

## MEMORANDUM

TO: All CJA Members

FROM: Stanley S. Bissey  
Executive Director & CEO

DATE: April 2016

SUBJECT: **Formal Ethics Opinion No. 71**

The Judicial Ethics Committee of the California Judges Association has issued the following formal opinions:

**Opinion No. 71**  
*“Judicial Attempts at Settlement”*

Judges may direct questions on the Code of Judicial Ethics to the current 2014/15 Ethics Committee by writing or calling the CJA office or any Ethics Committee member. The Ethics Committee, as a matter of policy, does not answer inquiries which are moot or raise issues of law. Nor does the Committee respond to questions that involve matters pending before the Commission on Judicial Performance.

All opinions of the committee are advisory only.

SSB:jmg

# CALIFORNIA JUDGES ASSOCIATION

## Judicial Ethics Committee

### Opinion No. 71

#### JUDICIAL ATTEMPTS AT SETTLEMENT

##### I. INTRODUCTION

A January 2013 amendment to the Code of Judicial Ethics adds a new section, Canon 3B (12), which makes it clear that judges may participate in settlement conferences in matters pending before them. Less clear is what behavior constitutes coercion by a judge during such a proceeding. Because this issue presents potentially significant ethical implications, the Committee on Judicial Ethics believes that this formal opinion will be beneficial.

##### II. APPLICABLE AUTHORITY

Cal. Const. Art. 1, Section 16.

Canon 2A: “Promoting public confidence- A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. A judge shall not make statements, whether public or nonpublic, that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office.”

Canon 3B(4): “A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers and of all staff and court personnel under the judge’s direction and control.”

Canon 3B (5): “A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gesture, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, or (2) sexual harassment.”

Canon 3B(7)(c): “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.”

Canon 3B (12): “A judge may participate in settlement conferences or in other efforts to resolve matters in dispute, including matters pending before the judge. 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. 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) Commentary: “While the judge plays an important role in overseeing efforts to resolve disputes, including conducting settlement discussions, a judge should be careful that efforts to resolve disputes do not undermine any party’s right to be heard according to law. The judge should keep in mind the effect that the judge’s participation in dispute resolution efforts may have on the judge’s impartiality or the appearance of impartiality if the case remains with the judge for trial after resolution efforts are unsuccessful. Accordingly, a judge may wish to consider:

- (1) Whether the parties or their counsel have requested or objected to the participation by the trial judge in such discussions;
- (2) Whether the parties and their counsel are relatively sophisticated in legal matters or the particular legal issues involved in the case;
- (3) Whether a party is unrepresented;
- (4) Whether the case will be tried by the judge or a jury;
- (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
- (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.”

...

*Adams v. Commission* (1995) 10 Cal. 4th 866.

*Dodds v. Commission* (1995) 12 Cal. 4th 163.

*Garcia v. Estate of Norton* (1986) 183 CA3d 413.

*Roth v. Parker* (1997) 57 CA 4th 542.

Rothman, David, *California Judicial Conduct Handbook* (3rd Ed), Sections: 3.13, 5.20, 7.36, 7.58, 7.61 (2013 Supp.), 7.62.

### III. DISCUSSION AND APPLICATION TO SPECIFIC FACTUAL SITUATIONS

Judges who conduct settlement negotiations need to be mindful that parties have a constitutional right to proceed to trial rather than settling their case. Coercive conduct could well undermine a party’s right to be heard according to law<sup>1</sup>. Even if it does not, such behavior can create that appearance.

---

<sup>1</sup> Cal. Const. Art.1, Section 16.

This is not to say that expressing opinions about the merits of a case, even emphatic opinions, is tantamount to coercion. In *Garcia v. Estate of Norton* (1986) 183 CA3d 413, 423, the Court of Appeal noted, “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.”

As our Supreme Court stated in the case of *Dodds v. Commission* (1995) 12 Cal.4th 163, 177, “Even an otherwise just settlement, if imposed summarily and coercively, is likely to disserve justice by leaving the parties with a lingering resentment of one another and the judicial system...” The Court went on to conclude, “But when a judge, clothed with the prestige and authority of his judicial office, repeatedly interrupts a litigant and yells angrily and without adequate provocation, the judge exceeds his proper role and casts disrepute on the judicial office.” *Id.*

The following examples may provide some guidance to illustrate specific settlement scenarios that may or may not be considered coercive or otherwise improper under section 3B (12).

