

Ethical Landmines in Veterans' Treatment Courts

Hon. Peggy Fulton Hora (Ret.)

NADCP

July 15, 2019

Out-of-court contact with participants

DTC picnic

Bowling night

Convicted felons

- May not associate
- May not have social contact

- *Matter of Blackman*, 591 A.2d 1339 (N.J. 1991);

What do you think?

- Attend a 12-Step meeting?
- Visit treatment facilities used by the Court?
- Ride along on probation checks?

Justice for Vets

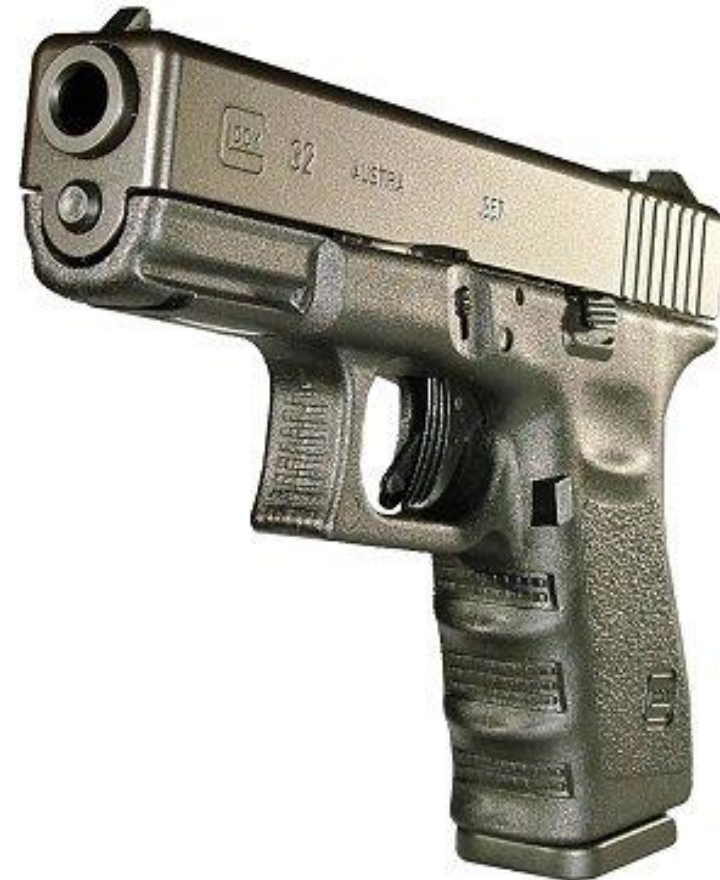
- Veterans' Court judge paid participant to paint his house
- What could go wrong?

Justice for Vets

- Judge took participant and his wife to dinner at a local restaurant to thank him for his service
- What's wrong with this picture?

Justice for Vets

- Judge invited Veterans' Court participant to judge's family events
- Judge allowed him to handle a gun and he went target shooting with judge's son.
- The veteran was a felon and Oregon law made it a felony for him to possess a firearm.



Justice for Vets, con't.

- Invited to Thanksgiving and Christmas at judge's home
- Encouraged court clerk to socialize with Vet
- Judge visited Vet's home and tried to fix his stove
- Judge's son drove Vet to appointments
- Vet did work for judge's son-in-law
- Judge "genuinely cared about participants. ...He put his 'heart and soul' into the VTC."
- Suspended for three years without pay for this and other misconduct

Justice for Vets

Cumberland Co., NC

Four Questions

1. Why did the judge choose a custodial sentence when he could have assigned volunteer work, writing an essay about honesty, stepped up counseling or drug tests or any variety of other sanctions? One of the beauties of treatment courts is being able to individually craft both positive and negative responses to participant behavior.

2. Was it appropriate to drive the participant to jail? The American Bar Association Model Code of Judicial Conduct requires a judge to “uphold and promote the, independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety” ([Canon 1](#)). Could someone, knowing the facts, question the independence and impartiality of the judge?

3. Canon 2, among other things, prohibits a judge from having *ex parte* communication. No defense attorney nor prosecutor was present at the jail. No court reporter was on hand to make a record. The conversation was personal according to Serna. What did they talk about? How might the judge use this information in the future? Was something said that would be of interest to the attorneys?

4. The Preamble of the Canons says, “[Judges] should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.” Does Judge Olivera’s conduct raise any questions in this regard?

Can Judicial Compassion Be Unethical?

- http://justicespeakersinstitute.com/essential_grid/can-judicial-compassion-unethical/

My favorite case:

- Judge informed arrest warrant would be served after court
- Didn't want participant in custody
- Allowed him to escape through her chambers

Don't fish off the company pier

- Judge had an affair with drug court team clinician
- Some encounters were at the courthouse
- Relied on clinician's input at staffings
- Public censure and suspension without pay indefinitely
- Judge resigned the day after the decision

OR Judge Stepped Down From Drug Court

- Advising Drug Court participants on how not to get caught drinking and
- To watch what they say on jailhouse phones because "deputy DAs have nothing better to do" than to listen to those recordings.

