

**JUDICIAL ETHICS COMMITTEE
ADVISORY OPINION NO. 11-01**

March 23, 2011

The Judicial Ethics Committee has been asked to provide an opinion as to the following inquiry:

Question: Does the Code of Judicial Conduct permit a judge, who is a member of a drug court team, to preside over the revocation/sentencing hearing of a defendant who is in the drug court program?

Answer: The Code of Judicial Conduct does not automatically require recusal under these circumstances. As will be discussed, only if the judge determines that he/she cannot be impartial is recusal required.

Relevant to this question are both the recusal provisions of the Code of Judicial Conduct and the restrictions placed by it upon a judge's receiving ex parte communications.

Tennessee Supreme Court Rule 10, Canon 3E(1), explains, in pertinent part, that judges should recuse themselves in matters where their impartiality might reasonably be questioned, such as if they have a bias or prejudice in the matter or knowledge of disputed evidentiary facts:

A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding[.]

As to a judge's receiving ex parte communications, Tennessee Supreme Court Rule 10, Canon 3B(7) provides in part that "[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[.]" However, exceptions exist to this principle, including that "[a] judge may initiate or consider any ex parte communications when expressly authorized by law to do so." Tenn. Sup. Ct. R. 10, Canon 3B(7)(e).

The few states which have considered the issue presented by this inquiry concluded that judicial ethics do not require that judges, who have participated in a matter as a member of the drug court team, must automatically recuse themselves from a subsequent probation revocation hearing.

In State v. Belyea, 999 A.2d 1080, 1081 (N.H. 2010), the defendant, following his pleas of guilty, received suspended sentences, conditioned upon his complying with the requirements of the drug court program. During his participation in the program, he received three sanctions, one because he left the state without permission for about two months. In response to the State's motion that the sentences be imposed, the defendant moved to recuse the judge, who had been a member of the drug court team, from presiding at the probation termination proceeding. The court denied the recusal motion and proceeded with the revocation hearing. Id. at 1082.

At the hearing, after the defendant admitted that he was gone from the state for nearly two months, the court imposed the sentences upon him. On appeal, the defendant again argued that the court erred in denying the motion for recusal and asserted that "a disinterested observer would entertain significant doubt about whether [the judge] prejudged the facts and was able to remain indifferent to the outcome of the termination hearing." Id. at 1085.

The New Hampshire Supreme Court determined, however, that both of these contentions were without merit. First, the court concluded the record showed that, while acting as a member of the drug court team, the judge "remained an impartial judicial officer," explaining the judge's permissible dual roles: "It is not uncommon for judges to acquire information about a case while sitting in their judicial capacity in one judicial setting and later to adjudicate the case without casting significant doubt on their ability to render a fair and impartial decision." Id.

As to the defendant's second assertion in Belyea, that the judge's impartiality could reasonably be questioned, the court also disagreed, saying that "nothing in the record demonstrate[d] that [the judge] had personal knowledge of the defendant's conduct that he acquired outside the context of monitoring the defendant's progress in the Program while serving in his judicial capacity on the drug court team." Id. at 1086. Additionally, the court noted that the defendant had failed to point to any "disputed evidentiary facts that [the judge] relied upon in terminating him from the program." Id. In fact, at the hearing, the defendant admitted leaving the state for two months without permission, but contended that he had done so because of "his troubled mental health and difficulty with medication." Id.; see State v. Rogers, 170 P.3d 881, 886 (Idaho 2007) ("The drug court judge may preside over the termination proceedings . . . [and] after the termination hearing . . . , the drug court judge may serve as the sentencing judge, since information from the termination proceedings would be admissible in a sentencing hearing.").

As to the matter presently being considered by this committee, we note that a defendant, who is entering the drug program of the court which posed this ethics inquiry, first executes the following waiver, consenting to the drug court judge's receiving a broad range of ex parte communications regarding the matter:

I, [defendant's name], hereby consent to communication between _____, and [the drug court judge], the [District] Attorney General's Office: Drug Court Division; the . . . Public Defender's Office: Drug Court Division; the . . . Probation and Pretrial Services: Drug Court Division; the . . . Sheriff's Office: Drug Court Division.