**No. 1**

a. Facts: During a settlement conference in a business dispute, the judge who is not the trial judge tells one of the sides, in an emphatic voice, “You’re going to lose if you try this case.” Both sides are represented by counsel.

b. Analysis: The judge is not being coercive and there is no violation of Canon 3B (12). Judges may express their opinions about the merits of the case during settlement negotiations.

**No. 2:**

a. Facts: Late during a settlement conference before the trial judge, the judge concludes that the parties do not have an adequate grasp of their case. The judge orders the parties to return for a continued settlement conference in two weeks “after you have reviewed your case and understand it better.” On the judge’s own motion, the trial date is continued for two weeks. The matter is a business dispute in which both sides are represented by counsel.

b. Analysis: This judge is not being coercive and there is no violation of Canon 3B (12). A judge has a right to manage the case apart from the settlement conference. The judge has formed a good faith belief that the parties are not ready for trial, do not understand their case well enough to engage in constructive settlement talks, and that continuing the settlement conference until a later date when they may have a better grasp of the matter may benefit the parties and increase the chances of settlement. It may also result in a more efficient trial.

**No. 3:**

a. Facts: The parties in a settlement conference appear unable to resolve the matter. The 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.”

b. Analysis: 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.

**No. 4:**

a. Facts: A judge is conducting a settlement conference in a family law dispute. One of the sides is self-represented, a person who has no familiarity with the judicial system. The judge is not the trial judge. Speaking to the self-represented person alone, the judge smiles and says, “Are you absolutely certain you want to go to trial? Do you really think you can win this case?” The litigant does not wish to participate any further and asks to be excused. The judge replies, “You ought to answer my question before you walk out of here.”

b. Analysis: While this behavior would not be coercive if the parties were represented by counsel, a self-represented litigant might feel otherwise. It is important that a settlement not appear to have been the result of strong-arming an unsophisticated party, who may leave the proceedings harboring resentment about the process even if the settlement is fair. The judge should make sure the self-represented party understands that there is no obligation to settle the case.

**No. 5:**

a. Facts: A judge who will not try the case is conducting a settlement conference between two represented parties. The defendant has insurance. The representative whom the carrier sent to the conference states that he only has authority up to \$7,500. The Plaintiff has demanded \$15,000. Believing that the case is worth more than \$7,500, the judge orders the parties to return in a week for a continued settlement conference and 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.

b. Analysis: This is 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.

**No. 6:**

a. Facts: A judge who is not the trial judge is conducting a settlement conference. The judge believes that a pending in limine motion has little merit. 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.”

b. Analysis: 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.

**No. 7:**

a. Facts: The trial judge is conducting a settlement conference. The judge believes that a pending in limine motion has little merit. The judge tells the moving party that they ought to settle the case, and by the way, “You can be sure that I’m not going to grant your in limine motion.”

b. Analysis: 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. Based on what has occurred during settlement discussions, the judge should consider whether or not he/she can still fairly preside over the trial or if because of events that occurred during the resolution efforts, the judge may be disqualified.

**No. 8:**

a. Facts: A judge who will not try the case is conducting a settlement conference. The parties are five thousand dollars apart. During a private discussion with counsel for one of the sides, the judge asks whether counsel would be willing to reduce their attorney fees by five thousand dollars so that the matter may conclude.

b. Analysis: 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 counsels judges not to “suggest to parties that they get a discount or reimbursement from their lawyers in order to pressure settlement.” Rothman, §3.13. However, as he notes, attorneys often reduce their fees to achieve a settlement. It would therefore not be improper for a judge to mention such a possibility to counsel. Here the judge is doing nothing more than mentioning the possibility.

**No. 9:**

a. Facts: The trial judge is handling a settlement conference and tells Plaintiffs they better take the offer because if they go to trial, they have a poor chance of winning. In addition, the judge says that he/she

has another trial ahead of this one so Plaintiffs won't get to court for another year, and that if the Plaintiffs somehow win, the Defense will appeal and drag out the case for another 3-4 years, which means the Plaintiffs will never get their money.

b. Analysis: This is coercive because the trial judge is dissuading parties from exercising their right to a trial. Based on what has occurred during settlement discussions, the judge should consider whether or not he/she can still fairly preside over the trial or if due to events that occurred during the resolution efforts, the judge may be disqualified.

**No. 10:**

a. Facts: While the trial judge is engaged in settlement discussions, he/she 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."

b. Analysis: 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. Based on what has occurred during settlement discussions, the judge should consider whether or not he/she can still fairly preside over the trial or whether the judge should voluntarily recuse.

