

Canon 2
Official Conduct
James Alfini
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Mr. Alfini submits for the Commission's consideration the following proposed rule and commentary on settlement, as guidance for judges faced with a "settlement culture" that has emerged and developed in the past few decades. The proposed rule addresses concerns about both judicial coercion in pursuing settlement and the fact that judges are beginning to sanction parties for failing to participate in "good faith" in settlement discussions and mediation. (Additions underlined.)

2.xx **Settlement.** A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not:

- (1) act in a manner that coerces a party into settlement, or
- (2) sanction a party or a party's lawyer for failing to participate in settlement discussions in good faith without first informing the parties of the judge's reasonable requirements for party participation in settlement discussions.

Commentary

[1] A judge should not undertake to act as a mediator in a matter assigned to the judge for trial. A judge may, however, undertake to mediate a case assigned to another judge if the judge undertaking the mediation has received mediation training.

[2] A judge who undertakes to mediate a resolution of a dispute in a case assigned to another judge should take care to insure that the mediator's judicial status does not unduly influence the outcome of the settlement discussions.

[3] If a judge orders parties to a dispute to use an alternative dispute resolution mechanism in an effort to settle matters in dispute, the judge should set for the in the order the judge's reasonable expectations for party and lawyer participation in the settlement activity.

[4] A judge should issue sanctions against a party or a party's lawyer for failure to participate in good faith in an alternative dispute resolution process ordered by the judge only if the judge has determined that the party or the party's lawyer has violated a clearly stated requirement for participation set forth in the judge's order or other writing provided to the parties.