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I. INTRODUCTION

In civil actions in the Illinois circuit courts, trial judges strive to facilitate the "convenient administration of justice."[1] Often, justice is administered conveniently through civil claim resolutions by trial or settlement. To prepare for such resolutions, trial judges often schedule case management conferences. To facilitate resolution through trial, judges often schedule trial preparation conferences. To facilitate resolution through settlement, judges often schedule settlement conferences. Settlement conferences usually involve at least some informal, off-the-record meetings at which opposing attorneys, and in some cases the parties themselves and perhaps certain interested nonparties, confer in the presence of trial judges.

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1. 735 ILL. COMP. STAT. 5/1-104 (2002).

Written civil procedure laws on pretrial conferences historically have spoken chiefly to trial preparation.[2] This focus was reflected in early pretrial conference rules governing both federal and state trial courts in Illinois. The rules spoke to meetings between counsel, in the presence of judges, that were aimed largely at the simplification of issues for trial.[3] Though settlements often followed from such meetings, they were generally considered the by-products, not the objectives.[4] More recently, written civil procedure laws explicitly have acknowledged case management and settlement as possible pretrial conference objectives.[5] New federal and state laws now even mandate case management (or scheduling) conferences in many settings. However, as to settlement, the new laws generally provide little guidance, resulting in excessive judicial discretion. Furthermore, the new settlement laws are silent on what happens once settlements are reached.

For the Illinois circuit courts, written guidelines on settlement conferences now appear in Illinois Supreme Court Rule 218.[6] While the companion guidelines on conferences geared to managing a civil action or preparing for a trial may be effective, Rule 218 inadequately addresses conferences geared to facilitating a settlement. For example, the rule fails to set forth standards for settlement conference conduct by judges, lawyers, and parties. As well, it is silent on the judicial authority to compel the attendance at settlement conferences of either represented parties (who may or may not have delegated to their attorneys settlement authority) or interested nonparties, such as insurers or lienholders (who often control or strongly influence settlement

2. *See, e.g.*, Jeffrey A. Parness & Daniel J. Sennott, *Recognizing Party and Nonparty Interests in Written Civil Procedure Laws*, 20 REV. LITIG. 481, 482 (2001).

3. *See, e.g.*, Judith Resnik, *Trial as Error, Jurisdiction as Inquiry: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 935–36 (2000) (finding that the original version of Federal Rule of Civil Procedure 16 ("FRCP 16"), promulgated in 1938, was intended to cover meetings about upcoming trials); *see also* Jeffrey A. Parness & Matthew R. Walker, *Thinking Outside the Civil Case Box: Reformulating Pretrial Conference Laws*, 50 U. KAN. L. REV. 347, 349 n.11 (2002) (noting that the 1938 version of FRCP 16 was adopted by a significant number of states and still operates in some of those states today).

4. *See, e.g.*, Alfred P. Murrah, *Pre-trial Procedure: A Statement of Its Essentials*, 14 F.R.D. 417, 424 (1953) (noting that the U.S. Judicial Conference in 1944 approved the Pre-Trial Committee's statement that "settlement is a by-product of good pre-trial procedure rather than a primary objective to be pursued by the judge").

5. *See, e.g.*, 97 F.R.D. 165, 201–05 (1983) (making "facilitating the settlement of the case" an express legitimate objective of a pretrial conference in a 1983 amendment to FRCP 16); ILL. SUP. CT. R. 218(a)(6) (listing "the possibility of settlement" as appropriate for consideration at a pretrial conference).

6. ILL. SUP. CT. R. 218; *see also infra* note 37 (providing the text of Rule 218 in full).

decisions).[7] Rule 218 is also silent on whether and when the same judge who will preside at trial may preside over a related settlement conference,[8] as well as whether an attorney appearing on behalf of a client at a settlement conference is presumed to have settlement authority. Finally, the rule says little about alleged breaches of settlement agreements.

If settlement facilitation may now be a major objective of a pretrial conference, new written guidelines in Illinois should more clearly speak to settlement conference participation as well as to appropriate conduct for judges, lawyers, parties, and interested nonparties. In addition, new guidelines should set forth at least some standards for postsettlement activities.

This Article begins by examining the history of written pretrial conference laws governing Illinois circuit courts.[9] It then demonstrates the unfortunate consequences that result when written laws do not adequately guide settlement conference conduct and employs two illustrative federal appellate court decisions.[10] The Article concludes by endorsing a new high court rule that provides more guidance on arranging, conducting, and effectuating settlement conferences.[11] The authors argue that reforms to Rule 218 will promote the convenient administration of justice by producing better settlement talks, agreements, and enforcement.[12]

II. THE HISTORY OF WRITTEN PRETRIAL CONFERENCE LAWS IN ILLINOIS

Pretrial conferences herein include meetings of attorneys in the presence of trial judges (often in chambers) that, at times, are attended by parties or interested nonparties. Pretrial conferences are traditionally scheduled for at least one of three major purposes: management, settlement, and trial preparation.[13]

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7. ILL. SUP. CT. R. 218(a). Since the most recent amendment in 1995, Rule 218 has stated that at a mandatory initial case management conference, "counsel familiar with the case and authorized to act shall appear." *Id.* No mention is made of participation by parties or interested nonparties. *Id.*

8. This issue is different, and more troublesome, in nonjury settings where the same judge who presides at a settlement conference could later act as fact-finder at trial.

9. *See infra* Part II.

10. *See infra* Part III.

11. *See infra* Part IV.

12. *See infra* Part V.

13. Participants in case management conferences can address a broad range of issues, including the scheduling of future pleadings and motions and the planning of formal discovery. These conferences may be guided by written laws not specifically labeled as pretrial conference

In Illinois, written laws on pretrial conferences historically have included a statute acknowledging the authority of a trial judge to conduct a pretrial conference subject to high court guidelines, coupled with an Illinois Supreme Court Rule supplying some guidelines.[14] The Illinois General Assembly first spoke of pretrial conferences in 1941 when it added Section 58½ to the Illinois Civil Practice Act.[15] That section authorized a trial judge, subject to Illinois Supreme Court rules, to direct the attorneys for the parties in a civil action to appear at a pretrial conference in order to consider "any matter as may aid in the disposition of the action."[16] Section 58½ was supplemented by Illinois Supreme Court Rule 23A, which set forth general guidelines on pretrial conferences in the Illinois circuit courts.[17]

Rule 23A provided that a trial court may, in its discretion, direct the attorneys for the parties to appear for a conference to consider (1) the simplification of the issues, (2) pleading amendments, (3) the possibility of obtaining admissions of fact or documents that would reduce the need for proof, (4) limitations on the number of expert witnesses, and (5) other matters as may aid in disposition.[18] The rule also required trial judges to establish pretrial calendars on which civil actions could be placed.[19] Once a pretrial conference was held, Rule 23A provided that the trial judge "shall make an order which recites the agreements made by the parties . . . and which limits the issues for trial to those not

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laws. *See, e.g.*, FED. R. CIV. P. 26(f) (stating that scheduling conference addresses matters such as settlements and formal discovery, though it is specifically coordinated with the pretrial conference rule, FRCP 16).

14. 735 ILL. COMP. STAT. 5/2-1004 (2002) ("The holding of pretrial conferences shall be in accordance with rules."); ILL. SUP. CT. R. 218 (providing substantive guidelines for pretrial conferences).

15. *See* ILL. REV. STAT. ch. 110, para. 182(a), § 58 1/2 (1941) (repealed 1955). The Illinois Civil Practice Act of 1933 was silent on the topic of pretrial conferences. *See* Civil Practice Act, 1933 Ill. Laws 784. However, the systematic use of pretrial conferences in Illinois courts appears to have predated the legislative authorization supplied by Section 58½. *Pre-Trial Conferences in Circuit Court*, 21 CHI. B. REC. 310 (1940) (announcing that on May 1, 1940, Judge Walter La Buy, Assignment Judge of the Circuit Court of Cook County, would conduct a pretrial conference for law cases before they were added to the trial calendar; at these conferences, "counsel familiar with the case and who are authorized to act shall appear (with or without their clients, as they see fit)" to consider various issues relating to the case, including the "possibility of adjustment, compromise or settlement").

16. ILL. REV. STAT. ch. 110, para. 182(a), § 58 1/2 (1941) (repealed 1955).

17. ILL. REV. STAT. ch. 110, § 259.23A (1943) (amended 1955). Rule 23A was based largely on the original FRCP 16, in place at the time Rule 23A was adopted. *Compare* ILL. REV. STAT. ch. 110, § 259.23A (1943) (amended 1955), *with* FED. R. CIV. P. 16, 308 U.S. 645, 684 (1938) (providing the original FRCP 16).

18. ILL. REV. STAT. ch. 110, § 259.23A (1943) (amended 1955).

19. *Id.* These motions could be placed on the calendar upon motion of the court or the parties. *Id.*

disposed of by admissions or agreements of counsel."[20] This order, when entered, controlled "the subsequent course of the action."[21]

The Illinois pretrial conference statute and rule were both revised in 1955. Section 58½ was repealed and replaced by section 58.1. The new section provided that "the holding of pretrial conferences shall be in accordance with rules."[22] The Illinois Supreme Court Rules were subsequently renumbered, with guidelines for pretrial conferences moved to Supreme Court Rule 22.[23] In addition to the renumbering, two significant changes were made in 1955. First, the new statute authorized a trial judge to compel attendance by individuals "necessary to make the conference effective."[24] Relatedly, whereas Rule 23A spoke expressly only to participation by attorneys, the 1955 rule provided that when a pretrial conference was held, "counsel familiar with the case and authorized to act shall appear, with or without the parties as the court directs."[25] Second, the 1955 rule granted a trial

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20. *Id.*

21. *Id.*

22. ILL. REV. STAT. ch. 110, § 58.1 (1955) (renumbered in 1982 as ILL. REV. STAT. ch. 110, para. 2-1004). This change made the pretrial procedure statute less restrictive with regard to who could be asked to participate in pretrial conferences. The original statute authorized courts to "direct the attorneys for the parties" to appear at pretrial conferences. ILL. REV. STAT. ch. 110, para. 182(a), § 58 1/2 (1941) (repealed 1955).

