



COMMONWEALTH OF KENTUCKY
ETHICS COMMITTEE OF THE KENTUCKY JUDICIARY

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JEFFREY SCOTT LAWLESS
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**FORMAL
JUDICIAL ETHICS OPINION JE-122**

October 10, 2011

**RECUSAL ISSUES WHERE A DRUG COURT OR MENTAL HEALTH COURT JUDGE
PRESIDES IN A REVOCATION HEARING BASED ON DEFENDANT'S VIOLATION
OF TERMS OF PARTICIPATION IN DRUG OR MENTAL HEALTH PROGRAM**

The Kentucky Supreme Court has recognized the importance and value of addressing drug and mental health issues that often contribute to crime and recidivism, and the benefits to society from alternatives to incarceration. In 2006, the Court adopted policies and procedures governing drug court. Administrative Procedures of the Court of Justice, Part XIII Drug Court. Similarly, in January 2010, the Court approved Local Rules for the Northern Kentucky Regional Mental Health Court Pilot Project; that project is colloquially known as "Mental Health Court".

The Ethics Committee of the Kentucky Judiciary has been asked for opinions regarding the ethical duties of judges who serve on these court-supervised alternatives to incarceration. The sense of the Committee is that those who serve as "drug court" or "mental health court" judges throughout the Commonwealth would benefit by a formal opinion regarding recusal when the drug or mental health court judge will be the same judge presiding over a probation revocation hearing. To paraphrase a recent inquiry to the Committee, the subject of this Opinion is:

May a drug court judge or mental health court judge, who has decided to terminate a defendant's participation in drug court or mental health court, preside as the sentencing judge over a subsequent probation revocation hearing conducted in a criminal action in which the termination serves as a basis for the revocation?

The Committee has decided that the answer to the foregoing question is a qualified "yes," and that recusal would only be required in certain circumstances.¹

¹The Hon. Jean Logue recused from consideration of this issue.

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In *Commonwealth v. Nicely*, 326 S.W.3d 441 (Ky. 2010), the Supreme Court discussed the philosophy and operation of drug courts, and the Committee believes that the reasoning in that case applies equally well to mental health court. Without going into the details of the opinion, the Court determined that more than sufficient statutory authority existed for the operation of drug courts. The Court described drug court as a treatment program offered to a criminal defendant with addiction problems as a condition of probation or a term of a diversion agreement. The program allows judicial discretion in modifying the conditions or terms as needed during the program. The trial court has the discretion to condition probation on successful completion of the program, but participation in the program is voluntary. The Court noted, at 445:

The program requires a defendant to make several commitments to enter the program and avoid immediate incarceration. One of these commitments is a waiver of full hearing rights during program participation, which does not affect the participant's due process rights in a probation revocation hearing if for some reason he is exited from the program.

The opinion discusses the role of the judge in the on-going supervision of the participant, noting, at 446:

[T]he drug court judge generally monitors the probation by having the defendant report to the court on a regular basis to have his progress reported. This allows the drug court judge to impose sanctions as punishment for relapses or other acts of bad judgment, or to simply "exit" or discharge the defendant from the program and set a probation revocation hearing. This monitoring is post-judgment, and consists of active review of a probated defendant's treatment program by the trial court.

Nicely was concerned with the punishment levied against Nicely, not whether the presiding judge should or should not have recused. However, the Committee has the benefit of *Stewart v. Commonwealth*, 2007-CA-000252-MR, 2008 WL 399626 (Ky.App., Feb. 15, 2008). In that case, the Muhlenberg Circuit Court allowed Stewart to participate in drug court as an alternative to further incarceration. Several months later, the sentencing judge terminated Stewart from the program, for failure to comply with conditions, and then scheduled a probation revocation hearing. At the hearing, a probation and parole officer provided the testimony regarding Stewart's violations of the terms under which Stewart was allowed to participate in drug court.

Stewart argued that the sentencing judge should have recused from the probation revocation proceedings since he also presided over Stewart's drug court. Stewart cited the provisions of KRS 26A.015, requiring a judge to recuse from proceedings in which he has

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personal knowledge of disputed evidentiary facts concerning the proceedings, and in which he has knowledge of any other circumstances in which his impartiality might reasonably be questioned. The Court of Appeals held:

[I]t was essentially undisputed that Stewart violated the terms of his probation. Thus, regardless of whether Judge Jernigan indicated, when issuing his oral ruling, that there had been “other problems” with Stewart in drug court, there is no indication that Judge Jernigan had any “personal knowledge of disputed evidentiary facts concerning the proceedings,” or that he was “likely to be a material witness in the proceeding.” KRS 26A.015(2)(a) and (d)4.

The Court of Appeals went on to state:

Further, no reasonable basis exists for questioning Judge Jernigan’s impartiality simply because he presided over both Stewart’s drug court proceedings and his probation revocation proceedings. As the United States Supreme Court has explained, “[i]t has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.” *Liteky v. United States*, 510 U.S. 540, 551, 114 S.Ct. 1147, 1155, 127 L.Ed.2d 474 (1994). The same rationale applies here, where Judge Jernigan presided over both of Stewart’s proceedings.

The Kentucky Supreme Court has stated that drug court “is a **court function**, clearly laid out as an alternative sentencing program under the applicable statutes.” *Nicely*, 326 S.W.3d at 444 (emphasis added). 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.” *Marlowe v. Commonwealth*, 709 S.W.2d 424, 428 (Ky. 1986) (citation and quotation omitted). *See also Harpring v. Commonwealth*, 2004-CA-000898-MR, 2005 WL 1924728 (Ky.App., Aug. 12, 2005) (rejecting defendant’s claim that due process was violated by same judge presiding over trial proceedings, drug court, and probation revocation absent evidence in the record to suggest judge harbored personal bias or prejudice against defendant, had personal knowledge of disputed evidentiary facts outside of the record, or expressed any opinion showing pre-judgment).

The Committee has considered non-Kentucky authority, some of which holds that a judge in the circumstances at hand should recuse, but nonetheless finds the reasoning of the Kentucky Supreme Court and Court of Appeals to be more persuasive.

The Committee has concluded that a drug court or mental health court judge, by the very

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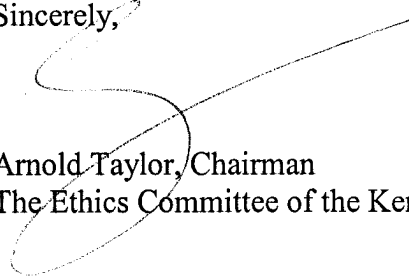
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nature and purpose of the program, must remain familiar with the status of the participant, who has voluntarily elected to enter the program. If the judge receives the reason for the termination from the program in the course of his or her official 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. However, recusal may 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. For example, if the judge personally observed the drug court participant committing some act that would form or support the basis for termination from the program, and that act formed the basis of probation revocation, then recusal would be required.

Please be aware that opinions issued by or on behalf of the Committee are restricted to the content and scope of the Canons of Judicial Ethics and legal authority interpreting those Canons, and the fact situation on which an opinion is based may be affected by other laws or regulations. Persons contacting the Judicial Ethics Committee are strongly encouraged to seek counsel of their own choosing to determine any unintended legal consequences of any opinion given by the Committee or some of its members.

Sincerely,



Arnold Taylor, Chairman
The Ethics Committee of the Kentucky Judiciary

cc: Donald H. Combs, Esq.
The Honorable Laurance B. VanMeter, Judge
The Honorable Jean Chenault Logue, Judge
The Honorable Jeffrey Scott Lawless, Judge
Jean Collier, Esq.