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Judicial Ethics and Judicial Settlement Practices: Time For Two Strangers to Meet

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Introduction

In October of 2005, the Honorable Robert Bohn of the Massachusetts Superior Court spent four successive days conducting a form of mediation among the eight attorneys representing the four parties involved in a highly publicized wrongful death case specially assigned to him for trial and scheduled for impanelment on the next day[1]. If his settlement efforts had ultimately been unsuccessful, who should decide whether he remained the appropriately impartial judge to conduct the jury trial? Did it matter that he engaged in hours of exparte communication with the individual attorneys? Furthermore, what ethical guidance

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[1] *See* Tony Wright, *'Total Trust' :Special Team of Lawyers Settle Bus Case*, MASSACHUSETTS LAWYERS WEEKLY, November 15, 2004; Stephanie Ebert & Ralph Ranalli, *$15M Accord In Bus Crash that Killed 4 from Newton*,

exists for him or anyone else to use in making that decision?

BOSTON GLOBE, October 14, 2004, at A1.

To illustrate the importance of these questions, in 1996 the Massachusetts Supreme Judicial Court's Standing Committee on Dispute Resolution, in reporting to the Supreme Judicial Court on their draft rules for court-connected dispute resolution, told the high court that, "An important but largely unstudied area is what rules or policies, if any, govern or should govern the conduct of judges....who direct or participate in settlement activities.[2]"

Our American legal tradition promises the public an impartial trial judge detached from the work of the attorneys and free to render judgment or guide a jury under settled principles of law. In fact, our adversary system of trial rests on the assurance of the truly neutral magistrate who emerges from his or her chambers, without preconception, to moderate the battles of counsel[3].

Over the past twenty years, however, a consensus has emerged among the bench and bar that judicial participation in the settlement of civil cases is a wise and useful activity[4]. Only a few have questioned the appropriate boundaries for this judicial intervention into

[2] Dispute Resolution in the Courts, A Report of the Massachusetts Supreme Judicial Court's Standing Committee on Dispute Resolution to the Massachusetts Supreme Judicial Court; June 18, 1996, pp's 32-33.

[3] *See* J. Michael R. Hogan. *Judicial Settlement Conferences: Empowering that Parties to Decide through Negotiation*, 27 WILLAMETTE L. REV. 429, 431-433 (1991) ("Under the traditional model, a judge renders decisions during a public trial when the judge learns about the merits of the case for the first time. The judge passively awaits a presentation of the evidence so that the contest can be decided according to the 'rules of the game'").

[4] James Alfini has labeled this "the settlement culture". James Alfini, *Risk of Coercion Too Great: Judges Should Not Mediate Cases Assigned to Them for Trial*, 6 Disp. Resol. Mag. 1, 11 (1999). Both federal and state judges have written at length about the reasons for and the accomplishments of this development. *E.g.* J. Robert Peckham,, *A Judicial Response to the Cvost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS LAW REVIEW 25 (1985): J. Hubert L. Will, Robert Merhige & Robert Alvin, "*The Role of the Judge in the Settlement Process*", 75 F. R. D. 89, 203 (1976); J. Harold Baer, Jr., "*History, Process, and a Role for Judges in Mediating Their Own Cases*" 58 N.Y.U. ANN. SURV. AM. L. 181 (2001). J. Peter W. Agnes, Jr., "*Some Observations*

what was once the exclusive domain of attorneys who were free to negotiate their own settlements.[5]

Currently the ethical limits of such activity have been left to the judge

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and Suggestions Regarding the Settlement Activities of Massachusetts Trail Judges, 31 SUFFOLK U. L. REV. 202 (1997).

[5] Among the handful of skeptics are Alfini, *supra* note 4; Daisy Hurst Floyd, "*Can the Judge Do That? The Need for a Clearer Judicial Role in Settlement*", 26 ARIZ. ST. L.J. 45, ___ (1994); Brian J. Shoot and Christopher T. McGrath, "*Don't Come Back Without a Reasonable Offer: Surprisingly Little Direct Authority Guides How Judges Can Move Parties(Part Two – The Judges Role)*", 76 N. Y. St. BAR J. 28, __ (2004). *See also* Leroy J. Tornquist, *The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry*, 25 WILLAMETTE L. REV. 743,773 (1989); Susan M. Gabriel, *Judicial Participation in Settlement: Pattern, Practice, and Ethics*, 4 OHIO ST. J. ON DISP. RESOL. 81, 95 (1988-89).

and counsel. The judge could disqualify him or herself and pass the case along to a colleague if he or she felt their settlement efforts raised an issue of impartiality and, in the absence of judicial self -appraisal, one of the attorneys could seek disqualification of the judge[6]. The growth of alternative dispute resolution (ADR) during these same twenty years has only worked to stimulate judicial participation in the settlement of civil cases. Untrained trial judges have mimicked mediators with techniques loosely borrowed from private mediation, but unfamiliar in the halls of justice.[7]

All of this novel settlement activity by judges assigned to try these matters confuses the pubic, undermines the traditional judicial role and, in the end, can lead to coerced settlements. The time has arrived, this author believes, for the enactment of explicit ethical rules in the Model Code of Judicial Conduct governing judicial settlement activity in civil cases. This article proposes one simple ethical rule – a bar on any

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[6] For a discussion of the federal caselaw on disqualification because of judicial bias, see Floyd, *supra* note 5, at 67-72.

[7] While he fully supports the training of trial judges who do mediation of their pending cases, the Honorable Harold Baer is one of the few judges who has written a detailed description of his approach to the mediation of cases in his docket. Baer, *supra* note 4 at 137-45. At one point he comments "Frequently, I even supply popcorn".

judge who undertakes settlement activity from ultimately trying the case if settlement fails – as well as other more detailed ethical rules such as written consent of the parties to participate in judge run settlement activities, disclosure of the settlement technique to be used by the judge, and mandatory training for any judge undertaking mediation or any other form of settlement activity.

The Reality of the Settlement Judge

Beginning in the early 1980's with Professor Judith Resnick's seminal article on Managerial Judges, judges, attorneys and academics have acknowledged the variety of motives that have made trial judges into managers of the litigation pending in their courts.[8] Both the volume and complexity of modern litigation, as well as the text of procedural rules enacted in response to this growth in

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[8] Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374 (1982. Others who have noted the same change in the judicial role include Marc Galenter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257 (1985-1986); J. Jack Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. DISP. RESOL. 241, 278-280 (1996).

caseloads, have encouraged judicial management.[9]

[9] The evolution of Rule 16 of the Federal Rules of Civil Procedure as well as the content of its counterparts in state rulebooks is the most frequently mentioned motivation for judicial management. For a description of other reasons including docket management, expediting litigation, resource savings, sense of personal accomplishment and obligation to the community *see* Marc Galenter and Mia Cahill, *Most Cases Settle:: Judicial Promotion Regulation of Settlements*, 46 STANFORD L. REV. 1339, 1340-46 (1993-94); Marc Galenter, *A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States* , 12 J. L. SOC'Y 1 (1985), J. Jack Weinstein, *Ethical dilemmas in Mass Tort Litigation*, 88 NW U. L. REV 469, 538-42, 549-52 (1993-94).

