

JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 12-908

DRUG COURT: EXTRAJUDICIAL ACTIVITY WITH DRUG COURT PARTICIPANTS

ISSUE

May a drug court judge meet with drug court participants three hours one day each week for twelve weeks as part of the participants' community-service requirement, if the judge intends to avoid any discussion of the participants' criminal cases? Answer: No.

FACTS

The drug court has instituted, as part of the drug court requirements, a community-service program that the judge supervises. For three hours one day each week for twelve weeks, the participants meet with the judge and several other volunteers at the courthouse to fulfill their community-service requirement. They learn a useful skill and experience the importance of "giving back" to the community. Their project is accomplished as they sit together as a group and engage in conversation with the judge. The judge is intent that the conversation during this extrajudicial activity not relate to the participants' criminal cases. The same judge presides in the drug court hearings, i.e., the scheduled appearance of each participant before the court, during which the progress of that participant is reviewed and discussed, and assignments, verifications, or other requested information is provided to the court by that participant. Alabama Administrative Office of Courts Drug Court Guidelines 2010, at 3-4.

DISCUSSION

In formulating the advice for this opinion, the Commission acknowledges the tireless work

judges have contributed, with the best of intentions, to incorporate the drug court model into our State's judiciary as an innovative option to address particular problems and crimes. In the drug court model, the judge presides in a nontraditional style, e.g., less formal, more hands-on, more flexible, with direct and engaging communications with the participants. Although this endeavor has sometimes been through "uncharted territories" and the ethical implications unclear, this unique nature of drug court requires that the judge be vigilant in complying with the Canons. Nat'l Drug Court Initiative, The Drug Court Judicial Benchbook 197 (Douglas B. Marlowe & Judge William G. Meyer, eds., February 2011).

The Alabama Legislature established the drug court model in the Alabama Drug Offender Accountability Act ("the Act"), §§ 12-23A-1 to -13, Code of Alabama (1975) (effective July 1, 2010). It adopted the "Ten Key Components of Drug Court," formulated by the United States Justice Department, Office of Justice Programs. One of those components is the drug court judge's ongoing judicial interaction with each drug court participant. § 12-23A-4(f)(7). However, one of the four aspects of drug court practice that "raise special concerns for a judge who would live up to the expectations of the Socratic charge¹ and the Canons of Judicial Conduct" is that "the intimacy that develops between participants and members of the

¹ "Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially."

drug court team — especially judges — can blur the boundaries between judicial action and personal involvement.” The Drug Court Judicial Benchbook 197. Addressing this concern is the cardinal limitation to the judge’s interaction with the participants: the judge’s interaction must be confined to the context of judicial proceedings, i.e., the regular status hearings. Bureau of Judicial Assistance, U.S. Dep’t of Justice, Defining Drug Courts: The Key Components 15 (photo. reprint 2004)(1997).

The Drug Court Judicial Benchbook observes the following in regard to the judge’s interaction with drug court participants:

The judge’s personal engagement with each participant is the keystone of the drug court model. “This active, supervising relationship, maintained throughout treatment, increases the likelihood that a participant will remain in treatment and improves the chances for sobriety and law-abiding behavior.” This personal engagement stands in tension with a common vision of the judge as a detached arbiter, figuratively blind to the parties before the court. However common this understanding of the judge, the Canon requires not disengagement, but impartiality. The judge may show concern about a participant’s progress in recovery — even to the point of celebrating a participant’s success — but the judge must extend the same quality of engagement and concern to each participant. Such engagement must be in the context of judicial proceedings. In one case, a judge was sanctioned for meeting privately and

individually (sometimes at their homes) with probationers. [In re Jones, 581 N.W. 2d 876, 876 (Neb. 1998).] The judge justified a portion of his conduct on his sincere concern for the welfare of addicts and their progress. The Nebraska Supreme Court was unpersuaded and found that the judge’s conduct constituted a violation of Canon 1 (uphold integrity and independence of judiciary) and Canon 2, in that the judge failed to act in a manner that promotes public confidence in the impartiality of the judiciary. The drug court judge does not function as a therapist and should not seek to develop a therapeutic relationship with individual drug court participants.

