

MONOGRAPH:

# Critical Issues for Defense Attorneys in Drug Courts

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**Revised edition, February 2025**

Treatment Court Institute  
Alexandria, Virginia



This project was supported by Grant No. 2019-MU-BX-K012, awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Department of Justice's Office of Justice Programs, including the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the SMART Office.

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Printed in the United States of America.

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The Treatment Court Institute (TCI) is pleased to provide defense attorneys nationwide with an overview of issues unique to their practice in treatment courts. TCI is sincerely grateful to those who participated in a defense attorney roundtable and provided peer review and editorial suggestions. This manual would not have been possible without their hard work and keen intellect. They are:

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This manual could not have come to fruition without the editorial work of Rebecca Pepper.

Finally, TCI is grateful to the Bureau of Justice Assistance component of the Office of Justice Programs in the U.S. Department of Justice. Their support made this publication possible.

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# INTRODUCTION

This revised monograph updates the original edition published in 2003. It should act as a reference guide for current or prospective criminal defense attorneys who practice in drug courts.<sup>1</sup> It also provides useful information to policy makers or other professionals who endeavor to design, implement, modify, or improve treatment courts in their jurisdictions. After years of practice, research, and constant modification, drug courts have provided an alternative to the traditional court system that can and does improve individual lives and increase public safety.

The drug court movement is a step forward in the evolution of the justice system: it represents a paradigm shift away from conventional notions that practitioners have of this country's justice system. Rather than the traditional adversarial courtroom, drug court programs encourage teamwork in accordance with therapeutic models of justice. However, tensions continue to exist between traditional advocacy and a collaborative justice approach, particularly for defense counsel who represent clients in these programs. Defense counsel are expected to have additional training and special skills to balance advocating for and advising clients, while also collaborating and supporting the therapeutic model. This monograph provides the background defense counsel need to be this effective advocate, while also supporting a successful program. In addition, some chapters are followed by practice guidance that is intended as a quick summary and reference to the background chapter.

This revised and rewritten version of the original was spearheaded by former public defenders with extensive practice in drug court programs, along with several other contributors, peer reviewers, and focus groups that included other public defenders and drug court experts throughout the nation.

## I. THE ROLE OF THE DEFENSE ATTORNEY

Drug courts and their progeny have become an accepted and well-established part of the criminal justice system. The original creation of drug courts was fueled by the challenges of mass incarceration, the repercussions of the War on Drugs, and the impact of drug laws on our nation. Drug treatment courts (hereinafter “drug courts”) have evolved from serving those charged with simple drug possession to more serious felony offenses. They have also continued to expand along with the confluence of substance use disorders, the prevalence of the unhoused with mental health disorders, and the apparent public health crisis created by these challenges.<sup>2</sup> The model has been modified and implemented to serve a variety of diverse populations through other collaborative treatment courts, such as veterans courts, mental health courts, DUI courts, domestic violence courts, juvenile

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1 Also referred to as specialty court, problem-solving court, therapeutic court, wellness court, mental health court, veterans court, juvenile drug court, family treatment court, and many other names and nuanced branches using a model similar to the original drug court.

2 *What Are Drug Courts?*, U.S. Department of Health and Human Services website, <https://www.hhs.gov/opioids/treatment/drug-courts/index.html>

and family courts, and others.<sup>3</sup> As drug courts and similar treatment court models continue to transform the criminal justice system, defense attorneys remain in the center of this process. They are the bridge that connects the traditional adversarial court system with collaborative problem-solving alternatives.

The role of defense counsel is unlike any other role and is arguably the most important role on the drug court team. Within many of these courts, defense counsel are the key connection between the participants and every aspect of the drug court process. It is the responsibility of defense counsel not only to fulfill their general ethical and legal obligations, but also to have the knowledge to skillfully guide their clients as they determine when to pursue the traditional route and when to opt for the alternative drug court approach. This requires additional training, experience, practice, and skill. Thus, criminal defense counsel in this role should be highly regarded and seen as the emerging experts in a growing field of therapeutic jurisprudence.<sup>4</sup> Unfortunately, they often struggle with dual misperceptions. Their clients and colleagues<sup>5</sup> may view them as apathetic, overly accommodating, and lacking in the necessary adversarialism, and the drug court team may see them as being too argumentative, unreasonable, or obstructionist.

To appreciate the role of defense counsel in drug court, the legal community must first acknowledge that the fundamental right to counsel remains unchanged in the drug court model. Under the Sixth Amendment to the U.S. Constitution, the right to counsel attaches when formal adversarial proceedings are initiated, specifically when the defendant is charged and their liberty is at risk.<sup>6</sup> The presence of defense counsel in drug court is constitutionally required at all critical stages, just as it is in the traditional system.<sup>7</sup> The most obvious of the “critical stages” would include events such as the entry of a plea, a revocation or termination hearing, implementation of sanctions, or sentencing.<sup>8</sup> For drug courts, the critical stages can depend on the specific jurisdiction and whether the legal involvement is pre-disposition or post-disposition.<sup>9</sup> Most drug courts use probation services to supervise participants and review hearings to monitor their progress. Defense counsel should generally be present when the court is considering a significant modification of the participant’s

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3 Douglas B. Marlowe, Carolyn D. Hardin, and Carson L. Fox, *Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Courts in the United States*, Treatment Court Institute, National Drug Court Institute (June 2016).

4 “Therapeutic jurisprudence” was an idea first written about by David Wexler and Bruce Winick. It is a model that analyzes how law, legal procedures, and the roles of court personnel “produce therapeutic or nontherapeutic consequences by taking a non-adversarial approach to the administration of justice.” See also Karen A. Snedker, *Therapeutic Justice*, Springer (2018), pp. 37–39.

5 “A judge shared that while the experience in MHC [mental health court] was enriching, it was not legally or intellectually challenging and that it was a great ‘break’ from traditional court practices. Her ambition toward a higher court judgeship deterred her from pursuing a return to problem-solving courts.” *Id.*, p. 123.

6 *Kirby v. Illinois*, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972); *Rothgery v. Gillespie County*, 554 U.S. 191 (2008).

7 *Brewer v. Williams*, 430 U.S. 387, 401, 97 S. Ct. 1232 (1977).

8 *United States v. Hidalgo*, 7 F3d 1566, 11th Cir. 1993. A critical stage of prosecution includes every instance in which the advice of counsel is necessary to ensure a defendant’s right to a fair trial or in which the absence of counsel might impair the preparation or presentation of a defense.

9 Douglas B. Marlowe and Judge William G. Meyer, *The Drug Court Judicial Benchbook*, Treatment Court Institute, National Drug Court Institute (2011, 2017), p. 172.



probation terms or any other important change in the posture of a legal matter.<sup>10</sup> Various liberty interests of the client, which are at stake throughout the course of the program, e.g., the loss of freedom through incarceration and the loss of property through legal financial obligations, should also be protected by effective representation by defense counsel. However, practice in drug court adds an additional obligation and challenge for defense counsel: not only to protect the participant's due process rights, but also to encourage full participation in the program.<sup>11</sup>

## A. BALANCING COMPETING CONCERNS

Drug courts are holistic by design, and the range of advocacy is extremely broad. As a general proposition, the collaborative nature of drug courts will shape the culture of these courtrooms. Steering committees, advisory committees, training, and memorandums of understanding can enhance this spirit of cooperation and problem solving. The team will consist of professionals whose opinions are formed from their own training, experience, and expertise. "The Drug Court team comprises representatives from all partner agencies involved in the creation of the program, including but not limited to a judge or judicial officer, program coordinator, prosecutor, defense counsel representative, treatment representative, community supervision officer, and law enforcement officer."<sup>12</sup> For the most part, the team will share consensus on how the program addresses treatment needs for the individual participant and the participants as a whole.

Within this multidisciplinary team setting, defense counsel are tasked with achieving the client's goals of recovery and graduation while also fulfilling legal and ethical responsibilities. The road to recovery can be very complex and is rarely straightforward, so the team and court invest great effort in determining how best to assist participants in completing the program. There are many decisions to be made along this continuum, requiring defense counsel to engage in different responsibilities and interactions with their clients, the court, and the team. "With a participant in drug court, defense counsel explains the court's processes, prepares the participant for appearances, and helps the participant to conform his or her behavior to the obligations undertaken on entering drug court. Within the drug court team, defense counsel ensures that the client's perspective is heard and respected, the client's rights are protected, and the court's procedures are followed."<sup>13</sup>

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10 "Probation and parole revocation proceedings are not considered a critical stage under the federal constitution, but virtually every state requires counsel at probation revocation proceedings if the defendant so requests. Some jurisdictions have held that a modification of the terms of probation is a critical stage of the proceedings, where the right to counsel attaches, at least where the modification adds significant terms to probation." *Gagnon v. Scarpelli*, 441 U.S. 778, 787, 93 S. Ct. 1756 (1973); see also, *State v. Kouba*, 709 N.W.2d 299, 299 (Minn. Ct. App. 2006); *State v. Sommer*, 878 P.2d 1007, 1008 (N.M. Ct. App. 1994). But see *DeMillard v. State*, 190 P.3d 128, 128 (Wyo. 2008).

11 All Rise, formerly NADCP, *Defining Drug Courts: The Key Components* (1997, 2004), Key Component 2, p. 3.

12 All Rise, formerly NADCP, *Adult Drug Court Best Practice Standards*, Vol. 2 (2018), VIII, Multidisciplinary Team, Team Composition, p. 39.

13 Judge Karen Freeman-Wilson, Robert Tuttle, and Susan P. Weinstein, *Ethical Considerations for Attorneys and Judges in Drug Court*, Treatment Court Institute, National Drug Court Institute (2001), p. 21.

## Effective Advocacy in Drug Courts Requires:

- Understanding the role of defense counsel
- Knowing the policies and procedures of the program
- Participating and collaborating as a team member
- Protecting due process and confidentiality
- Continuing multidisciplinary training

Due to this “bidirectional nature of legal representation,”<sup>14</sup> defense counsel will pivot between collaboration and adversarialism as the client’s legal and treatment needs demand. For example, defense counsel may seek to challenge a drug test result at a contested hearing or request additional mental health services or oppose a treatment program rule. *Assertive collaboration*<sup>15</sup> in drug court operates on a spectrum that ranges from problem solving and collaboration to negotiation and litigation throughout the course of representation.

Effective advocacy in drug court requires the continuous evaluation of how to actively participate as a collaborative team member and to represent the client while also balancing legal and treatment considerations. These competing interests can give rise to complex ethical, legal, and practical dilemmas. To fulfill their obligations and resolve these challenges, defense counsel will need to understand their dual relationship with their client and the team. Defense counsel must also learn the policies and procedures that govern the court as well as the best practice standards that underpin all drug courts, and should routinely cross-train in order to fulfill their role, duties, and obligations.

## B. THE DEFENSE ATTORNEY’S RELATIONSHIP WITH THE CLIENT

Defense counsel represent clients in drug courts for much longer and more intensive periods of time than in traditional criminal court. As defense counsel share information with a client and learn about the client, they invest in the attorney-client relationship. This relationship will differ from the traditional model, where the client is passive and protected by their legal professional.<sup>16</sup> Instead, in drug courts, defense counsel should adopt a participatory model: a more active partnership that requires acknowledgment that the lawyer does not have all the answers and enlists “the client to supply an added measure of creativity and often superior knowledge of the facts.”<sup>17</sup> A participatory model is more “client-centered” by focusing efforts around what the client hopes for, rather than what the legal professional thinks the client needs, thus treating the client as an effective collaborator rather than as a helpless person to rescue.<sup>18</sup> “We have no special wisdom

<sup>14</sup> *Id.*

<sup>15</sup> There are other business models that refer to “assertive collaboration.” Collaborative and competitive communication are styles that have been identified by Kenneth Thomas and Ralph Kilmann.