Judges who stepped forward to embrace this new role have offered their views on both the challenges and virtues of undertaking this approach to the job.[10] Published statistical measures such as "throughput" and "cases closed" have added to the pressure on trial judges to take control of their dockets. If you add the frequently cited goal that the courts (i.e. judges), and not counsel, should ultimately be responsible for the timely completion of the public's disputes then you have all the ingredients for hands on judicial management of pending cases from filing to disposition.

While this approach to judicial management once meant that trial judges monitored the timely occurrence of pre-trial events, like discovery compliance and motions practice, it was inevitable that the personal investment involved would lead to a similar concern for achieving prompt outcomes. So the progression for judges from insuring that each pre-trial event occurred in a timely manner to personally holding the pretrial conferences to participating in settlement discussions has been logical and pervasive.

[10] In addition to the judges mentioned in footnote 4, see Honorable Thomas C. Lambros, *The Judge's Role in Fostering Voluntary Settlements*, 29 VILLANOVA L. REV. 1363, (1984); Weinstein, *supra* note 8, at 190; Weinstein, *supra* note 9.

The other reality that fuels the movement to the managerial judge of today is the ready acceptance of this development by the bar. Virtually every study of the attitudes of practicing attorneys toward judicial involvement in settlement finds approval, if not an affirmative invitation, from the bar.[11] Thus, it is no surprise that the limited concern about this expansion of the judicial role has come from academics and not from practicing attorneys.[12]

The Impact of ADR

While the judicial settlement practices of the managerial judges of the last twenty years have been documented and, in some cases, analyzed, there has been little attention to the impact of ADR and specifically of mediation on these judges.[13] No comprehensive study

[11] These studies cover the years from 1984 to the present. While the views of the bar about judicial settlement activity are not uniform or consistent from state to state, they are far more positive than negative. *See* Carrie Menkel-Meadow *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 U.C.L.A. L. REV. 485, 497 (1985-1986) ("...it is instructive to note that despite all the academic criticism of the judicial settlement role, lawyers overwhelmingly seem to favor "judicial intervention."). Almost ten years later, Professor Galenter reached the same conclusion, "Nevertheless, lawyers generally approve of judicial intervention. Indeed, lawyers appear to approve of "judicial mediation" even more than judges themselves." *See* Galenter and Cahill, *supra* note 9, at 135. For detailed statistical studies confirming the high rates of lawyer approval of judicial settlement activities, *see* Dale E. Rude, Lawrence F. Schiller, & James A. Wall, *Judicial Participation in Settlement*, 25 MISSOURI J. DISP. RESOL .25 (1984); Milton Heumann & Jonathan M. Hyman, *Minitrials and Matchmakers: Styles of Conducting Settlement Conferences*, 80 JUDICATURE 123 (1996). *See also* Results of Attorney Survey for Conference on Judges and the Settlement of Cases (1999) (finding that 80% of the attorneys and 90% of the judges surveyed in Massachusetts felt the judge is responsible for encouraging and promoting settlement).

[12] *See* Baer, *supra* note 4, at ____. ("Particular criticism of an Article III judge's mediation of a case comes primarily from academics who frequently possess little practical experience").

[13] Among the most comprehensive studies of judicial settlement practices are Agnes, *supra* note 5; Resnick, *supra* note 8; Hogan, *supra* note 3; Tornquist, *supra* note 5; Galenter, *supra* note 9.from fn. 4.

exists documenting all of the various techniques of mediation which are used by settlement oriented judges. [14]

Nevertheless, we know anecdotally that trial judges use many of the

[14] Professors Hyman and Heumann have written about two styles of judicial settlement conferences they observed in New Jersey – the minitrial style and the matchmaker style – and compared each to general ADR techniques. Hyman & Heumann, *supra* note 11. As noted *supra* note 4, at 7, Judge Baer has described his personal approach to mediation of cases on his docket.

approaches of mediators. These borrowed techniques include (1) separate meetings with one side to the litigation and then the other, often called "caucusing"; (2) the inclusion of clients in these separate meetings; (3) separate meetings with only clients present; (4) promises of confidentiality to one side or the other in order to facilitate disclosure of key settlement positions; (5) evaluation of legal claims, including issues to be argued during trial on the admissibility of evidence and at the directed verdict stage; (6) exploration of non-financial terms of settlement, often involving apologies, reinstatement, resumption of a terminated relationship and other behavioral solutions; and (7) repeated suggestions of likely settlement positions in an ongoing attempt to close the gap between the parties. The judges who utilize these approaches to settlement are usually untrained in mediation skills and are relying on a combination of their personality, their experience, and the prestige of their position, rather than training under the watchful eye of a veteran mediator, to achieve success. [15]

[15] "Judicial-supervised alternatives are particularly effective because of the unique position of the judge: only the judge commands the court resources and the disinterested perspective necessary to efficiently and consistently guide parties toward fair settlements of substantial disputes", Lambros, fn 6, at p.1364.

While the emergence of ADR techniques is only the latest variation in the methods of settlement judges[16], the fundamental issue remains the same over the last quarter century – what price in terms of the public perception of the judicial role is paid for all these accomplishments, all these settled cases? No one can dispute that thousands of hours of trial time and thousands of dollars of client expense are saved by these judicial interventions. And no one can dispute that a judge has the greatest standing and resources to promote settlement.[17] However, one can legitimately ask whether the lawyers and clients are truly participating

[16] Judge Robert R. Merhige describes one settlement effort of his own when he and his wife invited those involved in the litigation, "all good lawyers", and "somebody with authority", to attend one or more of three parties, "on Sunday night, on Monday night, and on Wednesday night." He concedes, "Now that probably is a little extreme." He goes on to describe the settlement practice of a "Judge Dalton" who, upon hearing that counsel were $2200.00 apart, "...got up, took his hat off the coat tree, put his hat on, never said another word to the lawyers, said to his secretary, 'Tell the clerk this case is settled, I'll be at the farm'". Will, Merhige & Alvin, *supra* note 4 at 216-217.

[17] *See* Weinstein, *supra* note 9 ("Involvement of the judge often occurs by force of necessity. The numbers of litigants and claims in these cases and their often overwhelming complexity requires that some central authority take control and help the litigation. The judge in a complex case, the federal courts have long assumed, should encourage the settlement process.") In an article commenting on the Agent Orange case in which Judge Weinstein played the dominant settlement role, Professor Peter Schuck wrote, "In fact, the judge controls distinct kinds of resources that may facilitate or even be indispensable to settlement, especially in complex cases. ... They include control over the disposition of certain issues; and control over certain inducements and administrative supports." Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 350 (1986).

voluntarily in these judicially run settlement efforts, and whether an atmosphere of fairness and neutrality is fostered, particularly when more and more disclosures are requested and opinions given in what are essentially exparte sessions with the same judge who is assigned to try the case.

