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To: ABA Joint Commission to Evaluate the Model Code of Judicial Conduct

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I respond to the recent request for comments on the Commission's work that may relate, as described in a memo by Chair Mark I. Harrison, to the role of judges "in encouraging parties to settle," as well to proposed Canon 2.09(a)(4) (separate conferencing, with the consent of the parties, in an effort to settle pending matters).

Regarding the judicial role in encouraging settlement, I am unsure of the rationale for eliminating the language in the present Canon 3 B(7)(d) on efforts to "mediate." Is the thought that efforts to settle include judicial mediation activities so that the word "mediate" is superfluous? The proposed commentary for the proposed new Canon 2.09(a)(4) is said to track the commentary for the current canons and thus is not explanatory. I am myself not so sure that all readers would agree that settlement efforts are inclusive of mediation efforts. And do settlement efforts include judicial arbitration, where parties consent to binding decision in the absence of meeting summary judgment standards (assuming judges can even agree to do this)?

As well, I am not so sure, as proposed Canon 2.09(a) and current Canon 3B(7)(d) imply, that "the consent of the parties" should be a prerequisite to all ex parte communications concerning settlements, as least where the settlement conference judge will not be the trial judge should a trial later follow.

More fundamentally, the proposal on settlement efforts is now (as is the comparable language in the current code) limited to "matters pending before the judge." The implication seems to be that these are the matters that are otherwise subject to "adjudication," since the proposal appears under Section B of Canon 2 (and is similar, then, to "adjudicative responsibilities" in the current section B of Canon 3). Yet often federal and state trial judges help to settle (and mediate) matters that are or may not be subject to adjudication. Consider, for example, subrogation, insurance, indemnification and attorney's fees matters. The decision in Matsushita Electric Industrial Co. v. Epstein, 516 U.S. 367 (1996) is particularly illustrative, as it sanctions state judicial involvement in settlement talks about federal claims that could never

have been brought to trial in state court (due to exclusive federal court subject matter jurisdiction). Put another way, settlement conferences can include discussions of claims and other matters that would not be discussed at any trial preparation conferences that might follow the failures of settlement efforts and that would not tried later.

Most fundamentally, I ask you to reconsider placing much mention of particular settlement conferencing issues in any new Judicial Conduct Code. I have urged in several law review writings that new legal guidelines for judicial efforts in facilitating civil case settlements are needed and should be chiefly established in written civil procedure laws. I refer you, in particular, to Parness and Walker, Thinking Outside the Civil Case Box: Reformulating Pretrial Conference Laws, 50 Univ. of Kansas Law Review 347 (2002) if you think my suggestion may have merit. Nevertheless, some reference to general settlement facilitation responsibilities seems appropriate, perhaps in proposed Canon 2.02 (recognizing that while there is a "duty to decide," and certainly a prohibition on coercing settlements, the decisional duty is not inconsistent with, and is usually accompanied by, a settlement facilitation duty where the parties - and others - are open to the possibility of dispute resolution without trial).

I hope this note proves useful. I would be happy to elaborate further upon request. And I would welcome an invitation to address the Commission should it decide to pursue further more particular comments on settlement conferencing.