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The Commission on Judicial Conduct (CJC) is separate from the EAC. The CJC is a constitutionally-created, independent agency of the judicial branch of state government which enforces the Code of Judicial Conduct, pursuant to WA State Const. Art IV, §31. Although EAC opinions are not binding on the CJC, a judge's compliance with an opinion by the EAC shall be considered as evidence of the judge's good faith. GR 10(b). The CJC has a searchable website at www.cjc.state.wa.us.

STATE OF WASHINGTON
ETHICS ADVISORY COMMITTEE
OPINION 13-04

Question

Do any of the following scenarios create ethical concerns for a judicial officer:

1) The show cause hearing (at which the court will determine if the defendant met the terms of its previous order) will be continued so the defendant can become compliant with the Judgment and Sentence by obtaining a required evaluation or re-enrolling into a treatment program, etc. In this situation, the probation violation will be dismissed if the defendant can show compliance and a future hearing and no attorney would have been appointed in the matter.

2) The defendant may come to the first show cause hearing and request to accept the penalty that is outlined by the probation officer. For example, if the recommended penalty is a monetary fine, a defendant who requests to do so is normally allowed to stipulate to the violation and pay the fine without the appointment of an attorney.

3) The defendant comes to the first appearance and requests to be able to speak to the prosecutor to see if the case can be resolved. This normally occurs when a

defendant is determined not to qualify for a court-appointed attorney. It occurs in both probation violation cases as well as new charges. Does it create any ethical concerns for the judicial officer if the prosecuting attorney talks to an unrepresented defendant in these cases?

4) May a judicial officer conduct an initial show cause hearing in the absence of the prosecuting attorney?

The county is a small rural county that does not have a public defender office. There are several solo private practice attorneys who have contracts with the county and various cities to provide public defense services. All of the contracts contain limits on the number of appointments the attorney may be given. Each contract public defender is allotted a specific time and day of the week that their cases will be heard. Consequently, at the defendants' first appearance hearings for new charges and probation violations, the public defenders are not in the courtroom.

It is the past and current practice in the county not to appoint attorneys to qualifying defendants in probation violation cases at the first show cause hearing.

Answer

CJC 1.2 provides in part that a judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety. CJC 2.6 provides in pertinent part that a judge shall accord every person who has a legal interest in a proceeding the right to be heard and that a judge may encourage parties and their lawyers to settle matters in dispute but should not act in a manner that coerces any party into settlement. Comment [2] to CJC 2.6 by way of illustration sets out six factors that a judge should consider when deciding upon an appropriate settlement practice for a case. Those factors are: 1) whether the parties have requested or voluntarily consented to a certain level of participation of the judge in settlement discussions; 2) whether the parties and their counsel are relatively sophisticated in legal matters; 3) whether the case will be tried by the judge or a jury; 4) whether the parties participate with their counsel in settlement discussions; 5) whether any parties are unrepresented by counsel; and 6) whether the matter is civil or criminal.

1) It is permissible under CJC 1.2 for a judicial officer to continue a show cause hearing so that a defendant can become compliant with the Judgment and Sentence. Continuing the matter to afford the defendant an opportunity to meet the conditions of the judgment and sentence does not undermine the public confidence in the judiciary or prejudice either the defendant or the prosecution provided the judicial officer has determined that the defendant understands the right to counsel and waives that right.

2) It is permissible for a judicial officer to permit a defendant to come to the first show cause hearing and accept the recommended penalty outlined by the probation officer provided the judicial officer has determined that the defendant understands the right to counsel and waives that right. CJC 2.6 and Comment [2] to CJC 2.6.

3) A judicial officer may grant an unrepresented defendant's request to confer with the prosecuting attorney to determine if the case can be resolved if the judicial officer has determined that the defendant understands the right to counsel and waives that right. CJC 2.6 and Comment [2] to CJC 2.6.

4) A judicial officer may conduct an initial show cause hearing in the absence of the prosecuting attorney if the judicial officer reads the pleadings and questions or otherwise acts in a neutral manner and not as an advocate for the prosecution. CJC 2.6 and Comment [2] to CJC 2.6 and Opinion 03-01.