

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

FORMAL ADVISORY ETHICS OPINION 16-01
(February 2, 2016)

THREATS: TAKING APPROPRIATE ACTION; DISQUALIFICATION

Overview

The Judicial Ethics Advisory Committee (JEAC) has received two inquiries containing a number of scenarios involving alleged threats against judges, court personnel, lawyers, and litigants. The inquiries asked the committee for guidance on whether judges must disclose to the parties in pending cases the alleged threats and when judges must disqualify themselves after taking action to address alleged threats. Below are the scenarios the inquiries provided, a discussion of relevant provisions of the Arizona Code of Judicial Conduct, and the advice of the JEAC.

Factual Scenarios

1. A member of a judge's staff received a threat over the phone against the judge (name of caller known).
2. Law enforcement reported to a family drug court employee who worked with mother, that mother (name known) had made threats against her attorney and the assistant attorney general involved in the case that she was going to stab them with a knife in court. The mother was known to have significant mental health issues. Information was also received from law enforcement that the mother had threatened harm against the family drug court employee. The mother's husband was interviewed and he stated that he was concerned about mother's increasingly violent thoughts and behaviors. The court ordered extra security for the next scheduled hearing.
3. Court security was informed that a father threatened harm to three people (no specific people identified) if his parental rights were terminated that day. The court knew the father's name and knew the day and time of the hearing. The court ordered extra security for that hearing.
4. Mother (name known) made threats via social media against a lawyer involved in the case. When contacted, the lawyer stated she had other issues with mother before (the court had no specific information regarding those prior issues). The assistant attorney general involved in the case reported to the lawyer that the Arizona Department of Child Safety caseworker saw the threats on social media. The

assistant attorney general notified the presiding juvenile court judge and requested extra security. The court ordered extra security for the next scheduled hearing.

5. A judge received a call from a therapist who reported her client, the father (name known), had threatened to harm the judge.

6. An assistant attorney general learned that a mother (name known) had asked another person to purchase a gun for her. Mother is a prohibited possessor due to criminal convictions. Mother was also involved in the kidnapping of her children (by masked individuals) from an Arizona Child Protective Services supervised visit approximately two years ago. Mother was known to have significant mental health issues. The assistant attorney general contacted the presiding juvenile court judge to request extra security, which was provided at the next scheduled hearing.

7. An assistant attorney general was in the community to attend a meeting and the mother in a dependency/severance case followed the assistant attorney general into a building, continued to follow the assistant attorney general once inside and would not leave when asked until she was escorted out by security. The incident was reported to the presiding juvenile court judge.

8. A judge was informed by court security that threatening statements have been written in chalk about a judge during a protest outside of an Arizona Department of Child Safety office.

9. A judge was informed that an individual had posted on the Internet a “Wanted” poster with a picture of a judge.

Overview of Applicable Rules

The Scope section of the Arizona Code of Judicial Conduct provides, in part, as follows: “The rules in the code are rules of reason that should be applied consistent with constitutional requirements, statutes, other court rules, and decisional law, and with due regard for all relevant circumstances. The rules should not be interpreted to impinge upon the essential independence of judges in making judicial decisions.” The second sentence of this provision is particularly important as threats could be used to intimidate judges from making impartial decisions solely based on the law and facts in specific cases. “Independence” is defined in the Terminology section of the Code as meaning “a judge’s freedom from influence or controls other than those established by law.”

Rule 2.2 provides that “A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.” The Terminology section

of the Code defines “Impartial”, “impartiality”, and “impartially” to “mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.” Comment 1 to Canon 2 provides that, “To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.”

Rule 2.4(A) provides that “A judge shall not be swayed by partisan issues, public clamor, or fear of criticism.” Rule 2.4(C) provides that “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.”

Rule 2.7 requires judges to hear and decide matters assigned to them, except when disqualification is required by Rule 2.9 or other law.

Rule 2.8(A) provides that a judge shall require order and decorum in proceedings before the court.

