

Chapter 6

Ethical Issues For Judges And Courts In Processing Human Trafficking Cases

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HUMAN TRAFFICKING
AND THE STATE COURTS COLLABORATIVE

I. Chapter Overview

This chapter of the Guide addresses the underlying ethical concerns of the judges in handling cases where human trafficking may be an issue. The major concerns that face judges in this area include the following:

- Acting or appearing to act as an advocate for a human trafficking victim in the context of a criminal prosecution without compromising their neutrality.
- Undermining the prosecutors. For example, by identifying a criminal case filed under an alternative charge as a possible trafficking case, the judge may undermine the credibility of the prosecutor. Even adding a trafficking flag to a case in an automated case record system may indicate that the judge questions the decision of the prosecutor.
- Assisting potential trafficking victims in cases where trafficking may have occurred but the victims are not part of the legal proceedings. An example might be code violation cases. Even raising the possibility that human trafficking is involved may affect the court case and compromise the judge's neutrality.
- Actions that might disqualify or support a motion to recuse the judge. This could include *ex parte* discussions, independent investigation of the facts in a case, or any actions that might give rise to a reasonable belief that the judge has pre-determined a particular result.
- Actions that can give an appearance of bias.
- Being perceived as interfering with the attorney/client relationship.

The remainder of this chapter contains the following three sections.

- Section II discusses the implications of ethical issues for the state courts. It first covers ethical issues arising for judges in the adjudication process and in their extra-judicial activities and then covers the applications of judicial rules of ethics to other court staff.
 - ◆ With regard to issues arising in the adjudication process, the section points out that judges cannot act on information obtained outside of the trial process concerning an individual but may act on concerns that arise as the trial unfolds, including taking steps to protect a person who appears to be a victim of human trafficking, unless the judge shows such extreme bias against an alleged trafficker that his or her ability to conduct a fair trial can reasonably be questioned. The steps that a judge may ethically take to assist a victim are discussed in detail.
 - ◆ With regard to the judge's extra-judicial activities, the section points out that a judge may become involved in activities aimed at improving the law, the legal system, or the administration of justice, as long as the judge's participation doesn't raise an appearance that

¹ The views expressed here are those of Judge Marks in her individual personal capacity and as President of the National Association of Immigration Judges (NAIJ), not as official spokesperson for the U.S. Department of Justice (DOJ). The National Association of Immigration Judges is a professional association of Immigration Judges and the certified representative and recognized collective bargaining unit which represents the Immigration Judges of the United States. Judge Marks does not purport to represent the views of the U.S. DOJ, the Executive Office for Immigration Review, or the Office of the Chief Immigration Judge. Rather, her views reflect her personal opinions, which were formed after extensive consultation with the membership of the NAIJ.

the judge is unable to carry out his or her judicial duties impartially, such as being associated with an advocacy group or having too close a relationship with a service provider. It also points out that judges must be careful in their use of social media. Again, examples are provided.

- ◆ The section also notes that judges must hold court staff to the same standards of behavior.
- Section III presents selected judicial ethics opinions by the State of Washington Ethics Advisory Committee to provide detailed analysis and examples of some of the more difficult ethical problems.
- Section IV provides links to additional resources, including state judicial ethics opinions and the American Bar Association's (ABA) *Model Code of Judicial Ethics*.

II: Implications for the State Courts

This section includes a review of federal judicial ethics opinions and an analysis of situations in which ethical concerns may arise. *Judges and court staff should be aware that individual state judicial ethics codes and opinions may differ, so each judge should review his or her own state's rules.* Further, there are areas where either no clear ethical guidance has been developed at present or small nuances in the facts can have an effect on the ethics of a particular judicial action, so judges may be dealing with issues of first impression.

The discussion that follows addresses concerns of judges, court administrative staff, and court support staff and covers both actions in the adjudication process and activities of judges in their roles as justice system and community leaders. The discussion makes references to the ABA's *Model Code of Judicial Conduct* (2011 edition).

Judicial Actions in the Adjudication Process

A judge presiding over a case where human trafficking victims may be involved may have to decide what steps are appropriate to protect participants in the trial whom he has reason to suspect may be trafficking victims. Some of the actions that a judge may want to take to assist or protect trafficking victims can raise ethical issues, including the following:

- Taking steps to promote safety for a suspected trafficking victim;
- Asking questions of the prosecutor or attorney for a party to a case;
- Asking questions of a party, victim, witness, prosecutor, or defense attorney in open court or in chambers;
- Meeting with a party, victim, witness, prosecutor, or defense attorney privately in chambers;
- Asking questions aimed at revealing signs that the person may be a trafficking victim without giving rise to an appearance that the judge has already decided that the person is a trafficking victim;

- Assisting an unrepresented party, victim, or witness who appears to be a trafficking victim;
- Assisting a person charged with a crime who might have a defense of coercion due to victimization by a trafficker;
- Slowing down the process in situations that may raise red flags, such as an older male posting bail for or seeking guardianship over a younger female; and
- Taking leadership to assure that all participants in the courtroom, including prosecutors, defense attorneys, and other court officers, have a common understanding of the role that the judge will play in handling cases involving issues of human trafficking.

Many of the ethical concerns with regard to the above actions by the judge will have to be determined by particular fact situations. The following are some principles that should be applied in deciding whether a particular situation raises ethical concerns.

- A judge may be subject to disqualification in situations where pre-existing attitudes, relationships or statements deriving from an extra-judicial source appear to compromise the judge's neutrality or ability to decide a case fairly.
- Statements or actions by the judge at trial that reveal negative opinions about a party to a case based on information obtained in the context of a trial do not disqualify the judge unless the judge shows extreme bias.

The most important ethical issue with regard to all of the above actions is whether an action by a judge in a criminal case to protect a potential human trafficking victim would be considered an indicator of bias against the defendant that could make the judge subject to disqualification.

Assisting a Suspected Trafficking Victim

A critical issue for a judge is determining what steps, if any, he or she can take in the courtroom when suspecting that a criminal defendant might be a trafficking victim, to assist the victim without violating the ethical canon to be fair and impartial.

The concern for the judge is whether actions taken to identify or assist a victim could be viewed as evidence that the judge has determined that the case involves human trafficking, particularly where the defendant has not been charged with a trafficking crime but rather a related lesser offense. Under 28 U.S.C. 455 on judicial disqualification, the Federal Courts have held that expressions of opinion by a judge based on his or her participation in the trial do not disqualify the judge, unless the judge evidences bias from an extrajudicial source or "such a high degree of favoritism or antagonism as to make fair judgment impossible."



In Liteky v. United States, 510 U.S. 540, 550-551 (1994), a defendant in a criminal case claimed that the judge should be disqualified, due to the fact that the judge had shown frustration with the same defendant in a prior criminal case involving prosecution of the defendant for similar acts. In both cases the defendant was prosecuted for acts of vandalism in a federal military facility, which the defendant intended to be a political protest. The judge became impatient and antagonistic when the defendant tried to use the trial itself as a political forum to continue his protest. The U.S. Supreme Court held that the judge's remarks showing frustration with the same defendant in the prior criminal case did not require disqualification. The Court held that evidence of bias by the judge in reaction to what the judge has observed during the trial generally does not require disqualification.

The Federal Courts have also held that comments by a judge that a prosecutor should have charged a defendant with a particular count of criminal behavior did not require disqualification. One case involved a defendant who was initially charged with bank robbery, which charge was amended to add armed robbery after the judge questioned why the prosecutor had omitted the firearms charge. United States v. Wilkerson, 208 F 3d 794 (9th Cir. 2000). The defendant pleaded guilty to both charges but then moved to vacate the plea and have the judge disqualified based on the judge's comments to the prosecutor regarding the gun charge. The court held that the judge's actions did not require disqualification.

There are limits on how far a judge can go, however, in suggesting a course of action to a prosecutor. A New Jersey Supreme Court judicial ethics opinion held that it was unethical for a judge to advise a prosecutor in an *ex parte* communication regarding what was needed to create a record of evidence necessary to support a conviction in a case before the judge. See In the Matter of Diamond, Order (New Jersey, July 11, 2013).