23. ILL. REV. STAT. ch. 110, § 101.22 (1955) (reallocated with minor amendments in 1967 as ILL. REV. STAT. ch. 110A, § 218). The text of Rule 22, entitled "Pretrial Procedure," promulgated in 1955 read as follows:

> In any civil action, the court may hold a pretrial conference. At the conference counsel familiar with the case and authorized to act shall appear, with or without the parties as the court directs, to consider:
>
> (1) The simplification of the issues;
>
> (2) Amendments to the pleadings;
>
> (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
>
> (4) The limitation of the number of expert witnesses;
>
> (5) Any other matters which may aid in the disposition of the action.
>
> The court shall make an order which recites any action taken by the court and the agreements made by the parties as to any of the matters considered, and which specifies as the issues for trial those not disposed of at the conference. The order controls the subsequent course of the action unless modified.
>
> The court shall establish a pretrial calendar on which actions shall be placed for consideration, as above provided, either by the court on its own motion or on motion of any party. The court shall make and enforce all rules and orders necessary to compel compliance with this rule, and may apply the remedies provided in Rule 19-12(3).

Id.

24. ILL. REV. STAT. ANN. ch. 110A, § 218 note (Smith-Hurd 1984) (Historical and Practice Notes).

25. ILL. REV. STAT. ch. 110, § 101.22 (1955) (reallocated with minor amendments in 1967 as ILL. REV. STAT. ch. 110A, § 218)). This language was based on language from Cook County

judge the authority to impose sanctions for failure to appear or to participate adequately in a pretrial conference.[26] Available sanctions included dismissal for want of prosecution and entry of a default judgment.[27]

Although both the statute and the rule were again renumbered, the substance of the 1955 amendments remained in place until 1995. The statute was later codified as chapter 110, paragraph 2-1004 of the Illinois Revised Statutes, while the high court later spoke through Illinois Supreme Court Rule 218.[28] During the forty-year period in which the 1955 amendments provided the pretrial conference guidelines, there was spirited debate over whether settlement talks were even appropriate for pretrial conferences. The debate arose largely because settlement facilitation was not mentioned explicitly in written law.[29] While pretrial conferences were used by some trial judges to facilitate settlement, the lack of explicit authorization led other trial judges to eschew settlement talks at pretrial conferences.[30]

In 1995, Rule 218 was amended significantly.[31] While the 1955 rule left the decisions about pretrial conferences to trial court discretion, the 1995 rule requires that an "initial case management conference" be held within thirty-five days after the parties were at issue and no later than

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Local Court Rule 25½, which authorized trial courts to compel the attendance of represented parties at pretrial conferences. Rule 25½ had been in place since January 1, 1942. *See* SULLIVAN'S LAW DIRECTORY 158 (1942) (containing the full text of Rule 25½).

26. ILL. REV. STAT. ch. 110, § 101.22 (1955) (reallocated with minor amendments in 1967 as ILL. REV. STAT. ch. 110A, § 218). The 1955 rule further stated that courts "shall make and enforce all rules and orders necessary to compel compliance with this rule, and may apply the remedies provided in Rule 19-12(3)." *Id.*

27. *Id.* § 101.9-12(3).

28. ILL. REV. STAT. ch. 110, para. 2-1004 (1983) (reallocated in 1991 as 735 ILL. COMP. STAT. 5/2-104); ILL. REV. STAT. ch. 110A, § 218 (1967) (reallocated in 1991 as ILL. SUP. CT. R. 218).

29. Both the 1943 and the 1955 versions of the pretrial conference rule did allow for consideration of "any other matter which may aid in the disposition of the action," but neither explicitly employed the term settlement. ILL. REV. STAT. ch. 110, §259.23A (1943) (amended 1955); ILL. REV. STAT. ch. 110, § 101.22 (1955) (reallocated with minor amendments in 1967 as ILL. REV. STAT. ch. 110A, § 218). The extent to which this phrase was read as implied authorization to consider settlement at pretrial conferences varied greatly.

30. *See, e.g.*, Harry M. Fisher, *Pre-trial Conference and Its By-products*, 1950 U. ILL. L. F. 206, 212–13 (discussing the debate between judges who advocated settlement talks at pretrial conferences and those who viewed settlement as strictly a by-product of pretrial conferences); *see also* Albert W. Jenner, Jr. & Phillip W. Tone, *Pleading, Parties, and Trial Practice*, 50 NW. U. L. REV. 612, 621–22 (1955) (finding that pretrial conferences in Cook County are often "merely occasions for bringing parties together to talk settlement under the auspices of the court," with the practice underutilized downstate).

31. 166 Ill. 2d cvii (1995).

182 days after the filing of the complaint.[32] The new rule also includes an expanded list of matters that might be considered. The list includes all issues in the 1955 rule, together with "the possibility of settlement and scheduling of a settlement conference."[33] However, the rule language added in 1955 authorizing a trial judge to compel the attendance of parties has been eliminated.[34] The 1995 rule only calls for "counsel familiar with the case and authorized to act" to appear at pretrial conferences.[35] Finally, the rule language authorizing sanctions has been eliminated.[36] Rule 218 has not been amended since 1995.[37]

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32. *Compare* ILL. SUP. CT. R. 218(a) *with* ILL. REV. STAT. ch. 110, § 101.22 (1955) (reallocated with minor amendments in 1967 as ILL. REV. STAT. ch. 110A, § 218).

33. ILL. SUP. CT. R. 218(a). Though this reference to a separate "settlement conference" seemed to imply that a settlement conference was distinguishable from the "case management conferences" contemplated by subsections (a) and (b) of Rule 218, no further written laws speak to settlement conferences. Thus, it appears that settlement conferences are one form of a case management conference for which Rule 218 provides the guidelines.

34. *Compare* ILL. SUP. CT. R. 218(a) *with* ILL. REV. STAT. ch. 110, § 101.22 (1955).

35. ILL. SUP. CT. R. 218(a).

36. *Compare* ILL. SUP. CT. R. 218(a) *with* ILL. REV. STAT. ch. 110, § 101.22 (1955).

37. The current generally applicable written civil procedure laws on pretrial conferences are chapter 735, act 5, section 2-104 of the Illinois Compiled Statutes and Illinois Supreme Court Rule 218. Rule 218 reads as follows:

> a) Initial Case Management Conference. Except as provided by local circuit court rule, which on petition of the chief judge of the circuit has been approved by the Supreme Court, the court shall hold a case management conference within 35 days after the parties are at issue and in no event more than 182 days after the filing of the complaint. At the conference counsel familiar with the case and authorized to act shall appear and the following shall be considered:
>
> 1) the nature, issues, and complexity of the case;
>
> 2) the simplification of the issues;
>
> 3) amendments to the pleadings;
>
> 4) the possibility of obtaining admissions of fact and documents which will avoid unnecessary proof;
>
> 5) limitations on discovery including:
>
> i) the number and duration of depositions which may be taken;
>
> ii) the area of expertise and the number of expert witnesses who may be called; and
>
> iii) deadlines for the disclosure of witnesses and the completion of written discovery and depositions;
>
> 6) the possibility of settlement and scheduling of a settlement conference;
>
> 7) the advisability of alternative dispute resolution;
>
> 8) the date on which the case should be ready for trial;
>
> 9) the advisability of holding subsequent case management conferences; and
>
> 10) any other matters which may aid in the disposition of the action.
>
> b) Subsequent Case Management Conferences. At the initial and any subsequent case management conference, the court shall set a date for a subsequent management conference or a trial date.
>
> c) Order. At the case management conference, the court shall make an order which

While the 1995 amendments to Rule 218 include the first written acknowledgment of settlement as an appropriate objective for a pretrial conference, they include no significant guidelines on facilitating or enforcing settlements. There is no explicit acknowledgment of judicial power to compel the attendance of parties or interested nonparties, even where they may possess ultimate settlement authority. The amended rule contains no guidelines on which a trial judge should preside at a settlement conference; the rule does not speak to whether fundamental fairness dictates that someone other than the judge scheduled to preside at any trial should conduct a settlement conference. Furthermore, there are no guidelines in the amended rule on what might happen when postsettlement legal issues arise. The committee comments to the 1995 amendments shed no additional light; they focus largely on the case management objectives of pretrial conferencing.[38] Thus, fundamental questions regarding settlement conference activities under Rule 218 were left for case law precedents. Unfortunately, there is remarkably little Illinois case law.[39] Much of it arises under the 1955 rule and says little about many important questions, such as who may or must participate and how settlement agreements should be written and enforced.[40] The silence of the written laws together with the dearth of

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recites any action taken by the court, the agreements made by the parties as to any of the matters considered, and which specifies as the issues for trial those not disposed of at the conference. The order controls the subsequent course of the action unless modified. All dates set for the disclosure of witnesses, including rebuttal witnesses, and the completion of discovery shall be chosen to ensure that discovery will be completed not later than 60 days before the date on which the trial court reasonably anticipates that trial will commence, unless otherwise agreed by the parties. This rule is to be liberally construed to do substantial justice between and among the parties.

d) Calendar. The court shall establish a pretrial calendar on which actions shall be placed for consideration, as above provided, either by the court on its own motion or on the motion of any party.

