litigants, attorneys, judicial employees or others in a demonstrably egregious and hostile manner.”<sup>264</sup>

Cutting against the potential for expansive interpretation of cognizable misconduct are concerns about chilling judicial discretion and independence, and undermining principled decision-making.<sup>265</sup> The 1980 Act is not supposed to provide redress through the

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257. See RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, Preface (last revised Mar. 2019).

258. See THE JUDICIAL CONDUCT AND DISABILITY ACT STUDY COMMITTEE, IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980: A REPORT TO THE CHIEF JUSTICE 1 (2006); see also Hellman, *supra* note 180.

259. 28 U.S.C. § 354.

260. See COMM. ON JUD. CONDUCT AND DISABILITY OF THE JUD. CONF. OF THE U.S., C.C.D. No. 19-01, at 5 (Aug. 1, 2019) (“As a Supreme Court Justice, Justice [Brett] Kavanaugh is not a judge subject to this Act.”).

261. 28 U.S.C. § 351.

262. See COMM. ON JUD. CONDUCT AND DISABILITY OF THE JUD. CONF. OF THE U.S., C.C.D. No. 18-02 (May 31, 2019) (investigation of racial bias in magistrate judge selection by district court).

263. See RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, Rule 3(h) (last revised Mar. 12, 2019).

264. *Id.*

265. See *Pierson v. Ray*, 386 U.S. 547, 553–56 (1967) (explaining why judges should not be subject to civil liability for acts within judicial discretion).

ordinary appellate process.<sup>266</sup> The theoretical possibility of appeal may be dispositive whenever an act or behavior relates to action within a case, even if settlement activity is particularly difficult to challenge on appeal due to lack of a record (which also complicates the pursuit of a disciplinary complaint).<sup>267</sup>

While confidentiality of judges accused of misconduct understandably is protected, the identities of those who submit the complaints are not. The complaints cannot be filed anonymously; they must be signed and submitted under penalty of perjury.<sup>268</sup> Lawyers and parties face reputational risks for making public, non-anonymous complaints about sitting judges in real time absent extraordinary circumstances.<sup>269</sup> This suggests sample bias, of a sort, regarding filed complaints: complainants, who might be pro se, are less equipped to well-plead the facts or are unaware of the high standard necessary for a complaint to be viable.<sup>270</sup> Indeed, the Second Circuit and Seventh Circuit websites tell readers that “[a]lmost all complaints in recent years have been dismissed because they do not follow the law about such complaints.”<sup>271</sup>

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266. See 28 U.S.C. § 352(b); RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, Rule 3 Commentary. For example, the Second Circuit instructs litigants: “If you are a litigant in a case and believe the judge made a wrong decision—even a very wrong decision—you may not use this procedure to complain about the decision.” *Judicial Conduct and Judicial Disability Procedures*, U.S. CT. OF APPEALS FOR THE SECOND CIR., [https://www.ca2.uscourts.gov/judges/judicial\\_conduct.html](https://www.ca2.uscourts.gov/judges/judicial_conduct.html) [<https://perma.cc/YRB6-WERH>] (last visited June 24, 2021).

267. RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, Rule 11 (among grounds for dismissal are that allegations lack sufficient evidence to raise an inference that misconduct has occurred or is based on allegations that are incapable of being established through investigation).

268. *Id.* at Rule 6. The Commentary on Rule 4 advises that a person who wishes to remain anonymous can report something confidentially to the Office of Judicial Integrity, but that office is focused on workplace misconduct. *Id.* at Rule 4 Commentary.

269. See Flamm, *supra* note 230, at 761; Cole, *supra* note 252, at 48.

270. Defendants in an insurance matter filed a complaint against several judges, including a mediating magistrate judge. Among other things, the complaint identified an ex parte phone call between the magistrate judge and plaintiffs’ lawyers. The panel determined that this phone call was not an improper communication. In addition, allegations that defendants were not consulted about the scheduling of mediation sessions were undercut by the district court offering a continuance. *In re Judicial Complaints Under 28 U.S.C. § 351*, Nos. 4-20-90076, 4-20-90077, 4-20-90078 (4th Cir. Oct. 6, 2020).

271. *Judicial Conduct and Judicial Disability Procedures*, *supra* note 266; *Judicial Conduct and Disability*, U.S. CT. OF APPEALS FOR THE SEVENTH CIR., <http://www.ca7.uscourts.gov/judicial-conduct/judicial-conduct.htm> [<https://perma.cc/WVA9-592B>] (last visited June 24, 2021).

