

Searching for the Truth – A Function of the Judiciary?

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[Editor's note: The search for facts is a function of the trial court judge, with or without the help of a jury. Appellate Court judges have the benefit of communication with other minds, but the trial court judge is left with the lonely responsibility to find and declaim the facts himself. This article is dedicated to trial judges everywhere.]

In a decision earlier this year, a judge of the New York Supreme Court dismissed a complaint in foreclosure and canceled a *lis pendens* because the Plaintiff was not the owner of the mortgage and did not have standing to sue.

How did the judge determine that the Plaintiff was not the owner of the mortgage? Very simply – he conducted his own research into the title records of ACRIS (automated City register System), a website maintained by the New York City register, and found that another entity was listed as the mortgagee.

The judge's decision to go outside the record in the case, which at that point consisted only of three documents – the complaint by the bank claiming to be the mortgagee, the *lis pendens*, and a motion by the Plaintiff to serve the Defendant by publication – raised in my mind a vague but troubling sense that the judge had exceeded his authority. Of course, in a climate in which judges are inclined to discourage foreclosure actions, and especially in a case in which the mortgagee conceded that the mortgagor could not be found, a judge might be pardoned for reaching out to protect an individual borrower against one of the nation's leading banks.

However, in my discomfort over the judge's decision to search for the facts himself, I realized that I really didn't know the answer to what is ultimately one of the most fundamental issues in jurisprudence: may a judge in a pending action reach beyond the proof presented by the parties to conduct his own research into the facts and satisfy himself that he has the best answer possible.

Or, instead, is it a basic tenet of due process that the parties are entitled to confine the judge to the facts as they present them.

There really are two branches to this inquiry. They may be described as the *sua sponte* branch and the *ex parte* branch. Under the *sua sponte* branch, the judge conducts his own research outside the courtroom and outside the testimony of the parties and their witnesses, as in the case of the judge in our foreclosure matter. The research may be into simple, established facts or into social and technological studies, many of them inevitably unproven or disputed. Thus, a judge in a personal injury matter, faced with the conflicting testimony of two medical experts, may be tempted to inquire further into the opinions of other experts or to visit the library or the Internet for his answers.

The potential vice here is that the judge may reach a conclusion that is not supported by the testimony of either of the experts presented by the parties themselves. And the parties, unaware of the judge's independent research, are confronted with a judicial fiat that may not represent a resolution of the issues

as their attorneys understood and presented them, and they are left without an opportunity to rebut or dispute the judge's conclusions.

Under the *ex parte* branch of an inquiry, on the other hand, the judge receives or hears a communication from or on behalf of one of the parties, without giving the other party the opportunity to challenge its contents or its accuracy. The *ex parte* communication may enable the judge to reach a more accurate determination of the facts, but does it give the other party the most vital requirement of due process – the opportunity to be heard?

The Civil Law Courts

The quandary we face – whether a trial judge can go outside the record to find the facts – is a quandary facing the common law courts of the United States and England, not the civil law courts of countries in Europe.

A central difference between the common-law and civil-law principles, according to one analysis, is that the common-law system 'leaves to partisans the work of gathering and producing the factual material on which adjudication depends.' In contrast, lawyers in the civil law system mainly act as 'law adversaries' (i.e., arguing points of law) and judges more actively control the investigation and fact-finding process.... *A Primer on the Civil-Law System*, James G. Apple, Federal Judicial Center, and Robert P. Deyling, administrative Office of the U.S. Courts.

The common-law injunction against independent judicial fact-finding was codified in the 17th Century in Lord Hale's rules for His Judicial Guidance: *Things Necessary to Be Continually Had in Remembrance*.

Rule 4. That in the execution of justice, I carefully lay aside my own passions, and do not give way to them, however provided.

Rule 16. To abhor all private solicitation, of what kind soever, and by whomever, in matters depending.

Of course, this language applied essentially only to *ex parte* communications and not to a judge's *sua sponte* inquiry or research into the facts.

In 1924, the ABA published the first American Canons of Judicial Ethics, a compendium of thirty-four sections, each dealing with a different issue facing judges at the time, including the issues raised by the baseball scandal of 1919 involving the Chicago White Sox. Canon 17 provided as follows:

[A judge] should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for *ex parte* application.

While the conditions under which briefs or arguments are to be received are largely matters of local rule or practice, he should not permit the contents of such briefs presented to him to be concealed from opposing counsel. Ordinarily all communications of counsel to the judge intended or calculated to influence action should be made known to opposing counsel.

This was the first time that a rule enunciated the obligation of a trial judge to seek out opposing counsel and advise him or her of an *ex parte* communication that might influence the judge in his determinations or his decision.

In 1972, the ABA amended the 1924 Code (Canon 3A(4)) to read:

...A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

Significantly, the 1972 amendment seems to reject the 1924 Code and to prohibit *ex parte* communications completely, whether or not the judge alerts the parties to their content or the degree to which he may be influenced by them. On the other hand, the judge is permitted to go outside the record to consult “a disinterested expert” in the law affecting the proceeding before him, as long as he gives the parties “reasonable opportunity to respond.” Was it the ABA’s intent to distinguish between issues of law and questions of fact? Or to recognize for the first time the need to give the parties the opportunity to review and rebut any evidence or advice being considered by the judge?

The 1990 ABA Code of Judicial Conduct

The answer lies in the 1990 ABA model Code of Judicial Conduct. Canon 3B(7) of the 1990 Code provides essentially:

(7) a judge shall not “initiate, permit or consider *ex parte* communications” in a pending proceeding, except for:

...*ex parte* communications for scheduling, administrative purposes or emergencies “that do not deal with substantive matters or issues on the merits,” provided

- (i) the judge believes the communication will not disadvantage either party, and
- (ii) the judge notifies both parties of the communication and gives them the opportunity to respond.

