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Experience

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Feature

WHEN ROLES COLLIDE
Judicial Ethics and Problem-Solving Judges

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The nontraditional role judges play in problem-solving courts can create a tension with ethics rules that are based on the traditional concepts of judicial independence, integrity, and--particularly relevant in this context-- impartiality. The judiciary--in codes, advisory opinions, and decisions--is only beginning to wrestle with the possible conflicts between the objective detachment integral to codes of judicial conduct and the active engagement inherent in problem-solving courts.

Ex Parte Communications

The most obvious clash is with the prohibition on ex parte communications because, as a comment to the 2007 ABA *Model Code of Judicial Conduct* notes, judges in problem-solving courts “may be authorized and even encouraged to communicate directly with social workers, probation officers, and others outside the context of their usual judicial role as independent decision makers on issues of fact and law.” MODEL CODE OF JUDICIAL CONDUCT Application cmt. [3] (2007). Thus, a comment to the rule on ex parte communications states that the “authorized by law” exception to the ex parte prohibition applies to judges “when serving on therapeutic or problem-solving courts, mental health courts, or drug courts.” MODEL CODE OF JUDICIAL CONDUCT R. 2.9 cmt. 4.

In adopting the comment, several states have revised it to emphasize that, to be permissible even in problem-solving courts, ex parte communications must be “authorized by protocols known and consented to by the parties or by local rules” (Arizona and Nebraska) or “in conformance with the established protocols” to which the “parties have expressly consented” (Maryland). Similarly, the Pennsylvania version provides that, to obtain the exception's protection, “a judge should take special care to make sure that the participants ... are made aware of and consent to the possibility of ex parte communications.” *See also* CAL. COMM'N ON JUDICIAL PERFORMANCE, 2013 ANNUAL REPORT 21 (2013), http://www.cjp.ca.gov/res/docs/annual_reports/2013_Annual_Report.pdf (describing a private advisory letter to a judge who acted on ex parte information received in a sidebar conference with a deputy district attorney and a representative of a residential drug treatment program that did not include the defendant, who was present in court in custody but whose counsel was not present); N.Y. Advisory Comm. on Judicial Ethics, Op. 04-88 (Mar. 10, 2005), <http://www.nycourts.gov/ip/judicialethics/opinions/04-88.htm> (advising that a drug court judge must inform a defendant's attorney of the content and nature of ex parte communications with court personnel outside of or at staffings or court appearances).

Disqualification

The argument may be made that a judge's involvement with a defendant in the context of a drug court, for example, may undermine the judge's impartiality and require disqualification if problems arise and the judge must decide whether to allow

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the defendant to continue in the program or revoke the defendant's probation. The New Hampshire Supreme Court rejected that argument, relying on the principle that judges frequently acquire information about a case while sitting in one judicial setting but later adjudicate the case in another setting "without casting significant doubt on their ability to render a fair and impartial decision." *State v. Belyea*, 999 A.2d 1080, 1085 (N.H. 2010). Several advisory committees have reached the same conclusion. Ethics Comm. of the Ky. Judiciary, Formal Op. JE-122 (Oct. 10, 2011), http://courts.ky.gov/commissionscommittees/JEC/JEC_Opinions/JE_122.pdf (finding that a judge who terminated a defendant's participation in drug court is not disqualified from *39 a probation revocation hearing unless the revocation is based on information the judge learned outside regular drug court process); Nev. Standing Comm. on Judicial Ethics & Election Practices, Op. JE06-009 (Aug. 17, 2006), <http://judicial.state.nv.us/je060093new.htm> (finding that a judge may preside in a criminal case of a defendant who had previously appeared before the judge in drug court but must disclose recollection of the defendant); see also KAN. SUP. CT. R. 109A (permitting a judge who received an ex parte communication in a problem-solving court to preside over any subsequent proceeding if the judge discloses the existence and nature of the ex parte communication and both the defendant and the State consent to the judge hearing the matter).

