



Ethical Issues in the Family Drug Treatment Court

By Judge Leonard Edwards (ret.)

Many juvenile dependency courts¹ have developed family drug treatment courts (FCTCs)² to assist parents in their efforts to recover from substance abuse and related problems.³ These treatment courts have proved effective in helping parents recover from substance abuse and reducing the time children stay in foster care.⁴ However, FDTCS differ from traditional criminal drug courts in several critical aspects. As a result, judges presiding in FDTCS face unique ethical issues, some of which the literature has ignored.⁵ In particular, does a judge violate the ethical prohibition against *ex parte* communications when presiding over an FDTC in the non-participating parent's absence?⁶ Does a judge who develops a special relationship with an FDTC client give the appearance that the judge is partial toward that client?⁷ This article will identify and discuss these and other ethical issues facing juvenile court judges who are operating an FDTC.

1 These courts have different names in different states including abuse and neglect court, child protection court, Children in Need of Services (CHINS), and Children in Need of Protection (CHIPS). In this paper, the term juvenile dependency court will be used throughout.

2 Different names have been given to these courts including dependency drug treatment court, family treatment court, and family wellness court. This paper will use family drug treatment court (FDTC) throughout.

3 See generally, Leonard Edwards & James Ray, *Judicial Perspectives on Family Drug Treatment Courts*, 56 JUVENILE AND FAMILY COURT JOURNAL, Summer 2005, at 1-28.

4 S.D. Worcel et al., *Family Drug Treatment Court Evaluation Final Report* (NPC Research, 2007).

5 Judge Pach indicates that there may be problems with one judge hearing both the juvenile dependency and family drug treatment court dockets, but does not explore possible violations of the canons of judicial ethics. Nicolette Pach, *An Overview of Operational Family Drug Treatment Courts*, VI DRUG COURT REVIEW, 1, 67-121 at 104; In *Ethical Considerations for Judges and Attorneys in Drug Court*, Freeman-Wilson, Tuttle, and Weinstein mention the problem of *ex parte* communications, but have no discussion regarding the unique ethical issues facing judges in family drug treatment courts. K. FREEMAN-WILSON, R. TUTTLE, & S. WEINSTEIN, *ETHICAL CONSIDERATIONS FOR JUDGES AND ATTORNEYS IN DRUG COURT* (National Drug Court Institute, 2001), at 9-10.

6 ABA Model Code of Judicial Conduct, Canon 2, Rule 2.9 (refer to Scenario 2 in Section III below and Appendix D).

7 ABA Model Code of Judicial Conduct, Canon 1, paragraph 5 (refer to Scenario 3 in Section III below and Appendix D).

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This article will begin by discussing the nature of FDTCs, including how these courts interact with the juvenile dependency court and how they differ from other types of drug courts. In the second section, the article will address the legal and ethical framework in which all judges work. The third section will present a number of hypothetical scenarios that judges presiding in FDTCs encounter. The discussion relating to each scenario will include ethical issues facing the judge and recommendations that will permit the judge to continue to participate in an FDTC without violating ethical rules and the law. The article will conclude that FDTCs provide a valuable process for supporting parents in their rehabilitation and children's safe reunification with their families, but that careful planning is necessary so that these courts can be conducted ethically.

I. FAMILY DRUG TREATMENT COURTS (FDTC)

An FDTC is a specialized calendar or docket that offers substance-abusing parents in the juvenile dependency court an opportunity to focus upon their recovery. FDTCs are an example of problem-solving courts that have been sweeping the country over the past decade.⁸ Others include criminal drug courts, mental health courts, juvenile drug courts, homeless courts, re-entry courts, gun courts, and veterans' courts.⁹ Parental substance abuse is the foremost presenting problem that results in child abuse and neglect proceedings in the juvenile dependency court,¹⁰ but it is often accompanied by other problems including domestic violence, poverty, and mental health issues.

FDTCs share many similarities with other problem-solving courts. They enable the judge, professionals, and service providers to work together with parents whose children are the subjects of state-initiated child protection proceedings. These courts are characterized by the participation of a team of professionals who work collaboratively with each other and with the court to develop an individualized plan for each client. The team closely monitors the client's progress, and the client meets weekly or bi-weekly with the judge and team members in a courtroom setting to discuss problems, review progress, and receive guidance and inspiration in order to succeed.¹¹

Several studies have evaluated FDTCs. The studies reveal that the FDTC results in more treatment for parents, more family reunification outcomes, fewer terminations of

⁸ These are also called collaborative courts and therapeutic courts. This article will refer to them as problem-solving courts.

⁹ Peggy Hora, *Courting New Solutions Using Problem-Solving Justice: Key Components, Guiding Principles, Strategies, Responses, Models, Approaches, Blueprints and Tool Kits*, 2 CHAPMAN JOURNAL OF CRIMINAL JUSTICE, No. 1, 2011, at 7-52, 7.

¹⁰ "... a large percentage of parents who abuse, neglect, or abandon their children have drug and alcohol problems. . . . Although national data are incomplete, it is estimated that substance abuse is a factor in three-fourths of all foster care placements." National Conference of State Legislatures, *Linking Child Welfare and Substance Abuse Treatment: A Guide for Legislatures* (2000); Laura Feig, *Drug Exposed Infants and Children: Service Needs and Policy Questions* (U.S. Department of Health and Human Services, 1990); Kelly Kelleher et al., *Alcohol and Drug Disorders Among Physically Abusive and Neglectful Parents in a Community Based Sample*, 84 AMERICAN JOURNAL OF PUBLIC HEALTH, at 1586, 1588; Jose Ashford, *Treating Substance-Abusing Parents: A Study of the Pima County Family Drug Court Approach*, 55 JUVENILE AND FAMILY COURT JOURNAL, Fall 2004, at 27-37, 28.

