Advisory Opinion #2006-01

(adopted October 30, 2006)

Question: *May a judge conduct settlement conferences in cases where the judge is also the assigned trial judge?*

Opinion: A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge. Canon 3(B)(7)(a)(iii)(e). Trial judges conducting settlement conferences in their own cases must, however, have a heightened awareness of the appearance that the parties might feel improper pressure to settle or that the judge will no longer be impartial if the case fails to settle.

Some guidelines for settlement conferences include:

(1) Before beginning the settlement conference, the parties' request for and consent to participation by the trial judge should be established either in writing or on record.

(2) Sensitivity to the appearance of impropriety must always be a consideration for the judge. In all cases, the judge should be aware that recusal may be required if the case fails to settle and the judge has learned information during the conference that might undermine objectivity or create the appearance of impropriety. In each instance, the judge should ask whether a reasonable person, with knowledge of all the circumstances of the conference, would question continued impartiality by the judge.

(3) The concerns about the appearance of impropriety mentioned above may be heightened in cases where the judge, not the jury, will decide the case. Courts are divided on the question of whether, if settlement efforts fail in such a case, the judge must recuse from further participation in the matter. One state supreme court has held that the judge must recuse if a party requests it.[1] Another state supreme court has held that recusal is automatic by virtue of participation in settlement negotiations.[2] Courts in four other states have not required automatic disqualification, leaving the decision to the individual judge to determine whether continued involvement would lead to an

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[1] *Schellin v. N. Chinook Irrigation Ass'n,* 848 P.2d 1043, 1045 (Mont. 1993) (holding that the judge should have recused himself after participating in settlement negotiations between the parties); *Shields v. Thunem,* 716 P.2d 217, 219 (Mont. 1986) ("[W]here a judge is to be the trier of fact, and he participates in pre-trial settlement negotiations which subsequently fail, he should, upon request, disqualify himself from sitting as the trial judge.").

[2] *Timm v. Timm,* 487 A.2d 191, 204 (Conn. 1985) ("When a judge engages in a pretrial settlement discussion in a court case, he should automatically disqualify himself from presiding in the case in order to eliminate any appearance of impropriety and to avoid subtle suspicions of prejudice or bias.").

appearance of impropriety and bias.[3] The Alaska Supreme Court has not addressed this issue.

(4) Although the judge may explain the law to the parties, the judge should not state how he or she intends to rule on disputed legal issues.

(5) Particular care should be taken in cases involving unrepresented parties. The judge should consider the possibility of recording all discussion in order to resolve any later dispute about statements made during the course of negotiations.

(6) Many of the above concerns do not arise where judges share settlement conference work in a way that reduces or eliminates the need for assigned judges to conduct their own settlement conferences.

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[3] *Sinahopoulos v. Villa,* 224 A.2d 140, 142 (N.J. Super. 1966) ("[T]he mere fact that the judge participated in a pretrial conference with a view to possible settlement of the case does not and should not indicate prejudgment.").

In re Estate of Sharpley, 653 N.W.2d 124, 129 (Wisc. 2002) (disqualification required "[w]hen a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner…The determination of a basis for disqualification here is subjective.").

Enterprise Leasing Company v. Jones, 789 So.2d 964, 968 (Fla. 2001) ("A judge is presumed by law to be unbiased and unprejudiced. A mere allegation of bias without a specific factual showing in support is insufficient to require disqualification.").

Home Depot, U.S.A., Inc. v. Saul Subsidiary I Ltd., 159 S.W.3d 339, 341 (Ky. App. 2004) (holding that a trial judge is not required to recuse after conducting mediation).