



The Commonwealth of Massachusetts
Committee for Public Counsel Services
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To: Committee to Study the Code of Judicial Conduct
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Dear Committee Members,

The Chief Counsel and staff of the Committee for Public Counsel Services offer the following suggestions regarding the proposed changes to the Code of Judicial Conduct. Thank you for extending the time to comment on the proposed changes to the Code. We are also aware of the comments being submitted by the Massachusetts Association of Criminal Defense Lawyers, and we join those suggestions.

CANON 2:

RULE 2.3

Bias, Prejudice, and Harassment

We suggest that Comment 2 to this Rule be amended to include sex, gender identity, religion, national origin, ancestry, disease or disability, age, sexual orientation, marital status, or socioeconomic status as additional characteristics which could not properly be connected with crime, so that Comment 2 would read:

“[2] Examples of manifestations of bias or prejudice include, but are not limited to: epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; improper suggestions of connections between race, ethnicity, *sex, gender identity, religion, national origin, ancestry, disease or disability, age, sexual orientation, marital status, or socioeconomic status*, nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can

convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.”

RULE 2.6

Ensuring the Right to Be Heard

We suggest that Comment 2 to this Rule be amended in part (7) to add consideration of emotional abuse as well, so that Comment 2 would read:

[2] Judicial participation may play an important role in the settlement of disputes, but the judge should be careful that efforts to further settlement do not undermine any party’s right to be heard according to law.* The judge should keep in mind the effect that the judge’s participation in settlement discussions may have, not only on the judge’s own views of the case, but also on the perceptions of the lawyers and the parties if the case remains with the judge after settlement efforts are unsuccessful. A judge’s participation in settlement discussions shall be conducted in accordance with applicable law.* Other factors that a judge should consider when deciding upon an appropriate settlement practice for a case include: (1) whether the parties have requested or voluntarily consented to a certain level of participation by the judge in settlement discussions, (2) whether the parties and their counsel are relatively sophisticated in legal matters, (3) whether the case will be tried by the judge or a jury, (4) whether the parties participate with their counsel in settlement discussions, (5) whether any parties are self-represented, (6) whether the matter is civil or criminal, and (7) whether there is a history of *physical or emotional violence or abuse* between the parties. See Rule 2.9(A)(4).

RULE 2.9

Ex Parte Communications

The proposed amendment to Canon 2, Rule 2.9(A) (2) of the Massachusetts Code of Judicial Conduct would permit judges to “engage in ex parte communication in specialty courts, sessions, or programs, as authorized by law.” We respectfully object to this unprecedented categorical exception to the long-established prohibition on ex parte communications, which would impact many indigent parties during court proceedings at which they are unrepresented.

“The prohibition against ex parte communications is . . . a function of the general due process principle that an accused should have notice of the charges and the evidence against him

so that he can effectively answer with his own evidence and arguments.” D’Acquisto v. Washington, 640 F. Supp. 594, 621 (N.D. Ill. 1986) (citations omitted). “[E]x parte communications shadow the impartiality, or at least the appearance of impartiality, of any judicial proceeding,” and “may, in some circumstances, constitute a deprivation of due process of law.” Grieco v. Meachum, 533 F.2d 713, 719 (1st Cir. Mass. 1976). “Absent [a] compelling justification, ex parte proceedings are anathema in our system of justice.” United States v. Thompson, 827 F.2d 1254, 1258-1259 (9th Cir. 1987). This is especially true in Massachusetts, where our State Constitution establishes that “[i]t is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.” Art. 29, Massachusetts Declaration of Rights.

“[W]here a liberty interest is implicated in problem-solving-court proceedings, an individual’s due process rights must be respected.” State v. Shambley, 281 Neb. 317, 328 (2011) (citation and internal quotation marks omitted). Permitting unfettered ex parte communications in all specialty courts so long as they are authorized by some provision of law cannot be squared with the requirements of due process. Allowing such ex parte communications raises “fundamental fairness” and “due process concerns” because it prevents the excluded defendant from having an “opportunity effectively to rebut adverse allegations.” Duro v. Duro, 392 Mass. 574, 580 (1984). Under the proposed rule, a judge could receive highly prejudicial information about a defendant, without the defendant or counsel for the defendant being present and able to provide rebuttal or offer an explanation. The judge could then later preside over a sanction hearing, and the defendant would not even be informed that the judge had received this prejudicial information during an ex parte proceeding, let alone have a meaningful opportunity to respond to it. This is precisely what the traditional ban on ex parte communications is intended to prevent. We therefore urge the Committee to omit the proposed provision permitting ex parte communications in specialty courts.

