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ROSTER

**NHTSA IN-STATE:  
KANSAS DUI AND  
ETHICS**

April 25, 2017  
Topeka, KS

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## **NHTSA in-State - Kansas**

**April 24, 2017 — April 25, 2017**  
**Topeka, Kansas**

### **Faculty**

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## **NHTSA In-State - Kansas**

**April 24, 2017 — April 25, 2017**

**Topeka, Kansas**

### **Faculty Biographies**

#### **HON. JASON E. ASHFORD**

Jason E. Ashford is the State Court Judge for Houston County, Georgia, where he was elected in November, 2010 and re-elected without opposition in 2014. As State Court Judge, he presides over civil and criminal jury trials and is a vocal advocate for mediation, court technology and docket efficiency. Prior to taking the bench, Judge Ashford was a felony prosecutor for over a decade. He was the District Attorney and Chief Assistant District Attorney in Houston County, where he was responsible for prosecuting serious violent felonies and homicides. Prior to being named Chief Assistant, he helped create and was the first head of the Houston County Special Victims Unit, where he specialized in prosecuting both crimes against children and domestic violence. He was an adjunct professor for 17 years for Middle Georgia State University specializing in Computer Law and taught a Government Contracting at the graduate-level for several years at Georgia College and State University. The author of many articles in academic and practitioner publications, he travels regularly to speak on issues of prosecution and judicial ethics and technology in and out of the courtroom. He is on the faculty for many organizations, including the American Law Institute, the American Institute for Justice, and the National Judicial College. Prior to becoming a prosecutor, Judge Ashford was an active duty officer in the U.S. Air Force, and served as Comptroller and Support Flight Commander for the 5th Combat Communications Group at Robins Air Force Base. While in the 5th, he was responsible for group logistics, civil engineering, supply, equipment issue, and transportation. After serving as an active duty officer, he then joined the Georgia Air National Guard, where he was the Squadron Commander of the 116th Security Forces for the 116th Air Control Wing, heading a 60-person unit. Judge Ashford holds a Bachelor of Science in economics and a Juris Doctorate, both from Florida State University. He is a former President of both the Warner Robins Optimist Club and the Houston County Bar Association, and is a Rotary Paul Harris Fellow. Judge Ashford joined the faculty of The National Judicial College in 2014.

#### **HONORABLE STEVE SMITH**

Judge Steve Smith has served as a judge for more than twenty years and presently serves as Judge of the 361st District Court in Bryan. His undergraduate degree is from Abilene Christian University, and he earned his J.D. from the University of Texas School of Law in 1977. Board certified in Civil Trial Law, he is a member of the American Bar Association, American Judges Association, the State Bar of Texas and is a Texas Bar Foundation Sustaining Life Fellow and a Life Fellow of the American Bar Foundation. Judge Smith is a Past Chair of both the ABA Judicial Division's National Conference of Specialized Court Judges and the Judicial Section of the State Bar of Texas, and is a member of the faculty for the National Judicial College. Judge Smith is an alumnus of The National Judicial College and holds a Certification in General Jurisdiction Trial Skills. He joined the NJC faculty in 2003, and currently serves as Chair of the NJC Faculty Council representing General Jurisdiction.

## **NHTSA In-State - Kansas**

**April 24, 2017 — April 25 2017**

### **Topeka, Kansas Staff Biographies**

#### **HONORABLE CHAD C. SCHMUCKER, PRESIDENT**

Judge Chad C. Schmucker became the eighth president of The National Judicial College on January 1, 2014. He received his bachelor's degree from the University of Michigan and Juris Doctor from Wayne State University Law School. After graduation from law school, he entered into private practice specializing in personal injury and insurance defense litigation. In 1991, he became a circuit court judge in Michigan. During his 20-year tenure, he assisted in starting four problem-solving courts in Jackson, including felony drugs/alcohol, domestic violence, family dependency, and mental health. As Michigan's state court administrator, he oversaw management of the state's 246 trial courts, implemented a Michigan version of trial court performance measures, and developed a plan for court governance to promote cooperation and efficiency among courts. Judge Schmucker co-chaired the *Council of State Court Administrators/Council of Chief Justices Problem Solving Court Committee*. He was on the Steering Committee of Jackson County New Jail Project from 2002-2003 and on the Executive Board of the Michigan Judges Association where he chaired the Technology Committee from 1998-2001. Judge Schmucker served on the Department of Corrections—Evidence Based Sentencing/COMPAS Committee in 2010, Justice Young's Technology Committee from 2000-2010, Justice Corrigan's Underground Economy Child Committee from 2008-2010, the Criminal Justice Information Systems Advisory Board from 2002-2006, and the Michigan Judicial Institute Education Advisory Board from 2000-2002.

#### **JOY D. LYN GAR, ESQ., CHIEF ACADEMIC OFFICER**

Joy D. Lyngar joined The National Judicial College as academic director in October 2007 and was promoted to chief academic officer in June 2008. Before joining the NJC, Ms. Lyngar spent 10 years specializing in judicial education at the National Council of Juvenile and Family Court Judges. She most recently served as director of the Juvenile and Family Law Department where she implemented training programs for judicial and multi-disciplinary audiences ranging from 20–1500 participants on topics such as ethics, evidence, juvenile delinquency, and domestic relations. She served as project director for numerous federal grants to produce educational resources for judges and other court service professionals, and to provide direct technical assistance to improve court practice. Prior to her work in national judicial education, Ms. Lyngar practiced law in Canada working in a general practice firm that handled criminal defense, civil litigation, and family law. Ms. Lyngar received her bachelor's degree and Juris Doctor from the University of Saskatchewan. She has given presentations for the National Child Support Enforcement Association, the National Conference on Juvenile Justice, the Association of Family and Conciliation Courts, and the National Juvenile Defender Center. Ms. Lyngar is a member of the National Association of Women Judges, the Association of Family and Conciliation Courts, the National Association of State Judicial Educators, the Association of Fundraising Professionals, and the Professional Association of Diving Instructors.

