



**AMERICAN UNIVERSITY**  
W A S H I N G T O N , D C

JUSTICE PROGRAMS OFFICE

SCHOOL OF PUBLIC AFFAIRS

**BUREAU OF JUSTICE ASSISTANCE (BJA) DRUG COURT  
CLEARINGHOUSE**

**FREQUENTLY ASKED QUESTIONS SERIES: Ex parte communications in drug court/  
problem solving court matters and, specifically, position of states on Comment 4 under Rule 2.9 "Ex  
Parte Communications" of the 2007 ABA Model Code of Judicial Conduct.**

Subject: Ex parte communications in drug court/ problem solving court matters and,  
specifically, states' position on Comment 4 under Rule 2.9 "Ex Parte  
Communications" of the 2007 ABA Model Code of Judicial Conduct.  
From: BJA Drug Court Clearinghouse  
Date: November 17, 2008 (rev.)

Judge Joe Kisner of the 18th Judicial District Court (Division 17) in Wichita, Kansas, has requested information on how other states are dealing with the issue of ex parte communications in drug court and other problem solving court matters and, specifically, whether any states have taken a position on Comment 4 under Rule 2.9 "Ex Parte Communications" of the 2007 ABA Model Code of Judicial Conduct which is appended.

Judge Kisner's inquiry is as follows:

Question

The Kansas Supreme Court is currently considering the adoption of the 2007 ABA Model Code of Judicial Conduct. The Kansas Commission appointed to review the Model Code and make recommendations to the Court has proposed deleting Comment 4, under Rule 2.9 Ex Parte Communications. This comment states:

"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, probations officers, social workers, and others."

I am requesting information on how other states are dealing with this and related ethical issues faced by judges in problem solving courts. I would specifically like to know if other Supreme Courts have adopted the language in Comment 4 of Rule 2.9 as proposed in the Draft, if they have altered the language, deleted the language or otherwise addressed the issue of such ex parte communications.

Respondents were asked to indicate:

- (1) whether your Supreme Court has taken -- or is considering -- a position (adopted, deleted or other position) on Comment 4 under Rule 2.9 "Ex Parte Communications" of the 2007 ABA Model Code of Judicial Conduct; and, if your Supreme Court has taken or is

considering a position on the Comment, the position it has taken or issues that are currently being addressed; and/or

- (2) if your Supreme Court has not at this point considered the Comment, any comments you have on the issue.

[Judge Kisner's inquiry was a follow-up to a more general inquiry received in April 2008 from Norma Jaeger, State Drug Court/Problem Solving Court Coordinator for Idaho regarding the issue of potential violation of Ex Parte Communication prohibitions which was of immediate concern to the courts in Idaho regarding drug court staffings in which both the prosecutor and defense counsel weren't present. Responses to this FAQ were submitted from the following X states: Connecticut, Kentucky, New Jersey, New York, and Vermont and are reported in a separate FAQ memo.]

## **RESPONSES:**

### **ALASKA**

**Marla N. Greenstein**  
**Executive Director**  
**Alaska Commission on Judicial Conduct**  
**mgreenstein@acjc.state.ak.us**

Alaska has not adopted any new language to our Code, in our version of the 1990 Model Code, the language that allows ex parte communications if expressly authorized by law is interpreted to cover the therapeutic courts through the agreements that the participants sign permitting alternative court procedures.

### **ARKANSAS**

**Larry Brady**  
**Administrative Office of the Courts**  
**Larry.Brady@arkansas.gov**

The Arkansas Supreme Court has just begun its consideration of the new Code. I will pass on your question to the appropriate personnel and update you on what occurs.

Update: October 17, 2008: The Arkansas Supreme Court has posted a proposed version of the new code for comment. Below is an excerpt relating to Rule 2.9.

