

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 16th day of September, 2024.

On August 7, 2024, came the Judicial Ethics Advisory Committee and presented to the Court Opinion 24-2 pursuant to its authority established in this Court's order of April 18, 2019. Upon consideration whereof, the Court approves the opinion as set out below.

Judicial Ethics Advisory Committee Opinion 24-2

Ex Parte Communications in Recovery Court Programs

ISSUES:

The Committee has been asked to opine on the propriety of certain communications involved in a local recovery court¹ program. In particular, the requesting judge has asked about the application of the Canons of Judicial Conduct's proscriptions against *ex parte* communications to the judge's participation in weekly treatment team meetings.

1. Does the judge receiving information as part of a treatment team meeting constitute an impermissible *ex parte* communication under the Canons?
2. May the judge require participants in the recovery court program to execute a continuous waiver of *ex parte* communications or deem there to be such a waiver as a condition of entry into, and continued participation in the program, even though the participants are not aware of the information that will ultimately be provided? May such a waiver be used in lieu of relying on remittals of disqualification that address information already received as a condition of entry into or continued participation in the program?
3. In the alternative, if the program plan requires or deems such a waiver as a condition of entry and participation, does that alleviate a judge from complying with the prohibitions against *ex parte* communications?

Answer: Ideally, the presence of counsel to represent the participants in accordance with the Virginia Recovery Court Standards² would render these questions moot. However, because the recovery court program is a voluntary program which requires the participants to enter into a written agreement, the Committee opines that a waiver would serve as an explicit exception to the Canons' general prohibitions against *ex parte* communications. In the absence of an explicit waiver, the voluntary nature of the program and the participant's agreement, in conjunction with

the explicit notice provided to the participant regarding the processes of the recovery court program, is sufficient.

4. May the judge or the program rules forbid withdrawal of such waiver or consent?

Answer: No. A judge may not ethically forbid the participant from taking any action such as withdrawing a waiver.

5. If the judge or program may not forbid such withdrawal, may the program require that any withdrawal of such waiver by a participant result in termination from the program?

Answer: As the recovery court program is a voluntary program which requires the participants to enter into a written agreement, and in light of the Virginia Recovery Court Standards, it appears that any consequences to the participant withdrawing such a waiver could be addressed in the initial program contract, the parameters of which constitute a procedural question outside the purview of the Committee.

6. Does a judge violate Canon 1J(3) or any other Canon by receiving prejudicial information about participants at the treatment team meeting, even when there is a waiver?

Answer: No. The Committee is of the opinion that in the context of presiding over a recovery court program, a waiver would serve as an explicit exception to the Canons' general prohibitions against *ex parte* communications, in accordance with Canon 1J(1)(h). In the context of a recovery court program and in light of the Virginia Recovery Court Standards, the Committee assumes such information would have been reviewed with the participant prior to a treatment team meeting.

7. If a defense attorney is representing participants in the program and normally attends the treatment team meeting, but is absent due to illness or another court obligation, may the attorney waive *ex parte* communications on behalf of the participant, or must he consult with the participant and proceed only by remittal of disqualification?

Answer: This inquiry is a programmatic or structural or legal ethics question, as opposed to a judicial ethics question, and therefore outside the Committee's purview.

8. May the approval of a program plan by the Supreme Court of Virginia, pursuant to Code § 18.2-254.1, that specifically dispenses with the prohibition against *ex parte* contacts in relation to treatment team meetings, excuse compliance with the restrictions on *ex parte* communications in the Canons?

Answer: This inquiry is outside the Committee's purview.

9. Does a judge violate Canon 1L by actively participating in a treatment team meeting where the judge may inquire about participants' actions, attitudes, and treatment progress?

Answer: No. In the context of a recovery court program, the judge participating in the treatment team meeting does not constitute the sort of extrajudicial independent investigation prohibited by the Canons.

10. Does a treatment team meeting require a court reporter if the information received is not used by the judge in subsequent hearings? Does it make a difference if there is a defense attorney present?

Answer: This inquiry is a programmatic or structural question, as opposed to a judicial ethics question, and therefore outside the Committee's purview.