¹¹ Edwards & Ray, *op.cit.*, note 3 at 1.

parental rights, less time in foster care for children, and substantial savings to the court system, participating agencies, and service providers.¹² It is no wonder that the number of FDTCs has increased significantly from 10 in 1999 to more than 321 in 2010.¹³

The fundamental FDTC goals are parental rehabilitation, child safety, and timely permanency. The FDTC attempts to accomplish these goals using a team of professionals to maximize oversight of the parent's progress toward rehabilitation, provide timely and effective services, and impart encouragement throughout the life of the case. The FDTC resembles a court proceeding, but it differs in significant ways. FDTC hearings are not statutorily mandated.¹⁴ They occur only after a client (a parent) agrees to participate in FDTC proceedings designed to assist his or her rehabilitation.¹⁵

The FDTC can be described as an intensive set of review hearings designed to improve each parent's chances of overcoming his or her addiction. The FDTC attempts to provide a therapeutic environment including frequent hearings before a judge, with rewards and/or sanctions for progress or lack of progress achieved by the parent.¹⁶ The less formalized setting, the discussions between the court and the client, and the encouragement coming from the court and team members have been identified as supporting and inspiring parents to overcome their addiction.¹⁷

One characteristic of all problem-solving courts, and of FDTCs in particular, is the great amount of information that the judge learns about each drug court client. Because the client may appear in court on a weekly or bi-weekly basis and because so many professionals and community members are involved in the treatment process, the judge can learn how a client spends his or her days throughout the week. When the client resides in a residential program, the amount of information is significantly increased.

As with the criminal drug court, the underlying principles of FDTCs are the Ten Key Components.¹⁸ However, one need only to read these to realize that they were written for defendants subject to criminal court proceedings, and not for parents whose children are the focus of juvenile dependency proceedings.¹⁹

In fact, the FDTC is distinct from most other problem-solving courts primarily because of the unique nature of juvenile dependency proceedings. In both the criminal

12 D.B. Marlowe & S.M. Carey, *Research Update on Family Drug Courts*, NEED TO KNOW (NADCP, May 2012); B. Green et al., *How Effective Are Family Treatment Drug Courts? Outcomes from a Four-Site National Study*, 12 CHILD MALTREATMENT, 2007 at 50-56; Worcel et al., *op.cit.*, note 4.

13 There are more than 321 FDTCs in the United States as of 2010 according to The Center for Children and Family Futures.

14 The author has spoken with several national experts on this issue. None of those persons is aware of any state statute mandating the creation or operation of an FDTC.

15 In a few FDTCs, the substance-abusing parent is mandated to participate in the program. In most FDTCs, however, the parent voluntarily enters.

16 L. Edwards, *Sanctions in Family Drug Treatment Courts*, 61 JUVENILE AND FAMILY COURT JOURNAL, Winter 2010, at 55-62.

17 *Id.* at 58; Edwards & Ray, *op.cit.*, note 3 at 12-13.

18 NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, *DEFINING DRUG COURTS: THE KEY COMPONENTS* (NADCP, Drug Court Standards Committee, Drug Courts Program Office, Office of Justice Programs, U.S. Department of Justice, 1997, Reprinted 2004). Refer to Appendix A for a list of the Key Components.

19 "While FDTCs are in many ways similar to drug courts, they have their own set of complications that render NADCP's 10 key components necessary, yet insufficient, to guide the establishment, maintenance, and improvement of FDTCs." Pach, *op.cit.*, note 5, at 67.

court and criminal drug court, the defendant is the subject of the legal proceedings. In juvenile dependency court, the child is the subject of the proceedings, while in the FDTC the parent is the focus of the proceedings. The criminal court and the criminal drug court occur sequentially. Before the criminal drug court focuses on the defendant's recovery, the criminal charges have been resolved and the defendant has been sentenced. In the juvenile dependency court, the case is not over until the court has placed the child in a permanent placement. Thus the FDTC hearings occur in the same timeframe as the juvenile dependency case. Finding the allegations of the petition true in the dependency court only starts the process of determining what services the parents will receive and how successful the parents will be in their efforts to address the problems that brought their child to the court's attention and regain custody of their child. The juvenile dependency case will continue until the court establishes a permanent plan for the child, whether that is return to a parent, termination of parental rights and adoption, legal guardianship, or placement with a relative.²⁰ One or both parents may or may not reunify with the child—that has yet to be determined. An FDTC goal is that a parent's participation in the program will enhance his or her chances of reunification.

More significantly, the juvenile dependency court focuses on the permanent placement of the child who is before the court. Clients in criminal drug court work with the team to overcome their addiction and to stay out of jail. Parents in the dependency court and in the FDTC work to complete their rehabilitation so that their child will be returned to them. They are attempting to avoid losing their parental rights.²¹

More parties participate in a dependency case than in a criminal proceeding. Criminal cases usually involve only a prosecutor and a defendant. Juvenile dependency cases have at least two parents, a child, as well as the petitioning party, usually the county or state children's services agency. Other potential parties may be representatives from a Native American Tribe, a legal guardian, foster parents, or an additional father, if there is more than one child. The large number of parties in juvenile dependency proceedings raises problems with the ethical prohibition against improper *ex parte* communications as discussed in Section III.

Another distinctive aspect of juvenile dependency cases involves adherence to statutory timeframes. Since dependency cases involve children, federal and state laws mandate that court hearings occur within statutory limitations, specifically requiring that the court determine a permanent plan for the child within a year.²² Thus, juvenile dependency and FDTC hearings must take place within the same timeframe. The FDTC process may not wait until the dependency case is over—that would be too late as the court would have already established a permanent plan for the child.

