



Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Hon. Mary T. Noonan
State Court Administrator
Cathy Dupont
Deputy State Court Administrator

Informal Opinion 19-03

August 26, 2019

Question:

The Ethics Advisory Committee has been asked for its opinion on whether a judge may engage with a defendant before a criminal jury trial by, among other things, stepping down from the bench and shaking the defendant's hand in front of the potential jurors to emphasize to these jurors the defendant is presumed to be not guilty at that stage of the proceedings.

Answer:

It is the committee's opinion the judge may not engage in such interaction.

Discussion:

The judge who requested the opinion provided the Ethics Advisory Committee with an article written by the Honorable Mark W. Bennett, a former federal judge in the U.S. District Court, Northern District of Iowa. In the article, Judge Bennett describes his former practice of approaching defendants before a criminal jury trial and, in the presence of the potential jurors, making statements that the defendant is presumed to be not guilty. The judge who requested this opinion states that he engages in a similar version of Judge Bennett's practice where before the jury has been selected, the judge approaches a defendant in the presence of the jury venire, shakes the defendant's hand, welcomes the defendant to court, and explains to the potential jurors he has done this not because the judge favors one side or the other, but to emphasize the person with whom the judge just shook hands is presumed to be absolutely not guilty at that point in the proceeding. The judge then asks the potential jurors to look at the defendant and to stand if they are capable of affording the defendant the presumption of innocence. The judge does not engage in any similar interaction with the prosecutor. The judge asks whether this practice is permitted by the Code of Judicial Conduct. Although the committee is supportive of the judge's efforts to educate potential jurors about the presumption of innocence, the committee determines this type of practice is not allowed.

**The mission of the Utah judiciary is to provide an open, fair,
efficient, and independent system for the advancement of justice under the law.**

Rule 2.2 of the Code of Judicial Conduct states that a judge must perform all duties of the judicial office fairly and impartially. Rule 1.2 requires a judge to act at all times in a manner that promotes the impartiality of the judiciary. The committee recognizes there are many credible studies finding that jurors have difficulty understanding and applying the concept of the presumption of innocence. The committee agrees with the judge that the justice system should not ignore these studies. The justice system should actively find ways to improve jurors' understanding of the presumption of innocence, a concept that is constitutionally required and vitally important to the criminal justice system. The committee nevertheless concludes the judge's practice is not an appropriate way to educate jurors because of the risk that the judge may seem partial.

Explaining the importance and the application of the presumption of innocence is a critical role of a judge. But the judge's role is to explain the concept as it is grounded in the law. A judge may not make statements that may be perceived as the judge's opinion on a specific defendant's guilt or innocence. Once a judge has made such a statement, the perception of impartiality is undermined and the perception cannot be reversed by the judge explaining the judge does not actually favor either side. The judge's actions convey one impression and the judge's statements cannot completely overcome that impression.

In discussing the opinion request, the committee members expressed concerns about a judge inserting him or herself into a trial proceeding. The committee has no doubt the judge here has only the best intentions, but by shaking hands with a criminal defendant and making statements that the defendant is absolutely not guilty at this point, the attention of the jury undoubtedly shifts to the judge and the judge's statements about the defendant. The judge is no longer a neutral presence. In *United States v. Nickl*, 427 F.3d 1286, 1295 (10th Cir. 2005), the Tenth Circuit Court of Appeals stated: "The influence of the trial judge on the jury is necessarily and properly of great weight and [the judge's] lightest word or intimation is received with great deference, and may prove controlling. A trial judge's position before a jury is overpowering. [The judge's] position makes [the judge's] slightest action of great weight with the jury." A jury will focus on the actions and statements of the judge, and the consequence will be that the judge's neutrality may be undermined. The committee is also concerned about the public perception when one judge engages in a practice very different from the practices of other judges.

The system benefits greatly when the jury pays appropriate attention to the judge's explanation of the presumption of innocence. But neutrality is lost when the judge comments on the concept's application to a particular defendant. The Utah Supreme Court has stated: "Impartiality, both perceived and actual, is of a particular importance in a criminal case before a jury. The judge has the primary duty to protect the accused's right to a fair trial. The judge is forbidden to express or otherwise indicate a view as to the guilt or innocence of the accused." *State v. Beck*, 2007 UT 60, ¶ 16, 165 P. 3d 1225. The judge in this circumstance does not, for example, make similar statements about the jurors' obligations once they are convinced of a defendant's guilt beyond a reasonable doubt. The judge's obligation is to explain the concept of the presumption of innocence in a way jurors can understand and apply, but the judge must do so without commenting on how the concept would apply to a specific defendant and without engaging in actions that draw the potential jurors' attention to the judge.

In conclusion, the judge may not engage in the practice of interacting with a criminal defendant prior to seating a jury, at least in the way as has been explained to the committee. The

committee supports efforts to ensure potential jurors understand their role in the proceedings and how to apply the concepts that are explained to them. The committee encourages judges to explore ways to improve the justice system without compromising judicial neutrality.