

Ethical Issues for Judges and Court Staff in Criminal Case Processing

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National Association of Women Judges
2016 Annual Meeting
Seattle, Washington
October 2016

Overview of Ethical Concerns

When might a reasonable person question the ability of the judge to decide a case fairly due to the judge's actions, statements, or associations?

Problem areas may include:

- **Statements or actions by the judge, either in court or in other circumstances, that reveal opinions about a party to a case or indicate that the judge has prejudged the case;**
- **Ex parte communications providing the judge with information not available to one or both parties; and**
- **Actions taken by the judge to assist a party that make the judge appear as an advocate for one side in a case.**

Evidence of Bias That May Disqualify a Judge

When might a judge be disqualified for bias?

- **Whether a judge should be disqualified due to perceived or actual bias will often be a question of fact based on whether a reasonable person would question the ability of the judge to decide the case fairly.**

Actions That Give Rise to Ethical Concerns

Judges need to avoid taking actions that could give rise to a reasonable perception that the judge:

- **Is acting as an advocate for a human trafficking victim;**
- **Is undermining the prosecutor or defense attorney;**
- **Has engaged in an independent investigation of the facts in a case;**
- **Appears or is biased for or against a party;**
- **Has pre-determined a particular result in the case prior to trial; or**
- **Is interfering with the attorney/client relationship.**



Ethical Issues in Protecting a Human Trafficking Victim in a Criminal Trial

The following actions by a judge might raise ethical questions:

- **Taking steps to promote safety for a suspected trafficking victim;**
- **Asking questions of a party, victim, witness, prosecutor, or defense attorney in open court;**
- **Meeting privately in chambers with a party, victim, witness, prosecutor, or defense attorney;**
- **Asking questions in court aimed at revealing signs that the person may be 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; and**
- **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.**



Scenario 1

You are presiding at the felony preliminary hearing of a defendant charged with running a house of prostitution. She is in custody and bail is set at \$20,000. The courtroom is crowded. When she is brought out she sees a man in the audience and immediately gasps, looks down, and starts crying quietly. He has shiny medallion around his neck and he is dressed in unusual garb. You think the defendant looks afraid. You note from her birthdate that she has just turned 18 but she looks much younger. Your human trafficking training leads to these thoughts....

- **Could he be her pimp?**
- **Could she be a minor?**
- **Is she a victim of human trafficking?**

Scenario 1 continued

- **The DA makes a motion for continuance, letting you know that two essential witnesses they've subpoenaed have not arrived in court. Over the PD's objection, you grant the motion.**
- **The PD then makes a motion for the O.R. release of his client, saying she has no criminal record and her relative "Joe" is here to make sure she returns to court. Joe steps forward and nods in agreement. He's agreed to be her "third party custodian" and assures you that he knows exactly how to get the her back to court.**

Don't worry YOUR HONOR, I'll make sure she's taken good care of. You can trust me!



Scenario 1

- You deny the PD's request to be released.
- Suddenly, the PD announces the defendant will plead guilty. Both the DA and the PD are asking you to give the defendant probation with credit for time served.
- You ask the DA why such a lenient sentence, and the DA replies, "We've got proof problems." The other victims who were cooperating against the defendant have suddenly "disappeared".
- "Joe" nods his approval when he hears this and gives a knowing look to the defendant. She begins to cry again.
- You're worried for the safety of the defendant thinking that she might be a victim of human trafficking. You're worried that Joe will be taking the defendant home with him after court today. You review the probable cause statement in the file and it indicates that when the defendant was arrested she had fresh bruises all over her body.

What Can a Judge Do?

- You call for a break. Can you ask your Bailiff to get proper identification from Joe and then run his record to see if he's been convicted of any sex crimes?
- Can you ask your bailiff to see if he can get a hold of some of the defendant's jail house calls to determine if she's been calling Joe and if he's asking her not to cooperate or threatening her?
- Can you order that a victim advocate for human trafficking (a new program in your court) be appointed to represent the victim before taking the plea?
- Can you order the defendant to undergo a human trafficking assessment conducted by one of the Court's Probation Officers before accepting the plea agreement?



What Can a Judge Do? (Cont.)

