

Chapter 10

ETHICAL OBLIGATIONS OF JUDGES IN DRUG COURTS

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

~ Socrates¹

I. [§10.1] INTRODUCTION²

In all judicial proceedings, the judge bears the ultimate responsibility for ensuring the parties receive a fair hearing in a dignified forum. Although certain aspects of the drug court judge’s role may change, the ultimate responsibility is no different. The unique nature of drug court practice—and the political visibility of many drug courts—requires that the drug court judge be ever vigilant in complying with ethical requirements. Focusing on selected provisions of the 2007 American Bar Association’s (ABA) Model Code of Judicial Conduct, (hereinafter referred to as The Canons of Judicial Conduct or simply the Canons or Model Code), this chapter highlights potential ethical problems for drug court judges and offers suggested resolutions. Because some jurisdictions have not adopted the Model Code, or have deviated in some respects from the ABA’s formulation, judges should also refer to their own jurisdiction’s ethical rules and opinions for guidance.

Four aspects of drug court practice raise special concerns for a judge who would live up to the expectations of the Socratic charge and the Canons of Judicial Conduct. First, the collaborative nature of drug court decision making (seen most clearly in staffings) may undermine perceptions of judicial independence and impartiality. Second, the intimacy that develops between participants and members of the drug court team—especially judges—can blur the boundaries between judicial action and personal involvement. Third, the direct contact between judges and participants makes participants vulnerable. While defense counsel remains responsible for protecting participants’ rights, the judge shares responsibility. Finally, the drug court judge cultivates local support and develops community partnerships through education and leadership. Proper ethical boundaries must be observed, so the judge is not perceived as trading on the judicial office.

Dealing ethically with these and other issues will not prevent the judge from acting effectively in drug court. Rather, the success of drug courts depends on the trustworthiness and integrity of judges who serve in them.

A. [§10.2] Integrity and Independence

Canon 1 requires a judge to uphold the integrity and independence of the judiciary.³ Not only must the judge harmonize personal conduct to the legal and ethical demands of the role, but the judge must ensure that those with whom he or she works (and the institution in which he or she works) conform to these ethical and legal obligations.⁴ In fulfilling these two sets of obligations, the judge serves as an example for others.

Canon 1 has twofold significance for drug courts. First, as this Canon’s official commentary recognizes, “Conduct that compromises or appears to compromise the independence,

integrity, and impartiality of a judge undermines the public confidence in the judiciary.”⁵ As nontraditional legal institutions, drug courts may not enjoy the same presumption of legitimacy accorded to other legal institutions and so need to be especially concerned with maintaining public confidence in their integrity. Second, the Canon focuses on independence as an essential characteristic of the judge’s professional responsibility, but at least two of the Ten Key Components⁶ (included on page 217 of this benchbook) of drug courts seem to undermine judicial independence.

Key Component 6 dictates that “a coordinated strategy governs drug court responses to participants’ compliance.”⁷ The coordinated strategy is typically effected through staffings, in which members of the drug court team meet in advance of a participant’s hearing to discuss the participant’s progress in treatment and to reach consensus about rewards and sanctions. This collaborative decision-making process does not violate the judge’s duty of independent judgment so long as the final decision remains with the judge. The judge may not delegate this responsibility for a final decision to other members of the drug court team.⁸ In any event, the judgment made at staffing can only be tentative, subject to modification by the court based upon what the participant says during the court proceeding. Staffings must be considered in light of restrictions on ex parte contacts, found in Section 2.9 of the Canons.

*Common ethical issues
arise from:*

- *The collaborative nature of drug courts*
- *The enhanced relationship between judge and drug court participant*
- *The community advocacy role of the drug court judge*

Like the coordinated strategy of Key Component 6, the mandate to “forge partnerships” in Key Component 10 reflects the drug court model’s commitment to collaborative work among all stakeholders toward a set of common goals.⁹ A growing body of research underscores the benefits of this collaboration, but the emphasis on partnerships is not without its ethical pitfalls.

The call for “partnerships between drug courts and law enforcement”¹⁰ raises the most obvious ethical concerns. To the extent that the partnership educates law enforcement officers about drug court practices, the collaboration raises no serious ethical difficulties.¹¹ However, any such partnership must ensure that the court is neither perceived nor acting as an instrument of law enforcement, but maintains its constitutionally mandated role as independent arbiter and guardian of legal rights. In particular, special care should be taken to guard against inappropriate ex parte contacts between the court and law enforcement. Any direct communication between the court and law enforcement about a particular case should be disclosed to all members of the drug court team. For further discussion of ex parte communications, see the discussion following later in this chapter.

Less obvious, but no less serious ethical concerns arise from the call for linkages between drug courts and community-based organizations.¹² Coalition building has been a vital part of the drug court movement’s success. Drug courts have succeeded in marshaling a

wide range of resources in their communities, providing their participants with treatment and social services and at the same time responding to community concerns. These coalitions have provided crucial political support for drug courts. As with the drug court/law enforcement partnership, ethical assessment of these coalitions depends upon the exact nature of the linkages. Where the court/community coalition functions primarily as an exchange of general information, with the court educating the community about its practices and procedures and the community organization educating the court about available resources, ethical concerns are minimized.¹³

However, where community organizations and other institutions take a more active role in providing “guidance and direction to the drug court program,” as Key Component 10 advises, heightened ethical sensitivity is required. At a minimum, and whether this guidance and direction is provided through a formal or informal mechanism, court/community partnerships should never include discussion of particular cases that are pending before the court.¹⁴ Even if particular cases are not discussed, a judge must ensure that the court’s participation in formal or informal coalitions with community organizations does not appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.¹⁵ Thus, the judge or court personnel should not participate in discussions of how to allocate law enforcement resources (e.g., to target certain offenses or geographical areas); participation in such conversations would imply the court’s endorsement of arrests resulting from such reallocations.

