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Settlement Ethics**

1. Introduction

I am very pleased to be with you today to contribute to this program sponsored by the NCADR, and to represent South Texas College of Law in conveying our best wishes as a partner institution. My topic is "Settlement Ethics."

As we continue into the second decade of the 21st century, we are witnessing very significant changes in the litigation of civil disputes in the Georgian society, as well as in the United States. These changes are more significant than at just about any other period during this century. Much of the change has resulted from lawyers and judges recently developing a much more expansive view of the means that may be employed for resolving civil disputes. Judges are no longer simply passive adjudicators, but are now active case managers. Cases in litigation are now being sent to mediation, arbitration, and other alternatives to adjudication and lawyers are beginning to advise their clients of the availability of those ADR devices and are developing tactics and strategies for representing their clients in these different settings.

A lot has been said and written about these developments, generally under the heading of the alternative dispute resolution movement. However, very little attention has been given to what might be called a byproduct of this movement or, alternatively, a parallel development. One consequence of the increased use of ADR is that it has encouraged the development of a "settlement culture." What I mean by this is that lawyers and judges are approaching the litigation of civil cases with a very different mindset than they did ten years ago. This mindset has altered their behavior somewhat, or perhaps more accurately stated, has made certain behaviors more salient. The problem as I see it is that we have not created the necessary ethics infrastructure, or ethics rules. to support this settlement culture.

In many respects, this important aspect of our litigation process in Georgia and in the U.S. is in a state of anarchy. There are few rules to govern our behavior. As a result, the stage is set for a lot of dysfunctional behavior that (1) gets in the way of the just resolution of civil cases and (2) threatens to bring discredit to our legal professions and our civil justice systems.

In the time I have with you today I would like to focus on this problem – this ethics black hole – and to offer a few tentative suggestions for correcting this problem. Let me first though explain myself a bit more. I have made a number of broad statements based on

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certain assumptions that need to be elaborated. Again, my central premise is that we have created a "settlement culture" over the past two decades, but have not created the necessary ethics infrastructure to support that culture.

2. Settlement Culture

Let's first examine the evolution of what I have described as a "settlement culture" here in Georgia. Let's focus first on the judges.

Article 217 of the Civil Procedure Code of Georgia ("Commencement of the Hearing") clearly encourages judges to take steps to settle cases before them. I have recently had the opportunity to speak with trial judges from various regions of Georgia. Many said that they do encourage settlement. Some have taken advantage of your rule that allows judges to excuse the lawyers in the case and speak directly with the parties about settlement. They indicated that they were inclined to do what I would refer to in the mediation context as "reality testing." That is, they would ask the parties to think realistically about what would happen in court if the case where to go to a hearing before the judge. They made it clear that they would not do anything that might coerce the parties into settlement. Rather, they saw their role as that of facilitating a settlement discussion between the parties.

This role of the judge in Georgia as settlement facilitator will probably be enhanced as more Georgia judges receive mediation training. I understand that German judges have recently come to Georgia as mediation trainers. As you many know, judicial mediation has become pervasive in Germany. And, I believe, the Germans have adopted a very positive model from a judicial ethics standpoint. In particular, the Germans have been very careful to preserve the core value of judicial impartiality by providing that a judge who mediates a case may not subsequently preside over the trial of the same case if the case fails to settle through the judge's efforts at mediation. Again, I believe this is wise because a judge who acts as a mediator may acquire knowledge of the facts of the case that would not otherwise be available to the judge as adjudicator. Also, and perhaps more importantly, the judge may have developed a bias towards one or both of the parties if they were reluctant to settle in the mediation conducted by the judge.

These concerns might also be transferred to a new piece of legislation in Georgia. I understand that the Georgia legislature recently passed an act that would give Georgian judges the authority to offer parties an evaluation of their case before it goes to a hearing before the judge. Article 218.2 of the Civil Procedure Code of Georgia provides that, "A judge may indicate the possible outcomes or resolution of the case and suggest settlement conditions to the parties." In addition to the concerns I have raised over coercion and bias, I would also be concerned that Georgian judges who conduct an evaluation might run the risk of engaging in prejudgment in violation of Article 5 of the Norms of Judicial Ethics of Georgia. That is, a reasonable observer might be concerned that the judge who offered an evaluation that is not accepted by the parties and subsequently presides over the case and renders a judgment that is the same as the judge's evaluation may not have kept an open mind in hearing the testimony of witnesses.