- **Can you tell your bailiff to remove Joe from the courtroom?**
- **Once he's left, can you ask the defendant if she is really 18 because you think she looks like she's a minor?**
- **Against your better judgment, but with the safety of the defendant – potentially a human trafficking victim – in mind, you do all of these things. You disclose everything you've done to the parties.**
- **Both the DA and the PD immediately seek to have you removed from the case because of bias. The PD also alleges that you've interfered with the attorney/client relationship. Any merit?**



ABA Model Code of Judicial Conduct

RULE 2.9 (EX-PARTE COMMUNICATIONS):

- **Rule 2.9(A):** A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or lawyers concerning a pending matter.
- **Rule 2.9(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.

ABA Model Code of Judicial Conduct

CANNONS 1 and 2: IMPARTIALITY OF THE JUDICIARY

- **Cannon 1: A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.**
- **Rule 1.2: Promoting Confidence in the Judiciary**
- **A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.**
- **Cannon 2: A judge shall perform the duties of judicial office impartially, competently, and diligently.**
- **Rule 2.2: Comment: To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.**



ABA Model Code of Judicial Conduct

APPEARANCE OF BIAS AND/OR PREJUDICE

- **Rule 2.3 (B): A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment.**

Scenario #2: Comments By Judge

- In a Facebook post, a Judge writes: “Some things I guess will never change. I just love doing the stress of jury trials. In a Felony trial now State prosecuting a pimp. Cases are always difficult because the women (as in this case also) will not cooperate. We will see what the 12 citizens in the jury box do.
- Judge was publicly reprimanded for the post (and other conduct).
- The Minnesota Board on Judicial Standards found that the post could reasonably be interpreted as showing the Judge had concluded the defendant was guilty before he heard any evidence.
- His conduct burdened the administration of Justice because it resulted in vacating the verdict rendered after a 3 day trial.



Disqualification and Comments By Judge

- **An objective standard must be applied in determining whether a judge should be disqualified.**
- **The question is not whether the judge believes he or she is capable of impartially presiding over the case, but whether the judge's impartiality might be questioned from the perspective of an objective, disinterested observer who knows and understands the surrounding facts and circumstances.**

Alternative Practices

- You may direct questions to the appropriate advocate in the courtroom and inquire as to whether steps can be taken or have been taken to address your concerns.
- Understand that the area of human trafficking is an emerging area of the law where not every court stakeholder has been fully trained.
- You may advocate for and contribute to continued education in the area of human trafficking to court stakeholders and the community.
- When in doubt, consult with an ethics advisor for bench officers

Ethical Issues for Judges and Court Staff in Juvenile Cases

Hon. Barbara Mack
National Association of Women Judges
2016 Annual Meeting
Seattle, Washington
October 2016

Ethical Issues in Juvenile Cases

The following ethical issues may arise in juvenile cases.

- In juvenile cases judges may be more likely to be exposed to information outside of a court proceeding. How can judges avoid this?
- If exposed to outside information, judges should not base decisions on anything not in the record or available to all parties and attorneys.
- Court staff sometimes receive information outside of the presence of the judge. What is staff's responsibility to protect the judge from ex parte contact?
- How does a judge balance ethical issues where a child may be a victim of trafficking, with safety of the child and sensitivity to issues related to trauma?



Ethical Issues in Juvenile Cases: Assisting Possible Trafficking Victims

How can a judge ethically assist or protect children who are victims or at risk of being victims of trafficking?

- **What if you know an older male is posting bail for or seeking guardianship over a younger female?**
- **May a judge discuss issues with a judge in another jurisdiction where there are proceedings in each jurisdiction?**
- **May a judge have a private discussion with a probation officer where the judge suspects that trafficking is involved?**
- **May a judge request particular assessments or referrals if s/he suspects a child is being sexually exploited?**
- **What language can a judge use that is ethical, conscious of victim safety, and trauma-responsive?**

Scenario 1

You are presiding over a juvenile case with a 15 year old girl charged with identity theft. She is on probation on another minor matter. You know from prior probation reports that she runs from home, that CPS has investigated her family for abuse, and that she has been associating with a man in his 50s.

