

ETHICS FOR THE PROBLEM-SOLVING COURT JUDGE: THE NEW ABA MODEL CODE*

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Being a judge in a problem-solving court looks very different from what has been the judge's traditional role. As a result, judges in these courts have had concerns about possible ethical violations. Previous codes of conduct did not address these concerns, because, quite simply, these types of courts did not exist. This article examines how the American Bar Association's new Model Code of Judicial Conduct addresses these ethical issues.

With ever-rising caseloads and recycling defendants, there is increasing frustration with revolving-door justice. More and more judges are being encouraged to experiment with “problem-solving” courts. These could be drug courts, DUI courts, mental-health courts, domestic-violence courts, homeless courts—or a court for any other societal problem that has been put on the doorstep of the courts to be solved. For example, I currently preside over both a mental-health court and a homeless court.

Being a judge in a problem-solving court looks very different from what has been the judge's traditional role. A judge in a problem-solving court becomes the leader of a team rather than a dispassionate arbitrator. For example, in a mental-health court of the type over which I preside, the judge will serve as the chair and leader of a team of attorneys, probation officers, and mental-health professionals. The judge uses the judicial authority to coordinate the work of all of these players, so the judge becomes a convener and broker as well, an often unfamiliar role.

Most, if not all, of the team conferences will take place outside of the traditional courtroom. While a judge normally is allowed to hear only what parties choose to present, the judge in the problem-solving court now hears all kinds of information that a judge would not normally hear, nor would that information necessarily be considered relevant to the determination of the facts or law of the case at hand. Staffings are conducted without the presence of the defendant, although the defendant's attorney is present. Judges are encouraged, if not required, to ask questions and seek information from individuals.

Thus, there may be a concern that the judges are violating restrictions about ex parte communications, particularly those that prohibit independently investigating facts in a case. There has also been concern that the judge's intense and personal involvement could raise questions about impartiality. In fact, the effectiveness of the court often depends upon the judge's personal involvement and the use of judicial authority to

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change the behavior of the litigants. Previous judicial codes of conduct did not address any of these concerns because, quite simply, these types of courts did not exist.

THE NEW CODE

After an extensive and exhaustive three-and-one-half-year process by the American Bar Association Joint Commission to Evaluate the Model Code of Judicial Conduct (last revised in 1990), a proposed new *Model Code of Judicial Conduct* was presented to the ABA House of Delegates in February 2007. During the commission's thirteen public hearings, several commentators informed the commission that developing practices in recently created problem-solving courts, such as drug courts and domestic-abuse courts, encouraged or required judges to engage in communications with individuals and entities outside the court system itself, and that the judges feared they may have been running afoul of traditional restrictions on ex parte communications, as well as other ethical considerations.

The Code is intended to provide guidance for judges regarding their professional and personal conduct and to assure the public that effective standards exist to regulate that conduct. For those who sit in problem-solving courts, one of the hopes was that the new Code would address their issues and the concerns that arise out of this new way of conducting court proceedings. For while the American Bar Association, the Conference of Chief Justices, and the Conference of State Court Administrators had all endorsed problem-solving courts, there still had been no ethical guidelines adopted for them.

The commission believes it has addressed the issue by acknowledging that "problem solving" or "therapeutic" courts, such as drug courts, domestic-violence courts, and mental-health courts do exist—and that these courts function to help communities solve problems. Through this statement, the Code for the first time recognizes those of us who work in problem-solving courts. For those courts, the Code also acknowledges that the states, which may adopt or modify whatever portions of the Code they feel are appropriate, may allow judges to do things the Code restricts, for example, engage in ex parte communications in the course of monitoring a drug offender's sentence in which treatment is ordered.

If the issues noted above are now going to be addressed by the Code, the question becomes, Will the changes be sufficient to address the existing concern? In analyzing their situation, judges should now first look to the Code to see how their concerns are addressed. If the Code provisions are not sufficient, then the option exists that a local rule or administrative order could be implemented that would exempt the judge from the Code's requirements.

The new Model Code consists of four canons, which state overarching principles of judicial conduct. Each canon is followed by the black-letter rules, violation of which must be established for a judge to be disciplined for violating a canon. Commentary then adds explanation, interpretation, and aspirational goals.

The Code addressed problem-solving courts immediately in Commentary 3 to Section 1 by stating:

In recent years many jurisdictions have created what are often called “problem solving” courts, in which judges are authorized by court rules to act in nontraditional ways. For example, judges presiding in drug courts and monitoring the progress of participants in those courts’ programs may be authorized and even encouraged to communicate directly with social workers, probation officers, and others outside the context of their usual judicial roles as independent decision makers on issues of fact and law. When local rules specifically authorize conduct not otherwise permitted under these Rules, they take precedence over the provisions set forth in the Code. Nevertheless, judges serving on “problem solving” courts shall comply with this Code except to the extent local rules provide and permit otherwise.

