

COMPROMISE OF AN INDEPENDENT JUDICIARY IN CPS CASES

TCFR addresses this position paper on the independence of the judiciary in CPS cases in Texas for two reasons:

1. *Children and families are being hurt by the system.*
2. *Judicial practices have developed which appear to violate Constitutional provisions for separation of powers and the Code of Judicial Conduct. Specifically:*
 - a. **Judges intermingle on boards of organizations and task forces of parties that regularly appear before them in court**
 - b. **Those groups have close judicial, social and financial ties**
 - c. **To a parent in court there is the appearance that he or she stands alone against a multi-headed adversary including CPS/DAs/CASA/Therapists/Ad Liters/ and the Judge**

We present these facts in order to restore the independence of the judiciary.

SEPARATION OF POWERS

According to the Texas Constitution, modeled upon the United States Constitution, government is to be separated into three distinct branches. According to Art. II § 1:

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

In a letter to Gov. Perry, Speaker Craddick and the Honorable Tom Phillips calling upon them to investigate judicial impropriety, Russell Verney, Director of the Southwest Regional office of Judicial Watch wrote:

Indeed, the notion that the powers of government should be separated is a bedrock principle in our democracy. The U.S. Supreme Court “consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.” *Mistretta v. United States*, 488 U.S. 361, 380 (1989).

And James Madison, in writing about the principle of separated powers, said that “no political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty” and that “the accumulation of all powers legislative, executive and judiciary in the same hands...may justly be pronounced the very definition of tyranny.” The Federalist No. 47.

As a state agency, the Department of Family and Protective Services (DFPS) functions under the executive branch of the government. This agency has undermined this Constitutional principle through its pervasive influence upon judges who willingly sit on boards and act in advisory capacities to organizations unduly influenced by DFPS.

CODE OF JUDICIAL CONDUCT

The American judicial system rests upon the premise of an independent judiciary. Confidence in the judicial system rises and falls based upon this foundation. Consequently, Canon #1 of the Texas Code of Judicial Conduct emphasizes this principle twice, once as the basic tenet underlying the Code and once in light of the specific conduct expected of judges to preserve judicial independence. It unequivocally asserts:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct and should personally observe those standards so that the integrity and independence of the judiciary it preserves. The provisions of this Code are to be construed and applied to further that objective.

The positions and actions of judges functioning in the capacities outlined below compromise the independence of the judiciary. While a superficial glance may give the appearance that they are benign, a look below the surface reveals an intricate web of relationships that seriously calls into question the integrity and independence of the judiciary in the courtrooms of these judges in cases involving Children's Protective Services.

STRICT STANDARD FOR JUDGES - THE NEED TO INVESTIGATE

We acknowledge "[t]he Code of Judicial Conduct does not exist for the benefit of the judiciary exclusively, but rather for the community and the state as well." *In re K.E.M.*, 2002 WL 31402185 (Tex.App.Corporis Christi, 2002). As citizens of the state of Texas we need the judiciary to uphold the strict standards of the canons to maintain confidence in this vital part of the government. As the court in *Sears v. Olivarez*, 28 S.W. 3d 611 aptly stated:

Judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. TEX.CODE JUD. CONDUCT, preamble, *reprinted in* TEX. GOV'T CODE ANN., title 2, sub. G, app. B (Vernon 1998 & Supp.2000). In this regard, the Texas Code of Judicial Conduct requires that judges observe high standards of conduct so that the integrity and independence of the judiciary is preserved; conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary; refrain from conveying or permitting others to convey the impression that they are in a special position to influence them; and refrain from financial dealings that tend to reflect adversely on their impartiality or exploit their judicial position.

Moreover the Commission on Judicial Ethics has held, “Willful conduct in violation of Code of Judicial Conduct does not require judge to form the specific intent to violate the Code; as long as he intends to engage in the conduct for which he is disciplined, he is guilty of a willful violation of the Code.” *In re Davis*, 2002 WL 1425251, (Tex.App.Austin, 2002).

Acknowledging the importance of an independent judiciary, on behalf of the children and parents of Texas we request an investigation into violations of separation of powers and judicial ethics by judges serving in capacities undermining those very principles. The conduct and activities of such judges call into question the *integrity* and *independence* of the judiciary and the ability of such judges to conduct themselves in the court room in an *impartial and unbiased manner*.

An examination of the organizations reveals interrelationships which seriously undermine the independence of the judiciary. Specifically judges, DFPS officials, district and county attorneys, CASA leaders and representatives of the child abuse professional community sit on the Supreme Court Task Force on foster Care, Court Improvement Project, Children’s Justice Act and Texas CASA. While it is no surprise that representatives of the child abuse professional community would occupy those positions it is a surprise that judges join them. To a neutral observer and especially to a parent appearing before them in court, conduct and activities of judges related to the following organizations give the appearance of impropriety:

- 1. Member of the Texas Supreme Court Task Force on Foster Care (SCTF)**
 - **SCTF receives funding from the Children’s Justice Act (CJA) and acts as supervising entity of the Court Improvement Project (CIP)**
 - **Both CJA and CIP have financial, organizational and administrative roots in the Texas Department of Family and Protective Services (DFPS)**
 - **DFPS regularly appears before all CPS judges**
- 2. Member of the Court Improvement Project**
 - **CIP has financial, organizational and administrative roots in DFPS**
 - **DFPS regularly appears before all CPS judges in court**
- 3. Member of the Board of Directors of Texas CASA**
 - **Texas CASA trains advocates who regularly appear before CPS judges in court**
- 4. Member of Advisory Committees of lawyers representing children in CPS cases**
 - **Attorneys may appear before those judges in court**

THE FACTS

As one reviews the facts the three guiding principles enumerated above should be kept in mind: *government is to strictly adhere to a separation of powers; judges are responsible to uphold the Code of Judicial Conduct; judges are held to a strict standard.*

1. Member of the Supreme Court Task Force on Foster Care (SCTF)

Numerous judges serve on the SCTF. According to one listing sixteen judges or associate judges served on the executive committee or as members which also includes DFPS employees, DAs and leaders of CASA. (Appendix A).