As a result of these differences, unique ethical issues arise in the FDTC. A discussion of the ethical framework for judges follows in the next section.

20 Other possible outcomes include long-term foster care or group home care. Neither of these is a permanent placement under the law, although many children find themselves in these impermanent placements. See generally, L. Edwards, *Improving Implementation of the Federal Adoption Assistance and Child Welfare Act of 1980*, 43 JUVENILE AND FAMILY COURT JOURNAL, Summer 1992, 1-18.

21 *Id.* at 5.

22 See generally, L. Edwards, *Achieving Timely Permanency in Child Protection Courts: The Importance of Frontloading the Court Process*, 58 JUVENILE AND FAMILY COURT JOURNAL, Spring 2007, 1-37 at 5-6.

II. ETHICAL FRAMEWORK

Ethical guidelines govern a judge's conduct both on and off the bench. Everyone knows that judges must follow the law, but outside of the legal world, few understand that judges are also bound by ethical rules. Ethical rules for judges have been adopted by all state supreme courts or state legislatures in one form or another and are the law in each state. The Model Code of Judicial Conduct, promulgated by the American Bar Association in 1924, forms the basis for these rules. The ABA revised the Model Code in 1972, 1990, and again in 2007.²³ All state supreme courts or legislatures adopted versions of these rules into their codes or statutes in the years following their creation. Each state code or statute contains language closely approximating the Model Code.

The Model Code of Judicial Conduct embodies much more than a set of rules or guidelines. It reflects the principles underlying the system of justice we aspire to in this country. The Code is not meant to force judges into monastic isolation, but to give directions as to how to conduct themselves appropriately on and off the bench. The Code acknowledges that the strength of our judicial system can be measured by the conduct of those who preside in the judicial branch.

Several canons contained in the Model Code of Judicial Conduct are of particular relevance to the hypothetical scenarios described in this article. These canons likely exist in all state codes or legislative schemes, but the exact language and numbering may differ. The most relevant canons for this article concern avoiding the appearance of impropriety,²⁴ performing the duties of judicial office impartially,²⁵ the prohibition of improper *ex parte* communications,²⁶ and the consequences of unethical actions.²⁷ Each of these canons will be discussed in the hypothetical scenarios contained in Section III.

III. HYPOTHETICAL FACT SITUATIONS FOR JUDGES²⁸

This section addresses commonly occurring factual scenarios in FDTCs. Ethical issues arise in each scenario. Several FDTC models operate in the United States, the

23 A copy of the 2007 and all previous versions of the Model Code of Judicial Conduct are available on the ABA Web site at http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html [hereinafter ABA Model Code]. Additionally, that site has the reporter's comments on the reasons for the modifications to the Model Code. The discussion in this article will refer to the 2007 version of the Model Code of Judicial Conduct. Copies of the canons and comments relevant to the discussion in this article are contained in this section and in Appendix D. Readers should refer to their own state law for the ethical rules applicable in their state.

24 ABA Model Code, Canon 1 and paragraph [5] of the Commentary to Canon 1.

25 ABA Model Code, Canon 2.

26 ABA Model Code, Canon 2, Rule 2.9.

27 ABA Model Code, Canon 2, Rule 2.11.

28 There are many other ethical issues facing a judge presiding over an FDTC. These scenarios are by no means an attempt to encompass all such issues. They are intended to focus upon those issues facing the judge in relation to the clients who appear in the juvenile dependency court and the FDTC. For further discussion, see L. EDWARDS, *THE ROLE OF THE JUVENILE COURT JUDGE: PRACTICE AND ETHICS* (The Rutter Group, a Division of West, 2012) at 114-119, 202-208.

integrated and parallel models being the most popular.²⁹ In an integrated FDTC, the same judge hears the juvenile dependency docket and the FDTC. In the parallel FDTC model, one judge hears the juvenile dependency docket and a different judge hears the FDTC. There can be variations on these models with cases being traded back and forth between judges or additional judges being involved in either the juvenile dependency case or the FDTC.

Scenario #1

You are a juvenile court judge presiding over a dependency court and an FDTC, an integrated court. In the FDTC, you have regularly seen and personally engaged each participant.³⁰ You have encouraged them to change their lives, cheered them on when they have been successful, and given them tokens to mark their progress. Because of the frequency and intensity of your FDTC meetings, you find that your interactions with clients in the FDTC have had an impact on you. You have gotten to know many of the clients, understand their lives and problems, and believe that many are decent people who have had significant bad breaks in their lives. You wonder whether you can be a fair judge if the agency moves to terminate reunification services or terminate parental rights.³¹

Should you hear dependency cases after you have developed personal relationships with clients in the FDTC? Are there legal or ethical issues you should consider?

Discussion

This scenario goes to the heart of a judge's duty. You hear cases every day with sad, poignant stories about human beings and their problems.³² Your task as a judge is to follow the law, tempered with some acknowledgment of the litigants' difficult situation. If you find that you cannot follow the law, you are violating both the law and your ethical duty to follow the law.³³ You should disqualify yourself from hearing cases

29 Children and Family Futures created the descriptive terms for each model. *See generally* N. Young, M. Wong, T. Adkins, & S. Simpson, *Family Drug Treatment Court: Process Documentation and Retrospective Outcome Evaluation* (Children and Family Futures, Inc., prepared for the U.S. Department of Health and Human Services and Department of Justice, 2011), at 5; P. Breitenbucher, S. Gardner, & L. Owen, *Integrated and Parallel Family Drug Courts: A Comparison of Two Models* (unpublished manuscript, Children and Family Futures; a copy is available from the author).