One can also legitimately ask whether clients who have a laypersons understanding of the neutrality and independence of the judiciary, as well as of the workings of the adversary process, can comprehend how judges committed to these ideals can informally, in the privacy of their offices, discuss likely outcomes of both legal and financial issues. In fact, counsel from several state judicial conduct organizations have reported receiving complaints of judicial coercion and intimidation in settlement conferences[18]. Regardless of whether these are ultimately found to be about real or perceived judicial behavior, the fact that they have been filed is cause for concern.

A related and equally legitimate concern when judges attempt to settle cases using ADR approaches like mediation is their competency. While this issue is not one implicating judicial ethics like bias and coercion, nor one which strikes at the heart of the judicial process like the promise of a fair trial before a neutral magistrate, it has a direct bearing on choosing

[18] In correspondence with the author, Eileen Libby, Associate Ethics Counsel for the ABA Center for Professional Responsibility, reports on four states whose judicial disciplining counsel reported at a national conference in July of 2004 about receiving complaints of coercive or threatening behavior by judges in their settlement efforts. See e-mail from Eileen Libby to the author, March 9, 2005. In Massachusetts, the Chairman of the Judicial Conduct Commission sent a letter to all the trial court chief justices describing recent complaints "arising out of settlement conference where judges' comments have been erroneously perceived as threats or coercive behavior." Email from the Chief Justice of the Probate and Family Court to all Justices of the Probate and Family Court, January 26, 2005.

the best practice, the best policy, for judicial settlement activity. In fact, the lack of training impacts on both the timing and method by which a judge will offer a final evaluation and, thus, a potentially coercive opinion on the value of the case.

It is true that some judges will have had mediation training prior to coming to the bench and some will take an appropriate course during their judicial tenure, but experience tells us that a far larger number will not have had any type of formal ADR Training[19]. Instead, they rely on a combination of personal settlement techniques, tested over time, and procedures borrowed from ADR like "caucusing" from mediation. They also are unlikely by the nature of their courtroom work to have the skills which are traditionally emphasized in mediation[20]. This was thoughtfully articulated by Professor Frank Sander in his "Friendly Amendment" to Dean Alfini's plea that judges not mediate cases assigned to them for trial:

> Professor Alfini briefly alludes to the third issue of competence and training. We know that mediation and adjudication require very different skills. Judges need to focus on determining past facts, as well as applicable law. Relevance and admissibility of evidence are also critical issues. Judges are used to being in charge and making decisions according to set rules and established precedent. By contrast, mediators need to be good listeners and to be open to a broad range of possible solutions, with a view to helping the parties to arrive at an acceptable,

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[19] Judge Peter Agnes' 1999 study found that 84.8% of the responding judges had not had formal training as a mediator. Agnes, *supra* note 5, at ___.

[20] While Judge Harold Baer suggests that each judge who undertakes mediation of a pending case receive appropriate training, he acknowledges that it is voluntary in his jurisdiction. His description of settlement conferences and judicial mediations contain many similarities and he concedes, "There may, however, be a modicum of arm twisting in both settlement conferences and mediations, as both invariably involve an effort to convince one side or the other that a proposed resolution is a fair one." Baer, cited at fn. 1, at p. 146.

custom-made settlement of their case.[21]

What Does the Code of Judicial Conduct Say About Judicial Settlement Activity?

Although the ABA is currently in the midst of a revision of their Model Code of Judicial Conduct, the two versions most frequently referenced are the ABA's 1972 Model Code of Judicial Conduct and their 1990 revisions to it. Various states have enacted provisions from both codes and, in fact, continue to revise their codes using both documents

[21] Frank E.A. Sander, *A Friendly Amendment*, 1 DISP. RESOL. MAG., 11,.11 and 22 (1999).

as resources[22]. Commentators have been critical of both model codes for their vague, unhelpful approach to guiding judicial settlement practices.[23]

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[22] For example, Massachusetts completed its review of the 1990 Model Code in October of 2003 when a new Code of Judicial Conduct became effective. The ABA Joint Commission to Evaluate the Model Code of Judicial Conduct was appointed in September 2003.

[23] *See* Gabriel, *supra* note 5, at 89 ("Unfortunately, reference to the Code will not aid the scrupulous judge in his search for a definition of his proper role in this regard.") *See also* Alfini, *supra* note 4, at 14 ("Given the pervasiveness at both the state and federal levels, vague and ambiguous references to "coercion" in ethics rules give insufficient guidance to the judge engaged in settlement activities."); Floyd, *supra* note 5, at 84; Agnes, *supra* note 5, at 265; Wall & Schiller, "*Judicial Investment in Pre-Trial Settlement: A Judge is Not a Bump on a Log*", 6 AM. J. TRIAL ADOVC. 27, 33 (1982).

Basic provisions of the 1972 Code, repeated in the 1990 Code, require that a judge perform the duties of his or her office impartially.[24] The same two model codes require that a judge be patient, dignified, and courteous to all and afford every person the full right to be heard according to the law.[25] These two codes also contain provisions for disqualification when "… the judge's impartiality might reasonably be questioned.[26]" Furthermore, both of these codes prohibit ex parte communications by a judge[27].

The 1972 model code did not speak one way or the other to the practice of judicial settlement activity, but the 1990 model code contains three provisions endorsing, if not promoting, judicial settlement efforts.

[24] Canon 2, Model Code of Judicial Conduct, American Bar Association (1972 and 1990).

[25] *Id.* Canon 3B(4) and 3B(7).

[26] *Id.* Canon 3E(1).

[27] *Id.* Canon 3B(7).

Canon 3B(7)(d) provides that judges "may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.[28]"

[28] Canon 3B(7)(d), Model Code of Judicial Conduct, American Bar Association (1990).

The Commentary for Canon 3B(8) states "A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.[29]"

The Commentary to Canon 4F, the prohibition on judges doing private arbitration and mediation, states "Canon 4F does not prohibit a judge from participating in arbitration, mediation or settlement conferences performed as part of judicial duties."[30]

By 1990, as this review of the two current ABA Model Codes of Judicial Conduct reveals, the drafters made two basic decisions about judicial involvement in settlement activity; first, they endorsed the judicial settlement role albeit with some provisions about obtaining consent and avoiding coercion, and second, they left decisions about disqualification to the individual judge and the attorneys under very broad standards.

[29] *Id.* Commentary to Canon 3B(8).

[30] *Id.* Commentary to Canon 4F.