## **NHTSA In-State - Kansas**

**April 24, 2017 — April 25 2017**

**Topeka, Kansas**

**Staff Biographies**

**KATHERYN YETTER, J.D., ACADEMIC DIRECTOR**

Katheryn Yetter became academic director for The National Judicial College in July 2012. Before joining the NJC, she was senior attorney for the National Council of Juvenile and Family Court Judges. In this capacity, she managed the day-to-day operations of over \$1M in federally grant-funded projects designed to improve the justice system's response to child protection, custody, and visitation-related matters. Ms. Yetter was also a policy analyst for the Oregon Judicial Department in the areas of juvenile, criminal, and family law, providing staff support to the State Family Advisory Committee Subcommittee on Domestic Violence and the Juvenile Court Improvement Project Advisory Committee. Ms. Yetter co-authored the publication "A Judicial Guide to Child Safety in Custody Cases," the first national comprehensive tool for judicial decision making in custody and visitation cases when domestic violence is a factor. Some of her other publications include "Moving Beyond 'Failure to Protect'" in West Virginia (2010), "Judicial Decision Making in Custody and Visitation Cases" (2008), "Responding to Allegations of Parental Alienation Syndrome" (2008), and "Data Warehouse 'JOIN's' Oregon's Court and Agency Systems" (2006). She has written curricula and given presentations on behalf of the National Center for State Courts, the California Administrative Office of Courts, the Oregon Judicial Department, the Nevada Bar Association, the Battered Women's Justice Project, and Futures Without Violence, among others. She is a member of the Oregon State Bar and the American Bar Association, and is a graduate of Willamette University College of Law and the University of Oregon.



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# THE NATIONAL JUDICIAL COLLEGE

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## EVIDENCE ISSUES IN TRAFFIC COURT

## DIVIDER 1

Hon. Steve L. Smith

### OBJECTIVES:

After this session you will be able to:

1. Focus on several common evidentiary issues that arise in traffic cases;
2. Articulate the case law that applies in traffic cases; and
3. Confidently and correctly rule on admissibility of evidence.

### REQUIRED READING:

### PAGE

- |    |                                                                                            |   |
|----|--------------------------------------------------------------------------------------------|---|
| 1. | Steve L. Smith, <i>Evidence Issues in Traffic Court</i> (April 2017) [NJC PowerPoint]..... | 1 |
|----|--------------------------------------------------------------------------------------------|---|

**EVIDENCE ISSUES  
IN TRAFFIC COURT**

2017 KANSAS MUNICIPAL  
JUDGES CONFERENCE  
Topeka, Kansas  
April 24, 2017

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**Four Very Important Ideas  
For Judges Plus One Bonus  
Idea**

OR

The Practical Application of  
the Rules of Evidence

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**1. We have no time  
to think, so listen  
very carefully.**

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**2. Use Rule 104a**

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**3. Evidence rulings as a trial management technique**  
▫ Invite/discourage objection  
▫ Asked & answered  
▫ To interject or not to interject

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**4. Jury or Non-jury**

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**Bonus: The art of not ruling**

- "Move along counsel"
- "Please re-ask/re-phrase the question"

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**SOME IMPORTANT EVIDENCE RULES**

- Rule 104 – Preliminary Questions
  - Courts can decide preliminary questions of qualifications, privileges or admissibility. The rules of evidence do not apply to this determination except those involving privilege
  - A defendant/juvenile does not waive the 5<sup>th</sup> by testifying on preliminary questions
  - This rule allows evidence to be "connected up" at a later time in the trial

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**SOME IMPORTANT EVIDENCE RULES**

- Rule 201 – Judicial Notice
  - Court may take judicial notice of facts that are not subject to reasonable dispute
    - Generally known within the court's jurisdiction; or
    - Can accurately and readily be determined from sources whose accuracy cannot be reasonably questioned (the Internet?)
  - Court can do it on motion or on its own
  - Jury must be instructed as to effect

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## SOME IMPORTANT EVIDENCE RULES

- Rule 401 – Relevance
  - It's relevant if it:
    - Has any tendency to make or fact more or less probable; and
    - It's of consequence in determining the action
  - Just because it's admissible doesn't mean we need to hear it!

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## SOME IMPORTANT EVIDENCE RULES

- Rule 403 – Exclusion of Evidence
  - Relevant evidence may be excluded if its probative value is outweighed by danger of:
    - Unfair prejudice – persuasion on emotion or bias
    - Confusion of the Issues/Misleading of the jury – including technical or scientific evidence
    - Undue delay
    - Wasting of time
    - Needless presentation of cumulative evidence – don't beat the dead horse

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## SOME IMPORTANT EVIDENCE RULES

- Rule 404(b) – Crimes/Wrongs/Bad Acts
  - Permits evidence of "other" crimes, wrongs or acts for "other purposes"
  - *Montgomery v. State*, 810 S.W.2d 830
  - Evidence is admissible if it "... tends in logic and common sense to serve some purpose other than character conformity to make the existence of a fact of *consequence* more or less probable than it would be without the evidence." (emphasis added)

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**SOME IMPORTANT EVIDENCE  
RULES**

- State rules usually require notice prior to trial of intent to use "bad acts"
- On a timely request the judge **MUST** instruct the jury regarding the offeror's burden and limit the jury's consideration for the purpose admitted

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**SOME IMPORTANT EVIDENCE  
RULES**

- "Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."

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**SOME IMPORTANT EVIDENCE  
RULES**

- Rule 601- Witness Qualification
  - It's up to you to determine whether or not a witness is qualified to testify
  - It becomes an interesting issue when persons of young age are involved
  - "Do you know what it means to tell the truth?" "Do you know what a lie is?"