#### **SUPREME COURT OF ARKANSAS**

**No. 08-924**

**IN RE: ARKANSAS BAR  
ASSOCIATION PETITION TO  
AMEND CODE OF JUDICIAL  
CONDUCT**

**Opinion Delivered: 10-2-08**

**PER CURIAM**

The American Bar Association has proposed a new model code of judicial conduct, the 2007 American Bar Association Code of Judicial Conduct ("2007 ABA Code"), and each state is asked to consider its adoption. This court is considering whether the 2007 ABA Code should be adopted in Arkansas requested FREQUENTLY ASKED QUESTIONS SERIES: Ex parte communications in drug court/ problem solving court matters and, specifically, position of states on Comment 4 under Rule 2.9 "Ex Parte Communications" of the 2007 ABA Model Code of Judicial Conduct. BJA Drug Court Clearinghouse. American University. November 17, 2008. 2

that the Arkansas Bar Association review it and make a report to the court. The Arkansas Bar Association created the Task Force on the Code of Judicial Conduct and appointed the following members: Professor Howard Brill of Fayetteville, Chair, Hon. Kathleen Bell of Helena, Hon. Ellen Brantley of Little Rock, Laurie Bridewell, Esq., of Lake Village, Michael Crawford, Esq., of Hot Springs, Don Elliott, Jr., Esq., of Fayetteville, Frances Fendler, Esq., of Little Rock, Hon. John C. Finley, III of Ashdown, Donis Hamilton, Esq., of Paragould, Hon. Eugene Harris of Little Rock, Hon. Leon Jamison of Pine Bluff, James Simpson, Esq., of Little Rock, Hon. Kim Smith of Fayetteville, Hon. Gordon Webb of Harrison, Patrick Wilson, Esq., of Little Rock, and Hon. Ralph Wilson of Osceola.

1 Three editorial changes have been made in the Report that is being published for comment: In the Application Section, (I)(B), the terms “justice of the peace” and “court commissioner” have been deleted. In the Terminology Section, a Comment has been added with reference to the term “judicial candidate,” pointing out that Arkansas does not have retention elections and appointments only arise in limited contexts. In Rule 4.2 (B), we have inserted the term “judicial candidate” in the rule so that it reads, “judicial candidate in a public election, “ and clarified the Comment.

The Task Force worked on this project for over nine months and submitted its report to the Arkansas Bar Association House of Delegates on June 14, 2008. The House of Delegates approved the report and directed that it be presented to the court. On August 7, 2008, the Arkansas Bar Association filed a petition with the court to adopt the 2007 ABA Code, as revised by the Arkansas Bar Association, to replace the Arkansas Code of Judicial Conduct, as amended, which was adopted in 1993. The petition is now before the court. We thank the Arkansas Bar Association and especially the members of the Task Force for their work on this project.

To assist our deliberations, we solicit comments from the bench and bar. We have appended the petition and exhibits to this *per curiam* order and publish them for comment. Exhibit “A” is the Report containing the proposed Arkansas code, Exhibit “B” is a comparison of the proposed Arkansas code with the 2007 ABA Code, and Exhibit “C” is a comparison of the proposed Arkansas code with the current Arkansas Code of Judicial Conduct. Comments should be made in writing before January 1, 2009, and they should be addressed to: Leslie W. Steen, Clerk, Supreme Court of Arkansas, Attn.: Code of Judicial Conduct, Justice Building, 625 Marshall Street, Little Rock, Arkansas 72201.

**IN THE SUPREME COURT OF ARKANSAS  
ARKANSAS BAR ASSOCIATION PETITIONER  
IN RE: CODE OF JUDICIAL CONDUCT  
PETITION**

The Arkansas Bar Association, at the direction of its House of Delegates, and acting through its President, Rosalind M. Mouser, Past President Richard L. Ramsay, and by chair of its Task Force on the Code of Judicial Conduct, Howard Brill, petitions the Court to revise the Code of Judicial Conduct of the Commission and to adopt the rule set out in Exhibit “A” attached hereto.

1. The existing Arkansas Code of Judicial Conduct was adopted by PER CURIAM order on July 5, 1993.
2. At the request of the Court, Petitioner Arkansas Bar Association then President James D. Sprott and then President-Elect Richard L. Ramsay appointed its Task Force on Code of Judicial Conduct in May, 2007 to review the 2007 American Bar Association Code of Judicial Conduct.
3. The Task Force, comprised of eight judges and eight lawyers, met on several occasions over a nine month period, completed its assignment, and submitted its Report the to the Arkansas Bar Association House of Delegates on June 14, 2008. A copy of the Report is attached as Exhibit “A”.
4. For the Court’s convenience a Comparison of the House of Delegates Proposal to the American Bar Association Model Code (February 2007) is attached as Exhibit “B”, and the Comparison of the House of Delegates Proposal to the existing Arkansas Code of Judicial Conduct (1993) is attached as Exhibit “C”.

5. The House of Delegates at its meeting on June 14, 2008 adopted the Report from the Task Force and asked that it be presented to the Court.

