

Educating for Judicial Ethics

JUDICIAL ETHICS EDUCATION IN THE FEDERAL COURTS

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Given the importance of judicial ethics to the public's confidence in the judiciary, educating judges about ethics is a high and continuing priority in the federal courts. People appointed as federal judges typically have strong records of integrity and are motivated to act ethically, but inadvertent mistakes sometimes occur, and they harm the reputation of the judge and the judiciary. The Federal Judicial Center, the education agency for the federal courts, works closely with the Judicial Conference committees responsible for administering and interpreting the sources of ethical rules: statutes and the Code of Conduct for United States Judges. Together they have developed curricula for in-person programs and resources in hard-copy and online formats, as well as television programs. Ethics is included in orientation programs for new judges and in annual continuing education programs for judges. These sessions are usually interactive discussions, often using real or hypothetical problems. By regularly covering ethics, the goal is to heighten judges' sensitivity to ethical issues.

"Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges." Code of Conduct for United States Judges, Canon 1 Commentary.

Of the countless decisions that judges make, few are more likely than ethical mistakes to undermine public trust in the judiciary or to embarrass individual judges. The editors' decision to devote this issue of the *Justice System Journal* to judicial ethics reflects that, even with all the complex legal, social, and administrative issues facing the courts, adherence to established ethical standards must always be a priority.

The importance of judicial ethics is evidenced not only in timeless principles but also in contemporary headlines. At its September 2006 meeting, the Judicial Conference of the United States (JCUS) took several actions to respond to criticisms about judges' ethics from Congress and the media. The JCUS adopted reporting requirements for judges' attendance at privately funded seminars and a mandate to use conflict-screening automation tools to reduce the risk that judges will sit in cases in which they have financial interests. Chief Justice Roberts also received at that meeting a report on the judiciary's application of the Judicial Conduct and Disability Act of 1980, prepared by a committee appointed by Chief Justice Rehnquist and chaired by Justice Breyer. When he announced the formation of the committee, Chief Justice Rehnquist acknowledged that he was responding "to criticism from Congress" about the administration of the Act (Breyer Committee, 2006:App. A). The committee recommended several actions, including increased education of judges responsible for administering the Act. (For a more complete examination of the Breyer Committee report, see Hellman, in this issue.)

Given the importance of judges' adherence to ethical standards, teaching about ethics is a major part of education in the federal judiciary. This article discusses how education on judicial ethics is conducted in the federal courts. The first part of the article provides an overview of the major sources of ethical rules and guidelines, the judges who are subject to them, and the agencies that provide education about them, as well as observations about particular educational challenges in ethics training. The second part of the article describes educational programs and materials on judicial ethics, how they are developed and delivered, and how they deal with the challenges.

THE RULES AND GUIDELINES, THE JUDGES, AND THE EDUCATION PROVIDERS

The Rules and Guidelines. The two major sources of ethical rules for federal judges are the Code of Conduct for United States Judges (Code of Conduct), which JCUS adopted in 1973 and has amended several times since, and several statutes, some of which apply solely to judges and others of which apply to many or all federal government employees.

The Code of Conduct, contained in a twenty-page pamphlet, consists of seven canons and accompanying explanation. Broadly put, the canons encourage judges to uphold the integrity and independence of the judiciary, avoid impropriety or its appearance, and perform their duties impartially and diligently. The canons also contain more specific guidance, and a few requirements, on avoiding conflicts of interest, and they place limits on outside activities, including strict limits on political activities. The canons are designed to avoid not only actual problems but also the appearance of them. Because, except for a few prescriptive provisions, the canons "are necessarily cast in general terms" (Code of Conduct, Canon 1, commentary), finding and reading the appropriate canon is usually only the beginning of an ethics inquiry. To answer many questions, it is necessary to examine and analyze the body of interpretation surrounding the canons and the purposes behind them. This means that teaching about the canons involves more than imparting black-letter rules.

The ethical rules' concern with appearances contrasts with most legal and factual matters on which judges must rule. On the latter, judges are expected to make decisions without regard to how the public will receive them. With ethical matters, on the other hand, the test is "whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired" (Code of Conduct, Canon A, commentary), a test not always easy to apply to oneself.