The following facts raise serious concerns about the appearance of this participation and the influence upon those judges:

- Judges are to regulate their activities to minimize the risk of conflict with the proper performance of their duties and judicial duties take precedence over all other duties
- The SCTF is inextricably tied to the DFPS through two of its offshoots: the Children's Justice Act and the Court Improvement Project
- Judges on the Task Force enter into personal financial contracts with DFPS
- By design and in practice the Court Improvement Project and Children's Justice Act are Partial toward DFPS
- DFPS regularly and frequently appears before those judges

A. Judges are to regulate their activities to minimize the risk of conflict with the proper performance of their duties and judicial duties take precedence over all other duties

Questions concerning judicial conduct can be addressed to the Judicial Ethics Commission. At least eight of those opinions stretching more than twenty years relate to the issues addressed in this request for an investigation (Appendix B). In 1986 the Commission issued Advisory Opinion 86 in response to the following question:

QUESTION: May judges serve in an advisory capacity to a public board *or task force*, where in all probability they will later preside over cases arising out of the crisis or problem for which the board or task force was created to solve (emphasis added)?

ANSWER: Judges should regulate their activities to minimize the risk of conflict with the proper performance of their judicial duties. Canon 4 applies this admonition to judges' activities to improve the law, the legal system, and the administration of justice. Canons 5A, 5B, and 5D apply this same admonition to judges' extra-judicial activities. Canon 3 states, "The judicial duties of a judge take precedence over all his other activities."

A majority of the Committee is of the opinion that it would be a violation of the Code of Judicial Conduct for judges knowingly to agree to serve on or to continue to serve on such a board or task force, if in serving, a conflict with the proper performance of their judicial duties probably would arise or does arise. One judge dissented.

Based on this opinion alone, the actions of members of SCTC are called into question.

B. The SCTF is inextricably tied to DFPS through its offshoots: the Children's Justice Act and the Court Improvement Project

By design and in practice both the Children's Justice Act and the Court Improvement Project function under the DFPS (Appendix C flowcharts).

The SCTF acts as supervising entity for the Court Improvement Project

The SCTF acts as the supervising entity for the Court Improvement Project which is administered by DFPS. Grants are administered by the CJA under DFPS. According to the DFPS website:

The Court Improvement Project (CIP) is a federal grant to the Supreme Court of Texas to improve the judicial handling of child abuse and neglect cases. In August 1993, as part of the Family Preservation and Support Act, Congress set aside \$35 million to fund improvements on behalf of children in protective or foster care. The funds are to be distributed to State court systems as entitlement grants over a four year period starting in fiscal year 1995. The grant is administered by the Children's Justice Act Grant Project, Texas Department of Family and Protective Services, pursuant to an interagency agreement with the Texas Supreme Court. The Supreme Court Task Force on Foster Care serves as the advisory body to the CIP project (Appendix D).

As Appendix C shows Federal dollars flow through the Supreme Court Task Force on Foster Care through the Governor's office to the Department of Family and Protective Services. Both the Court Improvement Project and Children's Justice Act are recipients of those funds.

The Court Improvement Project, under DFPS, acts as the custodian of records for the Supreme Court Task Force on Foster Care

On June 29, 2004 Gary Gates requested information about SCTF from its chairman, Judge John Specia. He apparently turned the request over to the Criminal District Attorney for Bexar County, Susan D. Reed. Two letters from Ms. Reed are instructive regarding the role of the SCTF and its relationship to the CIP. The combined information of the letters raises a serious red flag about the independence of the judiciary (Appendix E).

In response to the Open Records requests of Mr. Gates, Ms. Reed's wrote to Attorney General Abbott. In it she claims the information requested is not subject to open records requests because the judiciary is excluded from the Public Information Act. She goes on to state "*we believe the 'SCTF' operates as a branch of the judiciary*" (emphasis added).

On the other hand, in her response to Mr. Gates she states, "Judge John J. Specia, Jr. as chairman of the Supreme Court Task Force on Foster care is not the custodian of records for the information you have requested in items #1,2,3,4,5,7,8,9,10,11, and 12 of your request. I suggest you contact Ms. Carole Hurley, Director of the Children's Justice Act Project directly at the Texas Department of Protective and Regulatory Services concerning this request for information. Ms. Hurley can be reached at Agency Mail Code Y-967, P.O. Box 149030, Austin, TX 78714-9030."

Apparently SCTF sees no compromise in using the judiciary as its shield while using CIP, a child of DFPS, as its custodian of its records.

C. Judges on the Task Force enter into financial contracts with DFPS for reimbursements (Appendix E)

Numerous members of SCTF have financial contracts with the DFPS to “provide services” including attendance at quarterly meetings and receive reimbursements related to their positions on the SCTF. These contracts can be as much as \$6,000 for a one year period. Examples of these contracts are found in Appendix F.

