

## Maryland Judicial Ethics Committee

**Opinion Request Number:** 1984-03

**Date of Issue:** August 31, 1984

Published Opinion     Unpublished Opinion     Unpublished Letter of Advice

### Judge May Not Refer DWI Defendant to Private Alcohol Program in Which Judge or Close Relative Has Financial Interest

A ... judge inquires as to the propriety of his referring a defendant in a DWI case to a privately-owned alcohol treatment program (whether profit or non-profit) as a condition of probation. The inquiry has three prongs:

1. Is reference to a privately-owned program (as opposed to a governmental program) ever ethically appropriate?
2. Is reference to such a program ethically appropriate if the judge believes the program to be ineffective?
3. Is reference to such a program ethically appropriate if the program is operated by the judge's brother-in-law, who stands to reap economic benefit from the reference?

Article 27, §§ 639(b) and 641(a)[(1)](ii) as a general rule require a judge who imposes probation in connection with a violation of § 2[1]-902(a) or (b) of the Transportation Article to include as a condition of the probation that the probationer "participate in an alcohol treatment or education program approved by the Administrative Office of the Courts ..."<sup>\*</sup> This language applies to privately-owned as well as governmental programs. In view of the legislative directive it embodies, we perceive no ethical problem with respect to reference of a DWI defendant to a private program. The legislature has made a policy decision; it is for each judge to determine which approved program can most effectively cope with the defendant's condition. Except as noted below, this determination is a matter of judicial discretion, not judicial ethics.

If a judge believes a particular program to be ineffective despite its approval by the Administrative Office of the Courts, one presumes that in the exercise of his judicial discretion he will not refer defendants to that program. The statutes do not require a judge to make references to any particular program; so long as a program is approved, the judge may choose the one, public or private, he believes to be most suitable. Once again, this is a judicial choice, not an ethical choice.

If, however, a particular private program is one in which the judge or a close relative by blood or marriage has a financial interest, ethical considerations arise. "A judge should abstain from performing or taking part in a judicial act in which his personal interests are involved." Canon XXVIII. A judge with a personal financial interest in a private alcohol program would fall afoul of

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<sup>\*</sup> As of the editing date [July 1, 2006], Maryland Code, Criminal Procedure Article, §§ 6-219(c) and 6-620(c), which apply to crimes in addition to Maryland Code, Transportation Article, § 21-902 and pertain to drug as well as alcohol education and treatment. Chapter 244, Acts of 1985, substituted approval by the Department of Health and Mental Hygiene for that of the Administrative Office of the Courts.

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this ethical standard should he refer persons to that program. Indeed, it may be improper for a judge to have any official connection with such a program. Canon XXIII and [Opinion Request No. 1983-03] (27 June 1983).

Moreover, “[a] judge ... should not suffer his conduct to justify the impression that any person can improperly influence him ...” Canon XIII. Such an impression could well arise should a judge refer persons to a private alcohol program in which a close relative has a financial interest.

The ethical considerations are summed up in Canon IV: “A judge’s official conduct should be free from impropriety and the appearance of impropriety” [emphasis supplied]. A judge who refers a DWI defendant to a private alcohol program in which he or a close relative has a financial interest creates a clear appearance of impropriety. He may not do so ethically.

We add a final cautionary note. A judge who consistently refers probationers to a particular private program may be suspect of improper favoritism for that program. Repeated referrals to a particular program may, of course, reflect no more than the judge’s good-faith determination that this program is best-suited to the referees, and are not necessarily unethical. Nevertheless, because consistent referrals may create the appearance of impropriety special care should be exercised in their use.