30 "This active, supervising relationship, maintained throughout treatment, increases the likelihood that a participant will remain in treatment and improves the chances for sobriety and law-abiding behavior." NADCP KEY COMPONENTS, *op.cit.*, note 18, Component #7. Refer to Appendix A.

31 FREEMAN-WILSON ET AL., *op.cit.*, note 5.

32 "Due to the continuing personal engagement between participants and the drug court judge, the judge runs the risk of being influenced by factors other than the merits of each participant's case. Participants with friendly dispositions or particularly compelling experiences may attract the judge's compassion and leniency, while those with less friendly personalities may provoke the opposite response." FREEMAN-WILSON ET AL., *op.cit.*, note 5 at 9.

33 ABA Model Code, Canon 1, Paragraph 5; Canon 2, and Rule 2.2—the text of each is contained in Appendix D.

in which you cannot follow the law.³⁴ You should not ask the parties to waive your disqualification because you have determined you cannot follow the law. As a result of your realization that you cannot follow the law, you should make changes in your judicial assignment and hear either the juvenile dependency docket or the FDTC calendar, but not both.

Scenario #2

You preside over an integrated court, hearing both the juvenile dependency court and the FDTC. You are hearing a contested permanency planning review in the juvenile dependency court, and one of the parents (the mother) is a participant in the FDTC. You wonder whether you need to disclose your involvement with one of the parents in the FDTC to the other parent (the father), to the child, and to their attorneys. If you decide to disclose, you wonder what you should say to them about the information you have learned from the FDTC court proceedings. You also wonder whether you should disqualify yourself.

Discussion

Scenario #2 presents a problem that many FDTCs encounter. No ethical guidelines have been forthcoming from the ABA, the National Association of Drug Court Professionals, or other national organizations regarding these issues.³⁵

In this scenario, one party to the juvenile dependency proceedings (the mother) regularly appears before you at the FDTC to discuss substance abuse recovery issues while the other party (the father) does not. Information about the mother's progress is presented to you and the other FDTC team members, and you usually have a conversation with her about progress or lack of progress, often offering encouragement and praise.³⁶ On occasion, the mother's relationship to the father may be discussed as well as other issues that may affect the mother's recovery.

The hearings you have had in the FDTC are improper *ex parte* communications and a violation of Canon 2, Rule 2.9.³⁷ You have had meetings and conversations with a party (the mother) in a "pending or impending proceeding" without the other parent (the father) being present. Nor is it likely that the child or the child's attorney was present.³⁸ The information you have gained from those conversations may be relevant to the decisions you are making in the dependency proceeding.

34 ABA Model Code, Canon 2, Rule 2.11 (refer to Appendix D).

35 As noted in note 29 and accompanying text, Children and Family Futures has defined the two models and discussed their differences.

36 This encouragement in itself is not a violation of the Model Code of Judicial Conduct. The Code does not require disengagement—rather it requires impartiality. The judge is permitted to show concern about a client's progress or lack of progress, as long as the judge displays the same quality of engagement and concern to every drug court participant.

37 Refer to Appendix D for the full text.

38 This is true because the FDTC client may be appearing before the judge on a weekly or bi-weekly basis. It would be most inconvenient for the non-clients to take time out of their daily schedules to attend an FDTC hearing that does not directly affect them.

In order to determine whether you can ethically preside over the dependency case, you must first decide whether you can still be fair to all parties.³⁹ Your ability to be fair to all parties is the essential basis of being a judge. If you cannot be fair, you must disqualify yourself. Moreover, the parties cannot waive your disqualification.⁴⁰ Should you conclude you can be fair to all parties, you may preside over the dependency case, but you must disclose your conversations in the FDTC to all parties to the juvenile dependency proceedings.⁴¹ Your disclosure will be difficult because you may not remember all that you and other team members said in the FDTC.

There is an additional ethical issue. You have had ongoing judicial interaction with this FDTC participant.⁴² This interaction includes a more thorough understanding of the problems facing the FDTC client than you would learn in juvenile dependency proceedings. Your interactions with the FDTC client often involve praise for progress made toward recovery from addiction. The relationship you develop with the client may give others the impression that you have developed a relationship that will make it difficult for you to be impartial when hearing a case involving that client. Canon 2.11 is relevant to your decision:

(A) A judge shall disqualify himself or herself in any proceedings in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of the facts that are in dispute in the proceeding.⁴³

Several procedures could be employed to address the ethical problems raised in this scenario. First, you could ask the other parent and parties to consent or stipulate that the first parent can participate in the FDTC and waive any objection to *ex parte* communications that take place in the FDTC.⁴⁴ The stipulation might include conditions such as: (1) the second parent and any other party could attend or be given notice and the opportunity to attend all FDTC hearings when the first parent appears, or (2) the second parent's attorney and the attorneys for other parties could attend all FDTC hearings where the first parent appears.

In the alternative, a second judge could hear all FDTC cases. As mentioned above, this model is called a parallel family drug court as opposed to an integrated family drug

39 ABA Model Code, Canon 2, Rule 2.11 (refer to Appendix D for the full text).

40 ABA Model Code, Canon 2, Rule 2.11(A)(1) and (C) (refer to Appendix D for the full text).

41 ABA Model Code, Rule 2.11, commentary (refer to Appendix D for the full text). The California Judges Association Ethics Committee has opined that "A juvenile judge handling a Family Wellness Court cannot participate in informal review hearings or staffing hearings in which only some of the parties and attorneys participate unless all of the parties agree to the *ex parte* communications with knowledge as to how the information will be used by the judge at future hearings." (California Judges Association, *Judicial Ethics Update*, November 2012) at 3.

