

PROFESSIONALISM: WHAT IS THE ROLE OF AN INDEPENDENT, RESPONSIBLE, WELL-INFORMED, AND ETHICAL JUDICIARY IN ADDRESSING OUR CURRENT SENTENCING AND INCARCERATION CLIMATE?

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PROLOGUE

More people are incarcerated in the U.S. than in any other country in the world — 25% of the world’s prisoners are in U.S. prisons. All of this has occurred with evidence that the “lock them in prison and throw away the key” theory does not work to reduce crime rates or recidivism. What we do know is that it is breaking the bank. While economic realities have forced a fresh look at these problems by many states and most recently by the federal government, this overwhelming problem persists. Faculty and group will discuss many of the ethical considerations relevant to how judges take a leadership role in bringing about constructive changes to sentencing practices.

THE QUESTION

Judges have “the inexorably central role” in sentencing.¹ Are we ethically and professionally bound to participate in, if not lead, the effort to put the sentence and its consequences on an evidence-based footing geared toward reduced recidivism and successful reentry into the community, and toward reducing our massive incarceration rates?

1 Michael Tonry, (1996), *Sentencing Matters*, p. 173, Oxford University Press: USA.

I.

PLACING THE QUESTION IN CONTEXT

A.

THE HISTORY OF SENTENCING REFORM IN THE UNITED STATES

It was a judge who began the conversation about sentencing and sentencing reform in the United States and a judge who was responsible for igniting the consideration of concepts like “the Sentencing Commission” and “Sentencing Guidelines.” In 1972, Federal District Judge Marvin Frankel of the Southern District of New York wrote *Criminal Sentences—Law without Order*.² In his book Judge Frankel excoriated the indefinite sentencing system of unfettered judicial sentencing discretion which had existed in both the U.S. state and federal systems since the 1930’s. Judge Frankel posited many possible suggested improvements to what he viewed as the lackadaisical, purposeless, and inattentive system under which judges were then sentencing offenders. The most significant of his suggestions were his calls for “Commissions on Sentencing” and “Codified Sentencing Weights and Measures.”

In 1972 every state and the federal system had in place a sentencing system which gave a judge unfettered discretion in sentencing with no clear statutory “sentencing standard or purpose.” Sentences were indefinite with potential terms of zero to ninety nine years. No statutory or jurisprudentially stated sentence purposes, goals or standards were in place. This sentencing system resulted in sentences which were widely disparate and unequal as to race, gender, geography, urban or rural jurisdiction, and based on the individual judicial temperament and value system. Appellate review of sentences was generally limited to violations of the Eighth Amendment prohibition against cruel and unusual punishment, and sentences rendered outside the individual statutory limits.

However, when Judge Frankel wrote his book in 1972 there were few mandatory minimum sentences, parole eligibility widely was set at completion of one-third of the sentence, good time credits were available and sentence enhancements for multiple offenders and violent offenders beyond the original sentence imposed were largely unheard of. The federal system had recently put

2 Marvin E. Frankel, (1972), *Criminal Sentences: Law Without Order*, Hill and Wang: New York.

into place the pre-sentence investigation and report which provided offender information to the sentencing judge.

The Ethical Implications of Judge Frankel's Bold Statements

There is no question, given the abundant early research on the topic, that Judge Frankel's accusation of widely deviant sentencing along racial, gender, socio-economic, and other lines was borne out.³ This accusation and eventual finding, of course, had huge ethical implications for the judiciary. It called into question the basic ethical tenet of the fair and impartial judgment and badly tarnished the reputation of both the state and federal judiciary.

Following Judge Frankel's book, we have seen forty years of "sentencing reform." In some states today the terrible problem of disparate sentences has been addressed while in others the original wide open discretionary system continues to exist with sentencing unfocused on goals or standards.⁴

On the one hand, most states today have statutorily stated general sentencing goals, standards, or purposes. Many states and the federal system formed sentencing commissions between the late 1970's and early 1990's with the purpose of establishing Sentencing Guidelines.⁵ Today, eighteen states, the District of Columbia, and the federal system have adopted Sentencing Guidelines.⁶ While state guidelines systems differ in their goals, scope of coverage, design, and operation, many are viewed as successful. The federal sentencing guidelines, however, are viewed by most as wholly unsuccessful, onerous, and burdensome.⁷

3 See, e.g., Alfred Blumstein, Jacqueline Cohen, Susan E. Martin, & Michael Tonry (eds.), (1983), *Research on Sentencing: The Search for Reform* Vol. II, Ch. 2, National Academy Press: Washington D.C.; Ilene Nagel & John Hagan, (1983), "Gender and Crime: Offense Patterns and Criminal Court Sanctions," in Michael Tonry & Norval Morris (eds.), *Crime and Justice: An Annual Review of Research*, Vol. IV, University of Chicago Press: Chicago; Kay A. Knapp, (1984), *The Impact of Minnesota Sentencing Guidelines: Three-Year Evaluation*, Minnesota Sentencing Guidelines Commission: St. Paul, Minnesota; Coramae Richey Mann, (1993), *Unequal Justice: A Question of Color*, Indiana University Press: Bloomington.

4 However, all over the United States and in the federal system the judge's discretion has been limited by mandatory minimum sentences, probation and parole restrictions, or elimination and sentencing enhancements above the base sentence.

5 Jeffrey Bashaw, (2012), *The Failure of Sentencing Commissions: The Effect of Resource Impact Assessment in Institutional Design*, Master's Dissertation, The London School of Economics: UK.

6 Richard S. Frase, (2005), State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues, 105 *Colum. L. Rev.* 1190. In some states such as Louisiana, guidelines were adopted and later rejected.

7 Tonry (1996).

Unquestionably, sentencing guidelines have caused unethical disparate sentencing to diminish in the jurisdictions in which they are in effect.

Beginning in 1989, drug courts began to come onto the scene and now exist all over the United States. More recently, in the last ten years, other specialty courts are also appearing, including mental health, veterans, DWI, and Reentry Courts. Sentences rendered within this milieu are specifically tailored to the individual offender's risks and needs.

