

## HANDLING ELDER ABUSE ISSUES

June 12, 2013

### LESSON PLAN-- JUDICIAL ETHICS Hon. Julie Conger

TIME	ITEM	SLIDES AND HANDOUTS
12:45 to 12:55 p.m.	<p><b>Introduction</b></p> <p>Three of the primary underlying ethical principles important to proceedings involving allegations of elder abuse are articulated in <b>Canons 1, 3B(2) and 2A</b>:</p> <ol style="list-style-type: none"><li>1. <b>Canon 1</b>: “An independent, impartial and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved.”<ul style="list-style-type: none"><li>• Nowhere is this principle more important than in proceedings involving elders, where independence, adherence to the law and integrity are balanced with maintenance of respect for the dignity of senior citizens.</li></ul></li><li>2. <b>Canon 3B(2)</b> of the Code requires that judges “shall be faithful to the law” and shall maintain “professional competence in the law;” thus judges hearing cases involving elders should observe continuing familiarity with Title II of the Americans with Disabilities Act and applicable state law concerning accommodations for elders and disabled person.</li><li>3. <b>Canon 2A</b> of the Code underscores the necessity for judges to act at all times in a manner that would promote public confidence in the integrity and impartiality of the judiciary. Canon 2,</li></ol>	<b>Slides 1–3</b>

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	<p>by its title, guides the judges in every action both public and private, by emphasizing that a judge “shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.</p> <p><b>Learning objectives:</b></p> <p>We will be focusing primarily on five general topics in today’s workshop.</p> <p>Increase understanding and application of judicial canons in proceedings involving elders:</p> <ul style="list-style-type: none"> <li>• Fairness and cultural issues and self-represented litigants</li> <li>• Ex parte communications</li> <li>• Judicial speech</li> <li>• Disqualification and disclosure</li> <li>• Community outreach</li> </ul>	<p><b>Slides 4-5</b></p>
12:55 to 1:05 p.m.	<p><b>Fairness and cultural issues</b></p> <p>Let’s look at the following scenario:</p> <p><i>An elderly woman, who is Hispanic, appears before you. She speaks only a little English and appears to have trouble addressing the court. She is seeking a restraining order protecting her from her adult son. Both you and your clerk feel a growing sense of frustration. You overhear your clerk and bailiff complaining about the litigant during a pause in the proceedings. They are joined in their discussion by counsel for the son who makes disparaging remarks about the elderly woman.</i></p> <p><b>Large group discussion</b></p>	<p><b>Tab 5A</b></p>

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	<p><b><i>List things you can do to remedy the situation and discuss what you should be careful about.</i></b></p> <p>Teach back -- 5 minutes</p> <p>California Code of Judicial Ethics <b>Canon 3B(4)</b> requires that judges be “patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity.” Patience and sensitivity to issues due to advanced age or disability are particularly important in proceedings involving elders, where litigants may need not only physical accommodations but also frequent breaks in the proceedings and interpretative assistance.</p> <p><b>Canon 3B(4)</b> also mandates that judges require the same standards of patience and sensitivity of lawyers, staff and court personnel under the judge’s direction and control. Thus, a judge has disciplinary responsibilities should a member of his/her staff, or a lawyer appearing in the court, exhibit rudeness or intolerance in these situations.</p> <p>California judges are advised that any conduct that could be perceived as bias or prejudice would be a violation of <b>Canon 3B(5)</b> and that the judge must require lawyers in proceedings before them to refrain from words or conduct that would exhibit such bias or prejudice. <b>(Canon 3B(6))</b> The prohibited categories include, but are not limited to, race, sex, gender, religion national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status or political affiliation. If one of the above categories is an issue of the proceeding before the judge, legitimate advocacy on this topic is permitted.</p> <p>In a related Canon regarding administrative duties, judges are required to exact the same standards of conduct concerning probity and lack of bias and</p>	<p><b>Slide 6</b></p> <p><b>Slides 7-8</b></p> <p><b>Slide 9</b></p>



