From: Geoff Drucker [gdrucker@mccammongroup.com]
Sent: Wednesday, September 07, 2005 9:41 AM
To: Taylor, Debra
Subject: Comments on Model Code of Judicial Conduct

Dear Ms. Taylor:

I appreciate the opportunity to comment on the draft revisions to the code. Please note that I am speaking only for myself, not for The McCammon Group or any of its members.

I believe Rule 2.09, Comment (2) fails to provide meaningful guidance on what judicial practices are and are not acceptable. Furthermore, for the reasons set forth below, I believe this comment undercuts the very laudable wording of Rule 2.09.

The distinction Comment (2) draws between "encouragement" and "coercision" is illusory because the power and discretion wielded by judges renders any "encouragement" they offer inherently coercive. When a judge "encourages" settlement, a party is likely to infer that, if he nevertheless demands a hearing, the judge will not be favorably disposed toward his case. A party is also likely to infer that the court has "pre-judged" his case and found it wanting in some regard.

In criminal cases, courts are very sensitive to the fact that being in police custody is inherently coercive. Thus the requirement that an officer remind a suspect of his right to remain silent before asking any questions. The legal power of the gavel is no less intimidating than the physical power of a gun or nightstick. Whether any judge would actually make unfavorable procedural or substantive rulings against a party who declines to settle is irrelevant; what matters is that to litigants the threat of adverse consequences appears real and deters them from seeking their day in court.

Comment (2) also fails to provide guidance on when a judge's efforts to encourage settlement through mediation (or any other form of ADR) become sufficiently onerous to be deemed coercive. In theory, so long as the parties are not legally required to settle, mandatory mediation is not coercive. As a practical matter, however, mandatory mediation as currently practiced has several coercive aspects. First, it adds to attorney's fees and often requires a significant investment of client time as well. Every additional hoop a litigant must jump through to reach its day in court impedes the right to be heard according to law. Second, some courts train and encourage mediators to evaluate the parties' cases and aggressively browbeat them into settling. The Joint Commission should consider whether an opinion formed by an private mediator based upon brief opening statements equals being heard according to law. Third, in cases that do not settle, some judges ask mediators to report what happened in mediation. This practice not only breaches the confidentiality of mediation, it also imposes tremendous pressure on the parties to make generous concessions in mediation. Again, the issue is not whether a judge would penalize a party for failing to settle in mediation, but whether a litigant is likely to fear such penalties, and, consequently, forego his day in court.

In summary, a judge should encourage and assist parties to carefully consider the potential advantages of settling, to negotiate in good faith with other litigants, and, where appropriate, to make use of a third party neutral. However, a judge should not pressure a party to settle. Nor should a judge create the appearance that the court will look with disfavor on a party's failure to settle, or to offer generous concessions in settlement negotiations.

Burgeoning caseloads have made it imperative to clear dockets with as few hearings as possible. However, the judiciary should not let this crisis blind it to the fact that, as a practical matter, judicial "encouragement" of settlement and court-ordered alternative dispute resolution coerce parties into giving up their day in court.

Geoff Drucker
Director of Federal Dispute Resolution
Tel: 703.582.9971
Fax: 804.343.0923
www.mccammongroup.com