42 This interaction is consistent with Component #7 of the Key Components, *op.cit.*, note 18. Refer to Appendix A.

43 ABA Model Code, Canon 2, Rule 2.11(A)(1). *See also* Canon 1, paragraph 5.

44 A waiver developed by the Santa Clara County (California) Juvenile Court is contained in Appendix B. A second draft waiver written by the author appears in Appendix C. It remains to be determined whether a waiver can cover all FDTC staffings or whether a separate waiver is necessary for each staffing. A supervising judge in New York (outside of New York City) concluded that a separate waiver was necessary for each staffing.

court where one judge hears both the dependency docket and the FDTC.⁴⁵ In a parallel FDTC, one judge hears the dependency case and another judge hears the FDTC. The dependency judge in the parallel FDTC model may learn of a client's progress or lack of progress from the FDTC, but should it be reported to the dependency court all parties in those proceedings would receive that information. Several courts around the country have adopted this second procedure where a different judge hears all FDTC matters instead of the dependency judge.⁴⁶

There seems to be some confusion whether the parallel FDTC proceedings violate the one-family/one-judge calendaring policy that has been promoted by a number of organizations and writings.⁴⁷ Judge Pach writes that the National Council of Juvenile and Family Court Judges (NCJFCJ) has recommended that courts observe the one-family/one-judge practice, which she believes means that the NCJFCJ recommends the integrated model for the FDTC.⁴⁸ This is a misunderstanding. The NCJFCJ recommendation refers to the calendaring of juvenile dependency proceedings so that the same judge hears all aspects of those proceedings from shelter care hearing through return to the parents or termination of parental rights.⁴⁹ The NCJFCJ has not taken an official position regarding preference for the integrated or parallel model FDTC.

Scenario #3

You preside over an integrated court. In one of your dependency cases, a parent (the mother), joins the FDTC and participates regularly in treatment court activities, appearing almost weekly for several months. The father does not participate in the FDTC. At an FDTC appearance, one of the FDTC team suggests that the mother will not recover as long as she continues to live with the father who continues to use drugs. Does this statement create any ethical issues for you as judge? If so, what steps can you take to avoid the problem?

Discussion

As with the previous hypothetical, you have received a number of *ex parte* communications about a pending or impending matter, and this particular one contains negative

45 Children and Family Futures has collected examples of each type of court. Additionally, the author has visited a number of FDTCs around the country. Examples of integrated FDTCs include Jackson County, Missouri; Suffolk County, New York; Denver, Colorado; Miami/Dade County, Florida; Kansas City, Missouri; Billings, Montana; and Washoe County, Nevada. Examples of the parallel model include Pima County, Arizona; Durham County, North Carolina; and Riverside, Santa Cruz, and Sacramento counties in California. Santa Clara County changed to a parallel model in 2011, partly because of the issues discussed in this article.

46 *Id.*

47 See, for example, P. Hora, *op.cit.*, note 9 at 13; B. Babb, *Unified Family Courts: A Comprehensive Solution for Resolving Complex Family Justice System Problems*, UNIFIED FAMILY COURT CONNECTION, Fall 2007.

48 Pach, *op.cit.*, note 5 at 85.

49 NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES (1995), at 19.

facts about the father and his substance abuse.⁵⁰ This is a violation of Canon 2, Rule 2.9; it is an improper *ex parte* communication.⁵¹ You should first ask yourself whether you believe you can be fair to all parties after hearing this information. If not, you should disqualify yourself from the dependency proceedings and ask that another judge hear the case. If you believe you can be fair, you do not need to disqualify yourself, but you must disclose the conversation to the father at the next dependency court hearing as well as other conversations held in the FDTC.⁵² The father may wish to present evidence on the matters discussed.

There is a second ground for possible disqualification. You should also decide whether to disqualify yourself based on the language or Rule 2.11(A)(1):

(A) A judge shall disqualify himself or herself in any proceedings in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of the facts that are in dispute in the proceeding.⁵³

If you conclude that the conduct would reasonably create that perception, you should disqualify yourself.

The same solutions suggested in Hypothetical #2 apply in this scenario. Because the information was so potentially damaging to the father's case, it appears that you should disqualify yourself.⁵⁴ The best solution would be for another judge to hear the case, perhaps by modifying the FDTC model your court is currently using and adopting a parallel FDTC model as described in the previous two scenarios.

Scenario #4

In an FDTC hearing, the mother asks you whether she can have more visits with her daughter. She explains that she has missed three visits, two because the social worker has not provided transportation and a third because her daughter was ill. The social worker quickly responds that the Department of Children's Services has no resources for transportation. You wonder whether this conversation is proper at an FDTC hearing and whether there are legal or ethical issues involved in this conversation.

Discussion

A recurring issue that arises in FDTC hearings is reference to matters that properly belong in the juvenile dependency court.⁵⁵ A parent may wish to modify the service plan,

50 Of course, if the mother was living with someone who was not the father, such as a boyfriend, and the comment referred to him, there would be no problem with *ex parte* communications regarding him, as the boyfriend is not a party to the juvenile dependency proceedings.

51 A copy of the relevant sections of this Rule is contained in Appendix D.

52 ABA Model Code, Canon 2, Rule 2.9(B) (refer to Appendix D).

53 ABA Model Code, Canon 2, Rule 2.11(A)(1). See also Canon 1, paragraph 5 of the Commentary.

54 ABA Model Code, Canon 2, Rule 2.11(A) (refer to Appendix D).

55 Judge Pach mentions this scenario in her article. N. Pach, *op.cit.*, note 5 at 104.

complain about the case plan, attempt to obtain a restraining order, or change attorneys. The most frequent issue that arises is visitation, as in this scenario. Contact with one's child is never far from a parent's mind.