<sup>16</sup> Stefan H. Krieger and Richard K. Neumann, *Essential Lawyering Skills*, 5th ed., Wolters Kluwer (2015), p. 27.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*, p. 26, quoting David Binder and Susan Price.

about what the client should want, and each client has to live with the results of our work long after the case has faded into the back of our memory.”<sup>19</sup>

The participatory model, unlike the traditional model, is not just about results, but also about experiences and relationship building. Clients are focused on more than just the results of their representation: “[m]any lawyers equate client satisfaction with the outcome achieved [but many studies] have produced impressive evidence that clients evaluate their lawyers’ competence more in terms of the process experienced by them in the representation than the outcome.”<sup>20</sup> Along with advising the client about the law and the case, defense counsel must also solicit information about the client’s immediate and long-term legal and personal goals and understand their life circumstances. The purpose is to include the client in the process and foster a partnership from the outset of representation. A lawyer and client working together will provide better solutions and outcomes than a lawyer working alone.<sup>21</sup>

Criminal cases involve potential incarceration, legal fines, and other long-term collateral consequences. Every decision matters. In addition to the expected drama and upheaval surrounding any arrest, it is likely that a client opting for drug court will be in crisis and feel disempowered by the system. Under these circumstances, a client must determine whether to *voluntarily*<sup>22</sup> participate in a program requiring significant personal investment or choose the traditional route of trial or plea bargain. For a client who has not always felt heard or respected, the quality of the experience they share with defense counsel matters greatly as they make decisions and undertake change throughout the course of the program. “One of the most powerful forces in life is the feeling of validation a person experiences from being heard and understood. Partly this is a function of the lawyer’s listening skills. But mostly it is a function of empathy—seeing the world through the client’s eyes.”<sup>23</sup>

**A client’s stated interests versus their best interests is an opportunity for client-centered lawyering.**

When a lawyer has built a relationship with a client, they can have a comprehensive dialogue about all the legal and personal considerations relevant to entry into the program.<sup>24</sup> Defense counsel will still provide the same

advice to a client considering drug court as would be provided in a traditional criminal case. Defense counsel must be knowledgeable of other sentencing options, diversion programs, and potential trial outcomes so clients are in the best

19 *Id.*, p. 26.

20 *Id.*, p. 31, quoting Clark Cunningham.

21 *Id.*, p. 26, quoting Doug Rosenthal.

22 Each defendant charged with a crime is entitled to request a jury trial as stated in the Sixth Amendment of the U.S. Constitution. The option of choosing drug court to resolve a criminal charge is voluntary by nature.

23 Krieger et al., *Essential Lawyering Skills*, p. 31.

24 All Rise, formerly NADCP, *Defining Drug Courts*, Key Component 2, pp. 3-4.

position to make informed choices.<sup>25</sup> Clients should be given “advice on alternative courses of action, including legal and treatment alternatives available outside the drug court program,” and discussions should occur about “the long-term benefits of sobriety and a drug-free life.”<sup>26</sup> This includes providing information about not only the benefits but also the costs of participating in drug court. Drug court is not appropriate for every client. The client should also be clearly warned of the risks associated with participating in the drug court treatment program. For example, if the client is unsuccessful in completing the program, they may be required to spend substantially more time under the court’s supervision than would be required after a negotiated plea bargain or even after a conviction at trial.

Trustworthy communication is key to managing the relationship with a client. Defense counsel should set out the parameters for communication and address concerns around confidentiality with their client. Defense counsel should educate their client on the rules related to privilege versus confidentiality. Drug courts often require participants to execute confidentiality waivers that allow relevant portions of their health information to be distributed, not just to the court but also to prosecutors. It is important that defense counsel advise clients of the potential consequences of disclosing such information and inform them that the purpose is to assist with their substance use disorder and long-term recovery. Clients also need to understand that defense counsel may share information with the team unless it is a matter that requires the client’s consent and waiver of privilege. Participants who do not trust their lawyer will not provide information, seek advice of their counsel, or respect what they hear.

Drug courts ask participants to change everything: what they do for fun, who they spend time with, what time they wake up, where they spend their day. Clients are giving up most of the control over the legal process and submitting to a treatment plan based on risk and needs assessments that will impact every aspect of their lives. Clients will not always agree with the judge’s rulings but must understand that this therapeutic approach is part of the process in reaching the long-term goals that are in their best interest. Defense counsel are uniquely situated to use their client-centered relationship to educate and encourage when there is conflict with the decisions of the court or the rules of the program. Clients should be advised about the short-term and long-term consequences of legal challenges and whether this pursuit is in their best interest. Ultimately, defense counsel still have an ethical duty to advocate for the client’s stated interest if the client chooses a path contrary to the recommendations of the team.<sup>27</sup>

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<sup>25</sup> See *Smith v. State*, 840 So. 2d 404, 408 (Fla. Dist. Ct. App. 2003): “It is essential that lawyers educate themselves as to the availability, requirements, and appropriateness of drug court programs. Only then can they effectively advise their clients. It is equally important for the institutions that educate future lawyers, as well as those that educate the other disciplines that play vital roles in the drug court process to incorporate drug courts into their curricula. For lawyers to do otherwise is for them to become legal dinosaurs. To ignore the need to learn about the drug court process is to ignore the evolution of the justice system. The sooner the Bar educates itself, the sooner the issue raised in this case will become extinct.”

<sup>26</sup> All Rise, formerly NADCP, *Defining Drug Courts*, Key Component 2, pp. 3-4.

<sup>27</sup> All Rise, formerly NADCP, *Adult Drug Court Best Practice Standards*, Vol. 2, VIII, Multidisciplinary Team, Team Communication and Decision Making, p. 44.

## C. THE DEFENSE ATTORNEY'S RELATIONSHIP WITH THE TEAM AND THE COURT

### The Team of Experts

"A dedicated multidisciplinary team of professionals manages the day-to-day operations of the Drug Court, including reviewing participant progress during pre-court staff meetings and status hearings, contributing observations and recommendations within team members' respective areas of expertise, and delivering or overseeing the delivery of legal, treatment, and supervision services."<sup>28</sup>

Drug court team members have different roles and responsibilities but share a common goal. In *Defining Drug Courts*, Key Component 2 states: "Using a nonadversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights."<sup>29</sup> While defense counsel's participation will follow a different trajectory in drug courts, the term *nonadversarial* does not imply nonadvocacy.<sup>30</sup> "Instead of starting with an assumption of conflict, prosecutors and defense counsel within drug court begin their work by expecting cooperation in achieving a shared goal: reducing or preventing the defendant's further engagement with the criminal system by addressing the defendant's addiction<sup>31</sup> to alcohol or other drugs. This shared goal gives rise to the team concept, but prosecutor and defense counsel maintain distinct roles with the team."<sup>32</sup>

Defense counsel's interaction with the team starts with clarification of the nature and scope of their participation and an explanation that ethical duties are owed first and foremost to the individual client, not the program or the team. "Evidence suggests participants may be more likely to perceive drug court procedures as fair when a dedicated defense attorney represents their interests in team meetings and status hearings."<sup>33</sup> Defense counsel do not represent the *aggregate drug court client*, only the individual client who needs someone clearly and completely on their side. At the same time, defense counsel also have a responsibility to uphold the principles of the program and protect the confidential undertakings of the drug court team. One of the challenges that defense counsel face is being marginalized by the drug court team for fear that defense counsel may obstruct the process or share inappropriate information with the client. When this imbalance starts to occur, the team should be reminded that defense representation should be encouraged rather than discouraged in drug courts because doing so is associated with significantly better outcomes for the court.<sup>34</sup>

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28 *Id.*, p. 38.

29 All Rise, formerly NADCP, *Defining Drug Courts*, Key Component 2, p. 3.

30 All Rise, formerly NADCP, *Adult Drug Court Best Practice Standards*, Vol. 2, VIII, Multidisciplinary Team, Team Communication and Decision Making, p. 44.

31 Substance use disorder, referred to as SUD.

32 Freeman-Wilson et al., *Ethical Considerations for Attorneys and Judges in Drug Court*, p. 21.

33 All Rise, formerly NADCP, *Adult Drug Court Best Practice Standards*, Vol. 2, VIII, Multidisciplinary Team, Team Composition, p. 40.

34 *Id.*

To be an effective advocate and active team member, defense counsel must be present at pre-court staff meetings, commonly referred to as staffings or case reviews.<sup>35</sup> Defense counsel must also understand the disciplines of each team member to understand the different perspectives at the table.<sup>36</sup> To the extent that drug courts are “nonadversarial,” it is precisely during the staffings with the team that the advocacy occurs.<sup>37</sup> Assertive collaboration in staffings requires that defense counsel share the participant’s accomplishments, identify barriers, provide input on case plan goals, and contribute to conversations about appropriate incentives and sanctions. Due to the highly confidential and timely nature of the information being shared, the drug court team meets privately, usually weekly, to discuss myriad issues, including the progress or lack thereof for current participants. During these staffings, information is shared regarding each participant, and all members of the team have the ability to report on the progress of participants. Participants do not attend staffings, there are no court reporters, and nothing stated in a drug court staffing should be divulged to persons outside of the team.<sup>38</sup> These discussions among the multidisciplinary team impact all decisions related to matters such as treatment issues, support services, drug testing, program compliance, phase advancement, and sanctions and incentives.

In preparation for court, defense counsel explain staffing discussions to the client: (1) why they are being promoted or not; (2) why they are receiving a sanction or incentive; (3) why the team is making a certain recommendation to the judge. The client and attorney will then participate in a discussion about whether to abide by the recommendation or make a different one in front of the judge. Following the staffing, the judge will usually go on the record and conduct the public portion of the drug court hearing, commonly referred to as a status hearing or status conference.<sup>39</sup> It is during this hearing that the court will engage in a brief colloquy with the participant and entertain any relevant new information. The judge will take into consideration the information presented during the staffing and any new information presented during the status conference, but all final decisions reside with the judge. It is a best practice for the judge to interact with each participant for a minimum of three minutes during status hearings.<sup>40</sup>

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35 All Rise, formerly NADCP, *Adult Drug Court Best Practice Standards*, Vol. 2, VIII, Multidisciplinary Team, Pre-Court Staff Meetings, p. 41.

36 Attorneys should learn as much as they can about substance use treatment, medication, mental health disorder, and the availability of community resources in order to adequately address or challenge things like drug test results, appropriate treatment, and the availability of necessary resources. The defense attorney may not be in a position to effectively advocate for the client if they don’t have a working knowledge of the subject matter.

37 All Rise, formerly NADCP, *Adult Drug Court Best Practice Standards*, Vol. 2, VIII, Multidisciplinary Team, Team Communication and Decision Making, p. 44.

38 All Rise, formerly NADCP, *Adult Drug Court Best Practice Standards*, Vol. 2, VIII, Multidisciplinary Team, Pre-Court Staff Meetings, p. 41, citing *State v. Sykes*, 182 Wash.2d 168 (2014). Staffings are not a critical stage.

39 All Rise, formerly NADCP, *Adult Drug Court Best Practice Standards*, Vol. 2, VIII, Multidisciplinary Team, Status Hearings, p. 46.

40 All Rise, formerly NADCP, *Adult Drug Court Best Practice Standards*, Vol. 1 (2018), III, Roles and Responsibilities of the Judge, Length of Court Interactions, p. 21.

While in court and on the record, defense counsel will advocate and litigate issues as needed when liberty interests are at stake. This is another opportunity to employ assertive collaboration by building upon information shared in the closed staffings. Defense counsel should be present at the hearing, prepare their client on how to present themselves to the court, and assist the client as needed. It is no surprise that clients may be nervous when speaking directly to the judge or be unable to articulate their accomplishments, concerns about progress, or legitimate complaints about their treatment program. Clients may make comments or statements on the record that are not appropriate or in their best interest. As in traditional court, defense counsel should be prepared to intervene to protect a client from the potentially serious consequences of divulging harmful information. Even when participants can properly articulate information, a drug court judge may not take a participant's concerns as seriously as those raised by their counsel.

When defense counsel first start to practice in a drug court setting, confusion is common. The term *nonadversarial* can lead to a misperception about how defense counsel should operate in this setting. Although there is a team approach, drug courts are still legal proceedings, and protecting the record is crucial. Many of the discussions that occur during staffings include confidential information, and said discussions are off the record. As a rule, defense counsel should maintain comprehensive records and, when circumstances require, should litigate on the record to protect the individual interest of clients.