Let's turn now to the evolution and nature of what I have referred to as a "settlement culture" in the U.S. The evolution of this phenomenon is perhaps best reflected in the changes that have been made to Rule 16 of the Federal Rules of Civil Procedure in the U. S. over the past twenty five years. Rule 16 is the pretrial conference rule. This rule, as it was originally adopted with the wholesale promulgation of the Federal Rules of Civil Procedure in 1938 (a major watershed in U. S. procedural history) was originally quite brief, only a couple of paragraphs in length, and relatively narrow in focus. It authorized the judge, as a matter of discretion, to direct the attorneys representing parties in a civil case to appear before the judge for a conference prior to trial. At the conference various pretrial matters could be considered. Among them was whether the pleadings should be amended and which facts and documents, if any, could be admitted without need of proof.

In 1983, Rule 16 was amended. Perhaps the most significant change reflected in the 1983 amendments to Rule 16 was that settlement was explicitly mentioned for the first time. As it was originally promulgated in 1938, settlement was not among the five pretrial enumerated discussion subjects in the original version of the rule.

The rule was amended again in 1993. The 1993 amendments to Rule 16 expanded the power of the trial court to "take appropriate action" in five different areas involving the litigation of a civil action. Principal among these was the area of settlement. Rule 16(c)(9) now reads:

"At any conference under this rule consideration may be given and the court may take appropriate action with respect to settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule."

In the advisory committee notes to the rule the committee explains:

Even if a case cannot immediately be settled, the judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits."

The committee note then goes on to say:

"The rule acknowledges the presence of statutes and local rules or plans that may authorize use of some of these procedures even when not agreed to by the parties."

So, in ten short years, we went from a federal pretrial conference rule intended to sharpen issues for trial to a rule that explicitly authorized and encourage settlement discussions, to a rule that now encourages the use of special procedures such as mediation, and early neutral evaluation to assist in settlement.

Because these procedural and practice changes foster new and different behaviors by the major actors in the litigation process – namely judges and lawyers – one might expect that ethics rules for judges and lawyers would be amended or changed accordingly to guide their actions. This has not been the case. The ABA Model Code of Judicial Conduct and the ABA Model Rules of Professional Conduct give American judges and lawyers little guidance. Indeed, what guidance there is in these ethics rules may actually encourage dysfunctional behaviors.

3. The Judge's Role

Let's first examine the ethical guidance available to the American judge in dealing with this new "settlement culture". Until 2007, the ABA Model Code of Judicial Conduct was virtually silent in terms of offering helpful guidance to the judge in encouraging or conducting settlement discussions. With the promulgation of a new ABA Model Code of Judicial Conduct in 2007, one might have expected that more careful attention would have been given to the judge's role in the settlement of civil cases. Unfortunately, this did not happen. The only changes of any consequence in the 2007 Model Code made it clear that the judge could participate from an ethical standpoint in settlement conference or ADR activities. But it gave little guidance to the judge as to appropriate behavior in participating in settlement discussions.

The closest the 2007 code gets to offer some guidance to the judge in this regard is found in the commentary to the Canon relating to the requirement that judges perform the duties of their offices impartially, and ensure the parties' right to be heard. Rule 2.6(B) states that "a judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement." The comments to Rule 2.6(B) offer some general guidance about judges' settlement procedures, but stop short of offering guidance to the judge who adopts the dual role of mediator and judge.

The shortcomings of the ABA model code in terms of their giving sufficient guidance to the judge who participates in settlement discussions are perhaps best exemplified by a California case. In Dodds v. Commission on Judicial Performance (1996), the Supreme Court of California considered a recommendation by the California Commission on Judicial Performance that a superior court judge be censured for engaging in certain conduct. In particular, the judge had allegedly attempted to coerce settlement in a case. The case involved alleged sexual misconduct by a physician.

