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ATTORNEY GENERAL OPINION NO. 89- 4

The Honorable Herbert W. Walton
District Judge, Division No. 1
Johnson County Courthouse
Olathe, Kansas 66061

Re: Automobiles and Other Vehicles--Driving Under
Influence of Alcohol or Drugs; Related
Provisions--Alcohol and Drug Safety Action Program

Synopsis: An administrative judge may, by directive, promulgate guidelines setting forth procedural requirements for obtaining certification, and interpreting statutory requirements for qualification of programs seeking certification under K.S.A. 1988 Supp. 8-1008. An administrative judge may not, however, establish and enforce guidelines which impose substantive conditions and requirements not contemplated by statute, as this would constitute a legislative rather than an administrative act. K.S.A. 1988 Supp. 8-1008(e) authorizes the court to contract for services necessary to the administration of its provisions, and to use 10% of the money credited to the alcohol and drug safety action fund to pay for such services. Cited herein: K.S.A. 1988 Supp. 8-1008; K.S.A. 20-239; 20-345.

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Dear Judge Walton:

As Administrative Judge of the Tenth Judicial District of the State of Kansas you request our opinion regarding the scope of

your authority in carrying out the responsibilities assigned to you pursuant to K.S.A. 1988 Supp. 8-1008.

K.S.A. 1988 Supp. 8-1008 lists the qualifications of, and services to be provided by, community-based alcohol and drug safety action programs seeking certification. The statute sets forth the responsibilities of the administrative judge certifying such programs as follows:

"A community-based alcohol and drug safety action program shall be certified either by the administrative judge of the judicial district to be served by the program or by the secretary of social and rehabilitation services for judicial districts in which the administrative judge declines to certify a program. In establishing the qualifications for programs, the administrative judge or the secretary shall give preference to those programs which have had practical experience prior to July 1, 1982, in diagnosis and referral in alcohol and drug abuse. Certification of a program by the administrative judge shall be done with consultation and approval of a majority of the judges of the district court of the district and municipal judges of cities lying in whole or in part within the district.

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"The certification shall be for a four-year period. Recertification of a program or certification of a different program shall be by the administrative judge, with consultation and approval of a majority of the judges of the district court of the district and municipal judges of cities lying in whole or in part within the district.

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"To be eligible for certification under this subsection, the administrative judge or the secretary of social and

rehabilitation services shall determine that a community-based alcohol and drug safety action program is capable of providing, within the judicial district:

- (1) The evaluations, supervision and monitoring required under subsection (a);
- (2) the alcohol and drug evaluation report required under subsection (c) or (d); (3) the follow-up duties specified under subsection (c) or (d) for persons who prepare the alcohol and drug evaluation report; and (4) any other functions and duties specified by law. . . ."

Initially, you question whether an administrative judge can promulgate standards and guidelines for the exercise of his discretion in certifying community-based alcohol and drug safety action programs. It is generally recognized that an administrative judge has authority to act in a ministerial capacity in order to carry out clerical and administrative functions of the court. K.S.A. 20-329; 48A C.J.S. Judges §63 (1981); 46 Am.Jur.2d Judges §27 (1969); Bankers Trust Co. v. Braten, 420 N.Y.S.2d 584, 590 (1979); Clerk of the Superior Court for the County of Middlesex v. Treasurer and Receiver General, 437 N.E.2d 158, 161 (Mass. 1982). Thus, in our opinion, an administrative judge is authorized to promulgate guidelines for the certification of alcohol and drug safety action programs and may deny certification requests based on those guidelines.

However, the authority to set guidelines is not unlimited. While an administrative judge may act in a ministerial capacity to carry out administrative functions assigned to the court by statute, the judge may not legislate by imposing upon these programs substantive conditions and requirements not mandated by statute. See Keigley v. Bench, 89 P.2d 480, 484, 485 (Utah 1939) (distinction between legislative and administrative acts); Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226, 29 S.Ct. 67, 53 L.Ed. 150, 158, 159 (1908) (distinction between legislative and judicial acts). Thus, we do not believe an administrative judge has the authority to establish a guideline such as the conflict of interest clause described in your request letter. This clause places an additional substantive condition on programs (that they refrain from providing treatment services) not set out in K.S.A. 1988 Supp. 8-1008. While we agree that allowing the same entity to provide treatment and to diagnose the necessity

for such treatment may create the potential for conflict of interest, we believe this problem must be addressed legislatively rather than through administrative guidelines.

You further ask whether an administrative judge may provide by directive for the ongoing monitoring of certified programs within the judicial district. This appears administrative in nature, thus falling within the scope of an administrative judge's authority. K.S.A. 1988 Supp. 8-1008 specifies the services and duties required of certified programs. It would appear appropriate to provide ongoing monitoring of the programs in order to determine whether they are indeed providing such services and performing such duties. This allows the administrative judge to perform the statutory duty of determining whether a program is qualified for recertification.

You inquire whether the administrative judge may provide for the ongoing monitoring of certified programs by the employment of a professionally qualified monitor and pay for this monitoring from proceeds obtained by the charging of a registration fee. K.S.A. 1988 Supp. 8-1008(e) authorizes the administrative judge to "contract as may be necessary to carry out the provisions of this section." That subsection also contemplates use of money credited to the alcohol and drug safety action fund to "cover expenses of the court involved in administering the provisions of this section." Thus, it appears that if the administrative judge finds it necessary to hire a professional monitor in order to administer the court's responsibilities in certifying programs, the statute would allow the court to contract for such services and use up to 10% of the money credited to the drug safety action fund to pay for the services. See Attorney General Opinions No. 85-68, 86-14, 88-106. We find no authority for assessing a registration fee against programs to fund monitoring services.

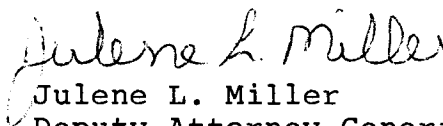
Similarly, if the administrative judge finds that a treatment counselor's services are necessary to carry out the court's responsibilities under K.S.A. 1988 Supp. 8-1008, money from the alcohol and drug safety action fund may be used to pay for such services. However, it is unclear what you envision a treatment counselor doing and thus we are unable to comment on the appropriateness of contracting for such services. Finally, it should be noted that K.S.A. 20-345 requires that district courts hire within staffing limits imposed by the Supreme Court. The court may therefore have to obtain Supreme Court approval before hiring either a monitor or a counselor.

In conclusion, an administrative judge may, by directive, promulgate guidelines setting forth procedural requirements for obtaining certification, and interpreting statutory requirements for qualification of programs seeking certification under K.S.A. 1988 Supp. 8-1008. An administrative judge may not, however, establish and enforce guidelines which impose substantive conditions and requirements not contemplated by statute, as this would constitute a legislative rather than an administrative act. K.S.A. 1988 Supp. 8-1008(e) authorizes the court to contract for services necessary to the administration of its provisions, and to use 10% of the money credited to the alcohol and drug safety action fund to pay for such services.

Very truly yours,



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