

Rule 2.09(a)(4)

Ex Parte Communications:

Professor Jeffrey A. Parness

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Professor Parness responds to the Commission's request for comments on the role of judges in encouraging parties to settle and offers comment on Rule 2.09(a)(4) (separate conferencing, with the consent of the parties, in an effort to settle pending matters).

- ***Role of judges in settlement:*** Professor Parness asks the Commission to reconsider placing much mention of particular settlement conferencing issues in the revised Code of Judicial Conduct. While Professor Parness recognizes the need for written guidelines for judicial efforts to facilitate civil case settlements, he believes such guidelines should be established in written civil procedure laws, rather than in a judicial conduct code. More appropriate would be a reference in the Code to general settlement facilitation responsibilities, perhaps in Rule 2.02 (recognizing that while there is a “duty to decide,” and a prohibition on coercing settlement, the decisional duty is not inconsistent with, and is usually accompanied by, a settlement facilitation duty where the parties – and others – are open to the possibility of dispute resolution without trial).
- ***Rule 2.09(a)(4):*** Professor Parness offers the following comments:
 - ▶ The rationale for eliminating language in present Canon 3B(7)(d) on efforts to “mediate” is unclear.
 - ▶ The implication in proposed Rule 2.09(a) and current Canon 3B(7)(d) that “the consent of the parties” should be a prerequisite to all ex parte communications concerning settlements is not clear, at least where the settlement conference judge will not be the trial judge if a trial follows.
 - ▶ The proposal on settlement efforts that is limited to “matters pending before the judge” does not square with the fact that federal and state trial judges often help settle (and mediate) matters that are or may not be subject to adjudication.