**No. 11:**

a. Facts: A judge who will preside over a bench trial meets with a self-represented plaintiff during the settlement conference. The defense makes an offer that while low, is not frivolous. The judge has doubts that this plaintiff can prevail. Even if the case has merit, the plaintiff appears ignorant of the rules of evidence. Worse yet, it appears the plaintiff has failed to subpoena essential witnesses. The judge has established a very good rapport with the plaintiff, who asks what the judge thinks of the settlement offer. The judge responds, "I would take it if I were you, and here's why". 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. The plaintiff says that although the settlement will not even pay her medical bills, she trusts the judge's wisdom and will do as the judge has suggested. She thanks the judge for the judge's time and attention to the case.

b. Analysis: 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. Based on what has occurred during settlement discussions, the judge should consider whether or not he/she can still fairly preside over the trial or if due to events that occurred during the resolution efforts, the judge may be disqualified.

**No. 12:**

a. Facts: A judge who will preside over a bench trial meets with a self-represented plaintiff during the settlement conference. The defense makes an offer that while low, is not frivolous. The judge has doubts that this plaintiff can prevail. Even if the case has merit, the plaintiff appears ignorant of the rules of evidence, and it appears the plaintiff has failed to subpoena essential witnesses. The judge has established a very good rapport with the self-represented plaintiff, who asks what the judge thinks of the settlement offer. The 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 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.

b. Analysis: The judge’s behavior is not coercive but rather is proper and noncoercive participation during settlement talks.

#### **IV. EXAMPLES OF CJP DISCIPLINE**

The prominent areas of judicial misconduct involving a judge’s efforts to coerce a settlement appear to involve demeanor problems, lack of impartiality, and misuse of sanctions.

In one discipline case for improper demeanor, a judge made unduly harsh remarks to a litigant, a witness, and to an attorney during a settlement conference. The judge received an advisory letter from the Commission on Judicial Performance, hereinafter “CJP”. The CJP monitored the judge for six months to ensure no additional violations<sup>2</sup>. In another case, where the CJP imposed public admonishment, a judge used profanity and a vulgar gesture while threatening counsel with retaliation during a break in the settlement conference. The judge loudly and angrily told counsel, “Your demand for money is bullshit...If you keep making this demand, you can stick it right here,” while gesturing toward his buttocks with rolled up paper<sup>3</sup>. In yet another CJP

---

2 CJP Annual Report (2007), Advisory Letter 2, pg. 31

3 CJP Public Admonishment of Judge Alexander H. Williams III, 1/22/97

discipline case involving improper demeanor, the judge was publicly censured for his behavior toward attorneys in a class action settlement hearing during which the judge engaged in a pattern of sarcasm and improper remarks toward the attorneys<sup>4</sup>.

The CJP sent Advisory letters to judges involved in settlement discussions for their lack of impartiality. In one case, a judge told the plaintiff they should be institutionalized<sup>5</sup>. In another case, the judge's comments about the parties and prospects of settlement reflected embroilment and lack of impartiality<sup>6</sup>.

Also, the CJP privately admonished a judge who threatened to order parties and lawyers to appear every month at settlement conferences if they did not agree to mediation. In that matter, the CJP found the judge's behavior created an appearance of coercion<sup>7</sup>.

## V. CONCLUSION

Canon 3B (12) of the Code of Judicial Ethics and its Advisory Commentary provide a discrete list of circumstances to consider in conducting a settlement conference. Judges must be mindful to not be coercive or give that appearance during settlement negotiations, or to engage in other improper tactics to reach a settlement.

---

4 CJP Public Censure of Former Judge Brett C. Klein, No. 187 (2/2/10)

5 CJP Annual Report (2010), Advisory Letter 15, pg. 26.

6 CJP Annual Report (2008), Advisory Letter 8, pg. 27.

7 CJP Annual Report (2011), Private Admonishment, 7, pg. 24.

## 2015/16 JUDICIAL ETHICS COMMITTEE

Mary E. Fuller, Chair

Barbara A. Kronlund, Vice Chair

Alice Vilardi, Secretary

Kenneth P. Barnum

Victoria G. Chaney

James R. Dabney

Leonard Perry Edwards

Laura W. Halgren

Aaron H. Katz

Edward F. Lee

Lisa B. Lench

Terri A. Mockler

Tam Nomoto Schumann

Elia Weinbach

Anthony J. Mohr, Past Chair Ex-Officio

Stephanie Sontag, Board Liaison



California Judges Association  
2520 Venture Oaks Way, Suite 150, Sacramento, CA 95833  
(916) 239-4068 Toll Free (866) 432-1CJA (1252)  
*[www.caljudges.org](http://www.caljudges.org)*