THE JUDGE'S ROLE IN SETTLEMENT NEGOTIATIONS:

An Overview of North Carolina Law

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In North Carolina, trial judges are allowed, and indeed encouraged, to assist parties with settlement negotiations, so long as they act in an impartial manner. Over the last half century the North Carolina Court of Appeals has consistently held that appropriate judicial participation in settlement discussions is good for society and entirely acceptable. While there is no North Carolina Supreme Court case addressing these issues, several of these Court of Appeals decisions have had discretionary review denied, thus at least implying support from the Supreme Court of this view of the judicial settlement role.

In the first of the cases to address this issue, *Roper v. Thomas*, 60 N.C. App. 64, 75-76, 298 S.E.2d 424, 431 (1982), *disc. review denied,* 308 N.C. 191, 302 S.E.2d 244 (1983), the Court recited the facts as follows:

> [T]he trial judge called the attorneys for both plaintiff and defendants into his chambers and advised them that based on the testimony before him the defendants were absolutely liable to the plaintiff, regardless of further evidence, and inquired about settlement possibilities. Nothing in the record indicates the judge could not proceed with the trial fairly and impartially. On the following day, the defendants filed a motion for order of recusal. Immediately thereafter, the matter was heard by [another judge], who found facts, and concluded that no grounds existed for recusal and denied the motion.

The Court of Appeals found no error, noting that a settlement conference such as the one the trial judge initiated is simply a forum "for the purpose of exploring settlement possibilities." That, the Court held, should "be commended to all trial judges in civil cases." *Id.* at 76, 298 S.E.2d 424, 431. The Court found because the conference at issue was not in the presence of the

jury, and was attended only by the judge and attorneys for both sides, it was a settlement conference and there was no need for the judge to recuse himself. *Id*. Indeed, the Court of Appeals said the trial judge should be "commended" for initiating settlement discussions. *Id.*

In *Melton v. Tindall Corp.*, 173 N.C.App. 237, 618 S.E.2d 819 (2005) in which a pedestrian walkway at a race track failed and the plaintiffs brought a negligence action against the race track and the construction company by whom it was built, the trial judge, Judge Spainhour, sent an email to counsel in which he noted he was "concerned" about defendant's motion to strike and then suggested the parties "seriously re-visit the idea of a settlement before ... the hearing [on the motion]." *Id*. at 253, 618 S.E.2d 819, 829. The plaintiff then filed a motion seeking recusal, contending that Judge Spainhour had departed from his duty of impartiality. Again the matter was referred to another trial judge for decision and the motion was denied. The North Carolina Court of Appeals affirmed, quoting *Roper v. Thomas* for the proposition that the decision by a trial judge to explore settlement possibilities is a function "to be commended to all trial judges in civil cases", and is not generally a ground for disqualifying a judge. *Id.*; *Roper v. Thomas*, 60 N.C. App. 64, 76, 298 S.E.2d 424, 431, (1982), *disc. review denied* 308 N.C. 191, 302 S.E.2d 244 (1983). The Court quoted from a criminal case in which the trial judge had delayed jury selection while the parties engaged in plea negotiations, *State v. Kamtsiklis*, for the proposition that "even where a trial judge becomes ostensibly angry at the failure of settlement negotiations, his disqualification is not necessarily required under the law." *Melton v. Tindall Corp.*, 173 N.C.App. 237, 253, 618 S.E.2d 819, 830, (2005) citing *State v. Kamtsiklis*, 94 N.C. App. 250, 258-259, 380 S.E.2d 400, 404, *appeal dismissed, disc. review denied*, 325 N.C. 711, 388 S.E.2d 466 (1989). The Court found that Judge Spainhour's suggestion that the parties settle was not improper, and indeed it was entirely appropriate that a

trial judge aid and even encourage the settlement process. *Melton v. Tindall Corp.*, 173 N.C.App. 237, 618 S.E.2d 819, (2005).

In *Dunn v. Canoy*, a lawyer's position about settlement halted negotiations, and the judge "let his annoyance be known to the parties." *Dunn v. Canoy*, 636 S.E.2d 243, ___N.C.App. ___, (2006). In finding no error, the North Carolina Court of Appeals once again cited the rule set forth in *Roper v. Thomas* that the decision by a trial judge to explore settlement possibilities is a function "to be commended to all trial judges in civil cases." *Dunn v. Canoy*, 636 S.E.2d 243, ___N.C.App. ___, (2006) citing *Roper v. Thomas*, 60 N.C. App. 64, 76, 298 S.E.2d 424, 431, (1982), *disc. review denied* 308 N.C. 191, 302 S.E.2d 244 (1983). The Court acknowledged that Canon 5(E) of *The Code of Judicial Conduct* provides that a "judge should not act as an arbitrator or a mediator", but held that this Canon does not prevent a judge from assisting the parties in reaching a settlement. *Dunn v. Canoy*, 636 S.E.2d 243, ___N.C.App. ___, (2006). The Court of Appeals also cited *State v. Kamtsiklis*, a criminal case in which the trial judge became "ostensibly angry at the failure of settlement negotiations," and yet the Court had found that his "disqualification from the case is not necessarily required under the law" because the evidence did not indicate the judge was not impartial. *Id*. and *State v. Kamtsiklis,* 94 N.C.App. 250, 258-59, 380 S.E.2d 400, 404, *appeal dismissed, disc. review denied,* 325 N.C. 711, 388 S.E.2d 466 (1989). The Court repeated its holding that "a judge's reaction to attempts to disrupt settlement negotiations does not, without more, require recusal," and indicated that personal bias, interest, or prejudice must be shown. *Id*. at 249.

While the case law has not explored the boundaries on the judge's role to participate in settlement negotiations, it seems obvious that a judge may not force the parties to settle. Moreover, the Code of Judicial Conduct sets forth some limits, albeit a bit indirectly, on the

judge's role in settlement. First, Canon 2(A) of the Code of Judicial Conduct requires that a judge "should conduct himself/herself at all times in a manner that promotes public confidence." *Code of Judicial Conduct*, Canon 2(A). Second, "a judge should perform the duties of the judge's office impartially and diligently." *Code of Judicial Conduct*, Canon 3. Third, "a judge should be patient, dignified and courteous..." *Code of Judicial Conduct*, Canon3(A)(1). Fourth, a judge must provide every litigant the "full right to be heard according to law" and should "neither knowingly initiate nor knowingly consider *ex parte* or other communications concerning a pending proceeding." *Code of Judicial Conduct*, Canon3(A)(4).

From these precepts, one can conclude that a trial judge should not:

- Force the parties to settle a case which one or both sides wish to try;
- State or imply that a party will be punished by the judge's rulings going forward if that party refuses to settle; or
- Speak privately, i.e., ex parte, to one side during a trial about settlement.

In conclusion, North Carolina courts have begun to contemplate the judge's role in settling cases. I would argue this role is one in which the judge may suggest the parties settle, urge the parties to settle, or even instill in the parties a fear of making the judge angry if they do not settle. Case law does not touch on the issue of actually proffering proposals, but I would argue this could cast doubt on the judge's partiality, and his role as a non-mediator. For this reason, it is my belief the judge should shy away from this form of assistance in settling. North Carolina Courts have looked favorably upon judges who have helped settle cases, and within the confines of *The Code of Judicial Conduct*, assistance should be often employed by judges.