The JCUS has authorized its Codes of Conduct Committee (Codes Committee) to "render advisory opinions concerning the application and interpretation of th[e] Code" (Code of Conduct, Introduction). The committee provides advisory opinions when requested by individual judges. Although most of these opinions are not published, the committee does publish redacted, edited opinions when an

issue has more general interest. The committee's published advisory opinions are much more voluminous than the canons themselves. These opinions are quite useful in interpreting the Code, and are available online. The Codes Committee has no enforcement function; its role is to interpret the Code and the ethics regulations and to recommend changes to them.

Several statutes establish ethical requirements for judges. For example, 28 U.S.C. § 455 requires judges to recuse themselves when certain conflicts of interest, or the appearance of same, arise. Judges are also subject to many ethical rules that apply to other United States government officials. These include rules concerning acceptance of gifts (5 U.S.C. §§ 7351 and 7353), engaging in outside employment (5 U.S.C. §§ 501-505), and disclosure of outside income and financial assets (5 U.S.C. §§101-112). In some cases, the rules that apply to judges are stricter than those that apply to other government employees; this is true of rules about outside employment, for example. The JCUS, upon recommendations of the Codes Committee, has issued regulations implementing many of these provisions, and the committee provides advisory opinions concerning them, just as it does for the Code of Conduct.

The financial-disclosure rules, which apply to all federal employees whose salaries exceed a certain amount, are so extensive and require such substantial administration that the JCUS has a separate Committee on Financial Disclosure to deal with them. Financial-disclosure requirements are especially significant for judges. Their financial-disclosure statements are often subjected to more scrutiny than those of other governmental officials because a judge's financial holdings can be a basis for disqualification in a case and because the nature of their work means that judges, more than most other government employees, are the targets of disgruntled litigants or others who might misuse information.

Under the Judicial Conduct and Disability Act, enforcement of the Code of Conduct is in the hands of the circuit chief judges and the circuit judicial councils. Circuit chief judges (or, if the chief judge is the subject of the complaint, the next senior judge on the circuit court) are initially responsible for handling complaints of misconduct, and may initiate a complaint themselves. If the chief judge finds that the complaint warrants investigation, the chief judge must appoint a special investigatory committee that reports to the circuit judicial council, which decides what action, if any, should be taken. In such a case, the judge who is the subject of the complaint or the complainant can ask the JCUS to review the circuit council's action. This reviewing authority has been delegated to the Committee on Judicial Conduct and Disability.

Judicial-council and chief-judge orders under the Judicial Conduct and Disability Act have generally been available for public inspection, at the respective circuit courts or at the Federal Judicial Center, but as a practical matter, they have been largely inaccessible. The Breyer Committee recommended making at least some orders, appropriately redacted, available on the judiciary's Web site, both to inform the public better about the Act's operation and to assist chief judges and circuit councils to fulfill their responsibilities under the Act.

The Judges. Before appointment, federal judges, including circuit court of appeals, district, bankruptcy, and magistrate judges, and judges of the Courts of International Trade and Federal Claims, have typically enjoyed highly successful careers as lawyers, professors, or judges in other courts, and have a proven record of integrity. Before appointment, all are subjected to a rigorous vetting process that includes a background check by the Federal Bureau of Investigation. While judges uniformly have a strong commitment to conduct themselves in a lawful and ethical manner, several factors can interfere with that commitment; principal are lack of knowledge, lack of attentiveness, and overconfidence. Examples of judges intentionally violating an ethical rule are extremely rare. Violations are usually inadvertent: the judge did not recognize or understand that a rule applied in a given situation, did not realize the existence of a fact that might have triggered the application of a rule of which the judge was aware, or did not consider or appreciate how the judge's actions might be perceived by others. These factors must be considered when developing ethics instruction.