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**SOME IMPORTANT EVIDENCE RULES**

- Rule 608(b)
  - While opinion and reputation character evidence of witnesses may be offered, specific instances of conduct (other than Rule 609 matters) may not be inquired to in x-exam nor may they be proved by extrinsic evidence
  - Specific instances may be offered for other purposes, such as showing bias or rebutting an implication of a sterling past

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**SOME IMPORTANT EVIDENCE RULES**

- Rule 609 – Criminal Convictions
  - Permits evidence of prior criminal record of felony or moral turpitude conviction if probative value outweighs prejudicial effect
  - Must be no more than 10 years old unless probative value outweighs prejudicial effect
  - Proponent must give, on request, enough notice to provide "fair opportunity" to contest use of evidence

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**SOME IMPORTANT EVIDENCE RULES**

- Rule 613 –Prior Statements
  - Prior inconsistent statements can be used, but often attorneys do not do it right
    - Tell witness contents, time and place of statement and to whom it was made
    - Witness can then admit or deny making statement
    - If statement is admitted, extrinsic evidence is not admissible

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**SOME IMPORTANT EVIDENCE  
RULES**

- Rule 702 – Experts
  - Extent to which theory is accepted as valid by relevant scientific community
  - Qualifications of expert
  - Existence of literature supporting or rejecting theory

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**SOME IMPORTANT EVIDENCE  
RULES**

- Rule 702 – Experts
  - Potential rate of error
  - Availability of other experts to test technique
  - Clarity of explaining this science
  - Experience and skill of person who applied technique

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**SOME IMPORTANT EVIDENCE  
RULES**

- Rule 801 – What Hearsay IS
  - Out-of-court statement offered to prove the truth of the matter asserted
  - "Statement" can be oral, written, or non-verbal conduct
  - Pointing, nodding or headshakes, if meant as "over there," "yes" or "no" can be substitutes for verbal responses

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**SOME IMPORTANT EVIDENCE RULES**

- Rule 801 – What is NOT Hearsay
  - Statement by an opposing party
    - Personal admissions
    - Admissions adopted by silence
    - Admissions authorized by the person against whom the admission is sought to be admitted
    - An agent within the scope
    - Co-conspirator statements

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**SOME IMPORTANT EVIDENCE RULES**

- Rule 801 – What is NOT Hearsay
  - W's prior inconsistent statement given under oath
  - W's consistent statement offered to rebut charge or fabrication or improper influence or motive in testifying
  - Not offered for truth

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**SOME IMPORTANT EVIDENCE RULES**

- Rule 801
  - Just because a W is actually in court and testifying doesn't mean that his or her own prior out-of-court statement is not hearsay. If offered to prove its truth, a prior statement may well be barred despite the fact that the W is on the stand and available for x-exam.

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**SOME IMPORTANT EVIDENCE RULES**

- Rule 801 – Operative Facts
  - When the mere making of an out-of-court statement – regardless of truthfulness – has legal significance, then it is transformed into an "operative fact." Even though it could provide truth of the matter asserted, it's offered for a more essential purpose, such as statements forming the basis for a fraud claim, acceptance or terms of a contract, etc. The statement itself is an operative fact, and therefore not hearsay.

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**SOME IMPORTANT EVIDENCE RULES**

- Rule 803 – Exceptions
  - These exceptions are couched in terms of non-application of the rule rather than in terms of admissibility, in order to avoid any implication that other possible grounds of objection might be eliminated from consideration.

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**SOME IMPORTANT EVIDENCE RULES**

- Present Sense v. Excited Utterance
  - Both overlap, though based on somewhat different theories
  - Present sense requires substantial contemporaneity, while excited utterances can be somewhat more removed (the duration of the excitement)
  - Measure trustworthiness not from lapse of time from event to statement but from first real opportunity to report statement

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**SOME IMPORTANT EVIDENCE RULES**

- Medical Diagnosis/Treatment
  - Must be pertinent to the medical diagnosis or treatment
  - General cause okay – car crash vs. "he ran a red light"
- Learned Treatises
  - May be read into evidence but not admitted as an exhibit

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**SOME IMPORTANT EVIDENCE RULES**

- Business Records
  - Remember that the witness does not have to be the one with personal knowledge of what was recorded

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**SOME IMPORTANT EVIDENCE RULES**

- Hearsay Analysis
  - Is the evidence an assertion or action?
  - Is the assertion made or done by someone other than the witness on the stand?
  - Is the evidence offered to prove the truth of the matter asserted?

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**SOME IMPORTANT EVIDENCE RULES**

• Five Part Hearsay Test

1. Is the evidence being offered hearsay?
2. If so, is the evidence within one of the recognized exceptions to the hearsay rule?
3. Which exception is applicable, and have the foundational requirements been met?

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**SOME IMPORTANT EVIDENCE RULES**

4. If the evidence is not admissible under a specific exception, is the hearsay exceptionally trustworthy?
5. Does admission of the hearsay statement survive a challenge under the *Crawford*?

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**UNDERSTANDING CRAWFORD (HOPEFULLY)**

Prior to *Crawford*, the standard for out-of-court statement admissibility was governed by *Ohio v. Roberts*. The Supreme Court held that a statement would be admissible if the absent witness was "unavailable" and if the statement bore an "*indicia of reliability*."  
The focus would be on whether there was a "*firmly rooted hearsay exception*."

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**UNDERSTANDING  
CRAWFORD (HOPEFULLY)**

*Crawford* overruled *Roberts* and set a new standard for out-of-court statements of unavailable witnesses. The testimony of a wife was admitted against her husband. She was unavailable due to her claiming the spousal privilege. After being upheld in the Washington Supreme court, the U.S. Supreme Court reversed, stating a new test that focused on whether the statement was "testimonial" or "nontestimonial."

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**UNDERSTANDING  
CRAWFORD (HOPEFULLY)**

If a statement is testimonial, it was made admissible only if the W is unavailable AND where there has been a prior opportunity for confrontation.

Later in *Davis v. Washington* and *Whorton v. Bockting*, the Supremes overruled *Roberts* as to nontestimonial statements.

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**UNDERSTANDING  
CRAWFORD (HOPEFULLY)**

Nontestimonial statements are now analyzed under a jurisdiction's ordinary hearsay rules. There's no longer a need for a "firmly rooted" exception or that there is a "particularized guarantee of trustworthiness."

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**UNDERSTANDING  
CRAWFORD (HOPEFULLY)**

Six-step analysis:

1. Is the hearsay being offered against the opponent?
2. Is the W testifying and subject to x-exam at trial?
3. Testimonial or nontestimonial?
4. Does it fall into a *Crawford* exception? (forfeiture by wrongdoing or dying declaration)

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**UNDERSTANDING  
CRAWFORD (HOPEFULLY)**

5. Has the opponent waived right to confrontation?
6. Can the proffering party establish unavailability of the W and that the opponent had a right to prior x-exam?

