

From: Mass Trial Court [cratsley@socialaw.com]

Sent: Friday, September 16, 2005 11:13 PM

To: Taylor, Debra

Subject: Comments on the Preliminary Report of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct

Dear Ms. Taylor,

After reviewing the Preliminary Report of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, I continue to believe that stronger language is needed in Canon 2 to guide judges who participate with counsel and parties in informal, mediation-like settlement activities.

Despite the text in Comment [2] to proposed Rule 2.09 cautioning that judges "...should not act in a manner that coerces a party into settlement.", this is insufficient guidance to deal with the real and perceived issues of conflict and bias for those judges who meet privately with lawyers and clients prior to trial.

I believe the position I advocate in my paper "Judicial Ethics and Judicial Settlement Practices: Time for Two Strangers to Meet" is the appropriate ethical solution. As you will recall from my testimony before the Joint Commission on June 3rd, my view involves the creation of a separate section of Canon 2 entitled "Settlement". The most important provision in that new section would be a prohibition from conducting the trial for any judge who participates in an informal, mediation-like settlement session with counsel and/or the parties. Specifically, my proposed Rule 2.13, "Settlement Activity", states "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."

To enable the Joint Commission and their staff to review my proposals and the reasoning behind them in detail, I will send you a copy of the latest version of my paper in a separate email. I should note that it has been accepted for publication in the April 2006 issue of the Ohio State Journal of Dispute Resolution.

Best wishes, and thank you again for your hospitality on June 3rd, John Cratsley, Justice of the Massachusetts Superior Court