AMERICAN UNIVERSITY
WASHINGTON, DC

JUSTICE PROGRAMS OFFICE SCHOOL OF PUBLIC AFFAIRS

BUREAU OF JUSTICE ASSISTANCE (BJA) DRUG COURT TECHNICAL ASSISTANCE/CLEARINGHOUSE PROJECT

FREQUENTLY ASKED QUESTIONS SERIES: Ex Parte Communications in Drug Court/ Problem Solving Court Matters and, Specifically, Position of States on Comment 4 Under Rule 2.9 "Ex Parte Communications" of the 2007 ABA Model Code of Judicial Conduct.

Subject: Ex Parte Communications in Drug Court/ Problem Solving Court Matters and, Specifically, Position of States on Comment 4 Under Rule 2.9 "Ex Parte Communications" of the 2007 ABA Model Code of Judicial Conduct.
From: BJA Drug Court Technical Assistance/Clearinghouse Project
Date: October 7, 2013 (rev.)

Judge Joe Kisner of the 18th Judicial District Court (Division 17) in Wichita, Kansas, has requested information on how other states are dealing with the issue of ex parte communications in drug court and other problem solving court matters and, specifically, whether any states have taken a position on Comment 4 under Rule 2.9 "Ex Parte Communications" of the 2007 ABA Model Code of Judicial Conduct which is appended. *(See Attachment A: ABA Model Code of Judicial Conduct, February 2007. [Excerpt] Rule 2.9 Ex Parte Communications)*

Judge Kisner's inquiry is as follows:

Inquiry

The Kansas Supreme Court is currently considering the adoption of the 2007 ABA Model Code of Judicial Conduct. The Kansas Commission appointed to review the Model Code and make recommendations to the Court has proposed deleting Comment 4, under Rule 2.9 Ex Parte Communications. This comment states:

"A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probations officers, social workers, and others."

I am requesting information on how other states are dealing with this and related ethical issues faced by judges in problem solving courts. I would specifically like to know if other Supreme Courts have adopted the language in Comment 4 of Rule 2.9 as proposed in the Draft, if they have altered the language, deleted the language or otherwise addressed the issue of such ex parte communications.

Respondents were asked to indicate:

(1) whether your Supreme Court has taken -- or is considering -- a position (adopted, deleted or other position) on Comment 4 under Rule 2.9 "Ex Parte Communications" of the 2007 ABA Model Code of Judicial Conduct; and, if your Supreme Court has taken or is considering a position on the Comment, the position it has taken or issues that are currently being addressed; and/or

(2) if your Supreme Court has not at this point considered the Comment, any comments you have on the issue.

Judge Kisner's inquiry was a follow-up to a more general inquiry received in April 2008 from Norma Jaeger, State Drug Court/Problem Solving Court Coordinator for Idaho.

Ms. Jaeger's inquiry was as follows:

Inquiry

"We are facing the necessity of having our Supreme Court deal with this issue through some sort of rule approach on April 30th. Right now we have several judges who have withdrawn from staffings, not talking to their coordinators about participants outside of court and close to shutting down altogether. The ABA has proposed new language in a model set of Canons but Idaho has not made any modifications yet and the whole issue has ignited with most of our judges absenting themselves if both attorneys are not there. That happens in several of our courts."

We would appreciate hearing of any experience that has developed in your respective jurisdictions regarding this issue, including:

(1) whether this issue has been raised?;

(2) any actions that have been taken in response -- including the development of special court rules, procedures or other policies;

(3) any relevant case law that has been developed; and

(4) any action that has been taken regarding the 2007 ABA Model Code of Judicial Conduct which contains the following new exception to ex parte communication in Rule 2.9 comment [4]:

> *"A Judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts or drug courts, In this capacity, Judges may assume a more interactive role with parties, treatment providers, probation officers, social workers and others."*

*Note: at the time of the inquiry, the most current update of Court Rules Relating to Drug Court Programs, conducted annually by the BJA Drug Court Clearinghouse, had not indicated any court rules that had been enacted pertaining to ex parte communication in drug court/problem solving court matters or any other aspect of procedural or ethical obligations relating to due process for which an exception to the Ex Parte prohibition had been enacted.

Responses to Ms. Jaeger's inquiry were submitted from the following states: Connecticut, Kentucky, New Jersey, New York, and Vermont; and responses to Judge Kisner's inquiry were submitted from: Alaska, Arkansas, California, Delaware, Idaho, Indiana, Maryland, Missouri, Montana, Ohio, and West Virginia.

All responses submitted to both of these inquiries have been compiled in this FAQ memorandum. Supporting materials, including the proposed ABA Rule 2.9 and applicable rules and orders from Arkansas, Idaho, Indiana, and New York, are included in the appendix.

RESPONSES

ALASKA

Marla N. Greenstein
Executive Director
Alaska Commission on Judicial Conduct
Anchorage, AK
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Alaska has not adopted any new language to our Code, in our version of the 1990 Model Code, the language that allows ex parte communications if expressly authorized by law is interpreted to cover the therapeutic courts through the agreements that the participants sign permitting alternative court procedures.

ARKANSAS

Larry Brady
Court Services Director
Administrative Office of the Courts
Little Rock, AR
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The Arkansas Supreme Court has just begun its consideration of the new Code. I will pass on your question to the appropriate personnel and update you on what occurs.

Update: October 17, 2008: The Arkansas Supreme Court has posted a proposed version of the new code for comment. Below is an excerpt relating to Rule 2.9. *(See Attachment B: Supreme Court of Arkansas, No. 08-924. In Re: Arkansas Bar Association Petition to Amend Code of Judicial Conduct. Opinion Delivered: 10-0 2-08 [Excerpt])*

CALIFORNIA

Judge Peggy Hora (Ret.)
Superior Court of California, County of Alameda
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No special rule in California. We get a specific written waiver.

CONNECTICUT

Maureen Derbacher
State Drug Court Coordinator
Connecticut Judicial Department
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We have not had a problem in Connecticut since all parties are present at team meetings/pre-trial discussions. Public Defenders cover for each other's' cases when the necessity arises. Private attorneys' cases are never discussed without them being present.