## D. ROADMAP FOR PRACTICE

This chapter has provided a roadmap for how best to serve and protect a client during each stage of the drug court program and to explain the role of defense counsel in a multidisciplinary team. "The 'team player' image does not reflect interchangeable roles, though it does represent an important change in perspective for both prosecutors and defense counsel."<sup>41</sup> Respecting the model does not mean sacrificing the role of defense, but rather can enhance it by aiding in better representation. In each future chapter, a topic will be discussed relevant to defense practice in drug courts: professionalism, ethics, legal issues, treatment, policy, training, and compassion fatigue, with practice guidance included for each topic.<sup>42</sup>

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41 Freeman-Wilson et al., *Ethical Considerations for Attorneys and Judges in Drug Court*, p. 21.

42 Although the discussion pertains to court-appointed attorneys or public defender agencies, the guidelines also apply to private defense counsel who practice in drug court.

## II. PROFESSIONALISM IN A MULTIDISCIPLINARY TEAM

### Areas of Professionalism

#### Collaborative skills:

- Communication
- Teamwork
- Problem-solving

#### Traditional skills:

- Negotiation
- Litigation

Do not underestimate the challenge for defense counsel of shifting from an adversarial criminal justice model to collaborative, active, and effective participation on a drug court team. Additional and enhanced skill sets are needed to effectively practice in this arena. It is not enough to simply be present and allow the team to make decisions regarding a client's participation in the program. To provide proper advocacy, defense counsel must use

effective communication, collaboration, problem-solving, and negotiating skills, all while anticipating and preparing for the possibility that a matter may revert to traditional litigation. Chapter 3 provides a quick reference for implementing practices related to the concepts presented and discussed here.

### A. COLLABORATION: COMMUNICATION IS THE FOUNDATION

It is the duty of defense counsel to clearly communicate advice to their client and to also communicate on behalf of their client to all members of the team. Good communication is a critical piece for creating relationships, allowing for collaboration, and finding common goals within the team.<sup>43</sup> “Stability and trust are key factors related to the functioning and effectiveness of the team model.”<sup>44</sup> Drug court participants and staff rate communication among team members as one of the most important factors for success in drug court.<sup>45</sup> Ongoing communication among team members ensures that clients receive consistent messaging. This prevents a participant from falling through the cracks, being subjected to unwarranted burdens, eluding responsibility for their actions, or attempting to manipulate different team members selectively.<sup>46</sup>

<sup>43</sup> Snedker, *Therapeutic Justice*, p. 122.

<sup>44</sup> *Id.*

<sup>45</sup> All Rise, formerly NADCP, *Adult Drug Court Best Practice Standards*, Vol. 2, VIII, Multidisciplinary Team, Sharing Information, p. 42; M. S. Frazer, *The Impact of the Community Court Model on Defendant Perceptions of Fairness*, Center for Court Innovation (2006); John R. Gallagher, Anne Nordberg, Michael S. Deranek, Eric Ivory, Jesse Carlton, and Jane Woodward Miller, “Predicting Termination from Drug Court and Comparing Recidivism Patterns: Treating Substance Use Disorders in Criminal Justice Settings,” *Alcoholism Treatment Quarterly*, Vol. 33, Issue 1 (2015), pp. 28–43; Margaret H. Lloyd, Toni Johnson, and Jody Brook, “Illuminating the Black Box from Within: Stakeholder Perspectives on Family Drug Court Best Practices,” *Journal of Social Work Practice in the Addictions*, Vol. 14, Issue 4 (2014), pp. 378–401.

<sup>46</sup> All Rise, formerly NADCP, *Adult Drug Court Best Practice Standards*, Vol. 2, VIII, Multidisciplinary Team, Sharing Information, p. 42.



**Motivational interviewing is a goal-oriented, client-centered counseling style for eliciting behavior change by helping clients to explore and resolve ambivalence.**

The ability to communicate effectively is enhanced by *listening*. Attorneys can find it hard to pause, be fully present, and just listen, but listening is essential. Active listening involves patience and encourages the client to talk and to clarify by adding information.<sup>47</sup> It requires listening to understand, not

listening to respond. In a traditional adversarial courtroom, attorneys become accustomed to fast-paced, direct conversations with clear delineations of the duties of confidentiality. Attorneys speak to the court and not to each other, or they attempt to speak over each other. In contrast, drug courts involve routine check-ins and conversations at status hearings that can lead to a client making an important disclosure. Therefore, defense counsel should be patient and more focused on the conversations that occur with a client outside of the courtroom in preparation for a hearing. The team is relying on defense counsel to gather this information from their client, raise appropriate issues to the team prior to the hearing, and listen to the advice and input of other team members. “At the core of the lawyer’s role as counselor are the skills of questioning and listening to a client with an attitude of sympathy and detachment, while attending to the client’s emotion as well as intellectual needs—all with the aim of helping clarify the client’s objectives and helping [them] to choose the best means of achieving them.”<sup>48</sup> By combining listening skills with empathy, defense attorneys can find out more about their client and what they are feeling in the drug court process, which is critical to the client’s success.<sup>49</sup>

Defense counsel should also consider incorporating the methodologies of motivational interviewing and trauma-informed care<sup>50</sup> into their communication skill set. Many clients feel disempowered, ambivalent, hopeless, or trapped by the system, and defense should look to empower them from the start of representation. Defense counsel should practice asking directed open-ended questions, providing affirmations, using reflective listening, and periodically providing summary statements in a nonjudgmental, nonconfrontational, and nonadversarial manner.<sup>51</sup> This approach will also facilitate team communication as professionals come to understand the importance of respectfully hearing from each team member so that they understand the reasoning, basis, or purpose for certain recommendations.

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47 Krieger et al., *Essential Lawyering Skills*, pp. 69–70.

48 Paul Brest, “The Responsibility of Law Schools: Educating Lawyers as Counselor and Problem Solvers,” *Law and Contemporary Problems*, Vol. 58, No 3 (1995), p. 8.

49 Krieger et al., *Essential Lawyering Skills*, p. 71.

50 All Rise, formerly NADCP, *Adult Drug Court Best Practice Standards*, Vol 2, VI, Complementary Treatment and Social Services, pp. 6–7, 14–15.

51 Ken Kraybill and Joseph Benson, *Introduction to Motivational Interviewing: Preparing People for Change*, presented at 2009 Best Practices Conference, Richmond, Virginia, <https://cdpsdocs.state.co.us/epic/EPICWebsite/resources/articles/MotivationalInterviewing/IntroductiontoMotivationalInterviewingPreparingPeopleforChangeKraybill.pdf>.

While practicing in drug court, defense counsel's communication style will change based on whether they are engaged in assertive collaboration or adversarialism. It will range from asking questions, gathering information, and giving advice to making legal arguments and clarifying the legal record. To communicate effectively with the team, the client, and the court, defense counsel must decide which skill set to use, based on how best to navigate and support the participant through the process. This is especially true when certain decisions may not seem logical or even fair to a client. For example, distinguishing a therapeutic response from a sanction requires defense counsel to investigate treatment methodology, to understand behavior modification, and to know enough to discuss clinical recommendations with the team. In turn, defense counsel are then equipped to share and explain the reasoning behind specific recommendations and convey that information to the client, while also appreciating the client's needs and positions. If, however, the client insists on challenging an issue, defense counsel will be better prepared for litigation.

## **B. COLLABORATION REQUIRES TEAMWORK**

Multidisciplinary teams are now recognized as a fundamental part of behavioral health staffing models in criminal justice. Defense counsel are not educated or trained in this discipline and may not be familiar with this type of team environment. Creating an effective team starts with respecting and understanding the value of each team member, based on their own expertise, experience, duties, and ethical obligations. No matter how knowledgeable defense counsel strive to be, there are limitations to the advice that they can provide as it relates to behavioral health needs. During these times, defense counsel will need to maintain the boundaries of their role and rely on the team of professional experts.

**“Each team member must understand and respect the boundaries and responsibilities of other team members.”<sup>52</sup>**

Cultivating the team dynamic and culture will create synergy in the decision-making process and lead to better recommendations based on more diverse opinions and perspectives. However, establishing boundaries and respecting each other's roles on the team can create friction and cause other challenges. It is common for the team to struggle with a perception that defense counsel are argumentative and interfere with the goals of the client and the program. The best way to overcome these perceptions is for defense counsel to build a strong foundation based on competence and knowledge and to develop good relationships with all team members. Defense counsel can use the guides and commentary provided in the *Adult Drug Court Best Practice Standards* to understand collaboration in a multidisciplinary team setting. These teamwork strategies can then be employed in daily practice.

<sup>52</sup> Marlowe and Meyer, *The Drug Court Judicial Benchbook*, p. 24.

## Personality Types:

- Adversarial
- Apathetic
- Collaborative

When initially working on a drug court team, defense counsel tend to fall into one of the three personality types: adversarial, apathetic, or collaborative. The more adversarial type tends to be argumentative, contesting every issue

regardless of a client's best interest at the cost of gaining respect among team members. A more apathetic personality may rarely offer opinions at staffings, agreeing with all team recommendations regardless of a client's stated requests. This makes the job easy for everyone else by creating a void as if there were no real defense counsel on the team at all. In a drug court setting, defense counsel should strive to be more collaborative. This requires the exercise of good judgment about when and where to make an argument, while also avoiding the loss of political capital with the team and the court.<sup>53</sup> "[T]he duty of zealous representation<sup>54</sup> does not require counsel to challenge every proposed sanction for violations of drug court requirements. It is merely appropriate that such sanctions continue to serve the defendant's underlying interest in recovery, are consistent with sanctions imposed on other participants for similar violations, and are reflective of the previously determined schedule of sanctions."<sup>55</sup> Defense counsel can advocate for their client's stated interests, but can also agree with other team members and counsel a client on the reasons behind what a client sees as an adverse recommendation.

## Be part of the team, but do not accept being just a team player.

Defense counsel should also take an active role in staffings to ensure that groupthink does not interfere with due process.<sup>56</sup> Defense counsel that remain silent in team meetings or defer

habitually to group consensus are violating professional obligations.<sup>57</sup> Letting the team consistently dictate what they view as the best interest of a client could lead to a client's failure to complete the drug court program, as the team may not always have all of the information that defense counsel may possess. Although these responsibilities may seem daunting, defense counsel have an obligation to their client, their team, and the court. By assuming a more engaged and collaborative approach, defense counsel will generate better recommendations for a client and better outcomes for the program. The client will also be more invested in the decisions of the court as they view defense counsel championing their interests and ensuring that they receive procedural justice.

53 Krieger, et al., *Essential Lawyering Skills*, p.7: "Judgment is knowing what to do and say—and what not to do or say—to improve a situation or prevent it from getting worse. . . . Excellent judgment is the single most important characteristic that separates good decision-making from bad decision-making."

54 See ABA Model Rules of Professional Conduct, 13, Diligence, regarding "zealous" advocacy. [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_3\\_diligence/comment\\_on\\_rule\\_1\\_3/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_3_diligence/comment_on_rule_1_3/)

55 Freeman-Wilson et al., *Ethical Considerations for Attorneys and Judges in Drug Court*, p. 28.

56 All Rise, formerly NADCP, *Adult Drug Court Best Practice Standards*, Vol 2, VIII, Multidisciplinary Team, Team Communication and Decision Making, p. 44.

57 *Id.*, p. 45.

## C. COLLABORATION SOLVES PROBLEMS

**“Team members have an obligation to contribute relevant observations and insights and to offer suitable recommendations based on their professional knowledge, experience, and training.”<sup>58</sup>**

Drug court team staffings provide an open forum to discuss ideas and resolutions. They provide an avenue for defense counsel to use assertive collaboration to resolve problems. Discussion and debate among team members should occur more in staffings, as opposed to in court hearings, in order to reserve the greater share of court time for intervening with participants rather than arbitrating uncontested facts or legal issues.<sup>59</sup> “Team members have an obligation to contribute relevant observations and insights and to offer suitable recommendations based on their professional knowledge, experience and training.”<sup>60</sup> Defense counsel can lead and navigate the development of proactive solutions with the team based on their unique insight into their client’s situation.

