

JUDICIAL ETHICS FOR ALL: AN EXPANSIVE APPROACH TO JUDICIAL ETHICS EDUCATION*

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This article explores the need to expand our way of thinking about teaching judicial ethics to include audiences that have not typically been addressed. Specifically, the article explores how judicial ethics is being taught in state court systems and suggests ways to broaden its application to different groups of both lawyers and nonlawyers. If judicial ethics is taught in a way that is meaningful to these audiences, they will, in turn, benefit by appreciating more fully the unique role of the third branch of government. They will also be in a better position to assist the judiciary in complying with its obligations under its respective codes of conduct.

While sitting judges, especially brand-new judges, certainly are the primary group for whom the teaching of judicial ethics is important, they are by no means alone in needing this education. With the recent passage of an updated version of the ABA's *Model Code of Judicial Conduct*, it is an appropriate time to consider expanding the audience of judicial ethics learners to include various subsets of lawyers: lawyers-to-be (law students), practicing lawyers, lawyers serving as part-time (pro tem) judges, lawyers interested in becoming judges, lawyers involved in the appointment or election process as candidates for judicial office, and lawyers serving as judicial law clerks (ABA, 2007). The subject of judicial ethics should be taught to nonlawyers as well: judges' family members, court staff, the media, and the public generally.

This article explores the current state of judicial ethics education in our state courts and suggests ways to broaden the field. Teaching judicial ethics to audiences other than judges and candidates for judgeships will help such groups—and the general public—appreciate more fully the unique role of the third branch of government (sometimes referred to as the “least understood branch”) and will make it easier for the judiciary to comply with its obligations under the relevant codes of judicial conduct.

LAW STUDENTS

While not all law students will become practicing lawyers, all practicing lawyers and judges started out as law students. Thus, there is no better opportunity to teach judicial ethics to a “captive audience” of prospective lawyers and judges than in a law-school class on the legal profession. While such courses have become quite popular, few law schools have incorporated judicial ethics into their curricula. Fortunately, because of increased interest in scholarship related to judicial ethics and judicial independence, that is beginning to change. If law students are to learn to “think like

* The author thanks her judicial clerk, Heather L. Weigler, for her research and editing assistance and Cheryl Fowler of the Oregon Judicial Department, as well as the many judicial educators who responded on the JERITT listserve, for their assistance with the Judicial Ethics Education Nationwide Survey.

lawyers” (and they do, after all, spend the majority of their time in law school reading what judges have written about the law), then surely it is important for them to gain an appreciation for the basics of how to “act like a judge,” with particular reference to the core values of judicial conduct: independence, impartiality, and integrity.

How should judicial ethics be taught in law school? Obviously, law professors are smart and can teach just about anything. But there is no real substitute for a “guest lecturer” who is a real-life judge. Probably the easiest and most effective way to teach judicial ethics to law students is for teachers of courses on the legal profession to invite a judge to speak on a panel with a practicing lawyer. Ideally, at least one of the participants would be a member of the judicial conduct advisory committee or the judicial discipline body for the state, and another might be a lawyer who represents judges in disciplinary proceedings. The goal would not be to study any codes of conduct in-depth, but rather to familiarize students with basic concepts of judicial ethics. Having judges tell “stories” of other judges who have been disciplined for ethical misconduct is one of the best ways to get the students’ attention and to bring this topic to life. An invaluable source of information pertaining to—and interpreting—state codes of judicial conduct can be found in the hundreds of “published” advisory opinions of judicial conduct commissions and advisory committees of the various states. All of the audiences mentioned in this article would benefit from a review of key opinions from these entities, which always include judges and, sometimes, lawyers and public members, as well (see Table 1).