In contrast, the Tennessee Court of Criminal Appeals held that a judge's role as the leader of a defendant's therapeutic team required a degree of involvement inconsistent with the detachment due process requires for adjudication of a parole revocation. *State v. Stewart*, No. W2009-00980-CCA-R3-CD, 2010 WL 3293920 (Tenn. Crim. App. Aug. 18, 2010). That judges often acquire information in different judicial settings without raising impartiality issues did not alleviate its constitutional concerns, the court stated, because drug court programs have numerous differences from traditional judicial settings. The court explained that, by playing an active role in the treatment process, a drug court judge develops a stake in a participant's success or failure; becomes involved in "the many problems that may occur with drug addiction, including other medical problems, family difficulties, financial difficulties, and childhood sexual abuse"; and is exposed ex parte "to a considerable amount of information about the defendant's conduct that would not normally be relevant to adjudicating a probation revocation, through methods that leave its credibility suspect for traditional legal purposes." *Id.* at *7, *9. Cf., TENN. CODE OF JUDICIAL CONDUCT R. 2.9 cmt. [4] (providing that if an ex parte communication in a problem-solving court "becomes an issue at a subsequent adjudicatory proceeding in which the judge is presiding, the judge shall either (1) disqualify himself or herself if the judge gained personal knowledge of disputed facts ... or the judge's impartiality might reasonably be questioned ... or (2) make disclosure of such communications subject to the waiver provisions"); Tenn. Judicial Ethics Comm., Op. 11-01 (Mar. 23, 2011), <http://www.tncourts.gov/sites/default/files/docs/11-01.pdf> (finding that a judge who is a member of a drug court team may preside over the revocation/sentencing hearing of a defendant who is in the program). Compare *State v. Rogers*, 170 P.3d 881 (Idaho 2007) (holding that a drug court judge may preside over proceedings regarding a defendant's termination from the program), with IDAHO CODE OF JUDICIAL CONDUCT Canon 3B(7) ("A judge who has [an] ex parte communication regarding the defendant or juvenile while presiding over a case in a problem solving court shall not preside over any subsequent proceeding to terminate that defendant or juvenile from the problem solving court, probation violation proceeding, or sentencing proceeding in that case.").

Fund raising

The extensive services needed by the participants and the intensive monitoring undertaken by the court can strain a problem-solving court's resources. The ABA Advisory Committee issued an opinion stating that judges may participate in fundraising activities for problem-solving courts (as well as other courts) as long as their involvement is limited to activities permitted by the *Model Code of Judicial Conduct*. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-452 (Oct. 17, 2008). For example, judges may participate in the process of raising funds through grants. See Okla. Judicial Ethics Advisory Panel, Op. 2002-2 (Jan. 24, 2002), <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=364900> (finding that a drug court judge may apply for, or authorize an entity to apply for, a grant from a state agency); Wash. Ethics Advisory Comm., Op. 12-01 (Jan. 13, 2012), http://www.courts.wa.gov/programs_orgs/os_ethics/?fa=pos_ethics.dispopin&mode=1201 (finding

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that a judge who runs a therapeutic court for veterans may accept a grant that will *40 provide free or reduced-charge alcohol monitoring to eligible participants).

However, a judge and the judge's personal staff may not solicit donations of cash, gift cards, or other merchandise to be used as incentives for drug court participants or ask that gift cards or other merchandise be offered at a reduced rate, although they may accept unsolicited donations. Nev. Standing Comm. on Judicial Ethics, Op. JE12-009 (Aug. 20, 2012), <http://judicial.state.nv.us/JE12-009.pdf> (not prohibiting staff of the court's administrative office from seeking such donations or discounts); *see also* Fla. Judicial Ethics Advisory Comm., Op. 2007-05 (Mar. 20, 2007), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2007/2007-05.html> (finding that a presiding drug court judge may not solicit or receive incentive gifts from lawyers or law firms for use as rewards to defendants/participants); Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2004-13 (Dec. 3, 2004), http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2004/default.asp (finding that a judge may not sign a letter requesting local businesses to donate items for use as rewards and incentives for defendants in the mental health court and may not direct a court employee to solicit such donations).