ILL. S. CT. R. 218.

38. *Id.* (providing the committee comments).

39. *See* Fisher, *supra* note 30, at 210 (noting that there are not many cases on the subject of pretrial conferences, perhaps because occasions for appellate review are limited); *see also* 3 CLARK A. NICHOLS, NICHOLS ILLINOIS CIVIL PRACTICE § 55:4 (2002) (stating that Illinois decisions are of little help in attempting to discern Illinois law on pretrial procedures).

40. The most frequently cited Illinois cases with regard to pretrial conferences arise under the 1955 rule and include *American Society of Lubrication Engineers v. Roetheli*, 621 N.E.2d 30, 33–34 (Ill. App. Ct. 1st Dist. 1993), in which the court stated that "one purpose of the pre-trial conference is to expedite the prosecution of a case, either by hastening a settlement agreement between the parties or by clarifying the issues . . . so that a trial on the merits can occur more swiftly"; *Schaefer v. Sippel*, 374 N.E.2d 1092, 1095 (Ill. App. Ct. 1st Dist. 1978), in which the court held that there is no requirement that a plaintiff be able to prove a prima facie case at the time a pretrial conference is held; and *General Magnetic Corp. v. Erickson*, 220 N.E.2d 633, 634 (Ill. App. Ct. 2d Dist. 1966), in which the court held that a pretrial conference is not meant to be a substitute for a full and complete trial on the merits.

case law leave Illinois circuit judges without much direction and with much discretion.

III. THE UNFORTUNATE CONSEQUENCES OF A SILENT PRETRIAL CONFERENCE RULE

The absence of written guidelines and case precedents is troublesome. Elsewhere, the failure of written civil procedure laws to speak to settlement conferences has not prompted definitive precedents—leading to confusion, uncertainty, and unfortunate disparities—as two major federal appellate court cases illustrate.[41] Each case involves a written pretrial conference law, Federal Rule of Civil Procedure 16 ("FRCP 16"), that did not provide expressly for judicially-compelled participation by represented parties and interested nonparties at settlement conferences. Both cases arose under the 1983 version of FRCP 16. This 1983 rule, like current Illinois Supreme Court Rule 218, acknowledged settlement as a possible objective of a pretrial conference, but did not speak directly to judicial authority to compel the attendance of represented parties or interested nonparties.[42]

The first case, *G. Heileman Brewing Co. v. Joseph Oat Corp.*, involved a settlement conference where a represented party had not granted settlement authority to its attorney.[43] The opinions in the case show that where there is an absence of written law, judges can take quite divergent, but always reasonable, approaches to settlement facilitation. The second case, *In re Novak*, involved a settlement conference where a nonparty insurer withheld settlement authority from the insured defendant whose defense it was providing.[44] The opinion in this case illustrates how strained (and strange) interpretations of written civil procedure laws can arise under unclear written civil procedure laws.

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41. *Compare In re* Novak, 932 F.2d 1397 (11th Cir. 1991) (conceding that district courts have no authority to issue orders directed at represented parties or nonparty insured under FRCP 16), *with* G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989) (en banc) (holding that FRCP 16 does not limit the authority of federal courts to order litigants represented by counsel to attend pretrial conferences to discuss settlement). Comparable confusion seemingly persists in the lower federal courts on questions of a trial court's power to order certain forms of settlement facilitation, including summary jury trials and nonbinding mediations. *See, e.g., In re* Atl. Pipe Corp., 304 F.3d 135, 143–45 (1st Cir. 2002) (discussing federal district court decisions regarding the power of judges to compel unwilling parties to participate in alternative dispute resolution).

42. The 1983 version of FRCP 16 authorized compelled participation by "attorneys for the parties and any unrepresented parties." 97 F.R.D. 165, 201 (1983).

43. *Heileman*, 871 F.2d at 650.

44. *Novak*, 932 F.2d at 1398.

In *Heileman*, the Seventh Circuit Court of Appeals addressed the issue of judicial authority to compel the attendance of a represented party at a pretrial settlement conference in the absence of explicit authorization in the written laws.[45] In the case, a federal magistrate judge had ordered a Joseph Oat "corporate representative with authority to settle" to attend a settlement conference.[46] The only representative from Joseph Oat who appeared was the corporation's attorney.[47] The trial court determined that Joseph Oat had violated the order and imposed sanctions.[48] Joseph Oat argued on appeal that the trial court lacked the authority to order the attendance of the corporate representative because the written rule on pretrial conferences at the time only explicitly permitted the trial court to compel the attendance of "attorneys for the parties or any unrepresented parties."[49]

The Seventh Circuit upheld the contempt order and sanctions. Writing for the majority, Judge Kanne found that the 1983 version of FRCP 16 did not "completely describe and limit the power of federal courts."[50] He reasoned that the "mere absence of language in the federal rules specifically authorizing or describing a particular judicial procedure should not, and does not, give rise to a negative implication of prohibition."[51] Judge Kanne determined that trial judges possess certain "inherent authority" deriving from "the very nature and existence" of their offices.[52] He held that such authority could be employed in settings not specifically addressed by rule or statute, but requiring action in order to promote just, speedy, and inexpensive resolution.[53] Judge Kanne concluded that the trial court had the

45. *Heileman*, 871 F.2d at 650.

46. *Id.*

47. *Id.*

48. *Id.* The sanctions involved the related fees of opposing counsel in the amount of $5860.01 "pursuant to" FRCP 16(f). *Id.*

49. *Id.* (quoting FED. R. CIV. P. 16(a) (1983) (amended 1987)).

50. *Id.* at 651.

51. *Id.* at 652.

52. *Id.* at 653.

53. *Id.* Similar principles appear in some Illinois state court precedents. *See, e.g.*, Sander v. Dow Chem. Co., 651 N.E.2d 1071, 1080 (Ill. 1995) (concluding that inherent authority, independent of any statute, allows courts to prevent undue delays in case dispositions and to control dockets); *see also* Rearden Family Trust v. Wisenbaker, 65 P.3d 1029, 1044 (Haw. 2003).

> The authority to order both the party and the party's representative or attorney to be present at a settlement conference is neither expressly set forth in [Rule 16 of the Hawaii Rules of Civil Procedure] nor in [Rule 12.1 of the Hawaii Rules of the Circuit Courts]; however, we believe that such a requirement falls well within the inherent power of the court to "prevent undue delays and to achieve the orderly disposition of cases."

Id.

authority to compel the attendance of a Joseph Oat representative, even without express written-law authorization and that it had not abused its discretion in doing so.[54]

The dissenting judges in *Heileman* presented very different views on inherent judicial authority and on the role of written laws in limiting judicial conduct. Judge Coffey believed that the federal pretrial conference rule did not "authorize a trial judge to require a represented party litigant to attend a pretrial conference" and that the rule mandated that only an unrepresented party litigant and attorneys may be ordered to appear.[55] He noted that while trial courts do possess some inherent authority, this authority has limitations.[56] Judge Coffey argued that if more expansive powers were to be recognized, they should originate in Supreme Court rulemaking.[57] Judge Coffey also observed that a "host of problems" accompany an overly broad view of inherent authority.[58] One such problem was the use of inherent authority "to substitute for the subpoena power at pretrial conferences," raising a "due process question," since a subpoena is subject to a motion to quash while an exercise of inherent authority is not.[59] Another problem was that in employing inherent authority to compel represented parties to talk settlement, trial judges would undermine the appearance of impartiality and confuse and dismay litigants with their participation.[60] Finally, Judge Coffey feared that too broad an inherent authority would invite judicial abuse.[61]

Other dissents raised different, but related, concerns. Judge Manion opined that inherent authority should not be a "license for federal courts to do whatever seems necessary to move a case along."[62] Thus, "where a statute or rule specifically addresses a particular area, it is inappropriate to invoke inherent power to exceed" what the statute

54. *Heileman*, 871 F.2d at 653–54 (finding that abuse of discretion would have occurred if the court had ordered Joseph Oat Corp. to agree to a particular form of settlement or to any settlement at all, and stating that abuse also would have occurred if attendance was "so onerous, so clearly unproductive, or so expensive" that it might also qualify as an abuse of discretion).

55. *Id.* at 658 (Coffey, J., dissenting).

56. *Id.* (Coffey, J., dissenting) (stating that there was limited authority in such areas as contempt and jurisdiction determination).

57. *Id.* at 663 (Coffey, J., dissenting).

58. *Id.* at 662 (Coffey, J., dissenting).

59. *Id.* at 660 (Coffey, J., dissenting).

60. *Id.* at 662 (Coffey, J., dissenting).

61. *Id.* at 661 (Coffey, J., dissenting) (arguing that such abuse includes "pressure to forego the essential right of trial").