PRE-JUDICIAL EDUCATION: LAWYERS INTERESTED IN BECOMING JUDGES

The concept of “pre-judicial education” is gaining traction as a result of concerns about the politicization of the judiciary and the concomitant need to ensure that judges are both properly qualified to serve and knowledgeable about what it really means to be a judge. This includes imparting to lawyers interested in becoming judges information about what they would be giving up, from an ethical perspective, to take the bench. It is important that these lawyers be aware of the “sea change” this may occasion in their lives. Nearly everyone has a story about a judge—or a judge’s family member—who never really appreciated the full consequences of being appointed or elected to the judiciary. While most judges ultimately adjust satisfactorily to their new way of life, some realize it was a mistake; most of them leave the bench rather quickly. Others remain and observe the restrictions, but build up a fair degree of resentment about them. Fortunately, only a small handful flagrantly violate the rules; those individuals might have self-selected out of the process had they realized judicial life would challenge their moral compasses so severely.

Pre-judicial ethics education should look a lot like ethics education for new judges, with more emphasis on issues that would give the opportunity to “lift the veil” and allow interested lawyers to assess whether a judicial position suits their needs and abilities” (ABA, 2005:18). This sort of program could be conducted as part of bar-association CLE programming in collaboration with the courts, judicial education

Table 1
Advisory Opinions Available Online*

Arizona

http://www.supreme.state.az.us/ethics/Judicial_Ethics_Advisory_Opinions.htm

Colorado

<http://www.courts.state.co.us/supct/committees/judicialethicsadvisoryboard/judethics.htm>

Florida

<http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/jeac.html>

Indiana

<http://www.in.gov/judiciary/judqual/opinions.html>

Kentucky

<http://courts.ky.gov/jec/jeo.htm>

Maryland

<http://mdcourts.gov/ethics/opinions.html>

Nebraska

<http://supremecourt.ne.gov/commissions/jecintro.shtml?sub16#Opinions/>

Nevada

<http://judicial.state.nv.us/advopnscjeep3new.htm>

New Mexico

<http://jec.unm.edu/resources/advisoryopinions/index.htm>

Virginia

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

* While these opinions are not usually binding on the disciplinary authorities (i.e., discipline commissions or supreme courts) of the respective states, if relied upon by judges, many jurisdictions will allow them to be used in mitigation of discipline, thereby playing an important role in deterring misconduct and providing extremely valuable educational content.

departments, law schools and, possibly, an educational institution such as the National Judicial College. A determination of the types of issues and scenarios that should be covered in pre-judicial education would benefit from focus groups of local judges, who would be asked what they wish they had known about being a judge before becoming one. From these responses, a curriculum that relies heavily on stories from real judges' experiences likely would include, at a minimum, such topics as permitted—and prohibited—conduct in the following areas: use of the judicial title, political activity (including judicial campaigns), membership in clubs and advocacy-oriented organizations, business and investments, charitable activities, giving and receiving of gifts, and family-related issues.

RUNNING: CANDIDATES FOR JUDICIAL APPOINTMENT OR ELECTION

Candidates for judge must have judicial ethics training. With the advent of more hotly contested judicial races—and the markedly increased fund-raising that has

become indispensable to such campaigns—it is essential that judicial candidates be acutely aware of the political-activity rules in their jurisdictions. Moreover, there is ample confusion about what is and is not appropriate when it comes to campaign appearances by the candidates. Since 2002, *Republican Party of Minnesota v. White* has colored the landscape of judicial speech and has made what earlier seemed obviously improper in the context of a judicial campaign more of a discretionary call on the candidate's part. Thus, it is necessary for candidates to be educated as to the nuances of post-*White* jurisprudence that could bear on their campaign activities (see, e.g., Raftery, in this issue).

Several states now run the equivalent of “campaign schools” for judicial candidates. Florida offers a model format. There, a series of judicial campaign conduct forums is held during election years in all judicial circuits where contested races appear on the ballot. They are cosponsored by the judicial ethics advisory committee, the Florida Supreme Court, the trial-court chief judges, and the Florida Bar. Most states, however, do not do anything special for those judicial candidates who are not already judges. While their judicial ethics advisory committees generally are willing to answer questions, there tends to be a kind of “catch-as-catch-can” attitude about teaching judicial candidates about the ethics rules that apply to them.