Further, several **judicial ethics** committees have advised judges they may not serve on the boards of nonprofit organizations created to raise funds for **problem-solving courts**. For example, the New York committee stated such service would be inappropriate because it would be impossible to separate the presiding drug court judge from fundraising activity directly benefitting the judge's court. N.Y. Advisory Comm. on Judicial Ethics, Op. 97-83 (Sept. 11, 1997), http://www.nycourts.gov/ip/judicialethics/opinions/97-83_.htm. *Cf.* Md. Judicial Ethics Comm., Op. 2005-11 (Sept. 23, 2005), <http://mdcourts.gov/ethics/pdfs/2005-11.pdf> (finding that a judge may serve as director of a nonprofit formed to solicit funds for a drug court if the judge's participation does not involve active or passive fundraising). Similarly, the Michigan committee explained:

In circumstances in which the nonprofit or charitable organization exists solely for the purpose of raising money for court ordered programs, the close nexus between the court and the non-profit or charitable organization is such that for a judge to serve as an officer, director, trustee or nonlegal advisor to such organization would by that fact alone create an appearance of impropriety

Mich. Judicial Ethics Comm., Op. JI-139 (Oct. 21, 2013), http://michbar.org/opinions/ethics/numbered_opinions/ji-139.cfm. *But see* Pa. Judicial Ethics Comm., Informal Op. 5/3a/10 (2010), <http://ethics.pacourts.us/digests.htm> (finding that a judge may, with other community leaders, form a nonprofit corporation to develop a specialty court and serve on the board but cannot personally participate in public fundraising activities).

Discipline

Several judicial discipline cases illustrate the problems created if judges exaggerate differences between their role in problem-solving courts and their more traditional roles. With the judge's agreement, the New York State Commission on Judicial Conduct censured a judge for speaking privately to a treatment court participant. *In re Tarantino*, Determination (N.Y. St. Comm'n on Jud. Conduct Mar. 28, 2011), <http://www.cjc.ny.gov/Determinations/T/Tarantino.Andrew.G.2011.03.28.DET.pdf>. The judge took the participant, who was in his late teens or early twenties, alone to a park approximately 16 miles from the courthouse. During the trip, the judge spoke with the young man about his substance abuse, his mother's death, and his need for grief counseling.

Concluding that the judge's "behavior, no matter how well-intentioned, was inappropriate and showed extremely poor judgment," the New York State Commission emphasized that "the unique dynamics and relative informality of Treatment Court proceedings" do not "excuse such conduct, which overstepped the appropriate boundaries between a judge and a defendant in pending proceedings." *Id.*, slip op. at 7-8.

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Even in Treatment Court, a judge is not a social worker or therapist, but *41 must maintain the role of a neutral and detached arbiter who at all times remains “cloaked figuratively with his black robe of office devolving upon him standards of conduct more stringent than those acceptable for others.” Respondent's behavior showed a serious misunderstanding of the role of a judge.

Id., slip op. at 8 (citations omitted).

In a second case, the New York Commission rejected the judge's claim “that the relative informality in some respects of Treatment Court proceedings justified his joking use of sexually charged language in an attempt ‘to take away the barriers of being afraid of the judge’ and to ‘remove those impediments’ so that the participants can be honest.” *In re Abramson*, Determination (N.Y. St. Comm'n on Jud. Conduct Oct. 26, 2010), [http:// www.cjc.ny.gov/Determinations/A/Abramson.Gilbert.2010.10.26.DET.pdf](http://www.cjc.ny.gov/Determinations/A/Abramson.Gilbert.2010.10.26.DET.pdf) (removing the judge for this and other misconduct). In 2012, the California Commission on Judicial Performance issued a private advisory letter to a judge who tossed small rewards from the bench to drug court participants. The California Commission did not take issue with the judge giving the items to the defendants but expressed concern that the items be delivered in a manner that does not demean the defendants or diminish the dignity of the court. CAL. COMM'N ON JUDICIAL PERFORMANCE, 2012 ANNUAL REPORT 25 (2012), [http:// www.cjp.ca.gov/res/docs/annual_reports/2012_Annual_Report.pdf](http://www.cjp.ca.gov/res/docs/annual_reports/2012_Annual_Report.pdf).