Where the court/community partnership is effectuated through a formal structure, like the steering committee suggested under Key Component 10 (organized as a nonprofit corporation), special ethical issues arise for the drug court judge and

Judges may not give up independent judgment in a collaborative court.

court personnel. Ethical aspects of participation in such an organization are covered under Canon 3 of the Model Code and discussed later in this chapter.

B. [§10.3] Relations with Participants

The judge’s personal engagement with each participant is the keystone of the drug court model. “This active, supervising relationship, maintained throughout treatment, increases the likelihood that a participant will remain in treatment and improves the chances for sobriety and law-abiding behavior.”¹⁶ This personal engagement stands in tension with a common vision of the judge as a detached arbiter, figuratively blind to the parties before the court. However common this understanding of the judge, the Canon requires not disengagement, but impartiality. The judge may show concern about a participant’s progress in recovery—even to the point of celebrating a participant’s success—but the judge must extend the same quality of engagement and concern to each participant. Such engagement must be in the context of judicial proceedings. In one case, a judge was sanctioned for meeting privately and individually (sometimes at their homes) with probationers.¹⁷ The judge justified a portion of his conduct on his sincere concern for the welfare of addicts and their progress. The Nebraska Supreme Court was

[§10.4]

unpersuaded and found that the judge's conduct constituted a violation of Canon 1 (uphold integrity and independence of judiciary) and Canon 2, in that the judge failed to act in a manner that promotes public confidence in the impartiality of the judiciary.¹⁸ The drug court judge does not function as a therapist and should not seek to develop a therapeutic relationship with individual drug court participants. Nevertheless, effective performance as a drug court judge requires continuing interdisciplinary education: the judge and the drug court staff need to understand both the range of available treatment options and the theories and practices supporting specific treatment approaches.

C. [§10.4] Reporting Crimes and Other Misconduct

One question that frequently arises is whether a judge's obligation to uphold the integrity of the judiciary requires drug court judges to report illegal drug use by participants under their supervision. Some states have statutes requiring judges (and other specified officials) to report crimes; drug court judges should be familiar with any such statutes in their own states. In the absence of such a statute, however, all states that have addressed this issue have held that a judge has no ethical obligation to report criminal activity disclosed during court proceedings.¹⁹ While Rule 2.15 of the Canons requires the court to report misconduct by an attorney or a judge in certain circumstances, no duty exists to report criminal activity by others. Moreover, where the prosecutor has the same information as the judge (which will ordinarily be the case in drug court), there is no need to report the offense because law enforcement officials are already aware of it. A custom of not prosecuting certain offenses disclosed during drug court proceedings is often reflected in memoranda of understanding and in participants' agreements with the court. In any event, to the extent that judges have any duty to report crimes, commentators have distinguished between serious crimes, such as murder, and the less serious offenses, such as possession, that are ordinarily disclosed in drug court.²⁰

II. [§10.5] PRIVATE CONDUCT OF THE JUDGE

Drug court judges should be aware that their conduct, both on and off the bench, may be scrutinized more closely than that of other judges. To comply with Canon 2, judges need to be sensitive to this reality. This requires particular caution with respect to substance abuse.²¹ For example, being stopped for driving while impaired would be embarrassing for any judge, but particularly for a drug court judge. Judges who themselves need substance abuse treatment (including ongoing participation in community support groups such as Alcoholics Anonymous) are not disqualified from presiding in drug courts, so long as their own problems do not interfere with their role in the drug court.

Judges should be wary of participation in outside drug court activities such as picnics or other social contacts.

The drug court judge must be circumspect in attending gatherings of drug court participants outside the confines of the courthouse. As noted by one court²² in censuring a judge who attended a picnic hosted by a convicted felon:

Improper conduct includes creating or acquiescing in any appearance of impropriety. When a judge chooses to attend a party hosted by a convicted criminal, there may be wholly innocuous reasons explaining such a decision. However, the judge must realize that members of the public cannot know the judge's subjective motives and may put a very different cast on his or her behavior. Such conduct could be perceived as evidencing sympathy for the convicted individual or disagreement with the criminal justice system that brought about the conviction. At worst, such conduct may raise questions concerning the judge's allegiance to the judicial system. Those impressions could generate legitimate concern about the judge's attitude toward judicial responsibilities, weakening confidence in the judge and the judiciary.

Thus, attendance at and participation in picnics, bowling events, baseball, and amusement park, or similar activities with probationers is potentially problematic. Additionally, attendance at a law enforcement function, such as a ball game with community police officers, adds another dimension as an appearance of partiality towards law enforcement.