Live programs like Florida's could be enhanced by the creation of a brochure prepared by the judicial conduct advisory committee and distributed by mail and provided online to all candidates for judicial office. The contents should include the pertinent provisions pertaining to the timing and scope of application of the code to judicial candidates, along with the relevant code provisions and related election-law statutes and rules, and a series of FAQs. The brochure also should contain a section referring readers to published advisory opinions as well as to additional resources available to candidates on a confidential basis. It would be helpful to have the chair or another member of the judges' advisory committee available by telephone, e-mail, or both for hotline-type advice to candidates with time-sensitive questions about such common campaign-related matters as print literature, advertisements, questionnaires, speeches, attendance at events, and fund-raising activities. It is especially important for the advisory committee to take the lead in reaching out to lawyer candidates, who may be somewhat uncomfortable about contacting sitting judges concerning campaign-related ethics issues.

LAW CLERKS AND OTHER COURT STAFF

Court staff, including judicial clerks, have far greater direct contact with all the participants in the justice system than do most judges. Thus, there are many opportunities for these people to enhance the participants' sense of the judge's ethics, thereby increasing the public's sense of trust and confidence in the administration of justice. At the same time, clerks and other court staff, although they are not subject to sanction for violating the judges' codes, can also—albeit unwittingly—cause trouble for the judge if they do not understand, and therefore do not adhere to, the rules to which the judge is subject.

Sprinkled throughout most state judicial conduct codes—and certainly the ABA's *Model Code of Judicial Conduct* (MCJC)—are references to the judges' obligation to keep staff, often referred to as those "under the judge's direction and control," from doing on the judge's behalf what the judge is not permitted to do under the code. These include such basic prohibitions as demonstrating bias or prejudice against participants in a matter before the court, misusing the prestige of the judge's office for private gain, and fund-raising (with the exception of campaign committees, which may raise funds on behalf of judge candidates). It is incumbent upon the chief judge, the court administrator, or both, then, to ensure the staff is properly trained in these areas of ethical constraint.

A recent informal survey of state judicial educators makes it apparent that many, if not most, jurisdictions recognize the importance of staff ethics training and incorporate it into more general staff training.¹ Clearly, some states' programs are far more formal and sophisticated than others. Some states honestly report they do not provide such training. Others note the availability of programs—from an occasional ethics program for staff (New Hampshire) to regular ethics sessions for all new judicial branch employees (North Dakota). The survey indicates that judicial clerk orientations are common and usually include at least some discussion of the court's code of judicial conduct.

The ideal format for court staff and judicial clerks is an orientation, led by both judges and other educators, with a session devoted to review of pertinent sections of the code applicable to the jurisdiction, along with specific examples of ethical dilemmas with which they may be confronted. This should be followed by annual refresher courses. Written materials specific to ethics issues faced by judicial clerks that may be helpful in conjunction with such programming, although not abundant, do exist (see, e.g., Federal Judicial Center, 2002; Rosenblum, 2006:VI).

PRO TEM (PART-TIME) JUDGES

In many jurisdictions, pro tem judging is an indispensable part of the efficient administration of justice. Because of pro tem judges' "hybrid" roles, in which they sometimes serve one day as a lawyer and the next as a judge, ethical considerations for them can be tricky. Yet, when it comes to ethics training, it appears most states overlook their part-time judges. Only six of the twenty-seven states responding to the survey of state judicial educators report providing such training.

¹ This article draws, in part, on an informal survey of state judicial educators undertaken by the author in 2007; twenty-seven state educators responded (Oregon Judicial Department, 2007). In this Judicial Education Nationwide Survey, submitted through the JERITT (Judicial Educator's Reference, Information, and Technical Transfer Project) listserv, educators responded to the following questions: 1) In your state, for which of the following groups of people do you provide judicial ethics education? New judges? Sitting judges? Pro tem judges? Judicial candidates? Lawyers? Judicial clerks? Other courthouse personnel? Judges' families? Other? 2) Does your state have a judicial ethics advisory committee? Is it limited to advice to judges? 3) Do you feel that enough is being done in your state to inform the above groups about judicial ethics? If not, what would you like to see done to improve the ways in which judicial ethics is taught? The survey results are available by contacting Cheryl Fowler at the Oregon Judicial Department (<http://ojd.state.or.us>).

