

SUMMARY

Geoff Drucker
Director of Federal Dispute Resolution
September 07, 2005

Rule 2.09, Comment (2)

Mr. Drucker comments that as a practical matter, judicial "encouragement" of settlement and court-ordered alternative dispute resolution can easily coerce parties, through an actual or perceived judicial preference for such resolution, into giving up their day in court.

He finds that this rule and comment fails to provide meaningful guidance on what judicial practices are and are not acceptable. Furthermore, he believes that the comment undercuts the wording of Rule 2.09. He states that the distinction Comment (2) draws between "encouragement" and "coercion" is illusory and that 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.

Mr. Drucker also notes that Comment (2) also fails to provide guidance on when a judge's efforts to encourage settlement become sufficiently onerous to be deemed coercive. He observes that as a practical matter, however, mandatory mediation as currently practiced has several coercive aspects. It adds to attorney's fees, and requires more of a client's time. Every additional hoop a litigant must jump through to reach its day in court impedes the right to be heard according to law. He states that some courts encourage and train mediators to pursue a settlement very aggressively. Mr. Drucker says, "The central 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."