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	<p>rules of evidence and procedure.</p> <p>This latter principle has now been articulated in the <b>Commentary to Canon 3B(8)</b> of the California Code of Judicial Ethics:</p> <p>“The obligation of a judge to dispose of matters promptly and efficiently must not take precedence over the judge’s obligation to dispose of the matters fairly and with patience.” For example, when a litigant is self-represented, a judge has the discretion to take reasonable steps, appropriate under the circumstances and consistent with the law and the canons, to enable the litigant to be heard. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs.”</p> <p><b>Options:</b></p> <ol style="list-style-type: none"> <li>1) Explanations in plain English</li> <li>2) Make sure they talk to you not to each other</li> <li>3) Tell them that civility counts; calling names is not useful</li> <li>4) Ask questions: “I need to ask you each a few questions so I can better understand”</li> <li>5) Actively listen but be prepared to cut them off if they stray from the main point</li> <li>6) Offer neutral assistance: tell them what legal standard is, what is relevant, what you need to know</li> <li>7) Guard against miscarriage of justice</li> <li>8) Other suggestions?</li> </ol> <p><b>What a Judge Can Do:</b></p> <ol style="list-style-type: none"> <li>1) Give effect to substance and provide opportunities to cure deficiencies</li> <li>2) Explain basis for rulings</li> <li>3) Grant continuance on behalf of a SRL</li> <li>4) Explain process of proceedings</li> </ol>	<p><b>Slide 14</b></p> <p><b>Slides 15-16</b></p> <p><b>Slides 17-18</b></p>



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	<p>this conversation?</p> <p>15 minute discussion and report back</p> <p><b>Teach Back</b></p> <p>Applicable canons</p> <p><b>Canon 3B(7)</b> states that “a judge shall not initiate, permit or consider ex parte communications, that is, any communications to or from the judge outside the presence of the parties concerning a pending or impending case.” For purposes of Canon 3B(7), all information available in the media, including the Internet and press, are specifically included in this prohibition. The Canon emphasizes that judges “shall not independently investigated facts in a proceeding and shall consider only the evidence presented or facts that may be judicially noticed.”</p> <p>A judge must make reasonable efforts to avoid any ex parte communications (except for certain exceptions). If a judge inadvertently receives such an inappropriate or unauthorized ex parte communication concerning the substance of a matter, the judge must “promptly notify the parties of the “substance of the communication and provide the parties with an opportunity to respond.” <b>Canon 3B(7)(d)</b></p> <p><b>Exceptions: Other Judges</b></p> <p>Though permitted as an exception to Canon 3B(7), judges must exercise caution in ex parte communications with other judges concerning a pending or impending proceeding. Reasonable efforts must be made to avoid receiving factual information that is not part of the record; if such information is received it must be disclosed to the parties. (<b>Canon</b></p>	<p><b>Slides 21-24</b></p> <p><b>Slide 25</b></p> <p><b>Slide 26</b></p>

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	<p><b>3B(7)(a))</b></p> <p>This poses difficulties for a judge hearing an elder abuse calendar where parties in a proceeding may have ancillary proceedings pending before another judge. For example, a judge hearing a case involving criminal elder abuse by one spouse upon the other may wish to consult the Family Law judge handling the dissolution between the parties or the Probate judge handling conservatorship of one of the parties. There is a fine line to be drawn between discussion about the case between the judges which satisfies the constraints of the Code of Judicial Conduct and a conversation in which impermissible factual information is related.</p> <p>A judge should not discuss a case with a judge who has previously been disqualified (<b>Canon 3B(7)(a)</b>), and judges are advised to be careful not to talk about a case with a judge whom the judge knows would be disqualified. (Canon 3B(7)(a) Commentary) In parallel, a disqualified judge must avoid discussing a case with the assigned judge. (Canon 3B(7)(a)).</p> <p>Finally, there is a specific prohibition against judges conversing about a case if either one has participated, is participating or will participate in appellate review. (<b>Canon 3B(7)(a) Commentary</b>)</p> <p><b>Ex Parte Communications – Exceptions: Court Personnel</b></p> <p>Special care must be taken by judges in proceedings involving elders in any communications with staff and court personnel; just as in communications with other judges, reasonable efforts must be made to “avoid receiving factual information that is not part of the record or an evaluation of that factual information.” (<b>Canon 3B(7)(a)</b>)</p>	<p><b>Slide 27</b></p> <p><b>Slide 28</b></p>