WHEREFORE, Petitioner, the Arkansas Bar Association, asks the Court to exercise its constitutional authority to adopt the Code of Judicial Conduct rules and revisions and direct the policy and guideline changes as set out in Exhibits "A", "B", and "C".

ARKANSAS BAR ASSOCIATION

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Rosalind M. Mouser  
President

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Richard L. Ramsay  
Immediate Past President

.....

**RULE 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:***

***(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:***

***(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and***

***(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.***

***(2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.***

***(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.***

***(4) [DELETED]***

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

***(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.***

***(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.***

***(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.***

**COMMENT**

FREQUENTLY ASKED QUESTIONS SERIES: Ex parte communications in drug court/ problem solving court matters and, specifically, position of states on Comment 4 under Rule 2.9 "Ex Parte Communications" of the 2007 ABA Model Code of Judicial Conduct. BJA Drug Court Clearinghouse. American University. November 17, 2008.

*[1] To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.*

*[2] Whenever the presence of a party or notice to a party is required by this Rule, it is the party's lawyer, or if the party is unrepresented, the party, who is to be present or to whom notice is to be given.*

*[3] The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this Rule.*

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

*[5] A judge may consult with other judges on pending matters, but must avoid ex parte discussions of a case with judges who have previously been disqualified from hearing the matter, and with judges who have appellate jurisdiction over the matter.*

*[6] The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.*

*[7] A judge may consult ethics advisory committees, outside counsel, or legal experts concerning the judge's compliance with this Code. Such consultations are not subject to the restrictions of paragraph (A)(2).....*

## **CALIFORNIA**

**Judge Peggy Hora (Ret.)**  
Alameda County (Haywood), California  
peggyhora@sbcglobal.net

No special rule in California. We get a specific written waiver.

## **DELAWARE**

**Hon. Richard Gebelein**  
(Former Drug Court Judge)  
New Castle County (Wilmington), Delaware  
Richard.Gebelein@state.de.us

Delaware Supreme Court hasn't yet adopted the new Code and therefore not adopted 2.9

## **IDAHO**

**Chief Justice Daniel Eismann**  
Supreme Court of Idaho  
deismann@idcourts.net

The Idaho Supreme Court recently amended Canon 3 to add two exceptions to the prohibition against ex parte communications. They are as follows:

**(e) During a scheduled court proceeding, including a conference, hearing, or trial, a judge may initiate, permit, or consider communications dealing with substantive matters or issues on the merits of the case in the absence of a party who had notice of the proceeding and did not appear.**

**(f) A judge presiding over a criminal or juvenile problem solving court may initiate, permit, or consider ex parte communications with members of the problem solving court team at staffings\*, or by written documents provided to all members of the problem solving court team. A judge who has received any such ex parte communication regarding the defendant or juvenile while presiding over a case in a problem solving court shall not preside over any subsequent proceeding to terminate that defendant or juvenile from the problem solving court, probation violation proceeding, or sentencing proceeding in that case.**

We also amended the definitions section to add the following definition of “staffings” used in subsection (f):

“Staffing” means a regularly scheduled, informal conference not occurring in open court, the purpose of which is to permit the presiding judge and others, including counsel, to discuss a participant’s progress in the problem solving court, treatment recommendations, or responses to participant compliance issues.

Subsection (e) applies to those situations in which one party, such as the prosecuting attorney, does not appear for problem solving court proceedings. It also applies to other court proceedings, including oral arguments before the Supreme Court, where one party does not appear.

**Michael Henderson**  
**Legal Counsel**  
**Idaho Supreme Court**  
**mhenderson@idcourts.net**

The Idaho Supreme Court recently amended our Code of Judicial Conduct in this order:  
<http://www.iscidaho.gov/ExParteCommunicationsAug08.pdf>

### **IN RE: IDAHO CODE OF JUDICIAL CONDUCT ORDER AMENDING IDAHO CODE OF JUDICIAL CONDUCT**

The Court having reviewed a recommendation from the Administrative Conference with regard to ex parte communications in problem solving court proceedings, and being fully informed;

NOW, THEREFORE, IT IS HEREBY ORDERED, that Canon 3B(7) of the Idaho Code of Judicial Conduct be amended as follows:

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. 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 except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge; .

During a scheduled court proceeding, including a conference, hearing, or trial, a judge may initiate, permit, or consider communications dealing with substantive matters or issues on the merits of the case in the absence of a party who had notice of the proceeding and did not appear.