The Canons don't prohibit all non-court contact with participants. For instance, if there was a picnic and the district attorney, defense counsel, law enforcement, other members of the drug court team, and drug court participants were present and the judge made a cameo appearance and said a few words of encouragement, such conduct would not violate the Canons. The question the judge must ask is whether the extrajudicial activities the judge engages in would cast reasonable doubt upon the judge's capacity to act impartially as a judge or whether the activity would threaten public confidence in the integrity of the judiciary.²³

A. [§10.6] Providing Information and References

A judge may not voluntarily testify as a character witness.²⁴ A court ordinarily should not act as a conduit for information about participants to those outside the drug court team, particularly where, as in drug courts, strict confidentiality laws may apply. Drug courts should develop forms, agreed upon by all members of the drug court team, for the release of information about participants (where such releases are appropriate). Each participant must sign the release.²⁵ The entire drug court team should review all other inquiries submitted to the judge or court personnel. The court should not convey or permit others to convey that they are in a special position to influence the judge.²⁶

*A judge must be impartial
but not indifferent.*

References raise even more serious concerns because they place the court's stature behind an individual who has been (and may still be) subject to the court's jurisdiction. It is

[§10.7]

particularly inappropriate for a judge to aid a participant in other litigation. Thus, one drug court judge was disciplined for sending an unsolicited character reference to another judge who was about to sentence a participant in an unrelated case.²⁷ While less egregious, it would still be troubling for a judge to serve as advocate for a participant by, for example, asking the participant's employer to be patient while the participant undergoes treatment.²⁸ The best way to avoid ethical problems is to have the prosecutor perform these services in lieu of the judge. A prosecutor's word in this context will carry nearly as much weight as a judge's because the prosecutor is also a public official and is in some respects the participant's adversary.

B. [§10.7] Impartiality and Decorum: Courtroom Conduct

Rule 2.3 of the Canons prohibits the judge from manifesting bias or prejudice, either by words or conduct, including, but not limited to, bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.²⁹ Additionally, the judge shall not permit staff, court officials, and others subject to the judge's direction and control to manifest such bias or prejudice.³⁰ Because of the continuing personal engagement between participants and the drug court judge, the judge runs the risk of being influenced by factors other than the merits of each participant's case. Participants with friendly dispositions or particularly compelling experiences may attract the judge's compassion and leniency, while those with less friendly personalities may provoke the opposite response. Psychological concepts of *transference* and *countertransference* further complicate the judge's engagement with participants—a judge's identification with a participant (which may be unconscious) may lead to disparate treatment, including excessively harsh treatment, through countertransference. The same concerns with favoritism or prejudice apply to other court personnel, such as the drug court coordinator, who will also have ongoing personal engagement with participants. Drug court judges and personnel should be trained to recognize such bias in themselves and others.

Conduct within the courtroom that can raise concern ranges from simple praise to clapping for participants to coming down from the bench to shake hands with, or hug, participants.³¹ These practices, which seem inconsistent with normal courtroom restraint and impersonality, reflect the underlying nature of drug court. A drug court judge's primary role is not to mediate a dispute between two litigants; rather, drug court judges actively promote the successful treatment of participants. The law does not prohibit a judge from assuming this orientation; a judge must be impartial but not indifferent. Applause, handshakes, and hugs do not suggest partiality when they promote the objectives of the drug court and are distributed without favoritism. Applause and physical contact may, however, negatively impact the court's dignity. There are no clear guidelines for protecting courtroom decorum. Judges must listen to their own instincts and respect community standards.

C. [§10.8] Impartiality and Decorum: Conduct Outside the Courtroom

Concerns about impartiality and dignity may arise from a judge's contacts with participants outside of the courtroom, in activities such as picnics (which are customary in some drug courts). Here, it is possible to enunciate guidelines. First, judges should not transact business with participants outside the courtroom, nor should they, in any manner, imply that a participant will receive special treatment during judicial proceedings. Second, extrajudicial contact between judges and participants should not be conducted in a secretive manner, lest outsiders suspect that the judge is concealing inappropriate conduct. Third, gatherings outside the courtroom should be open to all participants, or else invitations should be extended based on clearly identified criteria (even if the judge plays no role in preparing the invitation list), in order to avoid the perception that the judge is favoring some participants over others. Moreover, notwithstanding any selection criteria, a judge should never be alone with a single participant outside the courtroom or the judge's chambers.

There is a “therapeutic court exception” to ex parte communications in the ABA model code, but few states have adopted it.

D. [§10.9] Ex Parte Contacts

Regulation of ex parte contacts in the drug court context is evolving. Under the 1990 version of the ABA Model Code of Judicial Conduct, ex parte communications were prohibited, except in limited situations involving administrative purposes, scheduling, or emergencies.³² The 2007 ABA Model Code of Judicial Conduct³³ dramatically changes the ethical landscape by permitting ex parte communications in drug and other problem solving courts. Rule 2.9(A)(5) of the 2007 Model Code provides that a judge may “initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.” The comment to this provision states: “A judge may initiate, permit, or consider ex parte communications when 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.” At this point in time, only a handful of states have adopted the 2007 changes to their judicial conduct canons.³⁴ Because so few states have adopted the 2007 “therapeutic court exception” to the prohibition against ex parte communications, the remainder of this section shall address the subject under the 1990 ABA Model Code.

