Canon 2

The ABA initially adopted 34 Canons of Judicial Ethics on July 9, 1924. The Canons declared "ethical standards" in the hope they would "become habits of life." They chiefly described appropriate judicial behavior in broad terms. They did not articulate a range of duties for trial and appellate judges. Thus Canon 5, on essential conduct, declared a judge should be "temperate, attentive, patient, impartial and . . . studious of the principles of the law and diligent in endeavoring to ascertain the facts." Canon 19, on judicial opinions, stated a trial judge "should indicate reasons" when "disposing of controverted cases." And Canon 34, summarizing judicial obligation, noted that a judge should be "above reproach" as well as "conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamor . . . and indifferent to private political or partisan influences."

These Canons were superceded on August 16, 1972 by the Code of Judicial Conduct. Unlike the Canons, the Code articulated a range of judicial duties. Canon 3, on the performance of the duties of a judicial office, set forth "standards." These standards were divided into categories, including Adjudicative Responsibilities; Administrative Responsibilities (involving, in part, the direction of staff and court officials); Disciplinary Responsibilities (involving the need to take "appropriate action" regarding judicial or lawyer misconduct); Disqualification (involving grounds for questioning judicial impartiality); and, Remittal of Disqualification (involving waivers of certain bases for judicial disqualification).

Within the section on adjudicative responsibilities, the standards, at times, were sufficiently broad to cover judicial conduct on and off the record and to encompass civil case

responsibilities beyond pleaded claims and named parties. Thus, one standard stated a judge "should maintain order and decorum in proceedings." Another required a judge to be "patient, dignified, and courteous" to litigants, lawyers and "others with whom" the judge "deals" in an "official capacity." Yet another required a judge to "accord to every person who is legally interested in a proceeding . . . full right to be heard according to law."

In August, 1990 the ABA adopted the Model Code of Judicial Code. Canon 3 continues to address the impartial and diligent performance of judicial duties and to set forth "standards." Many of the 1972 standards remain. The 1990 Code continues to speak of "proceedings" before the judge; of responsibilities to "others" beyond litigants, jurors, witnesses, and lawyers; and, of "the right to be heard" for "every person" who has a legal interest in a proceeding.

While the 1972 Code declared a judge "should dispose promptly of the business of the court," the 1990 Code said a judge "shall dispose of all judicial matters promptly, efficiently, and fairly." The accompanying 1972 Code Commentary spoke of punctuality "in attending court" and expedition "in determining matters under submission." The relevant 1990 Code Commentary not only repeated those admonitions, but also spoke of extending "due regard for the rights of parties," of monitoring "cases," and of facilitating settlements by "parties." These additional admonitions speak more narrowly of judicial duties, limiting them to "cases," a term of art that often does not embody all the disputes within a civil lawsuit, and to "parties," another term of art that typically excludes many who have disputed legal interests that are resolved in civil actions (such as lienholders, those with subrogation rights and duties, and insurers).

Similarly, the 1972 and 1990 Codes each generally prohibited ex parte communications

involving judges and only one or some, but not all, people or entities with relevant legal interests. Yet the 1972 Code simply said a judge should "neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding" except as "authorized by law." By contrast, the 1990 standards specifically spoke of certain authorized communications (i.e., scheduling or administrative purposes) involving only one or some "parties," as well as of separate conferencing, with "the consent of the parties," involving a judge, one party, and that party's lawyer "in an effort to mediate or settle matters pending before the judge." Thus, there was no mention in 1990 of barriers to ex parte conferencing with nonparties legally interested in adjudicative proceedings.

So, as the 1924 Canons evolved into the 1990 Model Code, the judicial role was more particularly and narrowly defined, increasingly viewing "adjudicative responsibilities" as involving cases and parties rather than pending matters and persons legally interested. To date, in discussions about revising the 1990 Model Code, seemingly there has been little change. Under the June 2004 draft, Canon 2 would encompass the "standards" on judicial conduct involving the impartial and diligent performance of judicial duties. The proposed Canon 2 has standards in varying categories, including Adjudication (continuing much of the 1990 Code materials on Adjudicative Responsibilities, Disqualification and Remittal of Disqualification); Administration (containing much of 1990 Code materials on Administrative Responsibilities); and Reporting (containing much of the 1990 Code materials on Disciplinary Responsibilities).

