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Outsourcing Justice: A Judge’s Responsibility When Sending Parties to Mediation

Shelby A. Linton Keddie*

In civilized life, law floats in a sea of ethics.

– Earl Warren

I. Introduction

When citizens bring their disputes before a court in a common law system, they seek a chance to present their side of a dispute, to be heard, and to achieve a fair outcome. Most people, however, never get their day in court; instead, their cases are settled or dismissed prior to reaching trial. Currently, only 3.5% of federal civil cases and 7.5% of criminal

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cases ever get to trial. In the United States, many judges are aged, overworked, and burdened by an ever-growing docket. These deficiencies bolster the view that the U.S. justice system is inefficient, unable to fulfill its mission, and often inept.

In an effort to resolve disputes before they reach a courtroom, many federal judges have become more like “managers” rather than adjudicators, requiring parties to use other forms of dispute resolution such as court-ordered mediation, arbitration, or mandatory settlement conferences. In fact, federal judges’ encouragement of the widespread use of alternative dispute resolution (ADR) has moved many cases outside of courts altogether. New concerns have emerged as these types of required ADR court orders are used more often by federal judges.

What are a judge’s responsibilities when ordering a matter to either mediation or another form of ADR, and how can a judge ensure that a court-ordered mediator or arbitrator acts ethically, thus facilitating the parties’ right to justice?

This Comment examines the proposed changes regarding settlement to the ABA Model Code of Judicial Conduct (Model Code) and compares the proposed Model Code to the current Bangalore Principles of Judicial Conduct in an effort to address what responsibilities judges should have when requiring parties to use ADR forums to resolve their differences. In Part II, this Comment explores the Model Code’s goals and history, including its current revisions. Part III explains and analyzes the proposed changes to parts of the Model Code and explains how these changes could influence a judge’s ethical obligations in adjudicating disputes. Part IV provides the background history of the Bangalore Principles of Judicial Conduct. Finally, in Part V, this Comment proposes ways that the Model Code could change so judges can meet their ethical responsibilities while reducing their workload.

4. See Judith Resnik, Managerial Judges, 96 HARV. L. REV. 374, 378 (1982) [hereinafter Managerial Judges]. Judith Resnik is attributed with defining the term “managerial judges”: “I believe that the role of judges before adjudication is undergoing a change as substantial as has been recognized in the posttrial phase of public law cases. Today, federal district judges are assigned a case at the time of its filing and assume responsibility for sheparding the case to completion. Judges have described their new tasks as “case management”—hence my term “managerial judges.”” Id.
when requiring parties to use other forms of dispute resolution.

II. The Evolution of the ABA Model Code of Judicial Conduct

Since the early 1900s, the American Bar Association (ABA) has expressed an interest in the intersection of ethics and law. It was in 1908 that the ABA approved the first Canons of Professional Ethics for attorneys. Those Canons, however, did not include any guidance for members of the judiciary. In fact, ethical rules for the judiciary took longer to craft and implement.

A. History of the ABA's Model Code of Judicial Conduct

Resolutions for the first judicial Canons were presented to the ABA in both 1909 and 1917, but were never adopted. Subsequently, in 1922, then Chief Justice William Howard Taft was asked to chair the first ABA Commission on Judicial Ethics in order to draft such rules. A significant factor prompting the Commission’s creation and the need for judicial ethical ground rules was the conduct of U.S. District Court Judge Kennesaw Mountain Landis. Judge Landis refused to resign from the bench when he was appointed to serve as Commissioner of Baseball and accepted the $42,500 he earned in this position in addition to his judicial salary of $7,500.

In 1924, the ABA approved the Canons of Judicial Ethics (Canons) that were intended to be a “guide and reminder to the judiciary.” When the Canon’s thirty-six provisions were first adopted, they were not intended to serve as the basis for disciplinary action. These 1924 Canons, however, required revisions. Critics alleged that the 1924 Canons “reflected moral posturing and provided little guidance for judges facing difficult questions.” In response to these observations, the ABA appointed a Special Committee on Standards of Judicial Conduct in 1969 to develop new ethics rules for judges.

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7. See id.
8. See id.
9. See id.
10. See id.
11. See Background Paper, supra note 6.
12. See id.
13. See id.
15. See id.
16. Id.
17. See id.
After three years, the Committee, chaired by California Supreme Court Justice Roger J. Traynor, presented to the ABA a revised Code of Judicial Conduct (Code) in 1972. In contrast to the 1924 Canons, the drafters of the 1972 Code of Judicial Conduct sought to craft standards that would preserve the integrity of the judiciary. In an effort to reach this goal, the 1972 Code of Judicial Conduct specifically addressed issues such as judicial impartiality and independence.