Rule 2.9(A)(1) provides, in part, as follows. “When circumstances require it, ex parte communication for . . . emergency purposes, which does not address substantive matters, is permitted, provided:

- (a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
- (b) the judge makes provision to promptly notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

Rule 2.9(A)(3) authorizes a judge to “consult with other judges or with court personnel whose functions are to aid the judge in carrying out the judge’s adjudicative responsibilities. If in doing so the judge acquires factual information that is not a part of the record, the judge shall make provision promptly to notify the parties of the substance of the information and provide the parties with an opportunity to respond.”

Rule 2.9(B) provides, “If a judge inadvertently receives an unauthorized ex parte communication bearing on the substance of a matter, the judge shall make provision to promptly notify the parties of the substance of the communication and provide the parties with an opportunity to respond.”

Rule 2.9(C) provides that “Except as otherwise provided by law, a judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.”

Comment 3 to Rule 2.9 provides that “The proscription against communications concerning a proceeding includes communications with persons who are not participants in the proceeding, except to the limited extent permitted by this rule.”

Rule 2.11(A) requires a judge to disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including when “[t]he judge has personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of facts that are in dispute in the proceeding.” Rule 2.11(A)(1). Comment 5 to Rule 2.11 provides that “A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.” Rule 2.11(C) provides that “A judge subject to disqualification under this rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge’s disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.”

Rule 3.1 provides that a judge may engage in extrajudicial activities, except as prohibited by law or the code. “However, when engaging in extrajudicial activities, a judge shall not “(B) participate in activities that will lead to frequent disqualification of the judge[.]”

Summary of Relevant Judicial Ethics Opinions

A number of judicial ethics opinions from other jurisdictions have considered issues relating to threats. For example, the New York Advisory Committee on Judicial Ethics concluded in Opinion 12-01 (January 26, 2012) that a judge was not required to disclose that the judge had consulted with security personnel about a statement made in a letter admitted into evidence in a case that expressed a desire to use violence against federal judges. The committee indicated that it was within the judge’s discretion to disclose to the parties in the case that the judge had reported a security threat. The committee cited to one of its prior opinions that had advised a judge was not disqualified from presiding over a case merely because one party threatened the judge or the judge’s family, provided the judge believed he or she could be fair and impartial. The threat mentioned in Opinion 12-01 was not against the judge in the case.

Similarly, in Opinion 14-55 (April 24, 2014), the New York Advisory Committee on Judicial Ethics concluded that a judge could continue to hear criminal cases in which a prosecutor and/or defense counsel appeared that were unrelated to a criminal case they were handling involving criminal charges against a defendant for threatening the same judge. *See also* Opinion 13-83 (June 13, 2013) (“A judge, who has obtained an Order of Protection against an individual based on the individual’s conduct during a recent appearance before the judge, must disqualify him/herself from matters involving the individual until the Order of Protection expires. Once it expires, the judge may preside over matters involving the individual, provided the judge believes he/she can be fair and impartial.”).

Formal Ethics Opinion 67 of the California Judges Association (January 2013) addressed two issues. First, what ethically could be done to monitor the Internet for potential security threats? Second, what ethical duties arose when a judge discovered items posted on the Internet by litigants or others that involved a case before the judge? The opinion concluded that judges could set up alerts that reported the use of their names on the Internet as a preventive measure concerning threats against them. If an alert resulted in the receipt of information about a pending case, the judge was advised to disclose to the parties those portions of the alert that the judge read. To deal with the problem of the improper consideration of an *ex parte* communication under California’s judicial ethics rules, the opinion suggested the judge should refer alerts to a third party, possibly a court staff member, to review the balance of the information and report any security threats to the judge. On the issue of disqualification, the opinion noted that “The Committee has consistently advised judges that they are not disqualified simply because a litigant makes a threat against a judge or files a complaint against the judge. Indeed, so long as the judge believes he or she can be fair and impartial the judge is obligated to remain on the case under Canon 3B(1).” (footnote omitted). To require recusal every time a litigant or supporter posted threatening or disparaging remarks about a judge “would wreak havoc on the judicial process.” The opinion nevertheless counseled that a judge must disclose the information to the parties in a pending case as “[t]hreats, attacks on the character or competence of the judge and publication of information detrimental to the safety of the judge and his family are all reasonably relevant to the issue of disqualification.”