Beginning in the new millennium some jurisdictions have also begun considering the notion of "pre-sentence risks/needs assessment". Today, in a few states, pre-sentence risks/ needs assessment tools are now administered in some cases.

On the other hand, the United States prison population has more than tripled over the last forty years. Beginning in the 1980's and progressing into this millennium, Congress and state legislatures began passing legislative packages based upon "Truth in Sentencing" and "Tough on Crime" concepts which replaced the rehabilitative sentencing model with the retributive sentencing construct. In some states Sentencing Commissions worked in support of this process. Guidelines were also created or amended upward to support "Truth in Sentencing" legislation. Some form of the mandatory minimum sentence for an ever expanding number of crimes, decreased or eliminated probation and/or parole eligibility, and good time credits including the "three strikes and you're out" and "eighty-five percent" rules, and enhanced punishment beyond the base sentence for violent offenders, sex offenders, and multiple offenders now exists nationwide.

This "Truth in Sentencing" and "Tough on Crime" fervor was driven by the notion, which became widely popular on the campaign trail, that harsher penalties would reduce crime rates and that judges could not be trusted to impose tough sentences unless statutorily mandated. The federal government fueled the "Truth in Sentencing" and "Tough on Crime" drive by various federal initiatives in the 1980's and 1990's which sent billions of dollars to the states to build prisons contingent upon enactment of harsher sentence structures.

Today we know that tougher penalties and increasing prison populations do not reduce crime rates.⁸ This knowledge presents a complex conundrum for

8 See National Research Counsel Panel on the Understanding and Control of Violent Behavior, (1993-1994), *Understanding and Preventing Violence*, 4 Volumes, National Academy Press: Washington, D.C..

judges. We are ethically bound to apply the law as written; however, research tells us that the mandatory sentences we are imposing are, in many cases, doing more harm than good. What is our responsibility in the face of this dilemma?

For the last several years many states, primarily driven by economic realities, have taken a hard look at the “Truth in Sentencing” and “Tough on Crime” laws which have been enacted over the last forty years and more “sentence reform” is underway.⁹ New sentencing commissions continue to form which seek to address a broad range of sentencing goals rather than sentencing guidelines in particular. Specifically, these commissions seek research driven methods to address the mass over-incarceration rate which currently exists throughout the United States.¹⁰

The question for this paper is what role has the judiciary played in “sentence reform” and what role can and should the judiciary play going forward in this new effort in “sentence reform.”

B.

CANONS OF JUDICIAL ETHICS AND JUDICIAL CONDUCT

This paper poses a two part question. What role are judges ethically permitted to play in sentencing reform? And, professionally what role should judges play in sentencing reform? These questions must obviously be discussed and answered in the context of Canons of Judicial Conduct and Ethics. Because each state has its own Canons, in this conversation I will rely upon the national standards set forth by the American Bar Association.

1. ABA Model Code of Judicial Conduct¹¹

In writing its Model Code of Judicial Conduct the ABA stated that it intends the code to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct. The preamble states that an independent, fair and impartial judiciary is indispensable to our system of justice. The preamble further states that the judiciary plays a central role in preserving the principles of justice

9 Much of this effort has been driven by the help, funding, and encouragement of The Pew Charitable Trusts Public Safety Performance Project, which reports widely on the various state efforts.

10 Bashaw (2012), p.4.

11 All references *supra* are to the 2011 edition.

and the rule of law. The code is comprised of four Canons with numbered Rules and Comments relevant to each Canon. The relevant Canons are listed below. The relevant Rules and Comments are contained at appendix A and will be referred to throughout this paper.

Canon 1

A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Canon 2

A judge shall perform the duties of judicial office impartially, competently, and diligently.

Canon 3

A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.

II.

THE JUDGES' ROLE IN EARLY SENTENCE REFORM

A.

THE ROLE JUDGES PLAYED IN THE ORIGINAL SENTENCING COMMISSIONS AND SENTENCE GUIDELINES 1972-MID 1990'S

Judge Frankel's original 1972 proposal was for a commission which would be a permanent agency responsible for: 1. studying sentencing, corrections, and parole; 2. the formulation of laws and rules to which the studies pointed; and 3. the actual enactment of rules, subject to traditional checks by the legislative branch and the courts. Judge Frankel envisioned this commission to be comprised of people of "stature, competence, devotion, and eloquence" which would include lawyers, judges, penologists and criminologists. It would also include sociologists, psychologists, and prison inmates.

The membership of the original 1970 to early-1990's commissions, some of which were permanent and some for a defined period, was indeed multi-disciplinary. None included prison inmates. Most included victim's group representation. Judges were members of the overwhelming majority of the early

commissions. In Ohio, Nevada, Alabama, Louisiana, North Carolina, Delaware as well as other states the chief justice or another judge chaired the commission or “drove” its work. While some of the early commissions had broader mission statements, generally the work of those early commissions revolved around sentencing guidelines. Interviews with members of those early commissions indicate that the judges involved in the commissions were committed to addressing the rampant nationwide sentencing disparities and were generally enthusiastic participants in commission work.

Judicial participation in early sentencing reform beyond the commissions’ members was, however, less broad. As is frequently stated, “Change is hard, change in government is harder and change in the judiciary is hardest.” Second, it was very difficult for many judges to acknowledge that the sentencing disparities which existed in the indeterminate sentencing schemes existed at all or, if they existed, that they were unwarranted and unjust. Third, judges also saw any limitation on their unbridled sentencing discretion as both a usurpation of their authority and an attack on judicial independence. Finally, many judges believed then, and now, that it was inappropriate and possibly unethical to take an active role in policy making and policy debates.¹²

In some states, such as Maine, Connecticut, New York, and South Carolina, in the 1980’s, judges worked to defeat proposed guidelines. In the mid-1990’s, Louisiana judges joined with the prosecutors to extinguish existing guidelines.¹³