The informal nature of drug court proceedings should not be construed to relax the limitations on ex parte contacts. In particular, the judge should not initiate any extrajudicial factual inquiries; should not initiate legal inquiries without the consent of all parties; and should immediately report all unsolicited ex parte contacts to all parties. Because staffings include more than simply court personnel, the rules on ex parte

[§10.10]

contacts apply and all parties or their representatives should be entitled to attend. In fact, empirical research notes both improved outcomes and cost savings when both defense counsel and prosecutors attend staffings.³⁵

Case law concerning prohibited and unethical ex parte communication focuses on the most egregious conduct. For example, in *Briesno v. Superior Court*,³⁶ in a case involving allegations that police officers beat a motorist, the trial judge sent his law clerk to the prosecutor with the message, “don’t stay up all night, that the judge says trust him, he knows what he is doing.” In another case, a judge kept a telephone on the bench and called people whom he described as “friends of the court” during the trial to get information on how he should rule. The Arizona Supreme Court had no difficulty in determining that this conduct violated Canon 1 (proceedings lacking in order and decorum) and Canon 3 (prohibited ex parte communications).³⁷

Contacts between judges and probation officers require additional comment. Generally, the probation department acts as an arm of the court, so it is not improper for a judge to communicate with probation officers outside of regular court proceedings. Not all ex parte communications with probation officers are protected, however.³⁸ Cautious judges will observe the limitations listed above—that judges should not initiate contact and should insure that all parties are made aware of the substance of ex parte contacts—even in communications with probation officers.

E. [§10.10] Use of Nonpublic Information

All members of the drug court team, including judges and court personnel, should recognize the highly sensitive nature of participants’ disclosures in treatment and, occasionally, in court.³⁹ The judge should ensure compliance with federal and state regulations concerning the confidentiality of information disclosed in treatment, including waivers of confidentiality that strictly limit disclosures to information necessary to carry out the court’s mission.

Whether or not court proceedings are in open court or are open to the public depends on the type of case (juvenile or adult) as well as state law. In general, most adult court proceedings are open to the public and drug courts are no exception.⁴⁰ The value here is freedom of information and a desire not to have the perception of “star chamber” proceedings.

In actuality, this requirement places special considerations on the shoulders of the drug court team to handle participant information in open court with utmost care. For example, the team should be careful not to discuss personal issues in open court, limiting review hearings to program compliance facts. Participants can be called to the podium by their first names. It is crucial that each participant sign a consent wherein the public nature of the open court proceedings is made clear.

*Be cautious about discussing
personal information
in open court.*

Calendars could be labeled, *Department 2 Review Hearings* as opposed to *Drug Court Cases*. What the team needs to do is take a close look at its own proceedings and determine how best to protect the confidential nature of the treatment issues and operate in a public courtroom if their state law requires. The approximately 2500 operational drug courts in the United States have shown that these issues can be successfully resolved.⁴¹

III. [§10.11] DISQUALIFICATION AND RECUSAL OF THE JUDGE

A judge is disqualified whenever the judge’s impartiality might reasonably be questioned, regardless whether any of the specific provisions of Rule 2.11 of the Canons apply.⁴² A judge should disclose on the record information that he or she believes the parties or their lawyers might consider relevant to the question of disqualification, even if he or she believes there is no real basis for disqualification.

Judges sitting in drug court often have substantial information about drug court participants—some of which was gained through on-the-record colloquies and pleadings and other information from informal staffings with defense counsel, the prosecutor, treatment provider, and probation. The Oklahoma Supreme Court⁴³ recognized the potential for accusations of bias against a drug court judge for information obtained in the court’s supervisory role and recommended an alternate judge handle termination proceedings:

However, we recognize the potential for bias to exist in a situation where a judge, assigned as part of the Drug Court team, is then presented with an application to revoke a participant from Drug Court. Requiring the District Court to act as Drug Court team member, evaluator, monitor and final adjudicator in a termination proceeding could compromise the impartiality of a district court judge assigned the responsibility of administering a Drug Court participant’s program.

Therefore, in the future, if an application to terminate a Drug Court participant is filed, and the defendant objects to the Drug Court team judge hearing the matter by filing a Motion to Recuse, the defendant’s application for recusal should be granted and the motion to remove the defendant from the Drug Court program should be assigned to another judge for resolution.

A. [§10.12] Personal Knowledge of Facts

Related to the issue of ex parte contacts is the question of a judge having independent knowledge of disputed facts in a case. When a drug court judge receives information from a treatment provider or other source, this would be subject to the rules on ex parte contacts, not Rule 2.11’s disqualification based upon a judge’s “personal knowledge.”⁴⁴ The reason this does not qualify as “personal knowledge” is that the judge has not personally observed the events in question; therefore, the judge can conduct an evidentiary hearing without having

[§10.13]

to testify or otherwise place his or her own credibility in issue.⁴⁵ Judges should, however, recuse themselves from any adjudications arising out of events that they did witness, such as a participant appearing in court intoxicated or a participant attempting to escape.

B. [§10.13] Extra Judicial Activities

The personal engagement between the drug court judge and participants must be limited to the judicial role and context: a judge may not enter into a relationship with participants apart from that established by (and confined to) the drug court context. *In re Jones* provides an egregious example of improper relationships: a judge who professed concern for the alcohol problems of defendants that he had sentenced to probation, met privately with several of the probationers and even visited and shared meals with them at their homes.⁴⁶

IV. [§10.14] OTHER JUDICIAL ACTIVITIES

A. [§10.15] Publicity and Educational Activities

Rules 3.1 and 3.7 of the Canons authorize judges to act as educators.⁴⁷ It is especially important for drug court judges to assume this role, both because drug courts should be part of larger community efforts and because the public is entitled to understand why drug courts deviate from certain legal traditions. At the same time, the judge's public comments must be circumscribed by concerns about the appearance of partiality.⁴⁸ There are two primary constraints on judicial utterances: (1) a judge should not indicate an unwillingness to obey the law; and (2) a judge should not manifest a predisposition toward a particular outcome in a pending case. Ultimately, judges must maintain a delicate balance. They should not isolate themselves from their communities. They must, however, heed the line between nonjudicial activities that interfere with the business of judging and those that enrich judicial institutions or at least do no harm to them.

