Client Relationships

Q. I would like information on how other drug courts process or deal with relationships among participants or relationships with someone in a different drug court program.

A.

Your jurisdiction has a probation/drug court relationship clause that reads as follows:

> 17. You must have the Team's permission to engage in or continue any relationships. You agree to keep theTeam apprised of your relationship status. Relationship issues are the primary cause of most relapses, and the Court must ensure that any relationship is healthy and supportive of your recovery. The term "relationship" includes all intimate interactions with another person, such as dating, spending a lot of time together, casual sex, cohabitating, and marriage. People often confuse feelings of fear and vulnerability with feelings of intimacy.This tends to shift focus away from recovery and greatly reduces your chance of success in recovery. Early recovery is a period of profound personal change and self-discovery. Relationships formed during this period generally do not last because of the personal changes that are taking place. The person you may be attracted to today will not be the same person tomorrow. It is better to wait until you are stabilized in your recovery before entering romantic relationships. If you enter the Treatment Court married or in a long-term relationship, an evaluation of the relationship may be necessary to determine to what extent the relationship could interfere with your progress towards sustained recovery. Whether or not you believe your interactions with another person constitute a relationship, the Treatment Court can still prohibit you from having contact with anyone whom the team determines could be unhealthy for your recovery.
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> Relationships must be approved in advance by the Treatment Court Team. You must provide your probation agent with all biographical identification of the person with whom you wish to engage in any type of relationship. Even if the relationship is a healthy one, if you conceal it, you are in violation; see Rule Number 1.

I am concerned about some of the language in the contract. I will discuss the law and suggest a process and language that may pass constitutional muster.

The Law

This clause is constitutionally deficient because it is constitutionally vague—meaning that it does not give the participant fair notice of what is prohibited. See U.S. v. Guagliardo, 278 F.3d 868, 872 (9th Cir.2002), citing Grayned v. City of Rockford, 408 U.S. 104, 108-09(1972). First, I will discuss what is constitutionally permitted and then describe why this provision is constitutionally vague. Finally, I will offer language that satisfies program needs and that is constitutionally permissible.

Courts have permitted associational restrictions that prohibit probationers from associating with a person with a criminal record, if such prohibition is related to the crime for which the offender was convicted, is intended to prevent future criminal conduct, or bears a reasonable relationship to an offender's rehabilitation. See, for example, the following cases:

- State v. Allen, 370 S.C. 88, 634 S.E.2d 653 (2006)
- State v. Hearn, 128 P.3d 139, 139 (Wash. Ct. App. 2006) (prohibiting association with drug users or dealers is constitutional)
- Malone v. State 2012 Ark. App. 280, (Ark App. 2012) (The court said Malone had previously been afforded leniency and ordered to drug court. As a condition of that sentence she was prohibited from consorting with felons. However, as the trial court noted, after completing the alternative program, she once again involved herself with known felons. The court then concluded that because "she put herself back in a position to be involved with people that she was already trained and educated on through Drug Court not to be with . . . she does not earn the right to get a probationary sentence.")
- Andrews v. State, 623 S.E.2d 247, 247 (Ga. Ct. App. 2005) (restricting a drug court participant from associating with drug users and dealers)

Of course, such contact cannot be merely incidental. See Arciniega v. Freeman, 404 U.S. 4, 4, 92 S.Ct. 22, 30 L.Ed.2d 126 (1971) (per curiam).