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**UNDERSTANDING  
CRAWFORD (HOPEFULLY)**

1. Not implicated by *Crawford*
  - Evidence of the other party's own statements (including adoptive admissions)
  - Evidence not offered for truth of the matter asserted (remember limited instruction)

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**UNDERSTANDING  
CRAWFORD (HOPEFULLY)**

2. Is W subject to x-exam at trial?

No **Crawford** problems if W testifies. If W is in court but is not called, **Crawford** applies.

Also applies if W refuses to testify under an assertion of privilege or otherwise.

Confrontation under closed-circuit (**Maryland v. Craig**) is acceptable

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**UNDERSTANDING  
CRAWFORD (HOPEFULLY)**

Memory loss permits admission of evidence

If W is evasive or uncooperative, prior statements are admissible if they fall within an exception.

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**UNDERSTANDING  
CRAWFORD (HOPEFULLY)**

3. Is it testimonial?

Significance of involvement of govt. officials in the production of the evidence

911 calls that describe what's "actually happening," as opposed "description of past events."

Scientific reports are covered

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**UNDERSTANDING  
CRAWFORD (HOPEFULLY)**

Medical testimony usually turns on whether the professional was affiliated with law enforcement, or actual law enforcement involvement in requesting, directing, or observing the exam or interview.

The question of testimonial nature turns on the PRIMARY PURPOSE of the interrogation.

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**UNDERSTANDING  
CRAWFORD (HOPEFULLY)**

4. Is there an exception to *Crawford*?

Forfeiture by wrongdoing – where opponent acted with intent to silence W by making W unavailable for to deprive the justice system of evidence.

Intent to silence a W can be inferred in DV cases through an ongoing pattern of abuse. *Giles v. California*

Dying declarations

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**UNDERSTANDING  
CRAWFORD (HOPEFULLY)**

5. Waiver of confrontation?

Stipulation of testimony, through "notice and demand" statutes or by "opening the door."

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**UNDERSTANDING  
CRAWFORD (HOPEFULLY)**

6. Has unavailability and opportunity to x-exam been met?

After *Crawford*, the hearsay rules have no applicability to confrontation analysis so Rule 804 definition of "unavailability" doesn't apply.

Focus is on reasonable, good-faith efforts made to produce W in court.

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**UNDERSTANDING  
CRAWFORD (HOPEFULLY)**

Circumstances where unavailability is deemed:

Death

Assertion of privilege

Refusal to testify

Mental or physical infirmity so severe as to render W incompetent or unable to testify.

Where reasonable, good faith efforts have been demonstrated

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**UNDERSTANDING  
CRAWFORD (HOPEFULLY)**

Circumstances where prior x-exam opportunity has been demonstrated:

Testimony at prior court proceeding

Cross examination at deposition

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**SOME IMPORTANT EVIDENCE RULES**

- Rule 901- Authentication
  - A proponent must produce evidence sufficient to support a finding that the evidence is what it is claimed to be

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**SOME IMPORTANT EVIDENCE RULES**

- Rule 1003 - Copies
  - Don't sustain a "best evidence" objection when copies are introduced unless a GENUINE question is raised about the original's authenticity or circumstances make it unfair to admit the duplicate

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**Other Cases to Read**

- *Davis v. Washington*, 547 U.S. 813
- *Hammon v. Indiana*, 547 U.S. 813
- *Melendez-Diaz v. Massachusetts*, 557 U.S. 305
- *Michigan v. Bryant*, 131 S.Ct. 1143
- *Williams v. Illinois*, 132 S.Ct. 2221

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**Matters Arising in Traffic Cases**

- Horizontal Gaze Nystagmus (HGN)
  - Not permitted unless presented by an expert – *City of Wichita v. Molitor*, 341 P.3d 1275 (2015)
  - Most states permit the officer to testify
  - Under *Daubert*, would HGN come to be accepted just as radar is today?

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**Matters Arising in Traffic Cases**

- Refreshing Recollection v. Past Recollection Recorded
  - A witness can have his/her recollection refreshed by a document
  - W is permitted to review the document, then asked if it refreshes recollection
  - Document is not to be read allowed

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**Matters Arising in Traffic Cases**

- DIC-27
  - Present law permits DIC-27 to be used to prove the truth of the matter asserted – *State v. Baker*, 2 P3d 786 (2000); *Alt v. Kansas Department of Revenue*, 2015 WL 6621620 (2015)
  - What about *Crawford*?

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**Matters Arising in Traffic Cases**

- Radar
  - No need to establish admissibility of theory
  - Simply show that the officer was familiar with the operation of the radar unit and that the operation was followed – *State v. Primm*, 606 P2d 112 (1980); *State v. Ramirez*, 2016 WL 4499980 (Kan. App. 2016)

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**Matters Arising in Traffic Cases**

- Business Record Exception (K.S.A. 2015 Supp. 60-460(m))
  - Does not require custodian of records to testify if records affidavit is filed pursuant to K.S.A. 2015 Supp 60-245a - *State v. Cleverly*, 2017 WL 462036 (Kan. App. 2017)

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**Matters Arising in Traffic Cases**

- But pay careful attention to paragraphs 7 and 8
- "Cleverly asserts that admitting the business records in this case denied her 'constitutional right of being confronted with the witnesses who were going to testify against her...' Cleverly provides no authority to support this claim, which is deemed abandoned."

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**Matters Arising in Traffic Cases**

- What is Cleverly had simply mentioned *Crawford*?
- Different result?

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**Matters Arising in Traffic Cases**

DUI convictions do not require direct evidence – circumstantial evidence is sufficient. *State v. Fish*, 612 P2d 180 (1980) and *State v. Perkins*, 290 P3d 636 (2012)

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# THE NATIONAL JUDICIAL COLLEGE

EDUCATION | INNOVATION | ADVANCING JUSTICE

## DUI AND ETHICS

## DIVIDER 2

Hon. Jason E. Ashford

### OBJECTIVES:

After this session you will be able to:

1. Determine appropriate in-court and out-of-court judicial conduct related to ethical issues that frequently arise in cases involving impaired driving;
2. Recognize practices that may be contrary to the Code of Judicial Conduct in association with sanctions and interventions; and
3. Develop a plan to address questionable practices that have been identified throughout the curriculum.

