THE FEDERAL RULES AND THE QUALITY OF SETTLEMENTS: A COMMENT ON ROSENBERG'S, THE FEDERAL RULES OF CIVIL PROCEDURE IN ACTION

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Professor Rosenberg provides a perceptive and cautionary account of the difficulties that confound attempts to assess the working of the Federal Rules of Civil Procedure.[1] I would like to supplement his observations in two ways: first, by extending his account of the changing setting in which the Rules are employed; second, by elaborating his point about the problems of measuring the quality of processes and outcomes.

The composition of the federal courts' caseload has been changing. As Judge Carter points out, there are more "public law" cases.[2] Less noticed but equally dramatic is the relative decline of tort cases as a component of the caseload and the rise of business litigation, such as contracts and intellectual property. Since the early 1980s most diversity filings have been contracts cases.[3]

Increasing use of federal courts is part of a larger pattern of increasing expenditure on law by business. It appears that business spending on law is growing much faster than spending by individuals; businesses are buying a larger share of the legal service pie.

This dominance of business litigation accentuates the shift noted by Professor Rosenberg from lawyers working on fixed fees to those

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[1] *See* Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact,* 137 U. PA. L. REV. 2197 (1989).

[2] *See* Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights,* 137 U. PA. L. REV. 2179, 2182-83 (1989).

[3] In 1988, of 68,224 civil cases commenced in federal district courts on the jurisdictional basis of diversity of citizenship, 32,210 were contract actions. All tort actions combined accounted for 31,930 of diversity filings. *See* ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Table C-2, at 180 (1988).

working on hourly charges.[4] That is, relatively fewer of the cases in federal courts are staffed by attorneys on contingency fees with incentives to keep down costs—for their own side, of course; more are staffed by attorneys on hourly rates with incentives to bill more hours.

And these hours are more productive. New technologies originating outside the profession—photocopying, word processing, electronic transmission, and on-line data services—have exponentially increased the amount of information that lawyers can retrieve, manipulate, and deploy. Hence these lawyers' hours are capable of making more work for the courts.

As the society gets richer, the stakes in disputes become higher and there are more organizations and individuals capable of making greater investments in litigation. The federal courts are surrounded by an increasing number of legal actors capable of sustained strategic use of litigation. (These actors, in turn, are served by the upper layers of an increasingly stratified bar that are increasingly national in their sphere of operations and in their expectations of access.) As the law becomes more voluminous, more complex, and more uncertain, costs increase. Virtually every "improvement" in adjudication—refinements of due process that require more submissions, hearings, and findings; elaborations of the law that require research, investigation and experts—increases the need and opportunity for greater expenditures. Greater expenditures by one side lead to greater costs for the other.

Yet only a small portion of these disputes are fully adjudicated. As transaction barriers (time, money, attention, opportunity costs, uncertainty about recovery and its amount) rise, there is more chance of overlap in the bargaining position of the parties. There is a greater "settlement range" in which both parties would prefer to stop rather than run the full course of adjudication.

The presence of a settlement range does not automatically insure that a settlement will occur. As settlement ranges lengthen, they may become more difficult to negotiate, as actors seek relative advantage within that extended range. The recent proliferation of settlement brokers (judges, mediators, special masters) and devices (mini-trials, summary jury trials) testifies to the increased demand for signals to identify points of convergence within the broad and opaque settlement ranges created by higher transaction costs.

Settlement is not an "alternative" process, separate from adjudication, but is intimately and inseparably entwined with it. Both may be thought of as aspects of a single process of strategic maneuver and bar-

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[4] *See* Rosenberg, *supra* note 1, at 2200.

gaining in the (actual or threatened) presence of courts, to which I have attached the fanciful neologism "litigotiation." It seems unlikely that the portion of disputes ending in settlement will decrease in the near future. Demand for adjudication-backed remedies is increasing faster than the supply of facilities for full-blown adjudication. More generally, the costs of "litigotiation" continue to rise and this tends to produce settlements.

Professor Rosenberg tells us that "a major conceptual problem" of the various proposals for procedural reform is the failure to address the question of the "quality" of the process and outcomes; instead, there is a tendency to focus on the supposed efficiency of reforms, usually measured in terms of early and cheap disposition.[5] If we combine this "quality" problem with the observation that the principal product of the system is settlements, we arrive at the central and most intractable intellectual problem of assessing the quality of settlements. This is not a neutral, technical question, but a political question in the sense that an answer must engage our values and sense of priorities.

There has been a tremendous push in recent years to encourage settlement with an eye to lowering the demands on courts. It seems obvious that the occurrence of settlements means there is less that courts have to do. (But settlement also may have hidden costs for courts: for example, by depleting the supply of precedents that facilitate decisions and induce settlements in later cases. And settlement promotion by courts may encourage lawyers to rely on the courts to initiate and broker settlement discussions.) In any event, it has become the received wisdom that settlement is something that courts, as well as others, should strive to produce.

