

**AMERICAN BAR ASSOCIATION
CPR POLICY IMPLEMENTATION COMMITTEE**

COMPARISON OF ABA MODEL JUDICIAL CODE AND STATE VARIATIONS

| RULE 2.6 Ensuring the Right to Be Heard | |
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| | <p>(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law.*</p> <p>(B) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.</p> <p>COMMENT</p> <p>[1] The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.</p> <p>[2] The judge plays an important role in overseeing the settlement of disputes, but should be careful that efforts to further settlement do not undermine any party’s right to be heard according to law. The judge should keep in mind the effect that the judge’s participation in settlement discussions may have, not only on the judge’s own views of the case, but also on the perceptions of the lawyers and the parties if the case remains with the judge after settlement efforts are unsuccessful. Among the factors that a judge should consider when deciding upon an appropriate settlement practice for a case are (1) whether the parties have requested or voluntarily consented to a certain level of participation by the judge in settlement discussions, (2) whether the parties and their counsel are relatively sophisticated in legal matters, (3) whether the case will be tried by the judge or a jury, (4) whether the parties participate with their counsel in settlement discussions, (5) whether any parties are unrepresented by counsel, and (6) whether the matter is civil or criminal.</p> <p>[3] Judges must be mindful of the effect settlement discussions can have, not only on their objectivity and impartiality, but also on the appearance of their objectivity and impartiality. Despite a judge’s best efforts, there may be instances when information obtained during settlement discussions could influence a judge’s decision making during trial, and, in such instances, the judge should consider whether disqualification may be appropriate. See Rule 2.11(A)(1).</p> <p>Thirteen (13) states have identical language (AR, CT, IN, IA, MN, MO, MS, MT, NV, NY, OH, OK, WY)</p> <p>Eleven (11) states have similar language (AZ, CO, DE, HI, KS, MD, NE, NH, TN, UT, WA)</p> |
| AL | |
| AK | |
| AZ Effective 9/1/09 | <p>(B): deletes “act in a manner that”</p> <p>[2]: adds “or is on appellate review” to end of (3) and adds “(7) whether the judge involved in the settlement discussions will also be involved in the decision on the merits” to end</p> <p>[3]: adds “or on appeal” after “trial”</p> |
| AR Effective 7/1/09 | Identical |
| CA (as pro- posed) | CA Canon 3B(12), Commentary and Canons 3B(7) and (8): Like MC, the proposed canon and commentary would permit the settlement practice but would caution judges about not appearing to be coercive and emphasize the need to remain impartial. |
| CO Effective | Adds Comment [2]: <i>The steps that are permissible in ensuring a self-represented litigant’s right to be heard according to law include but are not limited to liberally construing pleadings;</i> |

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| 7/1/10 | <i>providing brief information about the proceeding and evidentiary and foundational requirements; modifying the traditional order of taking evidence; attempting to make legal concepts understandable; explaining the basis for a ruling; and making referrals to any resources available to assist the litigant in preparation of the case. Self-represented litigants are still required to comply with the same substantive law and procedural requirements as represented litigants.</i> [3]: Identical to Model Rule Comment [2] [4]: Identical to Model Rule Comment [3] |
| CT Effective 1/1/2011 | Identical |
| DE Effective 11/1/08 | (A) and (B): replaces “shall” with “should” [1]: same as last sentence of 1990 Model Code Canon 3B(8) Commentary first paragraph Deletes [2] and [3] |
| DC | |
| FL | |
| HI Effective 1/1/09 | (B): replaces “parties to a proceeding and their lawyers to settle matters in dispute” with “settlement of disputed matters in a proceeding” [2]: adds “and, if by a judge, whether he or she will be the settlement judge or another judge” to end of (3) [3]: adds “or recusal” after “disqualification |
| ID | |
| IL | |
| IN Effective 1/1/09 | Identical |
| IA Effective 5/3/10 | Identical |
| KS Effective 3/1/09 | (B): adds “But see Rule 2.11 Disqualification” to end Deletes [2] and [3] |
| KY | |
| MD Effective 7/1/10 | Adds new State Rule Comment [2]: <i>Increasingly, judges have before them self-represented litigants whose lack of knowledge about the law and about judicial procedures and requirements may inhibit their ability to be heard effectively. A judge's obligation under Rule 2.2 to remain fair and impartial does not preclude the judge from making reasonable accommodations to protect a self-represented litigant's right to be heard, so long as those accommodations do not give the self-represented litigant an unfair advantage. This Rule does not require a judge to make any particular accommodation.</i> [3] Similar to Model Rule Comment [2]: Adds sentence at beginning, “Settlement conferences and referrals to alternative dispute resolution may play an important role in the administration of justice.” Deletes sentence “The judge should keep in mind... unsuccessful” to end; changes numbering (1)-(6) to (a)-(f); replaces “un-represented by counsel” of (5) with (e): “self-represented”; replaces wording of (6) with (f): “the nature of the proceeding”. Adds [4]: “Judges must be mindful of the effect settlement discussions can have, not only on their |

