

**PROPOSED ADDITION TO THE ABA MODEL CODE OF JUDICIAL CONDUCT  
submitted by the ABA Section of Dispute Resolution, February 4, 2005**

In the 2004 Edition of the Model Code of Judicial Conduct, insert a new paragraph "C" in Canon 3 entitled "Settlement Responsibilities" between "Adjudicative Responsibilities" and "Administrative Responsibilities" and re-designate currently titled paragraphs "C", "D", and "E" as "D. Administrative Responsibilities", "E. Disciplinary Responsibilities", and "F. Disqualification", respectively.

**C. Settlement Responsibilities.**

(1) 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 a party into settlement.

(2) Ordinarily, a judge should not conduct a settlement conference or a mediation in a case in which the judge will serve as the adjudicator of the merits of the case.

(3) If a judge orders parties to a dispute and their lawyers to participate in a settlement conference, mediation, or other alternative dispute resolution ("ADR") mechanism privately or pursuant to a court-mandated ADR program, the parties and lawyers should have clear and objective descriptions of reasonable expectations for their participation in the settlement activity. If those expectations are not already defined in a standing order, court rule, statute, or other published directive, the judge should state them clearly in a written order.

(4) If a judge has jurisdiction over a case subject to a requirement for good-faith participation in mediation, a judge should impose sanctions against a party or a party's lawyer for failure to participate in good faith in a settlement conference, mediation, or other ADR mechanism ordered by the judge, or by standing order, court rule or statute, only if the judge has determined that the party or the party's lawyer has violated a clearly and objectively defined requirement or requirements for participation as set forth in a specific order of the judge, a standing order, court rule, statute, or other published directive.

(5) Unless otherwise authorized by standing order, court rule, statute, or other published directive, a judge ordinarily should not require a neutral, appointed by the judge or through a court-sponsored program, or privately retained by the parties and their lawyers, to provide an oral, written, or testimonial post-mediation report that contains confidential or privileged information. Ordinarily, the contents of a post-mediation report should be limited to: whether the mediation occurred or has terminated, whether a settlement was reached, and the identity of the persons in attendance.

(6) Judges should cooperate with stakeholders, such as court administrators, lawyers, mediators, and especially the users of court-sponsored mediation and other ADR programs, to adopt procedures to minimize foreseeable abuses of mediation and to educate these stakeholders on ways to productively participate in such court-sponsored ADR programs.

**Commentary:**

Section 3C(1) recognizes that the U.S. Constitution and, presumably, the constitutions and statutes of every state guarantee citizens the right to a court trial, including the right to a jury in most cases. While public policy favoring private resolution of disputes together with principles of sound and efficient judicial administration would support requirements to maximize the use and effect of court-ordered mediation or other forms of court-ordered ADR, those two factors do not trump the constitutional and statutory rights of citizens to have their cases heard and decided in court. Settlements coerced by judges undermine litigants' right to a court trial, engender in litigants distrust of settlement processes, and foster disrespect for the court system in general.

When conducting settlement conferences or mediations, particularly when caucusing (i.e., ex parte conversations with parties and/or litigants) is used, judges become aware of parties' confidential information to which they would not be privy, had they not conducted the settlement activity. If the parties do not settle and the judge later tries the case, this confidential information is often difficult for the judge to separate from evidence that the judge hears when adjudicating the merits of a case. The result is that, often, the confidential information serves to bias the adjudicating judge in favor of or against one or more of the parties to the dispute, thus compromising the integrity of the adjudication process. Section 3C(2) recognizes these facts, and additionally counsels against the settlement judge being the adjudicating judge. The word "ordinarily" recognizes that there may be instances where this section should not apply. For example, there may be situations where a jurisdiction may have only a single judge and/or where the parties, having been fully informed of the possible consequences of having one judge serve in both the settlement and adjudication role, nonetheless jointly agree to such procedure.