62. *Id.* at 666 (Manion, J., dissenting).

sets.[63] Judge Posner warned of the possibility of encouraging "judicial high-handedness"[64] and reasoned that the order directed at Joseph Oat was impermissible because Joseph Oat had made it clear it was not interested in settlement talks.[65] Judge Ripple found that too broad a recognition of inherent authority would upset the lawmaking balance between the legislature and the judiciary,[66] as well as promote inconsistency by encouraging "the individual district court to march to its own drummer."[67]

The *Heileman* opinions contained both a broad and a narrow "inherent authority" doctrine. Another federal appellate court employed neither doctrine, taking a different approach when asked if a trial judge could compel the appearance of a nonparty insurer at a settlement conference.[68] In *Novak*, an employee of the defendant's insurer, Roger Novak, possessed the settlement authority, which he delegated to neither the defendant nor the defendant's attorney.[69] A district judge ordered Novak to attend a "pretrial conference to facilitate settlement discussions."[70] Novak declined to attend the conference and the district judge held him in criminal contempt, fining him $500.[71] Novak appealed, arguing the district judge had no authority to compel his attendance.[72] The Eleventh Circuit Court of Appeals agreed that FRCP 16 did not explicitly authorize the district court to order Novak to appear.[73] The court of appeals upheld the order of contempt despite finding that the trial judge had no inherent, statutory, or rule-based authority to compel directly Mr. Novak's attendance.[74] The court suggested alternative means by which settlement conference participation by those other than "attorneys for the parties or any

63. *Id.* (Manion, J., dissenting) (stating that the purpose of inherent power "is to fill gaps left by statute or rule").

64. *Id.* at 657 (Posner, J., dissenting).

65. *Id.* at 658 (Posner, J., dissenting) ("Oat had made clear that it was not prepared to settle the case on any terms that required it to pay money.").

66. *Id.* at 665 (Ripple, J., dissenting).

67. *Id.* at 666 (Ripple, J., dissenting).

68. *See In re* Novak, 932 F.2d 1397 (11th Cir. 1991).

69. *Id.* at 1399.

70. *Id.* at 1398.

71. *Id.* at 1400.

72. *Id.*

73. *Id.* at 1406 (concluding that "Rule 16 does not explicitly authorize [courts] to issue orders directed at represented parties or nonparty insurers").

74. *Id.* at 1408–09 (refusing to extend *Heileman* to employees of nonparty insurers). The contempt order was upheld though authority to order Novak to attend was lacking because Novak was required to obey a court order until it was vacated. *Id.* at 1409.

unrepresented parties," including Novak, could be accomplished.[75] First, it opined that a trial court employing inherent authority could require a represented party who has retained full settlement authority to produce at a settlement conference an individual, such as Novak, who is "substantially prepared to discuss settlement options."[76] Second, the appellate court posited that parties that retain settlement authority may, in fact, be unrepresented with respect to settlement and therefore within the ambit of FRCP 16 that speaks expressly to compelled attendance by "unrepresented parties."[77] The *Novak* court suggested that when a nonparty insurer controls the settlement of a claim against an insured defendant, that nonparty's participation could be coerced by an order directed at the insured who is an unrepresented party for settlement purposes because of retained settlement authority.[78] The court reasoned that when an insured defendant's and its nonparty insurer's interests are "aligned" (the insurer being contractually obligated to defend and to pay at least part of any judgment entered against the insured), an order directing the insured as a party to produce a person with full settlement authority could effectively "coerce cooperation" from the nonparty insurer, as an agent of the insured, at settlement talks.[79]

By employing a strained analysis of FRCP 16, the *Novak* court invited trial judges to compel indirectly the attendance of certain nonparties at settlement conferences. This approach is troubling with regard to both defendants who have attorneys and nonparty insurers of defendants. First, it requires a trial judge to determine whether a party with an attorney is "unrepresented"[80] based on the degree of settlement authority delegated to others, a matter often within privileged attorney-client communications. Second, it seemingly conditions the ability to effectuate a nonparty insurer's participation in a settlement conference on a party's ability to influence the insurer as a result of a court order that does not reach the insurer directly. This approach may not even be effective when the party and its insurer have their interests aligned. [81]

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75. *Id.* at 1404.

76. *Id.* at 1407 (citing G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989)).

77. *Id.* at 1407 n.19.

78. *Id.* at 1408.

79. *Id.* (assuming settlement authority in the insurer).

80. *Id.* at 1407 n.19 (holding that an otherwise-represented party who retains full settlement authority is "an unrepresented party with respect to settlement").

81. *See id.* at 1408 (noting that this limitation on inherent authority may "impede . . . a district court's ability to conduct a fruitful settlement conference," as when a nonparty, not itself subject to inherent authority directives, is also not able to be coerced by the named parties or their attorneys).

When the party and its insurer are in conflict (as when policy coverage issues arise), the *Novak* approach seems unavailable to compel the attendance of those crucial to resolution by settlement.[82]

Illinois Supreme Court Rule 218 presents to Illinois judges questions similar to those posed in *Heileman* and *Novak*. Like the 1983 version of FRCP 16 at issue in *Heileman* and *Novak*, Rule 218 lists settlement as a legitimate goal of a pretrial conference.[83] But, at best, Rule 218 is silent on judicial authority to compel participation by parties (represented or unrepresented) and nonparties.[84] The *Heileman* and *Novak* opinions demonstrate at least three approaches that Illinois judges might employ. Yet, all three have significant drawbacks. The broad "inherent authority" approach from the *Heileman* majority embodies excessive judicial discretion, with the distinct likelihood of divergent precedents and inconsistent applications. The more narrow "inherent authority" approach in the *Heileman* dissents forecloses the possibility of compelling the appearance of a party or nonparty, no matter how crucial to settlement facilitation. Finally, there is the indirect approach suggested in *Novak*, in which an insured defendant has an attorney without settlement authority. Such a party is deemed to be without an attorney for settlement purposes, so that the presence of a nonparty insurer can be obtained indirectly through an order against the aligned insured defendant. This approach uncomfortably stretches the language of the pretrial conference rule and depends upon questionable assumptions about securing information on delegated settlement authority and about the influence of an insured over an insurer.

A simpler way to resolve the issues raised in *Heileman* and *Novak* would be an amended, written, pretrial conference law (or a distinct written law exclusively devoted to settlement conferencing).[85] A new law could include guidelines on judicial power over parties and nonparties. In 1993, FRCP 16 was amended to recognize expressly the

82. *See id.* (noting that a limitation on inherent authority exists when a nonparty insurer and an insured party have "conflicting interests"); *see also* Barley v. Consol. Rail Corp., 820 A.2d 740, 744 (Pa. Super. Ct. 2003) (finding that an employer was unable to produce his former attorneys for a deposition even though he was ordered to do so; the better approach would have involved subpoenaing the attorneys).

83. ILL. SUP. CT. R. 218(a)(6).

84. *Compare* ILL. SUP. CT. R. 218 *with* 97 F.R.D. 165, 201–02 (1983) (providing FRCP 16, as amended in 1983, and stating that a court may require that a party or its representative be present or reasonably available by telephone to consider possible settlement of the dispute). *But see Proposed Rules: Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of* Evidence, 137 F.R.D. 53, 85 (1991) (providing a proposal, which was not included in the final 1983 amendment to FRCP 16, to allow a trial court judge to require "insurers" of parties to attend settlement conferences).

85. *See, e.g.*, HAW. CIR. CT. R. 12.1 (prescribing a separate settlement rule).

judicial power to require a party or its representative to be present, or reasonably available by telephone, in order to consider possible settlement. A similar amendment to Rule 218 would reduce confusion and uncertainty, promote uniformity, and facilitate the convenient administration of justice during the settlement process.[86] Further, Rule 218 amendments could eliminate the need for difficult inquiries into inherent authority or reliance on dubious techniques of statutory construction. Finally, a new law could speak to other troubling settlement conference practices extending beyond issues of compelled attendance.

IV. ATTRIBUTES OF A NEW SETTLEMENT CONFERENCE RULE: A GOOD BEGINNING

Whatever the intent, talent, and stamina of those who might craft a new written law, their initial work product likely will not be comprehensive, everlasting, flawless, or facile. However major the initiative, any new lawmaking will likely mark only the beginning efforts to establish better guidelines for civil case settlement conferences and their aftermath. Shortcomings in any new law are inevitable, as there is much to do, only little experience from elsewhere to draw upon, a history of written pretrial conference laws (and civil procedure laws more generally) that are slow to reflect the realities of civil litigation,[87] and, most importantly, the need to integrate any new pretrial conference law with other written laws that also require revision. So how should reformers begin? We suggest that they focus on Illinois Supreme Court Rule 218 and deal with issues best handled within a written pretrial conference rule. And, we urge that they begin in a few arenas of significant practical import: arenas that have already posed, or are likely to pose, serious difficulties for Illinois lawyers and judges due to the absence of written laws and arenas where written laws have proven helpful in, and can serve as models from, other American states.[88]

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86. In other state court rules, as well as in FRCP 16, exercises of inherent powers are guided by written civil procedure laws. *See, e.g.*, ME. CIV. P.R. 66 (a)(1) (establishing "procedures to implement the inherent and statutory powers of the court" to punish contempt).

87. Consider the remarks on judicial rulemaking of Professor Judith Resnik: "National rulemaking . . . frequently represents codification of practice and reflection of change rather than the commencement of newly-minted regimes." Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 157 (1997) (emphasis omitted).

88. Not all written laws operative elsewhere are easily transferable. For example, there is less subject matter jurisdiction authority in the Illinois circuit courts than there is in the federal district courts (essentially diversity or federal question authority, as well as possible supplemental

Rule 218 reformers should eschew changes involving lawyer civil claim settlement authority. While difficulties have arisen in Illinois that can be addressed through new written laws,[89] reform efforts seem best directed at revising the attorney professional conduct standards.[90] Settlement conference issues involving individual judge assignments along with the boundaries of certain judicial conduct[91] also seem better situated in written laws outside Rule 218, including court system management (or judicial administration) laws[92] and judicial conduct laws.[93]

By contrast, several problem areas now seem ripe for Rule 218 reform. They deal with practical matters and engender confusion that would likely dissipate with a newly written law. These arenas include those whose attendance at or participation in pretrial settlement conferences might be compelled or encouraged, the requisite procedures for completing contracts once agreements have been reached at pretrial settlement conferences, and the opportunities for same case enforcement of agreements reached at pretrial settlement conferences.

