

STATE OF WASHINGTON
ETHICS ADVISORY COMMITTEE
ETHICS OPINION 18-04

Question

May a court allow court staff to conduct pre-trial dynamic risk assessments which includes an interview of the defendant prior to their first appearance?

The interview includes questions to ascertain the defendant's employment status, residential stability, and whether he or she has a history of drug abuse, and if so, whether they have been using any illegal drugs during the past six months and whether that usage has caused them family, social, or work issues. The defendant may or may not yet be represented by an attorney when the interview takes place due to logistical challenges inherent in conducting a prehearing interview with a defendant in custody.

Once the interviewer obtains the information, the staff person reviews the defendant's criminal history and data on pending charges, as well as previous records of failure to appear, and uses the statistically based risk assessment tool to categorize the defendant's likelihood of reappearing and complying with pretrial release conditions. Each defendant is assigned, by the assessment tool, a category of low, medium, or high risk to violate pretrial supervision.

The judge may look at the questions and answers gathered by the interviewer which provided the basis for the categorical risk score. The public defender's office appears, on a limited basis, at first appearance for everyone on a felony charge, and is also present in court to assist those with misdemeanor charges. The categorical result (low, medium, or high) of the assessment will be presented on the record to the court and the parties at the defendant's first appearance.

The interviewer's notes and conclusions are retained for a period of time and are subject to GR 31.1; however, the notes would not be made a part of the record or court file.

- 1) Does the prehearing interview process outlined above, conducted without the assistance of counsel, violate a defendant's rights, such as the right to counsel and the right to remain silent, and thereby violate CJC 2.2?

- 2) Would the risk assessment interview, which is conducted off the record and outside the courtroom, violate our state (Art. 1 Sec. 22) and federal (6th Amend.) constitutional guarantees and thereby breach a judge's ethical obligations under CJC 1.2 or 2.2?
- 3) Since the risk assessment process includes interviews of the defendant prior to their first appearance, might not this collection of information be considered ex parte communications in violation of the Code? Would the answer be different if the interview and assessment were conducted by a municipal or county employee who is not subject to the judge's direction and control?

Answer

- 1) This is a legal question that is beyond the scope of this committee. The requestor should consult with their legal counsel; if their counsel opines that the process violates the defendant's legal rights, then such conduct would violate CJC 2.2.
- 2) Same as answer #1.
- 3) The committee assumes, from how the question is posed, that the risk assessment interview by court staff under the judge's direction and control takes place off the record, without counsel, and without any signed waiver to counsel from the defendant. The committee also assumes that the purpose of the risk assessment interview is to collect information that the judge will use in making decisions in the defendant's pending case, including setting conditions of release.

The Code of Judicial Conduct prohibits judicial officers from investigating facts in a pending matter and does not contain an exception for off-the-record interviews of unrepresented defendants with pending matters for the purpose of conducting pre-trial risk assessments. This prohibition extends to court staff, who are under the judge's direction and control. Current law and court rules do not expressly authorize judges or court staff to conduct off-the-record interviews of unrepresented defendants with pending matters to gather information for use in a pre-trial risk assessment.

Thus, under the Code of Judicial Conduct, neither a judge nor court staff under the judge's direction and control may conduct off-the-record pre-trial risk assessment interviews. Such interviews conducted by persons who are not under the direction and control of judicial officers would fall outside the purview of the Code of Judicial Conduct.¹

The overarching framework for this opinion is underscored by Canon 1 which requires judges to uphold and promote the independence, integrity, and impartiality of the judiciary, and to avoid impropriety and the appearance of impropriety, and Canon 2 which requires judges to perform the duties of judicial office impartially, competently, and diligently.

The goal of implementing vigorous, dynamic pre-trial risk assessment services to assist judges with performing their duties as required by CrR 3.2 and CrRLJ 3.2 is laudable. However, doing so must not come at the cost of the underpinnings of a fair and impartial justice system.

A. Judges Are Prohibited From Investigating Facts In A Pending Matter

Under CJC 2.9(C), judges are prohibited from investigating facts in a matter pending or impending before that judge, and shall consider only the evidence presented and any facts that may properly be judicially noticed, unless expressly authorized by law. The committee has previously issued opinions regarding the judge's review of information prior to making a decision. See 04-07, and 13-07.

In 04-07, the opinion recognized that CrR 3.2 and CrRLJ 3.2 requires a judge to consider a variety of factors based "on available information" in setting conditions of release, including criminal history. Therefore, because CrR 3.2 and CrRLJ 3.2 authorized a judge to make a decision on conditions of release based "on available information," the opinion concluded that a judge may consider the Judicial Information System (JIS) screen when setting the conditions of release. However, the opinion

¹ The Committee acknowledges the value of the information that can be gained through a dynamic pre-trial risk assessment as described in this query. However, until and unless there is an amendment to the CJC or court rules, the pre-trial risk assessment conducted by court employees described in the question posed is prohibited by the CJC.

stated that the judge should advise the defendant that he or she is looking at the JIS screen and recite the criminal history or other relevant information displayed on the screen so the defendant may respond to or dispute the information if the defendant indicates it is not correct.

Similarly, 13-07 recognized the prohibition against judges investigating facts in a pending matter, unless expressly authorized by law. CJC 2.9(C). The opinion stated that a judge's review of juvenile files maintained in the Judicial Access Browser System (JABS) in a pending matter must be limited to reviews authorized by law. If a party requests that the judge review JABS records and such a review is not authorized by law, then the judge must allow all other parties to be heard on the request before deciding if a review of the JABS records is appropriate, and if so, specifically describe on the record the records it will review, or has reviewed, and the substance of those records.