FACTS:

The requesting judge is presiding over a recovery court program. The recovery court program was instituted pursuant to Code § 18.2-254.1 (the "Recovery Court Act," formerly the "Drug Treatment Court Act").

Generally, specialized court dockets, or "specialty dockets," operate within the existing structure of Virginia's circuit and district court system offering judicial monitoring of intensive treatment, supervision, and remediation integral to case disposition." Va. Sup. Ct. R. 1:25(a)(1). The Supreme Court of Virginia currently only recognizes three types of specialty dockets, including recovery courts as provided in the Recovery Court Act, pursuant to Code § 18.2-254.1. *Id.*

The General Assembly initially passed the Recovery Court Act in 2004, recognizing "a critical need in the Commonwealth for effective treatment programs that reduce the incidence of drug use, drug addiction, family separation due to parental substance abuse, and drug-related crimes." Va. Code § 18.2-254.1(B). The intent was to enhance public safety by facilitating the creation of recovery courts. *Id.*

The goals of the recovery courts include: (i) reducing drug addiction and drug dependency among offenders; (ii) reducing recidivism; (iii) reducing drug-related court workloads; (iv) increasing personal, familial and societal accountability among offenders; and, (v) promoting effective planning and use of resources among the criminal justice system and community agencies.

Va. Code § 18.2-254.1(C). Finally, "recovery courts. . . offer[] judicial monitoring of intensive treatment and strict supervision of addicts in drug and drug-related cases." Va. Code § 18.2-254.1(D).

Administrative oversight for implementation of recovery courts lies with the Supreme Court of Virginia. *See* Va. Code § 18.2-254.1 and Rule 1:25. In particular, the Court has established a state Recovery Court Advisory Committee to oversee planning, implementation, training, and evaluation of recovery courts. *Id.* For each jurisdiction or jurisdictions intending to establish a recovery court a local recovery court advisory committee is established, which must then petition the Supreme Court for authorization before beginning. *Id.* The local recovery court

advisory committee establishes the policies and procedures under which the local recovery court will operate, subject to approval by the state Recovery Court Advisory Committee. *Id.* This process means that although the recovery court programs must meet certain operational standards, individual jurisdictions may have different policies and procedures.³

In this case, the requesting judge has advised the Committee that the local court received approval of its plan pursuant to the Recovery Court Act and provided the following information regarding the specific operation of its recovery court program.

Participants charged with felonies must voluntarily request entry into the recovery court program. Prosecutions are deferred while a participant is in the recovery court program. Participants waive representation by counsel while in the program, but they may receive an appointed attorney for jailable sanction hearings. Participants who graduate may receive a more favorable outcome in their cases. Participants who fail to graduate are terminated from the program, receive new counsel, and the felony prosecution resumes.

An important part of the recovery court program is a weekly treatment team meeting. The meeting is not a court proceeding, and no record is made. The meeting includes a prosecutor, community service board members, the drug court coordinator, and a law enforcement officer, among others. At that meeting, the treatment team shares information and proposed plans of action for each participant – without the participant present. The information shared is often prejudicial to the participants, and may include their progress, attitude, compliance issues, use of substances, treatment needs, employment, etc. The meeting is meant to promote discussion of methods that recovery court personnel may use to increase the participants' chances of graduating. It may include team members formulating a course of treatment rather than court action. Because so much information is shared, it would be impossible to advise each participant of everything shared at the meeting for subsequent remittal of disqualification procedures. The treatment team may also prepare a recommendation for the judge regarding sanctions and treatment for violations by the participants. These sanctions may include short periods of incarceration. The information about participants may accumulate over weeks of meetings before it is addressed in court, if ever.

Best practices for recovery court programs advise that a judge and defense attorney should also be present at the treatment team meeting and actively participate in the meeting. This means that a judge may ask questions, gather information, and render recommendations. The meeting is designed to share information amongst the various stakeholders.

During the actual recovery court docket, the judge speaks to each participant. This is a court proceeding, with a court reporter present. If there is an alleged violation, the judge relies on the evidence presented at the hearing. The judge makes the final determination as to sanctions but does receive the recommendation of the treatment team prior to making any determination. The requesting judge has expressed skepticism as to the ability of any judge to sift out the information received over weeks of treatment team meetings or to say that the information does not impact the judge's decisions.

