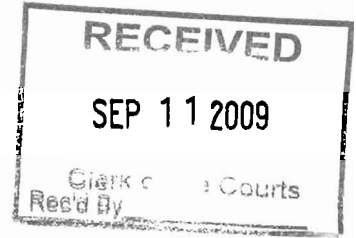


M 2009-01817



CIRCUIT COURT

STATE OF TENNESSEE

TWENTY-SEVENTH JUDICIAL DISTRICT

WILLIAM B. ACREE, JR
CIRCUIT JUDGE

225 S. SECOND STREET
SUITE C
P.O. BOX 576
UNION CITY, TENNESSEE 38281
(731) 884-2667
FAX (731) 884-2670

September 10, 2009

Mr. Michael W. Catalano
Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: Tenn. Sup. Ct. R. 10, Canon 3(B)(7)(e)

Dear Mr. Catalano:

The members of the 27th Judicial District Drug Court team strongly recommend the adoption of the commentary to this rule. We commend the members of the Supreme Court for their insight to the issues confronting problem solving courts such as Drug Court.

Sincerely,

A handwritten signature in cursive script that reads "WBA".

WBA/mw



THE TENNESSEE
COURT OF THE JUDICIARY

503 NORTH MAPLE STREET
MURFREESBORO, TN 37130
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J.S. "STEVE" DANIEL
Disciplinary Counsel

Assistant Disciplinary Counsel
JOE G. RILEY
BERNIE WEINMAN
PATRICK J. McHALE

September 21, 2009

Mr. Michael Catalano, Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

In re: Amendment to Rule 10, Canon 3 (B) (7) (e)

Dear Mike:

Please consider this letter as my opposition to the proposed amendment to the commentary of Canon 3 (B) (7) (e).

In my estimation, the whole purpose of Canon 3 (B) (7) (e) is to prohibit ex parte communications by judges who then ultimately hear disputed facts involving the parties to the action. Canon 3 (B) (7) (e) authorizes an exception to this prohibition for only a limited number of exceptional purposes. One of the primary examples is applications by indigent criminal defendants for the ordering of funds necessary to provide an adequate defense to criminal cases such as expert witnesses, investigators, etc. The type of inquiry that is made ex parte in those settings do not go to the heart of disputed matter.

The proposed commentary would authorize local courts to create their own rules and authorize ex parte communications by judges serving on therapeutic or problem solving courts. These judges then after having authorized for themselves ex parte communications would use information obtained in this fashion to make decisions on disputed issues. This is an antithesis to a neutral and detached magistrate hearing disputed issues. In these therapeutic settings judges who are involved in accepting ex parte communications from other treatment providers, probation officers and social workers should not be involved in the future court decision making for the individuals who are undergoing this treatment program. These undertakings are social work activities by the judges who participate. In a recent case that I was involved, the judge in addition to participating in ex parte communications with other treatment providers, engaged in his own individual investigations by going with others on home inspections of probationers in a drug court. This type of activity causes these judges to lose their capacity to be neutral and detached in deciding issues that come back to court for resolution. This type of conduct by the judges who are so involved diminishes the perception of the public that

their actions are fair, unbiased and appropriate. It is impossible for me to see judges act as therapists and interveners one day and arbiters of disputed facts on another. In my opinion, if a judge is participating in drug court and is actively involved in case management he or she is ineligible to act as a decision maker in probation revocations or other cases which involve disputed issues. Judges who act in this manner appear to violate basic due process of law. Judge Tipton held correctly this way in his opinion in the case of State v. Hopson 2008 WL 446717 (Tenn. Crim. App.) dealing with a drug court action of revocation. In the Hopson opinion Judge Tipton relies on Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1761 (1973) in which the Supreme Court of the United States held that due process mandates a neutral and detached hearing body. This would apply to any adjudicatory action and would disqualify those who possessed ex parte information.

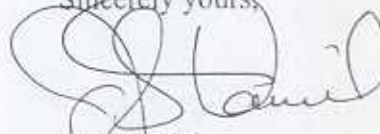
It would be my opinion that the commentary should be strengthened to reflect that if a judge participates in the active supervision of probationers and receives ex parte communications either through their own investigation, through social workers, probation officers, treatment providers or others who work with the judge in this role, those judges should be ineligible and prohibited from deciding contested issues of fact involving those in which treatment was provided to during the program.

The drug court scenario is beset with potential for Judicial Code violations. In addition to this Canon provision, judges who are participating in these types of activities are obviously making an independent investigation of facts in the case and this is prohibited by the same commentary which is being proposed to be amended and is prohibited by the Canon in question. The proposed commentary amendment offers an opportunity to much mischievous activity on the part of judges who ultimately decide these issues and I think it would be best for the Court to decline this proposed commentary amendment.

As an aside, I would like to point out that I only learned of this proposed amendment by a review of the AOC website. Although this proposed amendment was published September 3rd no effort was made to forward it to Disciplinary Counsel for comment. I would think that before such striking amendments to any provision of the Code of Judicial Conduct was contemplated by the Court that it would be advisable to make Disciplinary Counsel at least knowledgeable of the disputed issues so that we could properly respond.

If I can assist in any way in the future please feel free to call upon me.

Sincerely yours,

A handwritten signature in black ink, appearing to read "J.S. Daniel", written over the typed name below.

J.S. Daniel
Disciplinary Counsel