In the Media Spotlight

In March 2011, an episode of the National Public Radio program *This American Life* concluded Chief Judge Amanda Williams ran her drug court in a way that violated “the basic philosophy of all drug courts.” The Georgia Judicial Qualifications Commission was apparently already investigating and, in November, filed a notice of formal proceedings that alleged Judge Williams, in addition to other misconduct, had a practice of holding drug court participants indefinitely without a hearing and a policy of delaying their placement into treatment; showed favoritism to certain participants; engaged in a pattern of improper ex parte communications with regard to who would be admitted to drug court; and expressed bias in criminal matters in the drug court. In December 2011, based on the judge's resignation and agreement not to serve in judicial office again, the Georgia Commission dismissed the notice. *In re Williams*, Consent Order (Ga. Jud. Qualifications Comm'n Dec. 19, 2011), [http:// www.gajqc.com/news.cfm](http://www.gajqc.com/news.cfm).

In early 2011, Judge Mary Gunn retired to star in a syndicated reality TV show called *Last Shot with Judge Gunn*. In November 2011, the Arkansas Judicial Discipline and Disability Commission informed Gunn that it had dismissed complaints against her because she had agreed not to serve as a judge again. Press Release, Ark. Judicial Discipline & Disability Comm'n (Nov. 18, 2011), http://www.arkansas.gov/jddc/pdf/pr/2011/mary_ann_gunn_111811.pdf. According to news reports, there had been complaints the judge had coerced people into appearing on televised segments of her drug court; used her official time, public facilities, and court personnel to lay the groundwork for her commercial TV show; and took court files with her when she left the bench.

Until 2010, Gunn had allowed her drug court proceedings to be broadcast several times a week on local TV stations. When commercial media representatives expressed an interest in broadcasting to a national audience, she asked for an advisory opinion about how to implement the broadcasts in conformity with the Arkansas Code of Judicial Conduct. In response, the Judicial Ethics Advisory Committee concluded that, even without a commercial component, the “televising of drug court proceedings involving troubled and unfortunate individuals to 200,000 households in a ‘number one’ ranked television show” does not “promote public confidence in the judiciary.” Ark. Judicial Ethics Advisory Comm., Op. 2010-01 (Aug. 31, 2010), [http:// www.arkansas.gov/jddc/pdf/pr/2010/2010-01_advisory_opinion.pdf](http://www.arkansas.gov/jddc/pdf/pr/2010/2010-01_advisory_opinion.pdf). The committee noted that the televising of drug

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court could defeat its purpose, emphasizing that “[i]n this modern media culture once the taping is done and it is released into the public domain it is there forever” and “could be used against this person in a personal, political, economic or social *42 situation to his or her extreme detriment.” *Id.* The committee also questioned how voluntary a participant’s waiver of any objection to appearing on television could be when the judge requests the waiver, asking, “Might a defendant think the judge would hold it against him or her if he or she refused to cooperate in a televised court session?” *Id.*

Subsequently, amending an administrative order, the Arkansas Supreme Court prohibited the broadcasting of drug court proceedings. *See* Ark. Administrative Order 6: Broadcasting, Recording, or Photographing in the Courtroom (2011), <https://courts.arkansas.gov/rules-and-administrative-orders/administrative-orders>. *Cf.*, Ark. Judicial Ethics Advisory Comm., Op. 2013-02 (May 2, 2013), <http://www.arkansas.gov/jddc/pdf/2013-News/ralph-ohm-2013-02.pdf> (finding that under certain circumstances, a drug court judge may cooperate on a newspaper series following two drug court clients to their anticipated graduation); Pa. Judicial Ethics Comm., Informal Op. 4/22/05 (2005), <http://ethics.pacourts.us/digests.htm> (finding that a judge may permit photographing, recording, and televising of drug court graduations, but not of proceedings withdrawing charges).

Conclusion

In advancing the laudable goals of problem-solving courts, the judiciary cannot ignore the tensions between the unique dynamics of those courts and the ethical standards designed to create and maintain public confidence in the courts generally. Neither needs to be jettisoned, but the necessary balance can only be achieved through acknowledgment of the challenges and thoughtful engagement in the resolution.

Footnotes

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