The aim of the revised Code of Judicial Conduct was “to instill the public’s confidence so that it can rely on those qualities in the men and women [sitting on the bench].” The 1972 Code deviated from the 1924 Canons in terms of style and format, rather than keeping the original thirty-six Canons, the updated Code reduced the number of Canons to seven. Additionally, much of the language of the Canons changed while the substance of the overall document remained the same. Those changes were implemented and routinely used by federal judges over the next fourteen years.

By 1986, the ABA Standing Committee on Ethics and Professional Responsibility determined that the Code, once again, needed review. Although the Code, in general, served its purposes, the Committee nevertheless wanted a comprehensive review. The review was conducted from 1987 to 1990, and its findings led to the Model Code of Judicial Conduct as it currently exists.

Throughout the revision process of the late 1980s, the ABA sought and considered a variety of perspectives, including members of the judiciary, the bar, and the public. Recognizing that the Canons of the 1972 Code were used as a basis for discipline, the 1986 Standing Committee on Ethics and Professional Responsibility declined to replace the black letter language of the Canons with descriptive headings.

18. See id.
21. Id.
23. See id.
24. See id.
25. See id.
27. See id.
28. See id.
29. See id.
30. See id.
31. See MODEL CODE, supra note 14.
Instead, the Committee decided the revised Code sufficiently stated the appropriate ethical obligations for judges.\(^{32}\)

The major change between the 1972 and 1990 Model Codes was the reduction of Canons from seven to five.\(^{33}\) To reduce the number of Canons, the Committee combined the two rules that related to a judge’s conduct outside of court into one Canon.\(^{34}\) More significant than the number of Canons was the Code’s new purpose;\(^{35}\) the 1990 Model Code was “designed specifically to be enforceable and incorporated the use of mandatory language.”\(^{36}\) The 1990 Model Code also included a preamble, a terminology section, and an application section.\(^{37}\) Finally, an appendix that contained an example of a rule establishing a judicial ethics advisory committee was added.\(^{38}\) That appendix was not intended to be a part of the Code;\(^{39}\) rather, it served as an instructional tool for those jurisdictions in which no such committee currently existed.\(^{40}\)

The ABA Model Code of Judicial Conduct was adopted by the House of Delegates of the ABA on August 7, 1990,\(^{41}\) and amended in 1997, 1999, and 2003.\(^{42}\) An appendix, added to the Code in 2003, summarizes those amendments.\(^{43}\) The current Model Code of Judicial Conduct is comprised of five Canons. Canon 1 defines broad principles, highlighting ideas such as impropriety, integrity, impartiality, and independence of the judiciary.\(^{44}\) Canon 2 addresses performance of judicial duties.\(^{45}\) Canon 3 focuses on a judge’s conduct in their personal affairs, including the possible misuse of their title or office.\(^{46}\) Canon 4 speaks to a judge’s behavior in situations that implicate their roles as judicial actors, but do not involve their behavior while in court.\(^{47}\) Finally, Canon 5 prescribes general rules for those judges involved in

\(^{32}\) See id. at 3.

\(^{33}\) See Gallagher, supra note 22.

\(^{34}\) See id.

\(^{35}\) See id.


\(^{37}\) See MODEL CODE, supra note 14, at 3.

\(^{38}\) See id.

\(^{39}\) See id.

\(^{40}\) See id.

\(^{41}\) See id.


\(^{43}\) See MODEL CODE, supra note 14, at 3.

\(^{44}\) See id. at 6.

\(^{45}\) See id.

\(^{46}\) See id.

\(^{47}\) See id.
political activity. 

B. Molding the Model Code of Judicial Conduct to Fit into the Changing Judiciary

With a changing judiciary comes the need for change in the rules of conduct for judges. Recognizing that "judicial ethics are not static," ABA President Dennis W. Archer, Jr. announced the appointment of a Joint Commission to Evaluate the Model Code of Judicial Conduct in August of 2003. Mark I. Harrison, a Phoenix lawyer who chairs the ABA Joint Commission on Evaluation of the Model Code of Judicial Conduct, also saw a need for this review. "The life and times of judges have changed, as have the court cases . . . we need to get in step." "Getting in step" has taken some time. Like the first two sets of revisions that occurred over several years, this set of revisions has been no exception. Since 2003, the Joint Commission on Evaluation of the Model Code of Judicial Conduct has held seven public hearings and ten drafting meetings. The Joint Commission initially planned to submit its final report for consideration to the ABA Delegates in February 2005; however, given its interest in making useful and substantive revisions, combined with the number of changes needed, the Commission has indicated that it is in no hurry to rush a final product.