Insofar as these issues are being revisited in the current ABA review of the Model Code of Judicial Conduct, there are at least three proposed changes. First, the commentary to Canon 3B(8), as found in the 1990 model code, has been placed in Section [2] of the Commentary to proposed Canon 2.06 and slightly revised to read "A judge should encourage and seek to facilitate settlement, but should not coerce parties into surrendering the rights to have their controversy resolved by the courts."[31] This places the obligation to avoid coercive settlement practices squarely on the judge rather than on an evaluation of the perceptions of the participating parties. Second, the text of Canon 3B(7)(d) on the role of Ex Parte Communications in judicial settlement activity is now found in proposed Canon 2.09(a)(4) and reads "A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters before the judge.[32]" The word "mediate", found in the 1990 version, has been eliminated. And third, the new Canon 2.08, entitled Ensuring the Right to be Heard, has proposed Commentary [2] which states, "The judge has an important role to play in overseeing the settlement of disputes, but should be careful that efforts to further settlement not undermine a party's right to be heard according to law. A judge may therefore encourage parties to a proceeding and their lawyers

[31] Proposed commentary [2] to Canon 2.06, Model Code of Judicial Conduct, American Bar Association, June 2004 Draft.

[32] *Id.* Proposed Canon 2.09(a)(4).

to settle matters in dispute but should not act in a manner that coerces a party into settlement."[33]

[33] *Id.* Proposed Commentary [2] to Canon 2.08.

It should also be noted that proposed Commentary [4] regarding mandatory disclosure to all parties of ex parte communications, "in a manner that ensures notice", is directed only to those exparte communications described in Canon 2.09(a)(1) and (2) and not to those involved in judicial settlement efforts authorized by Canon 2.09(a)(4).[34] While the proposed text of 2.09(a)(4) does speak of "consent of the parties" for separate conferences with parties and their lawyers, it is silent, as is the Commentary, on whether the content of these ex parte communications should be disclosed to attorneys and their clients.

[34] *Id.* Proposed Commentary [4] to Canon 2.09.

There is also new commentary about judges and private ADR found in the ABA's current draft rules. It is not, however, about judges who uses ADR techniques to settle cases, but about judges who wish to do arbitration and mediation privately while remaining active on the bench. Proposed Canon 4.06, which is taken from prior Canon 4F, states, " A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.[35]" Nevertheless, Commentary [1] reinforces the code's 1990 position that "Judges regularly participate in arbitration, mediation or settlement conferences, either as part of their regular duties or as specially authorized by court rule or other law.[36]" The new text would now go on to state, "The integrity of the judiciary is undermined, however, when judges take financial advantage of their offices by rendering private dispute resolution services for pecuniary gain as an extra-judicial activity.[37]" To make sure, however, that the Code continues to endorse judicial participation in settlement activity, Commentary [2] to Proposed Rule 4.06 reminds judges, "Rule 4.06 does not prohibit a judge from participating in arbitration, mediation or settlement conferences performed as part of judicial duties."[38]

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[35] *Id.* Proposed Canon 4.06.

[36] *Id.* Proposed Commentary [1] to Canon 4.06.

[37] *Id.*

[38] *Id.* Proposed Commentary [2] to Canon 4.06.

Why Are Changes in the Model Code of Judicial Conduct Needed?

What then is the urgency or even the necessity for increased regulation of judicial settlement activity? First and foremost, the rapid expansion of these efforts, fueled by ADR techniques, has created an ever expanding range of settlement practices which have been questioned by academics, practicing attorneys and a few judges. Second, the reality of a number of complaints to state judicial conduct organizations suggests an issue of national concern. Third, the lack of training in the techniques of informal dispute resolution, *i.e.* mediation, on the part of those judges who choose to actively settle civil cases means their efforts are unskilled and open to misunderstanding, thereby reducing public confidence in our courts. And fourth, the inescapable human tendency, even by members of the judiciary, to develop opinions about the legal and factual issues developed during settlement discussions creates the likelihood of real or perceived bias on the part of the judge assigned to continue with the case and conduct the trial.

Regardless of the source of concern, whether from studying the myriad activities of managerial judges, from taking a closer look at the impact of ADR and particularly mediation on judges' settlement practices, or from an understanding of the paucity of current ethical guidance for judges, most of those who have suggested restrictions on judicial settlement activity have stopped short of recommending explicit prohibitions or additional requirements in the Model Code of Judicial Conduct. Proposals to halt or limit the practice have included informal courthouse agreements or mutual understandings that judges who are unsuccessful in their settlement efforts will not conduct the trial, changing the text of Rule 16 to the same end, placing guidelines for judicial settlement activity in local rules, and increasing judicial education.[39] Only a few writers have suggested changes to the existing ethical standards for judges.[40]

[39] *See* Floyd, *supra* note 5, at 87-90 citing Tornquist, *supra* note 5, at 774; Agnes, *supra* note 5, at 314-17.

[40] *See* Resnick, *supra* note 8, at 432-5; Agnes, *supra* note 5, at 314; Alfini, *supra* note 4 at 1.

Considering that the two current approaches to disqualification of a trial judge from further involvement in a case in which he or she has engaged in settlement activity – self-initiated or by motion of counsel -- are rooted in the Model Code of Judicial Conduct, this becomes the logical place to begin. In fact, the single most extensive exploration of the ethics of judicial settlement practices is based entirely on the 1972 Model Code of Judicial Conduct and the 1990 revisions to it.[41] While this thoughtful publication contains a variety of "acceptable" and "inappropriate forms of judicial settlement activity, its reliance on existing standards of judicial ethics and on appellate decisions interpreting those standards also suggests the Model Code is the appropriate setting for further regulation of this entrenched judicial practice.

The other compelling reason to look to the Model Code of Judicial Conduct as the appropriate source for rules to guide trial judges is the coercive character of its content. No other approach to influencing judicial behavior is as widely studied, publicized, litigated, or adhered to as the contents of each state's ethical commands.[42] If the settlement practices I have described are pervasive, as well as harmful to the public's perception of the judiciary, then a logical option is to amend the normative rules for the judicial profession.

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[41] *See* JONA GOLDSHMCIDT & LISA MILFORD, JUDICIAL SETTLEMENT ETHICS: JUDGES' GUIDE, A JOINT PUBLICATION OF THE AMERICAN JUDICATURE SOCIETY AND THE STATE JUSTICE INSTITUTE (1996).

[42] In fact, Wall & Schiller and Rude's s study of judges noted the impact of ethical constraints on the settlement activity. They concluded that, "...judges are more apt to use techniques [for settlement] which are considered ethical by the judicial community." Wall, Schiller & Rude, *supra* note 11, at 38.

Other approaches to this problem are not as likely to provide the same impact on judicial conduct as the directive language of the Model Code. Appellate decisions about disqualification due to judicial settlement activity

are few and very fact specific offering little guidance to the trial judge on a daily basis.[43] Advisory opinions, such as that issued to federal judges in 1999, usually repeat the balance found in the existing ethical provisions between the usefulness of judicial settlement conferences on one hand and the twin considerations of avoiding coercive behavior and promoting judicial objectivity on the other.[44] The ABA's 1993 formal advisory opinion on this subject concluded with a ringing endorsement of the judges role in facilitating settlement[45]. Local rules, particularly for federal judges, often differ across the nation.