A judge presiding over a criminal or juvenile problem solving court may initiate, permit, or consider ex parte communications with members of the problem solving court team at staffings\*, or by written documents provided to all members of the problem solving court team. A judge who has received any such ex parte communication regarding the defendant or juvenile while presiding over a case in a problem solving court shall not preside over any subsequent proceeding to terminate that defendant or juvenile from the problem solving court, probation violation proceeding, or sentencing proceeding in that case.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law\* to do so.

IT IS FURTHER ORDERED, that the Idaho Code of Judicial Conduct be amended by the addition of the following definition to the Terminology section of the Code, following the definition of "Senior judge":

**"Staffing"** means a regularly scheduled, informal conference not occurring in open court, the purpose of which is to permit the presiding judge and others, including counsel, to discuss a participant's progress in the problem solving court, treatment recommendations, or responses to participant compliance issues.

IT IS FURTHER ORDERED, that this amendment shall be effective on the 4<sup>th</sup> day of August, 2008.

DATED this \_4th\_ day of August, 2008.

By Order of the Supreme Court

\_\_\_\_\_/s/ Daniel T. Eismann Chief Justice  
ATTEST: /s/ Clerk

[article in *The Advocate* (Official publication of the Idaho State Bar), September 2008]

## IDAHO COURTS

### Ex PARTE COMMUNICATIONS-AOAPTING AN AOVERSARIAL RULE TO THE

FREQUENTLY ASKED QUESTIONS SERIES: Ex parte communications in drug court/ problem solving court matters and, specifically, position of states on Comment 4 under Rule 2.9 "Ex Parte Communications" of the 2007 ABA Model Code of Judicial Conduct. BJA Drug Court Clearinghouse. American University. November 17, 2008. 7

## PROBLEM-SOLVING SETTING

Michael Henderson

*Legal Counsel, Idaho Supreme Court*

The Supreme Court recently addressed an issue that highlights the special nature of problem-solving courts. The prohibition on ex parte communications with judges is essential to the fairness of adversarial proceedings. Canon 3(b)(7) of the Idaho Code of Judicial Conduct states 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," with certain specified exceptions. In drug courts, however, judges sometimes attend staffings where the prosecutor, defense counsel, or both are absent. Staffings are informal meetings, usually occurring before a regular drug court session, in which a participant's progress and treatment are reviewed and discussed. The presence of both counsel is preferred; the guidelines adopted by Idaho's Drug Court and Mental Health Court Coordinating Committee identify the participation of the prosecution and defense counsel as one of the "10 Key Components" of successful drug court programs. But in some cases, the prosecutor or defense counsel may choose not to attend the staffing. Can a judge then participate in the staffing without violating the Canons?

The issue was addressed in an opinion issued by the Idaho Judicial Council on March 18, 2008. The opinion stated that "e-mails, telephone calls or written communications from counselors, drug court coordinators, [or] prosecutors done in an ex parte matter are all prohibited except for those limited situations permitted by the Canons." Further, it said, "If the judge attends the staffing, all parties must be represented at the

*48 The Advocate*, September 2008  
staffing."

So Idaho was confronted with a problem that has arisen in other states as well: If counsel does not attend all court sessions and staffings, how can judges participate as part of the problem solving court team, while adhering to the requirements of the Canons? The ABA Model Code of Judicial Conduct has recognized this issue by adding the following comment to the rule on ex parte communications:

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.

ABA Model Code of Judicial Conduct, Rule 2.9, Comment [4].

An added element of concern was possible infringement of a defendant's rights when a judge who had been exposed to ex parte communications presides over subsequent proceedings involving the termination of the defendant from a problem-solving court, a probation revocation proceeding, or sentencing. This was of particular relevance in view of the recent decision in *State v. Rogers*, 144 Idaho 738, 170 P.3d 881 (2007), holding that a participant in a drug court who had not yet been sentenced, and whose plea of guilty was a condition of his acceptance to drug court, was entitled to a hearing on the issue of termination from the drug court program, at which he would have essentially the same due process protections afforded in parole and probation revocation hearings under *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