Even if some form of ex parte communication were proper, the proposed provision permitting ex parte communications in specialty courts is excessively broad in three ways. First, it does not specify the types of specialty courts where ex parte communications will be permitted. There are presently two primary types of specialty courts in Massachusetts: (1) problem-solving or therapeutic courts, like drug courts, homeless courts, veterans’ courts, and mental-health courts; and (2) subject-matter courts, like the firearm sessions in the Boston Municipal Court and the Lynn District Court. If there is any justification for ex parte

communications in specialty courts, that justification only applies in problem-solving courts, not in subject-matter courts. This limitation is not in the proposed canon.

Second, the proposed amendment does not specify what kinds of ex parte communications will be permitted. In a therapeutic specialty court, “the judge’s role is less that of a traditional ‘umpire,’ than a problem-solver, who coordinates court proceedings with one or more parties and a range of service providers, including social workers, psychologists, drug, alcohol, employment, or family counselors, and others.” Brian D. Shannon, “Specialty Courts, Ex Parte Communications, and the Need to Revise the Texas Code of Judicial Conduct,” 66 Baylor L. Rev. 127, 129 (2014) (citation and internal quotation marks omitted). In this context, the only ex parte communications that can possibly be justified are those communications that are needed for the judge to assist in coordinating the defendant’s treatment. There is no justification for a judge’s engaging in ex parte communications with a prosecutor or probation officer in order to determine whether or to what degree a defendant should be sanctioned for failing to comply with probationary conditions or other legal obligations.

Third, the proposed provision does not specify *when* a judge can engage in ex parte communications in a specialty court. Even assuming a need for a judge to have ex parte communications with the defendant’s treatment team in order to coordinate treatment, there is no justification for the judge to engage in ex parte communications when deciding whether to sanction the defendant.

We also object to the proposed provision because it fails to protect defendants’ due process rights by ensuring that judges who have engaged in ex parte communications do not later preside over hearings when defendants have been alleged to have violated their conditions of probation. As written, the proposed provision would permit a judge to receive information that would be inadmissible at a probation violation hearing, rely on that information in making therapeutic decisions, and then decide whether the defendant has violated a probationary condition at a hearing where this inadmissible information is highly prejudicial to the defendant’s interests. This cannot be squared with the requirements of due process.

Even ardent supporters of specialty courts have recognized that in such courts, a “judge is no longer merely a neutral fact-finder, but an active participant in proceedings.” Greg Berman & John Feinblatt, “Judges and Problem Solving Courts” (2002), available at <http://www.courtinnovation.org/sites/default/files/JudgesProblemSolvingCourts1.pdf> (last

visited May 15, 2015). Our “adversarial model” is based on the assumption that “there will be a decision by a neutral and detached judge.” Guardianship of L.H., 84 Mass. App. Ct. 711, 729-730 (2014) (Agnes, J., dissenting). When a probationer is alleged to have violated a condition of probation, due process requires “disclosure [to the defendant] of the evidence against him or her” and that “a ‘neutral and detached’ hearing body” make the determination of whether the probationer actually violated the condition and, if so, what sanction should be imposed. Commonwealth v. Wilcox, 446 Mass. 61, 66 (2006) (citation omitted). See also Gosha v. State, 931 N.E.2d 432, 434 (Ind. Ct. App. 2010) (holding that defendant “must be accorded procedural due process before the court may terminate his participation in the Drug Court Program”); State v. Varnell, 137 Wn. App. 925, 929 (Wash. Ct. App. 2007) (“Drug court participants have a due process right to have factual disputes resolved by a neutral factfinder” (citation and internal quotation marks omitted)). “Requiring judges to take on the perspective of an advocate is contrary to the judge’s proper role as a neutral arbiter.” Commonwealth v. Dwyer, 448 Mass. 122, 144 (2006).

