

**National Association of Women Judges
Ethical Issues for Judges in Dealing With Human Trafficking**

Scenario 1

You 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?

Faculty Notes

In Scenario 1 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.

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Scenario 2

You are assigned to preside over a criminal case in which a female defendant is being prosecuted for running a house of prostitution. One of the defenses she is raising is that she was forced into running the house by a trafficker and should be treated as a victim of human trafficking rather than a criminal. The defendant has previous convictions for prostitution, and in the latest of those trials you were the trial judge. In that trial you had refused to accept her defense that she was a trafficking victim and lectured her on her failure to learn from her prior convictions. The defendant is now demanding that you recuse yourself or be disqualified from the present case for bias due to your statements in the previous case. Do you need to recuse yourself?

Faculty Notes

Courts have held that a judge's remarks showing frustration with the same defendant in a prior criminal case did not require disqualification. Opinions expressed by a judge in reaction to what a judge has observed during the conduct of a trial, whether in the present case or in a prior case, generally do not require disqualification, unless the judge evidences such a deep seated favoritism or antagonism as to make fair judgment impossible.

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 a reasonable person, where a reasonable person is characterized as an objective, disinterested observer who knows and understands the surrounding facts and circumstances.

See Liteky v. United States, 510 U.S. 540, 550-551 (1994).

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Scenario 3

You are assigned to preside over a criminal case in which a female defendant is being prosecuted for running a house of prostitution. One of the defenses she is raising is that she was forced into running the house by a trafficker and should be treated as a victim of human trafficking rather than a criminal. You presided over a previous trial of the same defendant for prostitution and had found her not guilty, agreeing with her defense that she was a trafficking victim. In that trial you had suggested that the prosecutor, who is the same prosecutor in the present case, should have recognized the signs of trafficking and never charged her with prostitution. At the outset of this case, the prosecutor demands that you be disqualified from the present case for bias due to your statements in the previous case. Do you need to recuse yourself?

Faculty Notes

Courts have held that comments by a judge that a prosecutor should or should not have charged a defendant with a particular count of criminal behavior, where based on evidence observed during the conduct of a trial, does not require disqualification unless overall the judge evidences such a high degree of favoritism or antagonism as to make fair judgment impossible.

In this case it would be a factual matter whether the judge's comments and behavior in the prior case show a predisposition or mindset regarding the defendant and the prosecutor that might make a reasonable person concerned that the judge might be unable to approach another case involving the same parties in an unbiased manner, thus requiring that the judge be disqualified.

See United States v. Wilkerson, 208 F 3d 794 (9th Cir. 2000).

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Scenarios 4-A and 4-B

You are presiding over a criminal case in which a female defendant is being prosecuted for running a house of prostitution. One of the defenses she is raising is that she was forced into running the house by a trafficker and should be treated as a victim of human trafficking rather than a criminal.

Situation A: You believe that the facts support her defense and ask the prosecutor in open court during the trial why the defendant was charged with a crime rather than being placed in a diversion program, suggesting that the prosecutor should have recognized the signs of trafficking and not charged her with prostitution. The prosecutor is now demanding that you be disqualified from the present case for bias due to your statements in the trial. Do you need to recuse yourself?

Situation B: You believe that the facts support her defense and ask the prosecutor during a status conference why the defendant was charged with a crime rather than being placed in a diversion program, suggesting that the prosecutor should have recognized the signs of trafficking and not charged her with prostitution. The prosecutor is now demanding that you be disqualified from the present case for bias due to your statements in the trial. Do you need to recuse yourself?

Faculty Notes

As for Situation A, courts have held that comments by a judge that a prosecutor should or should not have charged a defendant with a particular count of criminal behavior, where based on evidence observed during the conduct of a trial, does not require disqualification unless overall the judge evidences such a high degree of favoritism or antagonism as to make fair judgment impossible. This latter criterion is a factual matter.

With regard to Situation B, a Ninth Circuit case held that the district judge did not abuse his discretion in denying a motion to disqualify based on his criticism of the government's initial failure to charge the defendant with carrying a weapon during the commission of a robbery. At a status conference, the judge had commented that the government's omission of the gun count was "absurd" and "asinine," and told counsel to share that with his boss. The Ninth Circuit found that the judge's comments did not rise to the level required for disqualification under § 455(a), stating that a judge's views on legal issues may not serve as the basis for motions to disqualify. *United States v. Wilkerson*, 208 F.3d 794, 797 (9th Cir. 2000).

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Scenario 5

You are presiding over a jury trial of a female defendant for procuring prostitution. The defendant was charged with overseeing a place of prostitution and recruiting women to work as prostitutes. You believe that the evidence presented by the prosecution at trial suggests that the defendant was coerced into recruiting women to engage in prostitution by a trafficker, although the defendant has not raised that as a defense. You also have noticed that during the trial the defendant has been often turning to look at the public gallery behind her, and from that behavior you suspect that the trafficker or one of his friends was observing the trial. You would like to have the defendant screened for human trafficking victimization before sending the case to the jury. You decide to call a recess in the trial and call the prosecutor and public defender into your chambers to discuss your concerns. Is that proper? What might you discuss in the conference? How might you have a screening conducted?

Faculty Notes

While adult criminal court proceedings are open to the public, the judge may take steps to ensure a victim or witness's safety and address her fear of testifying. Where human trafficking is involved, there is always a possibility that the trafficker is in the courtroom keeping an eye on his victim. If the judge suspects that is happening, one solution may be to poll the public gallery to find out who is there.