A. Compelled Attendance

Rule 218 would better promote the "convenient administration of justice" if it expressly authorized trial courts to compel the attendance at settlement conferences of all individuals whose input might be

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authority). Thus, many federal judicial concerns about exercising civil case settlement enforcement jurisdiction do not apply in Illinois. On such federal concerns, see Jeffrey A. Parness & Matthew R. Walker, *Enforcing Settlements in Federal Civil Actions*, 36 IND. L. REV. 33, 56 (2003) (noting case settlement enforcement troubles in federal district courts "including whether there is judicial discretion to refuse requests that future enforcement jurisdiction be retained," as may be appropriate when the federal judges find the underlying agreements are unfair, as well as "whether certain settlement disputes can prompt discretionary refusals of available enforcement jurisdiction," as should often occur when novel or complex issues of state substantive law arise).

89. Suggestions addressing these difficulties appear in Jeffrey A. Parness & Austin W. Bartlett, *The Authority of Illinois Lawyers To Settle Their Clients' Civil Claims: On Principles Not Quite Settled*, 31 LOY. U. CHI. L.J. 199 (2000).

90. These standards appear in article VII of the Illinois Rules of Professional Conduct, with rule 1.2(a) addressing, rather poorly, lawyer civil claim settlement authority. *See* ILL. SUP. CT. RULES OF PROF'L CONDUCT R. 1.2(a).

91. *Compare* Daisy Hurst Floyd, *Can the Judge Do That? The Need for a Clearer Judicial Role in Settlement*, 26 ARIZ. ST. L.J. 45, 88 (1994) (urging that issues of judicial conduct during settlement talks be addressed in FRCP 16), *with* N.D. OKLA. CIV. R. 16.2(c) (mandating that a judge assigned to a case normally shall not preside over a settlement conference).

92. *See, e.g.*, ILL. SUP. CT. R. 21(b) ("General Orders. The chief judge of each circuit may enter general orders in the exercise of his general administrative authority, including orders providing for assignment of judges, general or specialized division, and times and places of holding court.").

93. *See, e.g.*, ILL. SUP. CT. R. 61–76 (comprising the Illinois Code of Judicial Conduct).

necessary for productive negotiations, including parties and nonparties (which should include insurers and lienholders). Rule 218 now explicitly authorizes trial courts to compel the attendance of counsel only.[94] As demonstrated in *Heileman* and *Novak*, such a rule may be read to exclude other interested persons and entities. Yet, because meaningful settlement discussions, at times, can be held only with parties, nonparty insurers, and lienholders present, some circuit courts have taken "self help" measures. This likely has led to inconsistent settlement conference procedures throughout Illinois. A review of some local circuit court rules, as well as a recent survey of Illinois circuit judges, illustrates the use of inconsistent procedures.

At times, trial courts can address problems associated with inadequate written general civil procedure laws through local court rules.[95] In Illinois, under Supreme Court Rule 21, local rules must be consistent with both high court rules and statutes and be "so far as practicable . . . uniform throughout" Illinois.[96] Many Illinois circuit courts have spoken on compelled settlement conference participation in their local rules. Three circuit courts have promulgated local rules that substantially expand the range of those who may be compelled to appear, explicitly allowing, such as in the 17th Circuit, that "parties or their representatives having final settlement authority shall be present or available by telephone at the time of the pretrial conference."[97] Other circuit courts have local rules that expressly provide for compelled attendance at settlement conferences by the parties in marriage dissolution cases.[98] More than half of the circuits have no local rules on judicial authority to compel participation at settlement conferences.[99]

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94. ILL. SUP. CT. R. 218(a) (declaring that "counsel familiar with the case and authorized to act shall appear").

95. ILL. SUP. CT. R. 21(a) (explaining that "[a] majority of the Appellate Court judges in each district and a majority of the circuit judges in each circuit" may adopt rules governing cases that are consistent with state rules).

96. *Id.* Occasionally, circuit court rulemaking on individual subjects is specifically recognized, though the general rulemaking guidelines may still apply. *See, e.g.*, ILL. SUP. CT. R. 218(a).

> Except as provided by local circuit court rule, which on petition of the chief judge of the circuit has been approved by the Supreme Court, the court shall hold a case management conference within 35 days after the parties are at issue and in no event more than 182 days following the filing of the complaint.

Id.

97. ILL. 17TH CIR. CT. R. 11.02(c). The three circuits are the 9th, 14th, and 17th. *See* ILL. 9TH CIR. CT. R. G-17; ILL. 14TH CIR. CT. R. 6.1; ILL. 17TH CIR. CT. R. 11.02(c).

98. *See, e.g.*, ILL. 16TH CIR. CT. R. 15.17(d); ILL. 18TH CIR. CT. R. 15.09(c); ILL. 19TH CIR. CT. R. 11.06, 11.07; *see also* ILL. 10TH CIR. CT. R. app. 1 (2002).

99. *See generally* 3 ILLINOIS COURT RULES AND PROCEDURE, RULES OF THE CIRCUIT COURTS (2002) (collecting the rules of the twenty-one Illinois circuit courts).

Finally, one circuit court rule requires that at a pretrial conference, the attorney for each party "have present in person or immediately available by telephone a representative with authority to discuss and determine each aspect of potential settlement."[100]

While local rules can provide customized solutions for challenges facing particular trial courts, they also can foster inconsistencies and may violate the uniformity requirement of Illinois Supreme Court Rule 21.[101] The divergent approaches to compelled attendance at Illinois circuit court settlement conferences are illustrated further in the results of interviews with six Illinois circuit court judges about settlement conference practices.[102] When the judges were asked whether they ever compelled the attendance at a settlement conference of "someone on behalf of the insurance carrier," five out of the six judges answered yes.[103] The other judge indicated that he may request the attendance of representatives of insurance carriers.[104] At least two of the judges who answered that they compelled attendance by someone on behalf of the insurance carrier work in circuits where local court rules do not authorize expressly the compelled attendance of nonparties.[105]

The different local court rules and the survey results suggest that party and nonparty attendance at settlement conferences likely is approached differently in the Illinois circuit courts. Some circuit judges

100. ILL. 19TH CIR. CT. R. 4.01(a). This rule is distinguishable from the local court rules in force in the 9th, 14th, and 17th circuits in that its language appears to directly compel attendance only of the attorneys for the parties (as consistent with Illinois Supreme Court Rule 218), while compelling participation by parties and nonparties through those attorneys. This rule appears to mirror the approach taken by the *Novak* court, which suggested that the participation of nonparty insurers could be compelled through an order directed at the insured. *In re Novak*, 932 F.2d 1397, 1408 (11th Cir. 1991).

101. The Illinois Supreme Court also held that while circuit courts have "inherent power to enact rules governing the practice and procedure of the business conducted before them," such rules may not "change substantive law or impose additional substantive burdens upon litigants." People *ex rel.* Brazen v. Finley, 519 N.E.2d 898, 901 (Ill. 1988) (citing Kinsley v. Kinsley, 57 N.E.2d 449, 450 (Ill. 1944)). Local compelled-attendance rules for pretrial conferences arguably impose new responsibilities for parties and nonparties, but not additional burdens (in areas where the supreme court does not exercise "sole" rulemaking authority, analyses of "burdens" should differ from settings like *Brazen* where the regulation and discipline of lawyers implicates exclusive rulemaking authority). *Id.*

102. *See* Mark S. Mathewson, *Illinois Judges Speak Out on Settlement Conferences*, 90 ILL. B.J. 604 (2002).

103. *Id.* at 605.

104. *Id.*

105. *Id.* Judge Hollis Webster of DuPage County and Judge Richard Elrod of Cook County both answered that they did compel the attendance at settlement conferences of individuals "on behalf of insurance carriers." *Id.* However, neither circuit court has a local rule that speaks to authority to compel attendance by nonparties.

seemingly compel participation by parties and their representatives in all types of civil actions based upon local court rules. Other circuit judges more likely compel participation of parties in discrete types of cases, such as divorce, specifically addressed in local rules. Yet other circuit judges usually may not compel participation by anyone other than attorneys, as expressly provided in Rule 218, though they may request the appearance of parties or nonparties at settlement conferences if their participation is desired.[106] Other judges may effectuate party and nonparty participation in settlement talks through orders directed at attorneys, an approach suggested in *Novak*. Yet other circuit judges may compel attendance by parties and nonparties at settlement conferences through inherent authority orders comparable to those permitted in *Heileman* and *Novak*.

While we acknowledge that settlement conferences should always be subject to some judicial discretion, we posit that the question of who can be compelled (or invited) to attend settlement conferences is sufficiently fundamental to warrant greater uniformity. A new settlement conference rule that would promote uniformity while recognizing sufficient judicial discretion to facilitate the "convenient administration of justice" could be based on a current Michigan high court rule. The Michigan rule provides that "[i]f the court anticipates meaningful discussion of settlement, the court may direct that the parties to the action, agents of parties, representatives of lienholders, representatives of insurance carriers, or other persons . . . be present at the conference or be immediately available at the time of the conference."[107] Under this rule, for example, a court may compel a party who has not delegated to an attorney settlement authority (as the representative of Joseph Oat failed to do in *Heileman*)[108] to attend a pretrial conference without resorting to troubling questions about inherent authority. Similarly, a court could compel a nonparty insurer who controls settlement for a defendant (such as the claims agent in

106. Such requests (or invitations) are occasionally expressly recognized in written pretrial conference laws. *See, e.g.*, VT. R. CIV. P. 16.3(c)(5) (providing that at a "scheduled alternative dispute resolution session," with the agreement of the parties and the neutral nonparties, interested nonparties "may be invited to attend").