For instance, the initial contract with Judge Stephen B. Ables states “Agreement Between Texas Department of Protective and Regulatory Services and Stephen B. Abels [sic], Judge”. The signature below Texas Department of Protective and Regulatory Services is Mart Hoffman, Interim Executive Director. It appears with the signature of Judge Ables who provides the services and receives the money.

Succeeding amendments to the contract with Judge Ables reveal the direct ties of CJA, CIP and the Department of Protective and Regulatory Services. Each amendment clearly identifies the parties as did the original contract: TDPRS and Judge Ables. And each amendment includes a signature *for Texas Department of Protective and Regulatory Services* and Judge Ables. The signatures for TDPRS are as follows:

| | |
|------------------|--|
| Amendment: | James R. Hine, Executive Director |
| Amendment No. 1: | C. Ed Davis, Deputy Director for Legal Services |
| Amendment No. 2: | C. Ed Davis, Deputy Director for Legal Services |
| Amendment No. 3: | Missing |
| Amendment No. 4: | Carole Hurley, Director, Court Improvement Project |
| Amendment Five: | Carole Hurley, Director |
| Amendment No. 6: | Carole Hurley, Director, Court Improvement Project |

Clearly, Carole Hurley, Director of the Court Improvement Project, has the authority to bind the Department of Protective and Regulatory Services to a contract!

Correspondence to Judge John Specia about two similar amendments further illustrates the inextricable ties of CJA, CIP and Texas Department of Protective and Regulatory Services. Both memos are headed, “CIP Court Improvement Project, Carole Hurley, J.D., Director.” Both have all the contact information for Texas Department of Protective & Regulatory Services at the bottom. Both memos are from Virginia Ruiz, CJA Program Administrator (Appendix G).

Apparently most judges on the SCTF do not have any problem entering into these financial agreements with a party that frequently and regularly appears before them in court. It is interesting to note that according to notes provided regarding correspondence with judges at least one judge refused to sign such a contract. The Profiles states,

“She [Judge Aboussie] never signed her TF contract and is uncomfortable doing so b/c of the many terms [and] certifications it has. She’s served on many Boards and has never been asked to sign a contract. She will read the contract [and] assurances again carefully, but for the time being will not be requesting reimbursement” (Appendix H).

D. By Design and in Practice the Court Improvement Project and Children's Justice Act are Partial toward DFPS.

The design of CIP and CJA reflect control by and a bias toward DFPS.

It has already been established that funding flows to CIP and CJA through DFPS. Staffing is also an issue. Carol Hurley shares responsibilities as the Project Director of CIP and CJA. As explained above she has signed amendments for DFPS to contracts between DFPS and judges. She is listed on a DFPS website as the Director for the Children's Justice Act with the e-mail hurleyc@dfps.state.tx.us, a Department of Family and Protective Services e-mail (Appendix I)! When an open records inquiry was directed to Ms. Hurley of CIP, the response even came back on TDFPS letterhead from a TDFPS attorney (Appendix J)!

The Texas Court Improvement Project is also found at the DFPS website. The CIP page gives a link to the FFY 1999 1st Annual Program Report for the Texas CIP as submitted by Carole Hurley, JD of the Texas Court Improvement Project and CJA Project Director (Appendix K). The introduction to that report explains:

The Texas Court Improvement Act Project (CIP) is a federal grant to the Supreme Court of Texas to improve judicial proceedings in foster care and adoption cases. The Supreme Court Task Force on Foster Care serves as an advisory body to the project, which is administered by the Texas Department of Protective and Regulatory Services (TDPRS) pursuant to an interagency agreement with the Supreme Court of Texas. CIP is jointly administered with the Texas Children's Justice Act Project (CJA). By coordinating the funding activities of both these federally funded projects, the State of Texas has been able to address a broader range of issues and systemic obstacles to the judicial handling of child abuse cases.

The Minutes of the CIP Task Force Meeting on August 10, 2001 at the Marriott River Center Hotel in San Antonio reveal further control of staff. They state "an additional staff person assigned to CIP *has been approved by TDPRS* to handle the Cluster courts. This position will use a FTE from TDPRS" (emphasis added) (Appendix L, p.2, 3).

The practices of CIP and CJA reflect control by and a bias toward DFPS.

The practices of CIP, CJA their Project Director and staff follow their design. The tentacles of DFPS reach beyond the executive branch into both the legislature and the judiciary. For example, Rep. Suzanna Hupp introduced HB 1752 in the 2003 legislative session that would give parents the right to designate a caregiver of their child during a CPS investigation. ***Although DFPS is forbidden from expressing opinions on specific legislation, Cathy Morris, Chief Attorney, Field Operations of DFPS encouraged judges to lobby for them in the legislature against this bill!***

On March 14, 2003 at state expense Morris sent the following e-mail to Carole Hurley, Director of both CIP and CJA. Cathy Morris wrote:

This bill filed by Rep. Hupp basically guts PRS as we know it. It's a 'parents' rights' bill. This bill will be introduced in the Juvenile Justice committee this Thursday, Mar. 20. We REALLY need to have lots of people there who will testify against this bill. I was thinking that you could get some judges there – McGown, Specia – who do think would be good [sic] (emphasis added).

That same day Carole Hurley then forwarded that e-mail to at least seventeen judges or associate judges as well as district or court attorneys and others who she expected would advocate on behalf of DFPS! It is no coincidence that most of those individuals were members of the Supreme Court Task Force on Foster Care. She added, *“If you can come to testify, or even just sit in the audience, please let me know so that I can coordinate. In the past, the mere presence of some of you has spoken volumes”* (Appendix M).