As of April 2005, the Commission's new goal was to submit its recommendations to the ABA Delegates during the mid-year meeting of February 2006. In an effort to meet that goal, the 2003 Commission solicited input from judges' groups and professional responsibility organizations on its revisions. Although the contributions from those

48. See Revisions to Model Code, supra note 20.
49. Joint ABA Commission, supra note 36.
50. See id.
52. Id.
53. See Press Release, American Bar Association, ABA Releases Complete Final Draft of Revisions to Model Code of Judicial Conduct (Dec. 21, 2005) http://www.abanet.org/media/releases/news122105.html (last visited May 12, 2007) [hereinafter ABA Releases Final Draft]. The current revision process, started in 2003, was originally to be finished as of the Midyear Meeting in February, 2006. As it stands, however, with the most recent changes to the Model Code being released in December, 2006, the February Midyear Meeting will be used for public comment, and the complete final draft is now projected to be ready for a vote by August, 2006. Id.
54. See Gallagher, supra note 22.
55. See Joint ABA Commission, supra note 36.
56. See id.
58. See id.
groups have been helpful, Mark Harrison expressed a strong desire from the Commission to hear from smaller groups, such as state or local bar groups, who have largely been silent about the proposed revisions.

The most current version of the proposed changes to the Model Code of Judicial Conduct during the drafting of this Comment was posted on the ABA website on December 21, 2005. This version of the proposed changes to the Model Code of Judicial Conduct will serve as the basis of the revisions discussed throughout this paper.

Because the complete final draft of the Model Code was released later than anticipated, the Joint Commission on Evaluation of the Model Code accepted comments regarding its revisions throughout most of 2006. Rather than submit their changes for a vote as originally planned, the Commission scheduled a public hearing during the 2006 Midyear Meeting in order to solicit comments from interested parties. The Commission on Evaluation of the Model Code announced it would accept comments on the final draft of the Model Code until March 15, 2006, leaving the Commission time to consider any changes before submitting its final report for adoption of the revised draft in August, 2006.

Based upon the proposed rules from the Joint Commission on Evaluation, the Model Code will change substantially if adopted as currently proposed. Perhaps the most notable revision to the Code involves the restructuring of Canons into rules. In prior versions of the Model Code, sections and subsections were included in each Canon. In the proposed version, however, the Model Code of Judicial Conduct mimics the Model Code of Professional Responsibility in that it consists of a series of rules that includes comments that explain the scope of the rules presented in the Model Code.

III. Proposed Revisions to the Model Code of Judicial Conduct that Focus on Settlement

The 1990 Model Code of Judicial Conduct was the first version to

59. See id.
60. See id.
61. The complete proposed final draft report is available online at http://www.abanet.org/judicialethics/finaldraftreport.html (last visited May 12, 2007).
62. See ABA Releases Final Draft, supra note 53.
63. See id.
64. See id.
65. See id.
66. See Gallagher, supra note 22.
67. See id.
68. See id.
specifically address the judicial role in settlement.\textsuperscript{69} Canon 3B(7)(d) of 1990 Code authorizes that 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."\textsuperscript{70} The commentary to Canon 3B(8) in the existing Model Code states that 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."\textsuperscript{71}

As noted in Part II, \textit{supra}, the current revision process marks the fourth time since its inception that the ABA has drastically changed the Model Code of Judicial Conduct.\textsuperscript{72} Such an undertaking has not been attempted for the past eighteen years.\textsuperscript{73}

In announcing the creation of the 2003 Commission, ABA President Dennis W. Archer explained that it was necessary to revisit the Model Code "to see if it provides adequate guidance to judges about their conduct, and to the public about what to expect from judges."\textsuperscript{74} Archer further recognized that for the Model Code to be effective, it "must address the changing circumstances in which judges of all levels find themselves."\textsuperscript{75}

Today, many federal judges find themselves engaged in cases in a way that extends beyond the traditional adjudicatory role. They are expected to serve in more of a "managerial" role,\textsuperscript{76} whereby they are responsible for litigation both before and after trial.\textsuperscript{77} With this new role comes concerns about defining the extent to which a judge should encourage settlements,\textsuperscript{78} whether through direct settlement negotiations or through court-ordered mediation prior to a party's appearance in court.