107. MICH. CT. R. 2.401(F). An order to attend or be available is addressed as well in Michigan Court Rule 2.506(A)(2), which allows a subpoena to be issued to a party or to a representative of an insurance carrier for a party for attendance or proximity to "trial." *Cf.* ME. R. CIV. P. 16B(f)(1)(iv) (stating that alternative dispute resolution conference attendees include insurance adjusters and that nonparties, as lienholders, "may be requested to attend").

108. *See supra* notes 45–47 and accompanying text (noting that in *Heileman*, an attorney rather than a corporation representative with authority to settle attended a settlement conference).

Novak)[109] to attend without resorting to a strained interpretation of a written law. In addition, a nonparty lienholder or subrogee whose interest likely will be addressed in any settlement could also be ordered to attend.[110] The adoption in Illinois of the Michigan approach should eliminate the differing (and non-uniform under Rule 21) local court rules and practices.[111]

B. Procedures for Valid Civil Case Settlement Agreements

Rule 218 also could promote the "convenient administration of justice" (as well as desirable and perhaps necessary uniformity) by expressly articulating the procedural requisites for valid settlement agreements in pretrial conference settings. Currently, Illinois precedents indicate that Illinois contract law principles usually govern civil case settlement agreements,[112] whether or not an agreement arose from a private negotiation between the parties or from a settlement conference overseen by a judge.[113] As a result, for communications between parties or their representatives to constitute enforceable contracts at Rule 218 settlement conferences, there must be agreement on all material terms[114] as well as compliance with any statutes of fraud.[115]

While we do not dispute the application of basic contract law principles to civil case settlement agreements arising at pretrial conferences, we do think that such agreements, at times, should warrant different procedures than agreements reached at wholly private

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109. *See supra* notes 68–71 and accompanying text (discussing the facts in *Novak*).

110. A good example of a bad outcome resulting from the fact that a nonparty lienholder was not invited to a pretrial settlement conference appears in *Pratt v. Philbrook*, 38 F. Supp. 2d 63 (D. Mass. 1999), critically reviewed in Parness & Walker, *supra* note 3, at 367–69.

111. Maine recently amended its rule of civil procedure to allow settlement conference attendance orders to be directed to "parties, their insurers and their authorized representatives." *See* ME. R. CIV. P. 16(b). The accompanying 2001 Advisory Committee's Notes say: "Although many judges believe that the court now has the inherent power to compel such attendance, the grant of express authority dispels any possible argument that under the present rule the court may not have the power to compel the attendance of an insurer who is not a party." *Id.*

112. *See, e.g.*, Higbee v. Sentry Ins. Co., 253 F.3d 994, 997–98 (7th Cir. 2001) (applying Illinois contract law to determine whether an attorney had authority to settle a client's claims); Laserage Tech. Corp. v. Laserage Labs., Inc., 972 F.2d 799, 802 (7th Cir. 1992) (applying Illinois contract law to an issue of whether a meeting of the minds occurred as to a settlement agreement).

113. *Laserage Tech. Corp.*, 972 F.2d at 802.

114. *Id.* (noting that Illinois contract law requires an objective meeting of the minds between the parties as to all material terms).

115. Lynch, Inc. v. SamataMason Inc., 279 F.3d 487, 490 (7th Cir. 2002) (applying Illinois law). In his majority opinion, Judge Posner noted that enforcement of oral settlement agreements was the general rule and not something unique to Illinois, though Judge Posner also noted that the general rule has been changed by statute or court rule in some states. *Id.*

meetings. After settlement talks occur, disagreements can arise later as to whether, and under what terms, the parties agreed.[116] When such disputes do arise, there should be differences in the procedures for judicial assessments of any alleged agreements reached at settlement conference meetings and at wholly private meetings. In conference settings, factual determinations often will be based on the recollections of judges,[117] perhaps without much real chance for the presentation of other evidence.[118]

The confusion that can arise when written civil procedure laws fail to guide oral agreements allegedly made at settlement conferences is illustrated by the Seventh Circuit Court of Appeals case of *Lynch, Inc. v. SamataMason Inc.*,[119] a decision, as demonstrated in the next section, that reflects the approach taken by the Illinois Supreme Court. In *Lynch*, a settlement was allegedly reached during a pretrial conference in a copyright infringement suit commenced in an Illinois federal court.[120] The parties and their lawyers appeared before a magistrate judge to talk settlement.[121] No court reporter was present, and there was no transcript.[122] According to the magistrate judge's recollection, the parties "reached an agreement in principle to resolve the litigation" by a written settlement agreement.[123] After the conference, the parties exchanged drafts of the agreement.[124] A few months later, the parties appeared before the judge at a second conference.[125] Again, there was no court reporter and no transcript. [126] According to the judge's

116. *See, e.g.*, *Higbee*, 253 F.3d at 997–1000 (discussing a dispute between parties on whether and under what terms a settlement was reached at a conference presided over by a trial judge).

117. *See, e.g.*, Brewer v. Nat'l R.R. Passenger Corp., 649 N.E.2d 1331, 1333 (Ill. 1995); *Lynch*, 279 F.3d at 489; *cf. Higbee*, 253 F.3d at 997 (involving a judge who made written conclusions of law based on a hearing that included testimony to determine whether settlement had occurred).

118. *See Brewer*, 649 N.E.2d at 1333.

> Within nine days of the dismissal order, defendant moved to enforce its version of the settlement agreement .... At the hearing ... plaintiff's attorney first contended that the issue of plaintiff's resignation was never discussed at the settlement conference. However, the trial judge remembered and found that the issue was discussed and was the basis of defendant's payment to plaintiff.

Id.

119. *Lynch*, 279 F.3d at 489.

120. *Id.*

121. *Id.* (pointing out that the magistrate judge was the one "whom the parties had consented to have preside over the case").

122. *Id.*

123. *Id.* (noting also that the parties did not dispute this recollection).

124. *Id.*

125. *Id.*

126. *Id.*

recollection of the second conference, the parties said that one issue regarding a section of the settlement agreement "remained unresolved."[127] It was agreed that in the event the parties could not thereafter agree on wording for the section, the parties would submit competing versions to the judge, who would determine whether the issue had been settled orally at the second conference, and, if so, "which version accurately reflects the agreement reached."[128] The parties later submitted competing versions, and the judge ruled that the defendant's version was "the one that accurately reflected the agreement that the parties informed him" at the second conference that "they had reached."[129] The judge then directed the parties to execute that version.[130] The plaintiff refused, "whereupon the judge ordered the litigation dismissed with prejudice," but retained enforcement jurisdiction.[131] The plaintiff appealed, arguing that it was not bound by the magistrate judge's recollection of the terms of the oral agreement.[132]

The Seventh Circuit affirmed, effectively finding under Illinois contract law that the plaintiff could be bound by the judge's recollection.[133] For the court, Judge Posner said that an oral agreement at a settlement conference could be "enforceable" and "a proper predicate for dismissals with prejudice."[134] However, he then opined that reliance on the trial judge's memory is a problematic way to establish the settlement terms because "memory is fallible" and "trial judges have a natural desire to see cases settled and off their docket," which may shape their recollections of settlement conferences.[135] He suggested that at the end of the second settlement conference, the magistrate judge "should have called in a court reporter, dictated the terms of the settlement as he understood them, and made sure that the

127. *Id.*

128. *Id.*

129. *Id.* Presumably, this was through an oral agreement at the second conference that was to be placed in a written agreement following the second conference, as the Seventh Circuit looked to the magistrate judge's recollection of events at the second conference. *Id.*

130. *Id.*

131. *Id.* at 489.

132. *Id.*

133. *Id.* at 490–92.

134. *Id.* at 490. It would not be enforceable, for example, if there was a statute of frauds problem. *Id.*

135. *Id.* One example of shaped judicial recollection may be found in *Higbee v. Sentry Ins. Co.*, 253 F.3d 994, 1000 (7th Cir. 2001), in which the court, in deciding a case where the trial judge, facing what "seem[ed] to be a bit of a difficult plaintiff," enforced an oral agreement allegedly made in the judge's presence, held the agreement unenforceable because there was no agreement on all material terms.

parties agreed."[136] Judge Posner declared that this would have provided a "solid, indeed an unimpeachable, basis" for finding a settlement,[137] characterizing this technique as "standard practice" that "should be followed in all cases."[138]

The appellate court expressly declined to remand for an evidentiary hearing where the parties might testify as to their recollections, noting that two years had passed, and the terms of the agreement were "complex" so that the result of a hearing would be unreliable. [139] And, it declined to lay down a flat rule that a settlement arising at a pretrial conference is "void" if a dispute over it "cannot be resolved on the basis of a written record."[140] Judge Posner reasoned that when the parties failed to request that the culmination of settlement talks be placed on the record or in writing, they "assumed the risk" that the judge would recollect the conclusion differently than they did, and they must "live with the consequences."[141]

In *Lynch*, the failure of the trial judge to record the settlement in some way led to conflict, additional litigation that spanned over two years, and a resolution based upon a trial judge's recollection of settlement talks that had occurred two weeks earlier.[142] Litigants who participate in settlement conferences should not be responsible for ensuring that adequate procedural techniques are used to record agreements. Nor should litigants who participate in settlement conferences with judges who do not use "standard" practices be deemed to have "assumed the risk" of faulty judicial recollections.

