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[Balancing Judicial Propriety and Access to Knowledge of New Law Developments]

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The Honorable Ellen A. Peters*

Thank you very much. Let me say at the outset that I am grateful to Professor Lubet for having been kind enough to share his analytic model with me as we were getting ready for this panel discussion. On reflection, however, I want to take this opportunity to raise some questions on issues that are perhaps not yet sufficiently well-developed to fit neatly into his thoughtful model.

When I was asked to participate in this panel on judicial ethics, it occurred to me to revisit a problem that has recurrently troubled me since my appointment to the appellate bench. I expect that it is a problem that all of us have encountered in one form or another from time to time, but it is particularly troublesome to me, because of my long years of teaching at Yale, and because I am now married to a law professor. The problem on which I would like to focus is the extent to which a judge may consult with experts, especially with legal scholars, without violating the canons of judicial ethics.

I think this topic has some general interest, beyond the conversations at my breakfast table, because it illustrates the need to reconcile competing principles that have divergent implications for the proper boundaries of judicial ethics. On the one hand, as Judge Markey pointed out so eloquently in his earlier remarks, judges must not only do the right thing but must give the appearance of doing the right thing. The appearance of propriety is important to us not only because we have a general duty to be accountable to the public but also because we cannot perform our role without public respect for our actual and perceived integrity. On the other hand, judges cannot work effectively in splendid isolation from developments in the law. We have recognized that obligation by our commitment to foster continuing judicial education in each of our states. Indeed, tomorrow's program on the evaluation of judges will pick up on the theme that judges have an ongoing duty to continue to educate themselves about the law. All of us as judges have an independent, nondelegable responsibility to know as much as we possibly can about the cases pending before us and about the cases whose arrival is imminent. We cannot, in good conscience, rely exclusively on the contents of the briefs that the litigants have presented to us if such reliance turns out to be inconsistent with our obligation to do the legal probing that is required in the service of justice.

The duty to avoid the appearance of impropriety and the duty to

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search for knowledge may come into conflict under the Canons of Judicial Ethics. Canon 2A states the first of these obligations: "A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3A(4) addresses the second of these obligations: "The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply: A. Adjudicative Responsibilities . . . . (4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. "A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond." The official Commentary to Canon 3A(4) provides: "The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent provided. It does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities. An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite him to file a brief amicus curiae."

Let me test the boundaries of Canon 3A(4) the only way I know, through a variety of hypothetical cases. Suppose that you and your law clerk—I take it there is no ethical distinction there—are engaged in researching a case that your court has taken under advisement. As you set about preparing the opinion, you come across relevant materials not cited in any of the briefs: a treatise, a law review article, a case, or even a statute. We all know that all of these lacunae in briefs happen. If the materials uncovered by your ex parte research consist of ancient war horses, articles and cases once fondly cherished but now alas forgotten, I would suppose there is no problem. Anything that is part of the established literature is available to you because every lawyer has had access to these sources. The litigants need neither notice nor an opportunity to respond.

Suppose, however, that the article that intrigues you has, as Judge Markey suggested, only recently been published, or the case is one just now decided by the United States Supreme Court. Perhaps the materials suggest some entirely new theory or approach, not necessarily one associated with the Chicago school of law and economics. Does the spirit of "ex parte communication" under Canon 3A(4) impose upon

the judge a duty to call the lawyers back in order to tell them: "I have an idea about this case that had not previously occurred to me. Because it may or may not be a good idea, because it relates to the following newly-discovered materials that appear to be relevant, I'd like to set this case down for further argument." If widely adopted in Connecticut, such a practice would have a distinctly detrimental effect on the shape of our appellate docket.

Similar issues may arise out of judicial attendance at educational seminars. I think we can all agree that participation in such seminars is essential if we are to keep up with new developments in the law. Does Canon 3A(4) preclude a judge from attendance at a seminar on the constitutional law of search and seizure if he knows that a search and seizure case is now pending, or is impending, before the court? Does it matter how far along the case is in the pipeline? Does it matter whether the case has already been assigned to him for the writing of the majority opinion? In any of these situations, is the judge receiving forbidden ex parte communications? Is the position less precarious, ethically speaking, if the seminar in question is not one restricted to judges but has been sponsored by the bar association, or a local law school, and local lawyers were invited to attend? Does the ethical position turn upon the novelty of the lecturer's presentation?

In candor, I do not think that these examples are really hard cases. I do not think it likely that any of them can be said to involve ethical transgressions in fact or in appearance. But I can put you a harder case. Suppose the seminar discussion, by accident or by design, comes to focus on a hypothetical that bears a very close relationship factually to the case before your court.

I take it to be reasonably clear that a judge cannot directly or indirectly initiate questions that will cause the educational seminar to consider the case before him. In an open forum, the discussion would in all probability be ex parte to the litigants. And if the judge himself should refrain from asking the question, I expect it would be unseemly and improper to plant this question with a good friend or a colleague to act, even unknowingly, as the judge's surrogate.

Suppose, however the hypothetical comes to dominate the seminar discussion without your planting it? So often the questions that come for resolution to the Connecticut courts bear a close resemblance to similar cases that are concurrently surfacing in Utah or Minnesota or other states around the country. It is, therefore, not at all unlikely, it may in fact be foreseeable, that if you attend a well-designed educational seminar on new developments on a general topic that encompasses your problem, you may hear a pointed discussion of a specific fact configuration quite similar to the specific issue that is before you. Is it ethically reprehensible to take timely advantage of this nominally neutral seminar because you can foresee receiving communications

and provocative ideas concerning a pending or impending proceeding to which the lawyers in your case will not have the opportunity to respond? Under a strict reading of Canon 3A(4), I think the answer to this question is not free from doubt.