While the above cases did not involve human trafficking, the case law can be interpreted to support the proposition that a judge would not be subject to disqualification for taking steps to follow up on a concern that a person in court is a potential victim of human trafficking if that concern is based on the judge's observations in the trial. This could include situations where a judge's actions at trial to assist a victim/witness suggest that the judge believes the defendant should have been charged with human trafficking, as long as the judge does not suggest to the prosecutor how the evidence in the case could justify a conviction for human trafficking.

Judges should be aware that each state has its own statutes governing the process of moving to disqualify a judge. Once a judge has "disclosed," then those particular state statutes come into play. Some allow for disqualification for "cause" and "not for cause." If it is for cause, there are provisions that allow for judges to "defend" themselves from the challenge. Given the wide disparity and variances in state disqualification statutes, judges should refer to their own state statutes if a motion for disqualification is made.

A judge has the widest latitude to "help" a victim/defendant at sentencing. This is the appropriate time for "mitigating" circumstances to be evaluated. For example, after a victim/defendant is convicted at trial of armed robbery, she may divulge to the judge at sentencing that she was a victim of human trafficking and was forced to steal by her pimp. The judge can use this mitigating factor in determining the best disposition for the victim/defendant.

Judges may be more limited during trial. Perhaps there are appropriate jury instructions that could be given to help jurors sort out how they should factor in the additional evidence presented by a defendant that he/she was a trafficking victim. This presumes the defendant has offered this in his/her defense. Judges are more limited at trial because they have to remain fair and impartial in front of the jury. However, in jurisdictions which allow the parties to discuss the merits of a case with a judge before trial, a judge may be able to suggest that the victim/defendant appears to be a victim of human trafficking and should be treated accordingly. The judge should be mindful of Rule 2.2 (Impartiality and Fairness). Also see comment 2 to Rule 2.2: a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question. Hence, we believe it would be inappropriate for the judge to say something like “this defendant is a trafficking victim, I don’t know why the DA continues to bring these cases to my courtroom, I don’t believe these victims have committed a crime, they should not be detained, and I refuse to sentence them to any custody time!” (this assumes the state statutes still treat child prostitution as a crime).

When Can a Judge Request Human Trafficking Screening?

One major issue for judges is when a judge may use human trafficking screening tools and analytical methods for uncovering possible human trafficking issues. The above cases suggest that in circumstances where information arising at trial could raise a suspicion that a participant in the trial is a human trafficking victim, a judge may request an assessment of the status of the individual.

More broadly, courts commonly make decisions within a case that require information on an individual’s criminal record, employment status, financial capability, residence, living conditions, and ties to the community, such as bail and release decisions, sentencing, child placement decisions, juvenile diversion decisions, and juvenile detention decisions. It may be permissible for a judge to request that a human trafficking risk and needs assessment, as described in Chapter 6 of this HT Guide, be conducted as standard protocol in the context of those decisions, as the information may be a factor in the decision. The human trafficking screening tools in those circumstances might be administered by designated court personnel, prosecutors, probation officers, pretrial release programs, child protection agencies, juvenile diversion programs, or human services agencies.

At the broadest level, certain case types are more likely to have trafficking issues, and screening may be able to more consistently identify trafficking victims in those cases. Those case types include cases involving crimes commonly committed by trafficking victims, such as prostitution, drug use, moving violations, thefts, or illegal peddling, or other case types associated with human trafficking, such as juvenile delinquency; child abuse and neglect; foster care review; family; debt collection; wage disputes; or code violations. It is not clear whether a judge may take screening a step further and adopt a standard practice of requiring screening for trafficking victims in all of those case types. Different states may view this possibility differently.

Transfer of Juvenile Victim to Another Judge for Disposition

In a case involving a minor victim of trafficking where the jurisdiction hearing (plea hearing) is held in one county and the case is then transferred to another jurisdiction for disposition (sentencing), an important ethical issue for both judges is when it is appropriate for the first judge to discuss the case with the judge who is handling the disposition hearing.

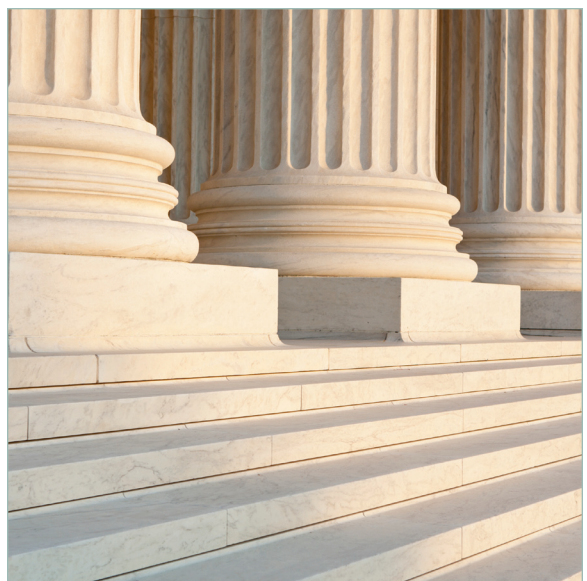
In juvenile cases involving transfer, the judge hearing the “plea” or taking “jurisdiction” will be in the county where the event occurred. The “sentencing” or “disposition” will take place in the county where the child’s parent or legal guardian resides, hence the bifurcated hearing. Transfers out routinely occur in about 7 to 10 days after jurisdiction is taken, leaving very little time (or incentive) for services to be given to a trafficked child who is going to be going home to another county. In cases involving human trafficking, a question arises as to whether there is a need to tell the other judge about the circumstances under which the victim/delinquent or victim/dependent was found. For example, where the victim/delinquent is charged with petty theft charges but the first judge suspects her to be a human trafficking victim who was working for a well known pimp in the county, would it be appropriate to communicate with the judge who is going to determine her “disposition” and suggest that specialized probation services are more appropriate for this trafficking victim than custody time?

In some juvenile courts, judges commonly talk to other judges about cases where venue is changed, either by writing notes to the file or, occasionally, by telephone. However, such communication may be inappropriate if the first judge had to recuse himself or herself due to some information that the judge received from a third party that would be prejudicial to one of the parties in the case. If the judge shares that information, or even appears to, it could compromise the receiving judge.

Rule 2.9(A)(3) allows a judge to consult with another judge as long as the judge makes reasonable efforts to avoid receiving information that is not part of the record. Rule 2.9(5)(c) says that a judge shall not investigate facts in a matter independently and shall consider only the evidence presented and any facts that may be properly judicially noticed. If it is determined that the judge receiving the information from another judge might be in violation of this rule, the remedy would be disclosure under Rule 2.9(A)(1)(b). This rule is aimed at preventing the judge from possessing outside information that would give one side or the other an advantage or might influence the judge’s decision, so it would seem that disclosure of the receipt of the outside information would ensure fairness to both sides.

Also note in certain states there are state statutes or interstate compact agreements that permit a judge to call another judge to discuss child custody issues in cases where a child may be moved from one state to another. This is probably not routinely applicable here with human trafficking cases, but there may be compacts or agreements that govern the transfer of cases involving children which would allow for some type of communication between judges. We recommend that a judge put any such communication on the record before the parties at the earliest instance if possible.

We suggest that the best practice is to not communicate directly with the next judge. The first judge might ask that the record contain a recommendation to look into determining whether the minor might be a victim of trafficking. Ultimately the best practice might be to have either juvenile probation or child welfare connect with their counterparts in the county receiving the case to share that information.



Self-Incrimination By a Witness That May Be a Perpetrator

If a judge suspects that a trafficking victim who is a witness testifying in his or her courtroom may actually be a perpetrator or someone who has recruited other trafficking victims to work for the trafficker, what can the judge ethically do?