[43] My own survey of the appellate decisions about judicial disqualification for participation in settlement efforts reveals three predominant themes; first, trial judges are presumed to be impartial and can be trusted to separate what they hear in settlement conferences from how they handle the issues during trial. *See* Blando v. Reid, 886 S.W. 2d 60, 65 (Mo. Ct. App. 1994); Estate of Sharpley v. Sharpley, 653 S. W. 2nd 124, 129 (Wis. Ct. App. 20020; Enterprise Leasing Co. V. Jones, 789 So. 2d 964, 968 (Fla. 2001); Second, the attorney challenging the judge's settlement behavior bears the burden to establish evidence of personal bias or actual prejudice. *See* Home Depot, U.S. A., Inc. V. Saul Subsidiary Ltd. P'ship, Nos. 2002-CA-002118-MR, 2003-CA-001 148-MR, 2004 WL 169961, at *2 (Ky. App. July 30, 2004); *In re* Marriage of Petersen, 744 N.E. 2d 877, 888 (Ill. Ct. App. 2001); C.N.H.L.K.G. v. M.H., 998 S.W. 2d 553, 561 (Mo. Ct. App. 1999); Third, judges are vested by the code of judicial conduct with broad discretion, which is usually given appellate deference, to determine when and in what circumstances they should disqualify themselves. *See* Blando v. Reid, 886 S.W. 2d 60, 65 (Mi, Ct, App, 1994); C.N.H.L.K.G. v. M.H., 998 S.W.2d 553, 561 (Mo. Ct. App. 1999). For a discussion of the very real limitations of legal disqualification and appellate reversal because of judicial bias, *see* Floyd, *supra* note 5, at 83-4. The problem for counsel is as follows, "Additionally, to prevail on a motion to disqualify or recuse a judge, the aggrieved party must often demonstrate actual bias or prejudice. This is certainly not an easy task to face for a party who may later be required to try the case in front of the same judge if the motion fails." *See* Wall and Schiller, *supra* note 23, at 33.

[44] "In the end, a judge's recusal decision following involvement in settlement discussions will be fact- specific and should be informed by an appropriate sensitivity to the requirements of impartiality and the appearance of impartiality." Committee on Codes of Conduct Advisory Opinion No. 95, "Judges Acting in a Settlement Capacity", January 14, 1999.

[45] *See* Floyd, *supra* note 5, at 79.

Educational activities, usually favored as the solution to complex issues of judicial behavior, also repeat the competing considerations in the prevailing code and ask those judges who attend to address hypothetical situations. Therefore, with the ABA once again reviewing the Model Code of Judicial Conduct, the time is at hand to place appropriate language in that document.

The ABA Joint Commission to Evaluate the Model Code of Judicial Conduct has received two proposals directly impacting judicial settlement practices in civil cases. The more substantial was submitted on February 4, 2005 by the ABA Section of Dispute Resolution containing a brand new paragraph "C" in Canon 3 entitled "Settlement Responsibilities".[46] Among the six suggested responsibilities would be the requirement, similar to that proposed in this paper, that "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.[47]" The Section's proposal also includes language which would insure that the attorneys and parties involved receive, prior to the judicial settlement event, "clear and objective descriptions of reasonable expectations for their participation in the

[46] Proposed Addition to the ABA Model Code of Judicial Conduct submitted by the ABA Section of Dispute Resolution, February 4, 2005.

[47] *Id.* Proposed C.(2).

settlement activity."[48]

[48] *Id.* Proposed C. (3).

The second submission, by Dean James Alfini, also creates a new section of Canon 2 entitled "Settlement". His proposed ethical rule, however, does not prohibit a judge from undertaking mediation in a case assigned to the judge for trial, rather he places a preference for this approach in the Commentary[49]. His Commentary also contains the provision that, "..., the judge should set forth in the order [to use ADR] the judge's reasonable expectations for party and lawyer participation in the settlement activity"[50]. Furthermore, his Commentary supports mediation training for any judge who undertakes to mediate a case for another judge who has the case in his or her trial docket[51].

Both of these submissions to the Joint Commission also contain ethical proposals and commentary regarding judges who wish to impose sanctions on attorneys and parties for failure to participate in mediation in "good faith"[52]. While this is an important concern for attorneys, clients and mediators, it is irrelevant to the settlement activities of trial judges and,

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[49] Proposed Rule and Commentary to Canon 2 on Settlement, 2.xx, James Alfini, February 4, 2005.

[50] *Id.* Proposed Commentary [3]

[51] *Id.* Proposed Commentary [1].

[52] *Id.* Proposed Rule 2.xx (2) and Commentary (4). *See* Proposed Addition by the ABA Section on Dispute Resolution, *supra*, note 46, Proposed C. (4) and Commentary, Fourth Paragraph.

therefore, is not contained in my proposed ethical requirements[53] .

What Are the Realistic Choices for Changes to the Model Code of Judicial Conduct?

[53] See pages, 32-34, *infra.*

The simplest and most straightforward change to the Model Code of Judicial Conduct addressing the issue of judicial involvement in the settlement of civil cases is the enactment of language prohibiting any trial judge who conducts settlement activity from proceeding to conduct the trial of the case when his or her settlement efforts fail. While this approach is mentioned in the literature, no writer to date has actually proposed explicit language to accomplish this result.[54] This may well be because the barriers to implementation of such a rule are real, including what to do in geographic areas where another judge is hard to obtain or actually unavailable and how to measure just how much judicial involvement would be enough to trigger this rule.

Another straightforward ethical rule, entirely consistent with the first, would require the judge who undertakes settlement activity to first obtain the written consent of all the parties to the litigation before proceeding with such an informal, off-the-record approach. This consent would follow delivery by the court to all counsel of a written description of the settlement process including any ADR technique, such as mediation, which would be employed by the judge and how it differs from trial. The document would also include the assurance that the judge doing the settlement activity would not be the trial judge should there be no settlement. Obviously, each jurisdiction adding this rule to their Code of Judicial Conduct could prescribe the precise

[54] *See* Tornquist, *supra* note 5, at 773 ; Gabriel, *supra note 5, at 95.* As previously mentioned, there are two proposals before the ABA's Joint Commission to Evaluate the Model Code of Judicial Conduct which would restrict judicial settlement activity in civil cases. *See* pages 18-20, *supra.*

content of the written acknowledgment.[55]

[55] It is interesting to note that the two pending proposals to change the Model Code of Judicial Conduct regarding judicial settlement activity have different approaches to these issues of obtaining consent and requiring a written description of the judicial settlement method. The ABA Section on Dispute Resolution's approach to "clear and objective descriptions of reasonable expectations for ...participation" requires them from the judge in writing unless these expectations are "already defined in a standing order, court rule, statute, or other published directive,...." Dean Alfini's draft has no such requirement, but only commentary which states, "...,the judge should set forth in the order the judge's reasonable expectations for party and lawyer participation in the settlement activity."