In the drug court context, it is common for judges to attempt to build public support for treatment-oriented programs. The clear import of these presentations is that this method of case processing is preferable to that which otherwise exists in the criminal justice system. Often, these comments include success stories about past or current drug court participants. Such comments do not violate the Canons, so long as the judge is not foretelling a future result or disclosing confidential information that could be used to identify a drug court participant. Indeed, Rule 3.7 specifically allows judges to speak, teach, write, and participate in extrajudicial activities concerning the law, the legal system, and the administration of justice.⁴⁹ Rules 3.2 and 3.7 also authorize judges to attend governmental hearings on behalf of drug court programs, drug courts in general, or affiliated treatment agencies. Moreover, Rule 2.11 permits general informative explanations on court procedures.⁵⁰

A judge's speech is most often questioned when it approaches activist support for a particular cause. The opinion by Circuit Judge J. Posner of the U.S. Court of Appeals for the 7th Circuit, in *Buckley v. Illinois Judicial Inquiry Board*,⁵¹ makes clear that those who

become judges or candidates for judicial office do not forfeit their free speech rights under the First Amendment of the United States Constitution. A blanket prohibition on judicial statements about controversial issues in law or politics would not survive constitutional scrutiny. Any limitation on judicial speech must be closely linked to the specific harms identified in Rule 3.1 speech that would appear to “undermine the judge’s independence, integrity, or impartiality”; “lead to frequent disqualification”; or “interfere with the proper performance of judicial duties.”⁵²

Cases interpreting the limits of permissible judicial speech vary by jurisdiction. For example, the Washington Supreme Court held that it was permissible for a judge to attend and speak at an antiabortion rally. The remarks of the judge at the rally included “Nothing is, nor should be, more fundamental in our legal system than the preservation and protection of innocent human life.” The court found that the comments did not call into question the judge’s ability to be impartial in an abortion case.⁵³ A judge was not censured for attending a telethon on domestic violence prevention because it was deemed to be similar to those dedicated to improvement of the law.⁵⁴ *In re Bonin*⁵⁵ is a close case: the Massachusetts Supreme Judicial Court disciplined the chief judge of the Massachusetts Superior Court for attending a lecture by Gore Vidal on sex and politics that was sponsored by a gay activist group. The court explained that discipline was warranted not because of the content of the lecture but the fact that the lecture was being held as a fund-raiser for defendants currently awaiting trial in superior court, even though Judge Bonin was not assigned to hear the case.⁵⁶ Because the case was not before Judge Bonin, the concern about lack of impartiality must be diminished, but as chief judge of the court in which the case was pending, public perception of the entire court’s bias seems a reasonable concern.⁵⁷

It seems clear that judges may advocate changes in the law so long as they make clear their own intention to adhere to the existing law. In *In re Gridley*,⁵⁸ the Florida Supreme Court declined to sanction a judge who wrote about his moral opposition to the death penalty in his church newsletter; the court noted that, in the same writing, the judge had reaffirmed his duty to follow the state’s law. Thus, a judge may criticize mandatory minimum sentences, so long as the judge acknowledges that he or she is bound to impose them while they remain in effect.

Because drug courts may attract opposition (particularly, though not exclusively, in the context of political campaigns), understanding the boundaries of appropriate judicial commentary is important. A drug court may avoid concerns about inappropriate judicial participation in political conflicts by establishing a media relations office outside the judge’s supervision. Nevertheless, judges may find themselves called on to respond to critics, and Rule 2.10 offers basic guidance. The judge is permitted to explain the law and the court’s procedures and respond directly or through a representative to allegations in the media or elsewhere concerning the judge’s conduct in a matter.⁵⁹ However, in responding to criticisms, the judge must be truthful⁶⁰ and the explanation “[m]ust be limited to a moderate and dignified response to the attack made upon the judge and may not be of a nature in quantity or substance that creates more harm than benefit to the judicial system.”⁶¹ *Ad hominem* replies, such as questioning critics’ competence, should be avoided as they call into question the judge’s impartiality and demean the court’s character.

B. [§10.16] Civic Activities—Board Member of Treatment Provider

Because of their involvement in drug treatment, drug court judges may be asked to serve on the board of directors for a treatment provider.⁶² They should abstain. If the provider is a governmental agency, service is precluded by Rule 3.4 of the Canons.⁶³ If the provider is private, the judge should not be on its board because the treatment provider may seek a contract with the drug court, placing the judge in violation of Rule 3.7.⁶⁴ In a recent case, a drug court judge required defendants to contribute to I Care, an organization that provided substance abuse education to young children. The drug court judge sat on the advisory council for the organization. While finding this a violation of the Canons, the Louisiana Supreme Court refused to impose any sanction, given the altruistic motives of the judge and his unblemished record.⁶⁵