(Id. at 199-200) (emphasis added; footnotes omitted). While outside drug court activities such as picnics or other social contacts are not strictly prohibited, a judge should be wary of attending and participating in them. Id. at 200-01.

The Canons don’t prohibit all non-court contact with participants. For instance, if there was a picnic and the district attorney, defense counsel, law enforcement, other members of the drug court team, and drug court participants were present and the judge made a cameo appearance and said a few words of encouragement, such conduct would not violate the Canons. The question the judge must ask is whether the extrajudicial activities the judge engages in would cast reasonable doubt upon the judge’s capacity to act impartially as a judge

or whether the activity would threaten public confidence in the integrity of the judiciary.

Id. (footnote omitted).

After considering the circumstances presented by the inquiring judge, the Commission advises that such extensive extrajudicial exposure to the participants during their community-service activity would violate Canon 3A(4)'s prohibition against ex parte communications: "A judge should . . . , except as authorized by law, neither initiate nor consider ex parte communications concerning a pending . . . proceeding." See also id. (a judge should accord to every person who is legally interested in a proceeding, or his or her lawyer, full right to be heard according to law). Although regulation of ex parte contacts in the drug court context is evolving, Alabama has not adopted any change to Canon 3A(4) to incorporate the authorization by law of any ex parte communication in a problem-solving court context. See § 12-23A-4(a)(1) and (2) (the structure, method, and operation of each drug court shall be created and operate pursuant to the Act and in compliance with rules promulgated by the Alabama Supreme Court); § 12-23A-4(j) (each drug court judge may establish rules and may make special orders and rules, as necessary, that do not conflict with the Act or rules promulgated by the Alabama Supreme Court). The informal nature of drug court does not necessarily remove "all of the evils that the rule against ex parte communication was designed to prevent: bias, prejudice, coercion, and exploitation," James J. Alfani et al., Judicial Conduct and Ethics § 5.03A (4th ed. 2007). Thus, the limitations on ex parte contacts cannot be relaxed. The Drug Court Judicial Benchbook 198, 203.

No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by un rebutted remarks about the other side's case

We are not here concerned with whether an ex parte communication *actually* prejudices one party at the expense of the other [but with] their effect on the appearance of impartiality of the tribunal. The impartiality of the trial judge must be beyond question.

Rose v. State, 601 So.2d 1181, 1183 (Fla. 1992). The judge's impartiality may be reasonably questioned when he or she has greater knowledge of the participant's circumstances than the attorneys or other members of the drug court team. Such question implicates Canon 2A (a judge should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), and Canon 3 (a judge should perform the duties of his or her office impartially).

The drug court judge's extensive extrajudicial interaction with the participants – clearly outside the parameters emphasized in The Drug Court Judicial Benchbook – cannot be neutralized by the assurance that the drug court judge would not discuss any issues regarding the participants' criminal cases. The participants' criminal cases are not the only justiciable issues before the drug court. The Act provides that the drug court may impose reasonable sanctions or incarcerate or expel a participant from the program if the court finds the participant is not performing

satisfactorily; is not benefitting from education, treatment, or rehabilitation; has engaged in conduct rendering him or her unsuitable for the program; has otherwise violated the terms and conditions of the participant's agreement with the drug court; or is for any reason unable to participate. § 12-23A-4(d). The judge's extensive extrajudicial exposure to the participants would surely address any multitude of factors the court would necessarily consider in executing his or her constitutionally mandated rule as independent arbiter and guardian of legal rights.