A third and more complex change in the Model Code of Judicial Conduct would be a requirement that any judge who undertakes settlement activity follow the ethical standards for dispute resolution conduct imposed by rule or statute in that state for neutrals who do mediation and other types of dispute resolution in the trial courts.[56] This would insure that issues like adequate preparation, disclosure of conflicts of interest, coercion, and voluntariness of any settlement were addressed by the judge with counsel and the parties before and during any settlement conference judicial mediation. It would also give counsel and parties detailed assurance of the expected conduct from the settlement judge.

Finally, the Model Code of Judicial Conduct should contain a provision that any judge who undertakes settlement activity in civil cases, whether using mediation or another ADR technique, have the same training that court rules or

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[56] In Massachusetts, Supreme Judicial Court Rule 1:18, The Uniform Rules of Dispute Resolution, contains Rule 7 which sets forth the ethical standards which must be followed by all neutrals who provide dispute resolution services to the courts. Among the ethical requirements are______________ ____.

statutes require a third-party neutral to have when undertaking that same type of dispute resolution activity in connection with a pending court case. Most states now have court rules or statutes specifying the type of training non-judicial neutrals must have to do court-connected mediation, arbitration, conciliation, etc.[57] A judge doing the same type of dispute resolution in his or her pending civil cases should have the same training.

In fact, there is no reason that all four of these changes to the Model Code of Judicial Conduct could not be enacted. Each works to insure that judges who undertake settlement activity in cases pending before them for trial do so with the consent and full knowledge of the parties, following the same ethics as neutrals who do this work for the court, with the same training as neutrals who do this work for the court, and with the assurance that should their efforts be unsuccessful they will not try the case.

<u>What Issues do These Proposed Changes Raise?</u>

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[57] In Massachusetts, the Uniform Rules of Dispute Resolution contain training requirements for five different types of dispute resolution services to the court; arbitration, mediation, conciliation, case evaluation, summary trial, and mini-trial. A survey done in ______ for the Massachusetts Supreme Judicial Court's Standing Committee on Dispute Resolution revealed that at least ____ states had some form of statute or court rule on qualifications for neutrals who wish to do court-connected dispute resolution work.

Because so few have written to propose that the Model Code of Judicial Conduct contain explicit restrictions on judicial settlement activity, there have been relatively few objections or critical observations. Collecting these views reveals at least four problems with my proposals; first, there is the longstanding judicial belief that pre-trial settlement activity is entirely consistent with proceeding to conduct a jury trial, but not a non-jury trial[58]; second, there are administrative problems, most familiar to court administrators and chief justices, when a judge who had been handling a case for a long time has to step aside and find another judge to try the case because his or her settlement efforts failed[59]; third, there are the obvious problems of drawing lines, e.g. when is a judge's settlement activity sufficient to bar him or her from going on to try the case and when is it so minimal that common sense would allow the judge to proceed to conduct the trial;[60] and finally at least one judge has argued that no

[58] "The difficulties associated with active judicial participation in settlement negotiations is expressly exacerbated when the trial is scheduled before the court rather than a jury of one's peers," G. Heileman, 871 F.2d at 622 (Coffey, J., dissenting).

[59] "Both state and federal courts (although perhaps more so in federal court) provide each judge with responsibility for the care and feeding of his or her own docket. The goal is for each judge to reduce steadily his or her own docket. Thus, a colleague is unlikely to welcome another case, which, even if it were to reach closure , would have taken the colleague's time without even decreasing his or her own docket number." Baer, *supra* note 4, at ___.

[60] A more precise approach to this problem is to draw a distinction in any applicable rule between judicial settlement conferences and judicial dispute resolution like mediation. This would clarify that the judge could continue, without the necessity of disqualification, to conduct the type of pretrial conferences contemplated by Rule 16 and its state counterparts as long as no formal dispute resolution technique was undertaken. Discussion of matters like the completion of discovery, scheduling of motions, selection of a trial date, and prospects and approaches to settlement involving counsel, third parties, or another judge, would be entirely appropriate. This approach is described by Professor Floyd in her article, *supra* note 5, at 87-88. I have endeavored to articulate this distinction in my commentary to proposed rule 2.13. *See* pp.'s 22 -23, *infra*.

experienced attorney should be at all troubled by participating in judicial settlement efforts since he or she knows the judge will ultimately conduct a fair trial should there be no settlement.[61]

[61] This view is rooted in the time-honored understanding, confirmed in appellate decisions, that trial judges always hear both the admissible and the inadmissible in motion arguments prior to trial, bench conferences during jury trials, and throughout jury-waited trials. There is, however, a substantial difference between judges hearing both the admissible and the inadmissible from counsel during argument and with the understanding that the judge will not use the inadmissible in any subsequent rulings, on one hand, and listening to the judge evaluate the merits of a legal position or suggest a financial settlement prior to trial on the other hand. In addition, confidence that experienced members of the bar can walk away from judicial pressure to settle does little to calm the fears of their clients.

As to the first concern regarding the arguable propriety of conducting jury trials following settlement activity, there are those, including myself, who think the jury/non-jury distinction is untenable[62]. While there is the obvious difference in who is doing the fact-finding, which arguably means that a judge should not conduct a non-jury trial after presiding over settlement discussions, there are so many occasions in which a judge conducting a jury trial makes decisions that could be understood as real or perceived outcomes of the prior settlement conversations. Decisions about the empanelment process, such as whether a potential juror's answers to a question show bias or whether a preemptory challenge was properly exercised, as well as decisions about evidentiary rulings, the motion for directed verdict, and the proper jury instructions are all instances in which one side or the other may feel the content of the settlement discussions influenced the judge's decision. If you also consider the role of judicial demeanor during a jury trial, it should be obvious that there really is no meaningful distinction between jury and non-jury trials when you are concerned about the real or perceived impact of judicial opinions expressed in the pre-trial settlement meetings.

With respect to the administrative problems caused by last minute changes in trial

[62] *See* Gabriel *supra* note 5, at 92; Tornquist, *supra* note 5, at 773.

assignments due to failed settlement discussions, it is easy, but not entirely satisfactory, to say that they are simply a modest price to pay for the improved public perception of fairness when judges who are involved in settlement activity do not go on to preside over the same case at trial.