DELAWARE

Hon. Richard Gebelein
(Former Drug Court Judge)
Delaware Superior Court
Wilmington, ED
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The Delaware Supreme Court hasn't yet adopted the new Code and therefore not adopted 2.9

IDAHO

Chief Justice Daniel Eismann
Supreme Court of Idaho
Boise, ID
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The Idaho Supreme Court recently amended Canon 3 to add two exceptions to the prohibition against ex parte communications. They are as follows:

> **(e) During a scheduled court proceeding, including a conference, hearing, or trial, a judge may initiate, permit, or consider communications dealing with substantive matters or issues on the merits of the case in the absence of a party who had notice of the proceeding and did not appear.**
>
> **(f) A judge presiding over a criminal or juvenile problem solving court may initiate, permit, or consider ex parte communications with members of the problem solving court team at staffings*, or by written documents provided to all members of the problem solving court team. A judge who has received any such 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.**

We also amended the definitions section to add the following definition of "staffings" used in subsection (f):

> "Staffing" means a regularly scheduled, informal conference not occurring in open court, the purpose of which is to permit the presiding judge and others, including counsel, to discuss a participant's progress in the problem solving court, treatment recommendations, or responses to participant compliance issues.

Subsection (e) applies to those situations in which one party, such as the prosecuting attorney, does not appear for problem solving court proceedings. It also applies to other court proceedings, including oral arguments before the Supreme Court, where one party does not appear.

Michael Henderson
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The Idaho Supreme Court recently amended our Code of Judicial Conduct in this order. *(See Attachment C: In Re: Idaho Code of Judicial Conduct Order Amending Idaho Code of Judicial Conduct. August 4, 2008)*

INDIANA

Mary Kay Hudson
State Drug Court/Problem Solving Court Administrator
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The Indiana Supreme Court very recently adopted a new judicial code of conduct, effective 1/1/2009. The new code is based upon the model ABA code but includes some modifications. Enclosed is link to the court's news release re: the 2009 Judicial Code of Conduct, which includes a link to the document adopted by the court. The new code of conduct does include the language described below (Rule 2.9, Comment 4). *(See Attachment D: Supreme Court of Indiana. Press Release, September 8, 2008. Indiana Supreme Court Adopts 2009 Judicial Code of Conduct. An Expectation for Judges to Serve as Fair and Impartial Officers Remains the Standard.*)

KENTUCKY

Connie Payne
State Drug Court Coordinator
Kentucky Administrative Office of the Courts
Frankfort, KY
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Several judges have raised the issue/concern that the judge may not be independent and impartial because of information they have learned from the staffings; however, they have been able to resolve it among themselves, so thankfully we haven't had to take any actions. I think, in part, since all of our participants are post-plea, the issue is less problematic than if it were pre-plea.

MARYLAND

Judge Jamey H. Hueston
Chair, State Problem Solving Court Commission
District Court of Maryland
Baltimore, MD
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Rule 2.9. EX PARTE COMMUNICATIONS

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

(1) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.

(6) When serving in a problem-solving court program of a Circuit Court or the District Court pursuant to Rule 16-206, a judge may initiate, permit, and consider ex parte communications in conformance with the established protocols for the operation of the program if the parties have expressly consented to those protocols.

MISSOURI

Ann Wilson
State Alcohol and Drug Abuse Coordinator
Missouri Office of State Courts Administrator
Jefferson City, MO
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In Missouri, it's been discussed by the Supreme Court Alternative Treatment Court Committee, but

currently it's just not addressed and there have been no problems yet. I'm sure that in the future the Committee will make some recommendations to the Supreme Court in that area.

MONTANA

Jeff Kushner
State Drug Court Coordinator
Montana Administrative Office of the Courts
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MT R Code of Jud. Conduct Rule 2.10

Rule 2.10. Ex parte communications*--all courts except for courts ' ' '
1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:
(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
(b) the judge makes provision promptly to notify all other parties of the content of the ex parte communication, and gives the parties an opportunity to respond.
(2) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge avoids receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.
(3) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law* to do so, or when serving on therapeutic or problem-solving courts, mental health courts, drug courts, or the water court. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others….

[3] A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, drug courts, or the water court. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.

NEW JERSEY

Carol Venditto
State Drug Court Coordinator
New Jersey Administrative Office of the Courts
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Our general experience mirrors that of Vermont as stated by Karen Gennette below.

"In Vermont we haven't had a problem with this - usually the prosecutor and defense are in the staffings and hearings. Every so often one needs to step out to take case of something in another courtroom. When this happens the staffing continues and the team catches them up when they return. If there's an issue that they need to weigh in on it's set aside until they return."
(2) any actions that have been taken in response -- including the development of special court rules, procedures or other policies: No

(3) any relevant case law that has been developed: No

(4) any action taken regarding the 2007 ABA Model Code of Judicial conduct which contains the following new exception to ex parte communication in Rule 2.9 comment [4]: No

NEW YORK

Frank Jordan
State Drug Court Coordinator
Executive Assistant to the Deputy Chief Administrative Judge
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Attached is a memo (2003) prepared by Judge Traficanti to address the issue of ex parte communications in drug treatment courts. *(See Attachment E: State of New York Unified Court System, Office of Court Drug Treatment Programs. Hon. Joseph J. Traficanti, Jr. Memorandum, April 8, 2003. Ex Parte Communications at Drug Court Staffings and Court Appearances [Rescission of Administrative Order 152/02])*

Judge Jo Ann Ferdinand
Brooklyn Treatment Court
Brooklyn, NY
JFERDINA@courts.state.ny.us

I have attached an Opinion of the New York State Advisory Committee on Judicial Ethics with relates to this topic. If you think more background as to the development of our policy would be helpful I would be happy to elaborate. *(See Attachment F: New York Advisory Committee on Judicial Ethics, Office of Court Administration. Opinion 04-88, March 10, 2005; with Transmittal Memorandum from Justices Thomas P. Flaherty and George D. Marlow, Co-Chairs, May 4, 2005)*

OHIO

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The Supreme Court of Ohio adopted a revised Code of Judicial Conduct, effective March 1, 2009. The Judicial Canons were updated and reorganized based on a rule format in line with revisions to the Model Code of Judicial Conduct approved by the American Bar Association in February 2007. To accommodate communication to ensure that the proper administration of a specialized docket does not violate the prohibition related to ex parte communication, Rule 2.9(A)(6) was specifically added to the Code.

RULE 2.9 *Ex Parte* Contacts and Communications with Others

(A) A judge shall not initiate, receive, permit, or consider *ex parte* communications, except as follows: …
(6) A judge may initiate, receive, permit, or consider an *ex parte* communication when administering a *specialized docket,* provided the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage while in the specialized docket program as a result of the *ex parte* communication.

Comment, Comparison & Terminology
A judge may initiate, receive, permit, or consider *ex parte* communications when administering a specialized docket established under the authority of the Rules of Superintendence or other law. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others. Rule 2.9(A)(6) is added due the increasing prevalence of specialized dockets in Ohio and the necessity to make provision

for the manner in which communications with parties and others must occur to facilitate the proper administration of a specialized docket.