The Director of Judicial Watch assessed this effort as **an agency of the executive branch using the judiciary to co-opt the legislature!** It is particularly alarming since federal law and policy, state law and policy and even DFPS policy dictate the agency must make reasonable efforts to keep families together. In practice, however, the agency has evidently exercised its strong arm through its connections, including connections with the judiciary, to circumvent those requirements.

In light of this illustration it should not be surprising that *the Court Improvement Project Strategic Plan for 2000-2003 reflects an expansive effort to dominate both the judiciary and legislature* (Appendix N). The Introduction states, **“Strategic planning** focuses the basic purpose (mission) and directions (strategy) of the task force. The strategic plan is an articulation of task force intentions which leaders have determined will ensure the achievement of consistent and planned results.”

While considering their planning it is important to remember that DFPS, a party in every CPS case before judges, is in the background of every decision. Were CIP and CJA totally independent of DFPS these same goals may be very noble and praiseworthy. However, all of the strategy, all of the planning must be viewed through the eyes of a party regularly and frequently appearing in court before these judges.

Consider the strategic directions of CIP (Appendix N, p. 5):

1. ENSURE JUDICIAL RESOURCES
 - Provide judges with tools to be more efficient and effective
 - Engage judges and provide them with leadership opportunities
 - Provide proactive leadership
2. MAXIMIZE JUDICIAL EFFECTIVENESS
 - Use data to improve effectiveness
 - Raise public awareness and support
 - Develop innovative programs
 - Maximize cluster courts
3. FORM STRATEGIC RELATIONSHIPS

- Engage key judges
 - Secure ownership by the Supreme Court
 - Develop additional alliances as appropriate
1. SERVE AS A RESOURCE ON CHILDREN’S ISSUES TO THE LEGISLATIVE AND EXECUTIVE BRANCHES

Interestingly DFPS is prohibited from taking a position on legislative issues but it has apparently fashioned an alternative mouthpiece.

Appendix 2 of the Strategic Plan highlights four significant questions with answers (Appendix N, p.9). Selected answers offer insight into their functions:

1. What do we have at the Court Improvement Project that we want to KEEP in our future?

Cluster Courts
 Relationships (Supreme Court, PRS, Tx. Center, OCA, CASA, etc)
 Positive, dedicated, proactive T/Force members (including judges)
 Judicial training

2. What do we have now that we do NOT want to keep?

Perception that CIP is owned by PRS
 Recalcitrant judges

3. What do we NOT HAVE that we really do NOT want?

Organized judicial opposition
 Legislative Scrutiny

4. What do we NOT HAVE that we want for our future?

Legislature in our pocket

The design and practices of CIP and CJA irreparably taint their goal of training judges

Minutes from the CIP Task Force Meeting of March 1-2, 2001 in Marble Falls enumerate project ideas discussed (Appendix O, p.3). One of those ideas included judicial training for CPS judges during which “[w]e would need to teach what judges need to do from the bench.” Based on an understanding of the design and practices of CIP and CJA, a neutral party immediately recognizes violations of separation of powers and the judicial canons of ethics, especially acknowledging the strict standard to which judges are to be held.

As an independent effort to improve the courts the goals of CIP are commendable. As a child of DFPS they taint the system, unduly influence the training of judges and cause the judges who undertake that training to compromise their ethics. Since every judge is required to uphold the Judicial Canons each judge who sits through this training jeopardizes the neutrality of the courtroom and seriously compromises the image of the judiciary. Since when does a party to

lawsuits train the judges before whom they will appear? If Enron trained the judge who was to hear its case in court would not the honest judge be forced to recuse himself?

E. DFPS Regularly and Frequently Appear before These Judges in Court

Other well-intentioned citizens may capably sit on a task force to oversee CJA and CIP, but a judge who hears cases with DFPS as a party violates the Judicial Canons. As the Judicial Ethics Commission wrote in Opinion 86, “Judges should regulate their activities to minimize the risk of conflict with the proper performance of their judicial duties,” and therefore “it would be a violation of the Code of Judicial Conduct for judges knowingly to agree to serve on or to continue to serve on such a board or task force, if in serving, a conflict with the proper performance of their judicial duties probably would arise or does arise.”

Since the Department of Family and Protective Services is the agency of the state that initiates suits against parents it exclusively represents the state in cases related to child abuse in these judges’ courts! Does this relationship avoid the appearance of impropriety? Would a parent coming to court knowing of these relationships expect to be heard without bias and impartially? Do not the activities and relationships associated with this responsibility cast a reasonable doubt on the capacity of these judges to act impartially? One wonders how often have such judges revealed this conflict of interest to a parent standing before them in court?

The close relationship between the Department of Family and Protective Services and these judges is frightening. For a judge to be so closely aligned with the Department so often seeking to separate children from their parents is an inherent conflict.

We believe that the relationship of these judges with DFPS and the CIP and the CJA which it administers violates the following Canons:

1. Upholding the Integrity and Independence of the Judiciary
2. Avoiding Impropriety and the Appearance of Impropriety in All of the Judge’s Activities
3. Performing the Duties of Judicial office Impartially and Diligently
4. Conducting the Judges’ Extra-Judicial Activities to Minimize the Risk of Conflict with Judicial Obligations

We believe their ability to judicially discern impartially has been severely hampered based upon their responsibilities as members of the Supreme Court Task Force on Foster Care overseeing CIP and CJA. In effect CIP and CJA function as children of the Department of Family and Protective Services which appears regularly and frequently as a party before these judges in court.