Numerous difficulties make such discussions improper. FDTC hearings are not the proper legal forum for such issues. No notice has been given to the parties that the court will consider issues such as visitation. Often there is no court reporter recording the proceedings in the FDTC, and usually not all parties or their attorneys are present. These are *ex parte* communications between the court and one parent, and they involve issues that should properly be heard only in noticed dependency proceedings.

You should not permit such discussions to take place in the FDTC because they are not properly before this court. You are presiding over a problem-solving court addressing issues of rehabilitation, not a dependency court with all parties before the court after proper notice has been provided. Even if you restrict yourself to discussions without making any orders, since the exchange is an *ex parte* communication, you must determine whether you can be fair to all parties at the next dependency proceeding. Even if you conclude that you can, you must disclose the exchange to all parties as soon as possible.

Of course, if all parties were present at the FDTC, including the child's guardian *ad litem* or attorney, the father and his attorney, and the social worker, and no one had an objection to the request, you may permit the discussion to take place. You may even make court orders based on the discussion.

Scenario #5

You are the only judge or one of two judges in a particular jurisdiction, and the second judge is not interested in presiding over either dependency or FDTC matters. In other words, you are the only judge available to hear the dependency docket and any FDTC, if you decide to have one. Can you do so legally and ethically?

Discussion

This scenario addresses the issue: as the sitting dependency judge, can you legally and ethically operate an FDTC? Can an integrated FDTC ever be operated ethically? Under these facts, no other judicial officer is available to hear either docket which means that the parallel FDTC model is not an available alternative. Because you are persuaded that an FDTC will result in better outcomes for the participants and their children, you want to try to work out a format where you can hear both dockets.

With careful planning, you can accomplish this goal. If only one parent wishes to participate in the FDTC, you might suggest having a meeting in which both parents attend along with their attorneys, the social worker and/or her attorney, and the attorney/guardian *ad litem* for the child. At the meeting, the FDTC would be explained to the parties along with the possibility that during FDTC hearings, *ex parte* communications may occur. If the parties agree, the parent can participate in the FDTC with any conditions that the parties wish to establish. Conditions might include: (1) the non-FDTC parent or his lawyer being personally present at the FDTC hearing; (2) having a

summary of what happened at the hearing presented to the non-FDTC parent; or (3) giving notice to the non-FDTC parent of each FDTC hearing. It turns out that many parents who do not participate in the FDTC support the other parent and want that parent to succeed in the FDTC and have the child returned to him or her. The non-FDTC parent may be “rooting” for the FDTC parent to be successful and does not care about any *ex parte* communications. That parent may simply waive any right to participate in FDTC hearings. This is particularly true when one parent is incarcerated. A signed waiver or a waiver on the record is a good practice in case the non-FDTC parent later denies any agreement was made or disagrees with the conditions attached to the waiver.⁵⁶

If the non-FDTC parent does not agree to waive any of the rights outlined in the proposed waiver, you can give that parent and his or her attorney notice of each FDTC hearing and permit either or both to appear at the hearing. A parent’s refusal to waive should not happen frequently, but you must be prepared to have a plan in place in case it does.⁵⁷

Scenario #6

In a pre-court discussion in the FDTC held in your chambers, the substance abuse service provider says that the mother used drugs over the weekend and that she was using with another mother who is also in the FDTC, but who will not appear on the docket today. Are there legal or ethical issues you must address?

Discussion

Pre-court discussions, often called staffings, take place in many problem-solving courts, including FDTCs. These discussions typically include the attorneys for the participating parent, the social worker, the substance abuse provider, a representative from the state (attorney for the agency or prosecutor), and may also include the guardian *ad litem* for the child, the father’s attorney, and other service providers. These discussions bring the judge up to date on the progress of each client during the time since the last court hearing.

Assuming that the father’s attorney is present, the discussion in this staffing is an *ex parte* communication, but only as to the pending litigation regarding the other mother who is not before the FDTC that day. Ethically, you have no obligation to report criminal activity by others to law enforcement, such as the other mother’s drug use.⁵⁸ If you are presiding over the juvenile dependency case for that mother, you do have an obligation to inform her or her attorney at the earliest time of the communication.⁵⁹ You will also

⁵⁶ Refer to Appendix B for an example of a waiver form created in Santa Clara County, California.

⁵⁷ The Common Law Rule of Necessity would not apply in this situation since there are procedures you can adopt that will permit you to operate your FDTC ethically.

⁵⁸ 18 No. 3 *Judicial Conduct Reporter* 3, A Judge’s Obligation to Report Criminal Activity (Ethics Committee, California Judges Association, 1996). Judge David Rothman (ret.) has a slightly different view. See D. ROTHMAN, CALIFORNIA JUDICIAL CONDUCT HANDBOOK (California Judges Association, West, Third Edition, 2007) at 252-255.

⁵⁹ ABA Model Code, Canon 2, Rule 2.9(B) (refer to Appendix D).

have to decide whether you can be fair to all parties the next time the other mother's dependency case is heard. If you conclude that you cannot, you must disqualify yourself.

However, if you are operating in a parallel FDTC model, you need not report anything or disclose any of the information you learned. You can assume that the social worker or some other party attending your parallel FDTC will pass the information on to the proper authorities. You may send a report to the juvenile dependency judge, but that report should be available to all parties.