The safest approach may be to take a break and appoint counsel to represent the trafficking victim because they may have a Fifth Amendment right not to say anything that might incriminate them. As long as they are on the witness stand and/or are going to testify, we believe it is fair for the judge to raise the question with the parties of the witness's Fifth Amendment rights and state that it appears to the judge that further testimony might implicate the witness's rights. At that point, the judge may decide to appoint counsel for the witness to advise the witness further on this issue and stop the testimony or take a break from the trial until the witness returns with counsel's advice.

We recommend that a judge make this assessment early on and appoint counsel to save valuable court time. It could be that the victim/witness was so embroiled in the pimp's operation that she/he will take the Fifth. It is better to know early rather than spend court time hearing testimony from a witness who later asserts the Fifth, cannot be cross-examined, and whose testimony may ultimately be stricken.

Relationship Between Evidence of Human Trafficking and Merits of the Issues at Trial

Where the facts relate to the human trafficking issue and are also critical to the merits of the underlying case, any action by the judge to determine if the respondent is a trafficking victim could give the impression that the judge has decided the underlying case in favor of the respondent. For example, in a case where a defendant is possibly a trafficker but was charged with a lesser crime such as procuring prostitution, a judge who asks questions to determine whether the victim of the crime may also be a victim of human trafficking might also unintentionally signal a belief in a particular version of the facts relating to the ultimate issue of guilt of the defendant.

Where the facts concerning the trafficking issue are separate from the facts of the underlying case, so that facts surrounding the trafficking do not involve the same subject matter as the merits of the criminal case, the case does not carry the same ethical dilemma. If, however, the facts pertaining to the trafficking issues cannot be fully separated from the facts relating to the contested legal issues involved in the case, the judge may want to have the trafficking assessment conducted outside the context of the contested case.

The following are two hypothetical examples of human trafficking issues arising in the process of adjudication that present the application of the above ethical principles. The hypotheticals are presented in the Immigration Court context, but the issues could arise in the state court context as well, so the concepts are applicable to all types of cases. The critical issue for the judge in both hypotheticals is how to maintain a role as a neutral arbiter in the proceeding while offering compassionate help to victims of human trafficking who may themselves be accused of some violation of criminal or civil law.

Hypothetical 1: Facts of Trafficking Also Relate to the Merits of the Case

In Hypothetical 1, removal proceedings are started against a young lawful permanent resident who was accused of engaging in marriage fraud in immigrating to this country. Immigration and Customs Enforcement (ICE) alleges that he entered the United States with an immigrant visa as the spouse of a United States citizen with whom he did not intend to create a marital life.* ICE prosecutors therefore seek to strip the respondent's permanent residence and deport him.

In the hearing on this matter, the respondent testifies that he fell in love with his (now ex-) wife while she was visiting his country, that he corresponded with her, that she later returned to his country to marry him in a civil ceremony, and that he intended to live with her in the U.S. as husband and wife. He further testifies that, when he arrived in the U.S., his wife and his mother-in-law picked him up at the airport and took him to the mother-in-law's house. There his life was controlled by his mother-in-law. He was promised that after a proper church wedding, he would be able to stay in the same bedroom with his wife, but until then, he was not allowed to share a marital life with her, though she lived in the same house. The illusive church wedding kept being put off into the future. He also testified that he was told he must help out the family by working in his brother-in-law's business in another city. There he was forced to do menial labor and sleep on the floor with only a blanket. While describing this treatment, the respondent breaks down in humiliation on the stand. He says that other employees were not required to sleep at the place of business, although his brother-in-law did sleep on a cot in the office. He was not paid for his work. Twice the respondent refused to continue working in the business and traveled back to his mother-in-law's house, but after the second time, he was told that he would be reported to immigration authorities if he continued to rebel. After this, he left his mother-in-law's house even though she retained his passport and visa.

** The primary requirement for establishing eligibility to immigrate based on marriage to a United States citizen or lawful permanent resident is that the couple, at the time of the marriage, intended to make a life together and the marriage, therefore, was not entered into solely or primarily for immigration purposes.*

In Hypothetical 1 the case presents a critical factual dispute between the two parties before the Immigration Judge. The judge suspects that the respondent may be a human trafficking victim but is ethically bound to remain neutral in her assessment of the facts of the case. ICE alleges he was complicit in marriage fraud and not a victim. The Immigration Judge wants to determine whether human trafficking has occurred by asking questions of the respondent in a way that shows compassion and understanding but does not re-traumatize the potential victim. However, this might derail the primary inquiry in the immigration case, and it might also unintentionally signal to the ICE attorney that the judge has a bias toward the respondent's version of the facts, which are critical to both the trafficking issue and the ultimate issue of deportability.



Hypothetical 2: Facts of Trafficking Not Related to the Merits of the Case

In Hypothetical 2 a respondent who has applied for asylum in removal proceedings before an immigration judge describes how he paid a down payment to an “agent” to bring him to the United States. He understood that he would have to work in the U.S. to pay off the remainder of the large fee for his passage and entry into the U.S. The agent helped the respondent receive a visa on false pretenses and the respondent entered the U.S. “legally”. He testifies that he was met at the airport by his new “employer” and driven in a van for many hours to a remote location, but he was never told the name of the location. He was settled into the employer’s house in the basement with seven other employees. They slept on cots. His employer held his passport. For a period of three years, he worked seven days a week in the employer’s restaurant. He was driven each morning in the van to the restaurant and back again to the employer’s house and worked approximately 16 hours per day. Otherwise, he was not allowed to leave the house, except that occasionally, he and the other employees were driven to a nearby drugstore to purchase personal items. For this purpose, the respondent was given \$100 per month. The employer sent the rest of his salary to the “agent” in repayment of his “loan” for passage and entry into the U.S. At the end of three years, he was put again into the van and driven many hours back to the large city where he had entered the U.S. At that time, his passport was returned and he was given \$300.00 and left in the city.

In Hypothetical 2, after hearing the above testimony the Immigration Judge calls a chambers conference with both attorneys. The judge is willing to involve both attorneys in the conference because the judge feels confident that the defense attorney was not hired by or involved with the trafficker because the attorney has a long history of ethical and competent practice before the judge. She explains her agency’s concern with human trafficking, notes that she is going to ask the respondent a series of questions, and explains that her purpose is to determine whether the respondent’s case should be referred for investigation regarding his being a victim of human trafficking. Both the attorney for ICE and the respondent’s counsel agree to this plan.

After asking a series of questions meant to determine the level of coercion involved, the judge tells the parties of her intent to refer the case for investigation and asks the respondent’s permission to share his information for that purpose. The attorney for ICE consults with her supervisor and tells the judge that human trafficking is “priority number one” for ICE and that if the respondent files an application for a “T” non-immigrant visa, ICE will agree to administratively close the case to allow time for United States Citizenship and Immigration Services (CIS) to adjudicate the application.²

This case does not carry the ethical dilemma presented in the case described previously. As an asylum case, the facts surrounding the trafficking do not involve the same subject matter as the merits of the immigration case. In addition, by the time this case came before the court, both the court and the prosecuting entity, ICE, had clarified their priorities with regard to human trafficking and it was relatively simple to come to agreement on how to handle the situation. And, most importantly, the respondent was no longer in the clutches of the trafficker.³

² “T” visas offer non-immigrant status and a path to permanent residence for victims of severe forms of human trafficking. The Immigration Court does not have jurisdiction to consider a visa application, which must be made before Citizenship and Immigration Services of the Department of Homeland Security (CIS).

³ If he had been, the strategy of calling a chambers conference would have to be considered only with much caution, as the attorney for the respondent is sometimes entangled with traffickers. Therefore, in some circumstances, such a conference might endanger the respondent. *Nihil hocer patiae, C. Simusa rei potamdintius etistil hin sena, quam popublia dest quam iae facta notidef acchuidient. Patiquam faciberit, C. Dum aur. Sci*

Nevertheless, even this second scenario could have been complicated if one of several factors were involved. Sometimes the method of arrival in the United States is relevant to contested issues involved in an asylum case or to the respondent's credibility overall. Sometimes, respondents' attorneys are hand in glove with trafficking agents. At times representation by an attorney chosen by the trafficker is included in the price for passage and entry into the U.S. Or the gentleman seated in the back of the courtroom, who the respondent said "gave him a ride to court," may be an agent of the trafficker. In that case, having the respondent answer questions in open court could put him or her in danger and may not elicit honest answers.