Within the section on adjudication, the proposed standards continue to describe-broadly at times-judicial conduct in civil actions. They speak of a duty to "hear and decide matters

assigned"; to "dispose of all judicial matters promptly, efficiently and fairly" (though the accompanying Commentary states that this duty goes to "parties," while also protecting the economic interests "of witnesses and the general public"); and, to "accord to every person who has a legal interest in a proceeding . . . the right to be heard according to law" (though the accompanying Commentary on judicial oversight of settlements states that this duty embodies "a party's right to be heard" and that any settlement by a "party" cannot be coerced). Elsewhere the 2004 proposed standards on adjudication speak more narrowly of the interests of "parties," as in the sections on ex parte communications and on remittal of disqualification. Thus, one proposed standard declares: "A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge." Another states: "A judge shall disqualify himself or herself when the judge has personal bias or prejudice concerning a party or a party's lawyer." There are no express barriers to separate conferencing with nonparties or to bias toward nonparties who are legally interested.

So the 2004 proposed amendments to the Model Code continue to focus on "parties" rather than on persons with legal interests and on "cases" and pleaded claims rather than on all "matters" in dispute. While unfortunate, this vision is not particularly surprising as it follows other contemporary visions of trial court authority, such as the ABA Standards Relating to Trial Courts, approved by the House of Delegates in February, 1976, and the Federal Rules of Civil Procedure (FRCP). As with ABA pronouncements, the FRCP have also chiefly reflected a narrow view of trial court authority. Because so many states have substantially followed the FRCP, a narrow judicial role is also reflected in state civil procedure laws. Under the FRCP, the

adversaries are "parties" (often represented by lawyers) who present or defend against a "claim for relief"; who undertake the varying methods of formal "discovery"; who make or oppose a "motion" related to a pending claim; and, who undertake pretrial, trial and posttrial efforts aimed at "claim" resolution. Further, jurors may only render a "special verdict" on issues "which might be properly made under the pleadings." A judgment in a case involving "multiple claims" or "multiple parties" may be limited to the resolution of only a single "claim." Further, an offer of judgment often may only be made by "a party defending against a claim." So, like the Model Code of Judicial Conduct, American civil procedure laws speak mostly to parties with their claims rather than to the broader group of persons "legally interested" or to the broader range of disputes possibly subject to resolution with judicial assistance.

While ABA standards and contemporary American civil procedure laws continue to speak to parties (rather than to legally interested persons) and to claims (rather than to all "matters" that may be resolved), increasingly trial courts face far fewer possible trials for certain types of civil claims; help to resolve more than pleaded claims; initiate more settlement talks involving persons with legal interests; and hear more appeals. Unfortunately, these responsibilities remain substantially unrecognized both in the ABA standards and in written civil procedure laws.

There are far fewer possible trials for certain civil claims today because of the expansive readings of the Federal Arbitration Act by the U.S. Supreme Court. They have resulted in an explosion in the numbers of compulsory and binding arbitration contracts covering future civil disputes, prompting more arbitration and fewer trial court proceedings.

There is an increasing trial court authority over legal disputes that are factually related to pending pleaded claims, but that do not involve any of the named parties implicated in those claims. For example, two insurers of two opposing parties may by at odds and may be the real adversaries. Such increased authority in the federal district courts over "factually interdependent" disputes involving nonparties was first broadly described by the U.S. Supreme Court in 1994 in Kokkonen v. Guardian Life Insurance Co. of America. The Kokkonen approach has been employed in state courts.

