Facilitating Civil Case Settlements and the Description of Adjudication

The current Model Code of Judicial Code (MCJC) speaks to (presumedly civil case) settlements by declaring in a section on permitted ex parte communications: "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 3B(7)(d)]. The most recent proposal for a new Code (PMCJC) has the same declaration except that it eliminates the reference to mediation, a good move in that "an effort to settle" seemingly encompasses mediation (as well as other settlement devices, like nonbinding arbitration). [PMCJC 2.10(a)(4)]. In that there now exists both federal and state precedents for at least some court-ordered settlement conferencing in the absence of party consent,[1] I suggest the word "usually" be inserted into PMCJC 2.10(a)(4) immediately before the first "with" so that the Code does not, at the least, imply that mandated conferencing is inappropriate. Any written guidelines on ordering settlement conferences without party consent are best left to civil procedure rules or codes, or to inherent power case precedents.

Another declaration on settlement conferencing helps illustrate my second point, that the PMCJC (like the MCJC) too narrowly describes "adjudication" (which I would prefer to be "case resolution" as I noted in my April 13th comments, which I will not repeat at length). The description should more consistently speak about persons having legal interests and not just

[1]Compare In re Atlantic Pipe Corp., 304 F.3d 135 (1st Cir. 2002) (inherent power to compel nonbinding mediation before a private mediator) and In re NLO, Inc., 5 F.3d 154 (6th Cir. 1993) (no inherent power to compel participation in a summary jury trial).

about parties.

On settlement conferencing, Comment 2 to PMCJC Rule 2.09 declares:

> The judge has an important role to play in overseeing the settlement of disputes, but should be careful that efforts to further settlement not undermine a party's right to be heard according to law. A judge may therefore encourage parties to a proceeding and their lawyers to settle matters in dispute but should not act in a manner that coerces a party into settlement.

This comment has some new language and accompanies the broader PMCJC 2.09 (on ensuring the right to be heard) that says: "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." PMCJC 2.09 tracks MCJC Canon 3B(7). A comment to MCJC Canon 3B(8) tracks Comment 2 to PMCJC 2.09 as it indicates a "judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts."

Notwithstanding these Judicial Code declarations, the classes of persons with legal interests who are or may be heard and who are involved in civil case resolution upon hearing or settlement are far broader than "parties." Thus, persons legally interested in pending civil cases can include not only parties, but also such nonparties as lienholders, insurers and lawyers.[2] Commentary in the PMCJC that suggests only "parties" are involved or have legal interests in hearings or in settlement conferences during adjudication should be, and can easily be, amended. The MCJC predecessors frequently used terms other than "parties" in referring to those involved

[2]See, e.g., Jeffrey A. Parness and Daniel Sennott, "Recognizing Party and Nonparty Interests in Written Civil Procedure Laws," 20 The Review of Litigation 481 (2001) and Jeffrey A. Parness and Tait Lundgren, "Nonparty Insurers in Federal Civil Actions: The Need for New Written Civil Procedure Laws," 36 Creighton Law Review 191 (2003).

in adjudication. For example, the 1924 Canons of Judicial Ethics (1924 Canons) had few references to "parties" when it described appropriate judicial behavior in very broad terms, though it did not articulate the range of duties undertaken by judges. The 1924 Canons often employed the term "litigants," arguably a more inclusive term (in civil procedure parlance) than "parties." The 1972 Code of Judicial Conduct (1972 Code) went beyond parties when it required that a judge be "patient, dignified and courteous" to litigants, lawyers, and "others with whom" the judge "deals" in an "official capacity." [Canon 3 A (3)]. Also, the 1972 Code dictated that a judge "accord every person who is legally interested in a proceeding . . . full right to be heard according to law." [Canon 3A(4)].

Judicial Code declarations on aspects of adjudications that do not involve settlement conferencing often are similarly limited to parties rather than to all persons interested, even though nonparties (as in settlement conferencing) may be so legally interested that they have a right to be heard, whether on claims, liens, or other forms of constitutionally-protected property or liberty interests. Thus, the responsibility to "decide all cases with impartiality and fairness," within PMCJC Rule 2.04, is said in Comment 1 to go "to all parties." The responsibility to "act diligently . . . disposing of all judicial matters promptly, efficiently and fairly," within PMCJC Rule 2.06, must, under Comment 2, be balanced with "due regard for the rights of the parties to be heard," as well as preserve the "fundamental rights of parties." As with the declarations on settlement conferences, these comments within the PMCJC can be easily broadened.

While the PMCJC should often be more concerned with all those legally interested in adjudication, rather than in just the parties and their lawyers, a wholesale switch in the PMCJC from "parties" to individuals or entities "legally interested" might be wrong. At times, perhaps

parties should be treated differently than nonparties who are legally interested in adjudications. For example, the disqualification responsibility within PMCJC 2.12 may, at times, reasonably require differentiation between parties and legally interested nonparties. While "personal bias or prejudice" of a judge may be improper towards anyone with a right to be heard during an adjudication, though PMCJC Rule 2.12(a)(1) speaks only to "a party or a party's lawyer," it may also be that a party or a legally interested nonparty should be treated differently when it comes to judicial disqualification founded on a contribution to a judicial campaign or on a recent association in private legal practice with a firm/lawyer representing a party or a legally interested nonparty. Incidentally, I am unsure about comparable differentiations involving "litigants," who remain undefined and yet who are recognized the proposed code. For example, in PMCJC 2.02, Comment 1, litigants are said to have "rights . . . in the integrity, impartiality and independence of the judiciary."

Finally, I reiterate briefly a point made in an earlier letter. The term "adjudication" preceding Rule 2.02 in PMCJC is underinclusive. The phrase "case resolution" better describes the major "duties of judicial office" under PMCJC Rule 2.01. Case resolution encompasses appellate and trial judges. And even in American trial courts today where there is exercised de novo decisionmaking powers over cases, there are also increasingly nonadjudicatory, non de novo, case resolution responsibilities. Thus, recent Federal Arbitration Act precedents from the United States Supreme Court have prompted for both federal and state trial judges rising numbers of very deferential, confirmation proceedings involving private arbitrations. As well, federal and state administrative procedure acts frequently invite very (differently) deferential, non de novo, appellate-type review by trial judges of case decisions initially made within

administrative agencies by administrative law judges or others. Even without distinguishing at all the differing forms of case decisionmaking (civil, criminal, arbitration, final agency action) by judges working in "Judicial Article" courts (that is, judges working in courts arising from a separate constitutional section on courts and forming the traditional judicial branch of government), the replacement of the term adjudication with case resolution before PMCJC 2.02 would suggest that judicial conduct responsibilities arise even where there is no de novo adjudication on the merits of a claim.