In the terminology section of the Code, the term "Specialized Docket" was specifically added because of the new reference made in Rule 2.9(A)(6). The following definition of specialized docket is only applicable as used in the Code of Judicial Conduct. "Specialized docket" means a docket or court specifically created by statute or pursuant to the authority of the Rules of Superintendence of the Courts of Ohio to address similar cases and parties. "Specialized docket" includes, but is not limited to, drug courts, mental health courts, domestic violence courts, child support enforcement courts, sex offender courts, OMVI/DUI courts, reentry courts, housing courts, and environmental courts. Courts created in the Ohio Constitution or Revised Code, including appellate courts, common pleas courts and divisions of a common pleas court, municipal courts, and county courts are not, without more, a specialized docket. See Rule 2.9.

VERMONT

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In Vermont we haven't had a problem with this; usually the prosecutor and defense are in the staffings and hearings. Every so often one needs to step out to take another case in another courtroom. When this happens the staffing continues and the team catches them up when they return. If there's an issue that they need to weigh in on it's set aside until they return.

WEST VIRGINIA

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West Virginia Supreme Court of Appeals, Administrative Office
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This matter has only recently been requested to be considered by the Court in West Virginia. Currently West Virginia's Judicial Code does not include the Model Code 2.9 Comment 4.

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We welcome any additional information and/or perspective readers may have on this topic.

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APPENDIX

A. ABA Model Code of Judicial Conduct, February 2007. [Excerpt] Rule 2.9 Ex Parte Communications

B. Supreme Court of Arkansas, No. 08-924. In Re: Arkansas Bar Association Petition to Amend Code of Judicial Conduct. Opinion Delivered: 10-0 2-08 [Excerpt]

C. In Re: Idaho Code of Judicial Conduct Order Amending Idaho Code of Judicial Conduct. August 4, 2008

D. Supreme Court of Indiana. Press Release, September 8, 2008. ***Indiana Supreme Court Adopts 2009 Judicial Code of Conduct. An Expectation for Judges to Serve as Fair and Impartial Officers Remains the Standard.***

E. State of New York Unified Court System, Office of Court Drug Treatment Programs. Hon. Joseph J. Traficanti, Jr. Memorandum, April 8, 2003. ***Ex Parte Communications at Drug Court Staffings and Court Appearances [Rescission of Administrative Order 152/02]***

F. New York Advisory Committee on Judicial Ethics, Office of Court Administration. Opinion 04-88, March 10, 2005; with Transmittal Memorandum from Justices Thomas P. Flaherty and George D. Marlow, Co-Chairs, May 4, 2005

RULE 2.9
Ex Parte Communications

(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:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) 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.

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law* to do so.

(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(C) 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.

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

COMMENT

[1] To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

[2] Whenever the presence of a party or notice to a party is required by this Rule, it is the party's lawyer, or if the party is unrepresented, the party, who is to be present or to whom notice is to be given.

[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.

[4] A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a

more interactive role with parties, treatment providers, probation officers, social workers, and others.

[5] A judge may consult with other judges on pending matters, but must avoid ex parte discussions of a case with judges who have previously been disqualified from hearing the matter, and with judges who have appellate jurisdiction over the matter.

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

[7] A judge may consult ethics advisory committees, outside counsel, or legal experts concerning the judge's compliance with this Code. Such consultations are not subject to the restrictions of paragraph (A)(2).

Attachment B: Supreme Court of Arkansas, No. 08-924. In Re: Arkansas Bar Association Petition to Amend Code of Judicial Conduct. Opinion Delivered: 10-0 2-08 [Excerpt]

SUPREME COURT OF ARKANSAS
No. 08-924
IN RE: ARKANSAS BAR ASSOCIATION PETITION TO AMEND CODE OF JUDICIAL CONDUCT
Opinion Delivered: 10-2-08

PER CURIAM

The American Bar Association has proposed a new model code of judicial conduct, the 2007 American Bar Association Code of Judicial Conduct ("2007 ABA Code"), and each state is asked to considered its adoption. This court in considering whether the 2007 ABA Code should be adopted in Arkansas requested that the Arkansas Bar Association review it and make a report to the court. The Arkansas Bar Association created the Task Force on the Code of Judicial Conduct and appointed the following members: Professor Howard Brill of Fayetteville, Chair, Hon. Kathleen Bell of Helena, Hon. Ellen Brantley of Little Rock, Laurie Bridewell, Esq., of Lake Village, Michael Crawford, Esq., of Hot Springs, Don Elliott, Jr., Esq., of Fayetteville, Frances Fendler, Esq., of Little Rock, Hon. John C. Finley, III of Ashdown, Donis Hamilton, Esq., of Paragould, Hon. Eugene Harris of Little Rock, Hon. Leon Jamison of Pine Bluff, James Simpson, Esq., of Little Rock, Hon. Kim Smith of Fayetteville, Hon. Gordon Webb of Harrison, Patrick Wilson, Esq., of Little Rock, and Hon. Ralph Wilson of Osceola.

1 Three editorial changes have been made in the Report that is being published for comment: In the Application Section, (I)(B), the terms "justice of the peace" and "court commissioner" have been deleted. In the Terminology Section, a Comment has been added with reference to the term "judicial candidate," pointing out that Arkansas does not have retention elections and appointments only arise in limited contexts. In Rule 4.2 (B), we have inserted the term "judicial candidate" in the rule so that it reads, "judicial candidate in a public election, " and clarified the Comment.

The Task Force worked on this project for over nine months and submitted its report to the Arkansas Bar Association House of Delegates on June 14, 2008. The House of Delegates approved the report and directed that it be presented to the court. On August 7, 2008, the Arkansas Bar Association filed a petition with the court to adopt the 2007 ABA Code, as revised by the Arkansas Bar Association, to replace the Arkansas Code of Judicial Conduct, as amended, which was adopted in 1993. The petition is now before the court. We thank the Arkansas Bar Association and especially the members of the Task Force for their work on this project.

To assist our deliberations, we solicit comments from the bench and bar. We have appended the petition and exhibits to this *per curiam* order and publish them for comment. Exhibit "A" is the Report containing the proposed Arkansas code1, Exhibit "B" is a comparison of the proposed Arkansas code with the 2007 ABA Code, and Exhibit "C" is a comparison of the proposed Arkansas code with the current Arkansas Code of Judicial Conduct. Comments should be made in writing before January 1, 2009, and they should be addressed to: Leslie W. Steen, Clerk, Supreme Court of Arkansas, Attn.: Code of Judicial Conduct, Justice Building, 625 Marshall Street, Little Rock, Arkansas 72201.