“Because of their nontraditional functioning and process, drug court operations provide the judge with the opportunity to unwittingly cross the bounds into ethical violations. . . . Judges must be ever vigilant to situations and behaviors that might be perceived as not being impartial, independent, or judicious.” Douglas B. Marlowe & William G. Meyer, The Drug Court Judicial Benchbook at 209 (Nat’l Drug Court Institute 2011). The proposed provision allowing for ex parte communications will create an unacceptable risk that judges will inadvertently violate other proposed rules of judicial conduct. See, e.g., Canon 2, Rule 2.6 (“A judge shall accord every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law”); Canon 2, Rule 2.11 (requiring that “judge shall disqualify himself or herself” where judge has “personal knowledge of facts that are in dispute in the proceeding”). We therefore recommend that the proposed provision relating to ex parte communications in specialty courts be omitted.

If the Committee rejects this recommendation, however, we urge the adoption of a rule that would permit judges to participate in the therapeutic mission of specialty courts, while at the same time ensuring that they are able to act as neutral and detached fact finders and decision makers. This rule would also ensure that sanctions are not imposed on defendants without disclosure of the evidence on which the judge’s decision to sanction is based. Our proposed

alternative rule is based on Idaho Code of Judicial Conduct, Cannon 3(b)(7)(f) (2013), which allows a judge presiding over a “problem solving court” to “initiate, permit, or consider ex parte communications with members of the problem solving court team at staffings” but also establishes that a judge who has received ex parte communication under these circumstances “shall not preside over any subsequent proceeding to terminate [the] defendant or juvenile from the problem solving court, probation violation proceeding, or sentencing proceeding in that case.” We also urge the inclusion of a provision permitting the defendant to assent to a judge’s presiding over a sanction proceeding, even though the judge has received ex parte communications. This assent provision would promote the efficient use of judicial resources by not requiring recusal when the defendant is convinced that the judge can serve as a neutral arbiter despite having received ex parte communications.

If the current proposed Cannon 2.9(A)(2) is not omitted in its entirety, we request that it be replaced with the following:

A judge presiding over a therapeutic specialty court (such as a drug court, homeless court, mental-illness court, or veterans’ court) may initiate, permit, or consider ex parte communications with members of the specialty court team at staffing conferences or meetings, or by written documents provided to all members of the specialty court team. The judge shall make a written record of any ex parte communications he or she receives under this Rule. A judge who has received ex parte communication while presiding over a therapeutic specialty court shall not preside over any subsequent proceeding convened in order to determine whether or to what degree to impose any type of sanction on the defendant. A defendant may consent to have a judge preside over a sanction proceeding, even though that judge has received ex parte communications under this Rule. Such consent, however, may only be made after the defendant has had an opportunity to consult with counsel, and the judge has disclosed to the defendant and counsel all ex parte communications he or she has received.

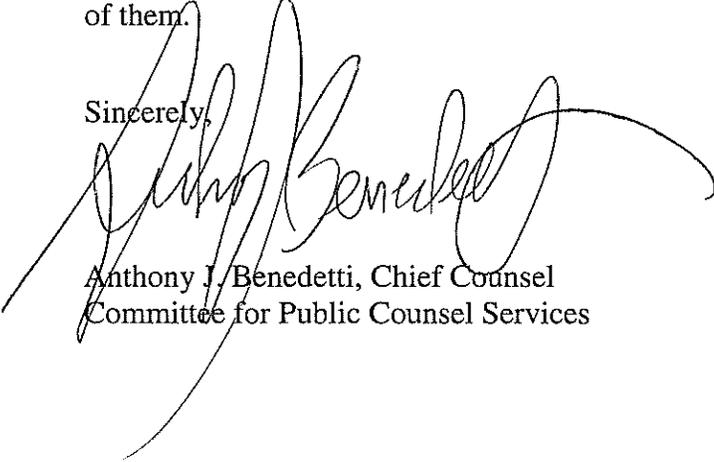
CANON 3

RULE 3.7 Participation in Legal, Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities

We suggest amending Comment 6 to this Rule by adding the following sentences to the end of that Comment: *“Judges should not, however, encourage lawyers taking court appointments pursuant to S.J.C. Rule 3:10 to take such cases for no or reduced fee. Such encouragement would be coercive for lawyers who accept appointments from that court at hourly rates set forth under General Laws chapter 211D.”* Lawyers should not feel compelled to accept free or reduced-fee appointments in order to remain eligible to receive appointments compensated at the rates set by statute.

We are grateful for the opportunity to submit these comments and for your consideration of them.

Sincerely,



Anthony J. Benedetti, Chief Counsel
Committee for Public Counsel Services