In addition to changing the form and substance of the existing Model Code, the complete final draft focuses its discussion of the

\textsuperscript{70} MODEL CODE Canon 3B(7)(d) (1990).
\textsuperscript{72} See MODEL CODE, supra note 14.
\textsuperscript{73} See ABA Releases Final Draft, \textit{supra} note 53.
\textsuperscript{74} Joint ABA Commission, \textit{supra} note 36.
\textsuperscript{75} Id.
\textsuperscript{76} Managerial Judges, \textit{supra} note 4, at 378 ("In growing numbers, judges are not only adjudicating the merits of issues presented to them by litigants, but also are meeting with parties in chambers to encourage settlement of disputes and to supervise case preparation."). Id.
\textsuperscript{77} See id. at 377 ("Both before and after the trial, judges play a critical role in shaping litigation and influencing results."). Id.
\textsuperscript{78} See ABA Releases Final Draft, \textit{supra} note 53.
judiciary’s role in settlement under Canon 2.79 In particular, four proposed rules and their respective commentaries relate either to the notion of settlement or to a judge’s delegation of powers.80 They are: proposed Rules 2.03, 2.09, 2.14, and 2.15.81 These rules and their commentaries emphasize the importance of the parties’ right to be heard.

The proposed draft of Rule 2.03 initially appears to deal only with diligence. It states, “[a] judge shall diligently perform all of his or her judicial duties, disposing of all matters promptly and efficiently.”82 The commentary that buttresses this rule, however, focuses on the idea that diligence in a courtroom does not deviate from ensuring fairness to the parties.83 When disposing of matters before them, “judges must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay.”84 Additionally, Comment 2 instructs, “a judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs.”85

The practice of court-ordered mediation or settlement negotiations fits well into this rule. When a court orders parties to mediation or settlement talks in an attempt to dispose of cases in a prompt and efficient manner, the judge is trying to resolve the case without unnecessary cost or delay. ADR is attractive to both judges and parties because it serves as a speedy and cost-efficient mechanism86 in which to resolve problems.87

The critical concern is whether these fast-forms of adjudication preserve the parties’ right to be heard. As proposed, Rule 2.03 gives little guidance to a judge who attempts to outsource cases to court-ordered mediation. In referring a case to ADR, a judge does not transfer

80. See id.
81. See id.
84. Id.
85. Id.
86. See Nancy A. Welsh & Bobbi McAdoo, Look Before You Leap and Keep on Looking: Lessons on the Institutionalization of Court-Connected Mediation, 5 Nev. L.J. 399, (2004) [hereinafter Look Before You Leap] (“Judges perceive the potential for mediation to deliver ‘justice:’ to ensure a fair outcome consistent with what might be achieved in court; to provide a process that includes the litigants; and to promote a speedier, less costly way to get to this resolution.”). Id. at 418.
87. See id. at 428 (“Mediation, and court-connected ADR more generally, were introduced as coping mechanisms, to help overwhelmed courts make better use of their existing resources in light of dramatically-expanded demands.”). Id.
control of the case to the parties or to the mediator. The responsibility for both case management and case resolution at all times rests entirely with the judge.

The only guidance proposed Comment 2 provides in directing a judge’s conduct in instances where ADR is used is a brief statement that provides, “[a] judge should monitor and supervise cases.” This broad language does little to define the limits on a judge’s behavior. What does it mean for a judge to monitor and supervise a case? Certainly, such a limitless scope encompasses updates on the progress of the case, the parties’ participation and the observations of the third party mediator. Does a judge retain these duties when outsourcing their cases to a form of ADR? The answer to this question has to be “yes.” A judge is responsible for a case from its inception to its closure, regardless of how that end is achieved.

Obviously, if a case does reach trial, the judge has an opportunity to directly observe the parties’ behavior, manage the attorneys’ procedure, and evaluate the merits of the case in order to ensure each side preserves its right to be heard. These opportunities are not surrendered by a judge in ordering mandatory mediation: the judge still has the responsibility for a case’s management until the case is closed. In sum, proposed Rule 2.03 fails to account for a judge’s retained responsibility when ordering parties to mediation.

Proposed Rule 2.09 is the only rule in the Model Code that uses the word “settlement.” Titled “Ensuring the Right to Be Heard,” proposed Rule 2.09 provides in subsection (A) that “[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.” In part (B), proposed Rule 2.09 states “[a] judge may encourage parties to a proceeding and their lawyers to settle matters in a dispute, but shall not act in a manner that coerces any party into settlement.” More expansive than its counterpart, 2.03, proposed Rule 2.09 on its face establishes two basic principles: Part A of this rule acknowledges that in the American common law system, a judge should ensure that parties retain the right to be heard while Part B demonstrates that the Joint Commission on the Evaluation of the Model Code understands the
possible danger of judicial settlement intruding upon a party’s rights. Additional concerns arise regarding a party’s right to be heard when analyzing court-ordered mediation in practice.  