Clearly, pro tem judges need guidance as to their ethical responsibilities. Because they are part-timers, they are not immersed in judicial culture to the same degree as full-time judges or even judicial clerks. Thus, it simply may not have occurred to a lawyer that he or she is subject to the judge's code of conduct while serving as a pro tem judge. While there is a lawyers' code that applies to practicing lawyers, lawyers serving as pro tem judges are also, generally, subject to most of the provisions of state codes of judicial conduct "while serving." Thus, both codes can be in play.

While the obvious way to train pro tem judges is for judicial education departments of the state courts to conduct special training for them regularly, it would be even more effective to have them attend the judicial ethics segment of orientation for new judges, as this approach would provide the added benefit of engaging in discussion of scenarios with judges who are serving full-time.

THE MEDIA AND THE PUBLIC

Judges frequently do not understand the media's needs, and the media do not keep judicial ethics at the top of their minds either, especially when operating on deadline. Beat reporters, in particular, are not well versed in why judges cannot talk to them "on the record" about pending or impending cases. Thus, they often conclude that judges are arrogant, or unhelpful, with the result that the judges' "no comments" that they report seem more like an indictment than a comment from an appropriately cautious and reasonable judge.

Fortunately, organizations like the National Judicial College's Reynolds Center for Courts and the Media train both journalists and judges to help each group understand the other's role. The Center has taken its program on the road to help journalists report on the courts in a way that is consistent with judicial ethics rules. Some state bar associations have bench/bar/media committees that both prepare materials and sponsor roundtable discussions that include representatives of the media, lawyers, and judges. The common value of impartiality in news coverage and judging serves as a valuable starting point for these discussions. While the primary purpose of these gatherings is to educate, an underestimated by-product is making connections and developing relationships between judges and their local media representatives. In playing a role in educating the media about judicial ethics, the judiciary does itself the indirect service of educating the public as to its own core values.

LAWYERS (WHO DON'T PRO TEM, AREN'T CLERKS, AND DON'T WANT TO BE JUDGES!)

Even if clerking or judging is the furthest thing from a lawyer's mind, most lawyers know judges as acquaintances, if not close friends, and nearly all lawyers deal with judges and their staffs in professional settings at one time or another. While the lawyers' code of professional conduct addresses such issues as ex parte contacts with the court, judges are not necessarily held to the same standard as lawyers in this and

other regards. Thus, it is critical for lawyers to be conversant in the specific rules that apply to those situations where they might, unwittingly, cause the judge to act in conflict with the rules of judicial conduct. Of course, if law schools follow the suggestion made earlier in this article, all lawyers will have at least a basic understanding of judicial ethics. That preliminary exposure, however, does not even begin to substitute for the more in-depth understanding of the rules with which lawyers must be familiar.

Perhaps not surprisingly, none of the state judicial educators who responded to the survey indicated they provided any judicial ethics training for lawyers. Given the importance of this topic and the opportunities for judges to fall into “traps” set by lawyers, however well-meaning, the judiciary should, at a minimum, ensure that written materials on professional ethics for lawyers include references to and discussion of relevant judicial conduct code provisions, with pertinent examples. Lawyers should also be provided with published judicial conduct advisory opinions, and judges should offer themselves as speakers at bar CLE courses on ethics.

JUDGES’ FAMILIES

When a judge is appointed or elected, life as this person knew it suddenly changes irrevocably. So does life for the judge’s family. Yet only a few states that responded to the survey provide anything by way of ethics training for the judges’ family members. Surely, if a mere lawyer acquaintance can stumble and get a judge into trouble, the chance of a family member doing so is even greater. Moreover, by providing such programming for families, the added benefit of showing care and concern for the new role of the spouse, partner, or child will be appreciated.