- **The probation counselor is in court and asks to talk to you privately. What do you do?**
- **The probation counselor who prepared the report is in your courtroom on another matter. Can you ask him or her to talk with you in chambers, and ask whether s/he believes the youth is a victim of commercial sexual exploitation?**
- **Can you take the attorney aside in the hall and ask whether s/he has any additional concerns or information to share, or ask him to ask the child?**

Scenario 1, more questions

- **The child's attorney asks to speak to you in chambers, with the child. What do you do?**
- **The child comes into chambers with her attorney and the prosecutor and discloses that she has been gang-raped. What do you do?**
- **The child discloses the name of the perpetrators of the rape. What do you do?**
- **How can you ethically ask questions or communicate your thoughts in court without violating the child's safety and without shaming him/her?**



Scenario 1, more questions

- **If your court has a team that consists of a probation counselor, defense counsel, prosecutor, and service provider, can you meet in chambers before court to make a decision about what will happen when the youth appears before you?**



Consultation with Probation Officer

- In juvenile cases the Juvenile Probation Counselor usually has much more information about a minor than has been disclosed in court.
- A private meeting between a judge and a probation officer (or case manager or social worker, or attorney) without all parties being present is an *ex parte* communication, and therefore improper.
- Would it be better to inquire 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.
- If so, how can a judge do this without endangering or shaming the child?



Scenario 2

You are the judge in a juvenile delinquency case where a minor is charged with misdemeanor theft. The event occurred in your county but the minor's guardians reside in another county, so the case will be transferred out of your court for probation once you resolve the offender case. You suspect that the child is a victim of child sex trafficking.

Scenario 2 Questions

- **What are the ethical issues in communicating with the judge who is going to determine her disposition and suggesting that specialized probation services are more appropriate for this trafficking victim than custody time?**
- **Is there any information that may be inappropriate for you to share?**
- **Are there ways for the judge to get the information without communication between judges?**

Consultation with Receiving Judge

- **In some courts, judges commonly talk to other judges about cases whether in the same jurisdiction or another, either by writing notes to the file or by telephone. Such communication may be inappropriate if the first judge received information 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.**
- **ABA Model Code of Judicial Ethics 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. The 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 the judge receiving the information from another judge might be in violation of this rule, he or she must disclose.**



Scenario 3

You are the judge in a case involving a placement decision for a victim of child sex trafficking. His maternal grandmother writes asking you to reconsider your decision to have the minor moved from a group home where he has been a frequent runaway and placed with the boy's uncle. The social worker recommends this change in placement, but the grandmother objects. A court hearing has been scheduled. The grandmother's letter, which was mailed and given to the judge to read in chambers, reveals additional facts about the uncle, including prior allegations that he sexually abused the minor and sold him to his adult friends for sex several years before.

Scenario 3 Questions

- **This is new information that has not been raised by anyone previously. What should you do?**

Receipt of Outside Information

- **The judge should 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 Scenario 3 the judge has just been given information outside the record that might affect his or her decision in the case. The judge must disclose that he or she received the letter, provide copies to all parties, and give them a chance to respond.**

Scenario 4

You are presiding over a dependency case where the parents are at risk of losing parental rights due to substance abuse. The child previously appeared before you on juvenile offender matters. You know from the juvenile offender case that the child was trafficked by a member of her immediate family, but that information is not in the dependency file.

- **What do you do?**

Ethical Issues for Judges and Court Staff: Participation in a Community Human Trafficking Task Force

Steven Weller

National Association of Women Judges

2016 Annual Meeting

Seattle, Washington

October 2016

Roles of the Judge

- **As justice system and community leaders, judges are increasingly being asked to work with other organizations in their communities to help develop community responses to human trafficking, including developing resources for victims.**
- **Judges encounter unique ethical issues in balancing the expectation that they will participate in these community efforts with the need avoid the appearance of bias.**
- **If a judge assigns a court staff member to represent the court on a task force, the *ABA's Model Code of Judicial Conduct* requires the judge to supervise his or her staff to ensure that they avoid any statements or actions that might cast doubt on the court's impartiality.**



Ethical Duties of Court Staff

- **With regard to the ethical duties of a court staff member representing the court on a task force, the staff member must avoid any statements or actions that might cast doubt on the court's impartiality.**
- **As court staff members are not trial decision-makers, some ethical limitations placed on judges to avoid compromising a judge's ability to make fair decisions in individual cases may not place the same limitations on court staff. Note that some states have specific codes of ethics for court staff.**
- **A judge should be able to discuss what is being considered by the task force with the court's representative on the task force as long as the judge makes reasonable efforts to avoid receiving factual information regarding any pending case outside the record and does not abrogate his or her decision-making responsibility.**

Scenario

You are a full time district court judge who has been invited to join and participate in a local human trafficking task force with the following mission: (1) to foster understanding of the effects of trauma on human trafficking victims, (2) to develop trauma-informed community service systems to assist human trafficking victims, and (3) to aid human trafficking victims, with a focus on their safety. Specific issues that the task force will consider are:

- **Developing standards for sentencing offenders who are HT victims and setting conditions of probation;**
- **finding alternatives to convicting HT victims who are compelled to commit crimes under the influence of a trafficker;**
- **Developing screening tools to identify HT victims;**
- **Developing methods to protect HT victims who testify in court;**



Scenario, Cont.