In Advisory Opinion 2009-02 (August 14, 2009), the Colorado Supreme Court Judicial Ethics Advisory Board opined that a judge who was the subject of a death threat for which the defendant was being prosecuted in a proceeding before a different judge was not required to recuse from her criminal court docket during the pendency of that prosecution. “Although we conclude that neither Canon 2 nor Canon 3 requires

the judge to disqualify herself *sua sponte*, we advise the requesting judge to consult her own conscience and emotions to determine whether she harbors any bias or prejudice toward the DA's office or against defense counsel as a result of the matter in which she was threatened. *See* C.J.E.A.B. 2006-05 at 4. Only the judge knows if her own subjective feelings amount to disqualifying bias or prejudice."

In Opinion 98-703 (June 26, 1998), the Alabama Judicial Inquiry Commission concluded that a judge was not disqualified from hearing a petition to modify in a domestic relations case because a party had voiced threats against the judge following a hearing the previous year. "It is the opinion of the Commission that the judge is not disqualified under the foregoing facts unless he actually developed a personal bias or prejudice against the defendant due to what occurred. A litigant's actions toward or statements to a judge during the course of a judicial proceeding do not cause the judge to be disqualified unless the judge is actually influenced and develops a personal bias or prejudice as a result. [Citing four prior opinions] To hold otherwise would allow a litigant to control judicial proceedings whenever a litigant becomes dissatisfied with the course of the proceedings. If the judge does not feel affected by the litigant's actions, the judge is not disqualified."

In Informal Opinion 98-12 (June 18, 1998), the Utah Judicial Ethics Advisory Committee was asked "whether disqualification is necessary in a proceeding in which the judge has heightened security concerns about a particular party and, because of those concerns, brings in extra security measures." The committee opined "that adding security because of the perceived volatility of an individual does not automatically indicate bias or prejudice toward that individual. Security is a normal concern of courts and judges. Judges must have the discretion to increase security as they deem appropriate, without having to worry about disqualification. Increasing security cannot automatically be construed as undeserved or excessive behavior toward an individual. It is also important to note that if disqualification were required in such a situation, parties could engage in acts calculated to require disqualification. The Code of Judicial Conduct does not reward persons who purposely engage in acts calculated to create bias or prejudice." (citation omitted).

Arizona JEAC Formal Advisory Ethics Opinion 98-02 (Disqualification Considerations When Complaints Are Filed Against Judges) is informative concerning the issue of disqualification based on threats. As with complaints to the commission, the mere fact that a threat has been made against a judge does not require automatic disqualification by the judge. A contrary rule could allow an individual to easily disrupt court proceedings at any time by making a threat. *See also* Arizona JEAC Formal Advisory Ethics Opinion 96-14 (Limitations on

Disqualification Requirement)(“That a judge has been sued by the litigant would ordinarily appear a real basis for disqualification. But the “objective, disinterested observer fully informed” would know that the suit or claim was brought by the party, often self represented, either as a tactical means to require disqualification where real grounds for disqualification under our procedural rules could not be established or as some benighted effort to intimidate the judge.”).

