

SETTLEMENT CONFERENCE ETHICS CHART: CJA Ethics Opinion No. 71

<p>A judge may participate in settlement conferences in matters pending before him or her. Factors to consider:</p> <p>(1) Whether the parties or their counsel have requested or objected to the participation by the trial judge in such discussions;</p> <p>(2) Whether the parties and their counsel are relatively sophisticated in legal matters or the particular legal issues involved in the case;</p> <p>(3) Whether a party is unrepresented;</p> <p>(4) Whether the case will be tried by the judge or a jury;</p> <p>(5) Whether the parties will participate with their counsel in settlement discussions and, if so, the effect of personal contact between the judge and parties; and</p> <p>(6) Whether it is appropriate during the settlement conference for the judge to express an opinion on the merits or worth of the case or express an opinion on the legal issues that the judge may later have to rule upon.”</p> <p>Canon 3B Commentary.</p>	<p>Canon 3B(12).</p> <p>“A judge may participate in settlement conferences or in other efforts to resolve matters in dispute, including matters pending before the judge.”</p>	<p>In doing so, the judge must avoid coercion: “At all times during such resolution efforts, a judge shall remain impartial and shall not engage in conduct that may reasonably be perceived as coercive.” Canon 3B(12)</p>
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<p>A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so or when authorized to do so by stipulation of the parties.</p>	<p>Canon 3B(7). “A judge may, with the express consent of the parties or their lawyers, confer separately with the parties and/or their lawyers during such resolution efforts.” Canon 3B(12).</p>	<p>“At all times during such resolution efforts, a judge shall remain impartial and shall not engage in conduct that may reasonably be perceived as coercive.” Canon 3B(12)</p>
<p>Coercion defined.</p>	<p>Expressing opinions about the merits of a case, even emphatic opinions, is not tantamount to coercion. In “Expressions of opinion of this nature by a judge, in what he conceives to be a discharge of his official duties, do not evidence bias or prejudice which would prevent him from being entirely fair and impartial in the trial.” <i>Garcia v. Estate of Norton</i> (1986) 183 CA3d 413, 423.</p>	
<p>“You’re going to lose if you try this case.”</p>	<p>Not the trial judge. Both sides represented.</p>	<p>The judge is not being coercive and there is no violation of Canon 3B (12).</p>
<p>Parties appear unable to settle the case. Master calendar judge orders them to continue negotiating and states that “I won’t let this case go to trial, so you better settle it.”</p>		<p>The judge is being coercive and there is a violation of Canon 3B (12) because the master calendar judge is impliedly threatening the parties with denying them a trial. Based on what has occurred during settlement discussions, the judge should consider whether or not he/she can still fairly preside even with respect to assigning the case to a trial court.</p>

Judge tells the carrier’s representative that someone with authority up to \$15,000 must personally attend the next time. The representative replies that the representative with authority at that level works in Hartford, Connecticut. The judge orders that person to fly out and attend in person.	Not the trial judge. Both sides represented.	Not coercive because judges have a right to order individuals with authority to attend a settlement conference in person, even if the person with authority has to travel a long distance.
The judge tells the moving party that they ought to settle the case, and by the way, “You can be sure that the trial judge will never grant your in limine motion.” [Good faith belief].	Not the trial judge.	This is not coercive because the judge is not the trial judge. The judge is expressing an opinion about the merits of part of the case, which judges may do during a settlement conference.
The judge tells the moving party that they ought to settle the case, and by the way, “You can be sure that the trial judge will never grant your in limine motion.” [Good faith belief].	The trial judge is conducting the settlement conference.	The judge is being both coercive and is prejudging the merits of the case. Judges must avoid expressions of opinion on legal issues that he/she may have to rule upon. Rothman, §7.62.
Judge privately asks Rothman § counsel about their willingness to consider a fee reduction in order to reach a settlement.	Not the trial judge.	This is not being coercive. A judge may privately ask counsel about their willingness to consider a fee reduction in order to reach a settlement. Rothman § 3.13.
Tells Plaintiffs they better take the offer because if they go to trial, they have a poor chance of winning; if they win, appeal will drag case out for years; if do not settle the case will not	The trial judge is conducting the settlement conference.	This is coercive because the trial judge is dissuading parties from exercising their right to a trial.

<p>get a courtroom for another year.</p>		
<p>Judge learns the identity of the expert witness whom one of the parties has retained. The judge states that no reasonable judge would ever allow that particular expert to testify because the expert is a “nut” who is “out in left field.”</p>	<p>The trial judge is conducting the settlement conference.</p>	<p>The judge has been coercive by exhibiting a lack of impartiality and implying how the judge will rule upon an issue in the case. The judge has expressed an opinion which demonstrates prejudgment of the evidence.</p>
<p>Judge meets with self-represented plaintiff. There is a low but not frivolous offer by defense; judge has doubts that plaintiff can prevail. Good rapport with plaintiff; no subpoenaed witnesses. In response to plaintiff’s request about judge’s opinion, judge recommends taking the offer, describing pitfalls of proceeding. Plaintiff expresses trust of judge, and accepts the offer even though it would not pay her medical bills.</p>	<p>The trial judge of a bench trial is conducting the settlement conference.</p>	<p>The judge has been coercive because as evidenced by the plaintiff’s comments, plaintiff feels pressured by the judge to accept the low settlement offer. Additionally, given the fact that this will be a Court trial with the settlement judge as the trier of fact involving a self-represented plaintiff, the judge has improperly expressed opinions on the merits or worth of the case.</p>
<p>Judge meets with self-represented plaintiff. There is a low but not frivolous offer by defense; judge has doubts that plaintiff can prevail. Good rapport with plaintiff; no subpoenaed witnesses. In response to plaintiff’s request about judge’s opinion, judge responds “My role here today is not to advise you as to whether or not you should take the offer. I can simply tell you some potential pitfalls and risks inherent in taking any case to trial as opposed to</p>	<p>The trial judge of a bench trial is conducting the settlement conference.</p>	<p>The judge’s behavior is not coercive but rather is proper and noncoercive participation during settlement talks.</p>

<p>accepting a settlement offer, but I don't know what will ultimately happen at trial and I can't advise you as to whether or not you should accept this offer. I attempt to provide you with all of your options so that you can make an intelligent choice, knowing the risks involved." Then the judge explains all the pitfalls of going to trial, the appellate process if there is verdict in plaintiff's favor, a risk v. reward analysis, etc.</p>		
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