Even though the MCJC and most current state codes recognize that the judge does not “control” family members’ conduct, nevertheless, there are provisions of the code that make it hard to separate judicial conduct from family conduct. Educating judges’ families is necessary to help them avoid running afoul of those provisions. In Connecticut, for example, all families receive a publication regarding ethical concerns when new judges are appointed to the bench. In Puerto Rico, the judicial branch provides an orientation in ethics through a support program for judges’ families.

The true leader in incorporating the family into judicial ethics training is Indiana, largely as a result of the pioneering efforts of Jan Dickson, a supreme court spouse, and Chief Justice Randall Shepard. At that state’s general orientation for all new judges, a special roundtable discussion is held for judicial spouses at which, among other things, ethical concerns impacting the family are addressed. During the judges’ annual meetings, judicial spouses are invited to sit in on ethics presentations that involve topics of concern to the judicial family. The Indiana Court’s Ethics and Professionalism Committee also has been a leader in developing family-friendly written materials, including a bimonthly e-journal called *Judicial Balance* (Judicial Conference of Indiana, 2007).

Families are busy, and it may be that family members no longer accompany judges to annual conferences in the numbers they once did. On the other hand, if

family members expected that there would be important programming applicable to them, perhaps they would be more likely to attend. In any event, materials regarding the ethics rules that concern family members should, at a minimum, be made available on the court Web site. A welcoming letter should be sent to the family encouraging them to familiarize themselves with these materials, and with it should come an open invitation to call or e-mail a representative of the judicial department or the conduct committee at any time with questions.

NEW JUDGES

There is no debate that the most critical audience for judicial ethics training is newly appointed or elected judges. Teaching them should be fairly straightforward and easy; after all, judges would not have become judges were they not already instinctively ethical. Teach them the rules, give them a few obvious examples, and they are on their way!

Unfortunately, such thinking presumes ethics rules are clear, when, despite recent attempts to clarify them, plenty of gray areas still abound. In fact, the ABA *Model Code of Judicial Conduct* only recently began to refer to them as actual “rules” (ABA, 2007:1). When public sanction and discipline loom, it is understandable that judges want answers that will give them reasonable assurance that their conduct is within ethical bounds.

The new-judge education provided by every judicial educator responding to the survey includes an ethics component. The range extends from several hours of ethics offered in most states to the two-day “Ethics for Judges” course given at the National Judicial College and mandated by Nevada Supreme Court order for all new Nevada judges. Although many states provide their own in-house new judge orientation and training, the NJC’s two-week courses on “Special Court Jurisdiction,” for justices of the peace and municipal-court judges, among others, and “General Jurisdiction,” for general-jurisdiction trial judges, are a valuable option both for states that do not provide an extensive orientation for new judges and as a supplement for those states that do. Both courses address ethics as part of the curriculum, although they do not address the nuances of particular states’ codes that differ significantly from the MCJC.²

Oregon provides one example of a typical format for new-judges training. There, two co-teachers provide training in judicial ethics at the annual “new judges’ school” in a two-hour format. This begins with a pretest of twenty questions for the participants, a brief overview of the Oregon Code of Judicial Conduct provisions, and a debriefing of the participants concerning the pretest. During the discussion period, the new judges are asked how they answered the questions, why, and what code, statutory, or local-court rule provisions they relied upon. The judges are encouraged to read certain published advisory opinions, to study relevant Oregon Supreme Court

² Excellent resources for the teaching of ethics to new and sitting judges can be found in the publications of the American Judicature Society (Gray, 1999; Gray, 2001a and b; *Judicial Conduct Reporter*), as well as the Commentary and Reporter’s Notes of the MCJC itself (ABA, 2007) and the seminal treatise on judicial ethics (Shaman, 2000).

cases, and to contact the chair of the judicial conduct advisory committee for informal advice on any ethics-related matter. (The committee aspires to respond to inquiries within twenty-four hours.)

