



Justice Speakers Institute
SPEAKING, TEACHING & TRAINING - WORLDWIDE

Crossing the Ethical Line in Problem-Solving Courts

Hon. Peggy Fulton Hora (Ret.)

Second International Conference on Non-Adversarial Justice:

Integrating Theory and Practice

Sydney, NSW, Australia

7 April 2017

OUT-OF-COURT CONTACT WITH PARTICIPANTS

DTC picnic



Bowling night



Convicted felons

May not associate

May not have social contact

Matter of Blackman, 591 A.2d 1339 (N.J. 1991);

What do you think?

- Attend a 12-Step meeting?
- Visit treatment facilities used by the Court?
- Ride along on probation checks?

Justice for Vets



- Veterans' Court judge paid participant to paint his house
- What could go wrong?

Justice for Vets



- Judge took participant and his wife to dinner at a local restaurant to thank him for his service
- What's wrong with this picture?

Justice for Vets

Judge invited Veterans' Court participant to judge's family events

Judge allowed him to handle a gun and he went target shooting with judge's son.

The veteran was a felon and Oregon law made it a felony for him to possess a firearm.

Oregon Commission on Judicial Fitness and Disability
(6)



Justice for Vets

Facebook

wp A compassionate judge se

The Washington Post (WP Company LLC) [US] <https://www.washingtonpost.com/news/morning-mix/wp/2016/04/22/a-judge-sentences-a-veteran-to-24-hours>

Morning Mix


A compassionate judge sentences a veteran to 24 hours in jail, then joins him behind bars

Cumberland Co., NC

By **Yanan Wang** April 22 at 4:12 AM

**Supporters of Judge Lou Olivera**
over a year ago





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Four Questions

Why did the judge choose a custodial sentence when he could have assigned volunteer work, writing an essay about honesty, stepped up counseling or drug tests or any variety of other sanctions? One of the beauties of treatment courts is being able to individually craft both positive and negative responses to participant behavior.

Was it appropriate to drive the participant to jail? The American Bar Association Model Code of Judicial Conduct requires a judge to “uphold and promote the, independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety” ([Canon 1](#)). Could someone, knowing the facts, question the independence and impartiality of the judge?

Canon 2, among other things, prohibits a judge from having *ex parte* communication. No defense attorney nor prosecutor was present at the jail. No court reporter was on hand to make a record. The conversation was personal according to Serna. What did they talk about? How might the judge use the information in the future? Was something said that would be of interest to the attorneys?

The Preamble of the Canons says, “[Judges] should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.” Does Judge Olivera’s conduct raise any questions in this regard?

Can Judicial Compassion Be Unethical?

http://justicespeakersinstitute.com/essential_grid/can-judicial-compassion-unethical/

My favorite case:

Judge informed arrest
warrant would be served
after court

Didn't want participant
in custody

Allowed him to escape
through her chambers

e Laura D. Blackburne, State of New York Commission on
cial Conduct, Nov. 8, 2005



Did judge help immigrant escape ICE agents waiting outside courtroom? Federal prosecutor complains

MAR 03, 2017 09:44 AM CST

RA CASSENS WEISS



from Shutterstock.

A federal prosecutor's complaint has led to an internal investigation into whether an Oregon judge helped an immigrant avoid arrest by immigration agents waiting outside the courtroom.

U.S. Attorney Billy Williams told court officials that a DUI defendant entered the courtroom of Judge Monica Herranz of Portland on Jan. 27, but he did not come out through the usual entrance, report [CNN](#), [Fox 12 Oregon](#) and the [Willamette Week](#). Williams acted after a complaint by U.S. Immigration and Customs Enforcement.

Courthouse officials are investigating whether Herranz let the defendant, Diddier Pacheco Salazar, a 22-year-old Mexican national, leave through a private entrance used by court employees. "I was troubled because, on the face of it, what I heard sounded like

potential federal criminal law violations and/or ethical violations," Williams told the [Willamette Week](#). "Generally, we're talking about obstruction of justice."

Williams decided he wouldn't open a criminal investigation or pursue an ethics complaint, according to the [Willamette Week](#). Instead, Williams and officials with ICE and the Department of Justice's Office of Professional Responsibility met with court personnel to discuss the issue over lunch.

