



Judicial Ethics Advisory Committee

MEMBERS:

Hon. Edwin Alderson
Municipal Judge Retired

Prof. Howard W. Brill

Hon. John Cole
Circuit Judge Retired

August 31, 2010

The Honorable Mary Ann Gunn
Washington/Madison County Circuit Judge
Fourth Division
PO Box 4703
Fayetteville, AR 72702-4703

Re: Opinion No. 2010-01

Dear Judge Gunn:

In your request for an opinion you advised that you have been the presiding judge of the Washington/Madison County Drug Court since 1999 and that there are approximately 185 defendants participating in the program. You stated that a defendant whose criminal case is transferred to drug court stipulates that the police/probation reports and crime lab results are true should the case go to trial and that all cases have been resolved through plea agreements.

You stated that for over five years the drug court proceedings have been broadcast several times per week on various local television stations and that the media coordinator shares footage with other media. You stated that currently the actual drug court proceedings are broadcast to over 200,000 households and three counties in Northwest Arkansas and that Jones TV reports that the telecast of your drug court proceedings is "their number one ranked program." You stated that commercial media representatives from California, having visited your court and observed the proceedings, want to broadcast your drug court to a national audience. You assured our Committee that Administrative Rule No. 6 of the Arkansas Supreme Court will be followed and that neither the court nor court staff would receive any financial benefit.

You asked three questions addressing your procedure in accomplishing the nationwide broadcast presuming that this Committee would not have much broader concerns with respect to any broadcast of actual drug court proceedings. The judge is ultimately responsible to insure that all aspects of any broadcast are consistent with the Code and Administrative Rule No. 6 and we are concerned that your current program is inconsistent with the spirit of the Code and Administrative Rule No. 6. This applies to the judge as well as others subject to the courts direction and control.

One of the primary duties of the court is to protect those persons who appear before it and in this case it relates to defendants in drug court. Once a criminal defendant with the advice of his or her attorney has agreed to the stipulations of drug court a very different relationship is created. The

defendant is often young, contrite and vulnerable and has come to the point that he or she will be compliant and go along with the requirements of the judge or the court personnel. Under these circumstances we think that it is unfair even to ask the defendant to consent to taping and broadcasting of these very personal proceedings in any venue, whether for profit or non-profit. One purpose of drug court is to avoid a conviction and the notoriety that comes with the conviction; to turn around a person and to get this issue behind him or her. In this modern media culture once the taping is done and it is released into the public domain it is there forever and can come up from time to time during the defendant's entire life. It could be used against this person in a personal, political, economic or social situation to his or her extreme detriment. Your recitations that the videos in your court are a number one rated show broadcasted to 200,000 households in three counties speak volumes in this regard. How might it appear to a defendant that he or she must be asked by the judge to waive any objection to appear on television? Would they be intimidated by the question knowing that the judge encourages this production? Can it be easily argued that the waiver is given fully and without coercion? Might a defendant think the judge would hold it against him or her if he or she refused to cooperate in a televised court session?

Administrative Order No. 6 (C) (2) says in part, "the court shall inform witnesses of their right to refuse to be broadcast." On the television production there could be relatives and employers being called forward to answer questions. Even if the defendants do consent what about the witnesses? While it is not our charge to interpret Administrative Orders we would encourage you to seek the guidance of the Arkansas Supreme Court as to whether or not the broadcast of drug court impairs the dignity of the proceedings. The Supreme Court should consider addressing the fundamental policy issue of whether drug court proceedings should be taped or televised in any form, or whether such broadcasts should be included as an exception in Order No. 6 (C) (3).

Regardless of serious issues relating to the current television program, we do not believe that the Code permits a judge to participate in or to permit the broadcasting of court proceedings by or with a for profit enterprise or purpose. Canon 1, Rule 1.2 states, "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Does the taping, releasing to the general media and televising of drug court proceedings involving troubled and unfortunate individuals to 200,000 households in a "number one" ranked television show promote public confidence in the integrity of the judiciary? We think that the answer is that it does not.

Canon 1, Rule 1.3 states, "A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so." We think the taping and televising of these proceedings especially in a for profit venue does indeed violate this section. In addition, while Judge Gunn will not directly profit financially from this endeavor, it does advance her personal interests. The judge might not reap immediate economic benefit from this but the fame and public exposure could advance both her economic, personal and political interests. Also, the personal economic interests of others are advanced by the current production and broadcast even if the production and distribution of the program is made by a non-profit corporation. The taxable status of Jones TV does not determine the applicability of Rule 1.3.

Canon 2, Rule 2.4 deals with external influences on judicial conduct. Subsection (B) states, "A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment. A reasonable person could conclude that putting on a "number one" television show broadcasting people in their most unfortunate times and the possibility of doing this for a national audience could influence the judge's judicial conduct or judgment.

We also invite your attention to Rule 3.1(C) and (E) together with Comment (1). This rule and comment contemplates activities of the judge outside the courtroom and does not contemplate the use of the judge, the courtroom, court staff and governmental facilities to assist others in the television broadcast of courtroom proceedings for regular viewing by a television audience such as you describe. In addition, it may appear to a reasonable person to undermine the judge's independence, integrity or impartiality.

As a result of our foregoing conclusions we cannot address your three questions about implementing the proposed broadcast.

Very truly yours,

Judge Edwin Alderson
For the Committee (3-0)