Guidelines were not originally comfortably received by most state judges, although, with the passage of time, judges in many guideline states are now of a more positive mind toward to their utility. Still, judges in non-guideline states remain adamantly opposed to guidelines. Why is that? Perhaps the early national dialogue in the face of the forty years of sentencing quietude from the 1930’s into the 1970’s was inadequate to motivate judges to embrace the massive sentence structure overhaul being contemplated. Perhaps the various commissions did not always do a sufficient job of seeking pre and post enactment widespread judicial buy-in. It is reported that in some states such as Oregon, Minnesota, and

12 Tonry (1994), pp. 165-173.

13 Andrew von Hirsch, Kay A. Knapp, & Michael Tonry, (1987), *The Sentencing Commission and its Guidelines*, Northeastern University Press: Boston; Deborah M. Carrow, (1984), *Judicial Sentencing Guidelines: Hazards of the Middle Ground*, *Judicature* Vol. 68, pp. 161-171; Deborah M. Carrow, Judith Feins, Beverly N.W. Lee, & Lois Olinger, (1985), *Guidelines Without Force: An Evaluation of the Multi-Jurisdictional Sentencing Guidelines Field Test*, *Report to the National Institute of Justice*, Abt Associates, Inc.: Cambridge, Massachusetts.

Washington, where guidelines were accepted by the judiciary and successfully implemented, the success was attributable to the persuasive abilities of the judicial commission members.¹⁴

Importantly, given the overwhelming data reported which reflected huge racial, gender, and other sentencing disparities, it was clear that something had to be done. While hindsight is 20/20, the judiciary as a whole was in rampant violation of Canons One and Two of the ABA Code of Judicial conduct as it exists today. ABA Canon 2 Rule 2.3 States,

A. A judge shall perform the duties of judicial office...
Without bias or prejudice.

B. A judge shall not, in the performance of judicial duties
by works or conduct manifest bias or prejudice...based
upon race, sex, gender, national origin, ethnicity, disability,
age, sexual orientation, marital status, socioeconomic status,
or political affiliation. . . .

B.

A JUXTAPOSITION: JUDGES AND DRUG COURTS 1989 – TODAY

Preliminarily, while judges did not initially dive whole-heartedly into the “sentencing reform” sea, as reflected in their general tepid to oppositional approaches to the early sentencing commissions and sentencing guidelines, from the beginning judges gave widespread initial endorsement and quickly came to lead the “Drug Court Movement.” What is that concept, if not Sentencing Reform?

While it goes without saying that Janet Reno, Dade County, Florida State’s Attorney in the late 1980’s and early 1990’s, (and later United States Attorney General) is the “inventor” of Drug Court, it is important to note, one more time, that we can see the germ of the idea in two concepts promoted by Judge Frankel in his 1972 book.

14 Tonry (1996).

Judge Frankel's "Sentencing Councils"

First, Judge Frankel promoted the interesting and novel notion of "Sentencing Councils." He explained a concept already in place in the early 1970's within the federal system in three individual courts, the Eastern District of Michigan (Detroit), The Eastern District of New York (Brooklyn), and the Northern District of Illinois (Chicago). In the early 1970's the federal district judges on the Eastern District of Michigan bench became concerned about their sentencing practices. They began meeting weekly to share their worries. Eventually this practice became formalized into "Sentencing Councils." Thereafter, two other federal district benches adopted the approach.

The system worked like this: The judge before whom a criminal case was pending and two other judges received the pre-sentence report. The three judges met, usually with a probation officer present. At the meeting the judges compared their preliminary estimates of the appropriate sentence and discussed the case. On the basis of that session, the sentencing judge might maintain his original position or revise his original thinking within his own exclusive judgment. The sentencing judge then presided over the sentencing hearing as would normally occur. According to Judge Frankel, the experience of the courts which engaged in this practice was that the sentencing judge, in a substantial percentage of cases, moved his own tentative stance toward an ultimate sentence reflecting in some part his colleagues' views. Also, it appeared that sentencing extremes, either harsher or more lenient, became tempered. Finally, while there was a tendency toward the middle, overall, it appeared that sentences were more lenient. It appeared that the judges involved in this program gave shorter prison sentences and tended toward the greater use of probation. Judge Frankel promoted this concept as a useful tool in the face of unbridled standard less sentencing discretion.¹⁵

Judge Frankel's "Mixed Sentencing Tribunals"

Judge Frankel's second proposal which found a home of sorts in specialty courts is "Mixed Sentencing Tribunals." Judge Frankel advocated for sentencing influenced by a panel of three: a judge, a psychiatrist or psychologist, and a sociologist or educator. He argued that this concept would give weight in sentence considerations to such concepts as youthful behavior, propensities toward

15 Frankel (1972), pp. 69-73.

violence, sexual misconduct, drug addiction, mental illness, family, and education history. While “Mixed Sentencing Tribunals” did not exist at the time Judge Frankel introduced the concept, federal judges were receiving pre-sentence investigation reports on every offender being sentenced.¹⁶

The Ethical Questions Presented By These Proposals

While Judge Frankel opined that the “Sentencing Councils” did not become wide spread because judges were reluctant to invest the added time involved in considering each other’s cases and feared an affront to the judicial independence of the sentencing judge, these novel concepts would easily have caused intense concern about violations of the judicial ethical constraints against *ex parte* communications. Only recently had federal judges begun receiving the pre-sentence investigation report and that was shared with both the prosecution and the defense. It was basically unheard of at that time for a judge to confer either with his colleagues or with a so called “expert” regarding any decision. The concept of exceptions to the *ex parte* restriction is new enough that the ABA created Canon 2 Rule 2.9 to deal with this very issue, specifically in terms of specialty courts.

Drug Courts

In 1989 States’ Attorney, Janet Reno presented a novel concept to her Dade County judges, “Drug Court.” The concept then and now was a hands on, judge - run court sentence and probation program which is problem solving and treatment based. Judge Stanley L. Goldstein, supported by the Florida State Supreme Court, took up the gauntlet and drove what has become one of the most successful sentencing and probation initiatives this country has ever seen. Since then, it has been largely state judge driven and state judge managed.