This second scenario is included because it emphasizes the importance of shared training on human trafficking issues including all stakeholders in the court's proceedings. Having all parties on the same page with regard to the need to identify and assist victims will lead to a better understanding of the court's purposes in asking questions or referring a case for investigation. The judge must be careful to disentangle these issues from the contested legal issues involved in the case. Where that cannot be done, such as in the first example above, then a referral to a neutral investigator that can investigate outside the context of the contested case should be made. For this purpose, even the initial steps of asking questions might be better left to the investigating entity.

Extra-Judicial Activities of Judges

As community leaders, a key issue for judges is the extent to which a judge can work with other organizations in a community to develop resources for victims without creating an impression of bias, including participation on a Human Trafficking Working Group. Juvenile judges in particular are often urged to go out in the community and create programs that will assist at risk youth to include children who are victims of commercial and sexual exploitation. Juvenile judges may also encounter unique ethical issues because of their leadership in the community. For a more detailed discussion of these particular issues facing Juvenile Judges, see "The Role of the Juvenile Court Judge: Practice and Ethics" by Judge Leonard Edwards (2012).

The following are some principles that should be applied in deciding whether a particular situation raises ethical concerns with regard to activities of judges in their role as community leaders.

- The activity must be aimed at improving the law, the legal system, or the administration of justice.
- Engaging in the activity must not create the appearance that the judge might act improperly in fulfilling his or her judicial duties.
- The activity should not be one that would cause a reasonable person to question whether the judge will be able to decide cases involving certain issues or parties in an unbiased manner.
- The activity should not compromise the judge's neutrality in a way that could lead to the need for frequent recusals.

The following is a discussion of some of the main ethical questions that may arise for a judge in the context of engaging in extra-judicial activities. References are to the ABA's *Model Code of Judicial Conduct* (2011 version). Ultimately, many of the answers to ethical questions will be up to each judge after a careful consideration of the circumstances and the individual judge's state ethical statutes.

Membership in Human Trafficking Committees and Working Groups

Section 3.1(E) of the *Model Code of Judicial Conduct* states that a judge may engage in extrajudicial activities that concern the law, the legal system, or the administration of justice. Judges are encouraged to engage in appropriate extra-judicial activities and are uniquely qualified to engage in those that concern the law, the legal system, and the administration of justice. Participation in both law-related and other extra-judicial activities helps integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system.

Judges must be careful, however, about serving on boards of organizations or in an advisory capacity to organizations that have a trial advocacy function. For example, Texas Judicial Ethics Opinion 270 (2001) states that it is a violation of ethical standards for a judge to serve on the advisory council of a children's Assessment Center that serves as an advocate for witnesses and children involved in the justice system, including providing expert testimony in court. The purposes and services of the center included the following:

- Videotaping forensic interviews with child sexual abuse victims;
- Providing sexual assault examinations;
- Providing expert testimony in civil and criminal court;
- Providing advocacy for children as they make their way through the justice system; and
- Providing a forum for a dialogue regarding mutual concerns about the sensitivity of child sex abuse cases.

In addition, Texas Judicial Ethics Opinion 86 (1985) addresses the situation where a judge was asked to serve in an advisory capacity to a task force where it was likely he or she would later preside over cases involving the problem that the task force was created to solve. The Judicial Ethics Commission stated that the judges could not serve on such a task force if it would create a conflict with their ability to perform their judicial duties.

As another example of a problematic relationship, Texas Ethics Opinion 240 (1999) holds that a judge could not serve as a member of a Board of Directors of a non-profit corporation that trains volunteers and employs professional staff to be appointed by the judge to serve as guardians of incapacitated or minor persons. The ethical problem is that the qualifications and competence of a guardian must be determined and approved by the judge, and the judge could not pass on the qualifications and competence of an individual trained by a corporation if the judge is a member of the board of that corporation without creating an appearance of impropriety regarding the judge's capacity to act impartially. A casual observer could well conclude that the judge would consider anyone trained by "his/her" corporation to be qualified and competent regardless of evidence to the contrary. It is the appearance of impropriety that must be avoided. It would make no difference if the judge were a voting or non-voting member of the board.

On the other hand, Texas Judicial Ethics Opinion 26 (1977) states that a judge may sit on the Board of an organization formed to advance the rights of people with disabilities, including assisting individuals in pursuing their rights, as long as the Board's function is limited to setting broad policy and the Board does not participate in any of the operational functions of the organization.

With regard to membership on a Human Trafficking Committee, the above principles suggest that a judge may be a member of such a committee as long as its functions are for education and broad policy development for the improvement of the law, the legal system, or the administration of justice. The judge should not participate in activities providing advocacy services and must assure that participation in the group will not give rise to a perception that the judge cannot be fair and impartial. For example, if asked to be a member of a law enforcement Human Trafficking Task Force, the judge should decline. There is too much danger in the judge looking like an advocate for law enforcement efforts. Further, judges should avoid relationships that could create an impression of putting people in a special position to influence the judge.

One important issue for judges is when a judge who is a member or the chair of a human trafficking committee or working group has to disclose that relationship to the attorneys when presiding over a case involving human trafficking or a bail hearing for a defendant charged with human trafficking. As long as the judge's participation on the human trafficking committee is to advance the law, the legal system, and the administration of justice, disclosure should not be required. If the judge firmly sets the ground rules of the working group early on that there will be no discussing of any pending matters or any actual cases, the judge will not be in danger of violating Rule 2.9 regarding disclosure of *ex parte* communications.

Sponsoring a Human Trafficking Conference in the Courthouse

Section 3.1(E) of the *Model Code of Judicial Conduct* states that a judge engaged in extra-judicial activities that concern the law, the legal system, or the administration of justice may make use of court premises for those activities. Rule 3.7 governs what a judge can and cannot do when fund raising is involved. A judge may assist in the planning of the event (3.7(A)(1)) but cannot ask for funding directly (3.7(A)(2)). The best solution may be to set up a resource board and have the attorneys, rather than judges or court staff ask for the funds.

Fundraising or Supporting Activities for Non-Profit Organizations

Judges must be careful about engaging in fundraising or other support activities for non-profit organizations. For example the West Virginia Judicial Investigation Commission, in an opinion dated April 24, 1997, held that it is not proper for a judicial officer to attend as a guest annual luncheons, picnics or parties sponsored by victim assistance programs, sexual assault centers, family violence prevention programs, police agencies, and others because these organizations represent one interest in a particular area and appear in court on a regular basis.

On the other hand, Texas Ethics Opinion 245 (1999) states that a judge who serves as director of a private, non-profit corporation supported by public and private funds to provide necessities for children under the supervision of Child Protective Services (CPS) may allow his or her name to appear on the letterhead of the organization as a director on a fundraising letter, as long as the judge does no fundraising.

The Arizona Supreme Court Judicial Ethics Advisory Committee in Advisory Opinion 00-06, presents the general rule for analyzing ethical considerations in participating in fundraising events for organizations that advocate a particular viewpoint on legal issues.

Whether a judge may attend a particular organization's fund-raising event depends largely on evaluation of multiple factors. Thus, the more active the organization is in advocating positions on disputed legal issues, in regularly engaging in adversarial court proceedings, or in filing amicus briefs on disputed issues, etc., the more caution the judge should exercise in attending that organization's fund-raising events. ... The critical issue is whether, from an objective standpoint, the judge's attendance at the fund-raiser may give the appearance that the judge is lending the prestige of the office to support a position that would impair the judge's impartiality.