Let me pose still a different kind of problem, the social encounter. At my house, or someone else's home, I meet a scholar who is known to be especially knowledgeable in the constitutional law of the fourth amendment. The Canon is reasonably clear that it would be unethical to ask her for an advisory opinion, even in hypothetical form, about a specific case then pending before my court, unless I follow the cumbersome methodology of soliciting an amicus brief.

The Canon is, I would submit, less clear about related encounters. Suppose that I have independently discovered some new writing, some dramatically new scholarly theory, that casts a new light on the opinion for which I am about to put pen to paper. Is it permissible to ask a scholarly friend about the professional standing of my newly discovered author, or about the professional respectability of this novel thesis in the field of fourth amendment literature? Are these questions legitimate because they do not deal directly with the particular facts of the particular proceeding before me? Indirectly, the answers that I receive will nonetheless inform me, will provide a point of reference, and will probably shape my view as I prepare my opinion. If it is on balance permissible to ask a scholarly expert to comment on bibliographic materials that I have located, is it equally permissible to ask the expert to save me a trip to the law library by identifying the bibliographic sources for me?

In thinking about the legitimacy of ex parte scholarly encounters, we need to remind ourselves of the role of our law clerks. We hire recent law school graduates to serve as our clerks precisely because they give us access to the new ideas that are percolating through law school classrooms, to the new theories that are finding their way into the legal literature. One of the central responsibilities we assign to our law clerks is to help us, where appropriate, to bring these new ideas to bear upon the proceedings that are pending before us. Because law clerks are part of our staff, the Code expressly excludes such ex parte communications from ethical opprobrium. The Code recognizes, as do we all, that such communications are essential to the discharge of our central responsibility for the development of the law. Greater access to scholarly assistance from other quarters would equally serve the goal of helping us to do a better job with this difficult assignment.

As I said at the outset, I see no easy answers to the competing ethical considerations of maintaining the appearance of propriety while facilitating access to scholarly ideas about new developments in the law. There are costs and benefits in our responsibilities for judicial

ethics, just as there are costs and benefits that attach to other competing principles that come before the courts.

The costs and benefits of meticulous compliance with the letter and the spirit of Canon 3A(4) have not often been carefully spelled out. The costs of delay because of repeated consultation with interested lawyers would be prodigious, if plenary consultation were required every time that a judge contemplated taking account of materials not mentioned in the briefs, even in a footnote. The case might have to be held up for a new hearing, for new briefs, perhaps even for reply briefs. Not only would such supplemental proceedings delay final disposition of the case, it would prolong that disposition to a time significantly removed from its original consideration and from recall of the original oral argument. The result would be a trade-off in which fuller discussion of new materials would be balanced against fading memories of the analytic and policy considerations that originally informed the court's preliminary judgment.

The cost-benefit calculus needs to take another factor into account as well. The question arises: how actively should judges pursue legal learning? One of the risks that I see in some of the attacks on judges, in excessive concern for the appearance of propriety, is that judges will be tempted to practice defensive judging. It would be easy to fend off criticism by sitting back and confining one's frame of reference to what is formally on the record. Judges could arguably sidestep ethical dilemmas by meticulously closing their eyes to any article or treatise not cited in the briefs. Such a posture would be, I believe, a very poor discharge of judicial responsibility. Judges, like lawyers, have an independent obligation to search out whatever resources will assist in the just resolution of disputes. As law becomes ever more specialized, as the issues that come before us raise ever more complex questions of analysis and policy, it seems to me that judges need encouragement to seek all the help that they can get.

One way to approach these conflicting ethical vectors is to impose lawyerly constraints on the language of Canon3A(4)'s prohibition of "ex parte or other communications concerning a pending or impending proceeding." If we can learn to construe this language, in particular circumstances, to accommodate judicial independence as well as judicial accountability, we will have served the interests of justice well.[1] For now, let me close by noting that these are difficult ques-

1. It might well be appropriate, for example, to invoke different ethical standards with respect to allegedly improper scholarly consultations that occur at different stages in legal proceedings. A cost-benefit analysis might well lead to a greater obligation to give notice to and to consult with interested lawyers while a trial is still in process than after a case has been taken under advisement, especially under appellate advisement.

The only reported case that construes Canon 3A(4)'s prohibition on consultation with disinterested experts is *In re Fuchsberg*, 426 N.Y.S.2d 639 (Court on the

tions about which we all need to think further. Thank you.

Judiciary, 1978). In that case, the judge engaged in ex parte consultations with law professors that included: (1) discussions of new developments in relevant areas of the law; (2) requests for professorial memoranda on recent developments in the law in response to briefs in pending cases; (3) requests for professorial drafts of judicial opinions; and (4) requests for professorial comments on unpublished opinions of other judges. In this context, it is not surprising that the court held, that even informal solicitation of professorial opinion about current thinking in a particular area of the law is "conduct . . . violative of the Canon and . . . the prescribed procedure of the Canon should be followed, if such solicitations of advice appear necessary." *Id.* at 648. A broad interpretation and application of the holding in the *Fuchsberg* case might well have a chilling effect on independent judicial pursuit of scholarly wisdom, and thus might well impair a judge's obligation, under Canon 3A(1), to "be faithful to the law and maintain professional competence in it." Code of Judicial Conduct Canon 3A(1) (1972).