Being willing and able to gather information from a client and offer opinions in a team setting is an essential skill for any attorney working in drug court. “An effective lawyer should assist clients in articulating their problems, defining their interests, their objectives, and generating, assessing, and implementing alternative solutions.”<sup>61</sup> How defense counsel approach problem-solving can directly impact their client’s progress in the program. The problem solver learns from experience, treats the entire problem as an integrated whole, and identifies the few things that really matter.<sup>62</sup> The problem solver is idea driven versus ego driven<sup>63</sup> in finding a solution: it is more important to find the solution than to be the creator of it. To be a problem solver in drug court requires creativity and being open to new ideas. Defense counsel will know from client-centered lawyering that to address their client’s needs, there will be no one-size-fits-all solution. Defense counsel will need to use divergent thinking to consider all options available to their client. Divergent thinking in problem-solving involves “thinking in several directions at once to find more answers or hypotheses or strategies.”<sup>64</sup> This is a contrast to traditional court settings, where parties tend to engage in convergent thinking, which narrows the inquiry to find a single right answer.<sup>65</sup> In the

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<sup>58</sup> All Rise, formerly NADCP, *Adult Drug Court Best Practice Standards*, Vol. 2, VIII, Multidisciplinary Team, Team Communication and Decision Making, p. 45.

<sup>59</sup> *Id.*, p. 44.

<sup>60</sup> *Id.*, p. 45.

<sup>61</sup> Brest, *The Responsibility of Law Schools*, p. 9.

<sup>62</sup> Krieger et al., *Essential Lawyering Skills*, p. 60.

<sup>63</sup> All Rise, formerly NADCP, *Adult Drug Court Best Practice Standards*, Vol. 2, VIII, Multidisciplinary Team, Team Communication and Decision Making, p. 45.

<sup>64</sup> Krieger et al., *Essential Lawyering Skills*, p. 45.

<sup>65</sup> *Id.*

traditional one-sided criminal justice lens there are winners and losers, guilty and innocent, right and wrong. In contrast, the problem-solving approach of a drug court looks for the “inclusive solution.” The very point of drug courts is to offer an inclusive solution to the community; they improve the legal situations and lives of participants while also providing cost savings and increasing public safety. “Inclusive solutions” solve the problem by seeking to satisfy the needs of everyone involved.<sup>66</sup> Listening to more perspectives allows for solution generation to happen faster because more information is shared and more needs are met.

<sup>67</sup> One of the ways to participate in creating inclusive solutions with the team is to have a growth mindset. A growth mindset keeps an open mind, is flexible, and embraces problem-solving, whereas a fixed mindset avoids challenges and failure.<sup>68</sup> Employing this growth mindset will also enable defense counsel to assist the client in overcoming challenges as problems shift and evolve throughout the course of representation.

Defense counsel should be creative, willing to listen, and ready to learn from team members, and should expect the same response in return. Together, defense counsel and the team will use the problem-solving strategies to think in an unconventional way. The goal is to create a climate of psychological safety by teaching team members to articulate divergent views in a manner that is likely to be heeded by fellow team members (refer to the Network for the Improvement of Addiction Treatment [NIATx] techniques in the “Strategies for Teamwork” section in the next chapter for ways to improve collaboration).<sup>69</sup> “Feelings of worth can flourish only in an atmosphere where individual differences are appreciated, mistakes are tolerated, communication is open, and rules are flexible—the kind of atmosphere that is found in a nurturing family.”<sup>70</sup> Being able to problem-solve together will expand possibilities and lead to better results for a participant and for the program as a whole.

## D. NEGOTIATION

There will be times when the team cannot agree on how to resolve a problem or when the client does not agree with the team recommendations. This mostly occurs when individual liberties of a client are implicated, such as a jail sanction or termination, causing a shift to adversarialism. Thus, defense counsel need to know how to negotiate effectively at staffings and in contested hearings. “In effect, negotiation is a form of collaborative problem-solving among parties whose interests converge and diverge in various ways.”<sup>71</sup> Assertive collaboration

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<sup>66</sup> *Id.*, p. 60.

<sup>67</sup> *Id.*

<sup>68</sup> Jennifer Smith, “Growth Mindset vs. Fixed Mindset: How What You Think Affects What You Achieve,” *Mindset Health* (September 25, 2020). <https://www.mindsethealth.com/matter/growth-vs-fixed-mindset>

<sup>69</sup> All Rise, formerly NADCP, *Adult Drug Court Best Practice Standards*, Vol. 2, VIII, Multidisciplinary Team, Team Communication and Decision Making, p. 45.

<sup>70</sup> Virginia Satir, quote.

<sup>71</sup> Brest, *The Responsibility of Law Schools*, p. 11.

## Problem-Solving Strategies

- Idea driven
- Inclusive solutions
- Growth mindset
- Divergent thinking

allows defense counsel to negotiate more effectively by balancing adversarial and problem-solving approaches. A problem-solving approach to negotiation focuses more on the interests of the parties, while an adversarial approach focuses more on the rights and powers of the parties.<sup>72</sup> When representing a client in negotiation, defense counsel must consider these different approaches to the process and their role on the team.<sup>73</sup>

When negotiators bargain over positions, they tend to lock themselves into those positions. The more you clarify your position and defend it against attack, the more committed you become to it. The more you try to convince the other side of the impossibility of changing your opening position, the more difficult it becomes to do so. Your ego becomes identified with your position. You now have a new interest in “saving face”—in reconciling future action with past positions—making it less and less likely that any agreement will wisely reconcile the parties’ original interests.<sup>74</sup>

Defense counsel should keep in mind their own bias and determine whether a problem-solving approach can accomplish more for a client. Challenge cognitive bias or “a pattern of thought that causes a person to reason unrealistically.”<sup>75</sup> These biases can cause blind spots; for example, confirmation bias will focus on information that confirms preconceptions while ignoring information that challenges them.<sup>76</sup> Discussion aimed at reaching an agreement is hampered by failure to consider the strengths and weaknesses of a party’s own position.

Successful negotiation starts with finding common ground between competing interests.<sup>77</sup> During negotiation, it is critical that all parties feel heard and respected. Defense counsel should be careful not to let their ego drive their position. They should consider what a client has shared during the course of representation and whether continued participation in the program or termination meets their needs. Defense counsel should resist the urge to win an argument for the sake of winning or feeling powerful and should avoid viewing a team member as an opponent. The ultimate goal is to enlist the aid of other team members to come to an agreement that serves the client and is permitted by the rules and law of the court.

72 Krieger et al., *Essential Lawyering Skills*, pp. 360–361.  
73 *Id.*, pp. 360–366.  
74 *Id.*, p. 362 (quoting Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving Up*.)  
75 *Id.*, p. 47. Daniel Kahneman received the Nobel prize for research into these different types of cognitive illusions.  
76 *Id.*, p. 53.  
77 *Id.*, p. 357.

## E. LITIGATION

Knowing when and how to shift from the collaborative process to the adversarial process is central to defense counsel's place within the drug court team. An adversarial approach can be used in several circumstances: when a client's liberty is at risk, when there is disagreement over a sanction, when there is a discrepancy in information, when there is a need to challenge a drug test result, when termination is being considered, or at any point where there are questionable legal or evidentiary issues. In these situations, defense counsel leave collaboration behind and use the tried-and-true litigation skills, hard learned in law school: arguing legal precedent, challenging criminal court rules, and invoking rules of evidence.

Despite the nonadversarial aspect of drug court programs, they are still legal proceedings, and protecting the record is crucial. Defense counsel should maintain comprehensive records and always be prepared to go "on the record" to protect the individual interests of the client. It is imperative that defense counsel continually keep copious notes, update internal records, and communicate with the client. When participants are ultimately terminated from drug court, it is usually due to a culmination of infractions that have escalated to the point that termination is the last straw. There is no way to properly defend a client if defense counsel have failed to make a complete and accurate record. Protecting the record should not be viewed as an adversarial action; it is essential to the process. It would be a mistake for defense counsel to allow team camaraderie to interfere with their duty and obligation to make legitimate arguments, raise objections, and defend their clients. Similarly, defense counsel should also ensure that program policies and procedures provide that statements made by clients during any status hearing or treatment session, and throughout the drug court program, cannot be used against them in any current or future prosecution.<sup>78</sup>

It should also be noted that defender offices and organizations function differently around the country. While many defender offices have backup counsel to provide support when the assigned defense counsel is unavailable, this is not always the case. In the event no backup counsel is available, particularly when liberty interests are at stake, prior to any legal proceeding defense counsel should make a thorough and complete record requesting postponement, referencing the law, ethical rules, and best practices. In some organizations if a client is terminated from the program, the drug court attorney will represent the client at the termination hearing. In other jurisdictions, the drug court attorney will pass the matter on to another attorney who will handle the termination hearing. In either event, the need for a complete case file and accurate records are critical in order to properly represent the client.

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78 *State v. Plouffe*, 329 P3d 1255, 2014 M.T. 183, 375 Mont. 429 (2014): "[T]he prosecutor cannot charge treatment court participant with a new crime based on confidential information learned in staffing"

# III. PRACTICE GUIDANCE: PROFESSIONALISM, COMMUNICATION, AND COLLABORATION

## The Essential Team Behaviors

- Be agile
- Believe in one another
- Communicate well
- Be detail oriented
- Have enthusiasm
- Be fearless
- Be goal oriented
- Be honest
- Innovate
- Joke around<sup>79</sup>

Great teams are built, not born. In the public sector, team composition will continually change. Maximum efficacy of teamwork requires nurturing and strengthening group skills over time. While interacting within a multidisciplinary team, defense counsel should consider the following:

## A. PERSONALITY TYPES

To understand your team dynamics, learn your personality type and the different types on your team:

- Adversarial: Combative argument in favor of one position.
- Collaborative: Due process and working together for client participation.
- Apathetic: Lack of concern or interest.

## B. CREATING A GREAT TEAM

Examine the communication dynamics and culture of the team to adjust your role and create better outcomes:

- Celebrating an achievement should be idea driven, not ego driven.
- Remember that the idea, not the person it came from, matters more.
- More perspectives allow change to happen faster.
- More information leads to better solutions.
- Stability and trust equal a well-functioning and effective therapeutic team.<sup>80</sup>

<sup>79</sup> NIATx, *Essential Team Behaviors*, <https://chess.wisc.edu/niatx/Content/ContentPage.aspx?NID=158>

<sup>80</sup> Snedker, *Therapeutic Justice*, p. 122.



## C. STRATEGIES FOR TEAMWORK

Consider some of these guidelines to improve communication and collaboration as you solve problems together:<sup>81</sup>

- **Avoid ego-centered communication.** Focus statements on the substantive issue at hand, rather than attempting to be “right” or win an argument.
- **Avoid downward communication.** Ensure that all team members, regardless of status or authority, have an equal opportunity to speak.
- **Practice attentive listening.** Hear all aspects of a team member’s statements before thinking about or forming a response.
- **Engage in empathy.** Imagine yourself in other team members’ positions to understand issues from their perspective.
- **Reinforce others’ statements.** Express appreciation for a team member’s input before making counterarguments or changing the subject.
- **Find common ground.** Acknowledge areas of agreement among team members before making counterarguments.
- **Reframe statements neutrally.** Restate a position in a manner that minimizes counterproductive affect such as anger or frustration.
- **Ensure inclusiveness.** Ensure that all team members weigh in on subjects within their area of expertise or experience.
- **Sum up.** The judge should recap the various arguments and positions, assure the team that all positions were considered carefully, and explain his or her rationale for reaching a conclusion or tabling the matter pending further information.<sup>82</sup>

## IV. ETHICAL CONSIDERATIONS IN DRUG COURTS

Defense counsel walk a fine line as they balance their collaborative role as advocates on the team with ethical obligations to their clients and the court. Although drug court programs provide attractive therapeutic alternatives to the traditional resolutions of criminal cases, defense counsel cannot forget that these programs are still “courts,” and liberty interests of participants are always at stake. Clients may perceive the close professional working relationship between defense

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81 All Rise, formerly NADCP, *Adult Drug Court Best Practice Standards*, Vol. 2, VIII, Multidisciplinary Team, Team Communication and Decision Making, p. 45. “Studies have identified effective communication strategies that can enhance team decision making in Drug Courts. For example, researchers have improved team decision-making skills in several Drug Courts using the NIATx (Network for the Improvement of Addiction Treatment) Organizational Improvement Model (Melnick et al., 2014a, 2014b; Wexler et al., 2012). The NIATx model seeks to create a climate of psychological safety by teaching team members to articulate divergent views in a manner that is likely to be heeded by fellow team members.”