The purpose of and need for this disclosure is to inform the court and the other above-named parties of my eligibility and/or acceptability for substance abuse treatment services and my treatment attendance, prognosis, compliance, and progress in accordance with the . . . Drug Court monitoring criteria.

The kind of information to be disclosed will be progress notes, medical diagnosis, testing, drug results, attendance records, results of medical testing and drug screens, HIV medical records, counselor and social worker notes and summaries, intake questionnaires, psychological evaluations, and all other records associated with rehabilitation and treatment.

Disclosure of this confidential information may be made only as necessary for and relevant to status hearings, progress reports, and sentencing hearings concerning case(s) under docket no(s). _____.

I understand that this consent will remain in effect and cannot be revoked by me until I have successfully completed the Drug Court Program or until I am terminated from the Drug Court for violating the terms of the Drug Court Treatment Program or conditions of my probation with regard to the above named case(s).

I understand that any disclosure made is bound by Part 2 of Title 42 of the Code of Federal Regulations, which governs the confidentiality of substance abuse client records, and that recipients of this information may redisclose it only in connection with their official duties as members of the . . . Drug Court Team.

Date: _____

Defendant/Client

We conclude that this waiver performs several functions. In executing the waiver, the defendant consents to communications between the judge; the drug court division of the district attorney general's office; the drug court division of the public defender's office; the probation and pretrial services office; and the drug court division of the sheriff's department. The waiver describes in detail that the judge is to have what would appear to be access to all relevant

documents and records but limits its use to “status hearings, progress reports, and sentencing hearings.”

It appears that judicial ethical considerations are moving in the direction taken in Belyea as to allowing “special” courts to receive ex parte communications. In this regard, we note that the 2007 version of the American Bar Association Model Code of Judicial Conduct, while continuing the prohibition against a judge’s receiving ex parte communications regarding a pending or impending matter, and listing exceptions to this proscription, explains in the Comments to draft Rule 2.9 the special considerations granted in this regard to “problem-solving” courts:

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.

We note that the Court of Criminal Appeals, in State v. Brent R. Stewart, No. W2009-00980-CCA-R3-CD, 2010 WL 3293920, at *10 (Tenn. Crim. App. Aug. 18, 2010), reviewing this issue on the basis of the United States Constitution rather than principles of judicial ethics, concluded that the due process clause prevented a judge who had been a member of the defendant’s drug court team from later conducting a probation revocation hearing as to the defendant, when the alleged probation violations “are based on the same or related subject matter that has been reviewed” by the judge as a member of the drug court team. However, this case was decided upon constitutional rather than ethical grounds and takes no position as to the latter.

This jurisdiction follows the same “reasonableness” standard as was applied in Belyea. That is, the judge must take the more objective, rather than subjective, approach and “ask what a reasonable, disinterested person knowing all the relevant facts would think about his or her impartiality.” Kinard v. Kinard, 986 S.W.2d 220, 228 (Tenn. Ct. App. 1998) (citing Alley v. State, 882 S.W.2d 810, 821 (Tenn. Crim. App. 1994)). Stated differently, recusal is warranted when a person of ordinary prudence in the judge’s position, knowing all the facts known to the judge, would find a reasonable basis for questioning the judge’s impartiality. Alley, 882 S.W.2d at 820.

The exercise of discretion by the judge upon consideration of recusal must be made on a case-by-case basis. Under the circumstances of the drug court judge who participated as a member of the drug court team, the outcome would necessarily depend upon the specific information the judge acquired as a member of the drug court team. In applying the “reasonableness” standard, recusal may be required in one case and not required in another.

We conclude, therefore, that serving as a functioning member of the drug court team does not in and of itself require recusal of the judge in a revocation hearing. Rather, recusal is required only if the appearance of impartiality should surface in the face of a fair and honest “objective standard” analysis by the judge predicated upon the specific facts developed in each particular case.

FOR THE COMMITTEE:

ALAN E. GLENN, JUDGE

CONCUR:

CHANCELLOR THOMAS R. FRIERSON, II
JUDGE CHERYL A. BLACKBURN
JUDGE JAMES F. RUSSELL
JUDGE BETTY THOMAS MOORE
JUDGE PAUL B. PLANT
JUDGE SUZANNE BAILEY