1. Member of the Court Improvement Project (CIP)

Numerous judges apparently serve on Court Improvement Project (Program). It may be that membership on the SCTF includes membership on CIP (Appendix P).

As highlighted previously Advisory Opinion 86 leaves no question how the Commission views the type of conflict of interest engendered when a judge acts in an advisory role to an organization “where in all probability they will later preside over cases arising out of the crisis or problem for which the board or task force was created to solve.”

The indisputable integral relationships of CIP and DFPS have been established. Could there be any doubt about the impropriety of serving not just on a Task Force overseeing CIP but on CIP itself considering its link to a party that frequently and regularly appears before these judges in court?

Example of Cluster Courts

Members of the Court Improvement Project have overseen the expansive growth of the Texas Cluster Court system. Today it covers a significant part of rural Texas. The system has gained attention nationally. However, we believe it is an example of how close ties to parties within a courtroom result in a bias that taints the independent decision making process. Presumably members of CIP which developed the cluster court process have been an integral part in its design, implementation and growth. At least one member of the SCTF and CIP now serves as a Cluster Court judge.

Were those courts completely independent they might offer answers to some of the chronic difficulties of CPS caseloads in rural areas. But, Cluster Courts, the brainchild of CIP carry the markings of their grandparent, DFPS. While some of the oversight of the Cluster Courts has wisely been transferred to the Office of Court Administration, the markings of DFPS remain.

For instance, presiding judges *select* an associate judge to handle CPS cases exclusively. Thus there is no opportunity for the citizens to remove the associate judge through elections. He will be insulated from the people he serves.

Upon selection, CIP will oversee training of the associate judge and staff including instruction that regular reports are to be submitted by the cluster courts to CIP. How could a disinterested observer view a court system designed by the state including an unelected judge trained by CIP (the state) consider that the opposing party (parent) could receive a fair and impartial hearing?

This is exactly the system that has been implemented by the members of the Court Improvement Project.

Belief in an independent judiciary in the courts of these judges has been undermined. Their actions convey a willingness to expand the reach of government rather than to protect the citizen from said infringement. Borrowing the language from a 1999 review tribunal, a 2003 decision reiterated the necessity for an independent judiciary:

“The standard for judicial conduct in the State of Texas must be more than effortless obedience to the law, but rather, must be conduct which constantly reaffirms one’s fitness for the high responsibilities of judicial office and which continuously maintains, if not furthers, the belief that an independent judiciary exists to protect the citizen from both government overreaching and individual

self-help.” *In re Canales*, 113 S.W.3d 56,73 referring to *In re Barr*, 13 S.W. 3d, 525, 532.

We believe the ability of these judges to judicially discern impartially has been severely hampered based upon responsibilities on the Court Improvement Project with its integral ties to the Texas Department of Family and Protective Services which appears regularly and frequently as a party before them in court.

1. Board Member of Texas CASA

Five judges currently serve on the Board of Texas CASA (Appendix Q). Notably, the current President of the Board is a previous member and Chairman of the DFPS Board of Directors.

As a board members of Texas CASA, according to numerous opinions on similar issues, judges violate Canons 1, 2, 3, 4 and 5 of the Texas Code of Judicial Conduct.

Judges on this board know or should know of Judicial Ethics Commission’s Opinions concerning such violations.

Judges who remain on the Board willfully and persistently violate those Canons.

In *In Re Barr*, 13 S.W.3d at 532 the Review Tribunal asserted:

In a civilized society, members of the judiciary are significant public figures whose authority necessarily reaches all points within their respective jurisdiction, if not beyond. Members of the judiciary of the State of Texas, whether a municipal judge in Fort Stockton, a justice of the peace in Cameron County, the county court at law judge in Liberty County, a state district judge in Ozona, a justice on the Sixth Court of Appeals, Texarkana, or the Chief Justice of the Texas Supreme Court, all serve as the collective guidon of the banner representing fairness and impartiality in our state. It is for that reason, plus others, that the judiciary must nurture and maintain respect for their decisions, as well as the judiciary of the State of Texas as a whole. **The Texas jurist must be held to the highest standards of integrity and ethical conduct, much more so than the standards to which members of the executive and legislative branches are held accountable.** Consequently, the ultimate standard for judicial conduct in the State of Texas must be more than effortless obedience to the law, but rather, must be conduct which constantly reaffirms one’s fitness for the high responsibilities of judicial office and which continuously maintains, if not furthers, the belief that an independent judiciary exists to protect the citizen from both government overreaching and individual self-help.

Judges on this Board have acted willfully and persistently in disregard to the Canons and the Commission’s Ethics Opinions. Citing a previous opinion, the Review Tribunal in *In Re Barr* at 534,535 explained:

The term “willful”, in the context of removal of members of the Texas judiciary for misconduct, has been defined as follows:

[T]he term “willful,” as applied in tex. Const. art. V, § 1-a(6)A, is the improper or wrongful use of the power of his office by a judge acting intentionally, or with gross indifference to his conduct.

Thoma, 873 S.W.2d at 489-90.