With the assistance of major federal funding, which began in 1994, Drug Courts have grown exponentially. Today there are 2,600 drug courts operating in the United States. The courts are based on a comprehensive model including offender assessment, constant judicial interaction, drug testing, monitoring and supervision, graduated sanctions and incentives, and treatment services including cognitive behavioral modification training. Repeated National Institute of Justice supported studies have found that drug courts significantly reduce recidivism rates and costs versus regular probation or incarceration. The concept has been so successful that with the dawn of the new millennium the treatment based

16 *Id.* at 74-75.

sentencing and probation concept has grown to embrace DWI, mental health, domestic violence, tribal, veterans and now reentry courts.

It is important, however, to point out that “Specialty Courts remain today the “Boutique” in the face of the “Wal-Mart” of traditional sentences.

The Initial Drug Court Induced Judicial Quandaries

Judges’ concerns with the Specialty Court concept have historically taken to three forms: 1. time; 2. ethical concerns; 3. skepticism over whether it really works. As to the time issue, first, as Judge Frankel discussed, some judges from the outset and today complain that the evaluation process pre-admission takes too long, clogging the docket; second, many judges are not interested in becoming “specialty court judges” – which is often a volunteer effort in addition to regular judicial duties. As to the ethical considerations, initially the entire drug court sentencing concept, wherein drug court acceptance is based upon an evaluation of the offender, and participant sanctions are imposed by the judge after a team conference, seemed fraught with potential violations of the ethical prohibition against *ex parte* communications. As to the third issue, as discussed above, today the success rate differential has been repeatedly proven in study after study.

With regard to the judges’ time concerns, ABA Canon 2 Rule 2.5 Comment 1 states, “Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge’s responsibilities of judicial office.” Efficiency cannot override effectiveness. As Judge Frankel stated,

“Measured by the time devoted to it, by the amount of deliberation and study before each decision, and by the attention to the subject as a field of intellectual concern in general, the judges’ effective expenditures of themselves in worries over sentencing do not reflect a profound sense of mission....The judge is likely to read thick briefs, hear oral arguments, and then take days or weeks to decide who breached a contract for delivery of onions. The same judge will read a presentence report, perhaps talk to a probation officer, hear a few minutes of pleas for mercy - invest, in sum, less than an hour in all – before imposing a sentence of ten years.” *Frankel at page 15.*

Furthermore, today, the time delay issues are frequently ameliorated by the transfer of “drug court cases” to the “drug court docket.” Also, the culture of sentencing on day of conviction or plea has, at least in many guideline states,

changed with the delay necessitated by guideline calculation. At least in some states judges have become comfortable with the notion that “effectiveness of their sentence is paramount to the speed at which they sentence.”

As to the additional time commitment involved with the “volunteer specialty court judge” effort, currently in many jurisdictions there are enough judges who are interested in volunteering for the job to cover the current need. As specialty courts continue to expand, this may become an issue. As the benefits of drug court and other specialty courts now clear, judges should consider participating in courts where there is a manpower need. Also, benches which do not currently have active drug or specialty courts should consider creating one. ABA Canon 1 Rule 1.2 Comment 4 states, “Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession and **promote access to justice for all.** (emphasis added)

Regarding the original ethical concerns, indeed Drug Courts, originally such a novel concept, did at first present an interesting ethical conundrum concerning the prohibition against *ex parte* conversations. That question, however, has been answered. ABA Canon 2 Rule 2.9 Comment 4 states,

A judge may initiate, permit, or consider *ex parte* communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.

C.

THE THIRD LEG OF THE STOOL: TODAY’S MASS OVER-INCARCERATION THE JUDGES’ ROLE IN GETTING THERE

While our discussion of the early sentencing reform picture thus far has been focused generally on positive efforts, other forces resulted in the mass over-incarceration we see nationally today. The forces are multi-dimensional.

The Current “Tough on Crime” sentencing construct traces its roots to New York State’s 1973 Rockefeller Drug Laws, which began the “war on Drugs” by

severely harshening the penalties for even low-level drug crimes.¹⁷ The federal government's shift from a rehabilitative sentencing and incarceration model, to a model based on retributive "Truth in Sentencing" and "Tough on Crime" rhetoric, took place as congress passed the 1984 federal Sentencing Reform Act, the 1984 Omnibus Crime Bill, and the 1994 Federal Crime Control and Law Enforcement Act. The federal government shifted its approach to sentencing and incarceration from a rehabilitative model to a retributive "Truth in Sentencing" and "Tough on Crime" model. These laws sent a tide of federal funds for prison construction to states who agreed to enact their own harsher sentencing laws. Under these influences, most states also adjusted their sentencing model from one based on rehabilitation to one based on retribution.¹⁸

With this philosophical and political turn came massive state legislative changes to sentencing and incarceration structures including mandatory minimum sentences for an ever increasing number of crimes; special attention to increased penalties and restrictions for drug offenses including enhanced penalties and restrictions for distribution of small amounts of drugs; probation, parole and good time restrictions or elimination; enhanced sentencing above the base sentence for multiple offenders, violent offenders, sex offenders, and some drug offenders.

A change also occurred in the philosophical underpinnings to probation and parole supervision. The "control and enforcement model" was substituted for the "rehabilitation" model. This meant that correction officer efforts to assist offenders to successfully reintegrate into the community diminished in favor of imprisonment and re-imprisonment for "technical violations" versus re-offenses. Permissible probation and parole terms were also extended. By 2000 more than 40% of California's prison populations was comprised of parole violators. Six in ten of California's new prison admissions were returns to custody from parole.

Both the federal prison construction funding and the uptick of state prisoners drove massive prison construction projects nationwide. While some states, notably Minnesota, remained restrained, tying statutory changes to existing available prison beds, this was by far the exception rather than the rule. In some states, such

¹⁷ See Brian Mann, *The Drug Laws That Changed How We Punish*, National Public Radio, February 14, 2013 (looking back on the legacy of Rockefeller drug laws), available at <http://www.npr.org/2013/02/14/171822608/the-drug-laws-that-changed-how-we-punish> (last visited August 23, 2013).