It has been suggested that when parties are sent to court-ordered mediation, they are not given as much latitude as one would expect in running their own cases and in coming up with a resolution. In fact, judges who were surveyed identified that, in many cases, they do not feel that it is even necessary to have parties present at their own mediation session. Upon noting this observation, Nancy A. Welsh and Bobbi McAdoo conclude that “[p]rocedural justice can be achieved only if parties have an opportunity to express themselves and be heard in an even-handed, respectful process.” In order to ensure a party’s right to be heard, there must be a series of checks and balances where a judge can question a mediator’s tactics as well as parties’ participation in the mediation process.

Comment 2 of proposed Rule 2.09 emphasizes a judge’s important role in overseeing the settlement of disputes. In fact, the comment for Rule 2.09 specifically states that a judge “should be careful that efforts to further settlement do not undermine a party’s right to be heard according to law.” This comment fails to mention, however, how a judge is supposed to meet this standard. Other than being limited to judicial settlement, this rule should extend to other ADR mechanisms such as mediation or arbitration.

Although proposed Comment 2 only specifically addresses judicial settlement, there are some positive factors presented that a judge should...

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96. See generally, Look Before You Leap, supra note 86 (gives results of a study asking judges of their perceptions about court-ordered mediation in practice); see also Nancy Welsh, The Thinning Vision of Self-Determination in Court-Annexed Mediation: The Inevitable Price of Institutionalization?, 6 HARV. NEGOT. L. REV. 1 (2001) [hereinafter Thinning Vision] (noting the effects of court-ordered mediation on participants; questioning the realities of court-ordered mediation in practice).

97. See Look Before You Leap, supra note 86.

98. See id. at 415. Welsh and McAdoo share this startling statistic:

For example, in answer to the question of whether it is important that clients appear at the mediation session, only 70% of responding judges answered in the affirmative for all cases. . . . It is problematic, however, to find any judges assuming that it can be appropriate to exclude the parties from a court-provided process.

Id.

99. Id.

100. See generally, ADR HANDBOOK FOR JUDGES, supra note 71 (discussing how a judge can and should set up an appropriate ADR program in their court).


102. Id.

103. See id.
consider before sending a case to settlement. It provides that:

Among the factors that a judge should consider when deciding on an appropriate settlement practice for a particular case are (1) whether the parties have requested or voluntarily consented to a certain level of participation by the judge in settlement discussions; (2) the relative sophistication of the parties and their counsel; (3) whether the case will be tried by judge or jury; and (4) whether the parties themselves or only their counsel will be involved in settlement discussions. ¹⁰⁴

An important point to note throughout this proposed comment is that the judge is required to be careful that efforts to encourage settlement do not impinge upon a party’s right to be heard.

Even when outsourcing cases to a mediator or other neutral, it is the judge who retains the responsibility to ensure a party is not coerced into settlement. In essence, a judge is required to ensure a parties’ right of self-determination;¹⁰⁵ this requirement does not disappear simply because a mediator or other neutral becomes involved in the case.

Even more troubling for judges is the proposition put forth by Part B of proposed Rule 2.09. This section provides: “[a] judge may 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.”¹⁰⁶ This assertion seems to contradict the exact rule it is meant to augment. It begs the question of how a judge can ensure that a mediator in a proceeding is acting in a fair and equitable manner when dealing with both parties. When parties in a court-ordered procedure reach a settlement, can a judge ensure that the settlement was not coerced if they did not directly oversee the process? Additionally, what is the threshold point at which a judge’s behavior becomes coercive? Although it has been suggested that it is not coercive to merely order parties to mediate,¹⁰⁷ the same cannot be said if a judge allows ADR neutrals to act in overly aggressive behaviors.¹⁰⁸ Ultimately, the proposed rule and comment for Rule 2.09 fall short of providing answers to any of these questions.

When the 1990 Model Code of Judicial Conduct was written and implemented, ADR was not as instrumental in the judicial process as it is today.¹⁰⁹ During the 1980s and 1990s, many federal courts began to

¹⁰⁴. Id.
¹⁰⁵. See Thinning Vision, supra note 96.
¹⁰⁷. See ADR HANDBOOK FOR JUDGES, supra note 71, at 36.
¹⁰⁸. See id.
further the trend toward greater use of ADR by implementing ADR procedures, rather than hearing every dispute in court. Today ADR has become an integral part of our justice system. Thus, it is surprising to find no direct mention of either mediation or arbitration in proposed Canon 2. Although neither the existing Model Code nor its proposed draft addresses a judge’s responsibilities when ordering ADR, some of the existing Canons can act as guideposts for judges who routinely seek settlement outside of court. Proposed Rules 2.14 and 2.15, “Supervision of Staff,” and “Supervision of Other Judges,” respectively, are two such examples.