82 *Id.*, p. 45.

counsel, the prosecutor, the court, and other members of team as a conflict of interest. The truth is that defense counsel are in alliance with the other members of the team, but not to the detriment of the client. “That said, prosecutors and defense counsel should be conscious of the possibility that the close professional relationships and trust that frequently develop within the drug court team might dissuade them from pressing issues when appropriate to their distinctive roles.”<sup>83</sup> Thus the duties of defense counsel in drug court do not differ from the duties in any other criminal proceeding. Initially, defense counsel must provide competent and careful advice to their clients from the outset about all aspects the program. As participants progress through the program, defense counsel should consistently be guided by the ethical rules as they guard their clients’ interests and rights throughout the program.

This chapter explores the guidance that certain ethical rules established by the American Bar Association (ABA) provide to defense attorneys who advise clients on whether to enter drug court programs and who represent clients in drug court programs. In the absence of specific guidance from the ABA, we examine how the ABA Model Rules of Professional Conduct and the ABA Standards for Criminal Justice inform the advice that defense attorneys give to clients about entry to drug court and how the rules and standards affect a defense attorney’s representation of a client participating in a drug court program. Chapter 5 provides a summary of some of the issues examined here.

The ethical rules and standards explored in this monograph are national in scope. Defense counsel serving clients who are considering, or are already participating in, drug court programs, however, should also be familiar with applicable ethical rules in their jurisdictions.<sup>84</sup> Below is a discussion of the ethical rules that are most necessary to defense counsel practicing in a drug court.

## **A. COMPETENCE**

Competence to represent a client who may be eligible for a drug court program first requires that the attorney possess functional knowledge and skills of criminal practice. It is essential that counsel identify legal and evidentiary issues, effectively communicate with the client, and engage in traditional courtroom skills, from bail motions to sentencing arguments. Defense counsel should be familiar with the charges the client faces, the client’s potential sentencing exposure, potential suppression issues, and possible legal defenses to the charges. Attorneys will need to know how to consult with experts, dispute scientific evidence, and maintain files in order to preserve the record.

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83 Freeman-Wilson et al., *Ethical Considerations for Judges and Attorneys in Drug Court*, p. 44.

84 See also Freeman-Wilson et al., *Ethical Considerations for Judges and Attorneys in Drug Court*.

## Establishing Competence for Practicing in Drug Court Involves:

- Basic training in the drug treatment court model
- Specialized training in drug testing
- Specialized cross-training in co-occurring disorders
- Specialized cross-training in treatment modalities

The assistance of counsel is critical to helping clients make an informed decision about choosing between entering a drug court program or remaining in the traditional adversarial system. Every drug court is designed to address specific concerns within the community or jurisdiction. Defense counsel should start by understanding the structure and framework of the court. Consider whether the court is a diversionary pre-adjudication or post-adjudication court. Analyze whether drug court is the most

appropriate venue to dispose of the client's matter and provides the best possible outcome for the client. Determine whether the client meets the eligibility requirements of the target population for this court.

Defense counsel must also possess the competence to engage and participate in regularly occurring court hearings and staffings. In order for defense counsel to be competent in any drug court, they must be cross-trained in co-occurring disorders and modalities of care.<sup>85</sup> They should also know and understand the science of this evidence-based approach and be familiar with the best practices and key components of the treatment court model, drug testing, and behavior modification.<sup>86</sup> They must have a clear understanding of incentives, sanctions, therapeutic adjustments, and the purpose of their imposition. Competence also encompasses an understanding of the program's structure, policies and procedures, and legal and clinical eligibility criteria, and the client's overall suitability for participation in the program.

In order to effectively use the staffing model, defense counsel should come to staffings prepared, which ensures that counsel are not only heard but also understood. Defense counsel should receive progress reports in advance of staffings to allow an opportunity to consult with the clients, exploring potential barriers as well as areas of success. They should also appreciate what will be considered at every review, including responses to behavior, changes in treatment, and changes in supervision.<sup>87</sup> Adequate time is necessary to prepare for court hearings and to speak to clients in advance of the hearings. This provides defense counsel an opportunity to discuss issues raised by the team with the client and to prepare the client for what will occur in court.

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85 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed. (text revision, 2022).

86 Freeman-Wilson et al., *Ethical Considerations for Judges and Attorneys in Drug Court*, pp. 23–25.

87 Douglas B. Marlowe, *Drug Court Practitioner Fact Sheet: Behavior Modification 101 for Drug Courts: Making the Most of Incentives and Sanctions*, Treatment Court Institute, National Drug Court Institute (2012).

Due to the level of requisite competence, experienced practitioners should be assigned to drug courts on a full-time basis. Continued training, like attending All Rise's annual conference and other training opportunities, will allow defense counsel to continue honing skill sets and gaining an appreciation for the application of behavioral science to the legal system.

• **Rule 1.1: Competence:** A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.<sup>88</sup>

• **ABA Standard 4-6.1: Duty to Explore Disposition Without Trial:** (a) Defense counsel should be open, at every stage of a criminal matter and after consultation with the client, to discussions with the prosecutor concerning disposition of charges by guiltRenot recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed. Such study should include discussion with the client and an analysis of relevant law, the prosecution's evidence, and potential dispositions and relevant collateral consequences. Defense counsel should advise against a guilty plea at the first appearance unless, after discussion with the client, a speedy disposition is clearly in the client's best interest.<sup>89</sup>

• **ABA Standard 4-8.3: Sentencing:** (a) Early in the representation, and throughout the pendency of the case, defense counsel should consider potential issues that might affect sentencing. Defense counsel should become familiar with the client's background, applicable sentencing laws and rules, and what options might be available as well as what consequences might arise if the client is convicted. Defense counsel should be fully informed regarding available sentencing alternatives and with community and other resources which may be of assistance in formulating a plan for meeting the client's needs. Defense counsel should also consider whether consultation with an expert specializing in sentencing options or other sentencing issues is appropriate. (b) Defense counsel's preparation before sentencing should include learning the court's practices in exercising sentencing discretion; the collateral consequences of different sentences; and the normal pattern of sentences for the offense involved, including any guidelines applicable for sentencing and, where applicable, parole. The consequences (including reasonably foreseeable collateral consequences) of potential dispositions should be explained fully by defense counsel to the client.<sup>90</sup>

<sup>88</sup> ABA, Model Rules of Professional Conduct, 1.1, Competence, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_1\\_competence/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/)

<sup>89</sup> ABA, Criminal Justice Standards, Defense Function, [https://www.americanbar.org/groups/criminal\\_justice/standards/DefenseFunctionFourthEdition/](https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/)

<sup>90</sup> *Id.*

• **ABA Standard 4-5.1: Advising the Client:** . . . (d) In rendering advice to the client, counsel should consider the client's desires and views, and may refer not only to law but also to other considerations such as moral, economic, social, or political factors that may be relevant to the client's situation. Counsel should attempt to distinguish for the client between legal advice and advice based on such other considerations.<sup>91</sup>

## B. DISPOSITION WITHOUT TRIAL

Many drug court programs require the client to decide whether or not to participate shortly after arrest, as the goal is to use a moment of crisis for immediate intervention.<sup>92</sup> Under these circumstances the rules and standards require that the attorney conduct an immediate investigation and attempt to gain early access to discovery in order to competently inform the client of the viability of all options.

With effective collaboration among the team, most drug courts can ensure both adequate representation of counsel and early intervention. Ideally, defender organizations should have participated in the program design and implementation of its procedures, such as early access to full discovery and sufficient time to explore legal options. Defense counsel must understand and explain these evidentiary and legal issues in order to effectively advise their clients on deciding whether to enter the program or continue in the traditional process. The role of defense counsel need not be minimized or diminished in order to place the client into treatment quickly. Entry into such a program is voluntary, and withdrawal should not harm the client's ability to proceed on the merits of the criminal case.<sup>93</sup> Encouragement for a client to enter drug court must be predicated on counsel's judgment about a client's best and stated interest in the matter at hand, rather than general support for the drug court team or the program.<sup>94</sup> While the decision is the client's, that does not mean defense counsel should be indifferent as to their best interest.

## C. COMMUNICATION

Prompt, frequent, and continuing communication will assist defense counsel's ability to determine a client's objectives. The rule and the standard require attorneys to give their clients sufficient information in a way that allows their clients to have a genuine choice. A client's choice must be informed by defense counsel's professional judgment of the case and the client's options, coupled with the client's (not the attorney's) aversion to risk and the client's (not the attorney's) objectives.

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<sup>91</sup> *Id.*

<sup>92</sup> All Rise, formerly NADCP, *Defining Drug Courts*, Key Component 3, p. 5, referring to the standard that time between arrest (or the incident that prompts a referral) and treatment court entry is 50 days or less.

<sup>93</sup> Freeman-Wilson et al., *Ethical Considerations for Judges and Attorneys in Drug Court*, p. 21.

<sup>94</sup> *Id.*

## **At a Minimum, Communication Should Include:**

**Literacy:** All forms should be read to clients.

**Interpreters:** Non-English-speaking clients must be afforded a bilingual translator or attorney.

**Clear explanations:** Clients should be given specific examples of the following:

- Drug court program rules
- Confidentiality and waivers
- Criteria for program completion (phases/phase advancement)
- Staffing
- Sanctions
- Incentives
- Infractions
- Therapeutic adjustments
- Drug testing (observed and random)
- Treatment modalities
- Treatment program rules
- Impact of termination

with their client balanced by the defense role on the team. An attorney's method for imparting information to ensure that a client has a genuine choice will vary from client to client.

There are no "client decisions" unless the client has the information and the time to make a genuine choice about how to proceed. Defense counsel must start with a clear understanding of the client's circumstances and objectives.

Even fierce drug court proponents recognize the importance of voluntary choice as the first step in the therapeutic process.<sup>95</sup> Defense counsel ensure that their client's choice is based on the client's risk and clinical assessments. As the client considers long-term and short-term goals, defense counsel advise on the rules of the drug court program and on the potential consequences of participation. Defense counsel also take steps to keep the client reasonably informed about the status of their matter (e.g., developments during staffings, sanctions, or following negative lab results).

The duty to communicate is ongoing, and the defense attorney must continue, throughout the client's participation in drug court, to consult, advise, explain, and counsel the client in a manner consistent with helping the client obtain his or her objectives. Defense counsel should establish a relationship

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<sup>95</sup> Hon. Peggy Fulton Hora, Hon. William G. Schma, and John T. A. Rosenthal, "Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America," *Notre Dame Law Review*, Vol. 74, Issue 2 (January 1999), pp. 439–538, 521.

• **Rule 1.4: Communication** . . . (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.<sup>96</sup>

• **ABA Standard 4-5.1: Advising the Client** . . . (b) Defense counsel should keep the client reasonably and regularly informed about the status of the case. Before significant decision points, and at other times if requested, defense counsel should advise the client with candor concerning all aspects of the case, including an assessment of possible strategies and likely as well as possible outcomes. Such advisement should take place after counsel is as fully informed as is reasonably possible in the time available about the relevant facts and law. Counsel should act diligently and, unless time does not permit, advise the client of what more needs to be done or considered before final decisions are made.<sup>97</sup>

## D. SCOPE OF REPRESENTATION AND DILIGENCE

The duties of defense counsel are twofold: to protect the due process rights of the client and to guide and encourage participation.<sup>98</sup>

A substantial body of research on procedural justice or procedural fairness reveals that criminal defendants are most likely to react favorably to an adverse judgment or punitive sanction if they believe fair procedures were followed in reaching the decision. The best outcomes were achieved when defendants were (1) given a reasonable opportunity to explain their side of the dispute, (2) treated in an equivalent manner to similar people in similar circumstances and (3) accorded respect and dignity throughout the process.<sup>99</sup>

After educating the client on the obligations of participation in the program, defense counsel will then provide support as the client navigates the course of the program, with compliance as the primary objective and successful completion as the ultimate goal. Whether the client's objective is sobriety and recovery or simple avoidance of a criminal conviction, the lawyer "shall abide" by the client's decisions concerning the objectives of the representation,<sup>100</sup> absent some agreement to the contrary.