### REQUIRED READING:

### PAGE

- |    |                                                                                                                                                  |    |
|----|--------------------------------------------------------------------------------------------------------------------------------------------------|----|
| 1. | Jason E. Ashford, <i>Kansas DUI and Ethics</i> (April 2017) [NJC PowerPoint].....                                                                | 1  |
| 2. | Jason E. Ashford, <i>Properly &amp; Effectively Adjudicating Drugged Drivers - Week Six: Judicial Ethics</i> (April 2017) [NJC PowerPoint] ..... | 11 |
| 3. | Jason E. Ashford, <i>Week Six: Judicial Ethics</i> (April 2017) [NJC Document].....                                                              | 25 |

# Kansas DUI and Ethics

Topeka, Kansas April 25, 2017  
Judge Jason E. Ashford  
Houston County State Court  
Warner Robins Georgia

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## Attention Getter



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## Let's Be Honest, This Stuff is DULL!!!

But this isn't your ordinary Ethics presentation... (I hope)

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## Why Ashford on Ethics?

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## Ashford Qualifications

- I have been where you are at before
- I have been unethical
- I have been stupid
- I continue to be unethical
- I continue to be stupid
- A great way to suck up to judges

2. Except in this case.



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## Goals

- Make you think and be relevant
- Discuss major ethical issues
- Convince you to take the high road
- Give you a judge's perspective
- Have some fun and laugh



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## Anti-Goals

- Teach the Rules
- Pretend to have all the answers
- Bore you
- Be like every other Ethics presentation



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## Ethics vs. Morality

- Objective vs. subjective
- Innate vs. learned

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## Judges and Social Media

- Best practices
- Getting elected vs. appointed

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### What is Professionalism?

- “The skill, good judgment, and polite behavior that is expected from a person who is trained to do a job well” – Webster Dictionary
- A social and cultural interaction that defines acceptable and respectable conduct
- A certain personal, self-awareness that motivates you to improve

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### Gotta Admit

- Fireworks are FUN
- Makes me feel important
- I get to stop Mike Tyson from eating the ear

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### The Indigent and Fines

- The problem
- The solution
- Best practices

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## A Lawyer's Professional Responsibilities

- A lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as by substantive and procedural law.
- A lawyer is also guided by conscience and the approbation of professional peers.
- A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service

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## Scenario

- Opposing counsel is an @\$\$#!%!
- Why I like it:
  - Most judges lead by consensus if possible, but we must go forward regardless
  - Both ethical and unethical conduct builds a memory within those who perceive it

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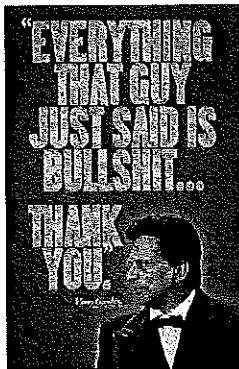
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- Forgo the temptation to retaliate at our opposition's level or to let our ego rule and choose a course of action that reflects who we truly are.



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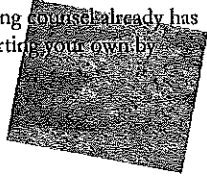
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### Pigs n' Professionalism

- "I learned long ago, never to wrestle with a pig. You get dirty, and besides, the pig likes it."
- Your reputation and your client's interests will be damaged by attempting to combat an opposing counsel who is an ass.
- At the end of the day, opposing counsel already has a bad reputation, so avoid hurting your own by getting dirty.



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### Remain Calm & Dignified

- If you find yourself becoming agitated, you should request a brief recess to regain your composure
- Allowing yourself to become frazzled works an injustice on the court, your client, and the public at-large
- Focus on what listeners are hearing and not just what you want to say

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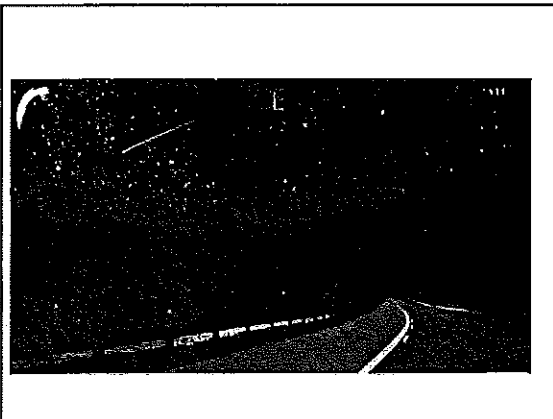
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### Off To A Great Start



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### Maintain a Clear Record

- We all have a job to do by maintaining a clear record and not getting caught up with nonsense
- Avoid structuring your arguments to attack opposing counsel instead of explaining your position to the court
  - “Opposing counsel’s bare assertions have no merit because...”
  - “Your Honor, the record does not support the proposition...”

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### Possible Consequences?

- Social stigmas developed through unprofessional conduct affects current and future relationships, including prospective clients, friends, family, co-workers, and employees.
- “Shyster!”

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## Reality

- Professional colleagues are more likely to be trusted on their word than someone “going against the grain”
- Unprofessional colleagues tend to need “verification” or “authority”
- Inside every cynical person is a disappointed idealist - “I want to believe you, but...”

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## Self-Actualization

- Reflect on your professional persona
  - Reach the right state of mind in a suitable environment
  - Be 100% truthful with yourself
  - Ask yourself the right questions to frame your successes and pitfalls
  - Integrate your reflections into future conduct

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## Don't be Conan



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### Practicalities

- Substance abuse: GET HELP and HELP OTHERS
- STRESS: Exercise and meditate
- Eat right
- Seek balance and avoid extremes

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### Finally

- BE GRATEFUL
- THANK YOU!
  
- Email [jason@jasonashford.com](mailto:jason@jasonashford.com)
- 478 718 0789 Cell

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## Properly & Effectively Adjudicating Drugged Drivers

Week Six: Judicial Ethics  
Hon. Jason Ashford

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### Quick-Write Exercise

- What legal and ethical issues arise when a judge comments on a proposed expert's qualifications or testimony?
  - 1.
  - 2.
  - 3.
  - 4.