C. [§10.17] Board Member—Other Civic Organizations

Key Component #10 recommends the formation of a drug court steering committee, which “provides policy guidance and acts as a conduit for fund-raising and resource acquisition.” Subject to restrictions on fund-raising described below under Rule 3.7, a drug court judge may serve on the steering committee or on the board of other organizations operating drug education programs. However, the judge’s participation becomes more complicated if the steering committee or other organization “engages in advocacy toward the adoption, repeal, or modification of particular substantive laws or towards the courts’ use and application of existing laws in a particular manner.”⁶⁶ The line between permitted advocacy of improvements in the legal system and forbidden political engagement is notoriously hard to draw. Resolution of difficult cases, however, should return to the principles articulated under Canon 1: does the advocacy for or against a particular change in the law reasonably call into question the judge’s independence and impartiality?⁶⁷

D. [§10.18] Fund-Raising

Operating a drug court often requires fund-raising. The role that judges may play in that fund-raising is limited by Rule 3.7 and its underlying rationale, which is that judges should not use their office to pressure potential donors into making contributions.⁶⁸ If the organization is a nonprofit, the judge may assist the organization in planning related to fund-raising.⁶⁹ To avoid any appearance of coercion, judges should not personally solicit funds.⁷⁰ Nor should the judge impose sentences on defendants that require them to contribute to an organization connected with the judge or the drug court over which the judge presides.⁷¹ A judge may serve on the board of the organization that conducts the fund-raising, but neither the judge nor any other person acting on behalf of the organization should rely on the judge’s office to encourage donations. It is appropriate for a judge’s name to appear on organizational letterhead used in a fund-raising solicitation, if comparable designations are used by other persons.⁷²

Judges should not personally solicit funds to support the drug court.

E. [§10.19] Political Activity and the Drug Court

Canon 4 merits attention from drug court judges because the drug court concept remains a fairly political one, and some candidates for public office have criticized drug courts. Canon 4 prohibits a judge or candidate for judicial office from engaging any political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.⁷³ Because of the political context, any response to these criticisms will itself appear to be political activity, implicating the restrictions in the Canon and associated rules. If the criticisms arise from a political campaign in which the drug court judge is not a candidate (*e.g.*, an election for district attorney or a different judicial position), the judge may respond to the criticisms, but must ensure that the response does not constitute public opposition to the candidate. It may seem less like a particular judge's involvement in political action if the drug court establishes a media relations operation outside of the judge's supervision. However, as long as the media relations operation remains within a part of the drug court sphere, the judge has a duty to ensure that the operation does not undertake political activity (as defined by Canon 4) that the judge himself or herself would be forbidden to undertake.

If the drug court judge is a candidate for judicial election and the judge's opponent in the election has made criticisms, the judge may respond to the criticisms.⁷⁴ The most difficult question in this respect is balancing the judge's appropriate defense of his or her past record with the prohibition under Rule 4.1 on statements that commit, or appear to commit, the judge to future decisions.⁷⁵ At minimum, the judge may both explain and defend the drug court model in general terms. The judge may not state an intention to decide future cases in a particular manner (*e.g.*, "I will enroll all drug offenders in treatment") unless the statement simply reflects an intention to follow established law. In 2002, the U.S. Supreme Court⁷⁶ struck down Minnesota's Canon of Judicial Conduct, on First Amendment grounds, that prohibited judicial candidates from expressing opinions on views on disputed legal and political issues. Since that decision, the lower federal courts have been divided on how far the First Amendment reaches in this area.⁷⁷

In states where the judge is permitted to discuss past cases, the drug court judge should take particular care to ensure that confidential information about drug court participants is not disclosed. Under no circumstance should a judge comment on a case pending before him or her.

V. [§10.20] CONCLUSION

Because of their nontraditional functioning and process, drug court operations provide the judge with the opportunity to unwittingly cross the bounds into ethical violations. Drug court judges must zealously ensure that their conduct meets the highest standards of ethical compliance. Drug court judges are frequently in the public limelight because of many human interest stories generated by the successes (and failures) in the drug court. Judges must be ever vigilant to situations and behaviors that might be perceived as not being impartial, independent, or judicious. Strict adherence to the Canons of Judicial Conduct can avoid any such claims.