In American trial courts today, there are also more judge-directed and judge-managed settlement talks involving nonparties with legal interests in civil disputes. Consider the changes to FRCP 16 since its appearance in 1938; as with other FRCP, this rule is followed in many states. Initially, FRCP 16 was entitled "Pre-Trial Procedure; Formulating Issues." It made no explicit mention of settlement; it was geared to trial preparation conferences. It allowed the trial court to "direct the attorneys for the parties to appear before it for a conference to consider" subjects that would "aid in the disposition of the action," including issue simplification, pleading amendment, and avoidance of "unnecessary proof."

FRCP 16 was significantly amended in 1983, with a new title, "Pretrial Conferences; Scheduling; Management." The new rule contemplated required scheduling and planning conferences early on, as well as the prospect of multiple conferences thereafter. Judicial authority was broadened to reach not only attorneys, but also "any unrepresented parties." Further, the 1983 rule expressly made "facilitating the settlement of the case" a legitimate objective of a pretrial conference. The "participants" at any conference could "consider and take

action" on a variety of subjects, including "the possibility of settlement." There was no language in the 1983 rule, however, describing all possible conference participants. The rule did say, however, that at least "one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed" (suggesting participants are only parties and/or their lawyers).

The Committee Note to the 1983 rule, prepared by the U.S. Judicial Conference Advisory Committee on Civil Rules, found that settlement discussions at pretrial conferences had "become commonplace" and were "appropriate at any time." It further said that a pretrial conference devoted exclusively to settlement "may be desirable" and that "settlement should be facilitated at as early a stage of the litigation as possible." In fact, the Advisory Committee viewed the 1938 rule as "a success," in part, because it improved and facilitated the "settlement process." Yet, the Committee found the 1938 Rule had become outdated because it did not reflect "the significant changes in federal civil litigation." The Committee said that "the amendment explicitly recognizes some of the objectives of pretrial conferences and the powers that many courts already have assumed," thus making the rule a "more accurate reflection of actual practice." The Committee did caution, however, that mandating settlement conferences "would be a waste of time in many cases."

FRCP 16 was last amended in 1993, with the most recent changes constituting more refinement than overhaul. The 1993 rule does contemplate a more active role for judges. While in 1983 the "participants" at a pretrial conference would "consider and take action" with respect

to the subjects discussed, as of 1993 "the court" was to "take appropriate action." The 1993 rule also expressly authorizes judges to "require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute." The Advisory Committee explained that this change would help "eliminate questions . . . regarding the authority of the court to make appropriate orders . . . to facilitate settlement." The Committee noted that participation by a party or its representative might involve "an officer of a corporate party, a representative from an insurance carrier, or someone else," depending upon the circumstances.

The 1993 rule received some criticism. There was concern "that explicit authority to require party attendance at settlement conferences would be misused by some judges to coerce settlements." The rulemakers also did not proceed with a few suggested changes. They rejected a provision explicitly authorizing "mandatory attendance and participation" of interested insurers in alternative dispute resolution procedures. The Committee did note "the strong feelings of many" that the authority to require insurers to attend a settlement conference was not only "needed," but also "already within the court's inherent powers." Judicial authority over insurers and other nonparties during pretrial conferencing thus generally remains subject to case precedents.

Finally, today American trial courts undertake far more appeals and comparable reviews of decisions about civil disputes made elsewhere. This has resulted both from an expanding use in the first instance of administrative tribunals to resolve civil disputes and from the increased numbers of civil disputes being arbitrated under the Federal Arbitration Act that contemplates a

later appellate-type process of confirmation before trial courts (so that these courts can enforce the arbitration awards).

Civil cases today may involve the possible participation in settlement talks of all who are legally interested. They also may involve matters factually related to the pending claims, even when only the pleaded claims may be tried to the judge or to a jury should no settlement emerge. The 1924 ABA Canons more clearly recognized this potential than did the 1990 Model Code (with its Commentary). There are ways to remodel the vision of contemporary trial courts. A new picture should include not only all those with "legal interests," but also all civil disputes that might become "matters under submission" during a civil action.