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| | <i>objectivity and impartiality, but also on the appearance of their objectivity and impartiality. A judge should keep in mind the effect that the judge's participation in settlement discussions may have on both the judge's own views of the case and the perceptions of the lawyers and the parties if the case remains with the judge after settlement efforts are unsuccessful. Despite a judge's best efforts, there may be instances when information obtained during settlement discussions could influence a judge's decision making during trial, and, in such instances, the judge should consider whether disqualification may be appropriate.”</i> See Rule 2.11 (a)(1). |
| MA | |
| MI | |
| MN Effective 7/1/09 | Identical |
| MO Effective 1/1/2012 | Identical |
| MS (as pro- posed) | Identical |
| MT Effective 1/1/09 | Identical |
| NE Effective 1/1/2011 | Adds [4]: <i>Mediation, which is court ordered according to law, does not constitute coercion within the meaning of this rule.</i> |
| NV Effective 1/19/10 | Almost identical, but removes “whether” after “practice for a case” and instead adds at the beginning of each item in the following list. |
| NH Effective 4/1/2011 | Adds [4]: <i>Court-ordered meditation is not considered coercion.</i> |
| NJ | |
| NM (as pro- posed) | [2] Deletes first half of the first sentence and starts with: “ A judge should be careful...;” Deletes the rest of the text starting with: “Among the factors that a judge should consider...is civil or criminal.” [3] Changes reference to corresponding Rule 21-211(A)(1) NMRA. |
| NY (as pro- posed) | Same as Model Code |
| NC | |
| ND (as pro- posed) | Identical |

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| OH Effective 3/1/09 | Identical Comments: Adds [1A]: <i>The rapid growth in litigation involving self-represented litigants and increasing awareness of the significance of the role of the courts in promoting access to justice have led to additional flexibility by judges and other court officials in order to facilitate a self-represented litigant's ability to be heard. By way of illustration, individual judges have found the following affirmative, nonprejudicial steps helpful in this regard: (1) providing brief information about the proceeding and evidentiary and foundational requirements; (2) modifying the traditional order of taking evidence; (3) refraining from using legal jargon; (4) explaining the basis for a ruling; and (5) making referrals to any resources available to assist the litigant in the preparation of the case.</i> |
| OK Effective 4/15/2011 | Identical |
| OR | |
| PA | |
| SD | |
| TN (as pro- posed) | (B) <i>A judge may encourage settlement of disputed matters in a proceeding but shall not act in a manner that coerces any party into settlement. A judge who participates in a judicial settlement conference shall not preside over the trial.</i> [2]: Replaces “The judge plays an important role....” to “...after settlement efforts are unsuccessful” with sentence “ <i>If a judge participates in the settlement of disputes, he or she should be careful that efforts to further settlement do not undermine any party’s right to be heard according to law.</i> ” [3]: <i>Information obtained by a judge during a judicial settlement conference is not subject to the safeguards of the rules of evidence and procedure and may place the trial judge in an untenable position as to the motions for new trial; judgment notwithstanding the verdict; additurs and remitturs: credibility determinations; or other issues in which the judge may not be able to ignore facts that he or she learned during the settlement proceeding. Therefore, it is not appropriate for the same judge to participate in a judicial settlement conference and, if such proceeding does not result in the resolution of the matter, to subsequently preside over the trial of the same matter or participate in other contested matters. See also Rule 2.11(A)(6).</i> |
| TX | |
| UT Effective 4/1/10 | [2]: replaces “The judges plays an important role in overseeing” with “If a judge participates in;” deletes “but” in second clause of first sentence and adds instead “the judge.” |
| VT | |
| VA | |
| WA Effective 1/1/11 | (B) State Code adds to beginning of paragraph, “Consistent with controlling court rules.” |
| WV | |
| WI | |
| WY Effective 7/1/09 | Identical |

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