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OR Judge Stepped Down From Drug Court

Advising Drug Court participants
on how not to get caught
drinking and
To watch what they say on
jailhouse phones because
"deputy DAs have nothing better
to do" than to listen to those
recordings.



Judge made a promise to all drug treatment court participants:
“If you do 90 meetings in 90 days, I will do cartwheels for you.”
He did it twice. In the courtroom. In his robe.



CNN: “A Judge Flips for Sobriety”

Judicial misconduct?

Judge met with juvenile Tx Court participant who was having bereavement issues.

Overdosed twice.

Asked to speak to Judge alone.

Judge and boy went for a walk alone in a park where he discussed the death of his mother and continued lack of sobriety.

Public Reproval

“Failed to maintain high standards of conduct so that the integrity and independence of the judiciary would be preserved...;

“Failed to avoid impropriety and the appearance of impropriety, in that he failed to respect and comply with the law...;

and initiated, permitted and considered an improper *ex parte* **communication...**

e Tarantino, NY State Commission on Judicial Conduct, March 28, 2011

Individual meetings in chambers

Judge met individually with probationers.

The judge justified a portion of his conduct on his “sincere concern for the welfare of addicts and their progress.”

The Nebraska Supreme Court was unpersuaded and found that Jones’ conduct constituted a violation of Canon 1 (uphold integrity and Independence of Judiciary) and Canon 2 in that Jones failed to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Jones, 581 N.W.2d 876 (Neb. 1998)

ORE DRUG COURT JUDGES REMOVED FROM CE

Misuse of custody

“This American Life” Ira Glass (PBS)

Holding participants in custody without counsel or hearing

Indefinite sentence

Loss of privileges like visits and phone calls

In custody 73 days before release

Judge signed consent order promising never to sit as a judge again

In re Williams, Consent Order 12-19-11 (GA)

Failure to supervise personnel

Failed to train and supervise court personnel re:
placement after serving jail sanction
Didn't advise participants re: right to attorney
Allowed unlawful detention of participants by drug
court personnel
Slow to provide hearing after rules violations
Court suspended by Indiana Supreme Court
Judge signed consent order promising never to sit as a
judge again

ulation Jerry F. Jacobi (March 4, 2015) (IN)

Jailed Drug Court Participants w/o Jurisdiction

Judge kept Drug Court participants past the two year limit

Jailed for unspecified violations

PROCEDURAL FAIRNESS/JUSTICE

Procedural Fairness/Justice

- Posits that the **manner** in which justice is done is just as important and the outcome
- “...bridges the gap that exists between familiarity and unfamiliarity and the differences between each person....”
- **www.ProceduralFairness.org**

(Burke, Kevin and Steve Leban, “Procedural Fairness: A Key Ingredient in Public Satisfaction,” *Court Review*, American Judges Association (2007))

Procedural Fairness, cont.

Voice: the ability to participate in the case by expressing their viewpoint;

Neutrality: consistently applied legal principles, unbiased decision makers, and a “transparency” about how decisions are made;

Procedural Fairness, cont.

Respectful treatment: individuals are treated with dignity and their rights are obviously protected;

Trustworthy authorities: authorities are benevolent, caring, and sincerely trying to help the litigants—this trust is garnered by listening to individuals and by explaining or justifying decisions that address the litigants' needs.

(Tom Tyler, "Why People Obey the Law" 22 (2006))

Due Process

Due process is made up of:

Participation: present their own view and share in decision making, so they perceive the procedure as fair (even if it may not influence the outcome).

Dignity, respect, and politeness: defendant rights and values as a competent, equal citizen, and human being are acknowledged.

Due Process, cont.

ust: the authority that allows the person to present evidence
displays dignity and respect, and clearly explains decisions
is considered more trustworthy

UTCOME: *Greater compliance with the law.*

(Tyler, 1990, 1996)

Procedural Justice, cont.

ut another way, the 3 “Vs”:

Voice: a chance to tell their story to the decision-maker.

Validation: if they feel heard and listened to then more likely to feel a sense of validation.

Voluntariness: voice + validation = experience the procedure as less coercive .

Greater compliance with the law.

(Ronner, 2001)

Maya Angelou



- “People may not remember what you say but they will always remember how you made them feel.”

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