(b) the advice of a disinterested expert on the law, provided the judge gives both parties the name of the expert, the contents of the report, and an opportunity to respond.

(c) consultation by the judge with court personnel and with other judges.

(d) with the consent of the parties, conferences with each party separately in an effort to mediate or settle the matter.

(e) communications authorized by law.

All of these provisions relate only to *ex parte* communications. What about *sua sponte* research by the judge? For the first time, the ABA dealt with this issue head-on. The Commentary to 3B(7) states clearly:

[a] judge must not independently investigate facts in a case and must consider only the evidence presented.

The 2007 ABA Code

Seventeen years later, in its 2007 Code, the ABA moved the provisions concerning *ex parte* communications from Rule 3B(4) to Rule 2.9(C), and it elevated the prohibition against independent judicial research from a Commentary to a part of the Rule itself. Rule 2.9, entitled “*Ex Parte Communications*,” now states:

(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.

To emphasize this obligation by the trial judge, selective Comments to Rule 2.9 state:

[1] To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

[3] The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this Rule.

[4] A judge may initiate, permit, or consider *ex parte* communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.

[6] The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic (emphasis added).

Except for its new treatment of *sua sponte* judicial research, the provisions of the current Canon 2.9 are essentially the same, especially as they relate to *ex parte* communications, as Canon 3B(7) of the 1990 ABA rules.

And What of New York?

Ex parte communications to or by judges in New York are covered in Part 100 of the rules of the Chief administrator of the Courts Governing Judicial Conduct (22 NYCRR Part 100). They appear at <http://www.nycourts.gov/rules/chiefad-min/100.shtml> and read, in those portions relevant to the issue of *ex parte* communications, as follows:

(6) 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. 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 proceeding, except:

(a) *Ex parte* communications that are made for scheduling or administrative purposes and that do not affect a substantial right of any party are authorized, provided the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and the judge, insofar as practical and appropriate, makes provision for prompt notification of other parties or their lawyers of the substance of the *ex parte* communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and a copy of such advice if the advice is given in writing and the substance of the advice if it is given orally, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge, with the consent of the parties, may confer separately with the parties and their lawyers on agreed-upon matters.

(e) A judge may initiate or consider any *ex parte* communications when authorized by law to do so.

(9) A judge shall not:

(a) make pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office;

(b) with respect to cases, controversies or issues that are likely to come before the court, make commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.

As we see, the New York rules take great care to cover all the ramifications resulting from *ex parte* communications, in much the same terms as the ABA, but they ignore completely the issue of *sua sponte* judicial research and its consequences.

In so doing, they ignore an issue treated firmly by the ABA Canons, which clearly prohibit the use of *sua sponte* research by a trial judge.

Conclusion

Whether prohibited (ABA) or ignored (New York), *sua sponte* research by the trial court would not appear to be in much favor. This is consistent with the view of many judges that due process is not satisfied

unless the parties have before them the same facts as the court itself and, further, that they have a full and complete opportunity to consider and respond to them. Justice Holmes in *Quong Wing v. Kirkendall*, 223 U.S. 59 (1912); Chief Justice Burger and a seven-member majority in *E.I. du Pont de Nemours & Company v. Collins*, 432 U.S. 56 (1977).

Further, under the 1990 ABA Code of Judicial Conduct (Canon 3E(1)(a)), a judge must disqualify himself when he has “personal knowledge of disputed evidentiary facts concerning the proceeding.” When a judge acquires scientific research data from a library [on his own initiative], he then acquires “personal knowledge of disputed evidentiary facts,” and the question becomes “may he ethically continue to preside over the matter?”

Of course, in a case involving precision in knowledge, we may regret the inability of the judge to conduct an independent inquiry into the facts. Many things are hard to pin down (will we ever find the causes of global warming?), but many can be described with accuracy and defined with certitude, especially in the physical sciences.

An intelligent judge facing lawyer ineptitude and neglect will strain to find the right answers, and he will be tempted to seek data and solutions that the lawyers fail to provide. Especially in this period of remarkable technological advances, are we right to constrain the judge and his research. Was the judge in my foreclosure case wrong to look at the City’s title records?

Surely, there is a way to give the judge some latitude and preserve the principles of due process. First of all, the judge can advise the lawyers that he is not satisfied with their proof and intends to look elsewhere. Secondly, he can report the results of his research to the lawyers. Lastly, he can give the lawyers the opportunity to challenge, modify or rebut his findings at a hearing on notice, conducted especially for that purpose.

In other words, the courts and the ABA can treat *sua sponte* research with the same receptivity and the same controls as *ex parte* communications. The resulting rule would read as follows:

A trial judge who forms the reasonable conclusion that he needs to conduct further inquiry or research into an issue presented to him by the parties, may conduct such research *sua sponte*, provided: (i) the judge gives notice to the parties of the data or facts he intends to research; (ii) the judge reports the results of his research on the record; (iii) the judge provides the parties, on reasonable notice, with the opportunity to be heard and to comment on or rebut the judge’s conclusions; and (iv) in his decision, the judge recites the purpose, result and effect of his independent research.

Lazar Emanuel is the publisher of NYPRR. He is pleased to acknowledge his reliance, in the preparation of this article, upon the comprehensive analysis of the Honorable George D. Marlow, Associate Justice, Appellate Division First Department, and Chair, NYS Advisory Committee on Judicial Ethics, in From Black robes to White Lab Coats: the Ethical Implications of a Judge’s Sua Sponte, Ex Parte acquisition of Social and Other Scientific Evidence during the Decision-making Process. St. John’s Law Review, 291 (1998).