IMPARTIALITY

Because of the intense level of involvement a problem-solving judge has with the defendant and the case, there has always been a question about the judge’s impartiality. Three separate rules of the Model Code require that a judge act with “impartiality.” Rule 1.2 states, “A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and avoid impropriety and the appearance of impropriety.” Rule 2.2 says, “A judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially.” And Commentary (1) to that rule explains that “to ensure impartiality and fairness to all parties, a judge must be objective and open-minded.”

The judge in a problem-solving court not only knows and sees the defendant regularly but also most likely knows the defendant’s family as well, and is familiar with other family situations, incidents, or drug or alcohol problems that have a relationship to why the defendant became engaged in criminal activity. This knowledge is necessary for the judge to assist in effectively fashioning an appropriate treatment plan. Judges must retain the ability to recognize when that knowledge has started to affect their view of the cases and must be ready to evaluate the point at which it would be appropriate to disqualify themselves.

Rule 2.11 addresses this issue of disqualification in relation to impartiality. It states in part:

(A) A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of *facts that are in dispute in the proceeding* (emphasis added).

Relevant to this analysis under this rule will be the posture of the case. If the case has been adjudicated and the judge is monitoring a defendant's post-adjudication compliance with treatment as part of probation or a sentence, it is unlikely there will be facts in dispute. However, if the case has not yet been adjudicated, the situation is more complex. If the defendant fails to comply with the treatment requirements, the ultimate sanction is to put the case back on the standard criminal track. Thus, the defendant, if not successful with the diversion aspect of the problem-solving court, could end up in an adversarial proceeding or, at a minimum, in a sentencing hearing. The judge who had worked with the defendant throughout the failed treatment process might no longer be in the position to be considered objective and open-minded. This could be analogous to a judge's participation in a settlement discussion. Thus, guidance in making that determination to disqualify oneself could come from Commentary (3) to Rule 2.6, which states:

Judges must be mindful of the effect settlement discussions can have, not only on their objectivity and impartiality, but also on the appearance of their objectivity and impartiality. Despite a judge's best efforts, there may be instances when information obtained during settlement discussions could influence a judge's decision making during trial, and in such instances the judge should consider whether disqualification may be appropriate. See Rule 2.11(A)(1).

A judge's impartiality may be questioned in this type of court when the judge has greater knowledge of the issues than the lawyers. For example, in a mental-health court, the judge may have a much greater knowledge of mental-health issues than do the attorneys. Certainly, the mental-health-court judge may take judicial notice of legislative facts concerning public-policy issues and, pursuant to Rule 201 of the Federal Rules of Evidence, take judicial notice of adjudicative facts as either generally known within the territorial jurisdiction of the trial courts or capable of accurate and ready determination by resort to sources, such as psychological treatises or authorities, whose accuracy cannot reasonably be questioned. The judge must be careful to give notice to the parties and explain on the record those facts of which judicial notice is being taken.

EX PARTE COMMUNICATIONS

The other key issue with which problem-solving court judges have been concerned is *ex parte* communications. This is addressed by the new Code in Rule 2.9, which states, "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." There then follow the familiar exceptions, such as administrative scheduling; consultation with disinterested experts on the law, court staff, or other judges; and consultation with consent for purposes of settlement. Then Rule (A)(5) addresses the concern of the problem-solv-

ing judge by stating, “A judge may initiate, permit, or consider any ex parte communications when expressly authorized by law to do so.”

The salient Comments to Rule 2.9 then state:

(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* (emphasis added), or if the party is unrepresented, the party, who is to be present or to whom notice is to be given, (3) . . . , and (4) A judge may initiate, permit or consider any ex parte communications when 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.

Perhaps the concern about ex parte communications is unnecessary. As Comment 2 states that whenever a party is required to be present, it is the party’s lawyer who is to be present, does this mean that if the defendant’s lawyer is present at all of the staffings, the discussions never rise to the level of ex parte communication? While Comment 4 is the most clearly directed at problem-solving courts, it leaves the statement “when expressly authorized by law” open to interpretation. Interestingly enough, most problem-solving courts do not operate under a specific law or administrative order. Programs are normally voluntary, and defendants sign confidentiality waivers. Will this be sufficient for a judge to be considered “expressly authorized by law” or does the court need additional authority to engage in staffing discussions? I would argue that the judge may ethically proceed with the defense attorney present and with waivers in place. With the defense attorney present, there is no ex parte communication, and the waivers provide the judge the legal authority to proceed. Only if the attorney will not be present would additional legal authority be required. However, I for one would certainly not recommend that the staffings proceed without defense counsel because their input is of great assistance.