Proposed Rule 2.14 states: “[a] judge shall require staff, court officials, and others subject to the court’s direction and control to act in a manner compatible with the judge’s obligations under this Code.” This rule is useful because it extends the Model Code’s scope beyond judges and includes those people who are subject to the courts direction and control. The rule’s reference to “staff” may pertain to court-appointed mediators and arbitrators, but because these professionals are not on the state’s payroll and are not accountable to anyone other than the parties, it is unlikely that this rule applies to ADR neutrals. Moreover, because ADR appointed neutrals act in an arguably judicial capacity, where they assist the judge with case management and resolution, their status, for purposes of the rule, is less like judicial staff and more like a judge. When applying the Model Code to ADR neutrals, rather than adhering to “Supervision of Staff,” it appears that proposed Rule 2.15, “Supervision of Other Judges,” is more appropriate and applicable than Rule 2.14.

Proposed Rule 2.15 provides, “[a] judge with supervisory authority for the performance of other judges shall take reasonable measures to assure that those judges properly discharge their judicial responsibilities, including the prompt and efficient disposition of matters before them.” Although this rule appears to ensure that a party’s right to be heard is preserved, this language is overly broad and thus useless to a judge in a supervisory role.

The only instruction proposed Rule 2.15 provides is that a judge is to take “reasonable measures” with regard to other judges handling

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110. See Managerial Judges, supra note 4, at 386 (“Federal judges who passively await parties’ pretrial requests are out of step with colleagues who have implemented a new regime of procedures designed to speed case disposition.”). Id.
111. See Niemiec, et al., supra note 88, at 1.
112. See ADR HANDBOOK FOR JUDGES, supra note 71, at 36.
113. See id.
matters before them. This prompts a reader to question what is a "reasonable measure" to assure that a fair and reasonable outcome is achieved? Also, why are a judge's supervisory powers limited only to other judges? Would a mediator, an arbitrator, or a third party neutral in charge of court-ordered settlement negotiations be acting in a judicial capacity under this rule? If so, proposed Rule 2.15 suggests that a judge who directs matters to mediation, arbitration or settlement has a responsibility to ensure that the rights of the parties are not infringed.

Proposed Rule 2.15's Comment does little to expand on the scope and the purpose of the rule. The only proposed Comment that exists for this rule states: "[p]ublic confidence in the courts depends on timely justice. To promote the efficient administration of justice, judges with supervisory authority must take the steps needed to ensure that judges under their supervision administer their workloads expeditiously." The problem with this assertion is that it only focuses on one aspect of the rule, namely promptness. This proposed comment for Rule 2.15 contradicts what is widely viewed as important throughout Canon 2—ensuring a party's right to be heard. Broadly, Canon 2 concentrates on judicial responsibility and justice, highlighting a number of important attributes, none of which rest solely on how quickly a matter is adjudicated.

Proposed Canon 2 instructs that "[a] judge shall perform the duties of judicial office impartially, competently and diligently." Rules relating to bias, prejudice and harassment, impartiality and fairness, ensuring the right to be heard, and disqualification make up the bulk of this Canon. As written, with regard to the supervision of other judges, the proposed Comment for Rule 2.15 sacrifices the import of impartiality, fairness and the right to be heard for the sake of "timely justice."

Today, when many federal judges have become slaves to the individual calendar system, it is important, now more than ever, that

118. See MODEL CODE OF JUDICIAL CONDUCT 2.02 (Proposed Official Draft 2005).
120. See MODEL CODE OF JUDICIAL CONDUCT 2.09 (Proposed Official Draft 2005).
122. Id.
123. See Managerial Judges, supra note 4, at 504.
judges do not begin to "value their statistics, such as the number of case dispositions, more than they value the quality of their dispositions."\(^{124}\) Increasing the speed of case resolutions will be meaningless if parties' rights are being sacrificed in the process.