Sections 3C(3) and (4) address the settlement responsibilities of the judge in the context of a judge- or court-ordered ADR process, or even a privately conducted settlement process in a litigated case. These sections respectively define: (1) the individual judge's duty of providing the parties and lawyers notice of the specific nature and type of party and lawyer participation that the judge reasonably expects to occur; and (2) the duty of the judge to limit the imposition of sanctions regarding so called "good faith" participation only to situations where the judge has determined that the party or the party's lawyer has violated a clearly and objectively defined requirement or requirements for participation. Requirements that litigants or lawyers participate in mediation in good faith create serious risks of ethical violations due to excessive or inappropriate pressure to settle. Thus, judges should avoid creating broad or subjective good faith requirements. If a judge is operating under a rule imposing a good faith requirement, the requirement should be interpreted to apply only in a narrow class of situations, in which sanctionable behavior was defined in advance and entailed only objectively-determinable conduct. In a narrow class of situations, court sanctions are appropriate for violation of rules specifying objectively-determinable conduct. Such rule-proscribed conduct includes but is not limited to: failure of a party, attorney, or insurance representative to attend a court-mandated mediation for a limited and specified period; or to provide written memoranda prior to the mediations. Rules and statutes that permit courts to sanction a wide range of subjective behavior create a grave risk of undermining core values of settlement processes and creating unintended problems. Such subjective behaviors include but are not limited to: a failure to engage sufficiently in substantive bargaining; failure to have a representative present at the court-mandated mediation with sufficient settlement authority; or failure to make a reasonable offer. Giving judges and courts such broad authority to sanction these and other similar types of subjective behaviors does not provide participants with clear understandings about what behavior is sanctionable, may cause participants to refrain from legitimate behavior in settlement processes, may create uncertainties about what communications would be confidential, and can actually stimulate inappropriate conduct by participants and neutrals. Ambiguity arising out of subjective "bad faith" conduct is likely to spawn extensive satellite litigation, thus defeating three primary purposes of the court-mandated mediation programs – to reduce docket congestion, to aid effective judicial administration, and to promote productive negotiation.

Confidentiality during a court-mandated mediation or other ADR process session is essential to the integrity of the settlement process. Section 3C(5) recognizes that, to be effective, a neutral must have the trust of all participants, both in joint sessions and in private caucuses. Requiring neutrals to report negotiating behaviors or alleged bad-faith conduct to the court imperils the confidentiality of the mediation process and the public's trust in it. Neutrals, court-employed or private, should not be required to report to the judge or court administrators whether parties participated in good faith. A negative report to a court from a mediator can cause a party to face the wrath of the court in the form of a tarnished reputation, adverse rulings, or the imposition of actual sanctions. In a sanctions hearing on allegations of a party's bad-faith conduct in the settlement process the neutral is typically subpoenaed to testify, thereby further breaching the

confidentiality of the settlement process. The lack of confidentiality protection creates uncertainty, engenders distrust of the settlement process, and impairs the public's full use of the process. It should be noted that some states (e.g. California) have statutes that prevent mediators from formally testifying or providing written reports beyond a check of settlement outcome and attendees.

Section 3C(6) counsels that judges whose courts administer mandatory settlement programs can prevent or minimize problems of parties' or lawyers' bad faith participation in settlement processes by designing the programs to satisfy the interests of key stakeholder groups. These stakeholder groups include judges, court administrators, lawyers, neutrals, and especially the parties in mediation. Education is key. By convening committees with representatives of all the stakeholders, courts can adopt procedures to minimize foreseeable abuses of settlement processes. For example, rules prohibiting mediation referrals from delaying trial dates can avoid unproductive mediations requested solely to postpone a trial date. Similarly, procedures for scheduling, canceling, or postponing mediations or other types of court-mandated ADR processes that generally meet the stakeholders' procedural interests, can increase the likelihood that participants will act productively in those settlement processes because participants will be more likely to be prepared to engage in the settlement process.