An additional concern about information received in a staffing could arise under Rule 2.9 (C), which states: “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.” Factual information that may be received in a staffing is a difficult matter. Even more problematic is the situation where the judge has knowledge of factual issues about a particular criminal defendant based upon matters discussed by the attorneys and other team members in a conference that is not part of a recorded and official court proceeding regarding the case or criminal defendant.

Given that the disqualification rule calls for disqualification if the judge has personal knowledge of facts that are in dispute in the proceeding, what should the judge consider in determining disqualification? If the judge learned of this factual information, and it is relevant to a legal determination, the judge need not be disqualified

unless the factual information was learned in an *ex parte* situation where both the prosecution and defense were not represented. Thus, the importance of always having counsel present during staffing sessions cannot be overemphasized. Even then, there still may be a concern if these facts are ones not normally presented in an adversarial proceeding. In this instance, it is arguably more appropriate for that judge to disqualify him- or herself if the matter reverts to a hearing or trial, much as a judge who conducts settlement conferences might not sit as the trial judge. Again, as discussed earlier, judges must be ready to evaluate whether disqualification may be appropriate. The only other appropriate option would be a process that has been expressly authorized by law to allow for such *ex parte* communications regardless of the facts that may be presented and that allows the judge under these circumstances to remain on the case for a trial.

THE JUDGE'S ROLE

Frequently, the role of the mental-health judge requires that the judge encourage attorneys representing the mentally ill to look to their client's long-term, rather than short-term, interest. It may be possible to achieve a short-term success through a plea bargain or dismissal of a case, yet the client's long-term interests would be better served by some type of extended treatment and supervision plan, which might better be accomplished through a court program. A dismissal or plea to a charge without probation supervision is much more attractive to the client than is a treatment program and supervision by a probation officer reporting to the court. Attorneys complain of the ethical conflict between their short-term duties to abide by a client's decisions and the long-term interests of a client. The lawyer's obligation is to provide "competent representation" to the client. Is this obligation met by simply advising them of all of their options and then letting the client make the decision? Or does the obligation also include the requirement to advocate that the client look to long-term interests?

This raises the question of the judge's role in this process. Should the judge be encouraging or fostering the defendant's participation in a treatment-court program? When the client's long-term best interests are clearly in completing a treatment program and these are also the best interests of the community as a whole, it remains the lawyer's job to represent the best interests of his client. Some guidance can be found in Rule 2.1 of the *Model Rules of Professional Conduct*, which states that "in rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation." However, rather than place the defense counsel in a potentially conflicted position, perhaps the better role is for the judge to be the one to pay attention to the need for appropriate treatment, restitution, or other conditions that will address issues that bear on the case and simply allow defenders to remain adversarial, acting as an advocate for the defendant.

Another ethical consideration embodied in Rule 2.10 of the new Code is that neither judges nor their staffs may make public comments about pending cases. That rule provides, in part, “A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.”

A judge of a problem-solving court must make public statements and provide information to lawyers and the general public about the workings of the court. The judge is frequently called upon to be an advocate for the problem-solving court in the legislature, in meetings with other related associations and organizations, and in other conferences, seminars, or venues that will provide an opportunity to educate lawyers and the public about the values of such courts. Clearly, the judge and the court personnel must take special care not to discuss specific defendants or specific facts pertaining to a defendant in a public or nonpublic setting. Unfortunately, this may preclude the judge and court personnel from discussing specific successful cases—and there are many—and identifying specific individuals who have benefited from the services of the problem-solving court. While the ban only applies to pending cases, because of the long-term treatment aspect of the problem-solving court, cases often remain pending for long periods of time. In addition, because a defendant’s involvement in a problem-solving court is indicative of other issues, such as mental illness, or because much of the information that a judge has may come from confidential medical records, comments may still be limited. Even with closed cases, judges should be cautious and not use names or identifying features. With these limitations in mind, judges should still be encouraged to share the impact of the work of the problem-solving court.



Those of us who have been involved in problem-solving courts over the last several years have found the new role to be a very rewarding one. There is truly a sense that one’s work is indeed making a difference and improving not only the life of the individual defendants but the quality of life for the entire community. The new ABA *Model Code of Conduct* recognizes not only the existence of but also the importance of these courts and has begun to provide us with guidelines to do our job and remain consistent with our ethical requirements. jsj