IV. History of the Bangalore Principles of Judicial Conduct

The Bangalore Principles of Judicial Conduct is an outgrowth from an April 2000 meeting in Vienna where the then-existing Judicial Group on Strengthening Judicial Integrity saw a need for a code that could measure the conduct of judicial officers.\(^{125}\) To draft its code, the Judicial Group on Strengthening Judicial Integrity prepared a report concerning the core considerations repeatedly present in other codes of judicial conduct and those considerations that existed in some, but not other, codes of judicial conduct.\(^{126}\) When the report eventually emerged from this group, the resulting draft Code of Judicial Conduct referenced approximately thirty-two then-existing codes of judicial conduct, including both state and national codes from around the globe.\(^{127}\)

A second meeting was held in Bangalore, India in 2001.\(^{128}\) At that time, the Judicial Group examined the draft judicial code, "identified the core values, formulated the relevant principles, and agreed on the Bangalore Draft Code of Judicial Conduct."\(^{129}\) The Bangalore Draft Code was not officially adopted at this time because the Judicial Group, in recognizing that the Code was created by primarily common law judges,\(^{130}\) wanted judges of other legal traditions to review the draft to assure its adaptability as an authenticated international code of judicial conduct.\(^{131}\)

Thereafter, the Bangalore Draft was dispersed among both common law and civil law judges, where it served as the subject of discussion at a number of judicial conferences.\(^{132}\) Notably, the Bangalore Draft was reviewed in 2002 by the Working Party of the Consultative Council of

\[^{124}\] Id.
\[^{125}\] Id. at 382.
\[^{126}\] See id.
\[^{127}\] See id.
\[^{128}\] See id. at 11.
\[^{129}\] Id.
\[^{130}\] See Bangalore Principles, supra note 125, at 11.
\[^{131}\] See id.
\[^{132}\] See id.
European Judges (CCJE-GT). Additionally, as suggested by the ABA, judges in many of the Central and Eastern European Countries translated and reviewed the draft. In light of comments made by the CCJE-GT and by reference to more recent codes of judicial conduct, the Bangalore Draft was revised.

The Revised Bangalore Draft of Judicial Conduct was adopted by a roundtable meeting of chief justices [or their representatives] from the civil law system, held in The Hague, Netherlands, in 2002. The countries that participated and eventually agreed on these principles were Brazil, the Czech Republic, Egypt, France, Mexico, Mozambique, the Netherlands, Norway, and the Philippines. Participating in at least one session were the following countries, represented by their Judge of the International Court of Justice: Madagascar, Hungary, Germany, Sierra Leone, United Kingdom, Brazil, Egypt, and the United States of America. The Bangalore Principles of Judicial Conduct are the result of the revisions made at the Round Table Meeting of Chief Justices in November, 2002.

A. A Look at the Bangalore Principles of Judicial Conduct

The Bangalore Principles of Judicial Conduct (Bangalore Principles or Principles) is a short document. In total, the entire Bangalore Principles are set forth in eight pages. Because it was adopted in 2002, any revisions have yet to take place. The Bangalore Principles, unlike the Model Code, are made up of values and principles, rather than Canons. Additionally, rather than dictating rules like the Model Code, the Bangalore Principles "are intended to establish standards for ethical conduct of judges." Some of the ethical standards covered in the Bangalore Principles listed as values are: independence, 

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133. See id.
134. See id.
135. See Bangalore Principles, supra note 125, at 11.
137. See id.
138. See id. at 12.
139. See id.
140. See Bangalore Principles, supra note 125, at 12.
141. See Bangalore Principles, supra note 125.
142. See id. at 12.
143. See id.
144. Id.
145. See id. at 3 ("Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify
When searching for an international code of judicial conduct that could be compared to the ABA’s Model Code of Judicial Conduct, the Bangalore Principles of Judicial Conduct seems to be a good match. Not only is the Bangalore Principles current, but also the document is the product of primarily common law judges. Another attractive feature of the Principles is its international appeal. As explained in the history of the Bangalore Principles, this code of judicial conduct was the product of a number of judges from different countries who evaluated the pros and cons of over thirty existing codes before drafting their own.

Part of the Bangalore Principles’ functionality comes from its simplicity. The number of values and principles expressed are short—there are only six of each. Most of the rules, contained in the application section are clear and unambiguous orders for judges. The majority of the application begins with either “[a] judge shall” or “[a] judge shall not.” Finally, even the list of definitions is brief, providing explanations only for the phrases “court staff,” “judge,” “judge’s family,” and “judge’s spouse.”

Although the Bangalore Principles have many good attributes, some of these attributes can also be seen as weaknesses. It is hard to imagine a complete guide for judicial conduct summed up in an eight-page document. Additionally, by only putting forth values, principles, and brief application with no commentary or explanation, judges are given broad discretion to interpret the Bangalore Principles themselves.

judicial independence in both its individual and institutional aspects.”). Id.

146. See Bangalore Principles, supra note 125, at 3 (“Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision was made.”). Id.

147. See id. at 4 (“Integrity is essential to the proper discharge of the judicial office.”). Id.

148. See id. (“Propriety and the appearance of propriety are essential to the performance of all activities of a judge.”). Id.