There are, in fact, a variety of approaches, particularly in the literature promoting judicial settlement activity, which make good administrative sense. One is the so-called "buddy system" in which judges are teamed from the beginning, with the understanding that one will do the settlement activity and the other the trial should settlement fail[63]. Another is the matching of a state trial judge with a federal mediator judge[64]. A third involves the selection of senior or retired judges to serve as the exclusive panel of judges for settlement efforts. Should the ethical restrictions proposed herein be enacted, there are numerous ways that court administrators and trial judges can arrange, far before the last minute failure of settlement discussions, to have another judge carry on with the trial.

It should also be noted that the remainder of my suggested amendments to the Model Code of Judicial Conduct raise few if any administrative issues. Concepts of consent, notice, and written acknowledgments, as well as requirements of training and adherence to prevailing

[63] *See* Alfini, *supra* note 4, at 13-14.

[64] The ABA Joint Commission to Evaluate the Model Code of Judicial Conduct has received at least three letters supporting rule changes necessary to permit federal judges to act as mediators in pending state court cases. These letters reflect the successful use of this approach in Oregon.

codes of ethics for neutrals doing court-connected ADR, require only some additional paperwork and certifications.

Drawing appropriate lines regarding the nature and extent of settlement activity sufficient to trigger these ethical requirements is a truly difficult issue. The most straight forward approach would be to say in both the rule and the commentary that these rules impact any and all settlement efforts by judges who are assigned to try the very same case. This disregards the fact that many judges do not know at the time they undertake settlement activity whether or not they will ultimately be assigned to try the case. It also disregards the fact that there are a variety of styles of settlement activity. Some judges do none, some do very little, and some make modest, evenhanded proposals to the parties that would be hard to describe as indicative of bias or coercion. And yet other judges are very involved, some to the point of offering parties a final, don't come back without settling, opinion. Others, as described earlier, utilize a variety of self-styled mediation techniques raising issues of exparte communications, breaches of confidentiality, and not so subtle pressure[65].

Given this reality, where to draw the line? Doing so is made even more difficult by

[65] Professor Tornquist has listed eleven "Disadvantages of Active Judicial Participation in Settlement", including real or implicit coercion, separate meetings with attorneys or parties, receipt of inadmissible information, and exacerbation of power differences. Tornquist, *supra* note 5, at 752-765.

the immense gains in case flow management of judicial settlement activity. To keep the positive impact of these gains, it is important to consider whether a line can be drawn that allows minimal, even moderate, judicial settlement activity, but restricts judges who conduct excessive settlement efforts from presiding at the trial, thereby promoting public confidence in the fairness of trial. In fact, isn't this exactly what the existing versions of the Model Code seek to accomplish with their prohibition on coercive settlement activity? Is it not also the reason that for years the Model Code placed the decision on disqualification squarely on the judge and attorneys?

In the end, however, when drawing this line is so difficult, when the existing safeguards are so unclear, and when the larger goal of increasing the public's confidence in the fairness of the judicial function is so significant, a simple bright-line ethical rule accompanied by disclosures and training achieves the best of both worlds. The gains of judicial settlement activity will not and should not be lost[66].

In fact, the commentary should explain that traditional pretrial conferences dealing with scheduling, trial preparation, and selection of external ADR can continue without triggering the no-trial rule. Judges can even continue to do settlement activity, but everyone involved will know their settlement judge cannot go on to try the case. Furthermore, those lawyers and their clients who do participate in judicial settlement efforts will know exactly

[66] Most of the critics of the styles of judicial participation in settlement activity support judicial efforts to settle cases. They simply want more and clearer safeguards against coercion, bias, and public misunderstanding of the judicial role. *See* Tornquist, *supra* note 5, at 773. Alfini, *supra* note 4, at 13.

what dispute resolution process they are entering into, how it works, and what will happen if it fails. They will also know that the judge conducting the settlement activity is trained in the chosen process and that there is a code of ethics for that ADR process.

With respect to the views that all judges are presumptively fair-minded, even after conducting a settlement conference, and that no experienced attorney should fear judicial retribution if his or her client rejects a settlement proposal and forces a trial, the reported experiences of the bar as well as the admissions of some judges suggest otherwise[67]. Judges, including this author, become invested in the success or failure of their settlement efforts and all too easily identify the reluctant or, even worse, the stubborn attorney or party. Rejecting the creation of what Dean Alfini calls the "judicial ethics infrastructure" for settlement

[67] The sharp contrast between the following judicial views supports this concern: "The possibility that a judge will jeopardize the integrity of the process by taking an interest in one side's position is too remote to negate the benefit of judicially-supervised settlement conferences in appropriate cases." Hogan, *supra* note 3, at 439. "That this [judicial wrath on the party who prevented settlement] may happen is hard to deny categorically. However, it seems to me that such a judge would likely take sides at some stage of litigation anyway." Baer, *supra* , note 4, at 146. For a review of several studies in which attorneys describe their doubts about certain types of judicial settlement techniques, *see* Hurst, *supra* note 4, at 55-56.

activity because most judges are, in fact, ethical and fair-minded would, taken to its extreme, eliminate the need for the preliminary efforts in two existing model codes to guide judicial activity in this area.

An alternate and more appealing version of the "all judges are presumptively fair" argument is the suggestion that counsel and their clients can waive any form or degree of judicial participation in settlement and, thus, keep the same judge for their trial. Several flaws are readily apparent. First, it is unlikely that all counsel and parties would be equally enthusiastic about keeping their settlement judge as their trial judge. The same hesitation and reluctance that appears in settlement conferences with the judge is just as likely to be voiced in the discussions over executing a written waiver. Second, the risk of judicial pressure to retain the same judge for trial, if only for caseload management or other court-oriented goals, is unrealistic in any courthouse with crowded dockets and equally busy judges. And third, no written document or positive past experience of counsel with the judge can alleviate the possibility, even the likelihood, that in a particular case the judge has reached certain inescapable views during the settlement conference. In the end, ethical rules are written to benefit the entire judiciary, whether principled, indifferent or just plain human, as well as, the public they serve.

Where Should the New Ethical Rules for Judicial Settlement Activity be Placed In the Model Code of Judicial Conduct and What Should They Say?

The ABA Joint Commission rewriting the Model Code of Judicial Conduct made a sensible decision in their June 2004 Draft to place all of the text governing Judicial Conduct in one place, Canon 2. In their draft, Section B of Canon 2, entitled "Adjudication", contains two provisions, as previously noted, which speak to judicial settlement activity. Canon 2.08, "Ensuring the Right to be Heard", contains commentary acknowledging that "The judge has an important role to play in overseeing the settlement of disputes," but it goes on to say, "[the judge] should be careful that efforts not undermine a party's right to be heard according to law[68]." The Commentary concludes with the balance that has prevailed in the code for years, "A judge may therefore encourage parties to a proceeding and their lawyers to settle matters in dispute but should not act in a manner that coerces a party into settlement[69]." Canon 2.09, on "Ex Parte Communication", contains the permissive language in 2.09(4) that "A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge[70]."

