Personal Calls to Participants and Probationers by the Judge During COVID-19

My drug court judge is calling drug court participants and probationers in an effort to ascertain their well-being and to reinforce the court’s concern for the participants and their recovery. Is this advisable?

Such *ex parte* contact is probably problematic and in violation of the Canons of Judicial Conduct. As observed in *The Drug Court Judicial Benchbook* (§10.9 NDCI 2017 update, page 205):

More recently, the Oregon Supreme Court suspended for three years a veterans drug court judge for *ex parte* contacts and a lack of candor. See *In re Day*, 362 Or. 547, 636, 413 P.3d 907 (2018).

Although the conduct of the judges here, in calling their drug court participants during a time when the court is not able to hold sessions, is exponentially less egregious than the cumulative and repeated behavior of Judges Jones and Day, it nonetheless violates the *ex parte* strictures of the Canons of Judicial Conduct—particularly Rule 3.9(A) (prohibiting *ex parte* communications). As noted by the Jones court, the motives of the judge, while laudatory, were no justification for engaging in the prohibited behavior. I would recommend that the judges cease this behavior or get an opinion from their judicial ethics regulatory authority approving such conduct.

The judge may show concern about a participant’s progress in recovery—even to the point of celebrating a participant’s success—but the judge must extend the same quality of engagement and concern to each participant. Such engagement must be in the context of judicial proceedings.

In one case, a judge was sanctioned for meeting privately and individually (sometimes at their homes) 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 the judge’s conduct constituted a violation of Canon 1 (uphold integrity and independence of judiciary) and Canon 2, in that the judge failed to act in a manner that promotes public confidence in the impartiality of the judiciary. See *In re Jones*, 581 N.W.2d 876, 876 (Neb. 1998).