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136. *Lynch*, 229 F.3d at 490.

137. *Id.* at 490–91. Even here, however, there can be problems, such as when a trial judge's recitation of an alleged oral agreement "in open court" contained inconsistent language and each side "heard only what it wanted to hear." Therma-Scan, Inc. v. Thermoscan, Inc., 217 F.3d 414, 420 (6th Cir. 2000) (permitting no enforcement since no settlement was reached).

138. *Lynch*, 279 F.3d at 491.

139. *Id.*

140. *Id.* The Seventh Circuit found support in a Second Circuit decision, *Monaghan v. SZS 33 Assocs.*, 73 F.3d 1276, 1282–83 (2d Cir. 1996). The Seventh Circuit agreed with the Second Circuit, stating "that if neither party asks that any part of the discussion be recorded, the judge's failure to insist that a settlement reached in such a discussion be recorded does not invalidate the settlement." *Lynch*, 279 F.3d at 491. Yet, in *Monaghan*, while the oral agreement was not made the subject of "a contemporaneous record," there was "substantial compliance" with a state statutory requirement on recording. *Monaghan*, 73 F.3d at 1283. The compliance occurred through a recognized oral agreement in "open court," as later trial court oral decisions, which had been transcribed, provided the details of the earlier oral agreement and no objections were raised to judicial recollections (though there were objections to enforcement founded on the argument that the oral pact did not resolve all material terms of the settlement). *Id.*

141. *Lynch*, 279 F.3d at 491.

142. *Id.* at 489.

A rule establishing that pretrial conference settlements that "cannot be resolved on the basis of a written record" are "void" in any same case enforcement settings would eliminate the need for reliance on judicial recollections.[143] One such rule operates in Texas, where Civil Procedure Rule 11 states: "Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record." [144] The Texas rule, of course, goes beyond pretrial conference settlement agreements and touches all agreements during civil litigation.[145] A more limited rule on "written record" agreements, which governs only civil case settlement agreements, operates in Louisiana, where the Louisiana Civil Code says that such an agreement

> must either be reduced into writing or recited in open court and capable of being transcribed from the record of the proceeding. The agreement recited in open court and capable of being transcribed from the record confers upon each of them the right of judicially enforcing its performance, although its substance may hereafter be written in a more convenient form.[146]

These two rules do not ban all oral agreements settling pending civil cases. They simply ensure that if same case enforcement is sought later, judicial recollections of settlement talks will not be solicited from the very judges who will then enforce any agreements they remembered. As well, any contempt proceedings more typically will involve only clearly mandated duties.

While there can be significant debate over the wisdom of a rule requiring that all civil case settlements, including those arranged privately, be in some form of writing,[147] the need for a more limited

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143. *Id.* at 491; *cf.* Evergreen Marine Corp. v. Div. Sales, Inc., No. 01C4933, 2003 WL 1127905, at *3 (N.D. Ill. Mar. 12, 2003) (finding that where lawyers and judges are witnesses to oral contracts sought to be enforced, it is "a factor which is far from insignificant" and that "if the judge's testimony is required, recusal is likely to be necessary"); ILL. SUP. CT. R. 63(C)(1)(a) (stating that a judicial disqualification is appropriate where the "judge has . . . personal knowledge of disputed evidentiary facts concerning the proceeding").

144. TEX. R. CIV. PROC. 11.

145. *See* Kennedy v. Hyde, 682 S.W.2d 525, 528 (Tex. 1984).

146. LA. CIV. CODE ANN. art. 3071 (West 2002).

147. Lynch v. SamataMason Inc., 279 F.3d 487, 491 (7th Cir. 2002). Judge Posner argued that such a rule would be "inconsistent with the premises of an adversarial system of justice." *Id.* at 491. He supported this contention by pointing out that "[n]o one supposes that there is any impropriety in a judge conducting settlement discussions off the record." *Id.* Judge Posner further stated that the Court Reporter's Act, 28 U.S.C. § 753(b), specified what proceedings must be on the record and does not require that settlement conferences be on the record. *Id.* However, this reasoning does not appear to address the distinction between putting all settlement conferences on the record and the separate practice of recording any agreements that are made

rule to govern in cases like *Lynch* is more easily justified. Rule 218 should be amended to require the "standard practice," demanding that trial judges recite settlement conference agreements in the presence of a court reporter, assuming no written contract. Such an amendment would reduce postjudgment adversarial conflicts and provide desirable uniformity. It would facilitate justice between the parties, maintain the necessary informality of pretrial settlement conferences, and continue to recognize that oral settlements privately reached between parties may be enforced in new civil actions.

C. Same Case Enforcement

Whether arising from private talks or settlement conferences, agreements resolving civil cases in Illinois circuit courts may be enforced by judges in those very same cases (same case enforcement) or in new civil cases (later case enforcement). Same case enforcement is usually available only where there is an express retention of enforcement jurisdiction or the incorporation of the agreement in a court order. There should also exist discretionary factors that favor enforcement. Unfortunately, such guidelines are not well understood in Illinois, in part because they are not articulated expressly in Rule 218 (or in any other general written civil procedure law). Rule 218 amendments better describing standard enforcement practices are necessary, as they would promote the "convenient administration of justice."[148] Unfortunately, a leading Illinois case, *Brewer v. National Railroad Passenger Corp.*, provides little help and, in fact, prompts confusion.[149]

In *Brewer*, Chester Brewer sued his employer, the National Railroad Passenger Corporation (also known as Amtrak), for injuries suffered during employment.[150] The trial court held a pretrial settlement conference attended by the attorneys for both parties as well as by Amtrak's claims agent.[151] Brewer was not in chambers during the settlement talks.[152] However, he and his wife were then in the courthouse.[153] At the conference, the attorneys purportedly agreed on a

between the parties at the end of settlement agreements, a practice that Judge Posner stated "should be followed in all cases." *Id.*

148. 735 ILL. COMP. STAT. 5/1-104 (2002).

149. Brewer v. Nat'l R.R. Passenger Corp., 649 N.E.2d 1331 (Ill. 1995).

150. *Id.* at 1332.

151. *Id.*

152. *Id.*

153. *Id.*

settlement.[154] The trial judge later dismissed the lawsuit with prejudice based, in part, on this oral agreement.[155] The agreement called for Amtrak to pay Brewer $250,000, plus an additional $50,000 in the event that he underwent surgery within six months of dismissal.[156] These terms were "incorporated" into the dismissal order.[157] The parties later disagreed, however, on an unincorporated term of the oral agreement encompassing additional duties for Brewer.[158] Amtrak and its claims agent alleged that Brewer's attorney had also agreed on Brewer's behalf at the conference that Brewer would quit his job with Amtrak; however, Brewer's attorney denied this.[159] No indication that Brewer would quit his job appeared in the dismissal order.[160] Within nine days of dismissal, Amtrak moved to enforce its version of the settlement,[161] including job termination. Brewer thereafter moved to vacate the dismissal.[162] The trial judge stated that he remembered that the issue of Brewer's resignation "was discussed" at the settlement conference and that Brewer's resignation formed a part of "the basis of defendant's payment to plaintiff."[163] The trial judge therefore granted Amtrak's motion to enforce and ordered Brewer to quit his job.[164] An appellate court affirmed these decisions.[165]

The Illinois Supreme Court reversed, finding that Brewer had never authorized his attorney to agree that he would quit his job.[166] Yet, the court strongly suggested that had the settlement authority of Brewer's attorney been established, same case enforcement then would have been available to Amtrak. For this suggestion, the court cited to two Illinois

154. *Id.* at 1332–33.

155. *See id.* This portion of the oral agreement was also later memorialized in a written court record, encompassing a transcript of an in-court proceeding at which this portion was recited.

156. *Id.* at 1332.

157. *Id.* at 1333 ("The trial judge personally spoke to plaintiff prior to dismissing the lawsuit. However, the judge did not remember specifically mentioning the resignation issue.").

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* Brewer sought to vacate under what is now section 5/2-1203 in chapter 735 of the Illinois Compiled Statutes. *Id.*

163. *Brewer*, 649 N.E.2d at 1333 ("The trial judge did not make any findings of fact or rely on any evidence.").

164. *Id.*

165. Brewer v. Nat'l R.R. Passenger Corp., 628 N.E.2d 331, 335 (Ill. App. Ct. 1st Dist. 1993), *rev'd*, 649 N.E.2d 1331 (Ill. 1995)

166. *Brewer*, 649 N.E.2d at 1333. The supreme court's conclusion on this issue has been the subject of some debate. For an extensive review of *Brewer's* impact on the issue of attorney-client relations and the authority of attorneys to settle claims on behalf of their clients in Illinois, see Parness & Bartlett, *supra* note 89, at 201–17.

appellate court precedents, *McAllister v. Hayes*[167] and *Sheffield Poly-Glaz, Inc. v. Humboldt Glass Co.*[168] The court stated: "A trial court has the power to enforce a settlement agreement entered into by the parties while the suit is pending before the court."[169] The *Brewer* court seemingly deemed the suit still pending because Brewer had moved to vacate the judgment based on the purported settlement within thirty days of entry of judgment, even though that motion followed the request by Amtrak for same case enforcement.[170] *Brewer* was not a "standard practice" same case enforcement scenario. Standard practice does not involve a later motion to vacate a judgment. Additionally, enforcement often occurs more than a month after a judgment is entered. Moreover, the party wanting jurisdiction to be exercised usually wants the alleged settlement enforced. What should be the "standard practice" for same case enforcement? Is it appropriate for inclusion in an amended Rule 218? And, are *McAllister* and *Sheffield*, if not *Brewer*, instructive?