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	<p>The <b>Commentary to Canon 3B(7)(a)</b> gives guidance as to the permissible discussions judges may have with court personnel – the conversation must relate solely to the performance the staff person’s duties. The Commentary to Canon 3B(7)(a) advises:</p> <p>“For example, a bailiff may inform the judge of a threat to the judge or to the safety and security of the courtroom, but may not tell the judge ex parte that a defendant was overheard making an incriminating statement during a court recess. A clerk may point out to the judge a technical defect in a proposed sentence, but may not suggest to the judge that a defendant deserves a certain sentence.”</p> <p><b>Canon 3B(7)(a)</b> is specific in listing which individuals qualify for the term “court personnel”: bailiffs, court reporters, court externs, research attorneys, courtroom clerks, and other employees of the court. Attorneys in a proceeding before the judge, employees of other governmental entities such as social workers or lawyers, or persons appointed by the court to serve in some capacity in a proceeding (special masters, CASA advocates, etc.) are NOT included in the definition. Judges are specifically forbidden to have an ex parte consultation with a representative of the Probation Department concerning a sentencing matter before the judge. In courts hearing elder abuse cases, it is probable that the same prohibition would apply to ex parte conversations with representatives of Adult Protective Services, victim witness advocates and Elder Case managers.</p> <p>Until 2013, judges were permitted, with notice to the parties, to “obtain the advice of a disinterested expert on the law”. This exception to the prohibition against ex parte communications has been eliminated as potentially inconsistent with the “core tenets of the adversarial system.” (Commentary to Canon 3B(7)). Judges are, however, permitted to “initiate, permit or</p>	<p><b>Slides 29-31</b></p> <p><b>Slide 32</b></p>

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	<p>consider” ex parte communications when expressly authorized by law or by stipulation of the parties. (Canon 3B(7)(c)) The Commentary to Canon 3B(7) cites Code of Civil Procedure 116.250 which allows a judge to informally investigate in small claims cases and also Evidence Code 730 which provides for judicial appointment of an expert if such testimony or analysis is deemed necessary.</p> <p>The provision for ex parte communications for scheduling, administrative purposes or emergencies has been maintained in the 2013 revision of the Code of Judicial Conduct, as long as neither party will gain a procedural or tactical advantage and proper notification of all parties is ensured. <b>(Canon 3B(7)(b))</b> Furthermore, court staff and personnel are permitted to communicate scheduling information and to perform other “administrative functions” ex parte. <b>(Commentary to Canon 3B(7))</b></p> <p><b>Settlement Conferences – Special Situations</b></p> <p>Settlement discussions are a very important element of handling a case involving elder abuse, and a judge participating in such discussions must do so with sensitivity to the numerous issues that arise: physical, mental and psychological fragility of the victim, availability of community resources, and frequently family dynamics. In many cases involving Elder Abuse, mediation may not be appropriate unless the victim has a trained and strong advocate.</p> <p>The revisions to the California Code of Judicial Ethics in 2013 recognized the importance of settlement discussion, moving the relevant canon from an exception to the prohibition against ex parte communications to <b>Canon 3B(12)</b> which specifically permits judicial participation in settlement discussions. With consent of the parties, a judge may confer separately with the parties and/or their lawyers, but</p>	<p><b>Slide 33</b></p> <p><b>Slides 34-35</b></p>

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	<p>judges are cautioned to strictly maintain impartiality and the appearance of impartiality during these discussions. Furthermore, a judge may not engage in conduct that could reasonably be perceived as coercive, and must at all times preserve rights of the parties “to be heard according to law.”</p> <p>A judge may decline to engage in settlement discussions if the judge believes that participation would affect his impartiality or would impact his ability to fairly decide the matter. If the judge will preside over the trial in a matter in which s/he has participated unsuccessfully in settlement discussions, Canon 3B(12) provides guidance as to factors a judge should consider before entering into mediation or negotiations:</p> <ul style="list-style-type: none"> <li>a) whether the judicial participation is with consent or over objection of the parties</li> <li>b) the relative sophistication of parties or their counsel</li> <li>c) whether a party is unrepresented</li> <li>d) whether the trial is by judge or jury</li> <li>e) whether the parties will participate and the effect of personal contact between the judge and parties</li> <li>f) whether the judge should, in the course of these discussions, express an opinion on the merits or legal issues</li> </ul>	<p><b>Slides 36-38</b></p>
2:05 to 2:15 p.m.	<p><b>Judicial Speech – Important Changes</b></p> <p><b>General provisions</b></p> <p><b>Canon 3B(9)</b> dictates that a judge may not make any public comment about a pending or impending proceeding in <i>any</i> court, and may not make a nonpublic comment that might “substantially interfere with a fair trial or hearing.” Exceptions to this general rule permit a judge to make statements in the course of official duties, to explain the procedures of the court</p>	<p><b>Slide 39</b></p>