Similarly, courts have found constitutional restrictions on sexual relations permissible to prevent recidivism and/or to promote rehabilitation. The Constitution does protect the right to enter into and maintain certain intimate relations when those are attendant to the creation and continuation of a family marriage. Roberts v. United States Jaycees, 468 U.S. 634*634 609, 617-18, 104 S. Ct. 3244, 82 L.Ed.2d 462 (1984) states that impediments to nonmarital romantic relationships are permissible provided they withstand rational basis scrutiny. A probationer's right to engage in a nonmarital romantic relationship is not a fundamentally protected right encompassed by due process. See the following cases:

- Stevens v. Holder, 966 F.Supp.2d 622, 633-38, (E.D. Va. Aug. 16, 2013) (declining to find that a fundamental right exists with respect to a nonmarital relationship devoid of any familial ties)
- Plummer v. Town of Somerset, 601 F. Supp. 2d 358, 366 (D. Mass. 2009) (refusing to extend constitutional protection to the right to an intimate association outside the bounds of marriage or a civil union because "[i]t is impossible to draw a principled line demarcating the point . . . at which a romantic attraction is transformed from a dalliance into a prospective union worthy of constitutional protection")

Here there is a legitimate rational basis that would permit a proper prohibition of intimate relationship—both parties have criminal records and are on probation, and the potential exists for enabling behavior and relapse into drug use. However, it is the language used in the prohibition that is problematic. What is a "sexual relationship," and what is an "inappropriate relationship"? For instance, in State v. Galanes, 2015 VT 80, 124 A.3d 800 (2015), the court found the term "sexual relationship" ambiguous, because it appeared to require more than one incident of carnal relations but was unbounded in what was meant by relationship. Compare this with the following cases:

- State v. Sauls, 106 P.3d 659, 662 (Or. Ct. App. 2005) (noting that term "sexual relationship" is ambiguous in some contexts, but not where the sexual relationship was of two years' duration)
- Welch v. Commonwealth, 628 S.E.2d 340, 343 (Va. 2006) (observing that "vague terms, such as 'sexual relationship,' invite speculation")

- Bates v. State, 258 P.3d 851, 860 (Alaska Ct. App. 2011) (concluding that the term "sexual relationship" is "sufficiently definite to survive . . . vagueness challenge as an evidentiary matter")
- Williams v. State, 924 N.E.2d 121, 128-29 (Ind. Ct. App. 2009) (holding that the phrase "is or was engaged in a sexual relationship with the other person" is not unconstitutionally vague where the parties were living together for months)

As for "inappropriate relationship"—what is inappropriate? Courts have struck down prohibitions using the language "intimate relationship," which is no less vague than the term "inappropriate relationship." In Bleeke v. State, 982 N.E.2d 1040, 1051-52 (Ind. Ct. App. 2013), summarily affirmed on this ground, 6 N.E.3d 907 (Ind. 2014), the court noted the definitions of "intimate" as "marked by close acquaintance, association, or familiarity," or "a close friend or confidant," and held that the term "intimate" was impermissibly vague because it did not indicate how such a relationship would be measured or when a casual relationship would cross into an intimate relationship. The Supreme Court summarily affirmed this decision, noting that the condition was impermissible "[w]ithout further clarification or specificity as to what conduct would result in [defendant's] return to prison for violating [the condition] in accordance with the Court of Appeals decision below. . . ." 6 N.E.3d at 921-22.

Your Terms

As I am sure you recognize, many of the terms you use in your policy have been held to be unconstitutionally vague. It does help that you have tried to define some terms, but the definitions include vague terms as well.

Remedies

Only after specific factual findings by the court that a fraternization condition is necessary to prevent recidivism or promote rehabilitation in the individual case can such a condition be imposed. A blanket prohibition is probably unconstitutional. I would suggest that the probation term prohibit contact or fraternization between drug court clients, except contact related to attendance and interaction at treatment sessions or 12-step fellowship meetings, or incidental to probation office meetings or court status hearings. All other contact or communication is specifically prohibited, unless prior written approval is obtained from the court or probation officer. As it relates to contact or relationship with another party, the court would need to make a specific factual finding that such a no-contact provision is necessary in the drug court participant's case to, once again, promote rehabilitation or prevent recidivism. Such findings could include that the person is a felon, the person is a current drug user, or the person has been involved in drug use with the participant previously and such history is likely to repeat itself because . . . (cite a specific scientific authority or reasons).

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