Discussion

Regrettably, judges and judicial employees are subject to threats for performing their official duties. Threats come from a wide range of sources: parties to litigation; relatives and friends of litigants; and third parties interested in litigation, among other sources. Threats can arise from in-person contact, telephone calls, letters, e-mails, and posts on various venues on the Internet. Some threats are specific as to the intended harm and target; some threats are more general. Although some threats are direct, other threats are relayed to the target, meaning the target did not personally observe the threat. Threats can be of physical harm, property or financial damage, and/or reputational damage. Threats must be taken seriously and considerable judgment must be applied to assess the level of threat, its temporal immediacy, and the nature and timing of appropriate responses. It is of utmost importance that the courts remain a safe and secure venue to peacefully resolve legal disputes. Judges should discuss appropriate threat reporting and action protocols with their staff, court security personnel and local law enforcement. It is, however, difficult to discern disgruntlement from intent to harm. This opinion provides guidance as to how judges should respond when receiving information falling into the latter category (intent to harm, or threats).

In-court threats may be recorded, either by way of written transcript, audio or video recording. The judge can then deal with the issue by, among other things, stating on the record that the recording will be submitted to the appropriate law enforcement agency for review as a criminal matter or through appropriate contempt proceedings. Such threats do not require *sua sponte* recusal by the judge; it would be up to a party to file a motion to disqualify the judge from future proceedings in the case based on a claim that the party’s own prior in-court threats cause the judge to be biased in favor of the adverse party or parties or to be prejudiced against the party who made the threats.

Out-of-court threats implicate Rule 2.9. When a judge learns of a threat made against the judge, other judges, court personnel, counsel, or other litigants from any source other than in-court proceedings that have been captured in a recording

(whether by way of written transcript, audio, or video recording), the judge should seek advice from security personnel to address the threat and should inform the parties of the alleged threat on the record and provide them an opportunity to be heard as to other appropriate action they recommend be taken. Absent the judge's *sua sponte* decision to disqualify under the standard set forth in Rule 2.11 or a favorable ruling on a motion to disqualify the judge from participating in further proceedings, the judge can continue to hear and decide the issues properly brought before the judge for decision.

Rule 2.9 does not apply to a judge who is serving in a supervisory capacity and has no decision-making responsibility in a specific case. The supervising judge may appropriately pass on threat incident information to security personnel and law enforcement authorities. To the extent a supervising judge passes such information on to a judge assigned a specific case, the judge receiving that information should proceed as indicated in the preceding paragraph. *See* Rule 2.9(A)(1)(a) and (b) and 2.9(A)(3).

Advice

The scenarios set forth at the beginning of this opinion can only serve as points of discussion concerning a judge's options in dealing with threats against judges, court personnel, and other participants in court proceedings.

In regard to Scenario 1, the member of the judge's staff could be instructed to inform court security of any such threatening calls. Even if the caller did not leave his or her name, court security may still be able to identify the caller and take appropriate action. To the extent the judge informed attorneys, court personnel, or others of threats, the judge should indicate on the record the action previously taken and provide the parties with an opportunity to be heard as to other appropriate action they recommend be taken.

Scenarios 2 through 6 fall into the category of situations where the judge properly sought the advice of security personnel and obtained or should consider obtaining extra security for the next court proceeding. To the extent the judge informed attorneys, court personnel, or others of threats, the judge should indicate on the record the action previously taken and provide the parties with an opportunity to be heard as to other appropriate action they recommend be taken.

Scenario 7 would appear to be best addressed by the assistant attorney general seeking advice from her administration. The attorney general's office undoubtedly

has a threat incident protocol in place to protect its employees from threats made against them in the performance of their official duties.

To the extent Scenarios 8 and 9 involve pending cases, the advice provided concerning Scenarios 2 through 6 applies. If a pending case is not involved, the affected judge should seek the advice of security personnel as to appropriate precautions or action to take.

In summary, threats must be taken seriously though it is difficult to discern disgruntlement from intent to harm. Judges should discuss appropriate threat reporting and action protocols with court security and local law enforcement. It is of utmost importance that the courts remain a safe and secure venue to peacefully resolve legal disputes. Judges are not required to disqualify themselves from further involvement in assigned cases merely because a threat has been made against them by a litigant, supporter, or otherwise.