Scenario #7

As presiding judge over the juvenile dependency court and the FDTC, you have been invited to attend the Thanksgiving party sponsored by the FDTC professionals. The FDTC clients will all be present with their children as will some of the parents' attorneys. All of the social workers involved in their cases will be there to ensure that everything goes smoothly. You are concerned that you may learn about the families in an informal fashion and that your objectivity will be reduced. You wonder whether you should attend the party.

Discussion

In this scenario, you wonder whether you should attend a social event where you will see parents and children together—the same parents who appear in your FDTC. On the one hand, your appearance may be an incentive to the parents to continue with their treatment. It is a demonstration of your commitment to their recovery. Your appearance would solidify the statements you have made in court about each client's commitment to recovery. On the other hand, you may learn information about the parents' relationship with their children that may be relevant to later decisions you will be making in their dependency cases. It may also expose you to *ex parte* communications should you interact with parents and children at the party.

There is no ethical reason not to attend as long as you do not receive evidence about a pending case and engage only in "harmless communications." The commentary to Canon 3, Rule 3.1 states: "To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities."

You must be cautious, however. Once you agree to participate in a community activity as a judge, you must be attentive to conduct which is impermissible. You should not have private conversations with any of the FDTC clients or discuss any pending matters. Perhaps the best solution is to make an appearance at the event, make a short statement about the importance of working on recovery, and then depart without spending time with any of the parents or children. You may choose to disclose your appearance at the event at the next court hearing, if the facts warrant. On the other hand, you could decide that it would be best not to attend and instead have other FDTC team members attend and give encouraging words. Once again, if you preside over a parallel FDTC, there would be no ethical problem attending since you will not be making any legal decisions in the FDTC.

Scenario #8

As presiding juvenile court judge you have been asked to preside over the FDTC graduation. You are operating an integrated FDTC. At the ceremony you will be passing out graduation certificates and making short statements about the success of particular clients. Many family members will be attending, and photographs will be taken of you and the graduates.

Discussion

This scenario resembles #7 where you considered attending an FDTC Thanksgiving party. An FDTC graduation can be an important event in a parent's life because it acknowledges the parent's success in addressing his or her addiction problems. Graduations often involve many family members and members of the community, as well as the FDTC team. The graduation may be the first time in the client's life that he or she has been recognized for a positive achievement. Many judges make speeches as graduation certificates are handed out, and photographs of you and each graduate may be taken. Celebrating success is a critical part of all therapeutic courts. But assuming that the dependency proceedings have not been completed, there are ethical issues presented by your participation in the graduation ceremonies.

If you decide to participate in the graduation ceremonies, you must be careful about your behavior just as you were at the Thanksgiving party in scenario #7. However, there is a more serious issue. At the graduation, you will be having an *ex parte* meeting with a party in a pending or impending proceeding. Even if you do not have any communication with the client, your congratulations and praise for the client's accomplishments may give the impression that you have a very positive relationship with him or her and that this relationship might prejudice your decisions in the dependency case. Your conduct

(A) . . . might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of the facts that are in dispute in the proceeding.⁶⁰

Should you conclude that your conduct falls within this rule, it may be necessary for you to disqualify yourself from the pending dependency proceedings. You must make this determination. Even if you decide not to disqualify yourself, you must disclose the circumstances surrounding the event to all other parties as soon as possible.

Should you determine that a person might reasonably entertain a doubt, in some states you can disqualify yourself, but offer the parties the opportunity to waive your disqualification and permit you to hear the dependency case.⁶¹ You should be careful not

60 ABA Model Code, Canon 2, Rule 2.11(A)(1). *See also* Canon 1, Rule 1.2, Comment [5].

61 ABA Model Code, Canon 2, Rule 2.11(C) (refer to Appendix D).

to interfere in the waiver process by leaving the room while the parties consider waiver, and the waiver should be in writing and signed by all parties and their attorneys.

To avoid these difficulties, two strategies should be considered. First, you should only schedule graduation ceremonies after the dependency proceedings have concluded. Second, as suggested several times in this article, you could adopt the parallel FDTC model and have a different judicial officer hear all FDTC proceedings.

To address some of the ethical issues raised by problem-solving courts, the ABA House of Delegates in 2007 added a new comment to the Model Code of Judicial Conduct governing *ex parte* communications. The comment states as follows:

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 the parties, treatment providers, probation officer, social workers, and others.⁶²

According to the commentary to the ABA Model Code, this provision was adopted at the urging of judges and others who work in drug courts and other problem-solving courts. They argued that some relaxation of the rules regarding *ex parte* communications is necessary for problem-solving courts to function effectively.⁶³

However, adoption of this new rule does not resolve the ethical issues addressed in this article. The new rule does not address the *ex parte* communications in an FDTC where the underlying dependency case has not been resolved, nor does it resolve the issue of your participation in the FDTC and the appearance that you have a special relationship to one of the parents.

CONCLUSION

Family Drug Treatment Courts have proven to be an effective procedure to help parents address their substance abuse problems and regain custody of their children. They have rapidly spread across the country with more than 320 FDTCs as of 2010.⁶⁴ Partly because they are so new to the judicial world, little attention has been paid to the ethical issues that arise when the same judge hears both the dependency case and the FDTC for the same parent and family. This article addresses a number of situations in which judges can commit ethical violations if they do not take precautionary steps. It also makes suggestions and recommendations that, if implemented, will enable FDTCs to continue to provide an environment for increased parental rehabilitation without ethical violations.

62 ABA Model Code of Judicial Conduct, Rule 2.9, Comment 4 (refer to Appendix D).

63 Refer to the comments found at the ABA Web site, *op.cit.*, note 23.

64 Center for Children and Family Futures, *op. cit.*, note 13; BJA CLEARINGHOUSE, JUSTICE PROGRAMS OFFICE, SUMMARY OF DRUG COURT ACTIVITY BY STATE AND COUNTY (BJA Drug Court Clearinghouse Project at American University, June 18, 2009).