The Idaho Supreme Court sought a wide range of views on how to address this problem. The Drug Court and Mental Health Court Coordinating Committee, judges throughout the state, trial court administrators, prosecuting attorneys, defense lawyers, and many others directly involved in problem-solving courts were consulted. On May 5, 2008, the Court issued an order permitting drug court judges to initiate, permit or consider ex parte communications with members of the drug court team at drug court appearances or staffings. The order was to be in effect for 90 days while the Court gave further consideration to the issue. On August 4, 2008, the Court issued an order amending Canon 3(B)(7) by adding two new provisions. The first provision clarifies the exparte prohibition by stating that during a scheduled court proceeding, a judge

FREQUENTLY ASKED QUESTIONS SERIES: Ex parte communications in drug court/ problem solving court 8  
matters and, specifically, position of states on Comment 4 under Rule 2.9 "Ex Parte Communications" of the 2007  
ABA Model Code of Judicial Conduct. BJA Drug Court Clearinghouse. American University. November 17,  
2008.

may initiate, permit, or consider communications dealing with substantive matters or issues in the absence of a party who had notice of the proceeding and did not appear. (This is essentially consistent with the Judicial Council's opinion of March 18, which stated, "If a matter is regularly scheduled for hearing and the party's attorney does not appear, then the Court should follow its usual procedures in determining whether to proceed or reschedule the matter.")

The second provision states that a judge presiding over a criminal or juvenile problem-solving court may initiate, permit or consider ex parte communications with members of the problem-solving court team at staffings, as well as written documents that are provided to all members of the problem solving court team. It goes on to state, however, that a judge who has received ex parte communications regarding a defendant or juvenile while presiding over a problem-solving court shall not preside over termination proceedings, probation violation proceedings or sentencing in that case.

The Court has resolved to continue to encourage and seek ways to insure the participation of counsel for all parties in problem-solving court staffings and proceedings. But in those instances where this does not occur, the new provisions will provide guidance to the courts. The entire process by which this issue has been addressed—a difficulty arising from a rule intended for adversarial proceedings, the soliciting and consideration of views from all involved, and the fashioning of a solution that will be tested in practice reflects the evolving nature of problem solving courts.

**Michael Henderson** is Legal Counsel for the Idaho Supreme Court. He previously served as a Deputy Attorney General for 18 years (seven of those years as Chief of the Criminal Law Division), and before that was a Deputy Prosecuting Attorney in Ada, Blaine and Twin Falls Counties.

## INDIANA

**Mary Kay Hudson**  
**State Drug Court/Problem Solving Court Administrator**  
**Indiana Judicial Center**  
**[mkhudson@courts.state.in.us](mailto:mkhudson@courts.state.in.us)**

The Indiana Supreme Court very recently adopted a new judicial code of conduct, effective 1/1/2009. The new code is based upon the model ABA code but includes some modifications. Enclosed is link to the court's news release re: the 2009 Judicial Code of Conduct, which includes a link to the document adopted by the court. (See below) The new code of conduct does include the language described below (Rule 2.9, Comment 4).

# SUPREME COURT

Kathryn Dolan

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OF INDIANA

<http://courts.IN.gov>



**FOR IMMEDIATE  
RELEASE  
September 8, 2008**

**Contact: Kathryn Dolan  
317.234.4722**

## **INDIANA SUPREME COURT ADOPTS 2009 JUDICIAL CODE OF CONDUCT. AN EXPECTATION FOR JUDGES TO SERVE AS FAIR AND IMPARTIAL OFFICERS REMAINS THE STANDARD.**

The Indiana Supreme Court is adopting a new Code of Judicial Conduct. Indiana is the second state to adopt new judicial ethics rules based on the new national model of the American Bar Association.

The 2009 Code emphasizes the “three i’s” of judicial conduct - independence, integrity, and impartiality. It continues to hold judges to strict standards of conduct in all activities. Chief Justice Randall T. Shepard, Professor Charles G. Geyh of Indiana University School of Law, and Judge Marianne Vorhees of Muncie will review the Code with judges across the state.

- The new Code specifies that judges may take measures to assist unrepresented litigants in gaining a fair hearing (Canon 2.2) and encourages judges to promote pro bono work by lawyers (Canon 3.7).
- The Code highlights the role of judges in promoting ethics and professionalism among lawyers and other judges (Canon 1.2).
- The Code provides more concrete guidance for avoiding “the appearance of impropriety,” a rule long criticized for its vagueness (Canon 1).
- The Code imposes clear requirements for public disclosure of income, reimbursements, and gifts (Canon 3).
- The Code includes ethical principles intended as guidance for judicial candidates (Canon 4).
- The Code encourages judges to reach out to the public to promote understanding of the judicial system (Canon 2.8).

