***[Please note: This is a memorandum by a law student intern. It is intended to jump-start your own research. We have not Shepardized the cases or determined that the student’s analysis of the cases or other sources is correct.]***

**MEMORANDUM**

TO: CAFL Appellate Panel Support Unit

FROM: Law Student Intern (JF)

RE: “Forcing” Settlements

DATE: June, 2020

1. **Question Presented**

When does a judge’s encouragement to settle a case cross the line from attempts at resolution into forcing settlement?

1. **Brief Answer**

A judge’s active involvement in or encouragement in settlement negotiations may warrant a reversal of his or her decision if the judge: (1) participates directly in settlement negotiations; (2) provides parties with an incorrect statement of the law; (3) threatens parties with adverse action if a settlement is not reached; or (4) rushes parties to settle. However, judicial commentary remains innocuous if: (1) the judge’s actions otherwise clearly indicate impartiality and that comments were offering advice; or (2) the record contains overwhelming evidence of parental unfitness. Further, barring exceptional circumstances or overwhelming error, objections regarding judicial misconduct must be made at trial to be preserved for appeal.

1. **Analysis**
2. **The Right to an Impartial Judge**

Individuals are entitled to a fair trial by an impartial fact-finder. Mass. Const. I, Art. XXIX. When acting as the fact-finder in a case, a judge is required to hear all of the evidence with an unbiased mind. *See* Preston v. Peck, 271 Mass. 159, 163-64 (1930). Although a judge may urge parties to settle a case, he or she cannot do so at the expense of the party’s right to a fair trial. *See* Graizzaro v. Graizzaro, 36 Mass. App. Ct. 911, 911 (1994). Doing so is cause for reversal on appeal. *Id.*

1. **Judges Should Recuse Themselves in Instances of Potential Bias**

A judge’s decision on whether to recuse themself consists of two steps: first, the judge must consider their own emotions and conscience in the situation; then, the judge must perform an objective appraisal of the situation and whether their impartiality would be questioned. *See* Lena v. Commonwealth, 369 Mass. 571, 575 (1976), citing S.J.C. Rule 3:25, Canon 3(C)(1)(a). Because of this internal test, the decision to withdraw from a case because of potential bias is often left to the discretion of the judge. *See* Care and Protection of Martha, 407 Mass. 319, 329 n. 10 (1990).

1. **Scope of Judge’s Ability to Encourage Settlement**

Judges are not barred from encouraging settlement, nor are they barred from asking questions to determine the root of the dispute that is causing a delay in settlement as long as there is no prejudgment. *See* Adoption of Georgia, 433 Mass. 62, 65 (2000).

1. **Judge Cannot Directly Participate in Settlement Negotiations**

A judge cannot directly participate in settlement negotiations as, in some instances, that participation may be sufficient to demonstrate partiality. *See* Furtado v. Furtado, 380 Mass. 137, 151-52 (1980) (requiring a new judge where trial judge engaged in settlement discussions and may have been biased); *see also* In re Allison G., 883 A.2d 1226, 1231 n. 4 (Conn. 2005) (barring same judge from presiding over both pre-trial settlement talks and trial). A judge also abuses their discretion when they recommend specific terms and provisions for a settlement, thereby indicating predisposition on the merits of the case. *See* In re Marriage of Hitchcock, 265 N.W.2d 599, 606 (Iowa 1979) (reversing trial court where judicial recommendation to parties about asset division induced settlement decisions). However, in other jurisdiction, “a judge will not be disqualified solely because [they] participated in discussion regarding a potential plea bargain or settlement,” and reversal is unwarranted absent a showing of bias or prejudgment. *See* In re Disqualification of Spon, 984 N.E. 1069, 1071 (Ohio 2012) (holding there was no basis to disqualify judge despite their active involvement in settlement negotiations).

1. **Judge Cannot Provide Parties with Incorrect Statements of The Law**

A judge may not provide parties with incorrect statements of the relevant law to encourage settlement, as such situations unjustly influence parties’ decisions and reveal the judge’s own biased interpretations of the law. *See* Pestana v. Pestana, 74 Mass. App. Ct. 779, 781-82 (2009) (reversing trial judge where judge induced settlement by incorrectly stating they could not defer sale of marital home until children reached age of majority); *see also* Domestic Relations Section for Diehl v. Mulhern, 594 A.2d 692, 695 (Pa. Super. 1991) (holding that a settlement exempting father from paying future child support if he paid lump sum was not preclusive of future child support claims despite judge’s assurance it would be binding).

1. **Judge Cannot Unduly Coerce Parties into Settlement**

A judge cannot abuse their discretion by barring parties’ access to a trial on the merits of the case or threatening adverse action, and thus force them to settle. *See* Graizzano, 36 Mass. App. Ct. at 911 (reserving trial decision where judge supported settlement, stayed proceedings to force parties to settle, and threatened attorneys with sanctions if they did not reach a settlement); *see also* Dawson v. U.S., 68 F.3d 886, 897 (5th Cir. 1995) (finding that forced settlement offers are coercion and are not accepted).