One limit to any analysis of the Disciplinary Act stems from the fact that this disciplinary system prefers informal corrective action.<sup>272</sup> That means we won't always see the remedy. Indeed, Congress imposed a relatively limited publicization requirement on the courts, and the judiciary has amplified it only modestly. These limitations typically are justified by confidentiality, baked into the statute itself and on which Judicial Conference rules elaborate.<sup>273</sup> Circuits must post final misconduct orders on their websites, and the U.S. Judicial Conference posts a sampling of final orders from its own judicial conduct committee.<sup>274</sup> But they are not required to, and do not, make it easy to find out what each order is about, short of opening and reading each posted file. Moreover, names are typically redacted.<sup>275</sup>

The disciplinary system is not a likely cure to the range of mediating judge practices seen in this article, nor was it meant to be.<sup>276</sup> Some complaints do arise from judicial settlement pressure.<sup>277</sup> Or-

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272. See, e.g., RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, Rules 4 & 11; *id.* at Rule 4 Commentary (informal corrective action is encouraged, so some complaints do not result in use of full-blown procedures and detailed explanations); *id.* at Rule 5 Commentary (encourages “swift remedial action”); *id.* at Rule 11 Commentary (following Breyer Commission emphasis on “voluntary self-correction”).

273. 28 U.S.C. § 360 (requiring posting only if sanction being imposed); RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, Rule 24; *id.* at Rule 24 Commentary (judicial conference urged circuits and courts to submit to West and Lexis decisions with “significant precedential value”).

274. *Judicial Conduct and Disability Orders*, U.S. Cts., <https://www.uscourts.gov/rules-policies/judiciary-policies/ethics-policies/code-conduct-judicial-employees/judicial-conduct-disability-opinions>, [<https://perma.cc/QFE3-VKBG>] (last visited Mar. 3, 2022).

275. Only the Fourth Circuit affords searches by content (such as “mediator”) on its website; the other numbered circuits do not. Circuits mostly organize orders by year, although some allow searches by case number. Circuits that upload scanned documents (First, Fifth, Eighth, Eleventh, and DC Circuits) offer no text search functionality within each order. Earlier misconduct decisions are not posted; they must be formally requested. Westlaw, Lexis, and Bloomberg Law do not offer comprehensive sets of misconduct orders; typically, they are limited to those the judiciary selects for the Federal Reporter.

276. See *In re* Judicial Complaint Under 28 U.S.C. § 351, No. 04-16-90012 (4th Cir. Feb. 17, 2016); *In re* Complaint No. 05-17-90082 (5th Cir. Aug. 9, 2017).

277. See *In re* Complaint No. 01-20-90003, at 1–2 (1st Cir. Judicial Council Apr. 14, 2021) (“Petitioner asserted that the magistrate judge ‘pressure[d]’ petitioner to accept a settlement offer, and ‘threat[ened]’ that if he did not settle, defense counsel ‘would plead him to death.’ Petitioner contended that, by suggesting that an allegedly retaliatory citation could be removed from petitioner’s employee file, the magistrate judge advocated an unlawful ‘subterfuge’ and an ‘unfair and deceptive practice.’”).



ders disposing of such complaints illustrate how such complaints are deemed to be related to the merits of the matter and are thus outside the scope of the Act,<sup>278</sup> or considered an inappropriate end-run around the appellate process.<sup>279</sup> This is the likely consequence even when the mediating judge is also performing other key tasks, such as a magistrate judge both assigned to mediate and to weigh in on a motion to dismiss.<sup>280</sup> As noted earlier, the inability to show evidence of settlement pressure because there are no transcripts of mediation sessions, and because of documentation indicating that the parties are participating voluntarily, can be fatal to a complaint.<sup>281</sup>

This is not to say judges are immune from disciplinary consequences for all behavior relating to settlement. Some things that happen during a case are supposed to be actionable, such as conspiracy with a prosecutor or race discrimination.<sup>282</sup> But the conduct would have to be extreme. The D.C. Circuit upheld a misconduct finding that relied in part on a presiding judge's behavior during a settlement conference.<sup>283</sup> Yet, that was only one part of a longer list of trouble.<sup>284</sup> It is hard to see guidance in such an opinion for more

278. See, e.g., *In re* Judicial Complaint Under 28 U.S.C. § 351, No. 04-16-90012, at 3 (4th Cir. Feb 17, 2016).

279. *Id.*; *In re* Complaint No. 05-17-90082, at 4 (5th Cir. Aug. 9, 2017).