Service Providers in Collaborative Working Groups

Where a service provider is part of a judge's collaborative working group, the judge faces additional ethical concerns. In circumstances where a judge would be permitted to refer a victim to a specific service provider, the judge must consider whether it is appropriate to refer trafficking victims to that particular service provider without disclosing the judge's working relationship on a committee with the service provider. If that service provider is the only one who offers that service in the county, the judge is not choosing them due to favoritism or improper bias so disclosure should not be required.

Generally, we believe that under Rule 3.1 it would be permissible to refer victims to this service provider without the need for disclosure, as long as there is no discussion of pending cases in the group meetings and the referral is made based on the needs of the victim. The downside to disclosure would be that the judge would have to do this in every case.

On the other hand, under Rule 2.4, if the judge's relationship with a service provider might give an appearance that it will influence his or her judgment or conduct, it might be best for the judge to disclose that relationship. In addition, if the judge always makes a referral to that service provider and one side or party consistently disagrees that the program is the best one for their client, Rules 3.1(B) and C would seem to require disclosure of the relationship. Finally, if the relationship might require frequent recusals, the judge should not enter into the relationship. See Commonwealth of Virginia Judicial Ethics Advisory Committee Opinion 00-3, March 27, 2000.

What if the judge learns that the service provider has posted his or her picture on its website or listed the judge's name as a supporter? Under Rule 2.4C, the picture of a judge on a service provider's website might convey the impression that the organization is in a position to influence the judge. It might be best to ask them to remove the picture and the judge's name on the website. (Also see Rule 1.2, Promoting confidence in the Judiciary by avoiding the appearance of impropriety.)

The remedy for a perpetrator or victim might be to report the judge to the agency responsible for overseeing judicial conduct. If the judge refused to recuse himself or herself and the defendant challenges the decision, the judge would have to look at the disqualification statutes for that state and follow those procedures.

Referrals to Service Providers Linked With Fees or Fines

Judicial Discipline and Disability Commission v. Proctor 2010 WL 271343 (Arkansas Supreme Court January 25, 2010), involved a judge who started a Cycle Breakers Program as part of Court Probation and subsequently created a non-profit organization to run the program. He kept referring defendants to the program and was actively involved in running the business. He imposed “civil fees” on probationers and had those fees paid to Cycle Breakers. The Arkansas Supreme Court found these actions on the part of the judge to be a violation of judicial ethics.

Ex parte Communications in Committee Meetings

It is not appropriate for a judge to have discussions about a particular case with an attorney, or other party, during a meeting of a human trafficking committee. An example might be discussing how well an individual is doing in a human trafficking residential program that the judge referred her to. A variation of that might be if participants in a human trafficking committee begin to discuss a particular case to illustrate a point about why services are needed.

A judge should establish early on the ground rules that the committee will not be discussing particular cases in the meetings, whether they are pending or probably even if they are “closed.” That would be an *ex parte* communication. The ground rules should make it clear that where judges are serving on the committee, any “hypothetical” examples should be fully shielded/changed so as to not be recognizable as real cases before the judges on the committee. If the community organization will not abide by that rule, the judge must decline to be on the committee.

Rule 2.9(B) requires that if a judge inadvertently receives an unauthorized *ex parte* communication, the judge must promptly notify the parties of the substance of the communication and provide the parties with an opportunity to respond. Practically speaking, the judge should walk away, but if he or she overhears enough of the conversation, then disclosure could be the safest course of action.

Uses of Social Media

Judges must be careful about how they use social media, including whom they accept as Facebook friends and what they say about attorneys, parties, or cases in their Facebook posts. “Friending” local attorneys or parties to a case may give an appearance of favoritism toward those attorneys or parties. Further, any discussion of the facts of a case or a judge’s concerns about an attorney should be avoided. This admonition applies to court staff as well.



Ethical Issues for Court Administrators and Staff

Proper conduct by court employees, including court staff, inspires public confidence in the courts and promotes the values of fairness and trust in the court system. Because the courtroom clerk, court reporter, and bailiff are often the first individuals to be seen by the public and are whom the public deals with most frequently, it is important that court staff exhibit exemplary conduct and follow the highest standards of ethical behavior.

The ABA's *Model Code of Judicial Conduct* specifically addresses court staff behavior and strongly suggests that a judge must supervise his or her staff and ensure that they follow the same rules as the judge. See Rule 2.9(5)(B) and (D) concerning *ex parte* communications involving court staff. Rule 2.9(3) states that a judge may consult with court staff and court officials as long as the judge makes reasonable efforts to avoid receiving factual information outside the record and does not abrogate his or her responsibility to make the decision. Rule 2.10(C) provides that a judge shall require court staff, court officials and others subject to the judge's direction to refrain from making statements a judge would be prohibited from making, such as comments on pending or impending cases, etc.

Rule 2.12 (Supervisory Duties) provides that a judge shall require court staff and court officials to act in a manner consistent with the judges' obligations under the Code. Recognizing this, several states have adopted detailed Codes of Ethics for Court Employees and practitioners are encouraged to ascertain whether their state has one. For example, see "Code of Ethics for Court Employees of California, adopted May 17, 1994, revised 10/23/09." (The link is included in the final section of this chapter.) Because these codes specifically address the conduct of court staff, they should be incorporated in any training of court staff in addition to the Judicial Canons of Ethics.

The following are some areas of concern that come up frequently.

Improper Communication with Staff by the Judge

Often court staff will overhear or be privy to matters related to a proceeding before the judge but which are outside the presence of the judge. It can be very tempting to share these details with the judge. Some examples might be when the bailiff overhears attorneys discussing concerns about their clients' credibility. Or the courtroom clerk might learn from an attorney that he needs a continuance of the trial because his client, showed up at the courthouse under the influence of drugs. The court reporter might overhear people in the courtroom disclosing that the real reason why the police officer in the case is not available to testify is because of a pending disciplinary proceeding. A minor might be overheard telling her social worker that she does not want to be in her current placement because the foster parents are mean and make derogatory comments about her. Should these kinds of facts that involve the pending proceeding be disclosed to the judge?

Although Rule 2.9(A)(3) allows a judge to consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, unlike law clerks or staff attorneys, it would appear that courtroom staff do not aid in carrying out the "adjudicative" part of a judge's duties. Therefore communication from the staff to the judge of factual matters involving a pending proceeding is an *ex parte* communication and is improper absent some type of exception. Because this type of situation comes up frequently, a judge should establish some ground rules with court staff as to how to handle such communications. Some hypothetical examples of these issues follow.

Improper Communication between a Court Stakeholder and the Judge

In human trafficking cases involving a minor, social workers and/or probation officers are often assigned to manage the case. In Juvenile Court, due to the collaborative nature of the work where everyone is trying to work towards doing what is in the “best interest” of the youth, the lines between the parties and stakeholders and the court can easily become blurred. Without proper training, improper communication between court stakeholders and the judge might occur. An example might be when a social worker sends an e-mail to the judge directly to advise that she does not agree with the results of a psychological examination of the minor and recommends that the judge use another evaluator. A probation officer might stop by to talk with the judge for a few minutes in chambers and mentions that the Juvenile Hall staff is concerned that one of the frequent visitors to a sex trafficking victim is really her pimp. She would like the judge to order that the person be removed from the visitors’ list that afternoon to protect the minor.

These examples illustrate improper *ex parte* communications between court stakeholders and the judge. Court staff can be the gatekeepers preventing inappropriate access to the judge where these improper communications might take place.

The following hypotheticals present some other examples of improper communication by staff, court stakeholders, or parties.

Hypothetical 3: *Ex parte* Communication From an Interested Party

Hypothetical 3 involves a human trafficking victim who is a minor. The maternal grandmother of the victim writes to the judge directly asking the judge to reconsider the decision to have the minor moved from a group home where she has been a frequent runaway and placed with the father. The social worker recommends this change in placement, but the mother is objecting and a court hearing has been scheduled on this issue. In the grandmother’s letter, which was mailed and given to the judge in chambers to read, the grandmother reveals additional facts about the father including prior allegations of the father’s sexual abuse of the minor several years before. She implores the judge not to make such an unwise decision. This is new information that has not been raised by anyone previously. What should the judge do? See the Kentucky Supreme Court opinion, *In re Langford*, Findings of Fact, Conclusions of Law, and Final Order (Kentucky, June 17, 2013).