IN THE SUPREME COURT OF ARKANSAS
ARKANSAS BAR ASSOCIATION PETITIONER IN RE: CODE OF JUDICIAL CONDUCT PETITION

The Arkansas Bar Association, at the direction of its House of Delegates, and acting through its President, Rosalind M. Mouser, Past President Richard L. Ramsay, and by chair of its Task Force on the Code of Judicial Conduct, Howard Brill, petitions the Court to revise the Code of Judicial Conduct of the Commission and to adopt the rule set out in Exhibit "A" attached hereto.

1. The existing Arkansas Code of Judicial Conduct was adopted by PER CURIAM order on July 5, 1993.

2. At the request of the Court, Petitioner Arkansas Bar Association then President James D. Sprott and then President-Elect Richard L. Ramsay appointed its Task Force on Code of Judicial Conduct in May, 2007 to review the 2007 American Bar Association Code of Judicial Conduct.

3. The Task Force, comprised of eight judges and eight lawyers, met on several occasions over a nine month period, completed its assignment, and submitted its Report the to the Arkansas Bar Association House of Delegates on June 14, 2008. A copy of the Report is attached as Exhibit "A".

4. For the Court's convenience a Comparison of the House of Delegates Proposal to the American Bar Association Model Code (February 2007) is attached as Exhibit "B", and the Comparison of the House of Delegates Proposal to the existing Arkansas Code of Judicial Conduct (1993) is attached as Exhibit "C".

5. The House of Delegates at its meeting on June 14, 2008 adopted the Report from the Task Force and asked that it be presented to the Court. WHEREFORE, Petitioner, the Arkansas Bar Association, asks the Court to exercise its constitutional authority to adopt the Code of Judicial Conduct rules and revisions and direct the policy and guideline changes as set out in Exhibits "A", "B", and "C".

Attachment B: Supreme Court of Arkansas, No. 08-924. In Re: Arkansas Bar Association Petition to Amend Code of Judicial Conduct. Opinion Delivered: 10-0 2-08 [Excerpt]

ARKANSAS BAR ASSOCIATION

Rosalind M. Mouser President	Richard L. Ramsay Immediate Past President

RULE 2.9
Ex Parte Communications

(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:
(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:
(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.
(2) 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.
(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.
(4) [DELETED]
(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law* to do so.
(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.
(C) 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.
(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

COMMENT
[1] To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.
[2] Whenever the presence of a party or notice to a party is required by this Rule, it is the party's lawyer, or if the party is unrepresented, the party, who is to be present or to whom notice is to be given.
[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.
[4] A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.
[5] A judge may consult with other judges on pending matters, but must avoid ex parte discussions of a case with judges who have previously been disqualified from hearing the matter, and with judges who have appellate jurisdiction over the matter.
[6] The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.
[7] A judge may consult ethics advisory committees, outside counsel, or legal experts concerning the judge's compliance with this Code. Such consultations are not subject to the restrictions of paragraph (A)(2)

IN RE: IDAHO CODE OF JUDICIAL CONDUCT ORDER AMENDING IDAHO CODE OF JUDICIAL CONDUCT

The Court having reviewed a recommendation from the Administrative Conference with regard to ex parte communications in problem solving court proceedings, and being fully informed;

NOW, THEREFORE, IT IS HEREBY ORDERED, that Canon 3B(7) of the Idaho Code of Judicial Conduct be amended as follows:

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.· 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 concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication.

(b) A judge may obtain the advice of a disinterested expert on the law· applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel· whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge;·· .

> During a scheduled court proceeding. including a conference. hearing. or trial, a judge may initiate. permit. or consider communications dealing with substantive matters or issues on the merits of the case in the absence of a party who had notice of the proceeding and did not appear.
>
> A judge presiding over a criminal or juvenile problem solving court may initiate, permit. or consider ex parte communications with members of the problem solving court team at staffings*. or by written documents provided to all members of the problem solving court team. A judge who has received any such 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.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law* to do so.

IT IS FURTHER ORDERED, that the Idaho Code of Judicial Conduct be amended by the addition of the following definition to the Terminology section of the Code, following the definition of "Senior judge":

> "**Staffing**" means a regularly scheduled, informal conference not occurring in open court, the purpose of which is to permit the presiding judge and others, including counsel, to discuss a participant's progress in the problem solving court, treatment recommendations, or responses to participant compliance issues.

IT IS FURTHER ORDERED, that this amendment shall be effective on the 4th day of August, 2008.

DATED this _4th_ day of August, 2008.

By Order of the Supreme Court

_____----:/s/ _ Daniel T. Eismann Chief Justice

ATTEST: /s/ _ Clerk

Attachment D: Supreme Court of Indiana. Press Release, September 8, 2008. *Indiana Supreme Court Adopts 2009 Judicial Code of Conduct. An Expectation for Judges to Serve as Fair and Impartial Officers Remains the Standard.*

SUPREME COURT OF INDIANA

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FOR IMMEDIATE RELEASE
September 8, 2008

Contact: Kathryn Dolan
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INDIANA SUPREME COURT ADOPTS 2009 JUDICIAL CODE OF CONDUCT. AN EXPECTATION FOR JUDGES TO SERVE AS FAIR AND IMPARTIAL OFFICERS REMAINS THE STANDARD.

The Indiana Supreme Court is adopting a new Code of Judicial Conduct. Indiana is the second state to adopt new judicial ethics rules based on the new national model of the American Bar Association.

The 2009 Code emphasizes the "three i's" of judicial conduct - independence, integrity, and impartiality. It continues to hold judges to strict standards of conduct in all activities. Chief Justice Randall T. Shepard, Professor Charles G. Geyh of Indiana University School of Law, and Judge Marianne Vorhees of Muncie will review the Code with judges across the state.

- The new Code specifies that judges may take measures to assist unrepresented litigants in gaining a fair hearing (Canon 2.2) and encourages judges to promote pro bono work by lawyers (Canon 3.7).
- The Code highlights the role of judges in promoting ethics and professionalism among lawyers and other judges (Canon 1.2).
- The Code provides more concrete guidance for avoiding "the appearance of impropriety," a rule long criticized for its vagueness (Canon 1).
- The Code imposes clear requirements for public disclosure of income, reimbursements, and gifts (Canon 3).
- The Code includes ethical principles intended as guidance for judicial candidates (Canon 4).
- The Code encourages judges to reach out to the public to promote understanding of the judicial system (Canon 2.8).

These rules and many others serve as the behavior requirement for the men and women interpreting and applying the law that governs our society. The Code sets out clear expectations for judicial conduct. If the rules are violated, a judge is subject to discipline by the Indiana Supreme Court.