At the settlement conference (or mediation), the judge abruptly and repeatedly interrupted the plaintiff. During an argument between the judge and the plaintiff, the judge pushed the plaintiff for a settlement figure. The plaintiff was reluctant to state a settlement figure because the defense was insisting on a confidentiality clause in the settlement agreement. The plaintiff opposed the confidentiality clause because it would prevent her from warning others about the physician's actions. However, the judge insisted that the case was simply about money and demanded a settlement figure. After the plaintiff finally stated a figure, the judge angrily threw up his arms and yelled, "Get out, it will not settle." The plaintiff was observed crying at the time and again when asked to recount the incident as part of the disciplinary proceeding.

The judge defended this conduct on the grounds that his" assertive judicial style" is desirable because it enables him to effect settlements in difficult cases. The Supreme Court of California was unsympathetic with the judge's defense stating: "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. We laud the creative and diverse means by which judges assist parties in reaching voluntary settlements of complex disputes. But when a judge, cloaked 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." Although the court found that the judge's actions constituted prejudicial conduct, they concluded that public censure was not warranted because the judge's actions did not rise to a sufficient level of seriousness and they thus rejected the commission's recommendation. I believe that such a result was dictated, in large part, by the failure of the California Code of Judicial Conduct to clearly and explicitly prohibit such behavior.

There are a few cases where an appellate court has reversed a trial judge's refusal to recuse himself or herself based on a finding that the trial judge had engaged in coercive behavior during settlement discussions. However, I was unable to find a single case where a judge was disciplined by a state high court on the recommendation of a judicial conduct commission that the judge had violated the code of judicial conduct by engaging in coercive behavior during a settlement conference. I believe state high courts in the U.S. are somewhat understandably reluctant to discipline a judge for settlement coercion for two reasons. First, the language relating to settlement in the ABA Model Code of Judicial Conduct is much too general and subjective to provide clear guidance to the judge. Second, as the administrative head of a state judicial system, most state supreme courts have taken active measures, usually though their rulemaking powers, to encourage this settlement culture, perhaps most prominently through the adoption of Rule 16 and analogous procedural innovations. It is therefore understandable that they would feel uncomfortable in disciplining a judge who became overly zealous in his or her attempts to settle a case.

Indeed, they have also stopped short of requiring a judge to recuse him or herself, if the judge has acted as a mediator, the case has failed to settle, and the parties have asked the judge to recuse herself for the trial of the case. These were the facts in Home Depot v. Saul Subsidiary. The judge who had acted as a mediator refused, at the request of the parties, to recuse herself. On appeal, the Supreme Court of Kentucky ruled that the judge did not have to recuse herself.

4. The Role of the Lawyer

Let me now turn to a discussion of the role of the other major actor in our settlement culture; namely, the lawyer. Like the ABA's Model Code of Judicial Conduct, the ABA's Model Rules of Professional Conduct provide little guidance to the lawyer engaged in settlement negotiations. What is worse is that the one rule that is most instructive provides guidance that I believe, standing alone, is harmful to the proper functioning of the litigation process.

Rule 4.1 of the Model Rules has the high-minded title: "Truthfulness in Statements to Others" The rule states, in part: "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person."

This is a wonderfully straightforward and clear statement that appears to set a high standard of conduct for a practicing lawyer. On the face of it, it seems to say that a lawyer should not lie. However, when we look to the commentary to this rule we find in the second paragraph the following. "This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as

statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where non-disclosure of the principal would constitute fraud."

So, when it comes to negotiations, the rule prohibits only "material" lies. And, it thus opens the door to what has been referred to as "puffery" or lying in negotiations, one commentator has concluded that the ABA has "unambiguously embraced "New York hardball" as the official standard of practice."

The commission that was responsible for drafting the rules, the so-called Kutak commission, had originally proposed a truthfulness rule without all the conditional language. However, they were convinced that such an absolutist rule would be untenable for the practicing lawyer. In perhaps the most influential article arguing for an amended rule that would permit "puffery" in negotiation, Professor James White of the University of Michigan Law School stated: "Pious and generalized assertions that the negotiator must be "honest" or that the lawyer must use "candor" are not helpful. They are at too high a level of generality and they fail to appreciate the fact that truth and truthful behavior at one time in one set of circumstances with one set of negotiators may be untruthful in another circumstance with other negotiators."