96 ABA, Model Rules of Professional Conduct, 1.4, Communications, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_4\\_communications/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_4_communications/)

97 ABA, Criminal Justice Standards, Defense Function.

98 Freeman-Wilson et al., *Ethical Considerations for Judges and Attorneys in Drug Court*, p. 21.

99 All Rise, formerly NADCP, *Adult Drug Court Best Practice Standards*, Vol. 1, IV, Incentives, Sanctions, and Therapeutic Adjustments, Commentary, p. 29.

100 Richard C. Boldt, "Rehabilitative Punishment and the Drug Treatment Court Movement," *Washington University Law Quarterly*, Vol. 76 (Winter 1998), pp. 1205-1306, note 1, pp. 1289-1291.

Diligent defense counsel should stay apprised of the client's goals and objectives, which are reasonably subject to change throughout the client's involvement in the drug court program. It is the duty of the defense attorney, in consultation with the client, to devise the means to achieve the client's goals. Because drug court programs operate differently than traditional adversarial proceedings, defense counsel may have to be creative or "think outside the box" when assessing these means. However, this difference between a drug court and the traditional system does not change the defense attorney's duty of loyalty and obligation to safeguard due process. For example, should defense counsel encounter a client who desires sobriety above all else, who believes that sanctions will assist his or her recovery, and who trusts and wants to confide in the treating judge, then a passive role as a virtual spectator in the courtroom (but still more active in the staffing meetings) may be appropriate. On the other hand, should defense counsel have a client who desires above all else to avoid a criminal conviction, or for whom short-term sobriety is simply a means to this end, counsel may seek to modify this client's participation in ways that limit the possibility that the client will be terminated unsuccessfully and/or to minimize the period of treatment. Either role may be inconsistent with the attorney's belief about what is in the client's best interest and may require full investigation and discussion of the potential legal consequences of the client's decision making.<sup>101</sup> The rules of ethics, however, do not distinguish between such clients—both are owed their attorney's diligence and zeal.<sup>102</sup>

In some instances, a client's objectives may appear to defense counsel to be contradictory, such as the client who desires both sobriety and a minimum of sanctions. Many drug court experts state that sanctions are key to the successful treatment of the addiction.<sup>103</sup> Nevertheless, upon consultation with the client on the consequences of pursuing potentially conflicting objectives, defense counsel must pursue these goals diligently and as effectively as the circumstances permit.

Regardless of whether defense counsel perform as passive participants or active advocates, they must be present at all staffings and court proceedings in order to provide competent and diligent representation. Without being present, defense counsel cannot share the recommendations of the team with the client. Nor can counsel intercede to communicate with the client if the client's conversation with the judge is thwarting the client's aims or if the judge is crossing into areas that are either not covered by the client's waiver or not protected from use by the government.<sup>104</sup>

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101 The primary limitation on the diligence and zeal with which defense counsel shall pursue a client's objectives is found in ABA Model Rule 1.2 (d), which states that "a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

102 For more about the importance of zealously pursuing client objectives throughout participation in a drug court program, see Boldt, "Rehabilitative Punishment and the Drug Treatment Court Movement," pp. 1287–1300.

103 See Hora, et al., "Therapeutic Jurisprudence and the Drug Treatment Court Movement," pp. 526–527; and Douglas B. Marlowe and Kimberly C. Kirby, "Effective Use of Sanctions in Drug Courts: Lessons from Behavioral Research," *National Drug Court Institute Review*, Vol. 2, Issue 1 (2000), pp. 1–31.

104 See Boldt, "Rehabilitative Punishment and the Drug Treatment Court Movement," note 1, p. 1295 (illustrating the importance of counsel's presence in various drug court scenarios).



- **Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer:** (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. . . . In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.<sup>105</sup>
- **Rule 1.3: Diligence:** A lawyer shall act with reasonable diligence and promptness in representing a client. **Comment [1]** A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with a commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.<sup>106</sup>

## E. CANDOR TOWARD THE TRIBUNAL AND CONFIDENTIALITY

ABA Model Rules 1.6 and 3.3 produce ongoing tension for the defense attorney in both the traditional adversarial system and a drug court program. Defense counsel may develop a stronger bond with a client in a drug court but should never cross the line into dishonesty on the client's behalf.<sup>107</sup> Defense counsel should encourage their client to be truthful in drug court treatment and hearings but should not be the conduit of confidential information to the rest of the team unless the client consents to disclosure. The informality of drug courts, combined with the frequency of contact between attorney, client, and judge, can make lawyers less vigilant regarding client confidences.<sup>108</sup> In addition to being an ethical violation, the client will not trust an attorney who cannot keep confidences, which will make it harder for the attorney to discharge their Sixth Amendment duties.

Although there is “an absence of empirical evidence or legal precedent to guide the decision,” under the ethical rules confidentiality transcends the structure of the court and role on the team.<sup>109</sup> A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent or unless the disclosure either is impliedly authorized in order to carry out the representation or is permitted by paragraph (b) of Rule 1.6. Defense counsel should establish their

<sup>105</sup> ABA, Model Rules of Professional Conduct, 1.2, Scope of Representation & Allocation of Authority Between Client and Lawyer, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_2\\_scope\\_of\\_representation\\_allocation\\_of\\_authority\\_between\\_client\\_lawyer/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_2_scope_of_representation_allocation_of_authority_between_client_lawyer/)

<sup>106</sup> ABA, Model Rules of Professional Conduct, 1.3, Diligence – Comment, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_3\\_diligence/comment\\_on\\_rule\\_1\\_3/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_3_diligence/comment_on_rule_1_3/)

<sup>107</sup> Freeman-Wilson et al., *Ethical Considerations for Judges and Attorneys in Drug Court*, p. 40.

<sup>108</sup> *Id.*

<sup>109</sup> All Rise, formerly NADCP, *Adult Drug Court Best Practice Standards*, Vol. 2, VIII, Multidisciplinary Team, Sharing Information, p. 44.

relationship with a client in drug court by explaining that if the client does not authorize disclosure of information then it will remain confidential. “In most instances, infractions come to the attention of the team from sources other than defense counsel, such as positive drug tests or progress reports from treatment providers or probation officers. In some instances, however, participants may self-disclose infractions to defense representatives which would otherwise go undetected by the program.”<sup>110</sup>

If the client does confide potential deceitful information, then similar to adversarial court, the test is past conduct versus future conduct: confidentiality will supersede candor to the tribunal if it is something that happened in the past, as there is no duty to divulge. Rule 3.3(a)(3) prohibits a lawyer from deceiving the court or “assisting” a client or witness to do so. It does not, however, require full disclosure by the lawyer of all information about the client, even if the information would be material to the proceeding. For example, if a client informs the lawyer that the client has suffered a relapse in the past and used either drugs or alcohol, but the client’s use has not been detected, neither the lawyer nor the client is obligated to disclose this fact.<sup>111</sup> Where a client unambiguously lies under oath to the court, however, Rule 3.3 imposes a duty of candor that supersedes the lawyer’s duty of confidentiality. Consider a client with a confirmed urinalysis result for illegal substances who tells her attorney that she has used and knows it is a violation. If this client intends to hand forward a document to the judge with a false sober birthdate, the duty of candor to the tribunal prohibits the attorney from assisting the client.

More perplexing situations arise when defense counsel are acting in a passive role: as a spectator to a narrative conversation between the court and the client, when the client shares information but is not placed under oath, or when the client speaks with the judge outside the presence of defense counsel and the conversation is later reported to the attorney. In each instance, defense counsel are not assisting the client, either by questioning the client or by presenting arguments on the client’s behalf using information that the client has supplied. If defense counsel are not “assisting a fraudulent or criminal act by the client,” the obligations of Rule 1.6 would appear to control, requiring defense counsel to maintain a client’s confidences.

Most of the time, defense counsel do not know with certainty what is the truth and what is not. A defense attorney can only counsel a client on being truthful.<sup>112</sup> Defense cannot help clients evade detection of drugs or avoid court orders (Rule 3.3, Candor to the Tribunal). If after you have counseled your client, the client insists on being untruthful to the court, withdrawing keeps your client’s interests protected (Rule 1.16, Declining or Terminating Representation)<sup>113</sup> and avoids the attorney engaging in an ethical violation.

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<sup>110</sup> *Id.*

<sup>111</sup> Boldt, “Rehabilitative Punishment and the Drug Treatment Court Movement,” p. 1258; Freeman-Wilson et al., *Ethical Considerations for Judges and Attorneys in Drug Court*, p. 40.

<sup>112</sup> Freeman-Wilson et al., *Ethical Considerations for Judges and Attorneys in Drug Court*, p. 49.

<sup>113</sup> ABA, Model Rules of Professional Conduct, 1.16, Declining or Terminating Representation, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_16\\_declining\\_or\\_terminating\\_representation/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_16_declining_or_terminating_representation/)

• **Rule 3.3: Candor Toward the Tribunal:**

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.<sup>114</sup>

• **ABA Standard 4-3.1: Establishing and Maintaining an Effective Client Relationship:**

(a) Immediately upon appointment or retention, defense counsel should work to establish a relationship of trust and confidence with each client. Defense counsel should explain, at an appropriate time, the necessity for frank and honest discussion of all facts known to the client in order to provide an effective defense. Defense counsel should explain that the attorney-client privilege protects the confidentiality of communications with counsel except in exceptional and well-defined circumstances, and explain what the client can do to help preserve confidentiality.<sup>115</sup>

<sup>114</sup> ABA, Model Rules of Professional Conduct, 1.3, Candor Toward the Tribunal, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_3\\_3\\_candor\\_toward\\_the\\_tribunal/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_3_candor_toward_the_tribunal/)

<sup>115</sup> ABA, Criminal Justice Standards, Defense Function.

• **Rule 1.6: Confidentiality of Information:**

Client-Lawyer Relationship

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.<sup>116</sup>

## F. CONFLICT OF INTEREST

A common conflict defense counsel encounter in drug court occurs when two clients possess adverse interests in the underlying criminal case. The obvious example is a pair of codefendants who both choose to enter the drug court program. An argument could be made that if each client's goal is to achieve recovery

<sup>116</sup> ABA, Model Rules of Professional Conduct, 1.6, Confidentiality of Information, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_6\\_confidentiality\\_of\\_information/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/)

and sobriety, no adversity exists between the two. However, the possibility of a variety of future actions that could create adversity (e.g., termination of one or both clients from the program) suggests that the best course of action is for codefendants to have separate counsel. There also may be adversity when one client is a witness to another client's relapse or to other behavior that violates the rules governing participation in drug court. Under such circumstances, the attorney cannot provide either client with conflict-free advice and must withdraw. Defense counsel must withdraw from representation of both clients because the attorney is in possession of client confidences from each client that cannot be shared with the other client's attorney without violating Rule 1.6(a).<sup>117</sup>

• **Rule 1.7: Conflict of Interest: Current Client:**

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation.

When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.<sup>118</sup>

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<sup>117</sup> Although some jurisdictions may permit defender organizations to wall off information between divisions or between attorneys, a single attorney clearly cannot create a system to ensure that information will not be shared during the course of representation of either client.