280. See, e.g., *In re* Judicial Complaint Under 28 U.S.C. § 351, No. 4-20-90035, at 3 (4th Cir. Aug. 12, 2020) (“Complainant has failed to present, and the records do not disclose, any evidence of improper motive, bad faith, or other misconduct. Complainant may not pursue his disagreement with the magistrate judge’s report and recommendation, or with the magistrate judge’s handling of the court-sponsored mediation process, through a complaint of judicial misconduct.”); *In re* Judicial Complaint Under 28 U.S.C. § 351, No. 04-19-90163 (4th Cir. July 9, 2020) (dismissing misconduct allegation involving mediated settlement in bankruptcy).

281. See, e.g., *In re* Complaint No. 01-20-90003, at 3 (1st Cir. May 21, 2020). In this case, other aspects also rendered the complaint unlikely to succeed, including that the complainant was a lawyer and did not follow an available rescission procedure. *Id.* at 4–5.

282. RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, Rule 4 Commentary.

283. See *Hon. John H. McBryde v. Comm. to Review Disability Act Orders*, 264 F.3d 52 (D.C. Cir. 2001) (upholding sanctions for racist comments, gross abuse of power, lack of empathy involving judge who also had an antagonistic relationship with other judges). The judge mistreated a lawyer who had a legitimate reason for suggesting that her client be excused from attending a settlement conference. A ten-year old plaintiff had previously been “terrorized” by the defendant who had removed his glass eye and put it in his mouth. The defendant’s lawyer had been given full settlement authority, making defendant’s attendance unnecessary. The judge ordered counsel to take reading comprehension courses and submit repeated affidavits about attendance. *Id.* at 67.

284. *Id.*

run-of-the-mill mediation zealotry, especially with the federal judiciary's longstanding endorsement of settlement promotion operating in the background.

Whatever one thinks of the Disciplinary Act, it is unlikely to be a particularly useful tool to improve mediating judge practices for reasons similar to discussion of other accountability measures: a disconnect due to the lack of a citable record, the interpretation of mediating judges as acting within their judicial capacities, and the judiciary's overall enthusiasm for docket management. Indeed, given that the Disciplinary Act is directed toward conduct prejudicial to the effective and *expeditious administration of the business of the courts*, mediating judges with a heavy foot on their powers and authority are likely to be seen on the right side of the law, not the wrong one.

### III. FILLING THE ACCOUNTABILITY GAP

Courts innovate in response to case-closing pressure. Well-intentioned objectives have fostered practices that turn out to be harder to reach by ordinary accountability measures than things presiding judges do.

One can make a parallel claim about mediating judges relative to private neutrals. Advocates of traditional mediation theory have lamented how private neutrals have drifted from the centrality of party consent and have become comfortable using higher pressure practices.<sup>285</sup> Left in the shadows have been the additional risks of those same practices undertaken by sitting judges.

In other words, problematic practices that might arise when judges handle other judges' cases come from both directions. Compared to presiding judges, mediating judges imposing high-pressure or other problematic practices are more insulated from judicial accountability. Mediating judges also can do or threaten to do things that private neutrals cannot by virtue of their court commission. When mediating judges engage in similar practices to private neutrals, judges may not be bound to the obligations imposed on certified mediators (such as confidentiality) unless they are certified mediators themselves, or by local rules of procedure that either do not apply when a judge mediates or that a specific mediation order suspended. Meanwhile, whether or not mediating judges are more assertive than private neutrals, the lawyers and parties cannot help but be aware of the mediator's sitting judge status.

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285. See *supra* Part I(B).

The case-closing abilities of mediating judges may be fueled in part by a kernel of uncertainty about what it means for a judge with significant official powers to sit in a role designed either for someone without any such powers, or to be accountable as the presiding judge.

Standard court oversight tools were created largely with traditional adversarial judging in mind, coupled with judges as delegators to others. They are difficult to apply when an Article III judge is a delegatee and yet, by design, there is little record of what transpired. For scholars of case management, this conclusion should come as no surprise.<sup>286</sup> The practical implications are nonetheless startling when one considers the powers and authority that some sitting judges believe comes with a mediation appointment.

In addition, when circuit and trial judges equate extrajudicial activity with extra-professional activity rather than simply activity outside of a case over which a judge presides, it becomes harder to disqualify a non-presiding judge who derives significant information from informal channels. Lawyers and parties may be disinclined to use disqualification tools early in a case. If they wait until later in the case when the consequences are clearer, they risk being told, “too late.”

The federal judiciary has both the power and the obligation to fill the gap and provide better guidance and accountability when judges work on other judges’ cases. This project may encourage judges within specific districts to have fruitful conversations and consider amending local rules. On a national level, the Judicial Conference of the United States is the appropriate body to pursue such projects, particularly through its committees on Codes of Conduct and those responsible for rules of procedure. Judicial discussion of these issues might need to be behind closed doors, but should be informed by commentary from lawyers and parties, with protected identities, to ensure that judges can understand how things look from the outside.