Additionally, while *ex parte* communications between the judge and staff are generally not permitted, there 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 to the safety and security of the courtroom and the people there. A courtroom bailiff is required to respond to any threat appropriately, in some circumstances even without involving the judge. In Scenario 10, if the bailiff senses that a person in the public gallery is making threatening gestures toward a witness or defendant, it would be within the bailiff's duty to inform the judge.

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Scenario 6

You as judge call a recess and bring the defendant and her public defender into your chambers. There you ask your bailiff to administer a questionnaire and leave them alone to complete the assessment. The questionnaire is a trafficking assessment screening tool, although you do not inform the defendant or her public defender of that fact. After the bailiff is finished, you send the defendant and her attorney back to the courtroom and review the results alone with your bailiff. When the prosecutor learns what you did, she files a motion to have you recuse yourself. Have you done anything to require recusal?

Faculty Notes

In a Sixth Circuit case, the appellant alleged that the trial judge had sent his law clerk to gather evidence and therefore the judge should have disqualified himself. The court observed that while “not every *ex parte* communication to the trial court requires reversal,” the allegation here was sufficiently serious as to require a remand to determine its truth.

See *Price Bros. v. Philadelphia Gear Corp.*, 629 F.2d 444, 446 (6th Cir. 1980). (Note that when the case returned to the Sixth Circuit, the court found harmless error. *Price Bros. v. Philadelphia Gear Corp.*, 649 F.2d 416 (6th Cir. 1981).)

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Scenario 7

You are the judge presiding over a case involving a 15-year old girl 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?

Faculty Notes

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.

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Scenario 8

You are the judge in a case involving a placement decision for a female human trafficking victim who is a minor. The maternal grandmother of the victim writes to you directly asking you to reconsider the decision to have the minor moved from a group home where she has been a frequent runaway and placed with the girl's uncle. The social worker recommends this change in placement, but the grandmother 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 uncle, including prior allegations that the uncle sexually abused the minor and sold her to his adult friends for sex 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 you do?

Faculty Notes

In Scenario 8 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. 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. 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.

See the Kentucky Supreme Court opinion, [In re Langford](#), Findings of Fact, Conclusions of Law, and Final Order (Kentucky, June 17, 2013).

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Scenario 9

You are the judge in a juvenile delinquency case involving a charge of petty theft against a female minor. 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 disposition once a plea has been taken. You suspect that the delinquent charged with petty theft is a human trafficking victim who was working for a well-known pimp in the county. 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?

Faculty Notes

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.

ABA Model Code of Judicial Ethics 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.

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.

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Scenario 10

You are a juvenile court judge who has been invited 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 human trafficking victims; providing human trafficking screening and assessments; providing expert testimony in dependency and delinquency cases; providing advocacy for children as they make their way through the justice system; and providing a forum for a dialogue regarding mutual concerns about child human trafficking cases. What are the ethical issues you face in deciding whether to join the advisory council?

Now assume that ask you court administrator or chief probation officer to serve in your stead the advisory council? What ethical issues do you and your replacement face?

Faculty Notes

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. 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.

With regard to the ethical duties of court staff, under the ABA's *Model Code of Judicial Conduct* a judge is expected to supervise his or her staff and ensure that they follow the same rules as the judge, including avoiding any statements or actions that might cast doubt on the court's impartiality. Still, a judge should be able to discuss what is being considered by the advisory council with the court's representative on the advisory council 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.

Note that some states have adopted detailed Codes of Ethics for Court Employees. Judges and court employees are encouraged to ascertain whether their state has one. Under California's rules, for example, the court employee on an advisory council could not discuss the details of any pending cases.

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Scenario 11

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. Some of the specific issues that the task force will consider are: developing standards for sentencing offenders who are human trafficking victims and setting conditions of probation; where possible finding alternatives to convicting human trafficking victims who are compelled to commit crimes under the influence of a trafficker; developing screening tools to identify human trafficking victims; developing protocols for protecting the safety of human trafficking victims who testify in court; and developing training programs on trauma-informed services for judges, probation officers, and human service providers. What are the issues for you in deciding whether to join the task force? What ethical issues might a court administrator or other employee face?

Faculty Notes

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 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.

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.

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Scenario 12

You have been asked to help plan a human trafficking symposium sponsored by two civic organizations, one of which is a provider of services for victims of human trafficking. That organization operates a shelter, provides treatment for victims, and offers advocacy services for victims. The stated purpose for the symposium is to educate the community and increase awareness of human trafficking, to coordinate community efforts to fight human trafficking, to develop a consensus toward an action plan, and to develop a multi-disciplinary community response. You have been also been asked to be the keynote speaker for the symposium, with the proviso that you would not advocate a particular approach or philosophy but would give a perspective on how the courts handle cases involving human trafficking victims, including different approaches and strategies for identifying and providing services for human trafficking victims, investigating and prosecuting traffickers, and administering justice in courts. What are the issues for you in deciding whether to help plan the symposium and give the keynote address? If your court administrator were involved in your stead, what ethical issues might he or she face?

Faculty Notes

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 human trafficking victims and offers advocacy services for victims. Because that organization acts as an advocate 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.

As 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. Even though the judicial officer may participate in the symposium as a speaker, 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.

See State of Washington Ethics Advisory Committee Opinion 97-10.