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Subject: General Comments to Model Adjudication Rules

Body: I apologize for the lateness of these comments (which I had earlier sent to Kent Barnett), but when I noticed two that came in just yesterday, I thought I would go ahead and submit them this morning in the hopes they might be included in today's discussion.

Thank you. Ann Marshall Young, Retired Administrative Judge

1. In the definition section, where there are already definitions for "record," you might want to add definitions for "record of the proceeding," "administrative record," and "on the record," as they are all relevant, and when I saw the definitions I wondered why they weren't there. Reference could be made to rule 350, which I would also work on a bit. (See below.)

2. Under MAR 101, I would add a reference to the Federal Rules of Evidence in subpart C. And I would revise MAR 320 to read:

Evidence admissible under the Federal Rules of Evidence shall be admitted in any proceeding. In addition, evidence not admissible under the Federal Rules of Evidence may be admitted if it is of a sort that reasonably prudent persons would rely on in the conduct of their affairs, and that is not irrelevant, immaterial, privileged, or unduly repetitious. A party is entitled to present her/his case or defense by any evidence meeting these standards, to submit rebuttal or sur-rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

I take the "of a sort that reasonably prudent persons would rely on in the conduct of their affairs" from the Tennessee APA at the time I was an ALJ there in the central panel (1984-2000). It was actually helpful, in part by being less open-ended than language like you have now.

3. In the comment to 111, I would add to number 4, the sentence: "The adjudicator should use discretion in calling any witnesses, and absent unusual circumstances that would not create any appearance of unfairness to any party, should limit any such witnesses to disinterested persons or experts."

4. I would expand on 112(A), by adding provisions from the ABA Model Code of Judicial Conduct relating to impartiality and fairness (Rule 2.2), to bias, prejudice, and harassment (Rules 2.3), and to External Influences on Judicial Conduct (Rule 2.4). These provide:

RULE 2.2 Impartiality and Fairness

A judge shall uphold and apply the law,* and shall perform all duties of judicial office fairly and impartially.*

RULE 2.3 Bias, Prejudice, and Harassment

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

RULE 2.4 External Influences on Judicial Conduct

(A) A judge shall not be swayed by public clamor or fear of criticism.

(B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.

(C) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

See also the comments to these rules in the ABA Model Code of Judicial Conduct, at https://www.americanbar.org/content/dam/aba/migrated/judicialethics/ABA_MCJC_approved.authcheckdam.pdf
(I will bring you a copy of this tomorrow.)

5. In the comment to Rule 112, I would add a reference to the fact that the 2007 Model Code of Judicial Conduct now includes the administrative Judiciary within the Application Section of the Code. See Application Section of Code (at the beginning, after definitions. See also the Housekeeping Revisions to the Code, in which it is stated that "The Application Section's definition of a judge as "anyone who is authorized to perform judicial functions" is meant to apply to the broadest possible range of individuals, and would not, therefore, permit the exclusion of a judicial officer whose official title does not make reference to administrative 'law.'" " This is found at https://www.americanbar.org/content/dam/aba/migrated/judicialethics/ABA_MCJC_Housekeeping_Revisions.authcheckdam.pdf

I would also add, at the end of comment 6 to 112, the phrase, "provided such action does not undermine fairness to the parties and the process."

6. With respect to Rule 120, I would substitute the ex parte rule in the ABA 2007 Model Code of Judicial Conduct, as a more practical and realistic approach to dealing with ex parte communications. Prior to 2007, ABA's Model Code of Judicial Conduct limited the prohibition, as does your draft rule, to communications relevant to matters on the merits of a proceeding.
But, because in actual practice there were many situations involving actual prejudice to parties being caused by ex parte communications on "merely procedural" issues, the rule was changed to read as follows:

RULE 2.9 Ex Parte Communications

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending* or impending matter,* except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

(4) 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.

(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law* to do so.

(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

In the definitions section of the Model Code, "'Impending matter' is a matter that is imminent or expected to occur in the near future." Also, "'Pending matter' is a matter that has commenced," and "A matter continues to be pending through any appellate process until final disposition." "Law," as in "authorized by law," is defined as
follows: "'Law' encompasses court rules as well as statutes, constitutional provisions, and decisional law."

This rule addresses the practicalities of real-life adjudication, and I think the committee should adopt it rather than what the current draft provides.