In *McAllister*, an appellate court relied on *Sheffield* for the proposition that "[a] trial court has the power, under certain circumstances, to summarily enforce a settlement agreement entered into by the parties while their suit is pending before it."[171] The relevant oral agreement, reached privately, had been made more than five months before the defendant sought same case enforcement and seemingly before the defendant paid to the plaintiff any of the money indicated in the agreement.[172] The *McAllister* proposition on enforcement was not crucial to the result in the case, however, as the alleged oral agreement was made on behalf of the plaintiff by her attorney, whom the appellate court found had no settlement authority.[173] As well, unlike *Brewer*, the trial court in *McAllister* had never entered a

167. McAllister v. Hayes, 519 N.E.2d 71 (Ill. App. Ct. 3rd Dist. 1988).

168. Sheffield Poly-Glaz, Inc. v. Humboldt Glass Co., 356 N.E.2d 837 (Ill. App. Ct. 1st Dist. 1976).

169. *Brewer*, 649 N.E.2d at 1333. Only *Sheffield* was cited by the appellate court in *Brewer*. *Brewer*, 628 N.E.2d at 334. The appellate court, however, cited two other Illinois cases: *Brigando v. Republic Steel Corp.*, 536 N.E.2d 778 (Ill. App. Ct. 1st Dist. 1989), and *Hopkins v. Holt*, 551 N.E.2d 400 (Ill. App. Ct. 1st Dist. 1990) (citing *Brigando* with approval). *Brewer*, 628 N.E.2d at 334. The *Brigando* holding that trial courts generally lack same case judicial enforcement powers for earlier settlements was deemed inapplicable in both *Brewer* decisions because Chester Brewer's postjudgment motion to vacate was deemed to open the door to enforcement jurisdiction, since the vacating and enforcing requests involved the same oral agreement. *Brewer*, 649 N.E.2d at 1333; *Brewer*, 628 N.E.2d at 334–35.

170. *Brewer*, 649 N.E.2d at 1333 ("Plaintiff's timely section 2-1203 motion properly brought before the trial court the issue of the settlement agreement's validity.").

171. *McAllister*, 519 N.E.2d at 72.

172. *Id.*

173. *Id.* at 72–73.

judgment so that the case always had remained "pending."[174] And, unlike *Brewer*, the alleged agreement in *McAllister* seemingly was not made during a pretrial settlement conference and in the presence of the trial judge.[175] Surely, *McAllister* was not the usual scenario for same case enforcement.

Nor did the earlier ruling in *Sheffield* involve "standard practice." There, an appellate court affirmed a trial judge's enforcement of an oral agreement.[176] The oral agreement was made in the presence of the trial judge, with no court reporter present, accompanied by an expectation that a dismissal order founded on the agreement would be submitted later by the parties and then entered by the court.[177] Such an order was never entered, however, because the defendant and its lawyer realized shortly after reaching the oral agreement that the defendant company's president "had not understood the terms of the settlement,"[178] which caused the defendant to seek to avoid compliance.[179] Sometime later, upon a hearing, the trial judge granted the plaintiff's motion for the entry of "judgment in accordance with the oral settlement agreement"[180] because the judge recalled the same settlement terms as the plaintiff.[181] The appellate court agreed that there was a "binding enforceable agreement"[182] that could be enforced as the suit was still "pending."[183]

Unlike *Brewer*, neither *McAllister* nor *Sheffield* contained a judgment where same case enforcement of a purported settlement agreement was sought. The court in *Brewer* did not address this difference, though it is crucial. Judgments end cases at the trial level, though trial courts have the authority to vacate or modify those judgments under certain circumstances. However, such authority to vacate or modify should differ fundamentally from authority to assess settlement pacts and to undertake their enforcement. Only in judgment alteration settings are the civil claims that prompted the litigation typically at issue. While authority to alter judgments usually must be exercised when the statutory or rule requisites are met, enforcement is far more

174. *Id.* at 72.

175. *Id.* at 71.

176. Sheffield Poly-Glaz, Inc. v. Humboldt Glass Co., 356 N.E.2d 837, 871 (Ill. App. Ct. 1st Dist. 1976).

177. *Id.* at 839.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 841 (rejecting the argument that enforcement was barred due to the president's misunderstanding).

183. *Id.* at 841–42.

discretionary. In cases like *Brewer*, postjudgment enforcement jurisdiction would have been better exercised by a trial judge who was not a witness to key events. Such a new judge could have been secured through a disqualification of the first judge during the motion to vacate proceedings in the original suit or, preferably, through a commencement of a new lawsuit prompted by a discretionary determination not to exercise any same case enforcement jurisdiction.

More generally (and more often), there is no second lawsuit for settlement contract breach but rather same case enforcement of an earlier civil claim settlement in only two settings, neither of which involves a motion to vacate or modify a judgment prompted by a settlement. The settings are described in an Illinois appellate case that was not cited in either *Brewer* opinion: *American Society of Lubrication Engineers v. Roetheli.* In *Roetheli*, the court stated:

> Generally, where the court enters an agreed dismissal order based on a settlement reached by the parties without the court participating and the defendant refuses to pay, the plaintiff must file a separate lawsuit for breach of contract. Here, however, the settlement was reached at a pre-trial conference with the judge participating, a procedure governed by Rule 218. Further, the court in the present case, unlike the court in *Brigando* and the cases cited in its footnote, retained jurisdiction for the precise purpose of enforcing the settlement.[184]

This is "standard practice." Similar circumstances prompt possible same case enforcement jurisdiction in the federal district courts.[185] In *Kokkonen v. Guardian Life Insurance Co. of America*, the U.S. Supreme Court sustained such jurisdiction where the settlement terms were "made part of the order of dismissal,"[186] either by express judicial retention of jurisdiction over the settlement or by incorporation of the settlement terms in the dismissal order.[187] Under *Roetheli* and *Kokkonen*, it would have been better for the *Brewer* circuit judge to look to a second suit for enforcement of the job-quitting contract term, as that term was neither incorporated in the dismissal order nor subject to jurisdiction retention. Had there been a dispute in *Brewer* about the monetary payout, then perhaps to serve judicial efficiency, any settlement term involving the job, per judicial discretion, should have

184. Am. Soc'y of Lubrication Eng'rs v. Roetheli, 621 N.E.2d 30, 34 (Ill. App. Ct. 1993) (citations omitted).

185. Parness & Bartlett, *supra* note 89, at 224. Similar circumstances also underlie same case enforcement jurisdiction in many American state courts. *See, e.g.*, Paulucci v. Gen. Dynamics Corp., 842 So. 2d 797 (Fla. 2003) (holding that there are circumstances in which it is appropriate for judges to enter enforcement agreements as part of the settlement process).

186. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 381 (1994).

187. *Id.*

been subject to same case enforcement. Of course, to avoid such issues of partial same case enforcement, the *Brewer* trial judge could have either incorporated all of the settlement terms or none of them (or retained enforcement jurisdiction over all future contract disputes, or over none).

A Rule 218 amendment containing the *Roetheli* principles seems in order. A change could be modeled after a rule now in place in California that says

> [i]f parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.[188]

Such an amendment would cover both validity and enforcement issues. It allows parties significant decision making powers regarding any later disputes. If the parties choose not to provide for same case enforcement, they could anticipate the potential additional expense (and delay) associated with second lawsuits, though they also may maintain, at least for the time being, the secrecy of their agreements. Conversely, if the parties request same case enforcement, they invite summary dispute resolutions. A rule amendment should, however, leave trial judges with some discretion on whether to permit possible same case enforcement and whether to exercise such jurisdiction when asked.[189]

V. CONCLUSION

Written civil procedure laws on pretrial conferences in civil actions in Illinois trial courts historically have spoken chiefly to trial preparation. More recently, such laws have recognized explicitly case management and settlement objectives. Trial preparation and case management conference procedures are described better in Illinois Supreme Court Rules and understood better in the legal community. Comparable guidelines and understanding of settlement conference procedures are

188. CAL. CIV. PROC. CODE § 664.6 (West 2002).

189. A court may choose to decline possible same case enforcement jurisdiction for a number of reasons, including possible contract illegality and the prospect that an enforcement proceeding would likely present issues better resolved after there has been an opportunity for a full trial on the merits before a new judge. A court may further choose to decline to exercise same case enforcement jurisdiction after an alleged breach for a number of reasons, including the prospect of significant first impression substantive state-law contract issues arising under the laws of another state. *See, e.g.*, Parness & Walker, *supra* note 88, at 52–54 (discussing comparable discretionary factors for same case enforcement jurisdiction in the federal district courts).

lacking. Confusion has arisen in several areas of significant practical import, including judicially compelled and invited participation in settlement conference talks, procedural requisites for enforceable agreements arising during such talks, and same and later case enforcement jurisdiction.

Amendments to Illinois Supreme Court Rule 218 addressing settlement conferencing and its aftermath would promote the more "convenient administration of justice" in the Illinois circuit courts. In particular, lawmakers should consider possible changes that speak to compelled and invited attendance, the procedural requisites necessary for valid contracts, and same and later case enforcement of settlement contracts. Fortunately, there are good models available from other American states. Amendments to Rule 218 should not alter dramatically current Illinois court practices, but rather would clarify and unify settlement conference procedures.