Such extensive extrajudicial exposure to the participants during the pendency of their cases also raises questions of the judge's disqualification pursuant to Canon 3C(1)'s general provision that a judge should disqualify himself or herself in a proceeding in which his or her impartiality might reasonably be questioned. The test under this canon is: "Would a person of ordinary prudence in the judge's position knowing all of the facts known to the judge find that there is a reasonable basis for questioning the judge's impartiality?" In re Sheffield, 465 So.2d 350, 356 (Ala. 1984). The question is not whether the judge is impartial in fact, but rather whether another person, knowing all of the circumstances, might reasonably question the judge's impartiality. Ex parte Duncan, 638 So.2d 1332, 1334 (Ala. 1994). Such personal involvement by the judge outside the judicial context presents a reasonable question of the judge's impartiality because the judge appears to be personally involved with each participant's success or failure and thus biased. See also Canon 3C(1)(a) (a judge should disqualify if he has a personal bias or prejudice concerning a party).

Furthermore, a judge should disqualify if he or she has personal knowledge of disputed evidentiary facts concerning the proceeding, Canon 3C(1)(a), or has been a material witness concerning the matter in controversy, Canon 3C(1)(b). The violation of these provisions may be based on any independent knowledge of disputed facts the judge may have obtained from personal observation, thereby, possibly having to testify or otherwise placing his or her own credibility in issue. A judge should disqualify from any adjudication arising from events he or she witnesses, such as a defendant appearing in court intoxicated. The Drug Court Judicial Benchbook 206.

Finally, the drug court judge should consider Canon 5's directive that a judge regulate his or her extrajudicial activities to minimize the risk of conflict with the judicial duties. A judge may not participate in civic and charitable activities if they reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties. Canon 5B. See also Canon 5B(1) (a judge should not serve if it is likely the organization or institution will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court). Even when affiliation with an entity that serves criminal defendants is required, the judge may not be involved with individual supervision of participants or employees so the judge's judicial responsibilities remain separate from his or her services to the entity. See, e.g., Advisory Opinion 97-681 (in serving on the board of a county work release program pursuant to a statute specifically providing for two judge members, a judge should not be involved in supervision of program participants or employees).

The Commission concludes the interaction between the drug court participant and the judge must be limited to the judicial role and context.² Thus, it is the Commission's opinion the drug court judge may not engage in the participants' extrajudicial community-service requirement.

REFERENCES

Alabama Canons of Judicial Ethics, Canons 2A, 3, 3A(4), 3C(1), 3C(1)(a), 3C(1)(b), 5, 5B, 5B(1).

Advisory Opinion 97-681.

Alabama Drug Offender Accountability Act, §§ 12-23A-1 to -13, Code of Alabama (1975).

In re Sheffield, 465 So.2d 350, 356 (Ala. 1984).

Ex parte Duncan, 638 So.2d 1332, 1334 (Ala. 1994).

Rose v. State, 601 So.2d 1181, 1183 (Fla. 1992).

Alabama Administrative Office of Courts Drug Court Guidelines 2010.

James J. Alfani et al., Judicial Conduct and Ethics § 5.03A (4th ed. 2007).

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Nat'l Drug Court Initiative, The Drug Court Judicial Benchbook (Douglas B. Marlowe & Judge William G. Meyer, eds., February 2011).

Nat'l Institute of Justice, U.S. Dep't of Justice, Drug Courts: The Second Decade 11 (2006).

Rachel Porter, Michael Rempel, and Adam Mansky, What Makes a Court Problem-Solving? Universal Performance Indicators for Problem-Solving Justice. New York, NY: Center for Court Innovation 22 (Feb. 2010).

²It is well documented that the most important influence in participants' drug court experience is the personal attention from the judge during status hearings. See Nat'l Institute of Justice, U.S. Dep't of Justice, Drug Courts: The Second Decade 11 (2006); Rachel Porter, Michael Rempel, and Adam Mansky, What Makes a Court Problem-Solving? Universal Performance Indicators for Problem-Solving Justice. New York, NY: Center for Court Innovation 22 (Feb. 2010).

This opinion is advisory only and is based on the specific facts and questions submitted by the judge who requested the opinion pursuant to Rule 18 of the Rules of Procedure of the Judicial Inquiry Commission. For further information, you may contact the Judicial Inquiry Commission, P. O. Box 303400, Montgomery, Alabama 36130-3400; tel.: (334) 242-4089; fax: (334) 353-4043.