Hypothetical 3 implicates Rule 2.9(A)(3) because the judge has just been given information outside the record that might affect his or her decision in the case. The proper remedy at this point would be to disclose that the judge received the letter, share copies with all parties in the case, and give everyone a chance to respond. Rule 2.9(5)(B). The judge might also want to instruct court staff that any letters addressed to the court from parties or interested persons in a case should not be given to the judge until all other parties in the matter have had a chance to review the correspondence and make objections. In the meantime, the clerk might be directed to place the communication in the court file in a sealed envelope and to send a form letter to the sender, with a copy to all parties, informing them that the court is not permitted to receive *ex parte* communications and the letter has been placed in a sealed envelope in the court file for now [Rule 2.9(5)(D)]. A similar situation might arise if a party, interested person, or witness attempts to contact the judge directly through the court’s e-mail with information about the case. The judge should strongly discourage this kind

of communication and admonish the parties that all correspondence to the judge must go through the attorneys for the parties or it will simply be returned to the sender and left unread. Court staff should be instructed to intercept all such correspondence and advise counsel in the case that an *ex parte* communication was attempted.

Hypothetical 4: *Ex parte* Communications: Exceptions for Threats to Public Safety

In Hypothetical 4 you, the Judge, are presiding over a criminal case where the defendant is charged with human trafficking, false imprisonment, assault and battery, and other criminal violations. The matter is set for a preliminary hearing. Before the case is called, outside the presence of the Judge, the District Attorney approaches the bailiff and advises that the under age victim who will be testifying in the proceeding has expressed extreme fear of several of the defendant's family members. The victim has stated that these family members have given her hostile looks while waiting outside the courtroom. The District Attorney suggests that the victim would feel more comfortable if she didn't have to see these family members when she testifies. The bailiff talks to the defendant's family and asks them to leave the courtroom. The Public Defender, who has been interviewing witnesses, comes into the courtroom after the family members have left. When you take the bench, only the District Attorney, the Public Defender, and the defendant are in the courtroom. Your bailiff comes up to you and tells you in a side bar conversation what just happened. What do you do? Would it make a difference if the defendant's family members became openly hostile when the bailiff spoke to them and made threats to disrupt the courtroom proceedings? Would it make a difference if the bailiff did not tell you anything?

In Hypothetical 4 the communication between the bailiff and the judge could be characterized as an improper *ex parte* communication that should be disclosed to all parties in court. Furthermore, adult criminal court proceedings are open to the public. While some proceedings are closed by statute, such as in juvenile delinquency and dependency matters, there are very few exceptions allowing closing the courtroom. Court staff should be advised of these rules and avoid closing the courtroom to others without the judge's approval. There may be other ways to ensure the victim/witness's safety and address her fear of testifying, including conducting her testimony using closed circuit television, which would not require excluding members of the public from the courtroom.

Additionally, while *ex parte* communications between the judge and staff are not permitted, there generally is an exception for information relating to threats to the court or the safety and security of the courtroom. The judge should instruct court staff to immediately advise him or her of any matter that might involve a threat to the judge or the safety and security of the courtroom and protection of the public. A courtroom bailiff is required to respond to any threat appropriately, notwithstanding the judicial ethics rules. Depending upon the severity and immediacy of the threat, it would appear that this may be done without involving the judge.



Hypothetical 5: Improper Communications with Probation Officer

In Hypothetical 5, the judge is presiding over a case involving a 15-year old minor who has been charged with possession of stolen property, a vehicle, near a known prostitution track in town. She was in the car with an adult, a man who had previously been arrested for pimping and pandering underage girls. After a contested jurisdiction, you sustain the petition, and put the matter over for a disposition hearing. In reviewing her probation report, you note that she is a frequent runaway, has been in and out of home placement for several years, has six prior referrals to Child Protective Services due to alleged physical and sexual abuse by a family member (all unsubstantiated), has a serious substance abuse problem, and prior to being detained in this case had been AWOL from her group home placement for six months. The minor has refused to talk with anyone in the case. You think she might be a victim of sex trafficking. By chance, the Probation Officer who prepared the report is in your courtroom on another matter. You ask her to talk with you in chambers privately for a few minutes. There you ask her about her thoughts as to whether the minor is a victim of human trafficking. Is this proper?

With regard to Hypothetical 5, in cases involving human trafficking of a minor, often the Juvenile Probation Officer will have much more information about a minor than what has been disclosed in court. While Probation Officers could be seen as “court personnel,” a private meeting between a judge and a probation officer in the absence of all parties being present is improper and is considered an *ex parte* communication. The better way to handle this would be to make this type of inquiry of the probation officer in front of all of the parties at the disposition hearing and perhaps put the matter over if needed for the probation officer to address the judge’s concerns in another report.

Uses of Social Media

Just as judges need to be careful about how they use social media, they also have to police how their staff uses social media. The following hypothetical illustrates how court staff might compromise a judge’s ethics by posting something on social media.

Hypothetical 6: Staff Posting Pictures on Facebook of the Judge at a Fundraiser

In Hypothetical 6 the judge has been invited to attend the annual fundraising gala for a non-profit organization that provides services to victims of human trafficking. The judge has been careful to instruct the organization that her/his name and the prestige of her/his office cannot be used to promote the fundraiser. The judge has invited her/his staff to come with her/him to this event and she/he has purchased all the tickets for the party. The judge’s staff takes pictures of the event throughout the evening. Later, these pictures are shared with others on Facebook asking people to “like” the photos. In one of the pictures, it shows the judge with the Chief Financial Officer (CFO) of the organization under the organization’s banner, with a caption “thanks to all of our supporters!” The judge did not tell the court staff to post these photos and is surprised to learn about them when a judicial colleague calls the judge to express a concern. Is this a problem? Does the answer change if the photos were posted by someone who was not affiliated with the court?

In Hypothetical 6 even though the judge may not be mentioned by name in the photos and did not encourage the postings of these photos on a social network, the postings might still be in violation of Rule 1.3. Because it was a member of the judge’s court staff who posted the photos linking the

judge with the fundraising efforts and the judge invited them to attend the function with her/him, the judge bears supervisory responsibility for making sure that the court staff acts in a manner consistent with the judge's obligations under the Code. Rule 2.12. An argument could be made that the pictures suggest the judge is in favor of the fundraising efforts of this organization. Since the judge is prohibited from using the prestige of the judicial office to support an organization's fundraising efforts, this same prohibition applies to the court staff. The rule also covers more than court staff. It includes court officials or others who are subject to the judge's direction and control. It might be good policy to advise court staff to be mindful of engaging in any activity that could be interpreted as abusing the prestige of the judicial office especially when it comes to using social media. This rule would not apply to someone who was not affiliated with the court in any way.

III: Tools and Guidelines

This section includes selected judicial ethics opinions by the State of Washington Ethics Advisory Committee and guidelines for Immigration Court Judges, to provide examples of detailed analyses of some specific ethical problems. The Washington judicial ethics opinions were chosen because the Washington Code of Judicial Ethics is based on the ABA's *Model Code of Judicial Ethics* and the opinions provide a detailed analysis of each problem. The following opinions and guidelines are presented, selected for their detailed discussions.

- State of Washington Ethics Advisory Committee Opinion 02-05 discusses the permissible role of the judge in planning and participating in victim impact panels, and the analysis has relevance for judge involvement in any type of victim assistance program.
- State of Washington Ethics Advisory Committee Opinion 93-03 discusses the permissible role of the judge in soliciting financial support for a court-related alternative youth placement program.
- State of Washington Ethics Advisory Committee Opinion 96-02 discusses issues regarding the possible participation of judges on a domestic violence task force aimed at proposing policies for the handling of domestic violence cases in court. It sets out limits on a judge's participation depending on the scope of activities to be undertaken by the task force.
- State of Washington Ethics Advisory Committee Opinion 97-10 discusses limits on a judge's participation in a domestic violence symposium where one of the participants is an organization that advocates for domestic violence victims.