The 2009 Judicial Code of Conduct was submitted to the Supreme Court by a committee of the Judicial Conference of Indiana chaired by Judge Vorhees. The draft was reviewed by judges, lawyers, and the public. The committee's work is based on the 2007 American Bar Association Model Code of Judicial Conduct. Professor Geyh and Professor Emeritus W. William Hodes, I.U. School of Law - Indianapolis., were the official Reporters of the ABA's commission, in whose work Chief Justice Shepard participated. The new Code can be found at courts.IN.gov/rules/jud_conduct/jud_conduct09.pdf. It is effective January 1, 2009.

Attachment E: State of New York Unified Court System, Office of Court Drug Treatment Programs. Hon. Joseph J. Traficanti, Jr. Memorandum, April 8, 2003. *Ex Parte Communications at Drug Court Staffings and Court Appearances [Rescission of Administrative Order 152/02]*.

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JONATHAN LIPPMAN
Chief Administrative Judge

JOSEPH J. TRAFICANTI, JR.
Deputy Chief Administrative Judge

Director
Office of Court Drug Treatment Programs

April 8, 2003

TO: All Drug Court Judges

FROM: Joseph J. Traficanti, Jr.

SUBJECT: Ex Parte Communications at Drug Court Staffings and Court Appearances [Rescission of Administrative Order 152/02]

Achieving the goal of a Drug Court participant's successful recovery from substance abuse and addiction requires the constant sharing of information among members of the Drug Court team. This collaborative approach to treatment and recovery calls for prosecutors, defense attorneys and other attorney-advocates in Drug Court to meet regularly with the Judge and other team members to review each participant's progress in treatment. These "staffing" sessions typically are followed by the participant's appearance in open court, where the Judge discusses the participant's progress, or lack thereof, directly with him or her. While proven effective in maximizing an addicted person's chances for long-term recovery, this "team" approach to adjudicating adult and Family Drug Court cases can present serious ethical issues for Drug Court Judges. This memorandum focuses on one of the most troublesome of these – the prohibition on ex parte communications – and provides some concrete guidelines for Judges to follow to avoid ex parte problems at Drug Court "staffing" sessions and court appearances.

Pursuant to section 100.3(B)(6) of the Chief Administrator's Rules Governing Judicial Conduct, "[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 proceeding." 22 NYCRR 100.3(B)(6). Among the enumerated exceptions to this general prohibition against ex parte communications are subparagraphs (d) and (e) of section 100.3(B)(6), which provide, respectively, that "[a] judge, with the consent of the parties, may confer separately with the parties and their lawyers on agreed-upon matters," and "[a] judge may initiate or consider any ex parte communication when authorized by law to do so." 22 NYCRR 100.3(B)(6)(d) and (e).

This latter exception, permitting ex parte communications "when authorized by law," formed the basis of an administrative order ("the order") signed by Judge Lippman at my urging in March of last year (*see*, Administrative Order 152/02, attached). The order, which was intended to address the issue of ex parte communications at Drug Court staffings, required the inclusion in all Drug Court participation agreements of an acknowledgment by the participant that the non-appearance of his or her attorney at a scheduled staffing "shall be deemed a waiver of his or her participation for that particular staffing," that communications during such staffings "may take place in the absence of...[the participant or his or her attorney]," and that such communications may be considered by the Drug Court Judge. Although the waiver language required by the order clearly satisfies the "authorized by law" exception to the general prohibition on ex parte communications, it has been criticized as being unduly burdensome to participants by requiring them, in effect, to waive their right to counsel at staffings as a prerequisite to participation in Drug Court. In addition, it has been noted that the order is too limited in scope in that it fails to address ex parte communications that may occur in open court immediately *following* the staffing.

In light of these concerns, and because, in my view, the issue of ex parte communications in the Drug Court context can effectively be addressed through the "consent" exception of subparagraph (d) of section 100.3(B)(6) and other relevant provisions of that section, I have asked Judge Lippman to rescind the order, effective immediately (*see*, Administrative Order 143/03, attached). This, of course, does not mean that Drug Court Judges are now free to engage in the kinds of ex parte communications covered by the order. To the contrary, this rescission will require each Drug Court Judge to be increasingly vigilant, and may call for the implementation of new practices and procedures tailored to the available resources and specific needs of each jurisdiction, to insure compliance with the rule against ex parte communications. To that end, and with the generous assistance of members of the recently formed New York State Drug Court Best Practices Committee, I have developed the following five guidelines to be applied at all Drug Court staffings and court appearances:

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I. For purposes of the rule against ex parte communications, Drug Court staffings should be treated no differently than any other criminal or Family Court proceeding.

Comment: Although Drug Court staffing sessions are usually conducted in an informal and non-adversarial setting, these proceedings are part of the underlying criminal or Family Court case, and, unless one of the exceptions under section 100.3(B)(6) applies, no ex parte communications with the Judge are permitted at such staffings.

II. At the first court appearance in Drug Court, or as early in the proceedings as possible, the Judge should: (A) ascertain whether the attorney for the participant will be representing the participant through completion of the case; and (B) make clear to the attorneys for the parties that they, or their duly designated representatives, are expected to be present at all future staffings and court appearances.

Comment: Part (A) of this Guideline is particularly relevant to adult Drug Court cases where the participant's attorney is retained. Sometimes a participant, due to limited financial resources or other circumstances, will retain an attorney solely for the purpose of negotiating a plea bargain, executing the Drug Court participation agreement and entering a guilty plea. It is important that the Judge, as early in the proceedings as possible, be made aware of this kind of limited retainer agreement so that he or she can take appropriate action, such as formally relieving the retained attorney (at the conclusion of his or her representation) and inquiring as to the participant's eligibility for assigned counsel. Having accurate and up-to-date information about the status of each participant's legal representation will assist the Judge in avoiding ex parte problems and unnecessary delays at future staffing sessions and court appearances.

Unlike most criminal or Family Court proceedings, Drug Court cases typically involve frequent court appearances, as well as weekly, bi-weekly or monthly staffing sessions, conducted over an extended period of time. An attorney representing a party in Drug Court should be advised by the Judge at the earliest possible time that he or she is expected to be present at *all* future staffings and court appearances. Making this expectation clear to the attorneys at the inception of the case, as required by Part (B) of this Guideline, should reduce the need to deal with ex parte communications issues as the case progresses.

III. Where an attorney for a party, or the attorney's designated representative, cannot be present at a staffing or court appearance, the Judge should, in accordance with section 100.3(B)(6)(d) and the relevant provisions of these Guidelines, obtain the consent of that attorney to proceed ex parte before going forward.[1] A record of any such consent should be retained in the Court's case file.