Judge made a promise to all drug treatment court participants:
“If you do 90 meetings in 90 days, I will do cartwheels for you.”
He did it twice. In the courtroom. In his robe.

CNN: “A Judge Flips for Sobriety”

Judicial misconduct?

- Judge met with juvenile Tx Court participant who was having bereavement issues.
- Overdosed twice.
- Asked to speak to Judge alone.
- Judge and boy went for a walk alone in a park where he discussed the death of his mother and continued lack of sobriety.

Public Reproval

- “Failed to maintain high standards of conduct so that the integrity and independence of the judiciary would be preserved...;
- “Failed to avoid impropriety and the appearance of impropriety, in that he failed to respect and comply with the law...;
- and initiated, permitted and considered an improper ***ex parte*** **communication...**

Individual meetings in chambers

- Judge met individually with probationers.
- The judge justified a portion of his conduct on his “sincere concern for the welfare of addicts and their progress.”
- The Nebraska Supreme Court was unpersuaded and found that Jones’ conduct constituted a violation of Canon 1 (uphold integrity and Independence of Judiciary) and Canon 2 in that Jones failed to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

3 More Drug Court Judges Removed
from Office

Misuse of custody

- “This American Life” Ira Glass (PBS)
 - Holding participants in custody without counsel or hearing
 - Indefinite sentence
 - Loss of privileges like visits and phone calls
 - In custody 73 days before release
 - Judge signed consent order promising never to sit as a judge again
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- In re Williams, Consent Order 12-19-11 (GA)

Failure to supervise personnel

- Failed to train and supervise court personnel re: placement after serving jail sanction
- Didn't advise participants re: right to attorney
- Allowed unlawful detention of participants by drug court personnel
- Slow to provide hearing after rules violations
- Court suspended by Indiana Supreme Court
- Judge signed consent order promising never to sit as a judge again

Jailed Drug Court Participants w/o Jurisdiction

- Judge kept Drug Court participants past the two year limit
- Jailed for unspecified violations

Procedural Fairness/Justice

Procedural Fairness/Justice

- Posits that the **manner** in which justice is done is just as important and the outcome
- “...bridges the gap that exists between familiarity and unfamiliarity and the differences between each person....”
- **www.Proceduralfairness.org**

(Burke, Kevin and Steve Leban, “Procedural Fairness: A Key Ingredient in Public Satisfaction,” *Court Review*, American Judges Association (2007))

Procedural Fairness, cont.

Voice: the ability to participate in the case by expressing their viewpoint;

Neutrality: consistently applied legal principles, unbiased decision makers, and a “transparency” about how decisions are made;

Procedural Fairness, cont.

Respectful treatment: individuals are treated with dignity and their rights are obviously protected;

Trustworthy authorities: authorities are benevolent, caring, and sincerely trying to help the litigants—this trust is garnered by listening to individuals and by explaining or justifying decisions that address the litigants' needs.

(Tom Tyler, "Why People Obey the Law" 22 (2006))

Due Process

Due process is made up of:

- 1. *Participation:*** present their own view and share in decision-making, so they perceive the procedure as fair (even if it may not influence the outcome).
- 2. *Dignity, respect, and politeness:*** defendant rights and values as a competent, equal citizen, and human being are acknowledged.

Due Process, cont.

Trust: the authority that allows the person to present evidence, displays dignity and respect, and clearly explains decisions is considered more trustworthy

OUTCOME: *Greater compliance with the law.*

(Tyler, 1990, 1996)

Procedural Justice, cont.

Put another way, the 3 “Vs”:

1. ***Voice***: a chance to tell their story to the decision-maker.
 2. ***Validation***: if they feel heard and listened to then more likely to feel a sense of validation.
 3. ***Voluntariness***: voice + validation = experience the procedure as less coercive .
- ▶ Greater compliance with the law.

Maya Angelou

- “People may not remember what you say but they will always remember how you made them feel.”

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ETHICAL LANDMINES IN VETERANS' TREATMENT COURTS

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"JOE"

Joe is a combat vet who did four tours of duty in Afghanistan. As a Green Beret, he had close brushes with death three times including almost being killed by a suicide bomber. He was the sole survivor in an armored truck incident. He was awarded three Purple Hearts as well as other military accolades. Ever since he returned home, he has exhibited all the classic signs of PTSD. It took the VA months to get him into an appropriate program.

He has been participating in your Veterans' Drug Treatment Court for 10 months on a charge of driving while impaired and his progress waxes and wanes. Two weeks ago, he had a positive test for opiates and swore he would never use again. This week not only was he positive for opiates, but he tried to sneak in someone else's urine to be tested. He admits to you he lied.

While the drug use would have its own sanction, the dishonesty is the hot button issue this week. You are furious with Joe and, when he figures out you are going to remand him into custody, he begins to shake all over. Joe starts crying and begging you not to put him in jail.

You call a quick sidebar with the team. What do you want to know? What, if anything, do you want to do?