In this jurisdiction, the recovery court program operates without a defense attorney. The jurisdiction does not have a Public Defender, but the Committee is unaware why there is not a representative from the local defense bar included in the recovery court team.

To date, the requesting judge has chosen not to attend the treatment team meetings because there is not a defense attorney noted as counsel for the participants, and because there is no court reporter present. The requesting judge has expressed concern that because the participants are self-represented, receiving the information and recommendations in their absence would be a violation of Canon 1J's prohibitions on *ex parte* communications. The requesting judge has stated that he or she would like to be present, if permissible, because research on recovery court programs indicates that the presence of a judge at the treatment team meeting increases the success rate for participants. The requesting judge has submitted a list of questions regarding the issues the judge feels are implicated by the current structure of the recovery court program.

DISCUSSION:

The request is one of first impression for the Committee, dealing with the judge, not in a traditional role of judging the issues of fact and law in a legal dispute, but as one overseeing a particular specialty docket. Recovery courts operate within the existing structure of the court system but provide “judicial monitoring of intensive treatment and strict supervision of addicts in drug and drug-related cases.” Va. Code § 18.2-254.1(D).

According to the Virginia Recovery Court Standards, the role of the judge is as follows:

The recovery court judge stays abreast of current law and research on best practices in recovery courts and carefully considers the professional observations and recommendations of other team members when developing and implementing docket policies and procedures. The judge develops a collaborative working alliance with participants to support their recovery while holding them accountable for abiding by docket conditions and attending treatment and other indicated services.

VIRGINIA RECOVERY COURT STANDARDS, Standard VIII (Office of the Executive Secretary, Department of Judicial Services, revised May, 2004), *available at* https://www.vacourts.gov/courtadmin/aoc/djs/programs/sds/programs/dtc/admin/adult_standards.pdf.

The Preamble for the Canons of Judicial Conduct for the Commonwealth of Virginia (the “Canons”) sets forth overarching goals for judges and their judicial service, while also recognizing a judge’s life and service in the community.

Intrinsic to these Canons are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. Judges should engage and serve their

communities, and these Canons should not be construed as requiring judges to live and work in isolation from their communities.

Va. Sup. Ct. R., Part 6, § III, Preamble. This analogy to community service appears particularly relevant, considering the goals of recovery courts and a judge's role in attaining those goals. Furthermore, it is important to remember that "[t]he Canons and standards are *rules of reason* and are not intended to be an exhaustive guide for the conduct of judges. They should be applied consistently with constitutional requirements, statutes, other court rules, and case law." *Id.* (emphasis added).

Finally, when determining if proposed conduct is consistent with the Canons, the Preamble also advises judges to consider certain questions, including whether the action or inaction will threaten the judge's impartiality. *Id.*

The Canons therefore must be analyzed and interpreted in light of a judge's nontraditional role in presiding over a recovery court program and its goals.⁴

1. Applicable Canons and Standards

The three broad Canons, along with their associated standards, are binding and authoritative. *Id.* The first Canon applicable to this request is Canon 1, which requires a judge to be impartial.

As one aspect of impartiality, Canon 1J addresses *ex parte* communications, noting that "[a] judge is required to 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." In furtherance of that, Canon 1J(1) sets forth the broad prohibition against *ex parte* communications: "A judge may 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 . . ." Certain exceptions apply, including "[a] judge may initiate or consider any *ex parte* communications when expressly authorized to do so by law or by these Canons," Canon 1J(1)(f), and "[a] judge may consider *ex parte* communication when the excluded party has waived, expressly or implicitly, its right to review the communication or to be heard." Canon 1J(1)(h).

As to another aspect regarding *ex parte* communications, Canon 1J(3) states that

To the extent reasonably possible, all parties or their lawyers are to be included in communications with a judge. A judge should always be cautious with regard to the possibility of prejudice or the appearance of such when communicating with a probation officer or a similarly situated person without the involvement of all parties.

Canon 1D addresses recusal or disqualification, beginning with the well-established principle that "[a] judge must recuse himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . ." Canon 1D(1). Canon 1D also includes a non-exclusive list of examples, which do not specifically deal with the issues at hand. Canons 1D(4)

and (9) explain when a judge should disclose information relevant to disqualification, and the process of parties waiving disqualification.

Finally, Canon 1L states that “[a] judge must not independently investigate facts in a case. A judge is entitled to consider only the evidence presented and matters of judicial notice as permitted by law.”

2. Analysis

As noted above, the Committee is aware that while Virginia Recovery Court Standards have been promulgated, they do not specifically address the issues raised by the requesting judge regarding *ex parte* communications. The Committee is also aware, as noted in those Standards, that

There are, and will continue to be, differences among individual specialty dockets based upon the unique needs and operational environments of the local jurisdictions and the target populations to be served (local needs and resources). However, there is also a need for overall uniformity as to basic docket components and principles. Therefore, this document is an attempt to outline the fundamental standards and practices to which all recovery courts in the Commonwealth of Virginia should conform.

VIRGINIA RECOVERY COURT STANDARDS, Introduction, page 2.

The requesting judge has inquired about specific operating procedures regarding his or her recovery court program. In arriving at these opinions, the Committee is mindful about the potential impact on recovery court programs in other jurisdictions. The Committee is similarly mindful of the necessity of staying within its purview of analyzing and applying the Canons, and not reexamining programmatic and operating procedures already approved by the Supreme Court. Based on the requesting judge’s assertion that the Supreme Court has already approved its recovery court plan, the Committee assumes that the plan has already been determined to comply with the Virginia Recovery Court Standards.

The requesting judge asks whether, under the facts presented, information that he or she would receive in the course of a treatment team meeting would be an impermissible *ex parte* communication, pursuant to Canon 1J and Virginia JEAC Opinion 00-4 (2000). Alternatively, the judge has asked whether he or she may require participants in the recovery court program to execute a waiver of *ex parte* communications or deem such a waiver a condition of entry and participation in the program.

The Committee previously considered the issue of *ex parte* communications with a probation officer in the context of the preparation of a presentence investigation report in a criminal case and concerning matters relating to the terms and condition of probation. *See* Va. JEAC Op. 00-4 (decided under a prior version of the Canons). Given that this inquiry is in the dissimilar context of the judge presiding over a recovery court program rather than regular

criminal sentencings or violations of probation, the Committee finds this opinion is not applicable.

Ideally, the presence of counsel to represent participants would render any discussion of *ex parte* communications moot. See Virginia Recovery Court Standard 2.1 (“The recovery court team includes, at a minimum, . . . a representative from the Public Defender’s Office or local defense bar”)

Nevertheless, “[p]articipation by an offender in recovery court shall be voluntary and made pursuant only to a written agreement entered into by and between the offender and the Commonwealth with the concurrence of the court.” Va. Code § 18.2-254.1(J). See also Standard 2.4 (“[p]articipation in a recovery court is voluntary and requires a written agreement among the defendant, the defense attorney, the prosecutor and the judge.”)

The Committee is of the opinion that the written agreement may include provisions regarding a waiver of *ex parte* communications, which would serve as an explicit exception to the Canons’ general prohibitions against *ex parte* communications, in accordance with Canon 1J(1)(h).

The requesting judge has also asked that if a waiver is required, could the judge or the program rules forbid the withdrawal of such a waiver, and if not, could the program require any such withdrawal to result in the participant being terminated from the program.

The Committee is of the opinion that the judge may not ethically forbid the participant from taking any action such as withdrawing a waiver.

However, as noted above, participation in a recovery court program is voluntary and requires a written agreement. See Va. Code § 18.2-254.1(J) and Standard 2.4. Standard 6.3 mandates that “[g]raduated responses to the participant’s compliance and noncompliance are defined clearly in the recovery court’s operating documents and are appropriately consistent with the infraction or accomplishment.” And, in accordance with Standard 6.4, the participant is put on notice as to the treatment team processes:

The recovery court provides clear and understandable advance notice to participants about docket requirements, the responses for meeting or not meeting these requirements, *and the process the team follows in deciding on appropriate individualized responses to participant behaviors*. This information is documented clearly and understandably in the docket manual and in a participant handbook that is distributed to all participants, staff, and other interested stakeholders or referral sources, including defense attorneys.

(Emphasis added).

Finally, Standard 6.11 requires in part that, with respect to a participant’s voluntary withdrawal, “[d]efense counsel clarifies in advance in writing with the participant and other team

members what consequences may result from voluntary withdrawal from the docket and ensures that the participant understands the potential ramifications of this decision.”

The Committee is aware that recovery court programs often have “built in” consequences outlined in the program contracts, and Standard 6.4 appears to direct that a participant be fully informed of the consequences. In light of the Standards, it appears that any consequences to the participant withdrawing such a waiver could be addressed in the initial program contract. The exact parameters of such consequences raise a procedural question outside the purview of the Committee, but ideally would conform to the Virginia Recovery Court Standards.

Next, the requesting judge has asked whether a judge violates Canon 1J(3) or any other Canon by receiving prejudicial information about participants at the treatment team meeting, even when there is a waiver.

The Committee is of the opinion that in the context of presiding over a recovery court program, a waiver would serve as an explicit exception to the Canons’ general prohibitions against *ex parte* communications, in accordance with Canon 1J(1)(h).

The Committee also recognizes that in the context of presiding over a recovery court program, the Virginia Recovery Court Standards define the judge as an integral member of the recovery court team. *See* Standard 2.1. Standard 2.2 states that “[t]eam members consistently attend pre-court staff meetings to review participant progress, determine appropriate actions to improve outcomes, and prepare for status hearings in court.” Standard 2.3 states that “[t]he court, supervision, and treatment providers maintain ongoing and consistent communication, including frequent exchanges of timely and accurate information about the individual participant’s overall performance.”

As to defining the role of the judge, Standard 8.2 states that

The judge attends precourt staff meetings routinely and ensures that all team members contribute their observations about participant performance and provide recommendations for appropriate actions. The judge gives due consideration to each team member’s professional expertise and strategizes with the team to intervene effectively with participants during status hearings.

Finally, as noted above, the participant has been put on notice that the process involves discussing his or her behaviors and compliance with program requirements. *See* Standards 6.3 and 6.4.

The Committee is reluctant to define information shared about a participant’s progress – even negative information – as necessarily prejudicial. Such information may or may not be deemed legally “unduly prejudicial” in the course of normal criminal litigation. In the context of a recovery court program, the Committee assumes such information would have been reviewed with the participant prior to a treatment team meeting; for example, in contact with other treatment team members as part of the ongoing collaborative process assisting his or her progression through the program.

The requesting judge has also asked whether the defense attorney who represents participants in the program and normally attends the treatment team meeting, may waive *ex parte* communications on behalf of the participant when that attorney is absent due to illness or another court obligation, or must that attorney consult with the participant and proceed only by remittal of disqualification.

This inquiry is a programmatic or structural or legal ethics question, not a judicial ethics question, and therefore outside the Committee's purview. In terms of ethical considerations, the inquiry would appear to be one relating to the Rules of Professional Conduct for attorneys within the purview of the Virginia State Bar.

The requesting judge has asked whether the approval of a program plan by the state Recovery Court Advisory Committee, pursuant to Code § 18.2-254.1, that specifically dispenses with the prohibition against *ex parte* contacts in relation to treatment team meetings, can excuse compliance with the restrictions on *ex parte* communications in the Canons.

The Supreme Court is the ultimate authority in interpreting the Canons. The Committee has not been asked to interpret the provisions of any recovery court plan, and whether a hypothetical plan approved by the state Recovery Court Advisory Committee may validly excuse compliance with the Canons is outside the Committee's purview.

Aside from *ex parte* concerns, the requesting judge has asked whether a judge violates Canon 1L by actively participating in a treatment team meeting where the judge may inquire about participants' actions, attitudes, and treatment progress.

As noted above, the judge's role as an integral part of the recovery court team and his or her involvement is clearly defined in Standards 2.1, 2.2, 2.3, and 8.2. Additionally, the participant has been put on notice that the process involves discussing his or her behaviors and compliance with program requirements. *See* Standards 6.3 and 6.4.

In the context of a recovery court program, the judge participating in the treatment team meeting as envisioned in Standard 8.2 does not constitute the sort of *extrajudicial* independent investigation prohibited by Canon 1L.

Finally, the requesting judge has asked whether the treatment team meeting requires a court reporter to be present if the information received is not used by the judge in subsequent hearings, and if the answer depends on whether there is a defense attorney present.

This inquiry is a programmatic or structural question, as opposed to a judicial ethics question, and therefore outside the Committee's purview.

CONCLUSION:

The Committee finds that under the facts presented, and based on the foregoing analysis, the judge may attend the treatment team meetings as part of the recovery court program.

REFERENCES:

Canons of Judicial Conduct for the Commonwealth of Virginia, Preamble, Canon 1, Canon 1D, Canon 1D(1), Canon 1D(4), Canon 1D(9), Canon 1J, Canon 1J(1), Canon 1J(1)(f), Canon 1J(1)(h), Canon 1J(3), and Canon 1L.

Va. JEAC Op. 00-4 (2000).

Va. Code § 18.2-254.1.

VIRGINIA RECOVERY COURT STANDARDS, (Office of the Executive Secretary, Department of Judicial Services, revised May, 2004), *available at* https://www.vacourts.gov/courtadmin/aoc/djs/programs/sds/programs/dtc/admin/adult_standards.pdf.

ABA Model Code of Judicial Conduct (2011).

A Copy,

Teste:



Clerk

FOOTNOTES:

¹ Effective July 1, 2024, the Drug Treatment Court Act was amended to be known as the Recovery Court Act. *See* Va. Code § 18.2-254.1; this Opinion will use the new naming convention.

² VIRGINIA RECOVERY COURT STANDARDS (Office of the Executive Secretary, Department of Judicial Services, revised May, 2004), *available at* https://www.vacourts.gov/courtadmin/aoc/djs/programs/sds/programs/dtc/admin/adult_standards.pdf.

³ *See* VIRGINIA RECOVERY COURT STANDARDS, Introduction, page 2.

⁴ The current Canons do not explicitly address specialty dockets. In comparison, the American Bar Association (ABA) and some other jurisdictions have amended their canons to address issues unique to such dockets. For example, the 2007 ABA Model Code of Judicial Conduct acknowledged the creation of “problem solving” courts and added Comment [3] regarding the applicability of the Model Code to activities associated with such courts. *See* ABA Model Code of Judicial Conduct, Application I, cmt. [3] (2011). Also, Comment [4] was added to Rule 2.9 which governs *ex parte* communications. That Comment provided “[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.” Model Code, Rule 2.9(A)(5), cmt. [4]. The response to specialty docket issues has not been uniform across jurisdictions, and even the Model Code confined its amendments to the Comments.

The Reporters’ Notes to the 2007 Code add that the Commission stopped short of recommending an express problem-solving justice exception to the bar on *ex parte* communications, because the courts at issue “were too many and varied for the Commission to devise general rules of applicability.” The solution, then, lies in courts of the several jurisdictions developing rules of their own that relax restrictions on *ex parte* communications to meet the special needs of problem-solving justice in their respective court systems.

CHARLES GARDNER GEYH, ET AL., JUDICIAL CONDUCT AND ETHICS § 5.03[7] at 5-23 (5th ed. 2013) (internal citation omitted).

AUTHORITY:

The [Judicial Ethics Advisory] Committee is established to render advisory opinions concerning the compliance of proposed future conduct with the Canons of Judicial Conduct A request for an advisory opinion may be made by any judge or any person whose conduct is subject to the Canons of Judicial Conduct. The Judicial Inquiry and Review Commission and the Supreme Court of Virginia may, in their discretion, consider compliance with an advisory opinion by the requesting individual to be a good faith effort to comply with the Canons of Judicial Conduct provided that compliance with an opinion issued to one judge shall not be considered evidence of good faith of another judge unless the underlying facts are substantially the same. Order of the Supreme Court of Virginia entered April 18, 2019.