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[1]Since staffing sessions, to be effective, are nearly always conducted without the participant present, the *participant's* consent to the Judge's proceeding in his or her own absence at all future staffing sessions is often included as one of the terms of the Drug Court participation agreement. Nothing in these Guidelines or in section 100.3(B)(6) would prohibit the continued inclusion of such a provision in the agreement. However, where the participant, at any stage of the proceedings and after appropriate cautionary instructions from the Judge, elects to proceed *pro se*, the Judge should, at the point of such election, advise the participant on the record of his or her right to be present at all future staffing discussions of the case.

Comment: Where an attorney for a party is unable to attend a staffing or court appearance, he or she may consent to the Judge's ex parte conversations at that proceeding with the other party's attorney (*see*, NYCRR 100.6(B)(6)(d)). Whenever possible, this consent should be obtained well in advance of the proceeding, so as not to delay the proceeding or necessitate an adjournment. The consent need not be a formal, written consent, and can be established through a simple phone conversation with the attorney, or by having the attorney fax a prepared form[2] confirming that the Judge is authorized to proceed in the attorney's absence. Regardless of whether the consent is written or verbal, a record thereof should be included in the Court's case file.

IV. (A) Under the exception in subparagraph (c) of section 100.3(B)(6), the Judge may engage in ex parte communications at staffing sessions with members of the Drug Court team who are employees of the Drug Court, such as the Drug Court Coordinator and Case Manager; and (B) Under the exception in subparagraph (e) of section 100.3(B)(6), and in accordance with Administrative Order 142/03, the Judge may also, with the consent of the parties and their attorneys, engage in ex parte conversations at staffing sessions with members of the Drug Court team who are *not* employees of the Drug Court.

Comment:

Part (A): Subparagraph (c) of section 100.3(B)(6) expressly permits ex parte communications between the Judge and "court personnel whose function is to aid the [J]udge in carrying out the [J]udge's adjudicative responsibilities." In the Drug Court context, such "court

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[2]To facilitate the use of this "faxed consent" procedure, Drug Courts may want to prepare and distribute to the attorneys for each party, at the inception of the case, a form to be completed, signed and faxed to the Court by the attorney when he or she is unable to attend a specific staffing or court appearance, expressly consenting to the Court's going forward in the attorney's absence. The form should contain a reference to the absent attorney's consenting to ex parte conversations at the proceeding with the attorney(s) for the other parties, and with the other (non-party) members of the Drug Court team. *See*, Guideline IV, *infra*. The form might also contain a clause acknowledging that: (1) where a significant sanction such as incarceration is likely to be imposed, the absent attorney will be contacted by the Drug Court Coordinator by telephone either prior to, during or immediately following the staffing or court appearance, so that appropriate arrangements can be made for the attorney to appear and be heard prior to the imposition of such sanction; and (2) in the rare instance where the *immediate* imposition of a significant sanction such as incarceration is deemed necessary by the Judge (*e.g.*, where the participant appears in court in an intoxicated condition or after being rearrested for a serious crime), and the attorney cannot be reached or, if reached, is unable to appear, the case will be adjourned, following imposition of the sanction, to the next business day or to a date requested by the attorney.

personnel" would include the Drug Court Coordinator and any other employees of the Drug Court who serve this function. *See*, 22 NYCRR 100.3(B)(6)(c).[3]

Part (B): Because the exception in subparagraph (c) of section 100.3(B)(6) applies only to ex parte conversations with "court personnel," it presumably would not permit a Drug Court Judge to engage in ex parte conversations with members of the Drug Court team who are not directly employed by the Court. This would include, in many jurisdictions, treatment providers, probation officers and other non-Court employed professionals who regularly participate in Drug Court staffings. Nor would such ex parte conversations with non-Drug Court personnel be permitted under the "consent" exception of subparagraph (d) of section 100.3(B)(6). As previously noted, that provision allows the parties to a court proceeding to consent to the Judge's "conferring separately *with the parties and their lawyers* on agreed-upon matters." 22 NYCRR 100.3(B)(6)(d); emphasis added. Because, on its face, this consent provision is limited to ex parte communications with "the parties and their lawyers," it arguably would not allow a party to consent to ex parte communications between the Judge and a *non-*party.

To deal with this problem, I have asked Judge Lippman to prepare a new Administrative Order (*see*, Administrative Order 142/03, attached) expressly authorizing a Drug Court Judge, with the consent of the non-present party and his or her attorney, to discuss the case at the staffing session with non-party members of the Drug Court team who are not "court personnel." This Order is based on the exception set forth in subparagraph (e) of section 100.3(B)(6) which, as previously noted, permits a Judge "to initiate or consider any ex parte communications *when authorized by law* to do so." 22 NYCRR 100.3(B)(6)(e); emphasis added.[4]

V. To minimize the need to rely on attorney consent under Guidelines III and IV(B), the Judge is encouraged to explore with the local provider(s) of indigent defense services (e.g., the Public Defender's Office or 18-B Administrator) the possibility of having these providers designate one or more attorneys to attend Drug Court staffings and court appearances when the originally assigned Public Defender or 18-B attorney is not available.

Comment: In many jurisdictions around the State, representation of indigent participants at Drug Court staffings and court appearances is routinely provided by an attorney

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[3]Unlike the "consent" exception of subparagraph (d) of section 100.3(6)(B)(*see*, Guideline III, *supra*.), this "court personnel" exception to the prohibition on ex parte communications does *not* require the consent of the absent party or his or her attorney.

[4]In effect, the Administrative Order constitutes the "law" that allows the parties to consent to such ex parte communications, and the Judge to consider same, without violating the general prohibition of section 100.3(B)(6).

specifically designated by the County 18-B Administrator or Public Defender's Office to handle these proceedings. Not surprisingly, in jurisdictions where this procedure has been established, problems with ex parte communications at staffings and court appearances have been largely eliminated. In Drug Courts where the participants are currently represented by several different attorneys from the local 18-B Panel or Public Defender's Office, the Judge, in cooperation with the local District Attorney's Office, may want to reach out to the 18-B Administrator or Public Defender in that jurisdiction to see if this representation model, or some variation thereof, can be implemented in that jurisdiction.[5]

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I would emphasize that the above Guidelines are intended both to alert affected Judges to the very real problem of ex parte communications in the Drug Court setting, and to provide practical recommendations for addressing the issue in the context of Drug Court staffing sessions and court appearances. Any questions regarding the Guidelines may be addressed to John Amodeo in Counsel's Office at (518) 473-2129.