One way to a new vision is through amendments to the Model Code of Judicial Conduct. While the Commission specifically invited comments in a few areas, including "what role judges should play in encouraging parties to settle" civil actions, it has yet to speak more broadly of all those with legal interests and of all matters possibly under submission . Canon 2 of its June 2004 draft continues to describe judicial duties as involving "Adjudication" as well as "Administration" and "Reporting." While the Standards and the Commentary at times speak to "matters assigned," any person "who has a legal interest" and "participants" in judicial proceedings, within the section on Adjudication they focus more narrowly, on the "rights of litigants"; fairness to "parties or lawyers"; diligence to "litigants and their lawyers"; "the rights of the parties to be heard"; the need for "parties" not to be coerced into settlement; ex parte communications barriers and procedures involving "parties"; separate conferencing "with the parties and their lawyers in an effort to settle matters pending"; "party" submissions of

"proposed findings of fact and conclusions of law"; "personal bias or prejudice concerning a party or a party's lawyer"; a judge's "economic interest . . . in a party to the proceeding"; campaign contributions by "a party or a party's lawyer"; and, "a remittal procedure" whereby "parties" waive their concerns regarding judicial disqualifications.

Incidentally, the June 2004 draft of a new Model Judicial Conduct Code also follows its predecessors in not making a clear distinction between adjudications of civil and criminal actions. Yet the applicable procedures are dramatically different. In criminal actions, unpresented claims are not adjudicated; judges are not proactive in facilitating settlements; lawyers do not settle on behalf of their clients; and, enforcement of remedial/punitive orders is generally done outside of the trial courts.

If the ABA Model Code of Judicial Conduct and similar visions of American trial courts were broadened to encompass all those with legal interests and all matters that might be resolved amicably, if not tried, in civil actions, perhaps written civil procedure laws, as FRCP 16, would speak more comprehensively. Alteration of views would not be difficult. The Model Judicial Conduct Code could speak to civil action responsibilities generally in a section on Civil Case Resolution rather than in sections on Adjudication and Administration. Within the new section, at least three avenues of civil case resolution should be recognized: De Novo, Appellate Review and Arbitration Confirmation. Within the De Novo category, criminal cases and civil cases would be separated. For civil cases subject to a de novo look, the major dispute resolution techniques should be separated, including Adjudication on the Merits (e.g., summary judgement, trial by jury, bench trial); Settlements; and, Resolutions Not on the Merits (e.g., dismissals on

jurisdiction grounds or as sanctions for litigation misconduct).

Within the settlement principles, distinctions should be drawn between wholly private settlements (no judicial involvement) and judicially-facilitated settlements (e.g., via devices such as judicial settlement conferences, court-compelled arbitrations and court-annexed mediations). Distinctions might also be drawn between the varying judicial-facilitation devices on questions like who might preside and whether only pleaded claims might be considered. Yet such distinctions seem better addressed in written civil procedure laws. As well, distinctions might be drawn between settlements which may prompt future same case enforcement (e.g., where a breach of a civil case settlement may be enforced in the very same case in which the settlement arose, thus requiring no newly-filed civil action and possibly prompting contempt proceedings). Again, written civil procedure laws seemingly would be better than more particular judicial conduct standards.

Within the de novo principles involving adjudications on the merits, civil disputes might be distinguished between those involving only named parties, only pleaded (or otherwise formally presented) claims, or only nonparties (where some such disputes might only be settled, as they could never be tried on the merits). Within the de novo principles involving resolutions not on the merits, discretionary versus mandatory adjudicatory jurisdiction might be addressed, as well as full faith and credit/comity concerns. Particulars are better addressed in written civil procedure laws.

Again, the Model Code of Judicial Conduct would better reflect contemporary American trial court dispute resolution if it contained a section on “Case Resolution” that distinguished

between de novo jurisdiction, appellate review and arbitration confirmation. Within the judicial duties involving de novo proceedings, civil and criminal cases should be distinguished, as should judicial authority over parties and nonparties and over pleaded claims and factually-related matters.