Many new judges are unaware of some of the specific ethical rules that now apply to them. For example, while most are generally aware of prohibitions on political activities, the federal rules are stricter than those in some states, where judges themselves must sometimes run for office. Judges are extremely busy. Most judges, especially new ones, find their attention consumed with hundreds of cases, requiring many decisions every day just to keep up, and ethical issues can get overlooked in this press of business, particularly when such issues appear in a benign context or are buried in a mound of details. Because judging is not for the timid and a judge's faith in his or her own ability—and rectitude—is essential to the job, the self-confidence necessary for making decisions that can fundamentally alter people's lives may sometimes blind a judge to others' perceptions of the judge's actions, a particular concern when ethical questions arise.

Providers of Ethics Education. Before confirmation, circuit and district judges receive a short orientation at the Administrative Office of the United States Courts (AO), and some courts have in-house orientation programs. However, the Federal Judicial Center provides the first extensive orientation for most judges. Its orientation programs consist of two one-week, in-person programs offered during a trial judge's first year on the bench. The first week, Phase I, is usually attended by between eight and fifteen judges, most of whom have less than three months on the bench; it covers procedure, case management, sentencing (for district judges), and ethics. The second week, Phase II, usually combines two or three groups who have completed Phase I and continues coverage of several areas in Phase I, including ethics, and adds some substantive law topics. Beyond the orientation programs, each year judges are invited to attend general-purpose, three-day continuing-education workshops, at which there are often over one hundred participants, where programs cover a variety of topics across a broad range of substantive-law and case- and courtroom-management issues. Most of the topics change from year to year, but ethics is regularly offered as a plenary session.

All Center education programs for judges are voluntary. This is because the principle of the independence of each individual judge is fundamental and deeply embedded in the culture of the federal courts, and requiring judges to attend certain programs would cut into that principle. In practice, virtually all new district, bankruptcy, and magistrate judges attend the Center's orientation programs. Some court-of-appeals judges attend orientations. Most judges attend Center continuing-education programs. In any given year, more than half of all judges attend a Center continuing-education program, and over three-quarters of all judges attend at least one Center program every three years.

The Center, the AO, and the Codes of Conduct and Financial Disclosure committees also provide continuing ethics education through other forums and media. Committee members have made in-person presentations at circuit judicial conferences. Often, the substantive advice that the two committees provide to individual judges is published on the courts' AO-administered intranet site, after editing to remove individual identifiers. The Center and the AO have produced videos and have published, in paper and electronic formats, pamphlets and monographs on various ethics-related topics. The two agencies communicate regularly to avoid duplication of effort, and the Codes of Conduct Committee (or, when relevant, the Financial Disclosure Committee) ordinarily reviews publications relating to ethics before release. The importance of the relationship between the Center, the AO, and the committees should neither be underestimated nor taken for granted. It would be far more difficult to develop relevant instruction and to find an equally credible source to deliver it without full cooperation between them.

EDUCATING JUDGES ABOUT ETHICS

Developing the Curriculum. Curriculum development at the Center follows an ongoing cycle familiar to educators: identification of needs, development of programs, delivery of programs, and evaluation. Experienced education attorneys at the Center follow trends in the law and in the courts to identify educational needs. They maintain close contact with judges and court staff and work closely with advisory committees of appellate, district, bankruptcy, and magistrate judges. These committees, composed of judges and representatives from the AO, regularly review program offerings and evaluations and advise on curriculum, faculty, and other matters. Occasionally, the Center conducts surveys of judges to assist in this process. Major topics for orientation programs remain fairly constant, while those for annual continuing-education workshops change regularly to provide variety and to address current issues. Ethics has remained a constant at both orientation and continuing-education workshops, but the specific content evolves to keep up with events.

The development process for ethics instruction follows the same general approach but differs from other subject areas in the deep involvement of the Codes of Conduct and Financial Disclosure committees, each of which has played a pivotal role in planning and presenting classes and materials in their respective fields. By

virtue of the work of these committees, judges who serve on them have in-depth knowledge of the rules and are most familiar with the issues that arise most frequently. Almost all ethics and financial-disclosure instruction for judges is provided by current or recent members of these committees, along with subject-matter experts from the AO.