Here, the described off-the-record risk assessment, which includes an interview with an unrepresented criminal defendant about his or her drug use, history of drug use, family, social, and work issues, is an investigation of facts in a matter pending or impending before the judge, and there is no law or court rule the Committee is aware of that authorizes a judge to conduct such an off-the-record interview with an unrepresented criminal defendant.

The described off-the-record risk assessment is distinguished from the circumstances in 04-07 and 13-07 because those opinions address a judge reviewing an electronic database for criminal history. The described off-the-record risk assessment is not a situation where the judge is simply reviewing existing information in an electronic database. The described off-the-record risk assessment involves actively engaging an unrepresented criminal defendant to procure substantive information that will be used by the judge in making a decision on conditions of release. Thus CJC 2.9(C) prohibits a judge from engaging in the described off-the-record risk assessment.

B. Ex Parte Communications Generally Prohibited

CJC 2.9(A) prohibits a judge from initiating, permitting, or considering ex parte communication, or considering other communications made to the judge outside the

presence of the parties or their lawyers, concerning a pending or impending matter, with few exceptions.

When circumstances require it, ex parte communication may occur for scheduling, administrative, or emergency purposes, which do not address substantive matters. CJC 2.9(A)(1). Ex parte communication may also occur pursuant to a written policy or rule for a mental health court, drug court, or other therapeutic court. CJC 2.9(A)(1). For any ex parte communication that is excepted from the general prohibition, the judge must reasonably believe that no party will gain a procedural, substantive, or tactical advantage as a result of the communication, and the judge must promptly notify all other parties of the substance of the ex parte communication and give the parties an opportunity to respond. CJC 2.9(A)(1)(a) and (b).

Under CJC 2.9(A)(1), an off-the-record risk assessment interview that asks questions of an unrepresented criminal defendant about drug use, history of drug abuse, family, social, or work issues and reports the answers to the court cannot be considered necessary communication for scheduling, administrative, or emergency purposes exception and addresses substantive information. Therefore, CJC 2.9 does not contain an exception for a judge to conduct an off-the-record risk assessment as described in this question.

C. Judges' Obligations Under The CJC Extend To All Subject To The Judges' Direction And Control

Under CJC 2.12, a judge shall require court staff, court officials, and others subject to the judge's direction and control to act with fidelity and in a diligent manner consistent with the judge's obligations under the Code of Judicial Conduct, and a judge may not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when such conduct would violate the CJC if undertaken by the judge. Thus, court personnel are prohibited from engaging in activities that a judge is otherwise prohibited from doing him or herself, including not investigating, gathering information, or having unauthorized communications, unless authorized by law. This, in turn, helps to protect and promote the independence and neutrality of the court as a fair arbiter of the information provided to the court, not as an independent fact-finder or researcher.

A judge is allowed to consult with court staff and officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, 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. CJC 2.9(A)(3). The committee previously issued an opinion on actions by court staff related to pre-trial supervision in pending and impending cases.

In 08-06, the opinion discussed whether a probation department in a court of limited jurisdiction could engage in pre-trial contact with alleged victims in connection with the pre-trial monitoring of a defendant's compliance with conditions of release. The opinion advised that ARLJ 11.1 authorized the court to establish a probation department and that ARLJ 11.2 specified the core services of the probation department to include conducting pre/post-sentence investigations with face-to-face interviews; researching criminal history, social and economic needs, community resource needs, counseling/treatment needs, work history, family and employer support, and completing written pre/post-sentence reports. Thus, because the court was allowed to establish a probation department and the core services of the probation department under the ARLJ included interviews, the court was allowed to establish a probation department and permit contact between the probation department employees and the alleged victims of the defendant's crime. However, probation staff should be counseled that their behavior should not create an appearance of partiality, and contacts with alleged victims should be limited to contacts intended to facilitate the enforcement of the court's orders.

The circumstance addressed in 08-06 is inapplicable here as the described off-the-record risk assessment interview is not being conducted by a probation department established under ARLJ 11.1. Therefore, because a judge is prohibited from conducting an off-the-record risk assessment interview that asks a defendant questions about employment status, residential stability, history of drug abuse, and illegal drugs during the past six months, the judge would also be prohibited from having a court staff person conduct such an interview.

D. Interview And Assessment Conducted By A Municipal Or County Employee Who Is Not Subject To The Judge's Direction And Control

The CJC applies to all judges, except when otherwise noted in the CJC. CJC Application, I(B). Thus, this opinion applies to conduct engaged in by a judge and, under CJC 2.12, by court personnel under the judge's direction and control. To the extent the described off-the-record risk assessment interview is not conducted by a judge, court staff, or someone under the judge's direction and control, the circumstance would fall outside the purview of the CJC.²

² The committee was not asked to opine on, and provides no opinion, on the legal status or appropriate retention of the records related to any pre-trial interviews and risk assessment calculations. However, the committee cautions that the retention of any such records should be conducted pursuant to appropriate court rule or statute depending on the employee or agency that creates them. The committee also notes that this opinion does not consider such records as simply administrative records under the Code of Judicial Conduct. Also, any material relevant to a court decision is presumptively public under article 1, section 10 of the Washington State Constitution. *Bennett v. Smith Bundy Berman Britton, PS*, 176 Wn.2d 303, 312, 291 P.3d 886 (2013).