CREATIVE JUDGING

Ethics Issues in Problem-Solving Courts

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Most judges feel a bit of unease when first sitting in a “problem-solving court.” There is great comfort in knowing clear boundaries and roles, and judges are trained to stay within those lines between adjudicator and advocate. Judges in the courts described in this issue must adjust those lines, creating a new category of “involved adjudicator.” Lines are still there, but they are fluid, adjusting to the particular problem-solving court’s demands.

When the most recent ABA Model Code of Judicial Conduct was drafted, there was a perceived need to help guide where these new lines might lie. There are a variety of ethics areas where these concerns arise. Most notably, defining permissible ex parte communications and maintaining dignity and decorum of the court seemed to be in issue. Judges in problem-solving courts are involved in ex parte meetings with teams that exclude the presence of the defendant. Some judges reward defendants’ successes with hugs or cheers and definitely applause. While these acts are outside acceptable norms in traditional court settings, they are expected and needed in the problem-solving court.

In an effort to address the most serious change, the agreement for ex parte meetings, the 2007 Model Code addressed the issue in a comment to Rule 2.9 (Comment 4): “A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on the 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.” Many states have adopted variations of this comment that include concepts of needing consent of the parties. Some also include disclosure obligations where there are ex parte reports considered by the court. The essential point is that even where there are rules authorizing ex parte communications with the court, there are ethical lines within which those communications can take place. Judges should be aware of the specific rules and expectations in their jurisdictions.

In addition to ex parte meetings, judges in therapeutic courts often find themselves in close relationship with local not-for-profit organizations that provide support to the program. Ideally, there will be a coordinator, other than the judge, who can solicit items needed by participants in the problem-solving courts and conduct the general fund-raising that these programs demand. Typically there are no issues with judges working on grant proposals that can fund these programs, but judges are prohibited from direct fund solicitation from individuals or organizations (See, e.g., Alabama Advisory Opinion 07-878 and Florida Advisory Opinion 07-18.)

Occasionally judges have gotten so involved with a participant in the problem-solving court that the judge exceeds acceptable boundaries in the relationship (In the Matter of Tarantino, NY State Commission on Judicial Conduct, March 28, 2011) that a sanction was warranted. Others have found themselves subject to discipline for using disrespectful language in court and directing fines to support particular not-for-profit organizations.

In short, while invaluable, problem-solving courts present unique challenges to judges. Flexible and creative solutions are invaluable parts of our justice system, and judges are essential leaders in these efforts. When serving in problem-solving courts, judges will serve best when always aware of that flexible line: the line that preserves the integrity of the judiciary while applauding the successes of those the courts serve.