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### Scenario

- Defense Attorney to judge in jury trial: "Your Honor, having established Officer Green's educational and professional background for the court, we would proffer Officer Green as an expert in drug recognition generally and, particularly, in assessing the impairing effects of marijuana. From her education and experience, it is clear that she is eminently qualified to give her opinions on the circumstances that prompted the statement attributed to my client in this case."

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### Scenario

- Prosecution: We object to the witness and the testimony, your Honor. We have moved *in limine* to exclude this witness and her testimony. First, no qualifications have been established nor could any be established, because what the witness wants to testify about is not a valid scientific field. There is no established scientific field of "drug recognition."

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### What legal issues arose in this in-court discussion?

Primary Legal Issues:

Secondary Legal Issues:

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### Exercise

- My state-specific rules on judicial comments on factual issues (in jury cases) are:
  1. State Constitution? \_\_\_\_\_
  2. State Statutes and Rules? \_\_\_\_\_
- My state procedure for preliminary questions related to witness' qualifications and admissibility of evidence is:
  1. \_\_\_\_\_

Hint: *See* R. Evld. 104(a)  
Note: Some constitutional requirements, e.g., *Jackson v. Denno*, 378 U.S. 368 (1964) [requiring jury-out hearing on admissibility of confessions]

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What ethical issues arose in this in-court discussion?

- Ethical Issues
- 1. A judge is required to comply with the law. See MCJC, Rule 1.1
- 2. A judge is required to “act at all times in a manner that promotes public confidence in the . . . impartiality of the judiciary.” MCJC, Rule 1.2
- 3. A judge is required to perform the duties of office competently. MCJC, Rule 2.5(A).

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What ethical issues arose in this in-court discussion? (Cont'd)

- Ethical Issues
- 4. A judge is required to accord every person with a legal interest a right to be heard. MCJC, Rule 2.6(A).
- 5. A judge must be patient. See MCJC, 2.8(B)
- 6. A judge may not make a “public statement that might reasonably be expected to affect the outcome or impair the fairness of a [pending] matter.” MCJC, 2.10

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Summary:  
Best Practices for Trial Judges

- 1. Utilize procedural rules to conduct jury-out hearings regarding a witness’ qualifications as an expert and the subject matter of witness’ expertise.
- 2. Require counsel to present witness’ vita to court and opposing counsel in advance.
- 3. At jury-out hearing, require counsel to state the subject matter of the witness’ proposed testimony and articulate the nature of the opinions that the witness will render.

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Summary:  
Best Practices for Trial Judges (Cont'd)

- 4. Do not comment on the witness' qualifications or the subject matter in the presence of the jury.
- 5. Do not give an opinion, in the jury's presence, as to whether the witness' testimony is likely to be helpful to the jury.
- 6. When asked to "declare the witness an expert," consider saying instead "Dr. X will be allowed to give her opinions."

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Judge's Role as Gatekeeper

A trial judge acting as a "gatekeeper," must "ensure that any and all scientific testimony or evidence admitted is not only relevant but reliable."

*Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 589 (1993)

Trial judges "must determine whether [all] testimony [based on scientific, technical, or specialized knowledge] has a reliable basis in the knowledge and experience of [the relevant] discipline.

*Kumho Tire, Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999)

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Judicial Notice, Fed. R. Evid. 201

- **(a) Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
- **(b) Kinds of Facts That May Be Judicially Noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it:
  - **(1)** is generally known within the trial court's territorial jurisdiction; or
  - **(2)** can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

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Judicial Notice, Fed. R. Evid. 201  
(Cont'd)

- **(c) Taking Notice.** The court:
- **(1)** may take judicial notice on its own; or
- **(2)** must take judicial notice if a party requests it and the court is supplied with the necessary information.

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What are adjudicative facts?

- Adjudicative facts are  
\_\_\_\_\_
- By contrast, legislative facts are  
\_\_\_\_\_
- \_\_\_\_\_
- The court may only take judicial notice of adjudicative facts.

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What are adjudicative facts?

- Adjudicative facts are FACTS OF THE PARTICULAR CASE USUALLY ESTABLISHED BY TESTIMONY OF WITNESSES.
- By contrast, legislative facts are FACTS THAT HAVE RELEVANCE TO LEGAL REASONING OR TO THE LAWMAKING PROCESS, WHETHER IN THE FORMULATION OF A LEGAL PRINCIPLE OF RULING BY A JUDGE OR COURT OR IN THE ENACTMENT OF A LEGISLATIVE BODY.
- The court may only take judicial notice of adjudicative facts.

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### Procedural Requirements for Judicial Notice

- **d) Timing.** The court may take judicial notice at any stage of the proceeding.
- **(e) Opportunity to Be Heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.
- **(f) Instructing the Jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

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### Post-Course Exercise

- My state-specific rules on judicial notice are:
  1. Applies to adjudicative facts?  
\_\_\_\_\_ YES \_\_\_\_\_ NO
  2. Applies to legislative facts?  
\_\_\_\_\_ YES \_\_\_\_\_ NO
  3. Permits me to take judicial notice sua sponte with notice?  
\_\_\_\_\_ YES \_\_\_\_\_ NO
  4. Requires me to take judicial notice on request if information provided?  
\_\_\_\_\_ YES \_\_\_\_\_ NO
- The procedural requirements for judicial notice include:
  - Notice? \_\_\_\_\_ Opportunity to be heard? \_\_\_\_\_
  - Other? \_\_\_\_\_

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### Judicial Notice Summary

- 1. Applies only to adjudicative facts.
- 2. Applies only to adjudicative facts that not subject to reasonable dispute:
  - Either because the fact is generally known within the jurisdiction, or
  - Because the fact can be readily and accurately determined from sources whose reliability cannot reasonably be questioned.
- 3. May be taken on judge's own motion, at any time, provided procedures are followed.

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**Judicial Notice Summary (Cont'd)**

- 4. Must be taken on party's motion if party supplies necessary information.
- 5. May be used when scientific theories have attained status of scientific law; otherwise, use prudently and strictly in cases involving scientific and forensic evidence.

