

D:\Documents and Settings\boguslal\Local Settings\Temporary Internet Files\OLK66C\Comm\_Code\_Alfini 01-022604ddt.doc

**DATE:** February 26, 2004

**TO:** Joint Commission and Advisory Committee Members

**FROM:** Jim Alfini

**RE:**

---

As promised, I have drafted a proposed Rule 2.04x on settlement for your consideration. The proposed rule and commentary are attached.

As you know, during the past few decades a settlement culture has emerged, perhaps best reflected in changes to Rule 16 of the Federal Rules of Civil Procedure. During the past decade, this rule has been transformed from a pretrial conference rule intended to sharpen issues for trial, to a rule that explicitly authorized and encouraged settlement discussions, to a rule that now encourages the use of special procedures such as mediation to assist in settlement. Thus, Rule 16 and its state counterparts reflect the creation and development of a settlement culture. Unfortunately, an ethics infrastructure to guide judges in pursuing settlement has not been developed. The attached proposed rule is an initial step in that direction.

The first part of the proposed Rule deals with concerns over judicial coercion in pursuing settlement. *Dodds v. Commission on Judicial Performance*, 906 P.2d 1260 (Cal. 1996), perhaps best exemplifies such conduct. There, the judge had allegedly attempted to coerce settlement in a case that involved alleged sexual misconduct by a physician. The California Commission on Judicial Performance recommended that the judge be censured for his behavior, and the judge defended on the grounds that his “assertive” judicial “style” is desirable because it enables him to effect settlements in difficult cases. The Supreme Court of California was unsympathetic, stating that “when a judge, clothed with the prestige and authority of his judicial office, repeatedly interrupts a litigant and yells angrily and without adequate provocation, the judge exceeds his proper role and casts disrepute on the judicial office.” However, the supreme court declined to sanction the judge, at least in part, because the Code of Judicial Conduct fails to clearly and explicitly prohibit such behavior. I therefore argue in an article titled, “Risk of Coercion Too Great: Judges Should Not

I:\USERS\LIBCPR\ETHICS\JUD-CODE\Code Revision 2003-2004\Comments\Code\  
Comm\_Code\_Alfini 01-022604.doc

D:\Documents and Settings\boguslal\Local Settings\Temporary Internet Files\OLK66C\Comm\_Code\_Alfini 01-022604ddt.doc

Mediate Cases Assigned to Them for Trial” *Dispute Resolution Magazine* (Fall 1999) that there is a need for a settlement rule in the Code of Judicial Conduct.

**Joint Commission and Advisory Committee Members**

**Page -2-**

**February 26, 2004**

The second part of the Rule deals with the fact that judges are beginning to sanction parties for failing to participate in “good faith” in settlement discussions and mediation. There is an emerging body of case law on this subject, *see e.g. Nick v. Morgan’s Foods, Inc.*, 99 F. Supp. 2d 1056 (E.D. Mo. 2000). Generally, the courts have upheld sanctions where the sanctioning judge had clearly ordered the parties to participate in a certain way (e.g. send someone with settlement authority to the mediation) and the parties had violated the judge’s order. For an argument by a prominent federal magistrate warning of the dangers of imposing a good faith requirement, see Wayne D. Brazil, “Continuing the Conversation About the Current Status and the Future of ADR: A View from the Courts,” *2000 Journal of Dispute Resolution* 11. For a review of case law, see James J. Alfini and Catherine G. McCabe, “Mediating in the Shadow of the Courts: A survey of the Emerging Case Law,” *54 Arkansas Law Review* 2. Prominent cases include: *Avril v. Civilmar*, 605 So. 2d 988 (Fla. Dist. Ct. App. 1992); *Bennett v. Bennett*, 587 A.2d 463, 464 (Me. 1991); *Texas Parks & Wildlife Dept. v. Davis*, 988 S.W.2d 370 (Tex. App. 1999); *Triad Mack Sales & Service, Inc. v. Clement Bros. Co.*, 438 S.E. 2d 485 (N.C. Ct. App. 1994); *Tobin v. Marriott Hotels, Inc.*, 683 A.2d 784 (Md. 1996); and *In re Bolden*, 719 A.2d 1253 (D.C. 1998).

jh

Attachment

I:\USERS\LIBCPR\ETHICS\JUD-CODE\Code Revision 2003-2004\Comments\Code\  
Comm\_Code\_Alfini 01-022604.doc