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	<p>and to discuss appellate cases in legal education programs and materials. (This exception does not apply to cases over which the judge has personally presided.) The prohibition does not apply to cases in which the judge is a litigant in a personal capacity.</p> <p>The <b>Terminology</b> portion of the California Code specifies that a “pending proceeding” continues through any period in which an appeal may be filed until final disposition. “Impending proceeding” is a matter that is imminent or expected to occur in the near future.</p> <p>If a judge is subjected to public or private criticism due to a ruling or court decision, the Commentary to Canon 3B(9) specifically permits a judge to release a full or partial transcript of a court proceeding open to the public, to release copies of a written ruling or opinion, and to explain the rules and procedures “related to a decision rendered by a judge.”</p> <p><b>New provision – 2013 change</b></p> <p>The 2013 revision to the California Code of Judicial Ethics has added a new, and significant provision in <b>Canon 2A</b> which governs judicial conduct in general:</p> <p>“A judge shall not make statements, whether public or nonpublic, that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office.”</p> <p>Such comments may lead to disqualification and thus would run afoul of Canon 4A which cautions judges to conduct all extrajudicial activities so that they do not lead to frequent disqualification.</p> <p>With regard to nonpublic speech, judges are cautioned by the Commentary to Canon 3B(9) that the</p>	<p><b>Slides 40-41</b></p> <p><b>Slide 42</b></p>

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	comment may be “misheard, misinterpreted or repeated.” A judge who makes a nonpublic comment about a case over which the judge is presiding is advised to avoid the appearance that the judge has formed an opinion prematurely and does not maintain an open mind.	
2:15 to 2:35 p.m.	<p><b>Disqualification and Disclosure</b></p> <p><b>Table exercise</b></p> <p>Fernandes 10 minutes at table 5 minutes of report back</p> <p><b>Questions:</b></p> <ol style="list-style-type: none"> <li>1. Is disqualification required in elder abuse cases under these circumstances?</li> <li>2. If disqualification is not required, is disclosure required?</li> <li>3. If disclosure is required, how long must Judge Fernandes do so?</li> <li>4. Is Judge Fernandes required to report the incidence of elder abuse involving his mother to the police?</li> </ol> <p><b>Teach back</b></p> <p>Judges are disqualified in any proceeding in which disqualification is required by law (<b>Canon 3E(1)</b>) and the law governing disqualification lies in <b>Code of Civil Procedure 170.1(a)</b>. Disqualifying factors include:</p> <ol style="list-style-type: none"> <li>a) Personal knowledge of evidentiary facts</li> <li>b) Judge or family member a witness</li> <li>c) Judge served as lawyer in proceeding (two</li> </ol>	<p><b>Tab 5C</b></p> <p><b>Slide 43-47</b></p>

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	<p>years limitation)</p> <p>d) Judge was associated with lawyer in proceeding (two year limitation)</p> <p>e) Judge or family member has financial interest</p> <p>f) Judge or family member is a party</p> <p>g) Lawyer or associate of lawyer is spouse or family member of the judge</p> <p>h) Judge doubts ability to be impartial</p> <p>i) Judge believes disqualification would further the interests of justice</p> <p>j) Person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial</p> <p>k) Judge is physically impaired and cannot properly perceive the evidence or is unable to properly conduct the proceeding</p> <p>l) Campaign contributions over certain limits within certain time frames</p> <p>m) Judge in negotiations for employment with attorney or party in proceeding</p> <p>The California Code of Judicial Ethics imposes upon judges further grounds for disqualification; <b>Canon 3E(3)(b)</b> requires disqualification if a judge owns a corporate bond worth more than \$1000 issued by a party in a proceeding. Ownership of a government bond issued by a party is disqualifying only if the outcome of the proceeding could substantially affect the value of the bond.</p> <p><b>New provision</b></p> <p><b>Canon 3E(3)(a), newly adopted in 2013</b>, requires disqualification if the judge, while a judge or candidate for judicial office, “has made a statement, other than in a court proceeding, that a person aware of the facts might reasonably believe commits the judge to reach a particular result or rule in a particular way in a proceeding.”</p>	<p><b>Slides 48-52</b></p>