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- 1 Eugene A. Wright, *Courtroom Decorum and the Trial Process*, 51 JUDICATURE 378, 382 (1968).
 - 2 This chapter is an update, distillation, and adaptation of the excellent publication by KAREN FREEMAN-WILSON, NAT'L DRUG COURT INST., *ETHICAL CONSIDERATIONS FOR JUDGES AND ATTORNEYS IN DRUG COURT* (2001).
 - 3 Canon 1 states: "A Judge Shall Uphold and Promote the Independence, Integrity and Impartiality of the Judiciary and Shall Avoid Impropriety and the Appearance of Impropriety." MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007).
 - 4 See MODEL CODE OF JUDICIAL CONDUCT R. 2.12 (2007).
 - 5 MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 3 (2007).
 - 6 NAT'L. ASS'N. OF DRUG COURT PROF'LS & BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, *DEFINING DRUG COURTS: THE KEY COMPONENTS* (1997) (delineating the 10 key components that are the basic elements that characterize effective drug court programs). These are the seminal standards by which drug court practitioners plan, implement, and enhance their drug courts. *Id.*
 - 7 *Id.* at 2.
 - 8 See, e.g., *In re Briggs*, 595 S.W.2d 270, 270 (Mo. 1980); *In re Bristol et. al.* (N.Y. Commission on Judicial Conduct, Nov. 4, 1992); *In re Hughes*, 874 So. 2d 746, 746 (La. 2004) (removing judge from office because he allowed convicted felons to frequent her courtroom, giving them access to confidential juvenile files, hired friends to work in the drug court, allowed staff to run her docket in her absence); JAMES J. ALFINI ET AL., *JUDICIAL CONDUCT AND ETHICS* § 6.03 (4th ed. 2007).
 - 9 Key Component #10: "Forging partnerships among drug courts, public agencies, and community-based organizations generates local support and enhances drug court program effectiveness." NAT'L. ASS'N. OF DRUG COURT PROF'LS & BUREAU OF JUSTICE ASSISTANCE, *supra* note 6, at 23.
 - 10 *Id.*
 - 11 On relationship between police and drug courts in education and training see NAT'L ASS'N OF DRUG COURT PROF'LS, U.S. DEP'T OF JUSTICE, *COMMUNITY POLICING AND DRUG COURTS/COMMUNITY COURTS PROJECT: A THREE YEAR PROGRESS REPORT* (2000).
 - 12 NAT'L. ASS'N. OF DRUG COURT PROF'LS & BUREAU OF JUSTICE ASSISTANCE, *supra* note 6, at 23.
 - 13 See MODEL CODE OF JUDICIAL CONDUCT R. 3.1, 3.7 (2007).
 - 14 See MODEL CODE OF JUDICIAL CONDUCT R. 2.10 (2007); *United States v. Microsoft Corp.* 253 F.3d 34, 34 (D.C. Cir. 2001) (deciding that judge must be removed from case due to his comments about case).
 - 15 MODEL CODE OF JUDICIAL CONDUCT R. 3.1(C).
 - 16 NAT'L. ASS'N. OF DRUG COURT PROF'LS & BUREAU OF JUSTICE ASSISTANCE, *supra* note 6, at 15.
 - 17 *In re Jones*, 581 N.W.2d 876, 876 (Neb. 1998).
 - 18 MODEL CODE OF JUDICIAL CONDUCT (1990).
 - 19 Cynthia Gray, *A Judge's Obligation to Report Criminal Activity* 18 JUDICIAL CONDUCT REPORTER 3 (1996).
 - 20 *Id.*
 - 21 See, e.g., *In re Esquiroz*, 654 So. 2d 558, 558 (Fla. 1995) (driving while impaired).
 - 22 *Matter of Blackman*, 591 A.2d 1339, 1339 (N.J. 1991). Judge Blackman argued that his attendance was an innocent mistake; he had no improper motive and had been friends with the defendant for many years. *Id.* The court was unpersuaded and stated: "The lesson is that a judge who attends a public or social event will be perceived as endorsing or supporting not only the event itself but also persons associated with the event." *Id.*
 - 23 See MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (2007).
 - 24 MODEL CODE OF JUDICIAL CONDUCT R. 3.3 (2007).
 - 25 For more information about releases from participants, see JEFFREY TAUBER ET AL., NAT'L DRUG COURT INST., *FEDERAL CONFIDENTIALITY LAWS AND HOW THEY AFFECT DRUG COURT PRACTITIONERS* (1999). See also CHAPTER 8 OF THIS JUDICIAL MANUAL.
 - 26 *In re Hughes*, 874 So.2d 746, 746 (La. 2004).
 - 27 *In re Fogan*, 646 So.2d 19, 19 (Fla. 1994).; *In re Marullo*, 692 So.2d 1019, 1019 (La. 1997).
 - 28 However, four jurisdictions have permitted judges to provide employment or other recommendations as long as the reference is based upon the personal knowledge of the judge. Alfini et al., *supra* note 8, at § 10.05A n. 147, § 2.07C (discussing the need for personal knowledge and the clarity of the 2007 rule changes).
 - 29 MODEL CODE OF JUDICIAL CONDUCT R. 2.3 (2007).
 - 30 *Id.*
 - 31 Decorum is addressed in MODEL CODE OF JUDICIAL CONDUCT R. 2.8 (2007).
 - 32 MODEL CODE OF JUDICIAL CONDUCT Canon 3B (1990).
 - 33 MODEL CODE OF JUDICIAL CONDUCT R. 2.9(A)(5) cmt. (2007).
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34 The states include Minnesota, Montana, Indiana, Idaho, and Arkansas. New York permits ex parte communications in drug courts by an administrative order.

35 SHANNON M. CAREY ET AL., NPC RESEARCH, EXPLORING THE KEY COMPONENTS OF DRUG COURTS: A COMPARATIVE STUDY OF 18 ADULT DRUG COURTS ON PRACTICES, OUTCOMES AND COSTS (2008), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/223853.pdf>.

36 *Briseno v. Superior Court*, 284 Cal. Rptr. 640, 640 (Cal. Ct. App. 1991).

37 *In re Anderson*, 814 P.2d 773, 773 (Ariz. 1991).

38 *United States v. Gonzales*, 765 F.2d 1393, 1393 (9th Cir. 1985); *People v. Smith*, 378 N.W.2d 384, 384 (Mich. 1985).

39 MODEL CODE OF JUDICIAL CONDUCT R. 3.5 (2007) prohibits the judge from using nonpublic information that is acquired in a judicial capacity for any purpose except those related to judicial duties.

40 See *State v. Noelle Bush*, Case #48-02 CF 6371-0, (October 15, 2002) (holding that open and public courtroom trumps federal confidentiality requirements). See generally *Argersinger v. Hamlin*, 407 U.S. 25, 25 (1972); *Gannett Co. Inc. v. DePasquale*, 43 NY2d 370, 370, *aff'd*, 443 US 368, 368 (1979).