149. See id. at 6 (“Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.”). Id.

150. See id. at 7 (“Competence and diligence are prerequisites to the due performance of judicial office.”). Id.

151. See Bangalore Principles, supra note 125, at 11.

152. See id. at 9.

153. See id.

154. See id.

155. Id.

156. Bangalore Principles, supra note 125, at 8.

157. As a general comparison, the 1990 Model Code of Judicial Conduct is fifty-two pages long, while the proposed complete final draft of the Model Code of Judicial Conduct was fifty-eight pages as of January 22, 2006.
B. Expanding the Meaning of "Judge": How the Bangalore Principles Can Apply to the Model Code

Unlike the ABA's Model Code, the Bangalore Principles do not mention "settlement" anywhere. Even though the Bangalore Principles have this deficiency, they have at least one attribute the ABA should consider in revising its own Model Code: expanding the definition of "judge."\(^{158}\)

As stated in the Bangalore Principles' definitions section, the word judge "means any person exercising judicial power, however designated."\(^{159}\) This simple, but expansive definition broadens both the scope and applicability of the entire document. Not only do judges have to adhere to the principles explaining a judge's ethical responsibility, but also these rules apply to anyone who acts in a judicial role, "however designated."\(^{160}\)

By expanding the scope of "judge" to anyone who serves in an adjudicatory function, it follows that arbitrators and mediators in a semi-judicial role would be covered under this definition. If nothing else, it would at least prescribe a set of minimum standards that an arbitrator and mediator must follow. These standards include acting with independence, impartiality, integrity, propriety, equality, and diligence.

V. Suggestions to Improve the Proposed Model Code of Judicial Conduct

As Judith Resnik astutely pointed out in 1982, "[c]ourt services, particularly judges' time, have become scarce commodities."\(^{161}\) That idea is, perhaps, the fuel behind the current ADR movement. Many judges believe that if they "manage" their cases, more will get done in a shorter period of time. What must be remembered, however, is that for ADR to be successful, it should complement a judicial system; not replace it.\(^{162}\) It is possible, with the right procedure, to allow for alternate

\(^{158}\) Bangalore Principles, supra note 125, at 8.
\(^{159}\) Id.
\(^{160}\) Id.
\(^{161}\) Managerial Judges, supra note 4, at 414.
\(^{162}\) See Look Before You Leap, supra note 86, at 428.
forms of adjudication while preserving the rights of the parties.

Although it is true that no guide of judicial conduct can begin to anticipate all situations in which a judge will need ethical guidance, it is possible to foresee situations that can arise through normal courtroom practice. With the growing use of ADR by today’s judges, it is inexplicable that the most recent revisions to the Model Code of Judicial Conduct omit court-ordered mediation.

Even though the proposed final draft of the Model Code of Judicial Conduct has come a long way to address and consider a judge’s role with regard to settlement, the ABA seems to have missed the mark regarding court-ordered mediation and settlement negotiations in which a judge is not directly involved.

In order to determine what a judge’s responsibility should be when outsourcing justice to mediators or other third party neutrals, the ABA could learn from the Bangalore Principles and do something as simple as expand the definition of “judge” to include anyone who exercises judicial power. At first glance, this would certainly appear to apply to both court-appointed mediators and arbitrators.

Arbitrators and mediators are both neutrals in a proceeding. Arguably, arbitrators serve a clearly adjudicative function: their decisions are binding and in most cases, unappealable. On the other hand, mediators have to work harder to establish their “judicial role.” Mediators help to facilitate case resolution, and in some cases, enjoy immunity from suit, much like judges. With the popularity of ADR and the blurring of judicial functions, it would not be an extraordinary step to include a provision or rule for court-ordered mediators and arbitrators in the definition of judge.

Although this is one change the Joint Commission on the Evaluation of the Model Code might consider as a simple way to hold mediators and arbitrators accountable for their actions, another possible change is obvious: mention court-ordered mediation, arbitration and settlement negotiations somewhere in the Model Code. The most appropriate place to discuss such matters appears to be in proposed Rule 2.09, “Ensuring the Right to be Heard,” the only rule in the Model Code that specifically addresses judicial settlement.

Although these changes are not difficult, they are necessary in order to adapt the Model Code of Judicial Conduct to the current practice of contemporary federal courtrooms. While it may be true in this country judicial system.

Id.

163. See ABA Releases Final Draft, supra note 57.
that "public confidence in the courts depends on timely justice," it also remains a truism that justice involves a party's right to be heard. By making minor adjustments to the Model Code of Judicial Conduct, the ABA has the opportunity to reaffirm citizens' faith in the courts and lead them to quicker results without sacrificing the safeguards of our common law system.

165. See Look Before You Leap, supra note 86, at 415.