- **One of the first projects of the task force is to plan and present a symposium to (1) educate the community and increase awareness of human trafficking, (2) coordinate community efforts to fight human trafficking, (3) develop a consensus toward an action plan, and (4) develop multi-disciplinary community responses. One of the members of the symposium planning team is a director of an organization that provides treatment and advocacy services for human trafficking victims. The task force would like you to participate in the planning process and make the keynote address.**

Questions

Address the following questions:

- **What are the issues for you in deciding whether to join the task force, assist in planning the symposium, and serve as the keynote speaker?**
- **If you asked your Court Administrator to participate in the Task Force in your place, what ethical issues might arise for you and for your Court Administrator?**

Basic Principles

- **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 cast doubt on the judge's capacity to decide impartially any issue that may come before him or her or 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.**

Positive Factors in Deciding Whether to Participate in a Task Force or Commission

- **The task force takes policy positions clearly central to the legal system or matters directly related to or affecting the judicial branch.**
- **The task force specifically serves the interests of the legal system and those who use it.**
- **The task force deals with matters a judge, by virtue of judicial experience, is uniquely qualified to address.**
- **The task force has a diverse membership representing more than one point of view.**
- **The task force is recommending legislation that benefits the law and legal system.**

See Vermont Judicial Ethics Committee Opinion 2728-12

Negative Factors in Deciding Whether to Participate in a Task Force or Commission

- The task force is utilizing the law or legal system as a means to achieving a social, political, or civil objective.
- The task force provides services, guidance, or support for a particular group (e.g. victims, law enforcement).
- The task force recommends legislation on social issues, such as making currently legal acts illegal or increasing penalties for existing criminal acts.
- The task force is comprised mostly of one interest or type of actor (e.g. prosecutors, law enforcement, victim advocates).
- The task force is recommending legislation that benefits a particular group or cause.
- The task force is comprised in part of members who will appear regularly before the judge either as advocates or witnesses.



Washington Ethics Advisory Committee Opinion 96-02

- **Under State of Washington Ethics Advisory Committee Opinion 96-02, a judicial officer may not join and participate on a task force if the task force’s goals include a specific agenda that recommends judicial policy and also acts as an advocacy group.**
- **Because this task force would be recommending judicial policy, and the group also appears to have a function of advocating for victims, it may not be appropriate for the judicial officer to join and participate in the task force.**

Washington Ethics Advisory Opinion 97-10

- **With regard to serving on the symposium planning committee, where one of the sponsors or planners of the symposium is a provider of services for human trafficking victims or offers advocacy services for 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.**
- **With regard service as keynote speaker for the symposium, if the purpose of the symposium is educational, the judicial officer may address the symposium and give a judicial perspective on the way human trafficking cases impact the courts. However, the judicial officer should not speculate on what the law should be or how it could be improved, 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.**



Summary: Characteristics of a Task Force That Could Be a Red Flag For a Judge

- **There are members of the task force that might appear before the judge in a court case;**
- **There are service providers on the task force that might receive victim referrals from a judge or a probation officer in a court case;**
- **The task force has as a mission or stated goals that are aimed at benefitting a particular group;**
- **The task force plans to undertake activities or projects that are aimed at benefitting a particular group.**
- **The task force may bring the judge into associations with members of other branches of government in a way that might cause an appearance of partiality.**

Ethical Issues involving Task Force Activities: Involvement in Fundraising

- **Fundraising**: Judges must be careful about engaging in fundraising or other support activities for non-profit organizations. The critical issue is whether, from an objective standpoint, the judge's attendance at a fund-raising event or engaging in other fundraising activities 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.
- 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. (Arizona Judicial Ethics Advisory Opinion 00-06.)

Ethical Issues Involving Task Force Activities: Ex-Parte Communications

- **Ex parte Communications**: It is not appropriate for a judge to have discussions about a particular case in front of the judge during a meeting of a human trafficking committee. Examples might include discussing how well an individual is doing in a human trafficking residential program that the judge referred her to, or discussing a particular case to illustrate a point about why services are needed. Ideally the judge should walk away, but if he or she overhears enough of the conversation, then disclosure may be the safest course of action.
- ABA Judicial Ethics Model Code 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.