41 For further information about confidentiality in drug court, see *infra* Ch. 9.

42 MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (2007). Also, due process requires that a judge possess neither actual nor apparent bias in favor of or against a party. *United States v. Ayala*, 289 F.3d 16, 27 (1st Cir. 2002) (holding that the standard is whether the facts, as asserted, would lead an objective reasonable observer to question the judge's impartiality); *Liteky v. United States*, 510 U.S. 540, 555 (1994). See, e.g., *United States v. Microsoft*, 253 F.3d 34, 117 (D.C. Cir. 2001) (finding that judge demonstrated bias by his comments to press while case was pending); *Young v. Track*, 324 F.3d 409, 423 (6th Cir. 2003) (finding that the court's comments and rulings did not show bias when they were based upon evidence acquired during proceedings).

43 *Alexander v. State*, 48 P.3d 110, 110 (Okla. 2002). *But see* *Wilkinson v. State*, 641 S.E.2d 189, 189 (Ga. App. 2006) (allowing the defendant to waive her ability to move for recusal of the drug court judge as part of her drug court contract).

44 MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(1) (2007) provides that a judge who has "personal knowledge of disputed evidentiary facts concerning the proceeding" shall disqualify himself or herself in that proceeding.

45 ALFINI ET AL., *supra* note 8, at § 4.05F.

46 *In re Jones*, 581 N.W. 2d 876, 876 (1998). For this and other misconduct, the judge was removed from office. *Id.*

47 MODEL CODE OF JUDICIAL CONDUCT (2007).

48 ALFINI ET AL., *supra* note 8, at § 9.02A, § 10.06B.

49 MODEL CODE OF JUDICIAL CONDUCT (2007).

50 MODEL CODE OF JUDICIAL CONDUCT (2007).

51 *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 224 (7th Cir. 1993).

52 MODEL CODE OF JUDICIAL CONDUCT (2007).

53 *In re Sanders*, 955 P.2d 369, 369 (Wash. 1998).

54 *Allen v. State*, 737 N.E. 741, 741 (Ind. 2000).

55 *In re Bonin*, 378 N.E.2d 669, 669 (Mass. 1978).

56 *Id.* at 685; *Alfini et al.*, *supra* note 8, at § 10.05D.

57 This concern was magnified by the significant publicity surrounding the judge's attendance at the lecture. ALFINI ET AL., *supra* note 8, at § 10.05D notes that "a photograph of the judge [with the lecturer] did, in fact, appear the next day in a Boston newspaper under the headline 'Bonin at benefit for sex defendants.'"

58 417 So.2d 950 (Fla. 1982).

59 See MODEL CODE OF JUDICIAL CONDUCT R. 2.10(D)-(E) (2007); *Alfini et al.*, *supra* note 8, at § 10.06E; *Office of Disciplinary Counsel v. Souers*, 611 N.E.2d 305, 305 (Ohio 1993) (imposing no sanction on judge who made public statements explaining a sentencing order).

60 See *Office of Disciplinary Counsel v. Ferreri*, 710 N.E.2d 1107, 1107 (Ohio 1999).

61 *In re Conrad*, 944 S.W.2d 191, 191 (Mo. 1997).

62 See *In re Rainaldi*, 722 P.2d 70, 70 (N.M. 1986) (disciplining a judge for referring clients to a DWI school he partially owned).

63 MODEL CODE OF JUDICIAL CONDUCT R. 3.4 (2007).

64 MODEL CODE OF JUDICIAL CONDUCT R. 3.7 (2007).

65 *In re Morvant*, 15 So. 3d 74, 74 (La. 2009). See also *In re Johnson*, 1 So. 3d 438, 438 (La. 2009).

66 COMMITTEE ON JUDICIAL ETHICS, CALIFORNIA JUDGES ASSOCIATION, OPINION No. 46, JUDICIAL PARTICIPATION IN ORGANIZATIONS AND GOVERNMENTAL BOARDS WHICH ADDRESS ISSUES INVOLVING THE ADMINISTRATION OF JUSTICE AND SOCIAL PROBLEMS IN THE COMMUNITY (1997).

67 MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007).

68 MODEL CODE OF JUDICIAL CONDUCT (2007).

69 MODEL CODE OF JUDICIAL CONDUCT R. 3.7(A)(1) (2007).

70 Rule 3.7(A)(2) of the Model Code of Judicial Conduct permits the judge to solicit contributions for non-profit entities from family members and other judges over whom the judge does not exercise supervisory authority. MODEL CODE OF JUDICIAL CONDUCT R. 3.7(A)(2) (2007).

71 *In re Morvant*, 15 So. 3d 74, 74 (La. 2009).

72 MODEL CODE OF JUDICIAL CONDUCT R. 3.7 cmt. 4 (2007).

73 MODEL CODE OF JUDICIAL CONDUCT Canon 4 (2007).

74 MODEL CODE OF JUDICIAL CONDUCT Canon 4 cmt. 8-9 (2007).

75 MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(13) (2007). Pledges, promises and commitments should be distinguished from statements of personal views or beliefs on legal and social issues, which are not prohibited.

76 *Republican Party v. White*, 536 U.S. 765, 765 (2002).

77 ALFINI ET AL., *supra* note 8, at § 11.08.