Given the broad and generally favorable content of these provisions on judicial settlement practices, as well as the fact that each can stand alone and be consistent with my proposals, I think a separate section of the new Canon 2 makes sense. Part B. of Canon 2 on

[68] *See* ABA Model Code of Judicial Conduct, *supra* note 31, Proposed Commentary [2] to Canon 2.08.

[69] *Id.*

[70] *Id.* Proposed Canon 2.09 (4).

"Adjudication" ends with the lengthy 2.12 on "Disqualification", followed immediately by Part C. on "Administration". In my view, the significance of any new restrictions and procedures for judicial settlement activity is enhanced by a new section entitled "Settlement" inserted between "Adjudication" and "Administration[71]". This is exactly what the ABA Section on Dispute Resolutions Recommends, but they reference the existing 1990 model code where all this content is found in Canon 3[72].

This new text would read as follows:

C. Settlement

2.13 Settlement Activity. A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute and may participate in settlement efforts to resolve the case, including mediation, but shall not conduct the trial of the same case.

2.14 Party Consent. A judge who participates in settlement activity, including mediation, shall obtain the written consent of all parties as well as their acknowledgment in writing of the reasonable expectations for their participation in the form of settlement activity involved.

2.15 Reasonable Expectations. A judge who participates in settlement activity, including mediation, shall comply with all of the reasonable expectations, including ethical standards, already defined i

[71] *Id.* Proposed Canon 2 8.2.12 and 2e.

[72] *See* Proposed Addition by the ABA Section on Dispute Resolution, *supra* note 46.

2.16 Training. A judge who participates in settlement activity, including mediation, shall have received the same training for the settlement process involved as court rules and statutes require for non-judges.

Commentary: (to 2.13) The constitutional and statutory right of all litigants to a jury or non-jury trial before an impartial judge, as well as the necessary public confidence that judicial participation in the settlement process does not impact on the right to a fair trial, requires that a judge who participates in settlement activity of any type or degree not proceed to try the same case when this settlement activity is unsuccessful. This does not prohibit the judge who conducts pretrial conferences pursuant to court rules or statutes including traditional case management, scheduling decisions and discussion of settlement options such as third parties neutrals and other judges, from proceeding to try the same case.

Commentary: (to 2.14) The judge has a duty to provide the attorneys and their clients with a written description of, and to obtain written consent for, the specific nature and type of lawyer and party participation that the judge reasonable expects to occur in the type of judicial settlement activity involved.

Commentary: (to 2.15) The judge has a duty to comply with existing court rules and statute defining the type of judicial settlement activity involved.

Commentary: (to 2.16) A judge has a duty to obtain the same training for specified settlement processes, such as mediation and conciliation, as court rules and statutes require for third-party neutrals who provide the same dispute resolution services to the court.

Conclusion

Should any of these changes to the Model Code of Judicial Conduct be adopted and then enacted in one or more of our fifty states, what are the potential long term consequences for civil practice in our trial courts? There is, of course, the possibility that the so-called "vanishing jury trial" will become extinct even sooner[73]. There is also the possibility that ethical rules meant to govern judicial behavior will have the unintended result of promoting the use of non-judicial neutrals, like mediators, arbitrators and conciliators. And finally, there is always the risk of non-compliance, *i.e.* attorneys, clients, and judges who, after unsuccessful judicial settlement efforts, proceed to trial anyway, or judges who do mediation of pending cases without ever attending the required training.

There is little reason for concern that the judiciary, state or federal, will run ever out of trials[74]. While statistics on civil filings are down nationwide, backlogs of pending civil caseloads, particularly in the state courts, remain high. Judges in state "Time Standards" systems, which have been designed to keep civil cases moving expeditiously, readily allow extensions of time to busy attorneys[75]. Cases based on claims of statutory or constitutional rights, cases seeking to extend the application of settled law, cases seeking substantial or

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[73] *See* "ADR and the Vanishing Trial," 10 DISP. RESOL. MAG. 3-21 (Summer 2004). *See* also "The Death of the Jury Trial", MASSACHUSETTS LAWYER'S WEEKLY, June 11, 2004.

[74] *See* Honorable John C. Cratsley, "____________________________", MASSACHUSETTS LAWYER'S WEEKLY, ________.

[75] Recent statistical analysis in Massachusetts shows that on average about 30% of the civil cases are "off track". This is usually because the deadlines have been voluntarily extended by counsel and routinely approved by the court.

definitive compensation, and cases claiming professional malpractice, are all examples of litigation less likely to settle even with judicial involvement. In fact, it is arguable that attorneys and clients in disputes which judges try to settle informally will feel more freedom to walk away from the final judicial recommendation precisely because they know another judge will try the case. The assurance of a neutral uninvolved judge for trial should promote more attorney and client independence in responding to the settlement judges' recommendations.

It could well be a positive development if these proposals lead to the increased use of non-judicial neutrals such as mediators, arbitrators, case evaluators, conciliators, etc. Some judges, perhaps many , will prefer to refer their pending civil cases out to others for settlement rather than give up the opportunity to preside at the trial should their own attempts at settlement fail. While mandatory training for judges in ADR skills, like mediation, will allow some to be skilled as well as ethical settlement judges, others will find that the pressures of their workload and the availability of court-approved neutrals readily dictates using outside talent. Given the variety of and preference for judicial settlement practices, it is simply too early to say if a no-trial rule will enhance non-judicial ADR.

With respect to the risk of judicial non-compliance, the clearer the ethical rules and the rationale behind them the greater the likelihood of compliance. The challenge in proposing new ethical rules for judicial settlement activity is to create a black-letter rule that addresses the most undesirable practices of judges, usually those associated with mediation (*ex parte*

communication, private conferences with only the clients, broken promises of confidentiality, and ever increasing judicial pressure to settle), by a simple, understandable prohibition that the judge cannot go on and do the trial when these efforts fail. This one rule, offered for the protection of our cherished belief in a fair trial with a neutral jurist is certainly balanced by my other proposals for the overall improvement of the judicial settlement process. When judges do want to be active in seeking settlements, as distinguished from traditional case management, I believe they should be trained in the ADR techniques they seek to employ. Furthermore, these settlement inclined judges should inform the attorneys and clients, in writing , about the ADR approach they will use and obtain their written consent to participate.

In conclusion, the problem to be addressed can be seen as two-fold. First, for many reasons, including the current permissive content of the Model Code of Judicial Conduct and the applicable case law, judicial settlement practices should be encouraged, but conducted in a more understandable and competent manner. Second, for equally valid reasons, most importantly the dual promises of impartial judges and fair trials, no judge who does even the most competent settlement effort and fails should go on to try the case on the merits. .

The few voices seeking to achieve more precise ethical provisions for judicial settlement activity in civil cases have a unique opportunity to impact the newly emerging ABA Model Code of Judicial Conduct. While these proposals are more modest than others which the Joint Commission has received, all of our efforts are offered to improve the quality

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of justice in America's trial courts.