Here is an agenda for judges to consider:

- Selection: Under what circumstances is it prudent for a sitting judge to select another sitting judge as a mediator? What processes should be implemented to ensure that parties are able to provide input on the selection without risking their reputations in the case or in general? If a government actor is going to choose the mediator, under what circumstances should that actor be someone other

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286. See, e.g., Peterson, *supra* note 12.

than the presiding judge, and possibly even from a different branch of government?

- Leakiness of information between judges: What level of communication is acceptable between presiding and mediating judges? Who is entitled to know about it?
- Discussion of the case with the public: To what extent do confidentiality restrictions on parties and lawyers apply to mediating judges? Should different rules apply when the case has broader political interest or a public institution as a major party?
- Exercise of formal judicial power: Under what circumstances should a mediating judge be able to exercise formal judicial powers of any kind? Is the term “mediation” compatible with the role executed by an actor with coercive public powers?
- Documenting basic activity of mediating judges: While mediation traditionally is premised on the lack of a usable record of negotiations, judicial accountability depends on the existence of a record. Is there a type of documentation of a judge’s role that could straddle this divide? Are some confidentiality agreements too broad to warrant enforcement such that they overprotect mediating judges?<sup>287</sup>
- Number of parties and consent: Should there be different guidance for mediating judge activity in multilateral disputes as opposed to binary litigation, given the implications for obtaining consent?
- Implied or express duty to mediate in good faith: To the extent the judiciary assumes parties have a duty to mediate in good faith, what is the origin of that duty? How might it be clarified?<sup>288</sup>

These questions should be approached with bigger picture issues in mind, such as:

- Separation of powers: How should separation of powers inform guidance to mediating judges? Even if the appoint-

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287. For refusal to enforce a broad confidentiality stipulation in a different context, see *In re Halvorson*, 581 B.R. 610 (Bankr. C.D. Cal. 2017), *rev'd on other grounds*, 2018 WL 6728484 (C.D. Cal. Dec. 21, 2018) (court refused to enforce parties’ overbroad confidentiality stipulation, which parties failed to lodge for presiding judge consideration).

288. See *Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 658 (7th Cir. 1989) (Posner, J., dissenting from en banc opinion) (litigants have no duty to bargain in good faith over settlement before trial, but lawyers rarely feel free to resist judges’ requests).

ment arises in the judge's official capacity, to what extent, if at all, should the work of the mediating judge be deemed "judicial" activity?<sup>289</sup> How should these considerations affect the scope of formal judicial activity a mediating judge undertakes? Do politically sensitive federal cases require more extensive precautions and guidance?

- Role of Code of Conduct for United States Judges and Commentaries: To what extent does this centerpiece of judicial ethics apply differently to judges when mediating versus presiding? What additional examples should commentaries address? Should the commentaries address the perception that judges might seek out mediation opportunities to burnish credentials for post-retirement alternative dispute resolution careers?
- Statistics: Why *not* collect and publicize statistics on mediating judges by type of case, demography of presiding and mediating judges, and the like? What are the downsides, and do they outweigh the benefits?

## CONCLUSION

Mediating judges have largely slipped through the cracks of widespread academic discussion. It is not hard to see why given the difficulty of even tracking the practices. There are compelling explanations, including access to justice, for the mediating judge. Yet, some practices create the perception or the reality of judicial overreach in ways that elude standard judicial accountability measures, with costs to parties and the system on several levels.

Judges probably will not stop working on other judges' cases. This reality makes it even more important that the judiciary expressly recognize that it cannot rely on the traditional accountability tools to manage the risks. With meaningful input from others,

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289. *Mistretta* informs the analysis by its use of the term "extrajudicial." The majority decision recognized a distinction between exercising judicial power and other activities that "share the common purpose of providing for the fair and efficient fulfillment of responsibilities that are properly the province of the judiciary." *Mistretta v. United States*, 488 U.S. 361, 389 (1988). "The Constitution does not preclude judges from assuming extrajudicial duties in their individual capacities." *Id.* at 402. Case law suggested that "Congress may authorize a federal judge, in an individual capacity, to perform an executive function without violating separation of powers." *Id.* at 403. That suggests support for the view that some professional activities judges undertake in cases over which they do not preside should be construed as extrajudicial. *See generally* *Liteky v. United States*, 510 U.S. 540, 541 (1994) (exploring "extrajudicial" in disqualification statutes).

the federal judiciary can and must chart a better path—starting not tomorrow, not next week, but today.