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**Is the best answer under the present MCJC TRUE OR FALSE?**

- 1. A judge may not conduct an independent investigation, including internet investigation, of facts in a case over which the judge is presiding.
- 2. A judge may conduct independent investigation of science, technology, or other specialized subjects relative to a case over which the judge is presiding.
- 3. A judge may conduct independent legal research concerning a case over which the judge is presiding.
- 4. A judge may not acquire information concerning a case over which the judge is presiding from a lawyer disinterested in the case.

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**Is the best answer under the present MCJC TRUE OR FALSE?**

- 5. A judge may attend an education program for purposes of acquiring knowledge to assist the judge in a case over which the judge is presiding.
- 6. A judge may not consult informally with disinterested nonlegal experts about issues in a case over which the judge is presiding.
- 7. A judge may consult with a law professor about issues in a case over which the judge is presiding without giving notice to the parties.

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Is the best answer under the present  
MCJC TRUE OR FALSE?

- 8. A judge may consult with a disinterested nonlaw expert about a case over which the judge is presiding provided that the judge gives advance notice of the person to be consulted, the subject matter of the advice to be solicited, and affords parties a reasonable opportunity to object and respond to the notice and advise.
- 9. A judge may invite a disinterested legal expert to file an amicus curiae brief on an issue in a case over which the judge is presiding.
- 10. A judge may appoint a disinterested expert from any discipline provided the judge provides notice and an opportunity to be heard as required by Rule of Evid. 706.

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Is the best answer under the present  
MCJC TRUE OR FALSE?

- 1. A judge may not conduct an independent investigation, including internet investigation, of facts in a case over which the judge is presiding.

**TRUE**

MCJC 2.9 (C), Comments

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.

[6] The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.

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Is the best answer under the present MCJC  
TRUE OR FALSE?

- 2. A judge may conduct independent investigation of science, technology, or other specialized subjects relative to a case over which the judge is presiding.

**FALSE**

MRPC 2.9

Most, but not all, scholars consider independent research to be in violation of the rule prohibiting ex parte communications because it puts the judge in the position of adjudicating issues based on evidence that was not presented in open court and subject to challenge by the parties.

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Is the best answer under the present  
MCJC TRUE OR FALSE?

- 3. A judge may conduct independent legal research concerning a case over which the judge is presiding.

**TRUE**

Legal research does not fall under MRPC 2.9's proscription against ex parte communication and is clearly authorized and anticipated.

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Is the best answer under the present  
MCJC TRUE OR FALSE?

- 4. A judge may not acquire information concerning a case over which the judge is presiding from a lawyer disinterested in the case.

**TRUE**

MRPC 2.9, Comment

[3] The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this Rule.

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Is the best answer under the present  
MCJC TRUE OR FALSE?

- 5. A judge may attend an education program for purposes of acquiring knowledge to assist the judge in a case over which the judge is presiding.

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Is the best answer under the present  
MCJC TRUE OR FALSE?

- 6. A judge may not consult informally with disinterested nonlegal experts about issues in a case over which the judge is presiding.

TRUE

MRJC 2.9

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending\* or impending matter, except as follows:

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Is the best answer under the present  
MCJC TRUE OR FALSE?

- 7. A judge may consult with a law professor about issues in a case over which the judge is presiding without giving notice to the parties.

FALSE

MCJC 2.9, Comment

[3] The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this Rule.

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Is the best answer under the present  
MCJC TRUE OR FALSE?

- 8. A judge may consult with a disinterested nonlaw expert about a case over which the judge is presiding provided that the judge gives advance notice of the person to be consulted, the subject matter of the advice to be solicited, and affords parties a reasonable opportunity to object and respond to the notice and advise.

TRUE

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MRPC 2.9

(B) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

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Is the best answer under the present  
MCJC TRUE OR FALSE?

- 9. A judge may invite a disinterested legal expert to file an amicus curiae brief on an issue in a case over which the judge is presiding.

**TRUE**

The MRJC do not add this explicitly, but judicial ethics scholars encourage this activity; moreover, this would not violate Rule 2.9's prohibition on ex parte communication.

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Is the best answer under the present  
MCJC TRUE OR FALSE?

- 10. A judge may appoint a disinterested expert from any discipline provided the judge provides notice and an opportunity to be heard as required by Rule of Evid. 706.

**TRUE**

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• **Federal Rule of Evidence 706**

- **(a) Appointment Process.** On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

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• **Federal Rule of Evidence 706 (Cont'd)**

- **(b) Expert's Role.** The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:
  - **(1)** must advise the parties of any findings the expert makes;
  - **(2)** may be deposed by any party;
  - **(3)** may be called to testify by the court or any party; and
  - **(4)** may be cross-examined by any party, including the party that called the expert.

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• **Federal Rule of Evidence 706 (Cont'd)**

- **(c) Compensation.** The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:
  - **(1)** in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and
  - **(2)** in any other civil case, by the parties in the proportion and at the time that the court directs — and the compensation is then charged like other costs.
- **(d) Disclosing the Appointment to the Jury.** The court may authorize disclosure to the jury that the court appointed the expert.
- **(e) Parties' Choice of Their Own Experts.** This rule does not limit a party in calling its own experts.

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## Faculty-Led Webcast:

Faculty begins the webcast with an introduction about the legal and ethical issues that arise when a judge comments on a proposed expert's qualifications or testimony. Drugged driving may have expert witnesses (DREs) or documents (toxicology reports) introduced as expert testimony. Faculty will lay a foundation about the ethical constraints.

Faculty leads participants through a four-question brief quiz, and then a short scenario related to admission of expert testimony. Faculty then reviews the primary legal issues:

Because the issue involved a preliminary question concerning the witness' qualification and the admissibility of the witness' opinion, the better course of conduct was for the judge to conduct the hearing out of the presence of the jury. See Fed. R. Evid. 104(c). Most jurisdictions prohibit judges from commenting on the evidence.