As noted in *Thoma*, willfulness involves more than an error of judgment or a mere lack of diligence. By way of further exposition, the *Thoma* Review Tribunal additionally noted that “willfulness” necessarily encompasses conduct involving moral turpitude, dishonesty, corruption, misuse of office, or bad faith generally, whatever the motive. **A specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority may in and of itself constitute bad faith.** *Id.* A judge acts intentionally, or with intent, when the act is done with the conscious objective of causing the result or of acting in the manner defined in the pertinent rule of conduct. See *In re Conduct of Schenck*, 318 Or. 402, 870 P.2d 185, 189 (1994)... A judge is subject to discipline for “willful” violation of any canon of judicial conduct as long as she or he intends to engage in conduct for which she or he is disciplined, whether or not she or he has specific intent to violate the canon. See *In re Flanagan*, 240 Conn. 157, 690 A.2d 865 (1997) (emphasis added).

Persistent conduct does not necessarily have to be long-lasting. The Review Tribunal in *In Re Barr* at 558,559 again clarified:

“Persistent” conduct, with respect to judicial disciplinary proceedings, is constant conduct which demonstrates a series of associated efforts and determination and which is insistently repetitive or continuous. It is conduct which is very general in scope in that the conduct need not manifest itself in identical fashion. Persistent conduct need not necessarily be of a long duration, but rather connotes conduct which remains unbroken throughout its entire length, no matter how great.

The actions of judges on this board have been both willful and persistent. *Dating back to 1983 the Judicial Ethics Commission has cited at least six opinions dealing with the issue of the participation of judges in organizations like CASA.* In 2001 the commission was asked, “Is it a violation of the Judicial Canons of Ethics for a judge to serve on the Judicial Council of the Children’s Assessment Center?” The committee responded, “Yes, it is a violation of the Judicial Canons of Ethics for a judge to serve on such a council. It is a judge’s function to act impartially and to be seen as neutral.” It highlighted the following reasons:

- Canon 2 provides, “A judge...should act at all times in a manner that promotes public Confidence in the integrity and impartiality of the judiciary.”
- Canon 2B provides, “A judge shall not allow any relationship to influence judicial conduct or judgement. A judge shall not lend the prestige of judicial office to advance the private interest of...others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.”

- Canon [*sic*] 4 which requires a judge to conduct extrajudicial activities so as not to interfere with judicial duties would be violated. Membership on this council would require frequent recusal in cases in which the members of the organization were testifying (Appendix C, Opinion 270).

CASA members *frequently* appear before the judge in CPS cases to determine placement and make other decisions related to the best interests of the child. Opinion 270 specifically asserted, “For a judge to give advice to an organization whose mission is to advocate for witnesses/parties in law suits is a violation of this Canon [2B].”

Opinion 270 concluded, “***The committee has issued several opinions regarding similar organizations and has consistently found membership in such groups to be a violation of the Canons.***” It then cited Opinions 66 (1983) , 86 (1986), 133 (1990), 225 (1998) and 240 (1999) (Appendix B).

For over twenty years the commission has been warning against such an association. Judges who remain on the Board of Texas CASA have intended to engage in this prohibited conduct and are guilty of a willful violation of the Code.

The Commission’s 1981 Opinion 57 answered a question regarding judicial membership on an advisory board of a non-profit corporation. Specifically it asked, “May a judge serve as an advisory board member to a private non-profit corporation whose purpose is to operate a home to house and offer counseling to battered wives?”

In response the Commission stated that a judge may participate in civic and charitable activities subject to certain limitations including:

1. A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him [or her] or will be regularly [or frequently] engaged in adversary proceedings in any court.
2. A judge should not solicit funds for any educational, religious, charitable, fraternal, political, or civic organization, or use or permit the use of the prestige of his [or her] office for that purpose;
3. [a judge] should not be a speaker or the guest of honor at an organization’s fund-raising events, but he may attend such events (Appendix B).

Judges may participate in civic and charitable activities. However, judges acting on the Board of Directors of Texas CASA violate both the first and second limitations listed above. They violate the first limitation because the very purpose of CASA is to train volunteers to advocate for children in court regarding child abuse cases. Moreover, e-mail correspondence from Megan Ferland indicates that CASA requested judges on their board to solicit funds for the organization (Appendix R). Assuming that they complied they violated the second limitation above.

Do judges on the Board of Texas CASA serve two masters?

As a member of the Board of Texas CASA a judge owes a fiduciary duty to act in the best interests of the organization. As a member of the Texas judiciary, a judge's judicial responsibilities are to take precedence over *all* other responsibilities. These two duties can and do conflict. Judges sitting as members of the Board of Texas CASA or local CASA organizations have this conflict of interest. One wonders how often such judges divulge their association to parents standing before them in court.

Board members and officers of Texas CASA deliberated over the Judicial Ethics Commission Opinion 240 issued in 1999 (Appendix B). Specifically, the question was:

May a judge serve as a member of a Board of Directors of a non-profit corporation which trains volunteers and employs professional staff to be appointed by the judge to serve as guardians of incapacitated or minor persons?

Unequivocally, the commission responded, "No."

Specifically the complete opinion states:

No. Canon 4 states that a judge "...shall conduct all of the judge's extra-judicial activities so that they (1) do not cast reasonable doubt on the judge's capacity to act impartially as a judge; or (2) interfere with the proper performance of judicial duties." The difficulty with the scenario presented is that the qualifications and competence of a guardian must be determined and approved by the judge. A judge cannot pass on the qualifications and competence of an individual trained by a corporation if the judge is a member of the board of that corporation without creating an appearance of impropriety regarding the judge's capacity to act impartially. A casual observer could well conclude that the judge would consider anyone trained by "his/her" corporation to be qualified and competent regardless of evidence to the contrary. It is the appearance of impropriety that must be avoided. It would make no difference if the judge were a voting or non-voting member of the board.