State of Washington Ethics Advisory Committee Opinion 02-05

Issue and Question

The committee has received several inquiries about courts participating in victim impact panels and education programs and has been asked to provide guidance on which panels/programs judges and/or court personnel may participate. Because there are various factors which affect whether or not it is appropriate for judicial officers or court staff to either take part in or plan these programs, the committee has determined it would be helpful to set out factors which courts should consider when evaluating whether to participate in these types of programs. This opinion summarizes the

relevant provisions of the Code of Judicial Conduct (CJC), issues and factors which should be weighed in determining whether a judicial officer or court staff should take part in or plan victim impact panels and education programs.

Answer

Relevant Canons:

CJC Canon 2(A) provides in part that judicial officers should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

CJC Canon 2(B) provides in part that judges should neither lend the prestige of their office to advance the private interests of others nor convey or permit others to convey that they are in a special position to influence them.

CJC Canon 3 provides in part that judicial duties of a judge take precedence over all other activities.

CJC Canon 3(A)(4) provides in part that judges should accord to every person who is legally interested in a proceeding, or that person's 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.

CJC Canon 3(B)(2) provides in part that judicial officers should require their staff and court officials subject to their direction and control to observe the standards of fidelity and diligence that apply to them.

CJC Canon 4(A) provides that judicial officers may participate in activities concerning the law, the legal system and the administration of justice if in doing so they do not cast doubt on their capacity to decide impartially any issue that may come before them.

Major Issues

The major issues judges must consider in deciding whether and to what extent a judicial officer or court staff should either take part in or plan victim impact panels and education programs are:

- The sponsorship and content of the program;
- Who participates in planning the program's content; and
- The nature of the judge's or court staff's participation in planning or participating in the impact panel and/or education program.



Relevant Factors

The following checklist may be helpful in assessing whether it would be appropriate for a judicial officer or court staff to participate in planning or participating in an impact panel and/or education program:

- What is the structure of the planning group and are all interested groups represented so that participation by the judicial officer or staff would not give the appearance of partiality or impropriety?
- Does the panel advocate for particular persons who may appear in court?
- What is the purpose of the program; e.g., educational or treatment?
- Does the group sponsoring the panel or program engage in any lobbying, legislative or other advocacy activities?
- Does the sponsoring group engage in adversarial proceedings in court or file *amicus* briefs?
- To whom will the program be presented?
- Would participation by the judicial officer or court staff give the impression that the sponsors or others are in a special position to influence the judicial officer?
- Would participation interfere with the performance of judicial duties?
- Would participation cast doubt on the capacity to decide impartially any issue that may come before the court?
- Could contact with either the sponsoring group or other panel or program participants either constitute *ex parte* communication or give the impression that the judicial officer is engaging in *ex parte* communication?

Conclusion

Generally, judges may participate in activities concerning the law, the legal system and the administration of justice if in doing so they do not cast doubt upon their capacity to decide impartially any issue that may come before them. Even though judges and court personnel are permitted to participate in victim impact panels and educational programs, that does not mean that they may participate in programs, even if the purpose is educational, if there are circumstances which would cause the impartiality of the judge to be questioned. Participation in programs which are sponsored by an advocacy group or a program which promotes a partisan or biased point of view would not be appropriate. Also, a victim impact panel or education program which would put the judge or court personnel in *ex parte* contact with individuals who routinely appear in court would call the court's neutrality into question and would be inappropriate. A judicial officer cannot appear to favor victims over the accused and they cannot appear to give preference to a particular type of case over other matters that come before them. If participation in a program were to give that impression, it would not be appropriate for the judicial officer or staff to participate.

An educational program is different from a victim impact panel because members of the impact panel have appeared before the judicial officer and have been ordered to attend the panel for treatment purposes. A judicial officer may participate in an educational program which is open, for

example, to students and/or other members of the community at large because that program is being offered for educational purposes to persons who have not appeared before the judicial officer. In general, educational programs for the general public raise fewer ethical concerns than programs directed towards persons who have appeared before the court and are required to attend.

State of Washington Ethics Advisory Committee Opinion 93-03

Questions

- A. May a judicial officer, through a program director and advisory board members, solicit financial support from local governments and corporations for the “Young Adult Court Mentor Program”?
- B. Is it acceptable to use court stationery for written requests for financial support?
- C. May the program director open a bank account in the name of the court to be used for the payment of program expenses?
- D. May a judicial officer serve on the advisory board which oversees and advises the program director provided that the judge does not engage in fundraising activities?
- E. May a judicial officer send letters of support to potential funders of this program? The letters would state that this is a court sponsored program and that community support (without specifying financial support) is crucial for its success.
- F. Alternatively, may the program be established by a non-profit corporation with the court establishing the policies and procedures and the corporation’s board of directors responsible for fundraising?

Answer

The following representations were made to the Committee: 1) the court is considering establishing a “Young Adult Court Mentor Program” for young adults between the ages of 17 and 25 who lack basic “life skills” and who would be ordered into the program as part of their sentence following conviction of a crime; 2) these defendants would be paired with a “mentor” who would be trained by a part-time program director; 3) the director would be responsible to and supervised by the judges of the court; 4) an advisory board comprised of community leaders would also exist to assist and advise the director; 5) funds are necessary to hire a part-time director and pay for supplies; and 6) local governments and corporations would be contacted for financial support by the director and advisory board members. CJC Canon 4 permits judicial officers to engage in activities involved in the law, the legal system and the administration of justice, if in doing so they do not cast doubt on their capacity to decide any issue that would come before them. Canon 4(A) provides in part that they may speak and participate in other activities concerning the law, the legal system and the administration of justice. Canon 4(B) provides that they may appear at a public hearing before a governmental body or official on matters concerning the law, the legal system and the administration of justice, and they may otherwise consult with them, but only on matters concerning the administration of justice. Canon 4(C) provides that judicial officers may serve as members, officers, or directors of an organization or governmental agency devoted to the improvement of the law,

the legal system or the administration of justice. Canon 4(C) also provides that judicial officers may assist the organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. Finally, judicial officers may make recommendations to public and private fund granting agencies on programs concerning the law, the legal system and the administration of justice.

1. A court may not, through a program director who is a court employee, solicit financial support from corporations for the "Young Adult Court Mentor Program." Because the program director is an employee supervised by the judges that could create the appearance that the judicial officer is permitting the program director, as a surrogate, to do something on the judicial officers' behalf that the judicial officer is prohibited from doing, that is, personally soliciting funds. The members of the advisory board are permitted to personally solicit funds if it is done independently of the court and its employees.
2. CJC Canon 4(C) prohibits judicial officers from personally soliciting funds for any purpose including activities which advance or promote the law, the legal system and the administration of justice, therefore, court stationery should not be used for written requests for financial support from non-government sources.
3. The Code of Judicial Conduct precludes the program director from opening a bank account to be used for the payment of program expenses in the court's name.
4. A judicial officer is permitted by Canon 4 to send letters of support to potential funders of the program which would not ask for financial support but which would state this is a court sponsored program and that community support is critical to its success.
5. 4. and 6. CJC Canon 4(C) permits a judicial officer to serve on the advisory board which oversees and advises the program director provided the judicial officer does not personally engage in fundraising activities for private monies. A judicial officer may, however, personally solicit financial support from local governments. Alternatively, the program may be established by a non-profit corporation with the court participating in establishing the policies and procedures and the corporation's board of directors responsible for fundraising for private monies.

State of Washington Ethics Advisory Committee Opinion 96-02

Question

- A. May a judicial officer join and participate in a domestic violence task force?

The mission statement for this particular task force provides that the mission of the various community service systems in regard to family violence should be to aid any person affected by such violence with the primary focus being the safety of the victim; and to foster a belief, at all levels of the community, that domestic violence shall not be tolerated in the county.