Attachments
c: Honorable Jonathan Lippman
Honorable Ann T. Pfau
Honorable Joan B. Carey
Michael Colodner, Esq.
Executive Assistants
NYC Chief Clerks
Greg Berman
Mizzi Diamond
Drug Court Project Managers
Drug Court Liaisons

[5]Implementation of this or a similar representation model is certainly not the only means by which a Drug Court Judge might address the ex parte problem at staffings and court appearances. With respect to the former, for example, Judges might consider allowing attorneys who would otherwise be unable to attend a particular staffing to "appear" by way of speaker phone or video conference, where these options are available at the Drug Court site.

Attachment F: New York Advisory Committee on Judicial Ethics, Office of Court Administration. Opinion 04-88: March 10, 2005; with Transmittal Memorandum from Justices Thomas P. Flaherty and George D. Marlow, Co-Chairs: May 4, 2005

ADVISORY COMMITTEE ON JUDICIAL ETHICS
c/o OFFICE OF COURT ADMINISTRATION
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May 4, 2005

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Chief Administrative Judge
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Hon. Judy Harris Kluger
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Director Court Drug Treatment Programs
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Dear Colleagues:

Please be advised that the Advisory Committee on Judicial Ethics has just issued

enclosed Opinion 04-88 which responds to an inquiry we received last year. It took a great deal of discussion, research, and meeting time on at least 2 or 3 dates. We felt the time was important to spend, because it impacts how drug court judges can and should fulfill the important program's objectives without compromising judicial ethics principles. The obvious concern of the inquiring drug court judge and some others we heard about was that they not run afoul of ex parte rules thus rendering them vulnerable to a Commission complaint. We told the inquiring judge at the outset that this would take a while to answer, and he/she was very patient.

On one occasion, we were fortunate to have the exceptionally valuable assistance of Judge Kluger who attended our March 2005 meeting. We invited her to assure ourselves as much as possible that any opinion we wrote would not have a devastating, practical impact on the way the drug court operates. In short, we wanted to find a resolution to the ex parte issue that would continue to allow the drug court to accomplish its work in reaching its founders' objectives. We believe this opinion serves that goal as well as that of the Rules Governing Judicial Conduct.

We also wish to note that Raymond Hack, Esq. did the principal share of the drafting of this opinion, and that our Committee appreciates his efforts.

As is our recent practice, this opinion has been sent to the New York Law Journal to make as many judges and lawyers aware of the opinion as possible.

Our purpose in writing to you today is not only to inform you of the opinion by including a hard copy, but also because you deem it advisable to disseminate it as soon as possible to drug court personnel statewide.

If any of you have any questions or concerns, please feel free to contact us.

Sincerely yours,

Tom

Thomas P. Flaherty
Justice of the Supreme Court (ret.)
Co-Chair

George D. Marlow
Associate Justice
Appellate Division, First Dept.
Co-Chair

Enclosure

Attachment F: New York Advisory Committee on Judicial Ethics, Office of Court Administration. Opinion 04-88: March 10, 2005; with Transmittal Memorandum from Justices Thomas P. Flaherty and George D. Marlow, Co-Chairs: May 4, 2005

ADVISORY COMMITTEE ON JUDICIAL ETHICS
c/o OFFICE OF COURT ADMINISTRATION
25 BEAVER STREET
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Opinion 04-88

March 10, 2005

Digest: A judge presiding over a drug court (1) may engage in ex parte communications with court personnel pursuant to 22 NYCRR 100.3(B)(6)(c) concerning information obtained by such personnel, whether outside of or at drug court staffings or court appearances, but should give notice to and inform the defendant's attorney of the content and nature of those communications; (2) is authorized under 22 NYCRR 100.3(B)(6)(e) to consider ex parte communications at staffings and court appearances from drug court team members provided there has been consent as required under Administrative Order 142/03; (3) should consult with his/her administrative authority for the purpose of revising the current drug court participation agreement used in the judge's court so that it is in conformity with Administrative Order 142/03.

Rule: 22 NYCRR 100.3(B)(6)(c), (e); A/O 142/03; 152/02 (rescinded). Opinion 01-52.

Opinion:

In Opinion 01-52 the Committee addressed the question of whether a judge presiding over a drug court treatment program may consider "ex parte communications which are likely to arise in the operation of the program as designed and intended to be implemented." Opinion 01-52. In concluding that under the circumstances a judge who presides over a drug treatment court may consider ex parte communications occurring at meetings of the drug court treatment team (referred to as "staffings"), we relied on the Chief Administrative Judge's Administrative Order 152/02 of March 19, 2002. That order directed that the participation agreement between a defendant and the court include a provision whereby the defendant agreed "that communications during these staffings may take place in the absence of myself or my attorney and that the judge may consider such communications," and further provided for a waiver of his or her attorney's participation at such meetings. In our view, the issuance of that order met the exception stated in section 100.3(B)(6)(e) of the Rules Governing Judicial Conduct which provides that "A judge may initiate or consider any ex parte communications when authorized by law to do so." 22 NYCRR 100.3(B)(6)(e).

Thereafter, concerns were expressed that the mandated provision was unduly burdensome in that it appeared to require defendants to waive their right to counsel at staffings as a prerequisite to participation in the program and, further, failed to mention ex parte communications that may occur in open court immediately following the staffings. As a consequence, Administrative Order 152/02 was rescinded on April 8, 2003, and a new Administrative Order (A/O 142/03) was issued on that date. It reads as follows:

> Pursuant to the authority vested in me, I hereby direct that a Judge presiding over a drug treatment court may at a drug court appearance or staffing session, initiate, permit or consider ex parte communications with treatment providers, probation officers, law enforcement officials and other members of the drug court team who are not court personnel, provided the absent party and his or her attorney have consented thereto.

Accompanying the issuance of the new directive was a detailed set of Guidelines intended to be applied at drug court staffings and court appearances concerning the handling of ex parte material. It is in light of these Guidelines, the new Administrative Order and sections 100.3(B)(6)(c) and (e) of the Rules Governing Judicial Conduct, which deal with ex parte communications, that the inquiring County Court judge who presides over a drug treatment court poses certain issues for consideration by the Committee.

In responding to those inquiries, we must first point out the special circumstances inherent in a drug court setting which are not necessarily present in an ordinary criminal proceeding in the context of a discussion about ex parte communications. A drug court proceeding is predicated upon an ongoing, interactive relationship between defendant, the drug court team and the court. That fact alone distinguishes it from the usual criminal proceeding structure of plea, trial, and sentence which often does not involve evaluation and consideration of a defendant's present activity between the proceedings' beginning and end. However, inherent in drug court relationship is the continuing exchange of information among the various participants virtually always including court personnel who are not drug court team members. It is only through such interchange that the salutary purposes of the program can be achieved. At the same time, achieving those goals can not be accomplished at the expense of the defendant's legal rights, which include the protections afforded vis a vis ex parte communications. As stated in the first sentence of section 100.3(B)(6) of the Rules Governing Judicial Conduct, "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." 22 NYCRR 100.3(B)(6). It is against this background, which includes the Rules Governing Judicial Conduct, the Administrative Orders referred to herein, and the Guidelines that we consider the questions posed by the inquirer.