APPENDIX A

THE KEY COMPONENTS⁶⁵

1. Drug courts integrate alcohol and other drug treatment services with justice system case processing.
2. Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights.
3. Eligible participants are identified early and promptly placed in the drug court program.
4. Drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services.
5. Abstinence is monitored by frequent alcohol and other drug testing.
6. A coordinated strategy governs drug court responses to participants' compliance.
7. Ongoing judicial interaction with each drug court participant is essential.
8. Monitoring and evaluation measure the achievement of program goals and gauge effectiveness.
9. Continuing interdisciplinary education promotes effective drug court planning, implementation, and operations.
10. Forging partnerships among drug courts, public agencies, and community-based organizations generates local support and enhances drug court program effectiveness.

APPENDIX B

SANTA CLARA COUNTY WAIVER FORM

1. I have discussed Family Wellness Court (FWC) with my attorney.
2. I understand that another parent who is a party in the case is eligible to participate or is participating in FWC.
3. I have discussed the other parent's participation in FWC with my attorney.
4. I understand that during the other parent's FWC staffing meetings and FWC review hearings, the judge may receive information about the child or children, and will receive information about the other parent, and that parent's participation and progress in court-ordered treatment programs.
5. I understand that during the other parent's FWC review hearings, the judge may deliver to that parent encouragement and incentive items to assist and motivate that parent in completing his or her case plan.

65 NADCP, *op.cit.*, note 18.

6. I understand that at the other parent's FWC staffing meetings and FWC review hearings there may be some limited discussion of me, and my participation and progress in any court-ordered treatment programs.
7. I understand that no court orders will be made or changed at the other parent's FWC staffing meetings or FWC review hearings.
8. I understand that the FWC judge will not discuss what occurs at FWC staffing meetings and FWC review hearings with any judge handling a non-FWC legal hearing in the case.
9. I understand and agree that the FWC staffing meetings and FWC review hearings for the other parent will not be recorded by a court reporter and no transcripts of these meetings and hearings will be prepared.
10. I agree that I do not need to be personally notified of the other parent's FWC staffing meetings and FWC review hearings.
11. I understand that my attorney may attend the other parent's FWC staffing meetings and FWC review hearings.
12. I agree not to be personally present at the other parent's FWC review hearings.
13. I understand I can revoke these agreements at any time.

After consulting with my attorney about Family Wellness Court, I am making the above acknowledgements and agreements freely and voluntarily.

DATED: _____

By: _____

(SIGNATURE OF PARENT)

(PRINT NAME)

Declaration of Parent's Attorney

I, _____, spoke with my client regarding these Acknowledgements & Agreements. I thoroughly reviewed them with my client. My client appeared to understand them and agreed to all of their terms. I am signing this form on her/his behalf until the client can sign it personally.

I declare under penalty of perjury, under the laws of California, that the foregoing is true and correct.

DATED: _____

By: _____

(ATTORNEY FOR PARENT)

APPENDIX C

WAIVER REGARDING A PARENT'S PARTICIPATION IN A FAMILY DRUG TREATMENT COURT

I understand that _____, a party to pending juvenile dependency proceedings, wishes to participate in the Family Drug Treatment Court (FDTC).

I understand that the FDTC is not legally a court, but rather a meeting of professionals and the party in court to discuss issues relating to the party's recovery from substance abuse addiction and rehabilitation in other areas.

I understand that the judge and other professionals in the FDTC will meet regularly and will discuss issues relating to the party's recovery.

I understand that some of the issues they will discuss will involve day-to-day living, who the party should and should not associate with, and other matters relating to living a clean and sober life.

I understand that my name and my relationship to the party may be discussed in the FDTC.

I agree that the party named above can participate in the FDTC on the following conditions (check those that apply):

1. I will get personal notice of the FDTC hearings. _____
2. My attorney will get personal notice of the FDTC hearings. _____
3. I will get a summary of progress made by the party at the FDTC. _____
4. I or my attorney can attend any of the FDTC hearings where _____'s case is heard. _____.
5. I have no conditions relating to _____'s participation in the FDTC. _____

_____ (date: _____)

Attorney for _____: _____ (date: _____)

APPENDIX D

THE 2007 ABA MODEL CODE OF JUDICIAL CONDUCT (SELECTED SECTIONS)

Preamble to the ABA Model Code (in part):

An independent, fair, and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved.

Canon 1

A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Paragraph (5) of the Commentary to Canon 1

Actual improprieties include violations of the law, court rules, or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

Canon 2

A judge shall perform the duties of judicial office impartially, competently, and diligently.

Rule 2.2

A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

Rule 2.9

- (A) A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except as follows:

- (4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.
- (5) A judge may initiate or consider any *ex parte* communication when expressly authorized by law to do so.
- (B) If a judge inadvertently receives an unauthorized *ex parte* communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

Commentary Accompanying Rule 2.9

[5] 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 the parties, treatment providers, probation officers, social workers, and others.

Rule 2.11 (in part)

- (A) A judge shall disqualify himself or herself in any proceedings in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
 - (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of the facts that are in dispute in the proceeding.
- (C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

Commentary to Rule 2.11

[5] A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

Canon 3

A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.

Canon 3.1 (in part)

A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not:

- (A) participate in activities that will interfere with the proper performance of the judge's judicial duties;
- (B) participate in activities that will lead to frequent disqualification of the judge;
- (C) participate in activities that would appear to a reasonable man to undermine the judge's independence, integrity, or impartiality.

Commentary to Canon 3.1 (in part)

To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities.