

SPECIALTY COURTS, EX PARTE COMMUNICATIONS, AND THE NEED TO  
REVISE THE TEXAS CODE OF JUDICIAL CONDUCT

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## I. INTRODUCTION

As of January 2013, there were roughly “140 operational specialty courts in Texas.”<sup>1</sup> These specialty courts include an array of focuses, “such as adult and juvenile drug courts, veteran courts, DWI courts, . . . family drug courts,” and mental health courts.<sup>2</sup> A listing of Texas specialty courts that is maintained by the Texas Governor’s office includes the foregoing types of specialty courts, as well as reentry courts, DWI hybrid courts, co-occurring disorder courts, and prostitution courts.<sup>3</sup> These courts differ from the usual adjudicatory model. For example, the first of the “Ten Key Components” of drug courts is the following: “Drug courts integrate alcohol and other drug treatment services with justice system case processing.”<sup>4</sup> Going beyond adjudication and punishment, the “mission of drug courts is to stop the abuse of alcohol and other drugs and related criminal activity.”<sup>5</sup> Correspondingly, the following characteristics are typical of “the vast majority of mental health courts”:<sup>6</sup>

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<sup>1</sup>The Governor of the State of Tex. Crim. Justice Div., *Criminal Justice Advisory Council Report: Recommendations for Texas Specialty Courts*, at 1, OFFICE OF THE GOVERNOR - RICK PERRY, [http://governor.state.tx.us/files/cjd/CJAC\\_Report\\_January\\_2013.pdf](http://governor.state.tx.us/files/cjd/CJAC_Report_January_2013.pdf) (last visited Nov. 23, 2013) [hereinafter CJAC Report]. A listing maintained by the Texas Governor’s office of all such specialty courts in Texas identified a total of 140 specialty courts as of August 1, 2013. *See* The Governor of the State of Tex. Crim. Justice Div., *Texas Specialty Courts*, OFFICE OF THE GOVERNOR—RICK PERRY (Aug. 1, 2013), *available at* [http://governor.state.tx.us/files/cjd/Specialty\\_Courts\\_By\\_County\\_August\\_2013.pdf](http://governor.state.tx.us/files/cjd/Specialty_Courts_By_County_August_2013.pdf) [hereinafter Specialty Courts List].

<sup>2</sup>CJAC Report, *supra* note 1, at 1; *see also* The Governor of the State of Tex., Executive Order RP 77—Relating to the reauthorization of the operation of the Governor’s Criminal Justice Advisory Council, 37 Tex. Reg. 2806 (2012), *available at* <http://governor.state.tx.us/news/executive-order/16995/>.

<sup>3</sup>Specialty Courts List, *supra* note 1, at 1.

<sup>4</sup>BUREAU OF JUSTICE ASSISTANCE, NCJ 205621, *Defining Drug Courts: The Key Components*, at 1 (2004), *available at* <https://www.ncjrs.gov/pdffiles1/bja/205621.pdf>.

<sup>5</sup>*Id.*

<sup>6</sup>COUNCIL OF STATE GOV’TS JUSTICE CENTER, *Improving Responses to People with Mental Illnesses: The Essential Elements of a Mental Health Court*, at vii (2007), BUREAU OF JUSTICE ASSISTANCE - HOME, [https://www.bja.gov/Publications/MHC\\_Essential\\_Elements.pdf](https://www.bja.gov/Publications/MHC_Essential_Elements.pdf) (last visited Nov. 23, 2013).

- A specialized court docket, which employs a problem-solving approach to court processing in lieu of more traditional court procedures for certain defendants with mental illnesses.
- Judicially supervised, community-based treatment plans for each defendant participating in the court, which a team of court staff and mental health professionals design and implement.
- Regular status hearings at which treatment plans and other conditions are periodically reviewed for appropriateness, incentives are offered to reward adherence to court conditions, and sanctions are imposed on participants who do not adhere to conditions of participation.
- Criteria defining a participant's completion of (sometimes called graduation from) the program.<sup>7</sup>

The judge's role in a specialty court differs from that of the traditional judicial role.<sup>8</sup> As a specialty court judge, "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."<sup>9</sup> As one mental health court judge described, "Being a judge in a problem-solving court looks very different from what has been the judge's traditional role. A judge in a problem-solving court becomes the leader of a team rather than a dispassionate arbitrator."<sup>10</sup> In that regard, "the collaborative nature of drug court decision

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<sup>7</sup> *Id.* For further discussion of specialty courts generally (often called "therapeutic" or "problem-solving" courts); see, e.g., JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (Bruce J. Winick & David B. Wexler eds., 2003); GREG BERMAN & JOHN FEINBLATT, CTR. FOR COURT INNOVATION, JUDGES AND PROBLEM-SOLVING COURTS (2002), available at <http://www.courtinnovation.org/sites/default/files/JudgesProblemSolvingCourts1.pdf>.

<sup>8</sup> See CHARLES G. GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 5.03(7), 5-23 (5th ed. 2013).

<sup>9</sup> *Id.*

<sup>10</sup> Louraine C. Arkfeld, *Ethics for the Problem-Solving Court Judge: The New ABA Model Code*, 28 JUST. SYS. J. 317, 317 (2007). Judge Arkfeld presided over both a mental health court and a homeless court; see Court Leadership Institute of Arizona, *Faculty*, ARIZONA JUDICIAL BRANCH, available at <http://www.azcourts.gov/clia/Faculty.aspx> & <http://www.azcourts.gov/clia/>

making (seen most clearly in staffings) may undermine perceptions of judicial independence and impartiality.”<sup>11</sup> In addition, because the judge—as team leader—will be coordinating information and discussion between multiple members of the specialty court team, “in such a capacity, *ex parte* communications with these various participants can be difficult to avoid.”<sup>12</sup> Correspondingly, “a blanket prohibition on *ex parte* communication” could thwart the specialty court judge’s efforts at addressing the “underlying causes of legal problems giving rise to the cases they adjudicate” such as substance abuse or mental illness.<sup>13</sup> In addition, exposure to *ex parte* communications and extensive involvement in staffings can lead to concerns regarding a specialty court judge’s impartiality in any subsequent judicial proceedings—particularly in situations in which an individual has been terminated from the specialty court program.<sup>14</sup>

The Texas Code of Judicial Conduct does not include any provisions that recognize the new role of judges in specialty courts.<sup>15</sup> This Article will discuss the shortcomings in this regard in the Texas Code of Judicial Conduct, particularly with regard to *ex parte* communications; the approach set forth in the American Bar Association’s 2007 Model Code of Judicial Conduct; and the law in several other states.<sup>16</sup> Finally, the Article will propose revisions to the Texas Code of Judicial Conduct pertaining to *ex parte* communications and specialty courts, and the related topic of disqualifications or recusals.<sup>17</sup>

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<sup>11</sup>William G. Meyer, *Ethical Obligations of Judges in Drug Courts*, THE DRUG COURT JUDICIAL BENCHBOOK 197 (Douglas B. Marlowe & William G. Meyer eds., Nat’l Drug Court Inst. 2011).

<sup>12</sup>GEYH ET AL., *supra* note 8, § 5.03(7), at 5-23 (italics in original). At specialty court team staffings, “the judge in the problem-solving court now hears all kinds of information that a judge would not normally hear, nor would the information necessarily be considered relevant to the determination of the facts or law of the case at hand.” Arkfeld, *supra* note 10, at 317.

<sup>13</sup>GEYH ET AL., *supra* note 8, § 5.03(7), at 5-23 (emphasis in original).

<sup>14</sup>See Meyer, *supra* note 11, at 205–06 (discussing possible disqualification issues, and observing that a “judge should disclose on the record information that he or she believes the parties or their lawyers might consider relevant to the question of disqualification, even if he or she believes that there is no real basis for disqualification”).

<sup>15</sup>TEX. CODE JUD. CONDUCT, reprinted in TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. B (West 2005 & Supp. 2013).

<sup>16</sup>See generally ABA MODEL CODE OF JUD. CONDUCT (2011).

<sup>17</sup>There are other ethical issues that can arise with regard to specialty courts that are beyond the scope of this Article. For an excellent overview discussion of ethical issues in drug courts that

## II. SPECIALTY COURTS AND CURRENT SHORTCOMINGS IN THE TEXAS CODE OF JUDICIAL CONDUCT

The Texas Code of Judicial Conduct does not mention specialty courts.<sup>18</sup> Indeed, although a January 2005 report of the Texas Supreme Court's Task Force on the Code of Judicial Conduct included recommendations for several amendments to the Texas Code, that report also did not address specialty courts.<sup>19</sup> Accordingly, the current Texas Code presumptively governs judges in both traditional courts, as well as specialty courts.<sup>20</sup> There are several sections relevant to ex parte communications and disqualifications or recusals. First, Canon 3(B)(8) places significant limits on the judge's consideration of ex parte communications.<sup>21</sup> Although the current Canon includes an exception for ex parte communications that are "expressly authorized by law," the Texas Code, however, does not further define the phrase "authorized by law."<sup>22</sup> Does it extend to local rules establishing specialty courts, or is it limited to statutes, formally adopted administrative regulations, and court opinions? As will be discussed below, in contrast to the Texas Code, the 2007 ABA Model Code provides further guidance in this regard with respect to specialty courts.<sup>23</sup> Similar changes are warranted for the Texas Code.

Another issue concerning specialty courts that should be considered and addressed pertains to disqualifications or recusals. Canon 3 of the Texas Code requires a judge to perform the duties of office "impartially and diligently."<sup>24</sup> Specifically, subsection (B)(1) of Canon 3 requires that a judge not decide a matter "in which disqualification is required or recusal is

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would be pertinent to any specialty court, *see* Meyer, *supra* note 11; *see also* GEYH ET AL., *supra* note 8, § 10.05(3), at 10-27 (highlighting situations in which specialty court judges had "associated with criminal defendants outside of court in ways that appear improper").

<sup>18</sup> *See generally* TEX. CODE JUD. CONDUCT.

<sup>19</sup> *See* Tex. Supreme Court Task Force on the Code of Jud. Conduct, *Final Report and Recommendations* (2005), available at <http://www.scjc.state.tx.us/pdf/rpts/cjcfinalreport.pdf> (recommending several amendments to the Code). The Texas Supreme Court has never adopted any of the Task Force's recommendations for Code amendments. *See* Kevin Dubose, *The Development of Judicial Ethics in Texas*, 1 State Bar of Tex. Prof. Dev. Program, *The History of Texas Supreme Court Jurisprudence Course* 13, 13.6 (2013).

<sup>20</sup> TEX. CODE JUD. CONDUCT, Preamble.

<sup>21</sup> *Id.* Canon 3(B)(8).

<sup>22</sup> *Id.* Canon 3(B)(8)(e).

<sup>23</sup> *See infra* Part III.

<sup>24</sup> TEX. CODE JUD. CONDUCT, Canon 3.

appropriate.”<sup>25</sup> In addition, a “judge shall perform judicial duties without bias or prejudice,” and a “judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice . . . .”<sup>26</sup> A specialty court judge may learn a considerable amount of information about a program participant both on the record and through *ex parte* communications as the specialty court’s team leader.<sup>27</sup> In addition, due to “the intense level of involvement a problem-solving judge has with the defendant and the case, there has always been a question about the judge’s impartiality.”<sup>28</sup> As discussed below, some states have adopted particular provisions relating to disqualifications or recusals in specialty court proceedings.<sup>29</sup> Should the Texas Code of Judicial Conduct be amended to include any specific rule in this regard for specialty courts?

### III. THE ABA MODEL APPROACH

The American Bar Association (ABA) substantially revised its Model Code of Judicial Conduct in 2007.<sup>30</sup> For the first time, the Model Code included recognition of specialty courts.<sup>31</sup> In particular, the revised Code addressed specialty courts in Comment 3 to Section 1 of the Application provisions of the Code, which provides:

In recent years many jurisdictions have created what are often called “problem solving” courts, in which judges are authorized by court rules to act in nontraditional ways. For example, judges presiding in drug courts and monitoring the progress of participants in those courts’ programs may be authorized and even encouraged to communicate directly with social workers, probation officers, and others

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<sup>25</sup> *Id.* Canon 3(B)(1).

<sup>26</sup> *Id.* Canon 3(B)(5)–(6); *see also* TEX. R. CIV. P. 18b(b)(1)–(3) (identifying certain grounds for recusal in civil cases including questionable impartiality, “personal bias or prejudice,” and “personal knowledge of disputed evidentiary facts”).

<sup>27</sup> *See* Arkfeld, *supra* note 10, at 318.

<sup>28</sup> *Id.* at 319.

<sup>29</sup> *See infra* notes 135–142 and accompanying text.

<sup>30</sup> GEYH ET AL., *supra* note 8, § 1.03, at 1-5. There were also further amendments in 2010. *See* ABA MODEL CODE OF JUDICIAL CONDUCT (2011).

<sup>31</sup> *See, e.g.*, ABA MODEL CODE OF JUDICIAL CONDUCT, Canon 2, R. 2.9 cmt. 4 (2011); One specialty court judge observed that the 2007 “Code for the first time recognizes those of us who work in problem-solving courts.” *See* Arkfeld, *supra* note 10, at 318.

outside the context of their usual judicial role as independent decision makers on issues of fact and law. When local rules specifically authorize conduct not otherwise permitted under these Rules, they take precedence over the provisions set forth in the Code. Nevertheless, judges serving on “problem solving” courts shall comply with this Code except to the extent local rules provide and permit otherwise.<sup>32</sup>

In the lead-up to the adoption of the 2007 ABA Model Code, several witnesses at hearings conducted by the ABA’s Joint Commission to Evaluate the Model Code of Judicial Conduct “urged the Commission to create special ethical rules” for specialty courts.<sup>33</sup> Because of the number and wide variety of specialty courts, however, the Commission opted not to adopt separate ethical guidelines solely for specialty courts.<sup>34</sup> Instead, the Commission set forth Comment 3 as quoted above, by which the ABA recognized that judges presiding over specialty courts are engaging in “nontraditional” activities as part of their duties.<sup>35</sup> The Comment also reflects the Commission’s intent that local rules governing specialty courts should prevail over the Code’s provisions when they “specifically authorize conduct not otherwise permitted under these Rules.”<sup>36</sup> Accordingly, in those

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<sup>32</sup> ABA MODEL CODE OF JUDICIAL CONDUCT, Application § I cmt. 3 (2011).

<sup>33</sup> Mark L. Harrison, *The 2007 ABA Model Code of Judicial Conduct: Blueprint for a Generation of Judges*, 28 JUST. SYS. J. 257, 264 (2007); see also Arkfeld, *supra* note 10, at 318 (stating that “[f]or those who sit in problem-solving court, one of the hopes was that the new Code would address their issues and the concerns that arise out of this new way of conducting court proceedings”).

<sup>34</sup> See Harrison, *supra* note 33, at 264 (observing that the “Commission was ultimately unwilling to” create separate ethical rules for specialty courts “because therapeutic courts are too numerous and varied to enable the Commission to devise enforceable rules of general applicability for such courts.”); see also Michele B Neitz, *A Unique Bench, A Common Code: Evaluating Judicial Ethics in Juvenile Court*, 24 GEO. J. LEGAL ETHICS 97, 119 (2011) (observing that “Unfortunately, the ABA fell short of adopting guidelines specifically for alternative courts.”).

<sup>35</sup> ABA MODEL CODE OF JUDICIAL CONDUCT, Application § I cmt. 3 (2011).

<sup>36</sup> *Id.*; see also Arkfeld, *supra* note 10, at 318 (asserting that Comment 3 reflects an acknowledgement “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.”). But see Neitz, *supra* note 34, at 120 (criticizing the Commission’s decision to leave these determinations up to local rules: “By leaving these issues to be resolved at the state and local

states that have adopted the 2007 Model Code, judges in specialty courts who face ethical questions will need to review their state's version of the Code, but may also consult local rules that govern the specialty court.<sup>37</sup>

The 2007 ABA Model Code also addressed and acknowledged that the judge's role in a specialty court is different from that of a court in a traditional proceeding in the coverage of issues pertaining to ex parte communications.<sup>38</sup> First, Model Rule 2.9(A)(5) provides that "[a] judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so."<sup>39</sup> In turn, the 2007 Model Code defines "law" to include "court rules as well as statutes, constitutional provisions, and decisional law."<sup>40</sup> The drafters of the 2007 ABA Model Code provided further guidance with regard to this subsection by including Comment 4 that specifically discussed ex parte communications in specialty courts:

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.<sup>41</sup>

This provision and comment go further than previous ethical guidelines in attempting to address specialty courts. Nonetheless, "the Commission stopped short of recommending an express problem-solving justice exception to the bar on ex parte communications" due to the wide variety and types of specialty courts.<sup>42</sup> Accordingly, some commentators have

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level, the ABA's reluctance to create ethical guidelines for the unique circumstances of nontraditional courts creates a dilemma for judges in these courts.").

<sup>37</sup>In addition, should specialty court judges and court administrators located in 2007 Model Code states believe that the Code does not address a particular issue, Comment 3 suggests that "the option exists that a local rule or administrative order could be implemented that would exempt the judge from the Code's requirements." Arkfeld, *supra* note 10, at 318.

<sup>38</sup>See ABA MODEL CODE OF JUDICIAL CONDUCT Application § I cmt. 3 (2011).

<sup>39</sup>*Id.* Canon 2, R. 2.9(A)(5).

<sup>40</sup>See *id.* at Terminology (defining "law" for purposes of the Model Code).

<sup>41</sup>See *id.* Canon 2, R. 2.9(A)(5) cmt. 4.

<sup>42</sup>See GEYH ET AL., *supra* note 8, at 5-23 (citing CHARLES E. GEYH & W. WILLIAM HODES, REPORTERS' NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT 38 (2009)).

suggested that states or local jurisdictions do more to tailor statutes or court rules to address the unique needs of specialty courts in their jurisdictions.<sup>43</sup>

#### IV. A REVIEW FROM OTHER STATES

Although there is not yet a considerable amount of case authority regarding *ex parte* communications and disqualification or recusal issues arising from specialty court proceedings, several other states have considered these issues in both judicial decisions and ethics opinions.<sup>44</sup> In addition, about half the states have adopted the 2007 ABA Model Code and its provisions recognizing specialty courts.<sup>45</sup> This Section will examine the existing case law and ethics opinions from other states, and then turn to a review of those states that have not only adopted that 2007 ABA Model Code, but also included additional, unique provisions relating to specialty courts.

##### A. Case Law and Ethics Opinions

A judge overseeing a specialty court will often be exposed to a significant amount of information about a program participant not only through traditional judicial processes, but also via program staffings or *ex parte* communications with court team members.<sup>46</sup> What, then, is the judge's proper action in a situation in which a hearing is necessary, for example, to consider whether an individual's specialty court participation

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<sup>43</sup> See *id.* (reviewing the history of the development of the special rule for *ex parte* communications for specialty courts and concluding, "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."); see also Arkfeld, *supra* note 10, at 321 (expressing a concern that the phrase in Rule 2.9(A)(5) and in Comment 4 regarding "expressly authorized by law" might be "open to interpretation" and not necessarily extend to specialty courts that "do not operate under a specific law or administrative order," but nonetheless arguing "that the judge may ethically proceed with the defense attorney present and with waivers in place").

<sup>44</sup> See, e.g., *In re* Disqualification of Giesler, 985 N.E.2d 486 (Ohio 2011).

<sup>45</sup> See GEYH ET AL., *supra* note 8, § 1.03, at 1-6-1-7 (observing that "[b]y 2013, 24 jurisdictions had adopted the 2007 Model Code of Judicial Conduct, although most with revisions to various sections").

<sup>46</sup> See Meyer, *supra* note 11, at 205 (observing that a judge overseeing a specialty court will "often have substantial information about . . . [specialty] court participants—some of which was gained through on-the-record colloquies and pleadings and other information from informal staffings . . .") (focusing on drug courts).

should be terminated or in subsequent proceedings on issues such as parole revocation or sentencing? Case authority, as well as ethics opinions, from other jurisdictions with regard to these questions vis-à-vis specialty court judges provide mixed outcomes. This Section will explore relevant recent judicial decisions and ethics opinions from several other states.

### 1. New Hampshire

In the New Hampshire case of *State v. Belyea*, Defendant pleaded guilty to forgery and credit card offenses and, following certain probation violations, received a suspended sentence, but with the condition that he take part in a drug court program.<sup>47</sup> During his time with the program, he garnered three program sanctions, the last of which resulted from his leaving the state without permission for two months.<sup>48</sup> Thereafter, the State moved to impose the previously suspended sentence and to terminate Defendant's participation in the drug court program.<sup>49</sup> In response to the State's motion, Defendant moved to recuse the judge "from presiding over any termination proceedings, contending that the judge's participation as a member of the drug court team, which had recommended his termination, created an appearance of impropriety."<sup>50</sup> The trial judge denied the motion and presided over the termination hearing.<sup>51</sup> At the close of the hearing, the judge "ruled that the defendant's participation in the Program [sic] was 'no longer warranted,' and he imposed the . . . suspended sentence."<sup>52</sup> On appeal, Defendant urged that the judge should have recused himself and contended "that a disinterested observer would entertain significant doubt about whether . . . [the trial judge] prejudged the facts and was able to remain indifferent to the outcome of the termination hearing."<sup>53</sup> In particular, he asserted that because the judge had been a part of the treatment team, the judge had "already evaluated the evidence and likely

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<sup>47</sup> 999 A.2d 1080, 1081 (N.H. 2010).

<sup>48</sup> *Id.* at 1082.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* Defendant admitted during the hearing that he indeed had been out of the state for nearly two months. *Id.*

<sup>53</sup> *Id.* at 1085.

given input about the recommendation to terminate” to other members of the team.<sup>54</sup>

The New Hampshire Supreme Court rejected Defendant’s appeal and noted that his “argument rest[ed] upon the faulty premise that . . . when . . . [the judge] participated as a member of the drug court team and monitored the defendant’s progress, he acted in some role other than as a neutral and detached magistrate.”<sup>55</sup> Instead, the Court found that the trial judge “remained an impartial judicial officer,” and that there was nothing in the record to reflect that the judge “acted as an investigator, advocate, or prosecutor when participating with the drug court team.”<sup>56</sup> The Court observed further, “It is not uncommon for judges to acquire information about a case while sitting in their judicial capacity in one judicial setting and later to adjudicate the case without casting significant doubt on their ability to render a fair and impartial decision.”<sup>57</sup> The trial judge in *Belyea* “listened to current information on the defendant’s progress or problems in the Program” as part of the entire drug court team and considered “recommendations presented by individual members of the team, as a result of the defendant’s purported misconduct.”<sup>58</sup>

With regard to Defendant’s contention of bias based on the trial judge’s prior participation as part of the treatment team, the New Hampshire Supreme Court concluded that there was “no evidence that he had or considered facts not known by the drug treatment team or that he had personal, independent knowledge of any facts relied upon in ordering Defendant’s termination from the Program [sic].”<sup>59</sup> Moreover, as the presiding judge of the drug court team, the trial judge had solely “learned information about the defendant’s compliant and noncompliant behavior in the context of the [team’s] weekly review meetings and in the presence of the entire team, and retained the authority to decide and impose any sanctions . . . for a participant’s misconduct.”<sup>60</sup> Accordingly, the New

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* The New Hampshire Supreme Court also observed that the trial judge’s participation was “in the presence of the entire drug court team, which included a lawyer from the New Hampshire Public Defender Program.” *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 1087.

<sup>60</sup> *Id.* at 1086. The record also revealed that there were “no disputed evidentiary facts that . . . [the trial judge] relied upon terminating . . . [Defendant] from the program. At the hearing, the

Hampshire Supreme Court determined that no “objective, disinterested observer would . . . entertain significant doubt about . . . [the trial judge’s] impartiality.”<sup>61</sup>

## 2. Idaho

Like New Hampshire, other courts have taken the view that a specialty court judge can preside over termination hearings. For example, in *State v. Rogers*, the Idaho Supreme Court considered an appeal by a drug court participant who had been terminated from the program and sentenced for possession of a controlled substance.<sup>62</sup> Defendant had initially pleaded guilty to possession, but the State agreed to a dismissal should Defendant successfully complete the drug court program.<sup>63</sup> After the drug court judge “confronted [Defendant] with information suggesting [Defendant] had been attempting to solicit fellow drug court participants to enter into a prostitution ring or ‘adult entertainment business,’” the judge “terminated [Defendant] from the drug court program” and thereafter imposed a sentence on the original possession charge.<sup>64</sup>

On appeal, Defendant alleged that his termination violated due process protections.<sup>65</sup> The Idaho Supreme Court determined that because Defendant pleaded guilty to enter into the drug court program, he then had a protected “liberty interest at stake as he . . . [would] no longer be able to assert his innocence if expelled from the program.”<sup>66</sup> Because he had a liberty interest in remaining in the program, he was therefore “entitled to procedural due process before he . . . [could] be terminated from that program.”<sup>67</sup>

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defendant agreed that he had left the state for two months without permission.” *Id.* This was a “clear violation” of the drug court policies, and the judge’s decision to terminate Defendant from the program and impose the previously suspended sentence was based solely on Defendant’s “admitted misconduct in fleeing the state, as well as his three prior Program [sic] sanctions.” *Id.*

<sup>61</sup> *Id.* at 1086–87.

<sup>62</sup> 170 P.3d 881, 882 (Idaho 2007).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 883. Defendant had also previously violated drug court rules and was sanctioned, yet had “seemed to improve markedly [thereafter] and even earned praise for his performance from the drug court judge” on two occasions. *Id.*

<sup>65</sup> *Id.* at 882–83.

<sup>66</sup> *Id.* at 884.

<sup>67</sup> *Id.* The Court reasoned that a liberty interest was implicated because prior to his termination from the drug court program “he was living in society (subject to the restrictions of

Notwithstanding this holding, however, the Court also determined that the drug court judge could preside over the termination proceedings, as well as any ensuing sentencing hearing, and that such subsequent adjudicatory processes would satisfy procedural due process requirements.<sup>68</sup>

### 3. Minnesota

Similarly, consider the court's dicta in an unpublished Minnesota Court of Appeals case involving the termination of parental rights.<sup>69</sup> Evidence in that case revealed that the children's mother had "received nine sanctions for drug court violations" and also "had one missed [drug] test, one diluted [drug] test, and one positive test for cocaine."<sup>70</sup> After the trial court terminated her parental rights, and among her contentions on appeal, Appellant asserted that the trial judge "should have voluntarily removed himself as the judge . . . because he . . . had previous knowledge of facts outside of the record and preside[d] over the county's drug court program."<sup>71</sup> The appellate court declined to rule on the contention because the parent had not properly objected at trial.<sup>72</sup> Nonetheless, the court added, "In any event, we see no basis for removal."<sup>73</sup> The court found no evidence of bias or reason to question the judge's impartiality and declared that "any knowledge the judge had of the appellant's drug history was obtained in his judicial capacity" and not via his personal or private life.<sup>74</sup> The court concluded, "Any information the district court judge obtained about appellant through her participation in the county's drug court program was acquired in his judicial capacity" not his private life.<sup>75</sup> "Therefore, he was

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complying with the drug court program), and after his termination from . . . [the drug court program] he was incarcerated." *Id.* at 885.

<sup>68</sup> *Id.* at 886. The Court also observed that "the neutral court may consider evidence which might not necessarily be admissible in a criminal trial, if such evidence is disclosed to [Defendant] prior to the hearing, is reliable, and would assist the court in making its determination." *Id.*

<sup>69</sup> *In re Welfare of Children of C.C.*, No. 07-JV-11-2909, 2012 Minn. App. LEXIS 471, at \*1, \*3 (Minn. Ct. App. May 29, 2012).

<sup>70</sup> *Id.* at \*4.

<sup>71</sup> *Id.* at \*20.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at \*21–22.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

not required to disqualify himself under the Minnesota Code of Judicial Conduct.”<sup>76</sup>

#### 4. Kentucky

Kentucky takes a similar view. In 2011 the Ethics Committee of the Kentucky Judiciary issued an ethics opinion “regarding recusal when the drug or mental health court judge will be the same judge presiding over a probation revocation hearing.”<sup>77</sup> The ethics committee concluded that in general a specialty court judge may preside at a subsequent revocation hearing at which program termination serves as the basis for the revocation, and that “recusal would only be required in certain circumstances.”<sup>78</sup> In particular, the committee opined that if the specialty court judge “receives the reason for the termination from the program in the course of his or her official duties, and no part of the evidence at a subsequent revocation hearing is dependent on the judge’s personal knowledge of any pertinent circumstances, no recusal is required.”<sup>79</sup>

In formulating this opinion, the Ethics Committee of the Kentucky Judiciary reasoned that a specialty court judge “by the very nature and purpose of the program, must remain familiar with the status of the participant, who has voluntarily elected to enter the program.”<sup>80</sup> The committee observed further, however, that recusal could “be required in situations where information on which the revocation may be based comes from the judge’s ‘personal knowledge,’ *i.e.*, information learned by the judge outside the regular drug or mental health court process.”<sup>81</sup> The

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<sup>76</sup>*Id.*; see also *Wilkinson v. State*, 641 S.E.2d 189, 190 (Ga. Ct. App. 2006). The court rejected an appeal from a trial judge’s decision to terminate an individual from a drug court program. *Id.* One of the issues on appeal was the drug court judge’s purported refusal to consider the defendant’s recusal motion relating to the termination hearing. *Id.* at 191. The court of appeals found the contention without merit and relied, in part, on the fact that the defendant had waived certain rights to seek recusal of the drug court judge as part of entering into the drug court contract. *Id.* The court also stated, “[W]e will not interfere with a trial court’s termination of a drug contract absent manifest abuse of discretion on the part of the trial court.” *Id.* at 190.

<sup>77</sup>The Ethics Comm. of the Ky. Judiciary, *Judicial Ethics Opinion JE-122*, KY BENCH & BAR, November 2011, at 34, 34, available at [http://www.kybar.org/documents/benchbar\\_searchable/benchbar\\_1111.pdf](http://www.kybar.org/documents/benchbar_searchable/benchbar_1111.pdf).

<sup>78</sup>*Id.*

<sup>79</sup>*Id.* at 35.

<sup>80</sup>*Id.*

<sup>81</sup>*Id.*

committee then identified an example that would likely require recusal as a situation in which the specialty court judge “personally observed the . . . [program] participant committing some act that would form or support the basis for termination from the program.”<sup>82</sup>

## 5. Tennessee

By way of contrast, however, the Tennessee Court of Criminal Appeals took a very different approach to the recusal question in *State v. Stewart* by focusing on due process concerns.<sup>83</sup> In *Stewart*, Defendant claimed “that his due process rights were violated because the judge presiding over his probation revocation had previously served as a member of his drug court team and had received *ex parte* information regarding Defendant’s conduct at issue by virtue of his prior involvement.”<sup>84</sup> The court agreed that due process required that a different judge, who had “not previously reviewed the same or related subject matter as part of the defendant’s drug court team,” must adjudicate the probation revocation proceedings.<sup>85</sup> Defendant in *Stewart* was not successful in his drug court participation, and accrued numerous program violations.<sup>86</sup> Consequently, “a trial judge who had participated in a significant amount of the defendant’s drug court treatment, including his expulsion from the program,” presided over Defendant’s probation revocation hearing.<sup>87</sup> Defendant “urged the trial judge to recuse

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<sup>82</sup>*Id.* In formulating its opinion, the committee observed that the “Kentucky Supreme Court has stated that drug court ‘is a **court function**, clearly laid out as an alternative sentencing program . . .’” *Id.* (citing *Commonwealth v. Nicely*, 326 S.W.3d 441, 444 (Ky. 2010)) (emphasis in original). The committee also noted, “Ordinarily, recusal is appropriate only when the information is derived from an extra-judicial source. Knowledge obtained in the course of earlier participation in the same case does not require that a judge recuse.” *See id.* (quoting *Marlowe v. Commonwealth*, 709 S.W.2d 424, 428 (Ky. 1986)) (internal citations omitted) (internal quotation marks omitted).

<sup>83</sup>No. W2009-00980-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 691, \*28 (Tenn. Crim. App. Aug. 18, 2010).

<sup>84</sup>*Id.* at \*1.

<sup>85</sup>*Id.* at \*1–2.

<sup>86</sup>*See id.* at \*8–10. The appellate court observed that the case was “not a shining example of a successful drug court program intervention” and that as part of the program, “the defendant had ongoing issues with marijuana usage and repeatedly failed to comply with basic program requirements.” *Id.* at \*8. He was also “‘sanctioned’ five or six times and sentenced to significant jail terms wholly outside of those envisioned by his original sentence or probation.” *See id.* at \*8–10 (delineating a lengthy list of the defendant’s drug court program violations and sanctions).

<sup>87</sup>*Id.* at \*10–11.

himself because of his prior participation on the drug court team,” but the judge declined, “citing the practical difficulties of bringing in a new judge every time someone violates their drug court contract.”<sup>88</sup> The trial judge then found that Defendant had violated his probation terms, and the court sentenced him to jail time.<sup>89</sup>

On appeal, the Tennessee Court of Criminal Appeals determined that due process bars “any member of the defendant’s drug court from adjudicating a subsequent parole revocation *when the violations or conduct at issue in both forums involves the same or related subject matter.*”<sup>90</sup> Given the liberty interest at stake, the court first observed, “[i]t is now firmly established that a probationer is entitled to due process when a State attempts to remove his probationary status and have him incarcerated.”<sup>91</sup> The Court then identified the minimum required procedural protections and described the right to a “neutral hearing body” as “[o]ne of the most fundamental” of the due process rights.<sup>92</sup> In finding a violation of due process in *Stewart*, the Court reasoned that “the role of a judge in the drug courts program is, by its very nature, almost the polar opposite of ‘neutral and detached.’”<sup>93</sup> In great detail, the Court highlighted the following array of due process concerns with regard to a drug court judge’s neutrality in later presiding at a defendant’s probation revocation hearing:

- Drug court judges are expected “*to step beyond their traditionally independent and objective arbiter roles.*”<sup>94</sup>

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<sup>88</sup> *Id.* at \*11. In seeking recusal, the defendant argued “that the judge would already be familiar with the materials that would comprise most of the State’s proof at the probation revocation by virtue of his [prior] involvement.” *Id.* Although the trial judge denied the motion to recuse, he “stated that he would not mind getting further guidance from the Court of Criminal Appeals on the issue as it was likely to arise again in other cases.” *Id.*

<sup>89</sup> *Id.* at \*12.

<sup>90</sup> *Id.* (emphasis in original).

<sup>91</sup> *Id.* at \*13.

<sup>92</sup> *Id.* at \*13–14. The court further opined that “a defendant’s rights are plainly violated when his probation revocation case is reviewed by something other than a ‘neutral and detached’ arbiter” and that in Tennessee, trial judges serve as the probation revocation adjudicators. *Id.* at \*14 & n.1.

<sup>93</sup> *Id.* at \*14.

<sup>94</sup> *Id.* at \*15 (emphasis in original) (quoting Key Components, *supra* note 4, at 15). The court further explained that under Tennessee law, drug court treatment programs are required to operate “according to the principles established by the Drug Courts Standards Committee of the National Association of Drug Court Professionals.” *Id.* at \*14. *See also* TENN. CODE ANN. § 16-22-104

- Drug court judges are expected to “issue praise for regular attendance or a period of clean drug tests, offer encouragement, and even award the participants tokens of accomplishment during open court ceremonies” for program successes.<sup>95</sup>
- Drug court judges should have “frequent status hearings and maintain regular communications with other program staff to uncover noncompliance,” should instill a “fear that big brother is always watching,” and address program infractions “with responses ranging from disparaging remarks to jail time.”<sup>96</sup>
- Drug court judges are “an integral part of the defendant’s ‘therapeutic team’” and are “expected to ‘play an active role in the [participant’s] drug treatment process.’”<sup>97</sup> Accordingly, a drug court judge “will necessarily find it difficult, if not impossible, to reach the constitutionally-required level of detachment when dealing with a course of conduct . . . [that was] previously reviewed as a member of a drug court team.”<sup>98</sup>
- Drug court judges will have participated in team decisions about treatment and services, and thus will “develop a stake in the success or failure” of the selected programs.<sup>99</sup>
- Drug court judges are participating in a collaborative process of decision-making that “poses an additional threat

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(West 2013) (setting forth ten general principles for the establishment and operation of drug court programs). Given the lack of further legislative elucidation of these ten principles, the court turned to the National Association of Drug Court Professionals’ program guidelines for further clarification. *Stewart*, 2010 Tenn. Crim. App. LEXIS 691, at \*14–15.

<sup>95</sup> *Stewart*, 2010 Tenn. Crim. App. LEXIS 691, at \*14–15 (citing Key Components, *supra* note 4, at 13). The court reasoned that such repeated praiseworthy activities could lead the prosecution to “question a judge’s impartiality.” *Id.* at \*16.

<sup>96</sup> *Id.* The court further observed that the judge’s imposition of disciplinary actions “could cause the defendant to reasonably question the judge’s impartiality when reviewing the same subject matter in a different forum later.” *Id.* at \*17.

<sup>97</sup> *Id.* at \*18 (quoting Key Components, *supra* note 4, at 2, 7).

<sup>98</sup> *Id.*

<sup>99</sup> *See id.* at \*19 (leading the court to question a drug court judge’s detachment in later proceedings).

to the impartiality of any judge who would later adjudicate a defendant's probation revocation involving the same or related conduct."<sup>100</sup>

- Drug court judges will have received access to a “considerable amount of *ex parte* information . . . as a necessary component of the drug court process.”<sup>101</sup>
- Drug court judges, as part of participation in and leadership of the drug court process, are privy “to a considerable amount of information about the defendant's conduct that would not normally be relevant to adjudicating a probation revocation”<sup>102</sup> and will likely be aware of other challenges or problems such as a “participant's mental illnesses, sexually transmitted diseases, domestic violence, unemployment, and homelessness.”<sup>103</sup>

Accordingly, the court in *Stewart* concluded that a drug court judge who participated as part of, and presided over, a defendant's drug court team could not “function as a ‘neutral and detached’ hearing body . . . for alleged probation violations that . . . [were] based on the same or related subject matter” that the drug court team had previously reviewed.<sup>104</sup> In reaching its decision, the court specifically rejected the reasoning of both the Idaho Supreme Court in *State v. Rogers*<sup>105</sup> and the New Hampshire Supreme

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<sup>100</sup>*Id.* at \*20. The court suggested that a drug court judge might subordinate his or her views to those of the treatment team, could put certain decisions up to a vote of the treatment team members, and generally be personally invested in “prior collaborative team decisions” that could “cloud the exercise of his or her own individualized, detached, and impartial review” of later adjudicatory processes. *Id.* at \*21.

<sup>101</sup>*Id.* at \*22. The court identified as troubling potential *ex parte* contacts such as frequent treatment team communications about a defendant's program participation, and “frequent interactions between the participants and drug court judges, in which the participants will not be represented by counsel.” *Id.* at \*23–25. The court further opined that “it simply strains credulity to believe that judges could or would consistently set aside all of the considerable amount of information they receive in this *ex parte* manner at a later probation revocation.” *Id.* at \*23–24.

<sup>102</sup>*Id.* at \*25.

<sup>103</sup>*Id.* at \*25 (quoting Key Components, *supra* note 4, at 7).

<sup>104</sup>*Id.* at \*30.

<sup>105</sup>*See id.* at \*30–\*31 (rejecting the approach of *State v. Rogers*, 170 P.3d 881, 886 (Idaho 2007), and reasoning that the Idaho court had not considered “all of the due process problems attendant to permitting judges to play . . . dual roles with respect to the same subject matter”). For a further discussion of *Rogers*, see *supra* notes 62–68 and accompanying text.

Court in *State v. Belyea*.<sup>106</sup> In addition, given that the court in *Stewart* reached its conclusion on due process grounds, the court found it “unnecessary to address whether the [Tennessee] Code of Judicial Conduct . . . would also generally require recusal” in similar cases.<sup>107</sup>

Of note, approximately six months following the Tennessee Court of Criminal Appeals’ decision in *Stewart*, the state’s Judicial Ethics Committee provided an advisory opinion on the very question left unaddressed in *Stewart*: whether the state’s Code of Judicial Conduct will “permit a judge, who is a member of a drug court team, to preside over the revocation/sentencing hearing of a defendant who is in the drug court

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<sup>106</sup>See *Stewart*, 2010 Tenn. Crim. App. LEXIS 691, at \*31–34 (declining to follow the decision in *State v. Belyea*, 999 A.2d 1080 (N.H. 2010), and observing that it was “similarly unpersuaded” by *Belyea*’s treatment of the court’s “constitutional concerns”). For a further discussion of *Belyea*, see *supra* notes 47–61 and accompanying text. The *Stewart* court also noted that its decision was consistent with an earlier 2008 Tennessee decision. See *Stewart*, 2010 Tenn. Crim. App. LEXIS 691, at \*28–29 (citing *State v. Stewart*, No. M2008-00474-CCA-R3-CD, 2008 Tenn. Crim. App. LEXIS 784 (Tenn. Crim. App. Oct. 6, 2008)). In the 2008 *Stewart* case (which coincidentally involved a different defendant with the surname Stewart), the court found a due process violation when the drug court judge delegated decisions about probation revocation and appropriate sentencing to members of the drug court team who had been present at the revocation hearing. *Id.* at \*5–6, \*10. After presiding at the revocation hearing, the judge asked the team members to deliberate and provide a recommendation. *Id.* at \*5–6. The team met without the judge and thereafter provided a recommendation for termination and that the defendant ““serve his original sentence.”” *Id.* at \*6. The trial judge adopted ““the ruling of the team.”” *Id.* The appellate court held this to be reversible error and found “telling that the trial judge instructed the drug court team at the hearing, ‘I have no thoughts or opinions on what you should do, should you decide that [the defendant] should come back with no sanctions whatsoever, or if he should be revoked and dismissed from the program or anything between.’” *Id.* at \*11. Moreover, the appellate court ordered that the matter be heard by a different judge on remand because of concerns that the drug court judge had received ex parte communications in his role with the drug court team, which could have impacted his impartiality in later proceedings. *Id.* at \*12. In particular, the court declared that “the trial judge received communication outside the presence of the parties concerning the matter and relied on that communication in disposing of the defendant’s case.” *Id.* Thereafter, in the 2010 *Stewart* case, the court relied on its earlier holding in the 2008 *Stewart* decision with regard to finding due process concerns pertaining to exposure to ex parte communications during drug court team activities. See *Stewart*, 2010 Tenn. Crim. App. LEXIS 691, at \*28–30. See also *Alexander v. State*, 48 P.3d 110, 115 (Okla. 2002) (recognizing “the potential for bias to exist in a situation where a judge, assigned as part of the Drug Court team, is then presented with an application to revoke a participant,” and declaring that in future cases involving the termination of drug court participation, a “defendant’s application for recusal should be granted and the motion to remove the defendant from the Drug Court program should be assigned to another judge for resolution”).

<sup>107</sup>See *Stewart*, 2010 Tenn. Crim. App. LEXIS 691, at \*12–13.

program.”<sup>108</sup> In contrast to the court’s sweeping language in *Stewart*, the state’s ethics committee opined that the state’s Code of Judicial Conduct “does not automatically require recusal,” and that recusal is required “only if the judge determines that he/she cannot be impartial.”<sup>109</sup> In contrast to *Stewart*, the ethics committee relied favorably on both the New Hampshire Supreme Court’s decision in *State v. Belyea*<sup>110</sup> and the Idaho Supreme Court’s opinion in *State v. Rogers*,<sup>111</sup> and quoted both cases with approval.<sup>112</sup> Moreover, the ethics committee added that “[i]t appears that judicial ethical considerations are moving in the direction taken in *Belyea* as to allowing ‘special’ courts to receive ex parte communications.”<sup>113</sup> As for *Stewart*, the ethics committee merely referenced the case and its holding, and then observed that the Tennessee Court of Criminal Appeals had decided the case “upon constitutional rather than ethical grounds and . . . [took] no position as to the latter.”<sup>114</sup>

Somewhat inexplicably, the Tennessee ethics committee made no attempt to reconcile its decision, which focused on judicial ethics, with the *Stewart* holding that was grounded on due process considerations.<sup>115</sup>

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<sup>108</sup>Tenn. Judicial Ethics Comm., Advisory Op. 11-01, at 1 (Mar. 23, 2011), available at <http://www.tncourts.gov/sites/default/files/docs/11-01.pdf>.

<sup>109</sup>*Id.*

<sup>110</sup>See *Belyea*, 999 A.2d at 1085–86 (finding no prejudice of the facts or question as to a drug court judge’s impartiality where the judge had acquired information and knowledge while serving in a judicial capacity on the drug court team). For a further discussion of *Belyea*, see *supra* notes 47–61 and accompanying text.

<sup>111</sup>See *State v. Rogers*, 170 P.3d 881, 886 (Idaho 2007) (determining that a drug court judge may serve in subsequent program termination proceedings and sentencing hearings). For a further discussion of *Rogers*, see *supra* notes 62–68 and accompanying text.

<sup>112</sup>Tenn. Judicial Ethics Comm., Advisory Op. 11-01, *supra* note 108, at 2.

<sup>113</sup>*Id.*, at 4. In support of this proposition, the committee referenced the 2007 ABA Model Code of Judicial Conduct and quoted from the ABA’s comments to “Rule 2.9 the special considerations granted in this regard to ‘problem-solving’ courts.” *Id.* See also *supra* notes 31–43 and accompanying text (discussing the 2007 ABA Model Code and provisions included therein pertaining to specialty courts).

<sup>114</sup>Tenn. Judicial Ethics Comm., Advisory Op. 11-01, *supra* note 108, at 4. The committee did recognize that *Stewart* had held that “the due process clause prevented a judge who had been a member of the defendant’s drug court team from later conducting a probation revocation hearing as to the defendant” for alleged violations “‘based on the same or related subject matter that has been reviewed’ by the judge as a member of the drug court team.” See *id.* (quoting *State v. Stewart*, No. W2009-00980-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 691 (Tenn. Crim. App. Aug. 18, 2010)).

<sup>115</sup>*Id.*

Instead, the ethics committee declared that in Tennessee the courts follow “the same ‘reasonableness’ standard as was applied in *Belyea*.”<sup>116</sup> “That is, the judge must take the more objective, rather than subjective, approach and ‘ask what a reasonable, disinterested person knowing all the relevant facts would think about his or her impartiality.’”<sup>117</sup> In turn, a judge’s decision on recusal should be made on a “case-by-case basis,” and for a drug court judge “the outcome would necessarily depend upon the specific information the judge acquired as a member of the drug court team.”<sup>118</sup> Accordingly, the ethics committee concluded “that serving as a functioning member of the drug court team does not in and of itself require recusal of the judge in a revocation hearing.”<sup>119</sup> This opinion, of course, appears to run directly counter to the Tennessee Court of Criminal Appeals decision in *Stewart* in which the court sweepingly declared that due process precludes a judge who was a member of a drug court team from later presiding over a probation revocation hearing in which the probation violations are the same as those that were before the drug court team.<sup>120</sup>

Can the 2011 Tennessee ethics opinion and the court’s due process decision in *Stewart* be reconciled? Although the court’s language in *Stewart* was broad, the specific facts are instructive. Upon reviewing the record, the court observed, “[W]e are additionally troubled by the four or five occasions where the defendant in this case was ‘sanctioned’ to significant jail time by the drug court team during the two years he participated in the program.”<sup>121</sup> This resulted in the defendant being “appreciably worse off from a punitive perspective than if he had chosen not to participate in the drug court program at all.”<sup>122</sup> Finding this problematic, the court urged

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<sup>116</sup> *Id.*

<sup>117</sup> *See id.* (quoting *Kinard v. Kinard*, 986 S.W.2d 220, 228 (Tenn. Ct. App. 1998), and referencing the New Hampshire Supreme Court’s approach in *State v. Belyea*, 999 A.2d 1080, 1085–86 (N.H. 2010)).

<sup>118</sup> *Id.* The committee added that under “the ‘reasonableness’ standard, recusal may be required in one case and not required in another.” *Id.*

<sup>119</sup> *Id.* at 5. The committee added further that recusal would be necessary “only if the appearance of impartiality should surface in the face of a fair and honest ‘objective standard’ analysis by the judge predicated upon the specific facts developed in each particular case.” *Id.*

<sup>120</sup> *See State v. Stewart*, No. W2009-00980-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 691, \*30 (Tenn. Crim. App. Aug. 18, 2010).

<sup>121</sup> *Id.* at \*37. The court added that “the net effect of these sanctions appears to be that approximately a half-year has been tacked onto the overall defendant’s sentence.” *Id.*

<sup>122</sup> *Id.* The court seemed troubled that a therapeutic form of process could result in the addition of “significant amounts of jail time” as sanctions. *Id.* at \*39.

judges who oversee drug court programs to assure that the programs “focus[] on drug addiction therapy and treatment, and recogniz[e] that, for good reason, punishment with substantial periods of incarceration is [the] bailiwick of the traditional criminal justice system.”<sup>123</sup> By way of contrast, the ethics committee referenced no comparable egregious facts pertaining to the matter under its review.<sup>124</sup> Instead, the ethics committee noted that individuals who participated in the drug court program pertaining to the matter then under review each executed a detailed “waiver, consenting to the drug court judge’s receiving a broad range of ex parte communications regarding the matter.”<sup>125</sup> After quoting the waiver in full, the ethics committee concluded that the waiver authorized the drug court judge “to have what would appear to be access to all relevant documents and records but limits its use to ‘status hearings, progress reports, and sentencing hearings.’”<sup>126</sup> Accordingly, the ethics committee declined to require an automatic recusal and determined that a case-by-case review was appropriate.<sup>127</sup>

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<sup>123</sup>*Id.* at \*41. The court added, “When necessary, truly recalcitrant participants may be swiftly returned to the traditional system via the drug court expulsion process.” *Id.*

<sup>124</sup>Indeed, the committee identified virtually no facts with regard to the specific matter for which the drug court judge had requested an ethics opinion. *See* Tenn. Jud. Ethics Comm., Advisory Op. 11-01, *supra* note 108, at 2 (setting forth the only references in the opinion to the underlying case).

<sup>125</sup>*Id.* at 2. The waiver authorized disclosure to drug court team members of communications such as “progress notes, medical diagnosis, testing, drug results, attendance records, results of medical testing and drug screens, HIV medical records, counselor and social worker notes and summaries, . . . and all other records associated with rehabilitation and treatment.” *Id.* at 3 (quoting waiver).

<sup>126</sup>*Id.* at 3–4. Moreover, the waiver provided that recipients of information obtained throughout the process could “redisclose it only in connection with their official duties as members of the . . . Drug Court Team.” *Id.* at 3 (quoting waiver). By way of contrast, although there had been references to a signed waiver in the record before the court in *Stewart*, the record did “not contain a copy, and consequently” the court did “not know the extent of the rights . . . [the defendant] purportedly waived prior to his participation” in the drug court program.” *See Stewart*, 2010 Tenn. Crim. App. LEXIS 691, at \*39–\*40 n.4. The court expressed doubt, however, as to whether—as a matter of due process—the defendant had the power to waive constitutional rights pertaining to “deprivations of his absolute right to liberty, such as those that may have occurred” in the case. *See id.* (discussing same in the context of the court’s concern about the drug court having imposed additional jail time for program violations).

<sup>127</sup>Tenn. Jud. Ethics Comm., Advisory Op. 11-01, *supra* note 108, at 4.

## B. State Codes of Judicial Conduct

Roughly half the states have adopted the 2007 ABA Model Code of Judicial Conduct.<sup>128</sup> As discussed above, the 2007 Model Code recognizes the unique nature of specialty courts and includes some coverage of ex parte communications rules for such courts.<sup>129</sup> As described in this Section, however, a number of states have promulgated variations of the 2007 Model Code to address specialty courts more specifically.

### 1. Tennessee

Subsequent to both *Stewart* and the 2011 Tennessee Ethics Committee opinion discussed above,<sup>130</sup> the Tennessee Supreme Court adopted a new Code of Judicial Conduct that became effective on July 1, 2012.<sup>131</sup> Tennessee's new judicial conduct code is modeled in large part on the 2007 ABA Model Code of Judicial Conduct, but with some differences.<sup>132</sup> With regard to specialty courts such as drug courts and mental health courts, like the 2007 ABA Model Code, the revised Tennessee Code includes a general recognition of these courts in the Code's "application" section.<sup>133</sup> In

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<sup>128</sup>See GEYH ET AL., *supra* note 8, § 1.03, at 1-6-1-7 (observing that "[b]y 2013, 24 jurisdictions had adopted the 2007 Model Code of Jud. Conduct, although most with revisions to various sections"). For links to documents that describe the differences between the various state enactments and the text of the 2007 Model Code, see American Bar Ass'n, Comparison of State Codes of Judicial Conduct to Model Code of Judicial Conduct, *available at* [http://www.americanbar.org/groups/professional\\_responsibility/resources/judicial\\_ethics\\_regulation/comparison.html](http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/comparison.html).

<sup>129</sup>See *supra* notes 30-43 and accompanying text.

<sup>130</sup>*Stewart*, 2010 Tenn. Crim. App. LEXIS 691; Tenn. Jud. Ethics Comm., Advisory Op. 11-01, *supra* note 108, at 1. See *supra* notes 83-127 and accompanying text.

<sup>131</sup>See *In re: Petition to Amend New Rule 10, RJC 4.1, Rules of the Tenn. Supreme Court*, Order No. M2012-01031-SC-RL2-RL, at 1 (Tenn. June 26, 2012), *available at* [http://www.tba.org/sites/default/files/rule\\_10\\_rjc4.1.pdf](http://www.tba.org/sites/default/files/rule_10_rjc4.1.pdf) (adopting a "comprehensive revision of the Tennessee Code of Judicial Conduct").

<sup>132</sup>For a detailed chart comparing the 2012 Tennessee Code with the 2007 ABA Model Code, see *Comparison between final revised Tennessee Code of Judicial Conduct and ABA Model Code of Judicial Conduct (2007)* (Aug. 8, 2012), *available at* [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/tennessee\\_mjcj\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/tennessee_mjcj_final.authcheckdam.pdf).

<sup>133</sup>See TENN. CODE OF JUD. CONDUCT, Tenn. S. Ct. R. 10, Application § I cmt. 3 (2012), *available at* <http://www.tsc.state.tn.us/rules/supreme-court/10>, which states:

Some states, including Tennessee, have created courts in which judges are authorized by court rules to act in nontraditional ways. For example, judges presiding in drug courts and monitoring the progress of participants in those courts' programs may be

addition, and specifically with regard to ex parte communications, the new Tennessee Code provides the following:

When serving on a mental health court or a drug court, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others. However, if this ex parte communication becomes an issue at a subsequent adjudicatory proceeding in which the judge is presiding, the judge shall either (1) disqualify himself or herself if the judge gained personal knowledge of disputed facts . . . or the judge's impartiality might reasonably be questioned . . . or (2) make disclosure of such communications subject to the [Code's] waiver provisions . . . .<sup>134</sup>

Accordingly, Tennessee's Supreme Court has adopted an approach that is closer to the 2011 Ethics Committee opinion's advisory opinion that judges in specialty courts are to consider recusal motions on a case-by-case basis,<sup>135</sup> rather than the Tennessee Court of Criminal Appeals' categorical approach based on due process considerations set forth in *Stewart*.<sup>136</sup>

## 2. Idaho

By way of contrast, consider the Idaho Supreme Court's approach to the same issue. In 2008, the court amended the ex parte contacts provisions of the Idaho Code of Judicial Conduct by adding the following subsection that focuses specifically on specialty courts:

(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

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authorized and even encouraged to communicate directly with social workers, probation officers and others outside the context of their usual judicial role as independent decision makers on issues of fact and law. Judges serving on such courts shall comply with this Code except to the extent laws or court rules provide and permit otherwise.

*Id.*

<sup>134</sup>*Id.* Canon 2, R. 2.9 cmt. 4 (internal citations to other sections of the Code omitted).

<sup>135</sup>Tenn. Jud. Ethics Comm., Advisory Op. 11-01, *supra* note 108, at 4.

<sup>136</sup>*State v. Stewart*, No. W2009-00980-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 691, \*30 (Tenn. Crim. App. Aug. 18, 2010).

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.<sup>137</sup>

The Idaho Supreme Court added the foregoing provision following a very restrictive March 2008 Idaho Judicial Council ethics opinion which “stated that ‘e-mails, telephone calls or written communications from counselors, drug court coordinators, [or] prosecutors done in an ex parte manner are all prohibited except for those limited situations permitted by the [former] Canons.’”<sup>138</sup> The opinion also directed that the parties must have representation in attendance when the specialty court judge is present at a staffing.<sup>139</sup> The ethics opinion accordingly created a challenge for Idaho specialty courts described as follows: “If counsel does not attend all court sessions and staffings, how can judges [ethically] participate as part of the problem-solving court team . . . ?”<sup>140</sup> Another concern was the “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 hearing, or sentencing.”<sup>141</sup>

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<sup>137</sup>IDAHO CODE OF JUD. CONDUCT, Canon 3(B)(7)(f) (2013), *available at* <http://www.judicialcouncil.idaho.gov/Idaho%20Code%20of%20Judicial%20Conduct.pdf>. The term “staffing,” as used in the subsection, was added in 2012 and is defined to mean “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.” *See id.* at Terminology (including the term in a list of “Terminology” definitions, and noting an adoption date of Nov. 30, 2012, with an effective date of Jan. 1, 2013).

<sup>138</sup>*See* Michael Henderson, *Ex Parte Communications – Adapting an Adversarial Rule to the Problem-Solving Setting*, THE ADVOCATE (Idaho), Vol. 51, Sept. 2008, at 48, 48 (quoting ethics opinion).

<sup>139</sup>*Id.*

<sup>140</sup>*Id.*

<sup>141</sup>*Id.* Recall that in *State v. Rogers*, 170 P.3d 881, 885–86 (Idaho 2007), the Idaho Supreme Court recognized that an individual participating in a drug court program has a protected liberty interest at stake in determinations whether to terminate that person’s participation; however, the court also concluded that although the defendant was entitled to a due process hearing, the drug

In response to the 2008 ethics opinion that called into question these practices in the specialty courts, the Idaho Supreme Court “sought a wide range of views” and ultimately adopted amendments to its Code of Judicial Conduct specifically regarding special courts.<sup>142</sup> The new subsection—Canon 3(b)(7)(f)—both recognizes the role of specialty courts, and also authorizes the court to consider *ex parte* communications at staffings and via written documents that are provided to all members of the specialty court team.<sup>143</sup> The court also added a provision allowing a judge to “initiate, permit, or consider communications dealing with substantive matters or issues on the merits in the absence of a party who had notice . . . and did not appear” at scheduled court proceedings “including a conference, hearing, or trial.”<sup>144</sup> Finally, however, the Idaho Supreme Court elected to adopt a blanket rule that any specialty court judge “who has received any . . . *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 for program termination, a probation violation, or sentencing . . . .<sup>145</sup>

### 3. Additional States

Like Idaho, a number of other states have gone beyond the 2007 Model Code’s provisions relating to *ex parte* communications in specialty courts to provide expanded or more specific coverage. Ten of these states, in addition to Idaho, have adopted specific subsections or unique comments that focus

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court judge could “preside over the termination hearings.” For a detailed discussion of *Rogers*, see *supra* notes 62–68 and accompanying text.

<sup>142</sup>See Henderson, *supra* note 138, at 48 (also indicating that the court consulted with judges, court administrators, prosecutors, defense lawyers, and the state’s Drug Court and Mental Health Court Coordinating Committee).

<sup>143</sup>See IDAHO CODE OF JUD. CONDUCT, Canon 3(B)(7)(f) (2013).

<sup>144</sup>See *id.* Canon 3(B)(7)(e). See also Henderson, *supra* note 138, at 48 (observing that this “provision clarifies *ex parte* prohibition” with regard to scheduled court proceedings).

<sup>145</sup>See IDAHO CODE OF JUD. CONDUCT, Canon 3(B)(7)(f). This decision, of course, represented a reversal, of sorts, from the same court’s 2007 decision in *Rogers* that due process did not require that a subsequent termination proceeding must always be considered by a judge different from the previously presiding drug court judge. See *Rogers*, 170 P.3d, at 885–86. See also Neitz, *supra* note 34, at 124 (suggesting that this aspect of the “Idaho approach recognizes that *ex parte* communications can sometimes be useful, but should not be a determining factor in the resolution of a case”).

on activities in specialty courts.<sup>146</sup> For example, Arizona’s 2009 Code of Judicial Conduct added an additional subsection to Rule 2.9 covering ex parte communications, which provides:

(6) A judge may engage in ex parte communications when serving on problem-solving courts, if such communications are authorized by protocols known and consented to by the parties or by local rules.<sup>147</sup>

Similarly, in adopting the 2007 Model Code, Hawaii crafted the following additional subsection regarding ex parte communications:

(6) A judge may initiate, permit, or consider an ex parte communication when serving on a therapeutic or specialty court, such as a mental health court or drug court, provided that the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication and any factual information received that is not part of the record is timely disclosed to the parties.<sup>148</sup>

Ohio has promulgated a comparable provision, which states:

(6) A judge may initiate, receive, permit, or consider an ex parte communication when administering a *specialized docket*, provided the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage while in the specialized docket program as a result of the ex parte communication.<sup>149</sup>

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<sup>146</sup>These additional states with unique provisions include Arizona, Hawaii, Ohio, Nebraska, North Dakota, Oklahoma, Kansas, Maryland, Iowa, and New Mexico. *See infra* notes 147–167 and accompanying text.

<sup>147</sup>ARIZ. REV. STAT. ANN., Sup. Ct. Rule 81, Canon 2, R. 2.9(6) (2009), available at <http://www.azcourts.gov/Portals/37/NewCode/Master%20Word%20Version%20of%20Code.pdf>.

<sup>148</sup>HAW. RULES OF CT. ANN., Ex. B, REV. CODE OF JUD. CONDUCT, Canon 2, R. 2.9(6) (2009), available at [http://www.courts.state.hi.us/docs/court\\_rules/rules/rcjc.htm](http://www.courts.state.hi.us/docs/court_rules/rules/rcjc.htm).

<sup>149</sup>OHIO REV. CODE ANN., CODE OF JUD. CONDUCT, Canon 2, R. 2.9(6) (2010) (emphasis in original), available at <http://www.supremecourt.ohio.gov/LegalResources/Rules/conduct/judcond0309.pdf>. The Ohio code defines “specialized docket” to include “drug courts, mental health courts, domestic violence courts, child support enforcement court, sex offender courts, OMVI/DUI courts reentry courts, housing courts, and environmental courts.” *See id.* at 9, Terminology (defining “specialized docket” for purposes of the Ohio Code of Judicial Conduct).

Nebraska has similarly created a variation on the 2007 ABA Model Code by adopting the following additional subsection pertaining to specialty courts:

(6) A judge may initiate, permit, or consider *ex parte* communications when serving on therapeutic or problem-solving courts, mental health courts, or drug courts, if such communications are authorized by protocols known and consented to by the parties. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.<sup>150</sup>

In contrast to the more detailed subsections described above, North Dakota and Oklahoma have promulgated narrower provisions that focus on party consent. Indeed, both North Dakota's and Oklahoma's versions of the *ex parte* rules include the following identical language:

(4) With the consent of all parties, the judge and court personnel may have *ex parte* communication with those involved in a specialized court team. Any party may expressly waive the right to receive that information.<sup>151</sup>

Rather than adding a separate subsection to its version of Rule 2.9, when Kansas adopted the 2007 ABA Model Code, the state promulgated a unique comment that cross-references a different court rule pertaining to specialty courts. In particular, the comment provides:

(4) A judge may initiate, permit, or consider *ex parte* communications as authorized by Supreme Court Rule

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<sup>150</sup>NEB. REV. CODE OF JUD. CONDUCT § 5-302.9(6) (2011), available at <http://www.supremecourt.ne.gov/supreme-court-rules/2152/%C2%A7-5-3029-ex-parte-communications>.

<sup>151</sup>N.D. CT. RULES, RULES OF JUD. CONDUCT Canon 2, R. 2.9(4) (2012), available at <http://www.ndcourts.gov/rules/judicial/frameset.htm>; OKLA. CODE OF JUDICIAL CONDUCT Chap. 1, App. 4, Rule 2.9(4) (2011), available at <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=461667>. Comment 4 to the North Dakota rule adds, "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." N.D. COURT RULES, RULES OF JUD. CONDUCT Canon 2, Rule 2.9(4), Comment (4). Similarly, Oklahoma's version includes virtually the same comment, except it refers to "specialized courts" rather than therapeutic or problem-solving courts. OKLA. CODE OF JUD. CONDUCT Chap. 1, App. 4, R. 2.9(4) & cmt. 4 (2011).

109A 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.<sup>152</sup>

In turn, Kansas Supreme Court Rule 109A sets forth additional provisions authorizing and regulating specialty courts for persons with mental illness or substance addictions.<sup>153</sup> The rule authorizes ex parte communications between the specialty court judge and members of the “problem-solving court team, either at a team meeting or in a document provided to all members of the team.”<sup>154</sup> Moreover, the rule specifically allows the specialty court judge who has received ex parte communications as part of presiding over the specialty court team to preside over subsequent proceedings involving a defendant provided that the judge discloses “the existence and, if known, the nature of” the ex parte information, and both the defendant and the prosecution consent.<sup>155</sup> Accordingly, under this latter provision, if a defendant objects to having the specialty court judge preside over a later program termination, probation revocation, or sentencing proceeding, the rule would require the judge’s recusal.<sup>156</sup> Unlike Idaho’s unique adaptation of the 2007 ABA Model Code, however, the Kansas approach does not create a blanket requirement for recusal, and both parties may consent to allowing the specialty court judge to preside.<sup>157</sup>

Like Kansas, Maryland’s version of the 2007 ABA Model Code pertaining to ex parte communications includes a cross-reference to another procedural rule; the Maryland provision states:

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<sup>152</sup> KAN. CODE OF JUD. CONDUCT, R. 601B, Canon 2, R. 2.9 cmt. 4 (2009), available at [http://www.kscourts.org/rules/Judicial\\_Conduct/Canon%202.pdf](http://www.kscourts.org/rules/Judicial_Conduct/Canon%202.pdf).

<sup>153</sup> KAN. SUP. CT. R. 109A, § (a) (2012), available at [http://www.kscourts.org/rules/District\\_Rules/Rule%20109A.pdf](http://www.kscourts.org/rules/District_Rules/Rule%20109A.pdf).

<sup>154</sup> *Id.* § (b).

<sup>155</sup> *Id.* § (c)(1)–(2).

<sup>156</sup> *Id.* § (c)(2).

<sup>157</sup> See IDAHO CODE OF JUD. CONDUCT, Canon 3(B)(7)(f) (2013), available at <http://www.judicialcouncil.idaho.gov/Idaho%20Code%20of%20Judicial%20Conduct.pdf>. (describing Idaho’s across-the-board requirement that a specialty court judge who has received ex parte communications while leading the specialty court *not* preside over subsequent legal proceedings involving the same defendant who was a part of the specialty court program).

(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.<sup>158</sup>

In turn, Maryland Rule 16-206 sets forth general guidelines for specialty courts in the state, and delineates a process for the planning and approval of specialty courts.<sup>159</sup> The rule also includes official commentary suggesting that a specialty court judge should be sensitive to any prior receipt of *ex parte* communications in any ensuing post-termination proceedings.<sup>160</sup>

Although they did not adopt unique rules pertaining to specialty court judges, two additional states—Iowa and New Mexico—departed from the proffered language in the 2007 ABA Model Code of Judicial Conduct via the adoption of state-specific comments pertaining to specialty courts. First, Iowa modified the official comments to the “Application” section of the Model Code by including a unique comment pertaining almost exclusively to drug courts (and not to other specialty courts).<sup>161</sup> In contrast to the comparable section of the 2007 ABA Model Code, which provides that “local rules” may take priority in authorizing conduct by specialty court judges not otherwise permitted under the rules, the Iowa provision instead

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<sup>158</sup> MD. RULE 16-813, Rule 2.9(a)(6) (2010).

<sup>159</sup> MD. RULE 16-206(a)–(c) (2013).

<sup>160</sup> *Id.* at 16-206(e), Committee Note (providing that in the consideration of “whether a judge should be disqualified . . . from post-termination proceedings involving a participant who has been terminated from a problem-solving court program, the judge should be sensitive to any exposure to *ex parte* communications or inadmissible information the judge may have received while the participant was in the program”).

<sup>161</sup> IOWA CT. R. CH. 51, IOWA CODE OF JUD. CONDUCT, Application § I cmt. 3, at 4 (2010). Comment 3, which focuses primarily on drug courts, provides the following:

In Iowa, many districts have formed drug courts. Judges presiding in drug courts may be authorized and even encouraged to communicate directly with social workers, probation officers, and others outside the context of their usual judicial role as independent decision makers on issues of fact and law. When the law specifically authorizes conduct not otherwise permitted under these rules, they take precedence over the provisions set forth in the Iowa Code of Judicial Conduct. Nevertheless, judges serving on drug courts and other “problem solving” courts shall comply with this Code except to the extent the law provides and permits otherwise.

*Id.*

references other “law” regarding specialty courts that can take precedence over conduct permitted by the Iowa rules.<sup>162</sup> In turn, the Iowa Code defines “law” broadly to include not only “court rules,” but also “statutes, constitutional provisions, and decisional law.”<sup>163</sup> Similarly, New Mexico expanded both the rule pertaining to ex parte communications and one of the comments to its version of the ex parte rule to provide a broader scope of applicable, permissive source law for specialty courts than under the 2007 ABA Model Code.<sup>164</sup> Like Iowa and the 2007 ABA Model Code, the New Mexico Code defines “law” to “encompass[] court rules as well as statutes, constitutional provisions, and decisional law.”<sup>165</sup> With regard to its version of the ex parte communications rule, however, New Mexico goes somewhat further in the text of the rule than the 2007 ABA Model Code by specifically providing in its rule that a “judge may initiate, permit, or consider any ex parte communication when expressly authorized by *law, rule, or Supreme Court order* to do so.”<sup>166</sup> In addition, New Mexico’s comment to its ex parte rule with regard to judges in specialty courts also specifically references authorization by “law, rule, or Supreme Court order.”<sup>167</sup>

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<sup>162</sup> Compare *id.* (authorizing other “law” to take priority over the Iowa Code provisions), with ABA MODEL CODE OF JUD. CONDUCT, Application § I cmt. 3 (2011) (authorizing “local rules” to take priority over conflicting Model Code provisions).

<sup>163</sup> See IOWA CT. R. CH. 51, IOWA CODE OF JUD. CONDUCT, Terminology, at 630 (defining “law”). In this regard, the Iowa Code has the same broad definition of “law” as does the 2007 ABA Model Code. See ABA MODEL CODE OF JUD. CONDUCT, Terminology (2007) (defining “law”). The ABA Code, however, only references “local rules” with regard to specialty courts in the comments to its “application” section. ABA MODEL CODE OF JUD. CONDUCT, Application § I cmt. 3 (2011).

<sup>164</sup> See N.M. ST. CT. RULES, RULES OF JUD. CONDUCT R. 21-209(A)(5) & cmt. 4 (2012) (providing an expanded scope of applicable law).

<sup>165</sup> See *id.*, R. Set 21, Terminology (defining “law” for purposes of the code).

<sup>166</sup> Compare *id.* Rule 21-209(A)(5) (quoted in text above with emphasis added), with ABA MODEL CODE OF JUD. CONDUCT, Canon 2, Rule 2.9(5) (2011) (using identical language except for including the phrase “authorized by law”—with “law” being otherwise broadly defined in the Terminology section of the 2007 ABA Model Code).

<sup>167</sup> NMRA, Rule 21-209, cmt. 4. In full, Comment 4 provides:

- (4) A judge may initiate, permit, or consider ex parte communications expressly authorized by law, rule, or Supreme Court order, 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.

## V. RECOMMENDATIONS TO REVISE THE TEXAS CODE OF JUDICIAL CONDUCT

Texas has not adopted the 2007 ABA Model Code of Judicial Conduct. Nonetheless, jurisdictions around Texas have been actively developing a wide array of specialty courts.<sup>168</sup> In addition, the Texas Legislature has given significant recognition to specialty courts.<sup>169</sup> During the 2013 regular legislative session, the Texas Legislature enacted Senate Bill 462 relating to specialty court programs in the state.<sup>170</sup> In part, the legislation consolidated into a single chapter of the Texas Government Code existing provisions pertaining to drug court programs, family drug court programs, mental health court programs, and veterans court programs that had previously been scattered across the Family Code, the Health and Safety Code, and the Government Code.<sup>171</sup> As noted by the bill's sponsor following the conclusion of the 2013 regular legislative session, however, Senate Bill 462 was also intended to "improve oversight of specialty court programs by requiring them to register with the criminal justice division of the Office of the Governor and follow programmatic best practices in order to receive state and federal grant funds."<sup>172</sup> Moreover, Senate Bill 462 added new

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In contrast, the 2007 ABA Model Code has almost identical language for this comment, but only includes the phrase, "expressly authorized by law" – although "law" has the broad definition set forth in the Code. *See* ABA MODEL CODE OF JUD. CONDUCT, Canon 2, R. 2.9, R. 2.9 cmt. 4, & Terminology.

<sup>168</sup> *See* Specialty Courts List, *supra* note 1, at 1.

<sup>169</sup> *See* Act effective Sept. 1, 2013, 83d Leg., R.S., ch. 747, 2013 Tex. Sess. Law Serv. 1883 (West) (to be codified at Tex. Gov't Code tit. 2, subtit. K (West 2013)), *available at* <http://www.capitol.state.tx.us/tlodocs/83R/billtext/pdf/SB00462F.pdf#navpanes=0> [hereinafter S.B. 462].

<sup>170</sup> *Id.*

<sup>171</sup> *See* House Judiciary & Civil Juris. Comm., Bill Analysis, at 1, Tex. C.S.S.B. 462, 83d Leg., R.S. (2013), *available at* <http://www.capitol.state.tx.us/tlodocs/83R/analysis/pdf/SB00462H.pdf#navpanes=0> (describing the former law).

<sup>172</sup> Tex. Sen. Research Center, Bill Analysis, at 1, Tex. S.B. 462, 83d Leg., R.S. (2013), *available at* <http://www.capitol.state.tx.us/tlodocs/83R/analysis/pdf/SB00462F.pdf#navpanes=0>. The statement of intent also indicates that the new law requires the Governor's Specialty Courts Advisory Council "to recommend programmatic best practices to the criminal justice division." *Id.* This is consistent with a gubernatorial executive order also calling for advice on best practices for specialty courts. *See* The Governor of the State of Tex. Crim. Justice Div., *Ex. Order RP 77 – Relating to the reauthorization of the operation of the Governor's Criminal Justice Advisory Council*, 37 Tex. Reg. 2806 (2012), *available at* <http://governor.state.tx.us/news/executive-order/16995/>.

language to the Texas Government Code mandating that specialty court programs “shall . . . comply with all programmatic best practices recommended by the Specialty Courts Advisory Council . . . and approved by the Texas Judicial Council.”<sup>173</sup>

The recommended programmatic best practices for Texas specialty courts have included the expectation for “adherence to the Ten Key Components and research-based best practices for specialty courts.”<sup>174</sup> As described by the Texas Criminal Justice Advisory Council, the National Association of Drug Court Professionals developed “the Ten Key Components . . . as essential characteristics specialty programs must embody.”<sup>175</sup> In turn, the Texas Legislature has codified these key components for Texas specialty courts.<sup>176</sup> Of significance to the discussion of a judge’s role in a specialty court, these codified program characteristics contemplate an “ongoing judicial interaction with program participants.”<sup>177</sup> Accordingly, the state legislature has not only recognized that a judge is engaged in a different, non-traditional role when presiding over a specialty court program, but has also codified the expectation that judges in such programs will have ongoing interactions with the participants. Unfortunately, however, the Texas Code of Judicial Conduct, unlike the 2007 Model ABA Code or its implementation in many states, does not address the unique role performed by judges in specialty courts, and it is

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<sup>173</sup>S.B. 462, *supra* note 170, at § 1.01 (enacting TEX. GOV’T CODE ANN. § 121.002(d)(1) (West Supp. 2013)). A failure to comply can result in the program’s ineligibility for state or federal funds. *Id.* § 121.002(e).

<sup>174</sup>*See* CJAC Report, *supra* note 1, at 2.

<sup>175</sup>*See id.* (referencing Key Components, *supra* note 4) (setting forth ten components identified as keys to successful drug court programs)).

<sup>176</sup>*See* CJAC Report, *supra* note 1, at 2. *See also* TEX. GOV’T CODE ANN. § 123.001(a)(1)–(10) (West Supp. 2013) (defining ten “essential characteristics” for Texas drug courts); *id.* § 122.001(1)–(10) (family drug courts); *id.* § 124.001(a)(1)–(10) (veterans courts); *id.* § 125.001(1)–(9) (mental health courts). S.B. 462 re-codified these statutes from their former locations in other parts of the Texas Government Code. S.B. 462, *supra* note 169, at §§ 1.02, 1.04–.06.

<sup>177</sup>TEX. GOV’T CODE ANN. §§ 122.001(7), 123.001(a)(7), 124.001(a)(7), 125.001(5) (West Supp. 2013). *See also* Key Components, *supra* note 4, at 15 (noting that the “judge is the leader of the drug court team” and is the link for participants from “treatment and to the criminal justice system” and indicating that such “courts require judges to step beyond their traditionally independent and objective arbiter roles”). Another key component, now codified in Texas, creates an expectation for “the use of a nonadversarial approach involving prosecutors and defense attorneys to promote public safety and to protect the due process rights of program participants.” *See, e.g.*, TEX. GOV’T CODE ANN. § 123.001(a)(2) (West Supp. 2013).

therefore time for the Texas Supreme Court to amend the Texas Code of Judicial Conduct to recognize such courts.

What is the best approach for amending the Texas Code of Judicial Conduct to recognize the unique role of judges in specialty courts – particularly with regard to *ex parte* communications and disqualifications or recusals? By not having acted as of yet, the Texas Supreme Court has the opportunity to study the actions by other states and adopt provisions that best serve the expanding use of specialty courts in Texas. Amending the *ex parte* communications section of the Texas Code of Judicial Conduct in a manner comparable to several other states' adoption of provisions comparable to the 2007 ABA Model Code would provide a significant improvement over current law with regard to specialty courts.<sup>178</sup> One approach to doing so would be to amend Canon 3(B)(8) of the Texas Code of Judicial Conduct pertaining to the prohibition on *ex parte* communications by amending the exception set forth in subsection (e) and adding a new subsection (f), as follows:

(e) considering an *ex parte* communication expressly authorized by law, which for purposes of this exception includes statutes, constitutional provisions, decisional law, and state or local court rules or orders; and

(f) A judge presiding over a specialty court program such as a drug court, family drug court, mental health 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, consistent with waiver and consent protocols developed and implemented by the specialty court program. In presiding over a specialty court, a judge may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.<sup>179</sup>

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<sup>178</sup>The Texas Supreme Court might wish to consider adopting additional portions or all of the 2007 ABA Model Code, but the scope of such a review is beyond the scope of this Article.

<sup>179</sup>The suggested language would amend TEX. CODE JUD. CONDUCT, Canon 3(B)(8). The proposed new language is underlined.

The proposed amendments to subsection (e) represent an amalgam of the Iowa and New Mexico approaches described above.<sup>180</sup> In addition, adopting this language would recognize that specialty court programs are still evolving and different jurisdictions will likely approach problem-solving courts in differing ways.<sup>181</sup> The language suggested for subsection (f) creates an exception specifically addressed to specialty courts, and the text is drawn from the approaches of several states.<sup>182</sup> In addition, the four specific types of specialty courts identified in the proposed language are not intended to be exclusive, but track those four types of programs identified during the 2013 Texas legislative session in S.B. 462.<sup>183</sup> Finally, the proffered language relating to waiver and consent provisions is consistent with one of the Texas Criminal Justice Policy Council's focus areas.<sup>184</sup>

In addition to language pertaining to ex parte communications, the Texas Supreme Court should also consider adding language pertaining to disqualifications or recusals. Canon 3(B)(1) requires that a judge not decide a matter “in which disqualification is required or recusal is appropriate.”<sup>185</sup> Moreover, a “judge shall perform judicial duties without bias or prejudice,” and a “judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice . . . .”<sup>186</sup> As discussed above, Idaho has adopted a firm rule that if the specialty court judge receives ex parte

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<sup>180</sup> See *supra* notes 161–167 and accompanying text.

<sup>181</sup> See CJAC Report, *supra* note 1, at 7 (observing that “the size and diversity of Texas prevents a one-size-fits-all approach”). The Texas Supreme Court could also adopt a comment to the proposed, revised subsection (e) that incorporates the 2007 ABA Model Code’s focus on local rules for specialty courts. See ABA MODEL CODE OF JUD. CONDUCT, Application § I cmt. 3 (2011) (authorizing “local rules” to take priority over conflicting Model Code provisions); see also, *supra* note 32 and accompanying text (quoting the ABA comment). For example, the Texas Supreme Court could consider the following approach for such a new comment: “When local rules establishing a specialty court specifically authorize conduct not otherwise permitted under this Code, they take precedence over the provisions set forth in the Code. Nevertheless, judges presiding over specialty courts shall comply with this Code except to the extent local rules provide and permit otherwise.” This proffered language closely tracks the 2007 ABA Model Code’s comparable comment.

<sup>182</sup> See *supra* notes 137–167 and accompanying text (notably, Idaho, Nebraska, and Kansas).

<sup>183</sup> See S.B. 462, *supra* note 170.

<sup>184</sup> See CJAC Report, *supra* note 1, at 7 (recommending the continued “development of standard consent and waiver forms for use by programs to ensure due process rights of participants are protected”).

<sup>185</sup> TEX. CODE JUD. CONDUCT, Canon 3(B)(1).

<sup>186</sup> *Id.* Canon 3(B)(5)–(6).

communications while presiding over the specialty court team, the judge “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.”<sup>187</sup> That also appears to be the approach of the Tennessee Court of Criminal Appeals, although not that of the Tennessee Supreme Court.<sup>188</sup> This Article does not advocate a blanket requirement for recusal from subsequent proceedings simply because the specialty court judge received *ex parte* communications in the course of presiding over the specialty court program. Typically, courts consider recusal motions on a case-by-case basis. Why should this type of situation be any different, particularly if the specialty court participant signed a thorough consent and waiver form? Accordingly, one possible approach would be for the Texas Supreme Court to consider adding a new subsection (12) to Canon 3(B) pertaining to a judge’s adjudicative responsibilities, as follows:

(12) If *ex parte* communications permitted by this Canon become an issue at a subsequent adjudicatory proceeding at which a specialty court judge is presiding, the specialty court judge shall either (1) recuse himself or herself if the judge gained personal knowledge of disputed facts outside the context of the specialty court program, or (2) make disclosure of any such *ex parte* communications.<sup>189</sup>

The foregoing language is intended to address the possible need for a recusal depending on the nature and extent of the *ex parte* communications that might arise as part of an individual’s participation in a specialty court program. It calls for a case-by-case assessment, rather than employing a blanket rule. Indeed, depending on the nature of the *ex parte* communications, as well as the extent of any signed waivers or consent documentation, there might be no need for recusal in a particular case.<sup>190</sup>

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<sup>187</sup> See IDAHO CODE OF JUD. CONDUCT, Canon 3(B)(7)(f), at 11.

<sup>188</sup> See *supra* notes 83–127 and accompanying text.

<sup>189</sup> This proposal closely tracks language from one of the official comments set forth in the 2012 Tennessee Code of Judicial Conduct. See TENN. CODE OF JUD. CONDUCT, Tenn. S. Ct. R. 10, RJC 2.9 cmt. 4; *supra* notes 130–136 and accompanying text. As an alternative, this proposed language could be included at the end of proposed subsection (B)(8)(f), described above. See *supra* text accompanying note 179.

<sup>190</sup> See, e.g., *supra* notes 108–127, and accompanying text (discussing Tenn. Judicial Ethics Comm., Advisory Op. 11-01, *supra* note 108).

Moreover, if the revised rules permit certain ex parte communications from, for example, treatment team members at a staffing meeting, the presiding specialty court judge will have received that information while performing a now permissible judicial role—and not gained it via “personal knowledge.”<sup>191</sup>

## VI. CONCLUSION

Specialty courts now comprise a significant and growing part of the Texas judicial landscape. Moreover, given both legislative and gubernatorial support for specialty courts in Texas, this growth will likely continue. To assure that there is appropriate recognition and coverage of this new role for a growing number of Texas judges who preside over specialty courts, it is time for the Texas Supreme Court to follow the lead of a number of states from around the country and amend the Texas Code of Judicial Conduct.

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<sup>191</sup> See Meyer, *supra* note 11, at 205–06 (asserting that “[w]hen a drug court judge receives information from a treatment provider or other source, this would be subject to the rules on ex parte contacts” and “does not qualify as ‘personal knowledge’” requiring disqualification because “the judge has not personally observed the events in question;” but, suggesting that judges should “recuse themselves from any adjudication arising out of events that they did witness, such as a participant appearing in court intoxicated or a participant attempting to escape”). In addition, separate and apart from issues pertaining to ex parte communications, there might exist other reasons by which the specialty court judge should consider whether to recuse himself or herself from an ensuing adversarial proceeding based on possible bias. See, e.g., Arkfeld, *supra* note 10, at 320 (providing the following example of possible bias when the specialty court judge is called to preside at a later sentencing hearing: “The judge who had worked with the defendant throughout the failed treatment process might no longer be in the position to be considered objective and open-minded.”).