Essentially, the questions raised by the judge assume various scenarios where information has been conveyed to members of the judge's staff (i.e. "court personnel") who are not members of the drug court team, and who then convey that information to the judge. The judge asks, for example, whether ex parte communications engaged in by the judge's staff who are employees of the court, outside of the drug court staffing may be reported to the judge "ex parte, in drug court staffing sessions and court appearances without consent of the absent party." Reference is made to section 100.3(B)(6)(c) of the Rules which provides that as an exception to the prohibition on judicial consideration of ex parte communications, "A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges." 22 NYCRR 100.3(B)(6)(c). That section appears to permit a judge to consider the communications referred to by the inquirer since they could be deemed to constitute a "consultation" with court personnel and therefore authorized under the Rules without first obtaining the consent of a party. That is, the fact that the information was obtained by the employees outside of a staffing session or court appearance does not mean that it cannot be communicated at such sessions or appearances to the judge, without the defendant's consent.

But, that still leaves open the question of whether the defendant is entitled to know about such communications. For, the fact that a judge may be authorized to engage in ex parte communications does not mean that such communications should be kept from the parties. Indeed, given the potential significance of such material dealing with conduct of the defendant during the pendency of the actions, and its possible consequences to the defendant's liberty, we are of the opinion that in this particular situation it is important that the defendant's attorney be given notice of and informed of the content and nature of the communications.

The judge also asks whether the judge's staff who are court employees may engage in ex parte communications in staffings or court appearances with drug court team members who are not court employees and then report the communications back to the judge ex parte, in the same drug court staffing session and/or court appearances if the party did not consent to ex parte communications. Here, it appears that the judge is asking about a possible scenario where the "court personnel" exception under the section 100.3(B)(6)(c) might come into play at the staffing or appearance itself thus obviating the need for obtaining consent in order for the judge to consider the ex parte information. Yet, since Administrative Order 142/03 is intended to cover communications from drug court team members at the staffings or appearances, we do not believe that the court personnel exception should be interpreted to avoid what is required under that order at such staffings or appearances, i.e., consent of the defendant. And, yet, the court personnel exception is provided for under the Rules. Under that set of circumstances, it again seems advisable that should court personnel be the conveyors to the judge of the communications from drug court team members, the judge should provide notice to and inform the defendant's attorney of the content and nature of the communications where consent has not been given.

In short, the court personnel exception does permit the judge to be the recipient of the communications in the situations outlined above. But, the due process rights of the defendant can best be preserved by instituting practices and procedures which assure the defendant and his or her attorney prompt and meaningful access to that information which comes to the judge from court personnel who are not part of the drug court team. Having access to that information would thus enable the defendant to properly invoke his/her right to be heard as provided by 22 NYCRR 100.3(B)(6). How that can best be accomplished is, of course, the province of the appropriate administrative authorities.

In addition, what should not be ignored, given the special nature and purposes served by the drug court is the desirability of effectuating Administrative Order 142/03. It is that provision which permits a judge to be engaged in ex parte communications "at a drug court appearance or staffing session," with members of the drug court team who are not court personnel "provided the absent party and his or her attorney have consented thereto." A/O 142/03 (emphasis added). That is the order which furnishes the authority for the judge to be engaged in the ex parte communications with certain non-court personnel, in that its promulgation constitutes authorization by law to initiate or consider such communications, and is thus an exception to what would otherwise be prohibited. 22 NYCRR 100.3(B) (6)(e).

Such consent presumably will be forthcoming in the agreement between the defendant and the court, and should be implemented in accordance with the detailed provisions of the Guidelines. This, however, does not mean that the wording of certain paragraphs of the agreement currently used in the judge's court should continue to be used.

The paragraphs quoted by the judge and about which he/she inquires are virtually identical to what was required under Administrative Order 152/02. But, as noted, that directive was rescinded on April 8, 2003 and replaced by Administrative Order 142/03, which although it does not specify the language pertaining to ex parte communications to be used in a participation agreement, must be read as providing the basis for such provisions in the agreement. Retaining the present language in view of the rescission is not tenable. Accordingly, we recommend that the inquiring judge consult with his or her administrative authority for the purpose of revising the current agreement so as to reflect what is provided for in Administrative Order 142/03, and not Administrative Order 152/02.

In sum, information obtained by court personnel whether outside of or in staffings or court appearances may be communicated to the judge ex parte at staffings or court appearances under section 100.3(B)(6)(c) of the Rules Governing Judicial Conduct regardless of whether the defendant consented, but the defendant's attorney must be informed of the nature and content of such communications. Moreover, the judge's consideration of ex parte information conveyed at staffings or court appearances which was obtained at such staffings or appearances from court drug team members is permissible under section 100.3(B)(6)(e) of the Rules in view of the issuance of Administrative Order 142/03, which order requires the consent of "the absent party and his or her attorney. . . " A/O 142/03. Any agreement between the defendant and the court . concerning what occurs at staffings or court appearances should reflect and not exceed what is permissible under that directive with respect to ex parte communications.

Further, and contrary to the judge's interpretation of Opinion 01-52, that opinion does not state that a waiver by a defendant in a drug court participation agreement may by itself enable a judge to engage in ex parte communications whether in or out of drug court staffings or court appearances. The Committee made clear that the validity of a waiver was dependent upon the exception provided for in subparagraph (e) of section 100.3(B)(6) which permits a judge to initiate or consider ex parte communication "when authorized by law to do so." 22 NYCRR 100.3(B)(6)(e). That is precisely what is accomplished, in our opinion, by Administrative Order 142/03 with respect to communications from drug court team members at staffings and court appearances where the defendant is absent.

Finally, in view of the fact that Opinion 01-52 was predicated in large measure on the issuance of Administrative Order 152/02 and that directive has been rescinded, that opinion should be deemed modified to reflect the particulars dealt with herein. We note, however, that its basic premise, that in the drug court situations an administrative order of the Chief Administrative Judge may constitute a sufficient basis for concluding that consideration of certain ex parte communications have been "authorized by law," and therefore are permitted under 22 NYCRR 100.3(B) (6)(e), remains in effect. This opinion adds the proviso that where court personnel who are not members of the drug court team, are the providers of information to the judge, notice should be given to the defendant's attorney of the nature and content of the communications.