The judicial officer is a full time judge in a district court who hears all aspects of Assault IV Domestic Violence cases. These cases make up a large part of the court's duties and that of the probation staff which the judicial officer oversees.

Some of the task force goals for the courts are: prosecution and courts need to develop standards for sentencing; courts should not sentence any defendant in domestic violence cases until the

defendant's background and prior convictions have been researched; domestic violence assaults should result in supervised probation; priorities should be given to domestic violence assault cases so the victim will not be required to wait long periods of time before a trial; and sentence revocation hearings should be held promptly.

Answer

CJC Canon 4 permits judges to participate in quasi-judicial activities that do not cast doubt on their capacity to decide impartially any issue that may come before them. Because the goals established by the task force adopt a specific agenda which recommends judicial policy and it appears to act as an advocacy group it would not be appropriate for the judicial officer to join and participate in the domestic violence task force as the judicial officer presides over domestic violence cases. This particular task force appears to act as an advocacy group which distinguishes its functions from other groups that do not act in an advocacy role such as the Domestic Relations Commission. This task force advocates for victims of domestic violence and as such is more like Mothers Against Drunk Drivers (MADD) than it is to other groups which do not engage in the role of advocate.

The judicial officer would not be precluded from meeting with this particular task force even though the judicial officer may not join and participate on the task force.

Amended Opinion 96-2 held that a judicial officer may not join and participate on a domestic violence task force because in that case the task force's goals established a specific agenda which recommends judicial policy and also acts as an advocacy group.

State of Washington Ethics Advisory Committee Opinion 97-10

Questions

- A. May a judicial officer plan and participate in a domestic violence symposium?
- B. If the judge cannot serve as a member of the planning team, would it be appropriate for the judge to serve in an advisory capacity?
- C. May the judicial officer address the symposium if the judicial officer's remarks are carefully crafted to avoid the appearance of impropriety?
- D. May the judge be a discussion leader at the symposium and in doing so give a judicial perspective on the way domestic violence cases impact the courts?

A judicial officer has been asked to organize a domestic violence symposium which is sponsored by two civic organizations one of which is a provider of services for victims of domestic violence. That organization operates a battered women's shelter, provides perpetrator treatment and offers domestic violence advocate services for victims.

The purpose for the symposium is to educate the community and increase awareness of domestic violence, to coordinate community efforts to fight domestic violence, to develop a consensus toward an action plan and to develop a multi-disciplinary community response.

The symposium will feature speakers discussing various aspects of domestic violence. Participants from one discipline would be exposed to ways domestic violence affects and is dealt with by members of other professions. Small group workshops will follow in an effort to develop a consensus toward an action plan for the community response to domestic violence.

The judicial officer has been asked to lead one of the small group workshops. The judge would not advocate a particular approach or philosophy, but would give a perspective on how the courts handle domestic violence cases and facilitate group discussion that may lead to a community consensus on different approaches and strategies for preventing domestic violence, treating perpetrators, investigating and prosecuting offenders and administering justice in courts.

Answer

CJC Canon 2(A) provides that judges should conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Canon 4(A) provides in part that judges may participate in activities to improve the law, the legal system and the administration of justice, if in so doing they do not cast doubt upon their impartiality to decide any issue that may come before them. CJC Canon 5(B) provides that judges may participate in civic and charitable activities that do not reflect adversely upon their impartiality or interfere with the performance of their judicial duties.

One of the sponsors of the symposium is a provider of services for domestic violence victims and offers domestic violence advocate services for victims. Because that organization acts as an advocate for domestic violence victims the judicial officer should not act as a member of the planning team for the symposium or serve in an advisory capacity as that could erode the judicial officer's appearance of impartiality and cast doubt over the judicial officer's ability to preside over domestic violence proceedings.

The purpose of the symposium is educational. Therefore, the judicial officer may address the symposium and/or act as a moderator and give a judicial perspective on the way domestic violence cases impact the courts. Even though the judicial officer may participate in the symposium, as either a speaker or moderator, the judicial officer should not speculate on what the law should be or how it could be improved in particular cases and the judge should not act as an advocate or give the impression as to how the judicial officer might rule in a particular case.

State of Washington Ethics Advisory Committee Opinion 95-19

Question

May a judicial officer serve on the board which will facilitate the risk and resource assessment, implement a plan for communicating the assessment to the community at large and develop long-term prevention strategies for the city's youth?

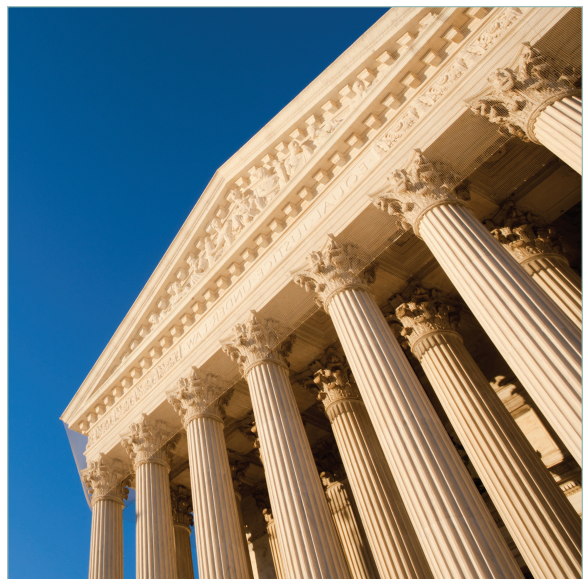
Community leaders have formed a prevention board made up of a diverse group of experts with a common commitment to youth. The Communities That Care model has been adopted by city leaders as the method of creating a comprehensive plan for addressing youth problems.

The process focuses on and addresses youth violence and other problem behaviors by reducing risks present in the community while exploring prevention strategies that have shown positive results. The process engages the members of the community from many sectors, cultures, ages, organizations and disciplines in the comprehensive, collaborative design of strategies and outcome measures.

Answer

For the purposes of this answer, it is assumed that this is a community based board and not an appointment to a governmental committee which is governed by CJC Canon 5(G). CJC Canon 5(B) provides that judicial officers may participate in civic activities that do not reflect adversely upon their impartiality or interfere with the performance of their judicial duties. Canon 5(B) further provides that judicial officers may not participate in these activities if it is likely that the organization would become involved in court proceedings and also prohibits the judicial officer from lending the prestige of the office for fund raising purposes.

Canon 5(B) permits a judicial officer to serve on the board which will facilitate the risk and resource assessment, implement a plan for communication the assessment to the community at large and develop long-term prevention strategies for the city's youth if the board is unlikely to become involved in court proceedings and court policies. However, should the board consider matters or issues which would ordinarily come before the judicial officer's court, the judicial officer must resign as a board member. Otherwise, the judicial officer would be required to constantly recuse when these matters come before the court. The judicial officer should periodically reexamine the activities of the board to determine that it is still proper to serve.



IV: Links to Additional Tools and Resources

The following are links to selected resources.

State Judicial Ethics Opinions

http://www.courts.wa.gov/programs/orgs/pos_ethics/?fa=pos_ethics.alpha

<http://www.courts.state.tx.us/judethics/ethicsop.asp>

<http://www.azcourts.gov/azcjc/judicialethicsadvisoryopinions.aspx>

<http://www.kscourts.org/appellate-clerk/general/judicial-ethics.asp>

<http://www.courts.state.va.us/agencies/jirc/opinions.html>

American Bar Association Model Code of Judicial Conduct, 2011 edition

http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/mcjc_canon_1.html

http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2.html

http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_3.html

http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_4.html

Code of Ethics for Court Employees of California

<http://www.courts.ca.gov/documents/codethic-courtemp.pdf>

Federal Judicial Center Analysis of Rules of Judicial Disqualification

[http://www.fjc.gov/public/pdf.nsf/lookup/judicialdq.pdf/\\$file/judicialdq.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/judicialdq.pdf/$file/judicialdq.pdf)