
**In re amendment of SCR 60.04(1)(g),
relating to ex parte communications
in treatment courts**

**SUPPORTING MEMORANDUM
RE PETITION 11-09**

The Director of State Courts hereby petitions the Supreme Court to amend SCR 60.04(1)(g) by adding a new provision regarding ex parte communications in treatment courts and similar problem-solving courts.¹

In 2010, the Director of State Courts Office, Office of Court Operations, convened an advisory committee of judges and clerks of circuit court to look at treatment court record-keeping and confidentiality of treatment court records. The committee's report recommended best practices to help courts strike an appropriate balance between the need for confidentiality for treatment records and the need for public accountability and open records in the criminal justice system.² The recommendations in that report have been adopted by the Planning and Policy Advisory Committee and its Effective Justice Strategies Subcommittee.

The treatment court committee also considered the role of the judge in treatment team meetings, where a multidisciplinary group of professionals meet regularly to discuss the participant's progress.³ Treatment team meetings are conducted off the record and outside the

¹ In 1997, the National Drug Court Institute (NDCI) published *Defining Drug Courts: The Key Components*, to define the work of the growing drug court movement and to set benchmarks for performance. This framework is commonly used to address drug use, intoxicated driving, juvenile drug use, and mental health problems. As used in this petition, the term "treatment courts" refers to courts that have a significant focus on the *Key Components*.

² *Wisconsin Treatment Courts: Best Practices for Record-keeping, Confidentiality & Ex Parte Information* (December 2011) is posted on the Wisconsin Court System website at <http://www.wicourts.gov/courts/programs/alternatives.htm>.

³ Treatment courts use a team approach, employing a collaboration of judges, prosecutors, defense counsel, probation and corrections, law enforcement, evaluators, local service providers, and the greater community. They usually employ a multi-phased treatment process consisting of stabilization (detoxification, assessment, education, and screening for other needs), intensive treatment (individual and group counseling, medication, and other therapies), and transition (social reintegration, employment and education, housing services, and treatment aftercare).

The treatment team has access to a wide range of information about the participant, including co-occurring problems such as mental illness, medical problems and HIV status, childhood

presence of the treatment court participant. The committee recommended that the Code of Judicial Conduct be amended to explicitly permit the judge to take part in these meetings and other information exchange without running afoul of the ethical prohibition on ex parte communications. The reaction among judges to this change has been uniformly favorable.⁴

The special role of the judge in treatment court

Regular treatment team meetings are standard practice for treatment courts, and the judge is seen as the leader of the treatment court team. Team members usually include representatives of the district attorney's office, probation and corrections, law enforcement, evaluators, service providers, and often a treatment court coordinator. The treatment team includes a representative from the public defender's office, although that office may not be counsel for every participant. In between meetings, the judge may speak with the treatment court coordinator or other members of the team about a participant's progress.

Because these interactions occur off the record and outside the presence of the treatment court participant, they are in tension with the ethical restriction on ex parte communications. Each participant typically signs a waiver agreeing that the judge may initiate and consider ex parte communications in conformance with the established protocols of the program. While this waiver provides informed consent and satisfies concerns about the substantive rights of the defendant, it only indirectly addresses the ethical obligations of the judge. Ongoing interaction with treatment team members should be clearly addressed by the Code of Judicial Conduct.

The ABA model rule and variations in other states

To address this problem, the 2007 ABA Model Code of Judicial Conduct added a comment to provide expanded latitude for judge's ex parte communications in therapeutic or problem-solving courts.

abuse, marital problems, homelessness, unemployment, etc. Information exchange among team members is expected to comply with federal regulations governing the confidentiality of alcohol and drug abuse patient records.

⁴ This recommendation has been discussed at meetings over the course of 2010-2011: at a breakout session at the 2010 Wisconsin Judicial Conference, at several meetings of the PPAC Effective Justice Strategies subcommittee, at the January 2011 Chief Judges' meeting, at the April 2011 meeting of the Wisconsin Association of Treatment Court Professionals, and at PPAC meetings in January and November 2011.

The ABA Model Rule of Judicial Conduct 2.9 states:

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: ...

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

*"Law" encompasses court rules as well as statutes, constitutional provisions, and decisional law.

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 treatment courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.

The Reporter's Notes to the 2007 ABA Model Code revision summarize the testimony that led to adoption of the comment:

[4] New comment dealing with problem-solving and therapeutic courts. The Commission heard a great deal of testimony about therapeutic or problem-solving courts. In these non-traditional courts that hear matters on an increasingly broad range of issues ranging from drugs to juvenile justice, domestic relations, and crime, judges communicate with parties, service providers (such as social workers), and others in ways that can be in tension with traditional rules governing ex parte communications. Several witnesses thus urged the Commission to create special rules for such courts. The Commission was reluctant to do so because therapeutic courts were too many and varied for the Commission to devise rules of general applicability. Instead, the Commission drafted this new Comment, which calls for special attention to the exception for ex parte communications authorized by law and notes that this exception enables individual jurisdictions to devise special rules for their therapeutic courts.