These rules and many others serve as the behavior requirement for the men and women interpreting and applying the law that governs our society. The Code sets out clear expectations for judicial conduct. If the rules are violated, a judge is subject to discipline by the Indiana Supreme Court.

The 2009 Judicial Code of Conduct was submitted to the Supreme Court by a committee of the Judicial Conference of Indiana chaired by Judge Vorhees. The draft was reviewed by judges, lawyers, and the public. The committee’s work is based on the 2007 American Bar Association Model Code of Judicial Conduct. Professor Geyh and Professor Emeritus W. William Hodes, I.U. School of Law - Indianapolis., were the official Reporters of the ABA’s commission, in whose work Chief Justice Shepard participated. The new Code can be found at [courts.IN.gov/rules/jud\\_conduct/jud\\_conduct09.pdf](http://courts.IN.gov/rules/jud_conduct/jud_conduct09.pdf). It is effective January 1, 2009.

## **MISSOURI**

**Ann Wilson**  
**State Alcohol and Drug Abuse Coordinator**  
**Missouri Office of State Courts Administrator**  
**Ann.Wilson@courts.mo.gov**

In Missouri, it's been discussed by the Supreme Court Alternative Treatment Court Committee, but currently it's just not addressed and there have been no problems yet. I'm sure that in the future the Committee will make some recommendations to the Supreme Court in that area.

## **WEST VIRGINIA**

**Linda Rae Artimez**  
**Director for Mental Hygiene Services**  
**Treatment Courts Director**  
**Administrative Counsel**  
**West Virginia Supreme Court of Appeals, Administrative Office**  
**LindaArtimez@courtswv.org**

This matter has only recently been requested to be considered by the Court in West Virginia. Currently West Virginia's Judicial Code does not include the Model Code 2.9 Comment 4.

November 17, 2008: Update:

As of November 5, 2008, the West Virginia Supreme Court of Appeals has provisionally revised Canon 3 of the West Virginia Canons of Judicial Ethics as set forth below and placed the revision out for comment.

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 5<sup>th</sup> day of November, 2008, the following order was made and entered:

**In Re: Provisional Amendment to Canon 3 of the Code of Judicial Conduct**

On this day came the Court, upon the recommendation of Linda Richmond-Artinez, Director, Mental Hygiene Services, Treatment Courts Project Director and Administrative Counsel, and proceeded to consider amendments to Canon 3 of the Code of Judicial Conduct.

Upon consideration whereof, the Court is of the opinion to and doth hereby provisionally approve said amendments, effective immediately, with any public comment to be filed with the Clerk of the Court by December 5, 2008. Justice Albright not participating. Senior Status Justice McHugh, sitting by temporary assignment, by administrative order entered on September 11, 2008.

The text of the amended rule to read as follows, with insertions indicated by underscore.

**'Canon 3. A judge shall perform the duties of judicial office impartially and diligently.**

: \* \*

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. 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 except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose functions include aiding the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

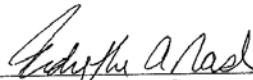
(e) A judge may initiate or consider any ex parte communications when authorized by law.

(f) 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.

\* \* \*

A True Copy

Attest:

  
\_\_\_\_\_

Deputy Clerk, Supreme Court of Appeals

## ATTACHMENT

### ABA Model Code of Judicial Conduct. February 2007

[Excerpt]

#### RULE 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:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

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

(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

#### COMMENT

FREQUENTLY ASKED QUESTIONS SERIES: Ex parte communications in drug court/ problem solving court matters and, specifically, position of states on Comment 4 under Rule 2.9 "Ex Parte Communications" of the 2007 ABA Model Code of Judicial Conduct. BJA Drug Court Clearinghouse. American University. November 17, 2008. 14

[1] To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

[2] Whenever the presence of a party or notice to a party is required by this Rule, it is the party's lawyer, or if the party is unrepresented, the party, who is to be present or to whom notice is to be given.

[3] The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this Rule.

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

[5] A judge may consult with other judges on pending matters, but must avoid ex parte discussions of a case with judges who have previously been disqualified from hearing the matter, and with judges who have appellate jurisdiction over the matter.

[6] The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.

[7] A judge may consult ethics advisory committees, outside counsel, or legal experts concerning the judge's compliance with this Code. Such consultations are not subject to the restrictions of paragraph (A)(2).

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We welcome any additional information and/or perspective readers may have on this topic.

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