

Informal Opinion 12-02¹
August 16, 2013

Question:

The Judicial Conduct Commission has requested an opinion on whether a judge may refer criminal defendants to a specific service provider when the provider is on a preapproved roster created by the court and the referrals are made on a rotating basis.

Answer:

Yes, the court may create a preapproved roster as long as the criteria the court creates for being admitted to the roster are reasonable and directly related to the services that the court needs and any interested individual or entity may apply to be included on the roster. Referrals should generally be made on a rotating basis or by allowing the defendant to select a provider.

Discussion:

The Judicial Conduct Commission (JCC) has requested an ethics advisory opinion on the propriety of a judge referring defendants to a specific service provider. The JCC states that the request arises from a concern “that a justice court’s on-going referral program . . . may violate [the] Code of Judicial Conduct.” The JCC provided the following background:

[T]he judge preapproves a pool of providers and then makes referrals among those providers on a rotating basis. Any state licensed provider may apply to be admitted to the pool by complying with the provisions of the [court’s] administrative orders. There is no evidence that the judge or the court benefits financially from the arrangement or that admission to the pool is based on anything other than state licensure and a willingness to adhere to the principles and requirements set forth in administrative orders.

The JCC also provided information from the justice court showing the criteria and process for inclusion on the roster.

In making its request, the JCC referenced Informal Opinion 10-2 in which this Committee determined that a judge may not refer parties to a specific mediator. The Committee determined that referring parties to a specific mediator would create the impression that the mediator is in a special position to influence the judge. The Committee also determined that referring to a specific mediator would be using the prestige of the judicial office to advance the personal and economic interests of the mediator. The Committee did not address the question of whether a judge could, for example, give parties a list of mediators and allow the parties to select from the list. However, the Committee stated that a judge could refer individuals to the roster of mediators maintained by the Administrative Office of the Courts.

¹ The original Committee opinion was reviewed and modified by the Judicial Council 1 pursuant to Rule 3-109 of the Utah Rules of Judicial Administration. The Council has directed the Committee to release the modified opinion as an informal opinion.

According to the facts provided by the JCC, referrals in the justice court are made from a roster of court-approved licensed providers. The court has established criteria for being listed on the roster. Any licensed provider may apply to be on the roster. The provider must be willing to make the commitments required by the court. Under the criteria, providers are required to have a representative present in the courtroom when referrals are made. The court will then make referrals from the list on a rotating basis, but a referral may also include consideration of a provider's proximity to a defendant's domicile or work. Thus, although referral will generally be on a rotating basis, some deviation may occur when the court deems it appropriate.

The Committee determines that a judge may create a roster from which referrals will be made provided the creation of the roster and referrals are based on unbiased considerations. The criteria for being included on the roster must be reasonable, unbiased, and directly related to the needs of the court. For example, if licensure is required to provide the services, either because a law specifically requires a licensed program, or the court determines that only licensed providers are capable of providing the necessary services, then licensure is a reasonable criterion. Requiring a provider to offer specific services is also a reasonable criterion. The reliability of providers might also be a consideration.

Referrals from the roster must also be based on neutral principles, such as referrals being made on a rotating basis or by having the defendant select from the list of approved providers. By creating a list that is open to those who are interested and by making rotating referrals, the court will eliminate any perception that the providers are in a special position to influence the judge. Also, the judge will not be using the prestige of the judicial office to advance the interests of others, as all interested and qualified providers will be on the list and have the same opportunities. Although the providers will benefit financially from the referrals, by allowing all interested providers to apply for inclusion, and by insuring that referrals are based on neutral criterion, the prestige of the judicial office is not a factor. The judge will not be favoring one provider over another.

When establishing a roster and making referrals the judge may not establish any criterion that reflects bias toward a specific provider or a specific type of provider. A judge must carefully consider every factor that could be perceived as a deviation from neutrality. For example, in this circumstance one of the criterion for receiving referrals is that the provider be present in court when the referral is made. A provider might be next on the rotation list but would not receive the referral because a representative is not present. Deviation might nevertheless be permissible if the judge can articulate reasons why having the provider present is important for doing the business of the court. For example, does it lead to more efficient treatment and processes? Similarly, the facts in this circumstance indicate that the court considers proximity when determining which provider is next in line to receive a referral. The judge must again be able to articulate how deviating from the regular rotation by considering proximity helps the court and defendants in the administration of justice. The Committee simply raises these questions to ensure that judges carefully consider the criteria they adopt.

In conclusion, courts may create rosters of service providers as long as all interested individuals and entities have an opportunity to apply for inclusion, and provided the criteria for

being included are reasonable and unbiased. The court must make referrals on a rotating basis or allow defendants to select from the roster. Under these circumstances, the court would not be lending the prestige of the judicial office, and providers will not be receiving economic benefits to the exclusion of others.

The Committee recognizes that the conclusions of this opinion may raise questions about court referrals in other areas, such as specialty courts. The Committee is unable to anticipate how this opinion will affect those areas because the questions will be fact specific as to how a provider is selected and being used. The Committee must therefore await opinion requests dealing with other situations before offering advice.