¹⁸ See, e.g., Bashaw (2012); Mona Lynch, (2011), Mass Incarceration, Legal Change, and Locale – Understanding and Remediating American Penal Overindulgence, *American Society of Criminology, Criminology & Public Policy* Vol. 10, Issue 3, pp. 673-698; Tonry (1996).

as Louisiana, prison construction costs were in part avoided by contracting with private prisons to house state prisoners and with local (county/parish) officials to house state prisoners. This set in place two new “industries” which “demand feeding” and created a more complicated picture for later sentencing reform.¹⁹

The statutory changes also increased prosecutorial power and diminished judicial discretion. Prosecutors now negotiate longer prison terms in exchange for a promise to reduce the charge to one with a lower mandatory minimum, or declining to file a multiple offender bill of information, which would result in an even longer term or a life sentence.

Finally, in the “Tough on Crime” atmosphere, which over the years became stronger and more politically popular, sentencing guidelines were adjusted upward in many guideline states and judges, particularly in non-guideline states, rendered longer sentence terms, more incarcerated sentences and less probated sentences for the same offenses on the same set of facts. Judges imposed stiff penalties for opting for trial in the face of a sentence offer.²⁰

Importantly, there was little to no empirical evidence to support these legislative and philosophical changes. There was no data to support the concept that “lock em up and throw away the key” would reduce crime or recidivism, or contribute to a greater likelihood for successful reentry into the community post sentence.²¹

III.

THE JUDGES’ ROLE IN THE MASS INCARCERATION REVOLUTION

The short answer is, judges, in the main, stood on the sidelines.²²

As discussed above, in some states the legislative changes were supported by sentencing commissions, so to the extent that judges were commission members or chairs, those judges were involved in drafting the “Truth in Sentencing” and “Tough on Crime” legislation. To the degree that 1980’s and 1990’s sentencing

19 Lynch (2011).

20 Lynch (2011), p. 676.

21 Tonry (1996), pp. 7-9.

22 Bashaw (2012); Lynch (2011); Tonry (1996).

commissions were guideline centric, this work was limited to guideline creation and adjustment to comply with the statutory changes. Since this legislation had little empirical support, either by way of cost analysis or outcome analysis (recidivism studies), there was little work for a sentencing commission beyond drafting to comply with legislative fervor.

As to the legislation itself, judges stood aside for several reasons:

1. Many judges believed, and continue to believe, that it is inappropriate and possibly unethical to take an active role in policy making or policy debates.
2. While in the last ten to fifteen years judges nationally have been encouraged to become appropriately civically active, judges more traditionally were encouraged to maintain distance from the greater community and from the political process for fear of a perception of impropriety such as *ex parte* communication.
3. Much of the “Truth in Sentencing” “Tough on Crime” legislation addressed itself to the “back end” of the sentence. That is, the legislation was focused on such issues as decreased or eliminated parole eligibility, restrictions in good time, or on corrections policies regarding probation and parole supervision and revocation. Judges traditionally did not focus on the offender after sentence was rendered, believing the offender at that point to be the responsibility of the corrections community.
4. While there was no empirical basis for the belief that the “Truth in Sentencing” and “Tough on Crime” retributive model would actually work, there was widespread acceptance and approval of this model. Many judges wholeheartedly believed this was the correct approach to dealing with the perceived crime problem.
5. “Truth in Sentencing” and “Tough on Crime” became wildly popular across the country generally and among the political establishment in particular. Going with the political trend was the easier route, bucking it dangerous, particularly among elected judges.
6. While in various states judicial associations existed, some were stronger than others and many were more social than policy driven at the time. Judicial associations did not regularly involve themselves in policy debates.

7. While judges occasionally appeared before the state legislatures, at that time those appearances were generally limited to judicial pay raise or court funding issues.
8. While this legislation caused expanded prosecutorial power and diminished judicial discretion, i.e., reduction of judicial independence, there was little focus on that issue at the time.

As to the harsher sentences imposed in the face of the same facts, as discussed above, judges honestly believed that stiffer sentences would reduce crime and recidivism. Yes, there were community and political pressures and no, there was no evidence to support this belief. However, plenty was written to support the premise.

The Ethical and Professionalism Implications of Standing on the Sidelines

As stated earlier in this paper, hindsight is 20/20. While Judge Frankel's 1972 comment that judges spend more time mulling over a contract for delivery of onions than on a ten year sentence is certainly true, today we have the benefit of Canons of Judicial Conduct which were not as clear and detailed in the 1970's and 80's when the "Tough on Crime" revolution got under way. Today, the Rules and Comments which elucidate on the canons might cause a state judicial organization to study the "Tough on Crime" legislation and take a position. Those rules and comments might encourage a judge to become involved in a sentencing commission, or engage in the study of effective and efficient sentencing and teach other judges on that topic. The canons' rules and comments might encourage the judge to speak to various community groups about what the evidence says drives crime, recidivism and mass incarceration. Those rules and comments might encourage the judge to become involved in his or her community to strike at the root causes of crime. The following rules and comments to the ABA Canons would have helped at the time:

Canon 3 Rule 3.2

Appearances before Governmental Bodies and Consultation with Government Officials

Canon 3 Rule 3.2 Comment 1

Judges possess special expertise in matters of law, the legal system, and the administration of justice, and may properly share that

expertise with governmental bodies and executive or legislative branch officials.

Canon 3 Rule 3.4

Appointments to Governmental Positions

Rule 3.4 implicitly acknowledges the value of judges accepting appointments to entities that concern the law, the legal system, or the administration of justice....

Canon 3 Rule 3.1

Extrajudicial Activities in General

Canon 3 Rule 3.1 Comment 1.

To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. In addition, judges are permitted and encouraged to engage in educational, religious, charitable, fraternal or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law.

IV

SENTENCING REFORM TODAY WHAT IS THE JUDGES' ROLE

A.

In The Big Picture

In the last twenty–five years a massive amount of research has been conducted from which we know the root causes of crime, and how to create sentencing systems which are efficient, effective, protective of public safety, and just.²³ The world of “Tough on Crime” is giving way to the data driven sentencing world of “Smart on Crime” and “What Works”.