Also, with respect to section D of your current proposed rule, I don't think it is necessary to include this. In my 30 or so years as a judge in cases with excellent lawyers, not-so-excellent lawyers, and pro se parties, I have never had a situation where there was a purposeful ex parte communication seriously intended to subvert the process. These kinds of communications generally take place due to a lack of understanding of the requirement against them, or carelessness, even from experienced lawyers.
The remedy of permitting responses to inappropriate ex parte communications, as in section (B) above, is the best remedy, while not tossing out a case that may be a valid one, or at least an arguable one.

7. Rule 121. This rule should not be necessary if you change the ex parte
rule as I earlier proposed, to the more practical and realistic ex parte rule from the ABA Model Code of Judicial Conduct. (Although the ABA Model Code is an ethical code, the ex parte rule also fits well within procedural rules.) In any event, the existing provisions of 121 imply that supervision of and "advising" adjudicators, by persons not involved in investigative or prosecutorial functions, might be okay. And this definitely should not be ok. If such supervision or advice is permitted, especially on an ex parte basis, this makes the whole adjudicatory process a sham, and you should not even call persons who are subject to this sort of thing adjudicators, because this will lead parties to believe that they do have the right to confront all evidence (including expert "advice") against them, when in fact someone behind the scenes may be making suggestions, or worse, direction as to the outcome of cases.

If you keep the rule, you should change it to simply: "All adjudicators
shall be in a separate Adjudication office, and be functionally and practically separate from any other part of the agency."

8. I assume that non-attorney "authorized representatives" as in Rule
140 would not be subject to state laws prohibiting the unauthorized practice of law. That was an issue for us in Tennessee, but I have heard that in federal proceedings such laws preempt state law. ??

9. For Rule 150, I recommend a subpart like that in 151(B)(4).

10. On comment 10 to Rule 151, I would encourage you to take a less rigid

approach (allowing rejection of a document that does not "conform to formatting requirements"). Perhaps you could add a provision at the end stating ", but shall not reject a document where this would undermine the fundamental fairness of the proceeding," or something like that.

11. In 171, I've never used any authority to issue subpoenas, so I'm not sure about this, but I think I might take the language at the end of comment 3 and add it to the end of 171(A), so it would read:

"Upon a party's request, a subpoena for testimony, records, or things shall be issued by [the Agency] upon a statement or showing of general relevance and the reasonable scope of the evidence sought."

12. Rule 200 (B)(4) – put an "and" where the comma is.

13. On Rule 330, I would add a comment that the end of discovery does not excuse any party from complying with Rule 152(A) (requiring supplementation of responses). I would add a similar provision as part (D) of Rule 232, stating that "These duties do not end with the end of discovery." I once had counsel from a very reputable firm argue that they did not have to supplement very important evidence about radiation levels at a particular location that were central to the issues of the case, because discovery had already ended. Gamesmanship does go on!

14. Rule 240 should include a section about appointing a mediator, who is different from a settlement judge, I think, in that this would be a trained person (could be a trained adjudicator who will not communicate with the adjudicator of the case other than as to scheduling) who would assist the parties in reaching a settlement by, for example, talking with the parties to ascertain points of commonality; giving them, separately as necessary, realistic appraisals of their chances of success; etc.

Comment 4 to Rule 240 should also emphasize that the adjudicator in a case should not be exposed to any comments about settlement negotiations, etc., in a pending case.

15. See above for my comment to Rule 320.

16. Rule 328. Change the beginning of section (A) to read:

Fees. Witnesses, other than employees of a federal agency, summoned in an adjudication [delete "will receive"] are entitled to the same fees …..
etc.

I recommend this because for parties without a lot of resources, a witness may decide to waive their fees, and the current wording mandates that they "will receive" the fees.

17. I would change the title of Rule 350 to "Record of Proceeding." I would then add a new section (A), to read something like this:

The administrative record of a proceeding includes the transcript or tape recording of the hearing and any conferences or oral arguments before the adjudicator that have been recorded or transcribed, all exhibits filed in the case, all other filings of the parties, all written orders and decisions of the adjudicator, any disclosures of ex parte communications as required under Rule 120,

any written statement(s) of settlement, and any other written or recorded records of activities taking place in the proceeding.

I would leave section (B) as is.

Respectfully submitted,

Ann Marshall Young
Retired Administrative Judge, U.S. Nuclear Regulatory Commission, 2000-2015; Administrative Law Judge, Tennessee Central Panel 1984-2000

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