Communications surrounding this issue are instructive both in the nature of CASA and its board. An initial e-mail specifically referenced Ethics Opinion 240. Later correspondence and corporate minutes of CIP seemed to mix references to both Opinion 240 and 270.

On July 20, 1999 Mary Kay Bickett, currently on the Texas Board of Directors and Secretary of the organization sent an e-mail to Margot McMurry regarding Ethics Opinion 240. She wrote, "Below is the opinion I think you all had asked me to find. *Hopefully it is open to some interpretation*" (emphasis added)(Appendix S).

On October 20, 1999 Jane Q. Piper, of Texas CASA wrote to one judge on its board regarding Ethics Opinion 240. Stating that "...obviously we want judges on our boards," she asked that judge, "Can you think of how to word a question to the committee so that we can get the answer we want?" (see Appendix S)

On March 1-2, 2001 the Court Improvement Project Task Force met at Balcones Springs Conference Center in Marble Falls, Texas. According to the minutes the meeting was convened by a judge on the Board of Texas CASA and attended by at least one other. It was also attended by Mary Kay Bickett who currently serves as the Secretary of the Texas CASA Board.

The minutes reflect, “The Advisory Ethics Opinion by Justice Suzanne Stovall was extensively discussed. It has had an impact on judicial willingness to serve on CASA and CAC boards” (see Appendix O, p.2). Those minutes do not elaborate on that extensive discussion nor do they identify the specific opinion by number. The context however, seems to indicate it would be Opinion 240.

Willing conflict with the opinions

By June 8, 2001 Texas CASA seems to have taken a position directly in conflict with the Opinion 240 and all other similar opinions. In a Texas CASA board meeting attended by two judges on the current board and Mary Kay Bickett the minutes state, “Tom [Krampitz, President of Texas CASA] told the board that the Ethics Opinion stated that a judge can sit on the CASA Board of Directors” (Appendix T, p. 6). No specific opinion is cited to support that assertion.

In the next two years understanding of the CASA position clouded.

On September 22, 2003 Maribel Bowles, Executive Assistant of Texas CASA sent an e-mail to one judge on their board on this issue. The subject of the e-mail to the judge was “help...ethics opinion!” She wrote:

“I need your help please...back when you first came on the Texas CASA Board I think it was you who had a concern with having a conflict of interest in serving on the board because you are a judge. Would you happen to have that Ethics Opinion in writing or tell me where I can find a copy of it? The same concern has come up again with one of our new board members and we want to be able to show hi something in writing stating that it is okay for him to sit on our board. All we have is a statement from our June 2001 board minutes” (Appendix U).

She forwarded that e-mail to Mari Kay Bickett (with a copy sent to Judge Specia on their board) and added:

“We are trying to figure out how it was that we came to the conclusion that it is okay for judges to serve on our board regardless of what the Judicial Canon of Ethics Opinion 270 states. Megan and Chris vaguely remember consulting you about it when it came up in February of 2001 when Judge Eva Guzman cam on board. The same concern has come up again with a new board member. We would appreciate any help we can get” (emphasis added) (Appendix U).

The next day, September 23, 2001, Mari Kay Bickett responded, “I will track it down this week” (Appendix U).

Also on September 23, 2001 the original judge wrote back to Maribel Bowles, “I will look for it today and send link by e-mail. I actually called the commission and discussed this at length. I am very comfortable” (Appendix V).

That same morning of September 23, 2001 Maribel Bowles responded to the judge, “Great, I actually found the ethics opinion stating it would be a violation to serve but we are still trying to track down something in writing to stating it’s okay to serve on our board” (Appendix V).

Therefore at least two judges on their board were privy to correspondence and communication on this vital issue. The Ethics Opinions are not clouded. A reading of Ethics Opinions since that time reveals no reversal.

Where were the voices of judges echoing the Ethics Opinions in this debate? Where were their voices while Texas CASA scrambled to find “the answer we want”? According to Judicial Canon 3 a judge’s judicial duties take precedence over all his other duties. As board members of Texas CASA they owe a fiduciary duty to speak out and act in the best interests of Texas CASA. Did this conflict cause them to yield the responsibility of their robes in favor of the prestige of judges sitting on the Texas Board? Where were their voices in this debate?

Financial Ties to DFPS

Texas CASA receives funding from TDFPS, a party that repeatedly appears before these judges in court. Consider a sampling of financial data related to funds received from TDFPS (Appendix W).

- June 7, 1999 Agreement between Texas Department of Protective and Regulatory Services and Texas CASA, Inc. to reimburse Texas CASA up to \$59,000 toward Texas CASA’s Rural Expansion Project
- June 2002 Texas CASA Program Administration Update for Board Meeting citing a grant from “The Children’s Justice Act (TDPRS) in the amount of \$97,341 for the first phase of the Outreach and Recruitment Team.”
- November 1, 2002 letter from Megan Ferland, CEO of Texas CASA and Susan Stahl, President of the Board of Texas CASA to Mr. Henry Darrington of TDPRS thanking him for sponsoring their 13th Annual Statewide Conference with a \$10,000 contribution and explaining how CASA highlighted their sponsorship throughout the conference.
- February 2003 Texas CASA Program Administration Update for Board Meeting citing a grant from “The Court Improvement Project (TDPRS) in the amount of \$175,000 for trainings, pass-through funds, grant writing and technical assistance to the programs.”

Clearly Texas CASA directly benefits financially from its relationship with DFPS. The actions of these judges in this regard violate both Canon 1 and Canon 2.

Canon 1 addresses the integrity and independence of the judiciary. It affirms that “[a] judge should participate in establishing, maintaining and enforcing high standards of conduct, and should

personally observe those standards so that the integrity and independence of the judiciary is preserved.”

Canon 2A states, “[a] judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

Canon 2B asserts, “[a] judge shall not allow any relationship to influence judicial conduct of judgment.”

For parties to appear before a judge who sits on a CASA board that receives funding from TDFPS reeks of undue influence and partiality.

Perception of CASA among families who appear in CPS courts is already tainted. In many courts CASA workers and CPS workers socialize before, during and after hearings. Parents perceive that CASA workers tend to mimic decisions of CPS. This is especially disconcerting in light of the recent “Evaluation of CASA Representation” done by Caliber Associates. Among its findings it concluded:

- “CASA volunteers in this sample spent significantly less time on the cases of African American children than children of other races, more than one hour less per month.”
- “Overall, CASA volunteers in this sample were highly effective in making recommendation to the court. In more than four out of five cases, all or almost all of volunteers’ recommendations were accepted.”
- “These finding suggest that children who had a CASA volunteer often looked no different from children who did not have a CASA volunteer. In some cases children with a CASA volunteer looked worse: they were more likely to be placed in out of home care and, for some, less likely to be reunified or in kin care than children who did not have a CASA volunteer.”

Apparently CASA volunteers are very persuasive with the court. While on the surface this may seem to be evidence of success, this fact raises concern for at least three reasons:

1. the disparity in ethnic representation of board members and volunteers compared to the individuals and communities they serve.
2. children who have CASA volunteers are less likely to be placed at home, with kin care or reunified with family.
3. informal and formal ties, including financial, to the Department of Family and Protective Services

Again, one wonders how often these judges disclose their relationship to CASA, and indeed with DFPS, to parents appearing before them.

1. Member of Advisory Committees or Boards of Organizations of Lawyers such as Texas Lawyers for Children

At least one judge is a member of the Advisory Committee of Texas Lawyers for Children.

Advisory Opinion #281 responded to two questions First, whether a judge may serve on the Board of the Houston Volunteer Lawyers Program, an organization whose staff and volunteer attorneys appear as advocates in the judge's court? Second, may a judge serve on the Advisory Board in an ex officio advisory capacity, not involved in decision or policy making (Appendix B)?

The response, in no uncertain terms, stated:

“No, as to both questions. See Opinion 270. Service in any capacity in an organization whose staff appears in the judges [sic] court violates Canon 2. Canon 2 requires a judge to act at all times in a way that promotes the public confidence in the judge's impartiality. Canon 2 further prohibits lending the prestige of office to advance the private interest of others or to convey that others are in a special position to influence the judge.”

While there are times that a child may need to be placed in an adversarial position to his parent(s) within the court system, by design the current system pits them against one another more frequently than necessary. The mission of Texas Lawyers for Children is “to improve case outcomes for abused and neglected children by enhancing the quality of legal services they receive. The most important decisions about an abused or neglected child's future are made in court. TLC exists to help insure that those decisions are the right ones for the child.”

Texas Lawyers for Children is funded at least in part by the Children's Justice Act a part of TDFPS (Appendix X, p.6).

A judge must act impartially toward parties in his courtroom or be disciplined. Children and parents are sometimes pitted in an adversarial position. The Department of Family and Protective Services has unjustly removed children from their parents and pitted them in an adversarial relationship against parents in the courtroom.

Again, as noble and praiseworthy as the goal is to “help insure that those [legal decisions] are the right ones for the child” the judge who may hear those attorneys representing those children in his courtroom has no place serving on the Advisory Committee for that group, especially as a recipient of funding directed through TDFPS..

CONCLUSION

The intricate web of the pervasive influence of CPS, a frequent and regular party in the courtrooms of CPS judges, is perhaps best revealed through the DFPS website itself. The document “Child Protective Services” describes the interaction of the subjects of this position paper in the following manner under the heading “Texas Court Improvement Project”:

“The Texas Court Improvement Project (CIP) is a federal grant to the Texas Supreme

Court administered by PRS to improve judicial proceeding in foster care and adoption cases. Texas Court Appointed Special Advocates (CASA) continues to expand with financial help from CIP. This funding also pilots projects known as 'Cluster Courts,' where a traveling judge hears only CPS cases for a cluster of counties. The Texas Legislature appropriated \$4 million for the coming biennium for 16 such courts throughout the state. CIP also helps fund several judicial trainings and training tools on child abuse and neglect. CIP monies maintain the Judicial Web Page, a tool for judges and PRS attorneys to check on the status of any child abuse or neglect case filed in Texas. CIP funds the development of online training software and video conferencing pilot projects, allowing a child to testify from the security and comfort of a Children's Crisis Care Center" (Appendix X, p.6).

The independence of the judiciary in child abuse cases has been severely compromised in the courtrooms of judges who are members of the Supreme Court Task Force on Foster Care, the Court Improvement Project and all CASA organizations, both statewide and local. Unfortunately this compromise reaches far beyond just those organizations to infiltrate the nature of the Cluster Court System which covers approximately half of the State of Texas. An investigation is necessary. But more than just an investigation is needed. A restoration of an independent judiciary is essential to reestablish confidence in the judicial system in CPS cases and therefore restore justice itself.