23 Tonry (1996), p. 4.

Fiscal realities are causing us as a nation to look again, and this time to consider empirical research: what actions drive down crime rates; what sentences and sentence conditions drive down recidivism rates; what sentence conditions result in successful reentry to the community upon sentence completion; and what drives down mass incarceration rates? We actually have many of the answers.²⁴ New sentencing commissions or like bodies are coming on line in many states with a much broader mission—to develop research driven policy and legislation to create a “Smart on Crime” sentence and incarceration structure based on “What Works.”

Interestingly, just as Judge Frankel drove the conversation in the early 1970’s, in many parts of the country it is judges who are beating the drum of reform. Former Missouri Chief Justice Michael Wolff, past Chair of the Missouri Sentencing Commission, has spoken and written prodigiously on the need to look to evidence based practices for improving sentencing.²⁵ Judge Roger K. Warren, president emeritus of the National Center for State Courts and retired California judge, travels the country teaching judges best practices in sentencing.

But, what about the rest of us?

In 1996 Michael Tonry wrote, “With only a few exceptions, American judges have been seen as part of the sentencing problem and have played relatively little role in the fashioning of sentencing policy.”²⁶ Isn’t that exactly what Judge Melvin Frankel told us in 1972? Tonry, like Judge Frankel, went on to opine that the judiciary must recognize the inexorable central role of the judge in sentencing. Tonry believed that new sentencing policies ought to result from a process in which judges are central participants.

The ABA Canons of Judicial Conduct speak loud and clear on the leadership role judges should play in evidence based sentencing reform. Gone are the days when quiet standing at the side line was encouraged. Judges should consider the following Canon Rules in becoming the drivers of sentence reform.

Canon 1 Rule 1.2 Comment 4

Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the

24 Bashaw (2012), p. 4.

25 Michael A. Wolf & Paul J. DeMuniz, (2009), *Devil's Advocate, Judicature* (Vol. 92:4), pp. 165-166.

26 Tonry (1996), p. 165.

judiciary and the legal profession, and promote access to justice for all.

Canon 1 Rule 1.2 Comment 6

A judge should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice...

Canon 3 Rule 3.1 Comment 1

To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects....

Canon 3 Rule 3.2 Comment 1

Judges possess special expertise in matters of law, the legal system, and the administration of justice, and may properly share that expertise with governmental bodies and executive or legislative branch officials.

Canon 3 Rule 3.4 Comment 1

Rule 3.4 implicitly acknowledges the value of judges accepting appointments to entities that concern the law, the legal system, or the administration of justice....

1.

**How Can Individual Judges Play a Role in
Reforming Our Current Sentencing Structure?
Some Ideas**

The Sentencing Commission

As discussed above, many states are forming new sentencing commissions with a broader mission. Almost all sentencing commissions have judicial membership and in many states such as Missouri, Alabama, Nevada, Louisiana, Ohio, North Carolina, and Delaware, judges have chaired the commission or taken a leadership role. In 2011 the Connecticut Committee on Judicial Ethics, in response to a request for an Advisory Opinion from a judge who had been appointed to the Connecticut Sentencing Commission, unanimously agreed that it

was proper for the judge to serve on the commission. In some states the commission seeks assistance from sentencing experts. This has meant that in states such as Louisiana many judges have become involved and played a vital role in commission work.

Some judges express hesitancy to becoming involved in the current broader commission work because some of the current reform work involves subjects like alternative community based corrections such as job training as a condition of probation, reentry programs, prison based education, job training or substance abuse treatment, which are not really of concern to judges. Those judges argue that once they render the sentence their job is complete and the corrections officials' job has begun. The sentence, however, begins when it is rendered and ends when the offender is successfully reintegrated into the community at the conclusion of the sentence term. Blinders are no longer appropriate. It is important for the judiciary to be involved in improving the process from the moment the offender is arrested until the offender successfully completes his or her sentence. Myopia is no longer the order of the day. As Michael Tonry stated, if we are not a part of the solution, we are a part of the problem.

State Policy Institutes

In some states thorny topics or pieces of legislation are occasionally referred to a policy or "study" group. Often judges serve on these groups. Occasionally it is these groups which study sentencing issues.

State Supreme Courts and State Judicial Administrators Offices

In many states, the Supreme Court or the State Judicial Administrator takes a leading role in issues central to the judiciary, such as sentencing reform. For years in Missouri, Chief Justice Michael Wolff was the leader in the Missouri sentencing reform movement. In Nevada in 2007, Chief Justice James W. Hardesty drove the Nevada sentencing commission. In 2011, Alabama Chief Justice Sue Bell Cobb made an aggressive call for sentencing reform. In Louisiana beginning in 2009 and continuing until today, former Chief Justice Kitty Kimball and current Chief Justice Bernette Johnson instructed the state judicial administrator to provide much needed technical assistance to the Louisiana Sentencing Commission.

Judicial Organizations

When Judge Frankel's book was published in 1972 judicial organizations existed in most states. At that time however, many of those organizations were more social than policy making. Their legislative forays were usually limited to requests for pay raises or funding for courts. Judicial education efforts through

these organizations were typically not terribly strong. Today, however, judicial organizations in many states are less socially myopic and more actively engaged in policy and best practices work. In many states these organizations review pending legislation and take positions on legislation which may affect the quality of justice. These organizations frequently interface with state legislatures in education efforts regarding pending legislation.

Judiciary/Corrections Liaison Committees

In some states, the supreme court or the judicial administrator of a judicial organization, has formed a liaison committee of judges to work with the state corrections department(s). In these states, the judges gained tremendous insight into what happens to the offender when the offender leaves the court room. This has provided judges with invaluable information in rendering a meaningful sentence.

Judicial Education

Most states have a judicial college responsible for educating the state judiciary. Typically, it is the judges themselves who serve as instructors. Curriculum is generally driven by judicial needs. Clearly, sentencing and incarceration is an area ripe for judicial education.

