

Stop, Collaborate, and Listen: Judicial Ethics in Collaborative Justice Courts

Collaborative justice courts blend judicial supervision with rehabilitation, treatment, and other support in place of detention. These courts are intended to improve legal outcomes by focusing on underlying problems such as mental health and substance abuse. California's collaborative courts take a non-adversarial, multidisciplinary approach with involvement from judges, lawyers, law enforcement, and health and social services agencies. Collaborative justice is intended to be trauma-informed¹ and culturally sensitive, and involves early intervention, continued supervision, and regular reviews with the court and other stakeholders.

California's first collaborative courts were implemented piecemeal in response to individual courts' needs. However, their success and popularity soon caught on, and in 2000, the Judicial Council created the Collaborative Justice Courts Advisory Committee "to assess the effectiveness of problem-solving courts and nurture best practices, secure funding and promote ongoing innovation."²

There are over 400 collaborative courts in California, in nearly every jurisdiction in the state.³ These courts consist of adult and juvenile drug courts, dependency drug courts, adult and juvenile mental health courts, veterans' courts, domestic violence courts, DUI courts, homeless courts, peer court for juveniles, reentry courts, and more, including newer courts such as tribal healing to wellness court, and court for commercially sexually exploited children.⁴

¹ There is no universal definition of "trauma-informed" as it applies to the legal system, but most definitions include the recognition that participants have likely experienced trauma, which may in turn affect their behavior and responses. Trauma-informed practices promote safety, empowerment, and healing. Cal. Civ. Code § 1954.08, subd. (g). The National Council of Juvenile and Family Court Judges states, "a trauma-informed court recognizes the pervasiveness and impact of trauma" on both litigants and court personnel, "and institutes practices to mitigate those effects and reduce further retraumatization." "Coming to court is traumatic in and of itself for many parties.... A trauma-informed court considers how trauma may be impacting the presenting parties and factors that into interactions with parties.... A trauma-responsive court provides an atmosphere of dignity, respect, transparency, and safety. This includes supporting people who have experienced trauma to feel empowered and engaged in court proceedings." *Promoting Well-Being in Domestic Relations Court – Building Understanding Series*, p. 11, https://www.ncsc.org/__data/assets/pdf_file/0027/77832/Building-Understanding-Series-Chapter-2.pdf [as of October 28, 2024].

² Judicial Council of California, Center for Court Innovation, *California's Collaborative Justice Courts: Building a Problem-Solving Judiciary* (2005) p. 4.

³ Judicial Council of California, *Fact Sheet: Collaborative Justice Courts* (Updated June 2023) at https://www.courts.ca.gov/documents/CollaborativeCourts_factsheet.pdf [as of August 28, 2023].

⁴ *Id.*; California Association of Collaborative Courts, *Tribal Healing to Wellness Court* <https://wearecacc.org/programs/tribal-healing-to-wellness-court/> [as of October 14, 2024]; U.S. Department of Justice, *Tribal Healing to Wellness Courts: The Key Components* <https://www.ojp.gov/pdffiles1/bja/188154.pdf> [as of October 14, 2024].

California's collaborative courts operate according to a set of foundational principles, which are modeled on the 10 key components of drug courts as outlined by the National Association of Drug Court Professionals.⁵ In 2001, the Collaborative Justice Courts Advisory Committee adopted an 11th principle emphasizing commitment to cultural competency.

1. Collaborative justice courts integrate services with justice system processing.
2. Collaborative justice courts emphasize achieving the desired goals without using the traditional adversarial process.
3. Eligible participants are identified early and promptly placed in the collaborative justice court program.
4. Collaborative justice courts provide access to a continuum of services, including treatment and rehabilitation services.
5. Compliance is monitored frequently.
6. A coordinated strategy governs the court's responses to participants' compliance, using a system of sanctions and incentives to foster compliance.
7. Ongoing judicial interaction with each collaborative justice court participant is essential.
8. Monitoring and evaluation measure the achievement of program goals and gauge effectiveness.
9. Effective collaborative justice court operations require continuing interdisciplinary education.
10. Forging partnerships among collaborative justice courts, public agencies, and community-based organizations increases the availability of services, enhances the program's effectiveness, and generates local support.
11. Effective collaborative justice courts emphasize a team and individual commitment to cultural competency. Awareness of and responsiveness to diversity and cultural issues help ensure an attitude of respect within the collaborative justice court setting.⁶

Collaborative courts tout many successes, including that they save lives.⁷ Other findings include greater retention rates, reduced drug use and criminal behavior while in the program, reduced costs (from reduced incarceration, criminality, criminal justice

⁵ National Association of Drug Court Professionals, Drug Court Standards Committee (Jan. 1997, Reprinted Oct. 2004) *Defining Drug Courts: The Key Components* at <https://www.courts.ca.gov/documents/DefiningDC.pdf> [as of August 28, 2023].

⁶ California Courts, The Judicial Branch of California, *Components of Collaborative Justice Courts* at <https://www.courts.ca.gov/programs-collabjustice.htm> [as of August 28, 2023].

⁷ California Association of Collaborative Courts, *Treatment Works: Collaborative Courts Save Lives* at <https://wearecacc.org/treatment-works/> [as of August 28, 2023].

costs, and social services agency costs), and reduced recidivism even after participants leave the program.⁸

It is important to note that as a result of changes in the law over the past several years, services and support for those who struggle with addiction, mental health illnesses, anger management, etc. may access those services and diversion programs in courtrooms not expressly designated as collaborative courts.