A potential drawback to relying on committee members as instructors is that few of them have prior experience as teachers. Like a lot of things, teaching looks easier if you have never done it; many people, including judges, do not fully appreciate what is entailed in preparing and delivering an effective presentation until they have had to do it. The committees and the Center have tackled this problem in several ways. First, the Center has provided considerable guidance to faculty judges about how to prepare and present effective classes. Second, a judge who lacks experience teaching ethics is often paired with a judge or an AO attorney who has such experience, or with an academic with expertise in judicial ethics. Finally, by maintaining an open, honest dialogue with the committee chairs, the Center has helped ensure that judges selected to deliver these sessions appreciate their importance and the need to prepare well. This includes sharing the results of participant evaluations along with the assessments and advice of the Center's own education attorneys.

Subject Areas, Orientation Programs. The Center and the committees with which it works have identified three major objectives relating to ethics in the two one-week programs that judges attend during their first year on the bench: 1) reinforcing appreciation for the importance of adhering to ethical standards; 2) providing familiarity with the sources of ethical rules; and 3) establishing awareness and understanding of specific ethical and related legal rules that most often raise questions or problems.

In the first program, two hours are devoted to the Code of Conduct and one hour to financial-disclosure statements. The format for both is informal lecture, with faculty following an outline but encouraging interruptions for questions and discussion. These ethics sessions typically are scheduled before lunch or at day's end to allow greater time flexibility, and it is not unusual for these sessions to run over the scheduled time.

For each of these subjects, a committee member provides a brief introduction explaining the sources of the requirements and the importance of meeting them. To drive home the point, examples of news articles about judges who did not, or allegedly did not, follow the rules are ordinarily included. This introduction is followed by an overview of the Code of Conduct, identifying the main components of the seven canons. The faculty judge then describes other sources of rules and guidance, including statutes and committee advisory opinions, and how to find them. The faculty judge strongly encourages new judges to use these resources and, in case of any doubt about a possible course of action, to call a member of the committee for either informal advice or a formal advisory opinion. Not infrequently, the faculty judge relates an ethical mistake made early in his or her career. This makes the judge sound less pontifical and illustrates how easily ethical mistakes can be made.

Specific ethical areas that are covered include conflicts of interest; relationships with a former law firm; and outside activities, such as teaching, membership in legal or social organizations, fund-raising prohibitions, and political activities. Greatest attention is devoted to conflicts of interest—particularly financial conflicts, because mistakes seem to occur more commonly here and these have been the subjects of considerable media interest—and the recusal process. New or modified topics being introduced as a result of the actions taken by the JCUS in September 2006 are use of the AO-developed conflict-screening software; the standards to be considered when deciding whether to attend a privately funded seminar and the public-disclosure requirements that the program provider and the judge must follow; and the operation of the Judicial Conduct and Disability Act. About one of the three hours devoted to ethics is a detailed discussion of how to fill out the financial-disclosure report, delivered by a subject-matter expert from the AO. This instruction uses projected images for a section-by-section look at the disclosure form, with examples to show how to, and how not to, complete the form. Common mistakes are pointed out.

At the second week of orientation, later in the judge's first year, about ninety minutes are devoted to the Code of Conduct in a session led by a member of the Codes of Conduct Committee. After a few basic reminders about the matters described at the first orientation program, this session usually includes updates on recent questions or problem areas—for example, if allegations of misconduct have been in the news—and a short quiz to generate interest (and perhaps humility) and discussion. The bulk of the session, which spouses are invited to attend, is spent discussing questions raised by the new judges.

Continuing-Education Programs. That ethics is a recurring topic at continuing-education programs for judges reflects both its importance and an effort to overcome those factors—the press of business, too much self-confidence or complacency—that can lead, or lull, even conscientious judges into mistakes. The Codes Committee, the Center's advisory committees of judges, and Center staff agree that ethics warrants this continuing attention, and that view is reinforced the large majority of participant evaluations of the programs. The costs of ethical mistakes to the reputations of the individual judge and the institution of the judiciary are so high that this emphasis is warranted.

While ethics is featured in each year's continuing-education programs, the specific topics differ, both to avoid boring audiences with the identical message and to address subjects of current significance. To identify the specific ethical issues to be addressed, committee members draw from questions that they are frequently asked or that raise important issues and from examples reported in the media. Topics covered in recent years include attendance at privately funded seminars; conflicts of interest and recusal; letters of recommendation; outside activities; spouses' political activities; and gift-acceptance rules. Recent Judicial Conference actions were discussed in 2007.