The Reporter's Notes recognize the wide variation in problem-solving and therapeutic courts and the need for individual jurisdictions to devise their own approach to these courts. One judge who served on the ABA commission has observed that the recommendation is meant to be a starting point for discussion and that local rules may permit what the Code otherwise forbids:

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.⁵

Accordingly, the states have taken a variety of approaches to their own judicial canons. The ABA comment has been adopted in substantially identical form by at least 11 states.^{6 7} The treatment court exception has been adopted as part of the rule rather than as a comment in Montana, West Virginia, and Idaho.⁸ Some courts tie the ethics rule to compliance with treatment program protocols⁹ or with local court rules.¹⁰ And some states have considered

⁵ Judge Louraine Arkfeld, Justice System Journal, *Ethics for the Problem-Solving Court Judge: the New ABA Code* (2007), <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/judicial&CISOPTR=161>.

⁶ See Arkansas Code of Judicial Conduct 2.9, comment 4; Colorado Code of Judicial Conduct 2.9, comment 4; Hawaii Code of Judicial Conduct 2.9, comment 4; Indiana Code of Judicial Conduct 2.9, comment 4; Iowa Code of Judicial Conduct 2.9, comment 4; Kansas Code of Judicial Conduct §601B 2.9, comment 4; Minnesota Code of Judicial Conduct 2.9, comment 4; Nevada Code of Judicial Conduct 2.9, comment 4; Utah Code of Judicial Conduct 2.9, comment 4; Washington Code of Judicial Conduct 2.9, comment 4; Wyoming Code of Judicial Conduct 2.9, comment 4.

⁷ In addition to Rule 2.9, comment 4, Wyoming created a separate set of *Rules Governing Judicial Participation in Court-Supervised Treatment Programs*. Rule 11 states: "Other than between treatment team members or as may occur in staffing sessions, the participating judge shall not engage in ex parte communications or contacts, and shall immediately report to the parties any unsolicited ex parte contacts. The participating judge shall not initiate factual or legal inquiries without the consent of all parties."

http://www.courts.state.wy.us/CourtRules_Entities.aspx?RulesPage=TreatmentPrograms.xml.

⁸ See Montana Code of Judicial Conduct Rule 2.10(A)(3); West Virginia Canons of Judicial Ethics, Canon 3(7)(f). Idaho Code of Judicial Conduct Canon 3B(7)(f) specifically permits ex parte communications at "staffing" and adds a prohibition against the judge subsequently presiding over sentencing, probation revocation, or termination from the program.

⁹ Maryland Code of Judicial Conduct 16-813, Rule 2.9(a)(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."

creating a special ethical rule for treatment courts but have not done so, relying instead on the written waivers.¹¹

The proposed rule for Wisconsin

The treatment court committee recommends that Wisconsin courts follow those states that address this as an exception to the ex parte rule and not simply as a comment, to provide additional protection for the judge. The Wisconsin code currently provides:

SCR 60.04. A judge shall perform the duties of judicial office impartially and diligently....

(1) In the performance of the duties under this section, the following apply to adjudicative responsibilities: ...

(g) A judge shall accord to every person who has a legal interest in a proceeding, or to that person's lawyer, the right to be heard according to law. A judge may not initiate, permit, engage in or consider ex parte communications concerning a pending or impending action or proceeding except that: ...

5. A judge may initiate, permit engage in or consider ex parte communications when expressly authorized by law.

This petition proposes to add a new provision relating to treatment courts:

6. A judge may initiate, permit, engage in or consider ex parte communications knowingly waived by a participant when serving on therapeutic or problem-solving courts, mental health courts, or treatment courts. In this capacity, judges may assume a more interactive role with participants, treatment providers, probation officers, social workers, and others.

¹⁰ See 2009 comment to Tennessee Sup. Ct. R. 10, Code of Judicial Conduct, Canon 3(b)(7)(e), providing that local rules of court may authorize ex parte communications in a problem-solving court, thereby making those communications “expressly authorized by law.”

¹¹ In 2008, the Bureau of Justice Assistance Drug Court Clearinghouse at American University asked drug court coordinators in the various states whether their courts had adopted the ABA model rule. The BJA survey comments note that in Alaska, the Commission on Judicial Conduct took the position that “expressly authorized by law” would be “interpreted to cover the therapeutic courts through the agreements the participants sign permitting alternative court procedures.” In California, a decision was made to rely on written waivers. The survey is found at http://www.american.edu/spa/jpo/customcf/get.cfm?jpo_collection=1&doc=FAQ-Ex-Parte-Communications-in-Drug-Court-Problem-Solving-Court-Matters-and-Specifically-Position-of-States-on-comment-4-under-Rule-2-9.

Although the Wisconsin committee looked at the work of treatment courts specifically, the proposed rule follows the ABA model and other states by referring to “therapeutic or problem-solving courts, mental health courts, or treatment courts.” The rule is meant to be broad enough to include other courts such as veterans’ courts and teen courts, so that judges are able to take initiative and develop new approaches to these issues. The Reporter’s Notes to the ABA Model Code recognize the wide variation in problem-solving and therapeutic courts and the need for individual jurisdictions to devise special rules for these courts.

Creation of this exception does not result in any loss of rights by the treatment court participant. Participation in treatment court is voluntary and requires the participant to agree to a number of conditions in order to complete the program successfully. Each participant already signs a waiver agreeing to ex parte communication among treatment team members and the judge, and the requirement of knowing waiver is expressly included in the new rule.

Approximately 40 treatment courts are currently operating in Wisconsin. The judges of these courts have worked closely with other professionals in their communities to develop effective coordinated approaches to these often intractable problems. This rule affirms that judges may properly work a part of a team and communicate as needed to provide the ongoing interaction, monitoring, and control needed for success.

Respectfully submitted this ____ day of _____, 2011.

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