The few systematic studies provide no assurance that active judicial promotion of settlements produces more settlements or makes courts more productive. A line of research, beginning with Professor Rosenberg's pioneering study of the pre-trial conference in New Jersey,[6] suggests that the dynamics of settlement are relatively independent of judicial intervention. This limited efficacy is not surprising if we recall that most cases would settle anyway. Settlement activity would have to be undertaken with exacting selectivity to save in those cases in which it made a difference as much time as was consumed in treating large numbers of cases in which it made no difference. Even if it does not produce more settlements, judicial intervention may be accounted a success by other, more specialized measures. For example,

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[5] *Id.* at 2201.

[6] *See* M. ROSENBERG, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE (1964).

court administrators may value the solidification of the trial calendar.

But if judicial participation does not produce more settlements, does it produce better ones? Are judicially-promoted settlements superior to those produced by bilateral negotiations or to the results of adjudication? Do they come earlier and involve less cost? Do they display more of whatever other qualities are thought to make one outcome superior to another? Such quality questions might include:

- Are they based on superior knowledge of the facts and the parties' preferences?
- Are they more principled, infused with a wider range of norms?
- Do they display more inventiveness in finding solutions and devising remedies?
- Do they induce more compliance?
- Do they produce better general effects—that is, the precedents, models, and threats that influence other actors?

These questions, Professor Rosenberg reminds us, have remained largely unexplored. He brings us ample warning of the difficulty of addressing them.

Yet the problem of the quality of settlements is inescapable, not only for those who negotiate settlements, but for judges and mediators who would intervene in them, and for legislators, judges, and reformers who would formulate policy that affects the settlement process. The task for policy is not promoting settlements, or discouraging them, but regulating them. How do we encourage settlements that display the qualities we favor? In large measure the answer is that we do not know and that developing reliable knowledge of the quality of settlements is, as Professor Rosenberg points out, fraught with difficulties.[7] That there is a lot we do not know about settlement is not an excuse for doing nothing until the results of further research are in. Existing knowledge supplies some useful ideas about where to look and for what to look.

Because settlement is intimately bound to litigation, settlement outcomes reflect in some measure the potential results and costs of litigation. Substantive and procedural rules, and the practices of courts and lawyers, confer bargaining endowments upon the parties in settlement negotiations. Power to achieve an attractive settlement may be dependent on having adjudication as a viable alternative. One recent

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[7] *See id.*

study observed that:

> the most important cost of rules and procedures that deny the poor and weak access to adjudication may be that the disadvantaged are thus effectively denied the opportunity to settle claims informally. The expansion of legal rights and resources for disadvantaged parties enhances their ability to impose costs and risks and thus to bargain effectively.[8]

Even the most ardent proponents of principled negotiation concede that "the relative negotiating power of two parties depends primarily upon how attractive to each is the option of not reaching agreement."[9]

Settlements depend not only on the bargaining endowments that parties bring to the negotiating arena, but also on the institutions of the particular bargaining arena that translate endowments into outcomes. The features of the arena also offer possibilities for policy intervention: the skills and styles of the negotiators, the ethical constraints under which they operate, the presence of mediators or other settlement facilitators, the review of negotiation results by third parties (as, for example, in the fairness hearings held in class actions and in cases involving minors), requirements about publicity and disclosure, and so forth.

How does the presence or absence of these devices affect the costs of the process? How does it affect the distribution of the "savings" produced by the settlement? How does it affect the "general effects" or "public goods" produced by the settlement? Are settlements in a particular arena improved by detaching them from litigation, for example by removing them into different institutions, or by coupling them more closely to litigation, such as by summary jury trials before the fact or fairness hearings afterward? These are the questions that have to be addressed if we are going to regulate settlements responsibly.

Most remedy-seeking in the vicinity of courts is going to end in settlement. Assuring the quality of these settlements is a central task of the administration of justice. It is time to move beyond uncritical celebration and equally uncritical condemnation of settlement and to grapple with the complex dynamics of the various species of settlements in different bargaining arenas.

But who will do this? And where? The poverty of systematic empirical study of American legal institutions reflects not only the research problems that Professor Rosenberg catalogs, but institutional

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[8] McEwan & Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11, 46 (1984).

[9] R. FISHER & W. URY, GETTING TO YES 106 (1981).

problems as well. American law schools, despite repeated exhortations to change their ways, have not shown a sustained inclination to make the generation of this kind of knowledge one of their central functions.

There are some hopeful straws in the wind. A few law professors are producing rich contextual accounts of civil litigation, and the availability of on-line data bases raises the hope that we can be empiricists without leaving the building. The research produced by these means is unlikely to live up to the requirements of rigorous quasi-experimental design exemplified in Professor Rosenberg's work. But we have much to learn from a variety of empirical research techniques, soft as well as hard. If it can abandon its diffidence, the legal academy may yet be the primary location of knowledge about the working of the legal system. It would be ironic if in the end the repositories of that knowledge were found not in the Ivy League and the Big Ten, but in the Big Eight.