SITTING JUDGES

Sitting judges must be effectively trained not only to be familiar with their state's code of judicial conduct, but also to be able to apply it to the multiplicity of situations that present themselves every day. While every state should have a judicial ethics hotline for judges for quick turnaround advice in the stickiest situations and an ethics advisory committee to issue advisory opinions that are not so time-sensitive, it is not realistic, nor desirable, to expect judges to make a call or request an opinion every time an ethics question comes up. It is hoped that by the time judges have been through the new-judge orientation and have been judging for a while, ethical responses to most situations will be instinctual. Despite attempts to make the MCJC rules clearer and to provide improved examples in commentary, even the newly revised code openly acknowledges that it does not provide all the answers.

The good news is that, as the survey demonstrates, judicial ethics training for sitting judges is a high priority of state judicial educators. While the quantity, frequency, format, and level of creativity vary from state to state, nearly every reporting state noted the incorporation of some ethics training into their educational conferences. Some states appear to include ethics as a topic only sporadically, however, and it seems that few innovative teaching techniques are being used. Thus, there is significant room and desire for improvement.

Considering the importance of this issue and the apparent need and desire for more engaging presentations of judicial ethics issues, it is worth pointing to several existing national models. Unfortunately, education budgets and time constraints may make it difficult to send judges to these programs or to emulate them at home, but "best practices" do exist and should be recognized and used if greater resources become available.

First, the National Judicial College provides four programs devoted solely to ethics. Two of these, "Ethics, Bias and Judging: Reaching Higher Ground" and "Ethics, Bias and the Administrative Law Judge," are state-of-the-art Web-based programs in which judges explore a variety of ethical issues while engaging in online interactive dialogue with the instructor and students. In addition, the NJC provides a two-day face-to-face program called "Ethics for Judges" and, in alternating years, "Building a Bias-Free Environment," which addresses ethics issues.

Second, the federal judiciary has set an excellent example for states to follow by putting significant resources into judicial ethics training (see Cooke, in this issue). For instance, Judge Peter Bowie and Professor Laurie Levenson, a law teacher and television commentator, present ninety-minute programs to large groups of federal judges, followed by more-intimate small-group discussions. The Federal Judicial

Center provides software and hardware that enables the audience to respond to hypothetical situations, and the group results are immediately tabulated. More often than not, the intentionally vague questions result in a major split in the audience response, and a lively panel-audience exchange ensues. Videos, slide shows, and licensed movie clips are used for variety and visual effect.

Probably the most unique and comprehensive judicial ethics program for state judges is held in California, where the state pays for judges to be insured against ethics complaints. For new judges to qualify for this coverage, the carrier requires them to participate in a two-and-a-half-day ethics program as part of their orientation, and every sitting judge is required to take five hours of ethics training every three years. These hours are filled by participation in small classes, with sixty-five courses having been presented in different parts of the state over the past three years. The courses use a variety of teaching techniques, including quiz shows, "video vignettes" followed by small-group discussions, "road warrior" broadcasts by cable and satellite, and elective opportunities, including online education.

CONCLUSION

Judicial ethics training is alive and well, but there is much room for improvement. Perhaps this was put most succinctly by a Wisconsin educator when asked whether enough is being done to inform the various audiences mentioned herein about judicial ethics: "Not all the groups identified above are provided ethics information on a formal basis. The obvious answer must be NO." Given the limited resources of budgets for judicial departments, it is not realistic to suggest that it is up to the judiciary to provide judicial ethics training to every group mentioned. In the wake of the passage of the revised *ABA Model Code of Judicial Conduct*, and consistent with the increased role of judges in judicial outreach, however, the judiciary should provide materials and speakers and use their skills of persuasion to increase the audiences for judicial ethics instruction. Because an understanding of judicial ethics is part and parcel of a true appreciation for the core values of the judiciary—judicial independence, integrity, and impartiality—this cannot be an optional project. **jsj**

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