1. **Judge Cannot Rush Parties into Settlement**

Further, judges cannot rush parties into settling without granting them sufficient time to discuss and consider settlement; if they do so, the trial court’s decision warrants reversal. *See* Peskin v. Peskin, 638 A.2d 849, 856-59 (N.J. 1994) (reversing trial court decision where judge coerced settlement by forcing answers, barring discussions, and telling party it was only settlement opportunity); Schunk v. Schunk, 84 A.D.2d 904, 904-05 (N.Y. 1981) (reversing trial court decision where judge conceded they pressured parties into settlement). *See also* Slaughter v. McVey, 20 Mass. App. Ct. 768-69, 771 (1985) (criticizing trial judge for pressuring parties into hasty and ill-formed settlement).

1. **Exceptions to Restrictions on Judge’s Ability to Encourage Settlement**
2. **Lack of Bias**

Judicial commentary urging settlement may be acceptable when the judge makes it clear that they will not force parties to settle, but instead offers unbiased advice. *See* In re Custody of Zia, 50 Mass. App. Ct. 237, 247-48 (2000) (affirming case where judge encouraged mother to settle in view of risk of losing parental rights rather than forcing mother to do so). It is not reversible error for a judge to volunteer settlement terms as long as the judge does so without demonstrating bias or prejudgment. *See* Harrington v. Boston Elevated Ry. Co., 229 Mass. 421, 431-33 (1918) (affirming case despite judicial comments on settlement amounts).

Additionally, if the judge encourages settlement but a settlement is not reached, there may be no harm warranting reversal if the record demonstrates the judge’s impartiality. *See* Richman v. Richman, 28 Mass. App. Ct. 655, 667 (1990). In Richman, Wife filed a motion asking for the case to be transferred to a different venue. Id. at 666. Her reasoning amounted to a motion for recusal. *See* id. The Appeals Court, while acknowledging the trial judge’s unnecessary interjections of opinion, found that the judge did not overreach his judicial privilege during his participation in settlement efforts because the record demonstrated that he was able to remain impartial. Id. at 667. Ultimately, because no settlement was reached and there was no document or arrangement that needed to be revised because of judicial efforts or pressure, there was no need for reversal of the decision. *See* Richman, 28 Mass. App. Ct. at 667.

1. **Overwhelming Evidence**

Judicial comments that are blatantly improper, urge settlement, and demonstrate partiality may not be sufficient grounds for reversal given the circumstances of the case. Adoption of Tia, 73 Mass. App. Ct. 115, 119-24 (2008) (upholding judgment where judge openly encouraged settlement).[[1]](#footnote-1) In Adoption of Tia, the trial judge made several comments that indicated that she had prejudged the case, and openly encouraged Mother to settle based on a long DCF record and witness testimony. Id, at 120-21. Despite the inappropriate behavior of the trial judge, the Appeals Court upheld the initial decree, holding that there did not need to be a reversal because there was overwhelming evidence of parental unfitness such that no other conclusion could possibly have been reached. Id. at 124.

1. **Objections to Judicial Bias Must Be Made at Trial to Preserve the Issue**

Any objections to judicial conduct regarding settlements must be entered into the trial record to be considered on appeal. *See* Innis v. Innis, 35 Mass. App. Ct. 115, 117-18 (1993) (affirming judgment despite alleged judicial misconduct because of failure to object at trial). *See also* In re Marriage of Cole, 729 P.2d 1276, 1281 (Mont. 1986) (upholding judgment despite alleged judicial bias because parties failed to file recusal motion at trial). These exceptions, however, may be overcome in extraordinary circumstances. *See* Innis, 35 Mass. App. Ct. at 118 (acknowledging special circumstances may allow appeal of an unpreserved issue but holding there was not one here); *see e.g.* Adoption of Norbert, 83 Mass. App. Ct. 542, 545 (2013) (holding untimely claims of judicial bias can be considered if potential due process violation); Adoption of Parker, 77 Mass. App. Ct. 619, 622-23 (2010) (allowing appeal of unpreserved issue where lower court terminated parental rights based off documents and counsels’ offers of proof that relied on facts in dispute).

1. **Conclusion**

A judge may encourage settlement, but may not do so in a manner which reveals clear prejudgment or bias or denies a party the right to carefully consider the possibility of settlement. If a judge infringes upon a party’s right to a fair and impartial factfinder by overzealously encouraging settlement, reversal will likely be granted upon appeal.

1. In this instance, the judge said “…I just ask [the mother’s attorney] if [they] have spoken to [the mother] about it, because if [mother] puts this in my hands – and I mean, I’m going to hear more; I’m open to finishing this trial and hearing all the evidence. As you know, I’m available….” and “…I guess I wanted to know – after this speech – whether or not the mother has taken any time to think about that. If [mother] still wants to put this decision in my hands. I don’t know if you need – if you want to talk to her…”. Adoption of Tia, 73 Mass. App. Ct. at 119-124. The evidence in this case clearly supported termination of mother’s parental rights. *See id.* [↑](#footnote-ref-1)