Secondary Legal Issues:

Judge may have commented on right to be free from self-incrimination. Judge may have interfered with counsel's right to preserve legal error under Fed. R. Evid. 103(a)(2). [2-5]

Faculty then leads a group discussion related to the pre-course exercise and provides a short tie-in to 104(a). Then, we return to the scenario and possible ethics rules that are touched by admitting drugged driving-related experts and expert testimony.

What ethical issues arose in this in-court discussion?

1. A judge is required to comply with the law. See MCJC, Rule 1.1
2. A judge is required to "act at all times in a manner that promotes public confidence in the . . . impartiality of the judiciary." MCJC, Rule 1.2
3. A judge is required to perform the duties of office competently. MCJC, Rule 2.5(A).
4. A judge is required to accord every person with a legal interest a right to be heard. MCJC, Rule 2.6(A).
5. A judge must be patient. See MCJC, 2.8(B)
6. A judge may not make a "public statement that might reasonably be expected to affect the outcome or impair the fairness of a [pending] matter." MCJC, 2.10

Faculty discusses best practices for judges in related to qualifying witnesses.

1. Utilize procedural rules to conduct jury-out hearings regarding a witness' qualifications as an expert and the subject matter of witness' expertise.
2. Require counsel to present witness' vita to court and opposing counsel in advance.
3. At jury-out hearing, require counsel to state the subject matter of the witness' proposed testimony and articulate the nature of the opinions that the witness will render.
4. Do not comment on the witness' qualifications or the subject matter in the presence of the jury.
5. Do not give an opinion, in the jury's presence, as to whether the witness' testimony is likely to be helpful to the jury.

6. When asked to “declare the witness an expert,” consider saying instead “Dr. X will be allowed to give her opinions.”

This all ties into a judge’s role as gatekeeper. A trial judge acting as a “gatekeeper,” must “ensure that any and all scientific testimony or evidence admitted is not only relevant but reliable.” Trial judges “must determine whether [all] testimony [based on scientific, technical, or specialized knowledge] has a reliable basis in the knowledge and experience of [the relevant] discipline.

Some commentators insist that the gatekeeper duties not only permits but requires judges to become better versed in the scientific and technological evidence that is presented. When the parties fail to educate the judge, they argue, it is the judge’s obligation to seek outside information to enable the judge to make the reliability determination. Several in this camp are urging modification of the Code of Judicial Conduct to accommodate what they see as a new and pressing obligation for trial judges. [6-9]

Next, faculty moves on to the topic of taking judicial notice of facts, and runs through a short group exercise regarding adjudicative and legislative facts. Now let’s turn to the topic of the use of judicial notice in the context of drugged driving evidence. The use of judicial notice has both a proper and improper place in cases involving expert testimony. Judicial notice, under the Federal Rules of Evidence, as can be seen by the Rule itself, applies only to adjudicative facts.

What are adjudicative facts? And when are adjudicative facts involved in issues related to the admission of scientific and forensic evidence? Most definitions of adjudicative fact define the concept in contrast with another concept, that of legislative facts. The two are fundamentally different. Adjudicative facts are the facts of the particular case, while legislative facts are those that have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle of ruling by a judge or court or in the enactment of a legislative body.

As has been frequently noted, adjudicative facts are usually established through the introduction of witness testimony, but when the facts are outside of reasonable controversy, proof is not necessary. When a high degree of indisputability is present, a party may request judicial notice or the judge may take judicial notice on her own, provided certain procedures regarding notice and an opportunity to be heard, set out in the rule are followed.

So, when is the concept of judicial notice used properly in cases dealing with scientific or forensic evidence? The Daubert majority – while emphasizing that the judge’s gatekeeper function was not limited to novel scientific techniques – also advised that “theories that are so firmly established as to have attained the status of scientific law, such as the laws of thermodynamics, properly are subject to judicial review under Federal Rule of Evidence 201.”

The comment, tucked away in footnote 11; the nature of the example given (thermodynamics); the characterization of theories that are subject to judicial notice having attained the status of “scientific law,” and the limitations of Rule 201 itself demonstrate how infrequently judicial notice may be used as a substitute for judicial gatekeeping regarding the reliability of scientific or forensic evidence. [10-15]

Faculty then reviews the pre-webcast quiz questions with answers. [16-34]

Some of the main points to drive home are that 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. The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.

Most, but not all, scholars consider independent research to be in violation of the rule prohibiting ex parte communications because it puts the judge in the position of adjudicating issues based on evidence that was not presented in open court and subject to challenge by the parties. Judges are the gatekeepers to the expert testimony and must determine whether to admit the expert testimony.

Often, judges are tempted to research issues that they not fully comprehend, and doing so may violate judicial ethics codes. Legal research, though, does not fall under MRPC 2.9's proscription against ex parte communication and is clearly authorized and anticipated.

The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this Rule. Faculty will review the remaining questions with answers on the slides.

Faculty may note that we will answer some of these questions, while undoubtedly unearthing many others. We encourage you to continue to explore these issues by consulting case law and judicial ethics opinions in your jurisdictions and by reviewing some of the excellent resources that we have identified.

Faculty then facilitate a brief discussion on procedural fairness. Judges cannot conduct themselves perfectly at all times, but they must aspire to conduct that reflects the underlying premises of the Model Code of Judicial Conduct, as reflected in the Preamble, that "the United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society." As the Preamble continues, "inherent in all the Rules contained in the [Model Code of Judicial Conduct] are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system."

Judges should remain mindful, not only of their statements, but also of their non-verbal conduct. Judges may send messages to jury, quite innocently, by their movements, gestures, eye contact, and facial expressions. Gestures, expressions, and mannerisms may sometimes signal to the jury that a judge disbelieves or disrespects a witness. Judges must avoid communicating their opinions or expressions of confidence in a witness to the jury, even when the communication is unintended. Examples of unintended, yet harmful, non-verbal communication to be aware of include sighs, eye-rolling, shoulder shrugging, rubbing one's face, yawning, and looking at a watch or a clock. Sometimes a common verbal expression can also communicate an opinion to the jury. [35]

Faculty concludes with a discussion of sanctions and interventions, such as ordering medication-assisted recovery tools, what the readings indicated, and what their understanding of the ethical implications are based on the MCJC. [36-37]



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