Specialty Court Expansion

As discussed above, numerous outcome studies tell us that the “Drug Court Model” now used in various specialty courts in every state results in higher successful sentence completion, lower re-custody of offenders and lower recidivism rates than the traditional sentence. As specialty courts expand, judges are needed to run and preside in those courts. This is frequently a volunteer effort in addition to the judge’s regular duties. All reports, however, are that the judges who participate in these programs become stronger and better judges because of the experience.

Pilot Programs

In many states, individual benches or judges pass legislation to permit that court to try a new approach to sentencing. Here in Hawaii, Judge Steven Alm created HOPE, Hawaii’s Opportunity Probation with Enforcement Program. This is an intensive supervision program that aims to reduce crime and drug use. The program proved to be highly successful. Judge Alm now speaks all over the country and his program has been adopted by several other states. In St. Tammany Parish, Louisiana Judge William “Rusty” Knight and his colleagues are putting together a pre-sentence risk needs assessment program for every offender for

whom a probated sentence is probable. Judge Knight will conduct and outcome study and report to the Louisiana Sentencing Commission.

Community Outreach

Today we know the specific drivers of crime things like poverty, drug dependency or addiction, poor education, among many others. As we discussed above, today the Canons of Judicial Conduct strongly encourage judges to become active in their community. A great example of this work in action is Judge Gene Thibodeaux, Chief Judge of the Louisiana Third Circuit Court of Appeal. After years as a judicial educator, Judge Thibodeaux turned his interest to his community, Lake Charles, Louisiana. He has been the key motivator in the opening of two highly successful charter elementary schools and a community health center which, among other things, provides much needed substance abuse treatment.

2.

Some Big Issues for Judges to Address

Guideline States

Some judges in some guideline states view sentence problems in their states as having been resolved by sentencing guidelines, obviating the need for further reform work. However, Judge Michael Wolff pointed out in his 2009 article that the U.S. and some state guidelines are blind to risk and need assessment. He explained that those guidelines were designed to reduce disparities, to provide some measure of “truth in sentencing,” and to slow prison growth. He argued that most of these guidelines neither ended disparity nor slowed prison growth. He stated that the U.S. and most state guidelines have nothing whatsoever to do with public safety, and result in misallocation of prison resources. Judge Wolff recommended that state guidelines be reevaluated in order to determine whether redrafting is necessary in order to accommodate for offender risk/needs assessment and offender specific sentencing based upon those findings, thus focusing on driving up successful reentry into the community at sentence conclusion and driving down recidivism.²⁷

Determinate and Indeterminate Discretionary States

In the non-guideline, non-risk assessment tool states the judges’ sentencing world has changed little since Judge Frankel first addressed sentencing disparity in

27 Wolff & DeMuniz (2009), p. 165.

1972. These states represent over half of the country. The changes in these states have been to impose the mandatory minimum sentences and parole, probation and good time restrictions demanded by “Truth in Sentencing.” However, within those prohibitions sentencing is wide open.²⁸ This means that no changes were made which address the original horror of disparate sentencing based upon race, gender, ethnicity and socio-economic status. Don’t the Canons of Judicial Conduct instruct the judiciary in those states to engage in a full blown sentencing analysis in order to determine whether the judiciary is in rampant ethical violation?

Canon 2.

A judge shall perform the duties of judicial office impartially, competently, and diligently.

Canon 2 Rule 2.3

Bias, Prejudice, and Harassment

A. A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

B. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation...

Risk/Needs Assessment at Sentencing

Some states, notably Missouri, Wisconsin, Oregon, and Virginia, have instituted some form of risk/needs assessment at sentencing. In Virginia, this resulted in a twenty-five percent reduction of inflow into the prison population.²⁹ As Judge Wolff points out in his 2009 article, “treatment courts” have taught us that evidence based practices in sentencing are highly successful. While one of the original arguments against the treatment courts was that it took too long to sentence the offender, clogging dockets, we now know the success rate justifies the wait. This is an avenue worth pursuing.

28 Bashaw (2012), p. 3.

29 Wolff & DeMuniz (2009), p. 165.

Arriving at Guiding Principles in Sentencing

Retired Missouri Chief Justice Michael Wolff suggests the following guiding principles applied in sentence reform efforts:

Punishment should be no harsher than warranted. Whatever our sentencing objectives, a sentence should not be disproportionately severe in view of the offender's blameworthiness and the harm inflicted or threatened by the offender's behavior. A sentence should not be more severe than required by the pursuit of legitimate sentencing purposes.

Avoid mandatory minimum sentences. Individualized sentencing does not guarantee best practices, but when properly directed and informed it is critical to best practices.

"Evidence-based sentencing" should replace the misunderstood phrase "judicial discretion".

We should have a preference for community-based sanctions, rather than for incarceration. For most low and moderate risk offenders (other than some sex offenders), community based sanctions work better, as measured by recidivism reduction, than does incarceration, and they are far more cost effective. The great majority of offenders who are imprisoned will return to their communities without receiving effective programming. When we need to use incarceration, that resources should not be spread among offenders who are better dealt with in the community.

Everyone who works with an offender should know that person's risks and needs.

Every sentence should pursue best efforts to minimize recidivism because, in most cases, such a sentence best serves all sentencing purposes. When other sentencing purposes demonstratively require that we deviate from efforts to minimize recidivism we should deviate only to the extent demonstrably necessary to serve those other sentencing purposes.

All treatment programs, both in prison and in the community, should be evaluated on an ongoing basis, particularly with respect to how well they meet the criminogenic needs of moderate and high risk offenders.

*We should evaluate sentencing outcomes.*³⁰

B.

The Individual Sentence

“the principal and underlying reason why...prisons are overcrowded, cost a lot and result in high levels of recidivism at the expense of public safety is that judges are sentencing too many non-violent offenders to prison, and sentencing some of them for too long a term.”

- Judge Roger K. Warren, National Center for State Courts.³¹

While most of this paper has been dedicated to the judges’ role and responsibility in sentencing system reform, the fact of the matter is in most states, particularly in the non-guideline states-which make up over fifty percent of the country-the buck stops with the sentencing judge. As discussed earlier in this paper, the “Tough on Crime” revolution and move from the rehabilitative to the retributive sentencing model has resulted in guideline adjustments upwards and in judges in discretionary states rendering harsher sentences with more incarcerated sentences and less probated sentences.