Applying the Code of Judicial Ethics Within the Framework of Collaborative Courts

The focus on integrated services, coordinated strategies, ongoing judicial interaction, and partnerships between courts and other stakeholders contribute to collaborative courts' successful outcomes. However, these same priorities raise unique ethical concerns. Judges must carefully navigate the diverse needs of collaborative court cases within the bounds of the Code of Judicial Ethics.⁹ Other issues arise, including those involving due process, continuity of care, eligibility criteria, equality of services, and access to justice. Each of these topics could be its own article. Accordingly, we will limit our focus to one of the most common concerns in the collaborative court landscape – ex parte communication.

Canon 3B(7)(a) states “A judge shall not initiate, permit, or consider ex parte communications, that is, any communications to or from the judge outside the presence of the parties concerning a pending* or impending* proceeding, and shall make reasonable efforts to avoid such communications”

The Advisory Committee commentary to canon 3B(7)(a) states, “Though a judge may have ex parte discussions with appropriate court personnel, a judge may do so only on matters that are within the proper performance of that person’s duties. For example, a bailiff may inform the judge of a threat to the judge or to the safety and security of the courtroom, but may not tell the judge ex parte that a defendant was overheard making an incriminating statement during a court recess.... A sentencing judge may not consult ex parte with a representative of the probation department about a matter pending before the sentencing judge.”

The American Bar Association’s Model Code of Judicial Conduct contains an express exception for ex parte communication in the context of collaborative courts. Comment 4 to rule 2.9 of the Model Code states: “A judge may initiate, permit, or

⁸ Belenko, *Research on Drug Courts: A Critical Review* (2001 Update) The National Center on Addiction and Substance Abuse (CASA) at Columbia University, in National Drug Court Institute Review, pgs. 11, 16-17; Krebs, et al., *Assessing the Long-Term Impact of Drug Court Participation on Recidivism with Generalized Estimating Equations* (2007) Drug and Alcohol Dependence, Vol. 91, Issue 1, pgs. 57-68.

⁹ All further references to the code, canons, terminology, and advisory committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.”

California’s code contains no such exception. This underlines the expectation that judges will conform to the ethical limitations on ex parte communication, even in less formal settings such as problem-solving courts. This can be particularly challenging for collaborative court judges given the underlying goals of maintaining ongoing judicial interaction with program participants, and fostering partnerships between collaborative courts and public agencies, community organizations, and law enforcement.

In communicating with law enforcement, judges must exercise caution and restraint. Throughout the collaborative process, judges must ensure that the court is neither acting as, nor perceived to be acting as, an agent for law enforcement.¹⁰ While some interactions, such as discussing a probation officer’s presentence report, are permitted, others can be more problematic.¹¹ Generally, judges should refrain from extrajudicial factual inquiries as well as legal inquiries without the consent of all parties, and should immediately report any ex parte contact to all parties.¹²

Collaborative court judges are also encouraged to “forge partnerships” with public agencies and community-based organizations to “provide access to a continuum of services,” “increase the availability of services, enhance[] the program’s effectiveness, and generate[] local support.”¹³ This too must be done within the confines of the code. To minimize ex parte communication, courts can educate community partners on the rationale behind the rule, and how to identify and avoid the prohibited contact. In addition, judges may want to separate legal hearings from treatment hearings, and ensure that the case notes for legal and treatment hearings stay separate. Judges should also refrain from discussing with public agencies and community organizations any specific cases pending before the court, and must immediately report any unintentional ex parte communication to all parties.

¹⁰ Douglas B. Marlow, J.D., Ph. D., and Hon. William G. Meyer (Ret.), *The Drug Court Judicial Bench Book, Chapter 10: Ethical Obligations of Judges in Drug Courts* (Feb. 2011, updated Feb. 2017) National Drug Court Institute, p. 198.

¹¹ See, e.g., *U.S. v. Gonzales* (9th Cir. 1985) 765 F.2d 1393, 1398 (“[W]hen the officer is preparing a presentence report he is acting as an arm of the court and this permits ex parte communication”); *U.S. v. Davis* (9th Cir. 1975) 527 F.2d 1110, 1112 (stating it is entirely proper for a judge to discuss the presentence report and sentence with the probation officer outside defendant’s presence).

¹² Douglas B. Marlow, J.D., Ph. D., and Hon. William G. Meyer (Ret.), *The Drug Court Judicial Bench Book, Chapter 10: Ethical Obligations of Judges in Drug Courts* (Feb. 2011, updated Feb. 2017) National Drug Court Institute, p. 203-204.

¹³ California Courts, The Judicial Branch of California, *Components of Collaborative Justice Courts* at <https://www.courts.ca.gov/programs-collabjustice.htm> [as of August 28, 2023].

The ongoing relationship between judges and collaborative court participants may also lead to a greater chance of ex parte communication, but there are ways to decrease the risk. This may include education and training for attorneys and other justice partners, as well as consistent upfront discussions with the participants about how to recognize and prevent ex parte communication. Judges should share all communications with or about the litigants with all attorneys, and, as with all ex parte communication, must immediately disclose should it occur. To facilitate the collaborative nature of these courts while steering clear of ex parte communication, some judges have opted to obtain stipulations from the parties authorizing ex parte communication with justice partners and stakeholders pursuant to canon 3B(7)(c).¹⁴

Ex parte communication is just one of the ethical pitfalls encountered in the context of collaborative courts. Judges must find ways to fulfill their unique judicial role while still complying with the code. In her interview with *The Source*, Judge Yew notes that one of the most important takeaways for collaborative justice court judges is to remember your role. It can be difficult to do so given the less formal setting, frequent and ongoing interaction with litigants, and continuing collaboration with justice partners. But this guiding principle may provide a touchstone to judges as they navigate the complicated ethical landscape that is the collaborative justice court system.

¹⁴ Rothman et al., *California Judicial Conduct Handbook* (4th ed. 2017) § 5.1, p. 258.