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	<p>This stringent disqualification provision appears to limit significantly the provisions of Code of Civil Procedure 170.2 which specify that it shall NOT be grounds for disqualification that a judge “has, in any capacity, expressed a view on a legal or factual issue “presented in a proceeding.</p> <p><b>Disclosure</b></p> <p><b>Canon 3E(2)</b> requires judges to disclose on the record information reasonably relevant to the issue of disqualification under Code of Civil Procedure 170.1, “even if the judges believes there is no actual basis for disqualification” as well as campaign contributions in excess of \$99. The Commentary to Canon 3E also advises a judge to disclose membership in organizations which have the potential to given an appearance of partiality, even though membership is permitted under the Canons.</p> <p>Disqualification under <b>Canon 3E(3)</b> (a judicial statement which might be interpreted to commit the judge to reaching a particular result in a case) is also subject to the reasonable person test. Thus, if a judge has made such a statement in the past, other than in a judicial decision or opinion, disclosure should be considered.</p> <p>Judges presiding in elder abuse cases frequently question whether they have a duty to disclose facts or information which may be personal but relevant to the case over which the judge is presiding. Personal family situations which entail issues such as dementia, capacity, and undue influence may be relevant to a case, but may raise concerns of privacy so that the judge is loath to make such intimate revelations. In this instant, recusal is appropriate (without explanation) and, if questioned, the judge may submit a sealed explanation to the Presiding Judge.</p>	<p><b>Slides 53-54</b></p>

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2:35 to 2:45 p.m.	<p><b>Community Outreach</b></p> <p>Judge Yee is invited to speak at a local forum sponsored by the Center for Excellence in Elder Abuse and Neglect. She would like to participate and educate the public about elder abuse issues.</p> <p>Large group discussion</p> <ol style="list-style-type: none"> <li>1) What would you want to know before accepting this invitation?</li> <li>2) Are there any restrictions on what you can speak about?</li> <li>3) May Judge Yee appoint the Center to perform elder services?</li> </ol> <p><b>Teach back – ethical rules</b></p> <p>Judicial Administration Standard 39 of the California Rules of Court specifically encourages judicial participation in community outreach:</p> <p>“Judicial participation in community outreach activities should be considered an official judicial; function to promote public understanding of and confidence in the administration of justice. This function should be performed in a manner consistent with the California Code of Judicial Ethics.”</p> <p>California judges are reminded that Canons 1 and 2 require judges to uphold and observe high standards of conduct, in both bench and off-bench activities. The <b>Commentary to Canon 2A</b> cautions that “a judge must therefore accept restrictions on the judge’s conduct that might be viewed as burdensome by other members of the community and should do so freely and willingly.”</p> <p>Guidelines for these constraints upon judicial conduct in extrajudicial activities are codified in <b>Canon 4A</b>,</p>	<p><b>Slide 55</b></p> <p><b>Slide 56</b></p> <p><b>Slide 57</b></p>



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	<p>which mandates that a judge may engage in extrajudicial activities only so long as the activities do not:</p> <ol style="list-style-type: none"> <li>1) cast reasonable doubt on the judge's impartiality</li> <li>2) demean the judicial office</li> <li>3) interfere with the proper performance of judicial duties, or</li> <li>4) lead to frequent disqualification.</li> </ol> <p>Thus judges must conform off-bench behavior to comport with maintaining these high standards; the Commentary warns that inappropriate use of humor or incidental demeaning remarks may be considered violations of the Code as they may be deemed to be expressions of bias or prejudice.</p> <p>Judges may "speak, write, lecture, teach and participate in activities concerning legal and non legal subject matters" but are advised to ensure that the use of the judicial title, or the prestige of judicial office, is not utilized to promote the personal or pecuniary interest of the judge or others. <b>(Canons 4B, 2B)</b> An exception to this is permitted to identify the judge by title in the promotion of legal education programs and materials. <b>(Commentary to Canon 4B)</b></p> <p><b>Conclusion and Wrap-up</b></p> <p>Judges in Elder Abuse courts can play an important and vital role by educating their courts and their communities on elder abuse and other topics involving the senior population, networking and coordinating organizations and individuals who provide services to the elderly, and promoting access to the courts for Elders and disabled persons. As articulated in the Preamble to the Code of Judicial Ethics,</p> <p>"The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to this code are the precepts that judges, individually and</p>	<p><b>Slides 58-59</b></p>

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	<p>collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system.”</p> <p>Thus, the constraints and restrictions imposed by the Code need not be burdensome or obstacles, but aspirations for judicial conduct. Leadership in the community on Elder Abuse and other issues can be achieved without compromising due process and impartiality, and thus the court can fulfill a significant role in violence prevention, community awareness and the enhanced safety of the citizenry.</p>	