Professor White won the day. The rule permits lying in negotiations. And since the adoption of the Model Rules, numerous commentators have written on the topic of lying in negotiation arguing that we need a continuing discourse on the ethics of lying in negotiation because our discourse is, as one commentator put it, "uncritical, self-justificatory, and unpersuasive." This commentator states, "...lying is not the province of a few "unethical lawyers who operate on the margins of the profession. It is a permanent feature of advocacy and thus of almost the entire province of law." Others have argued that we need an alternative model for negotiation that emphasizes truth seeking, or that we need a negotiation rule that articulates the various "conventions" in negotiations. One goes so far to accept lawyer deceit as a negotiation norm and suggests that we might consider a caveat lawyer rule (that is recognize that lying is an inherent part of the negotiation process and just accept the fact that anything goes). After reading these articles, one is left with a strong sense of unease over this ethics low water mark.

With the increased use of mediation by the courts and the colonization of the mediation field by attorneys, Rule 4.1 has become more problematic. In an article in the ABA's Dispute Resolution Section Magazine, Bruce Meyerson, an Arizona attorney mediator, asks the question, "What obligation does a lawyer in mediation have to be honest with the mediator, the opposing party and counsel?" He begins the article by reporting on a conversation that he had recently with a well-known mediator and mediation trainer, who told Mr. Meyerson, "Don't believe anything a lawyer will tell you during a mediation." Mr. Meyerson goes on to argue that a mediator should be owed the same ethical obligation of candor that a lawyer owes to a judge.

Indeed, the lawyer's obligation of candor to a judge or a court is much higher than the lawyer's obligation of truthfulness in negotiation. Model Rule 3.3, which is entitled "Candor toward the Tribunal", states that a lawyer shall not knowingly make a false statement of

material fact or law to a tribunal. Unlike Rule 4.1, Rule 3.3 does not have the same kind of qualifying language in the rule or in the commentary to the rule. Unfortunately, an ABA ethics opinion has stated that the truthfulness rule (3.3) does not apply in mediations because mediation is not a "tribunal". Thus, the opinion goes on to say, the permissive Rule 4.1 applies to lawyer communications during mediations. Arbitration, on the other hand, is defined as a tribunal. So, lawyers may not lie in arbitrations, but they may lie in mediations.

Let's turn to the ethical obligations of Georgian lawyers, particularly their obligation to tell the truth. Article 9(3) of the Georgian Code of Professional Ethics for Lawyers, promulgated by the Georgian Bar Association, provides: "A lawyer should not present knowingly false evidence to the court." So, similar to the American Rule 3.3, a Georgian lawyer must be truthful in court. How about when representing a client outside of court particularly in settlement negotiations and mediations? As far as I can tell your code is silent on this point.

However, there are two provisions in the Georgian ethics code that I believe implicitly require Georgian Lawyers to be truthful when negotiating with other lawyers. Principle 7 is your "Principle of Collegiality" and states" "In the course of the discharge of professional activities, a lawyer shall be required to respect his or her colleagues and not to abuse their dignity." This is a wonderfully straightforward statement that should enhance the civility of the legal profession in Georgia. I wish we had a collegiality provision in the American ethics rules. Implicit in this rule is the notion that you shouldn't lie to someone you are required to respect.

Also, your Article 10 of the Georgian code not only restates the respect requirement but goes on to state: "the corporate spirit of the profession of a lawyer requires a relationship based on mutual trust and cooperation between lawyers in order to avoid litigation and any actions that may prejudice their clients." Again, how can you lie to someone with whom you are required to have a relationship of mutual trust and cooperation?

5. Conclusion

So, let's step back for a moment and take stock of some of these points that I have made. I have created two monsters, or twin demons: the bullying judge and the lying lawyer. Let me be clear that I am not arguing that many of today's judges and lawyers fit these characterizations in either the U.S. or Georgia. What I am saying though, is that the continuing development of a "settlement culture" as an essential aspect of the civil litigation process has set the stage for these characters to emerge in increasing numbers on our litigation scene.

What can we do about this situation? Well, let me offer two suggestions, one that addresses the bullying or coercive judge situation and another that takes on the lying lawyer.