<sup>118</sup> ABA, Model Rules of Professional Conduct, 1.7, Conflict of Interest: Current Clients, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_7\\_conflict\\_of\\_interest\\_current\\_clients/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_7_conflict_of_interest_current_clients/)

## G. DIMINISHED CAPACITY

If a participant cannot make legal decisions, defense counsel should determine if there is a disability and whether it is temporary or permanent. Then defense must determine whether it is related to substance use or mental health.<sup>119</sup> If necessary, defense counsel should take protective action under the rule and act in the client's best interest. Defense shall continue to keep the client's information confidential but reveal it as reasonably necessary to protect their client's interest.<sup>120</sup>

### • **Rule 1.14: A Client with Diminished Capacity:**

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian. (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.<sup>121</sup>

## H. TRIAL LAWYER AS ADVISOR

These duties require that defense counsel possess full knowledge of the policies and procedures of the drug court in order to properly advise the clients. Policies within a drug court should take into account factors related to poverty, trauma, mental health, and substance use. Defense counsel should also consider these factors when rendering advice to the client. Defense counsel should be vigilant in addressing policies that are harmful to clients, while balancing competing interests between the group and the individual.

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119 See the commentary for Rule 1.14. Intoxication or withdrawal may affect a client's ability to make adequately considered decisions. Defense counsel should be familiar with the signs of intoxication and withdrawal and be prepared to seek additional time to allow a client to recover from the immediate effects of intoxication or withdrawal before he or she must decide on a specific course of action. When seeking additional time, defense counsel should be mindful of the tactical and ethical considerations involved in revealing information about the client's current mental or physical state to the court or the state (see Rule 1.6). However, in no event should an attorney substitute his or her own judgment of the client's best interest for an informed choice by the client.

120 *Id.*

121 ABA, Model Rules of Professional Conduct, 1.14, Client with Diminished Capacity, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_14\\_client\\_with\\_diminished\\_capacity/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity/)

• **Rule 2.1: Lawyer as Advisor**

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.<sup>122</sup>

## I. ETHICAL DILEMMAS

Although this section highlights the most important of the ethical rules for defense counsel in drug court, there are others that apply as they would in any other attorney role. There are arguably more complicated ethical dilemmas in a problem-solving court than in the traditional court setting. Defense counsel practicing in a drug court, mental health court, veterans court, or any type of problem-solving court that attempts to address the root cause of legal involvement and problematic behavior will encounter ethical challenges around addressing histories of trauma, substance use, and mental health disorder.<sup>123</sup>

## V. PRACTICE GUIDANCE: ETHICAL ISSUES

The following practice guidance serves as a quick reference guide when complex questions arise for defense counsel during day-to-day operations in these courts. Refer back to the previous chapter for the full text of the rules discussed here.

### A. COMPETENCE (RULE 1.1)

*“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”*

- Establishing competence requires having knowledge not only of criminal practice, sentencing ranges, and legal issues, but also of procedures of the drug court, best practices, evidence-based research, mental health diagnoses, substance use disorders, different treatment modalities, and available community resources.

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<sup>122</sup> ABA, Model Rules of Professional Conduct, 2.1, Advisor, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_2\\_1\\_advisor/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor/)

<sup>123</sup> In other problem-solving programs (mental health courts, co-occurring disorder courts, veterans courts), the issues of mental health and trauma are at the forefront. For further discussion on assisting clients with mental health disorders, see the ABA Criminal Justice Standards on Mental Health, particularly Standard 7-1.4: Roles of the Attorney Representing a Defendant with a Mental Disorder.

## **B. COMMUNICATION (RULE 1.4)**

*“A lawyer shall: promptly inform the client of any decision or circumstance with respect to which the client’s informed consent . . . is required . . . ; reasonably consult with the client about the means by which the client’s objectives are to be accomplished; . . . keep the client reasonably informed about the status of the matter. . . . A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”*

- Establish a relationship with your client balanced by your role on the team. Prompt, frequent, and continuing communication will assist your ability to determine your client’s objectives. Use communication skills to present information so that your client can make a genuine choice.

## **C. SCOPE OF REPRESENTATION (RULE 1.2)**

*“A lawyer shall abide by a client’s decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued.”*

- The scope of representation in drug court includes your client’s decision to enter a drug court, treatment planning, negotiation, and advice on noncompliance. Your duties are twofold: explain the drug court to your client and guide their participation, while ensuring that their perspective is heard and their rights are protected within the team.

## **D. DILIGENCE (RULE 1.3)**

*“A lawyer shall act with reasonable diligence and promptness in representing a client.”*

- Once your client enters a drug court, the goals of defense representation expand to include completion of the program. Determine whether challenging a violation diverts your client from their goals.

## **E. CANDOR TOWARD THE TRIBUNAL (RULE 3.3)**

*“A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer. . . . [or] offer evidence that the lawyer knows to be false.”*

- You may develop a strong bond with a client in a drug court, but you should never cross the line into dishonesty on your client’s behalf. Confidentiality will supersede candor to the tribunal if it involves something that happened in the past. You should insist that your client be truthful in statements to the court, but this rule does not require full disclosure of information.



## F. CONFIDENTIALITY (RULE 1.6)

*“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent [or] the disclosure is impliedly authorized in order to carry out the representation....”*

- Remind team members that confidentiality will transcend collaboration. At the start of representation, build trust with your client by explaining this duty. Encourage your client to participate, but do not be the conduit of confidential information to the rest of the team.

## G. CLIENTS WITH DIMINISHED CAPACITY (RULE 1.14)

*“When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”*

- If your client exhibits an inability to make a decision, determine whether the disability is temporary or permanent and whether it is related to substance use or mental health. If necessary, take protective action under the rule and act in your client’s best interest. Keep your client’s information confidential, but reveal it as reasonably necessary to protect their interests.

## H. LAWYER AS ADVISOR (RULE 2.1)

*“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client’s situation.”*

- Know the policies and procedures of the drug court so that you can properly advise your client. Consider factors related to poverty, trauma, mental health, and substance use. Address disparities that are harmful to your client, but balance competing interests between the participants as a whole and the individual participant.

# VI. LEGAL ISSUES IN DRUG COURTS

This chapter explores the general considerations of due process for drug court participants and many of the legal issues that defense counsel may confront as they advocate and protect the constitutional rights of their clients. These issues include equal protection, protection of due process, confidentiality, the right to counsel, waiver of fundamental rights, preservation of fundamental due process in court, and the evolution of drug courts. Chapter 7 summarizes these issues, and Chapter 8 focuses more closely on the legal aspects of drug testing.

## A. HISTORICAL PERSPECTIVE

### Legal Areas

- Due process
- Equal protection
- Confidentiality

More than 60 years ago, in *Robinson v. State of California*, the U.S. Supreme Court invalidated a California statute that criminalized the “status” of narcotics addiction as a violation of the Eighth Amendment of the U.S. Constitution.<sup>124</sup>

The Supreme Court stated, however, that “a State might establish a program of compulsory treatment for those addicted to narcotics”<sup>125</sup> and that “penal sanctions might be imposed for failure to comply with established compulsory treatment procedures.”<sup>126</sup> The Supreme Court’s decision opened the door to treatment programs that included the use of penal sanctions but also recognized that “drug addiction”<sup>127</sup> is an “illness which may be contracted innocently or involuntarily.”<sup>128</sup>

The *Robinson* decision highlights the tensions inherent in addressing the complex problem of substance use disorders within the criminal justice system context. These tensions are even more pronounced today and continue to increase in complexity. When the first drug court started operating in Miami in 1989, the nation was battling the advent of crack cocaine and had declared a “war on drugs.”<sup>129</sup> The rise of drug courts across the United States coincided with a massive increase in the nation’s reliance on incarceration.<sup>130</sup> Changes in technologies, advances in forensic testing, increased video surveillance, and higher levels of scrutiny of law enforcement and public officials have made Americans more critical of our criminal justice system. More recently the nation has experienced the opioid epidemic shifting from a criminal justice issue to a public health emergency.<sup>131</sup> And then came the COVID-19 pandemic, George Floyd protests, Black Lives Matter, and the collective and ongoing social movement of 2020.<sup>132</sup> All of these historic events continue to highlight the complex and multilayered challenges of a criminal justice system desperate for change but rooted in traditional concepts. More than ever, defense counsel must remain vigilant in protecting the rights of their clients as they navigate a fast paced and ever-changing legal environment, and this includes practice in drug court.

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124 370 U.S. 660, 666 (1962).

125 *Id.* at 665.

126 *Id.*

127 Drug addiction is more appropriately referred to as substance use disorder

128 370 U.S. at 667.

129 Boldt, “Rehabilitative Punishment and the Drug Treatment Court Movement,” pp. 1207–1208.

130 The number of incarcerated Americans grew from 330,000 in 1980 to nearly 1.4 million by 1999; James P. Lynch and William J. Saybol, *Prisoner Reentry in Perspective*, Urban Institute (2001).

131 *What Are Drug Courts?*, U.S. Department of Health and Human Services website, <https://www.hhs.gov/opioids/treatment/drug-courts/index.html>

132 “Not Enough Has Happened”: Protesters Reflect on What Has Changed—and What Hasn’t,” *Washington Post*, June 17, 2021, <https://www.washingtonpost.com/nation/interactive/2021/george-floyd-protests-blm-impact/>

## B. EQUAL PROTECTION

In 1996, the Supreme Court decided in *United States v. Armstrong* that to establish a case of selective prosecution, a defendant had to demonstrate “that there was a discriminatory effect and that it was motivated by a discriminatory purpose.”<sup>133</sup> A defendant must show “some evidence that similarly situated defendants of other races could have been prosecuted, but were not.”<sup>134</sup> The admission or exclusion of a defendant from a drug court program is analyzed under the rational basis of equal protection, and this is a difficult standard to meet.<sup>135</sup> Once defendants enter the criminal justice system, the question becomes whether similarly situated people are afforded an equal opportunity to opt for diversion programs such as drug court. Although prosecutors possess wide discretion to make charging decisions and offer plea bargains, these decisions cannot be based on impermissible factors,<sup>136</sup> such as race or disability.<sup>137</sup> Equal protection and constitutional rights of potential participants are at risk if the prosecutors determine eligibility and remain the gatekeepers to enrollment.<sup>138</sup> Proving claims of discrimination remains a challenge because there is no constitutional right to enter drug court.<sup>139</sup>

## C. DUE PROCESS

Protecting fundamental due process begins before the client enters drug court, when the client is contemplating different options for case resolution. As outlined in sections of *The Role of Defense Attorneys in Drug Court* and *Ethical Considerations in Drug Court*, one of a defense attorney’s most essential roles in the drug court process is to ensure that their client makes an informed decision regarding whether to enter the program. In many jurisdictions, the decision to enter drug court involves a guilty plea, which necessarily entails the waiver of the right to a jury trial<sup>140</sup> and the waiver of Fifth and Sixth Amendment rights.<sup>141</sup> Although some jurisdictions may allow a defendant to litigate suppression motions through a mechanism such as a conditional plea, others require the waiver of potential claims under the Fourth Amendment as a condition of drug court participation.<sup>142</sup>

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133 517 U.S. 456, 465-66 (1996).

134 517 U.S. at 469.

135 Marlowe and Meyer, *The Drug Court Judicial Benchbook*, p. 170.

136 See *Woodward v. Morrissey*, 991 P.2d 1042, 1046-47 (Ct. Crim. App. Ok. 1999) (provision allowing prosecutor to veto defendant’s drug court application did not violate separation of powers and was merely exercise of prosecutorial discretion); and *C.D.C. v. State*, 821 So.2d 1021, 1025 (Ct. Crim. App. Ala. 2001) (“the prosecutor’s decision to refer a defendant to drug court is solely within the prosecutor’s discretion”).

137 U.S. Const. Amend. XIV. Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 *et seq.* (2002).

138 Judge Gregory G. Pinski, “The Constitutionality of a Prosecutorial Veto in Veterans Treatment Courts,” *Drug Court Review* (Winter 2018), pp. 111-123.

139 Marlowe and Meyer, *The Drug Court Judicial Benchbook*, p. 171.

140 U.S. Const. Art. III, § 2, cl. 3.

141 U.S. Const. Amend. V (right not to be compelled to be a witness against oneself); U.S. Const. Amend. VI (right to a speedy and public trial, right to confront witnesses and to have a compulsory process for obtaining witnesses, and right to the effective assistance of counsel).