Retired Missouri Chief Justice Michael Wolff recommends that as sentencing judges we identify our sentencing purposes and then pursue them within the means available as a matter of law, proportionality, risk, and priority.³² Judge Wolff suggests that the legitimate purposes of sentencing are all contained in the following goals:

Public Safety: crime reduction, accomplished by rehabilitation, incapacitation, and deterrence. Of these, deterrence is the least achievable, and, except very rarely, the weakest guide for sentencing.

Public Values: a) promotion of respect for persons, property, and rights of others; b) obviating vigilantism and private retribution; c) serving the legitimate needs of any victims.

30 Wolff & DeMuniz (2009), p. 166.

31 Little Hoover Commission, Public Hearing on Sentencing Reform, *Written Testimony of Roger K. Warren* (June 22, 2006).

32 Wolff & DeMuniz (2009), p. 165.

The bottom line is that currently many state judges are locked in the frenzy of the very long sentence. There is nothing to be served by the “90 years without benefit of parole” sentence except a very old, very expensive state prisoner. Aren’t we ethically and morally obligated to render no harsher sentence than necessary to achieve the above two stated goals?

The current “Tough on Crime” statutory construct of mandatory minimums, benefit restrictions, and sentence enhancements over the base sentence means that we judges have basically abdicated our judicial independence, in fact our judicial responsibility to the state prosecutor who uses these statutory constructs to eek uselessly long sentences out of offenders in exchange for avoiding an even longer sentence post trial. We need to pick up our mantel of responsibility.

We are ethically and morally responsible to sentence each offender who appears before us in the thoughtful, fact and evidence based manner Judge Frankel advocated for in 1972. Isn’t it time to get started?

Conclusion

The answer to the original question posed is: We, the judiciary, are ethically and professionally bound to participate in, and to lead, the effort to put the sentence and its consequences on an evidence based footing geared toward reduced recidivism and successful reentry into the community, and toward reducing our massive incarceration rates. We, as individual judges, in sentencing each individual offender, are also ethically and morally bound to identify our sentencing purposes and then to pursue them within the means available as a matter of law, proportionality, risk, and priority.

APPENDIX A
American Bar Association
Model Code of Judicial Conduct
2011 Edition
Relevant excerpts

Canon 1

A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Canon 1 Rule 1.1

Compliance with the law

A judge shall comply with the law, including the Code of Judicial Conduct.

Canon 1 Rule 1.2

Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Canon 1 Rule 1.2 Comment 1

Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.

Canon 1 Rule 1.2 Comment 4

Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all.

Canon 1 Rule 1.2 Comment 6

A judge should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice....

Canon 2

A judge shall perform the duties of judicial office impartially, competently, and diligently.

Canon 2 Rule 2.2

Impartiality and Fairness

A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

Canon 2 Rule 2.2 Comment 1

To ensure impartiality and fairness to all parties, a judge must be objective and open-

minded.

Canon 2 Rule 2.2 Comment 2

Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

Canon 2 Rule 2.3

Bias, Prejudice, and Harassment

- A. A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.
- B. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, as shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.
- C. A judge shall require lawyers in proceeding before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.
- D. ...

Canon 2 Rule 2.3 Comment 1

A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.

Canon 2 Rule 2.4

External Influences on Judicial Conduct

- A. A judge shall not be swayed by public clamor or fear of criticism.
- B. A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.
- C. A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

Canon 2 Rule 2.4 Comment 1

An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.

Canon 2 Rule 2.5

Competence, Diligence, and Cooperation

- A. A judge shall perform judicial and administrative duties, competently and diligently
- B.

Canon 2 Rule 2.5 Comment 1

Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office.

Canon 2 Rule 2.9

Ex Parte Communications

A. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

(2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge give advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

(3) A judge may consult with...other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.

Canon 2 Rule 2.9 Comment 4.

A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.

Canon 2 Rule 2.9 Comment 5.

A judge may consult with other judges on pending matters, but must avoid ex parte discussions of a case with judges who have previously been disqualified from hearing the matter, and with judges who have appellate jurisdiction over the matter.

Canon 3

A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.

Canon 3 Rule 3.1

Extrajudicial Activities in General

A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not:

C. participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.

Canon 3 Rule 3.1 Comment 1.

To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. In addition, judges are permitted and encouraged to engage in educational, religious, charitable, fraternal or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law.

Canon 3 Rule 3.1 Comment 2

Participation in both law-related and other extrajudicial activities helps integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system.

Canon 3 Rule 3.2

Appearances before Governmental Bodies and Consultation with Government Officials

A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except:

- (A) in connection with matters concerning the law, the legal system, or the administration of justice;
- (B) in connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties; or
- (C)

Canon 3 Rule 3.2 Comment 1

Judges possess special expertise in matters of law, the legal system, and the administration of justice, and may properly share that expertise with governmental bodies and executive or legislative branch officials.

Canon 3 Rule 3.2 Comment 2

In appearing before governmental bodies or consulting with governmental officials, judges must be mindful that they remain subject to other provisions of this Code, such as Rule 1.3, prohibiting judges from using the prestige of office to advance their own or others' interests, Rule 2.10, governing public comment on pending and impending matters, and Rule 3.1 (C), prohibiting judges from engaging in extrajudicial activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.

Canon 3 Rule 3.4

Appointments to Governmental Positions

A judge shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the law, the legal system, or the administration of justice.

Canon 3 Rule 3.4 Comment 1

Rule 3.4 implicitly acknowledges the value of judges accepting appointments to entities that concern the law, the legal system, or the administration of justice. Even in such instances, however, a judge should assess the appropriateness of accepting an

appointment, paying particular attention to the subject matter of the appointment and the availability and allocation of judicial resources, including the judge's time commitments, and giving due regard to the requirements of the independence and impartiality of the judiciary.