Audiences at continuing-education workshops are too large for seminar-type discussions, but introductory lectures are usually complemented by more demonstra-

tive and interactive methods. Showing judges news clips or newspaper articles reporting ethical violations is an attention getter, even though Center policy calls for redaction of individual judges' names, as the purpose is not to further embarrass the individual judge. Hypothetical issues, sometimes presented in video vignettes, are often used to pose questions, usually with audience-response technology that permits choosing among multiple-choice answers, allowing individual judges to "vote" without being embarrassed by a "wrong" answer in front of their colleagues. Collective answers are displayed and often produce divided votes, enabling the instructor to discuss the assumptions that can lead to a subtle but substantial difference in one's analysis. Most judges report to us that they find these methods far more interesting and effective than straight lecture.

Chief judges are another important audience for continuing education. In addition to the formal role that chief circuit judges play under the Judicial Conduct and Disability Act, chief judges of the circuit, district, and bankruptcy courts play an informal role in dealing with their colleagues on ethical matters—by the example they set, by making ethics a subject at judicial meetings, and by discussing possible problems privately with individual colleagues. At the Center's conferences for chief district judges and chief bankruptcy judges, these topics are often discussed in small-group sessions. In addition, every three or four years the Center holds a one-day meeting of the chief circuit judges. At the last two such programs, hypothetical problems were used to illustrate difficult questions that arise when reviewing complaints under the Act. The Breyer Committee recommended holding these meetings more frequently and implementing a procedure to educate all new chief circuit judges on their duties under the Act. Training was also recommended for members of circuit judicial councils and for circuit staff who assist chief circuit judges in administering the Act. And to give chief judges and others who play a role in administering the Act better information about how the Act is being applied, the Breyer Committee recommended preparing and maintaining a compendium of orders and decisions under the Act. The Center, working with the AO and the JCUS Committee on Judicial Conduct and Disability, is developing such programs.

Other Educational Media. Judges are free to choose the means by which they obtain information, and, like most people, they have varying preferences. The Federal Judicial Center strives to accommodate these preferences by utilizing a variety of media to deliver education. Although workshops and seminars allow for interaction among judges and with faculty, satellite broadcasts, online resources, and publications offer convenience: they do not require travel and can be used at one's desk, at a time of one's choosing. The Center and the AO have produced videos, pamphlets, monographs, and Web-based tutorials addressing judicial ethics issues.

A multimedia approach to delivering judicial education has many advantages. Because workshops and seminars are planned on yearly cycles, there may be a need to educate judges sooner than the next in-person programs. For example, the recent JCUS actions on attendance at privately funded seminars and the use of conflict-

screening software occurred well before the next set of scheduled in-person, continuing-education programs. The rule changes were announced in a message to all judges, but using the screening software requires some training, and overcoming some judicial reluctance to use it is a challenge. The Center and the AO produced a video demonstrating use of the software; it included some words of encouragement by the chief justice and interviews with judges explaining the software's advantages and ease of operation. The video was broadcast over the courts' satellite television network and is also available in streaming and downloadable formats on the courts' intranet.

A much wider range of issues can be presented via distance education than can be addressed in a live program. For example, Web-based resources can address "frequently asked questions" as well as those that arise less frequently but are nonetheless significant. In addition, this electronic format provides search tools that make it a very helpful and accessible means for accessing information. In-person programs remain a primary tool for delivering education to judges, but they also serve as a means to inform judges about the availability of other resources and an opportunity to demonstrate the advantages of distance-education products.



The attention devoted to ethics education is disproportionate to the relatively small body of law, regulations, and guidance related to ethics. The emphasis is not because ethical standards are especially difficult to understand and apply. Rather, it is because the consequences of error, or even the perception of error, can be so high. The judiciary's most valuable asset—public trust—is at stake.

So, while the Center and the committees it works with occasionally hear complaints that ethics instruction is redundant, a far more common comment is, "We need this. It is important." The Breyer Committee Report and other recent activities only reinforce that point and are leading to even more extensive coverage of ethics in the future. *jsj*

REFERENCES

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