To remedy the potential bullying judge situation, I would argue that Americans need to amend the Model Code of Judicial Conduct to prohibit judges from participating directly in settlement discussions in a case that has been assigned for adjudication to the judge. Some might argue that this would turn back the clock to the time when a judge was simply a passive adjudicator. I am not, however, arguing that the judge should not exercise control over his or her case load by holding pretrial conferences, issuing scheduling orders and exercising other managerial responsibilities, including encouraging the parties to enter into settlement

discussions or to use alternative dispute resolution techniques. Nor, am I arguing that a judge cannot directly participate in settlement discussions, or even act as a mediator, in a case that has been assigned to another judge. My concern here is that when a judge involves himself or herself in settlement discussions in a case that has been assigned to the judge for trial the risk of coercion is too great if the judge takes off the judge hat and puts on the hat of a mediator. The judge has a personal interest in clearing that case off his or her docket. The parties know this and there is a high likelihood that the parties and their representatives will feel pressure, however subtle, to enter into a settlement agreement. Worse yet, is the situation where the case does not settle, and the same judge who acted as a mediator in the case is now the judge trying the case. Can the judge be impartial, when the judge heard certain facts during the mediation that would not be available at trial, or might the judge be biased against a party who was reluctant to settle?

Again, this would not preclude having a judge ask another judge in his court to engage in settlement discussions with the parties. Such a "buddy system" which has one judge buddying up with another judge who presides at their pretrial settlement conference and vice versa, has actually been codified in Germany, as I have mentioned, and in eastern Canada. Also, under Arizona Supreme Court rules, Arizona's mandatory pretrial settlement conference rule obligates a trial judge to conduct a settlement conference, but gives the judge the discretion to "transfer the settlement conference to another division of the court willing to conduct the settlement conference." One federal judge has noted that such a buddy system may in the abstract be the most desirable course, but it is a practical impossibility for a judge to refer more than a fraction of the judge's caseload to other judges for settlement conference. I would argue, though, that judicial intervention is necessary, if at all, in only a small fraction of a judge's caseload. A judge needs to be perceptive enough to distinguish these cases from those cases where the judge may simply need to encourage settlement negotiations between the parties or urge the parties to consider the use of an ADR technique.

In light of the new provision that permits Georgian judges to offer evaluations, I would suggest a similar approach. That is, if a judge offers an evaluation that is not accepted by the parties, the case should be referred to another judge for the hearing. Otherwise, there is a risk of the appearance of bias or prejudgment, compromising the judge's image as an impartial adjudicator.

Let's now consider the problem of the lying lawyer. I would support Bruce Meyerson's suggestion that we need to move the legal profession's ethical norms in negotiation closer to those relating to a lawyer's norms in court. But how do we do this? Particularly since lying in negotiations is pretty well entrenched and it would probably be difficult to eliminate the qualifying language in the commentary to Rule 4.1.

Why not add a Mediation Advocacy Rule to the Model Rules of Professional Conduct that parallels the candor to a tribunal requirement of Rule 3.3 The rule should require candor not only to the mediator but also to opposing counsel and the opposing party or parties.

Well, that would be fine. So we have a high standard for settlement negotiations in the context of a mediation, but we still have the problem of lying in non-mediated settlement discussions. That's right, but Rome wasn't built in a day. If lawyers can establish a high standard of candor and truthfulness in mediations and the use of mediation continues to

expand, ultimately this should have an educative effect on the legal profession. Eventually, it will become more and more difficult to justify negotiation conventions that include puffery or lying.

Although I have pointed to the collegiality requirements in the Georgia ethics rules, the Georgian Bar Association may wish to consider the adoption of an explicit rule that applies to communications in mediation as mediation is used more and more in Georgia.

To me, the most troubling question that arises from this proposal for a mediation advocacy rule is the question of who will police this candor or truthfulness requirement in mediations. Given the confidentiality requirement in most mediations, there are obvious problems if a party, or worse yet, a mediator reports a lack of candor or truthfulness on the part of one of the parties to the court or even to a disciplinary authority. I would therefore suggest that there be an analogous rule in mediator standards of conduct that place an affirmative duty on the mediator to remind the parties of their duty of candor during the mediation.

Well, I think that I have identified at least two problems that have resulted from the emergence of what I have characterized as a “settlement culture.” You may have a problem with my characterization of these two problems or with the solutions I have suggested. I would be pleased to entertain your questions, comments or criticisms at this time.