142 John Stuart, “Problem Solving Courts: A Public Defender’s Perspective,” *Judges Journal*, Vol. 41 (Winter 2002), p. 23.

Selection of drug court by a client to resolve their case involves weighing evidentiary considerations with an understanding of the drug court model. In many circumstances, the decision to enter drug court could result in a more extended entanglement with the state than traditional probation.<sup>143</sup> Defense attorneys need to provide clients with information regarding the range of treatment options and possible drug court sanctions to ensure that their clients enter guilty pleas knowingly, voluntarily, and intelligently.<sup>144</sup> As in any undecided legal issue, attorneys must have time to investigate the case sufficiently to advise the client regarding possible defenses.

**Hearings protect due process whenever liberty is at risk:**

- Probation revocation
- Termination
- Imposition of sanctions

The role of defense counsel in any criminal court setting centers around protection of the client's constitutional rights. Contrary to what some practitioners believe or how drug courts in some jurisdictions continue to work, drug courts are not exempt from

constitutional protections. It is arguably more critical for the defense attorney to monitor constitutional protections in a collaborative environment than in a traditional court hearing because the operations of the court and collaboration among the multidisciplinary team can obscure the lines of what the law does and does not allow. Defense counsel must protect the rights of their clients by participating in staffings, appearing at every hearing, and providing effective assistance of counsel at every stage of participation.<sup>145</sup>

The question of how best to preserve due process in drug court programs is complicated by the relative informality of the model. Defense counsel are encouraged to collaborate for the greater good, but they still must safeguard individual rights. There may be fear that the court will view an attempt to challenge evidence, present evidence, question violations, or object on due process grounds as being too adversarial or as a failure to accept responsibility, resulting in a higher sanction.<sup>146</sup> However, the danger of never holding the government accountable for its practices or for proving violations erodes the adjudication process, and the Constitution becomes no longer enforced.<sup>147</sup>

143 Boldt, "Rehabilitative Punishment and the Drug Treatment Court Movement," p. 1255.

144 Mae C. Quinn, "Whose Team Am I On Anyway? Musings of a Public Defender About Drug Treatment Court Practice," *N.Y.U. Review of Law and Social Change*, Vol. 26 (2000), p. 37.

145 Marlowe and Meyer, *The Drug Court Judicial Benchbook*, p. 163.

146 Boldt, "Rehabilitative Punishment and the Drug Treatment Court Movement," pp. 1259-1260.

147 Stuart, "Problem Solving Courts: A Public Defender's Perspective," p. 21.

## D. CONFIDENTIALITY

The information divulged in drug court is protected by a number of federal and state confidentiality provisions. Federal law prohibits the disclosure of “the identity, diagnosis, prognosis or treatment of any patient” by “any program or activity relating to substance use disorder education, prevention, training, treatment, rehabilitation or research, which is conducted, regulated or directly or indirectly assisted by any department or agency of the United States.”<sup>148</sup> Drug courts may be subject to this provision if they receive federal funding and conduct assessments and refer or order participants to treatment.<sup>149</sup> Under the provision, protected information may not be used to substantiate criminal charges against a participant or to further a criminal investigation against the participant.<sup>150</sup> However, this does not prohibit participants from obtaining access to their drug court records.<sup>151</sup> State laws also may further protect information disclosed in drug court, including information relating to mental health or other sensitive health information (such as HIV status).<sup>152</sup> Defense counsel in drug court may need to be aware of these provisions to comply with their mandates and adequately advise clients regarding release forms, protect them against illegal disclosure, and gain access to client records.

**For additional considerations, refer to the corresponding practice guidance:**

- Legal Issues, Chapter 7
- Drug Testing, Chapter 8

Drug courts often require participants to execute confidentiality waivers that allow relevant portions of their medical treatment information to be provided to the court and prosecutors. Clients should be made aware of the potential consequences of disclosing such

information and informed that the purpose is to assist them with their substance use disorder and long-term recovery. Clients also need to understand that defense counsel may share information with the team unless it is a matter that requires the client’s consent.

<sup>148</sup> 42 U.S.C. § 290dd-2 (2022).

<sup>149</sup> Jeffrey Tauber, Susan P. Weinstein, and David Taube, *Federal Confidentiality Laws and How They Affect Drug Court Practitioners*, Treatment Court Institute, National Drug Court Institute (1999).

<sup>150</sup> 42 C.F.R. § 2.12 (2022).

<sup>151</sup> 42 C.F.R. § 2.23 (a) (2022).

<sup>152</sup> See individual state laws for guidance on further protection of sensitive health information

## E. EVOLUTION OF TREATMENT COURTS

As drug courts and other similar treatment courts expand and evolve, so do the legal issues and the case law. Defense counsel should be able to spot these important legal issues and potential violations. The practice guidance sections in the following chapter provide an overview of some essential legal strategies to support an effective legal analysis of common issues. These areas are in constant evolution, and All Rise maintains an ongoing list of case law from jurisdictions across the country.<sup>153</sup>

## VII. PRACTICE GUIDANCE: LEGAL ISSUES

This chapter serves as a quick reference for the issues discussed in the previous chapter. The next chapter focuses specifically on legal issues related to drug testing.

### A. IMPORTANT CONSTITUTIONAL PROTECTIONS

#### 1. Challenges to Requirements: AA and NA

Participation in certain twelve-step programs can be required for drug court participants, provided that such programs do not violate the Establishment Clause of the First Amendment.<sup>154</sup> Courts have found that the Establishment Clause of the First Amendment precludes requirements that defendants take part in religion-based substance use disorder treatment programs, such as certain Alcoholics Anonymous or Narcotics Anonymous programs.<sup>155</sup> Caution must also be taken regarding individuals with social phobias or those who experience difficulty with groups of strangers. The decisions for a participant to attend a twelve-step program or other self-help group should be made by a treatment clinician in collaboration with their client as part of the individual's comprehensive treatment plan. Doing so ensures informed referrals matching clients to mutual support groups that best meet their assessed needs and maximize the likelihood of engagement and positive outcomes. Drug courts should offer both secular and nonsecular sober support groups and, if there are no available options for secular sober support groups, consider online secular support groups as an option.

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<sup>153</sup> See *Case Law*, <https://allrise.org/laws/>; and Marlowe and Meyer, *The Drug Court Judicial Benchbook*.

<sup>154</sup> The First Amendment of the U.S. Constitution states that “Congress shall make no law respecting an establishment of religion or prohibiting the full exercise thereof...” U.S. Const. Amend. I. The First Amendment applies to the states via the Fourteenth Amendment of the U.S. Constitution. *Id.*; Amend. XIV. See also *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

<sup>155</sup> *O'Connor v. California*, 855 F. Supp. 303, 308 (C.D. Cal. 1994); *Freedom from Religion Foundation, Inc. v. McCallum*, 214 F. Supp. 2d 905, 916 (W.D. Wis. 2002); *Warner v. Orange County Department of Probation*, 173 F3d 120 (2d Cir. 1999); *Kerr v. Farrey*, 95 F3d 472 (7th Cir. 1996). U.S. Const. Amend. I (“Congress shall make no law respecting an establishment of religion.”)

## 2. Restrictions on Freedom: Associations and Areas

Depending on the situation, a court can impose area or rights of association restrictions. These have survived constitutional attack when they are *narrowly tailored*.<sup>156</sup> Courts have routinely upheld association restrictions as a condition of supervision. Courts can limit travel and other area restrictions: “The factors often used in determining whether the restriction is reasonable include whether the defendant has a compelling need to go through or to the area, a mechanism for supervised entry into the area, the geographic size of the restricted area, and the relationship between the restriction and the rehabilitation needs of the offender.”<sup>157</sup>

## 3. Search and Seizure

Unreasonable searches and seizures are limited in a drug court setting under the Fourth Amendment. Participants on probation can be searched because there is a lesser expectation of privacy.<sup>158</sup> There is a difference between pre-disposition and post-plea cases relating to search and seizure. Suspicionless searches are appropriate for participants on parole (probation), but they cannot be used to harass the participant. These types of searches are probably not appropriate for those on a diversion or pre-disposition in drug court.<sup>159</sup> This legal analysis is less critical if drug court participation is contingent upon a participant’s agreement to execute a search waiver, by which the participant consents to a physical and property search, often without cause.

## 4. Treatment Recommendations

Deliberate indifference to a participant’s prescribed medication or treatment is unconstitutional. The court, the prosecutor, and defense counsel are not qualified to decide a participant’s treatment. Only licensed medical professionals are qualified to make medical decisions as to appropriate medications. For example, denying medication for addiction treatment (MAT) can be cruel and

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156 Marlowe and Meyer, *The Drug Court Judicial Benchbook*, p. 162; *Oyoghoc v. Municipality of Anchorage*, 641 P.2d 1267, 1267 (Alaska Ct. App. 1982) (conditioning probation on not being within a two-block radius); *Johnson v. State*, 547 So. 2d 1048, 1048 (Fla. Dist. Ct. App. 1989) (prohibiting defendant from being near areas of high drug use); *State v. Morgan*, 389 So. 2d 364, 364 (La. 1980) (prohibiting entrance into the French Quarter); *State v. Stanford*, 900 P.2d 157, 157 (Haw. 1995) (supporting a prohibition against entering the Waikiki area); *People v. Pickens*, 542 N.E.2d 1253, 1253 (Ill. App. Ct. 1989). But see *People v. Beach*, 195 Cal. Rptr. 381, 385 (Cal. Ct. App. 1983) (holding unconstitutional defendant’s banishment from the community where she has lived for the last 24 years); *State v. Wright*, 739 N.E.2d 1172, 1172 (Ohio Ct. App. 2000) (reversing prohibition of entering any place where alcohol is distributed, served, consumed, given away, or sold because it restricted the defendant from grocery stores and the vast majority of all residences). See also *United States v. Guest*, 383 U.S. 745, 757-58 (1996) (recognizing a fundamental right to travel); *People v. Rizzo*, 362 Ill. App. 444 (2005) (A court may, as condition of probation or other sentence short of incarceration, bar a defendant from certain areas if the penalty is reasonably related to the offense, provided that, if the defendant has a legitimate and compelling reason to go to that area or place, he may apply to a specified authority for specific permission); *People v. Bolt*, 984 P.2d 1181 (Colo. Ct. App. 1999); U.S. Const. Amend. I.

157 Marlowe and Meyer, *The Drug Court Judicial Benchbook*, p. 162. See also *People v. Rizzo*, 842 N.E.2d 727, 727 (Ill. App. Ct. 2005).

158 *Samson v. California*, 547 U.S. 843 (2006).

159 *Id.*

unusual punishment.<sup>160</sup> Treatment providers are the only professionals qualified to create or recommend a treatment plan. Defense counsel should remind the court to rely on the recommendations of a qualified professional. The U.S. Department of Justice found courts in Pennsylvania and Massachusetts in violation of the Americans with Disabilities Act (ADA) for prohibiting drug court participants with opioid use disorder from using MAT or requiring discontinuance of the medication in order to graduate from the program.<sup>161</sup>

## 5. Confidential Information

Drug court waivers and procedures should clearly state what information is confidential. Drug court waivers must comply with state and federal law, specifically Title 42<sup>162</sup> and the Health Insurance Portability and Accountability Act of 1996 (HIPAA).<sup>163</sup> Confidential information provided to defense counsel by the participant is governed by rules of ethics.<sup>164</sup> This protected information must not be requested from defense counsel. Confidential information learned by the prosecutor during participation in drug court cannot be used against the participant.<sup>165</sup>

## 6. Open and Public Courtrooms

Staffings or pre-court meetings may be presumptively closed to the public by the judge at the discretion of each drug court because they are not a “critical stage of the proceeding.”<sup>166</sup> Staffings may be closed as long as no final decision is made. Contested matters, termination hearings, and probation violations must be resolved in open court as part of due process and to protect the ap-

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160 U.S. Const. Amend. VIII.

161 See *Pesce v. Coppinger* 355 F.Supp. 3d 35 (D. Mass. 2018), Title II of the ADA, 42 U.S.C §§ 12131-12134; 28 C.F.R. Part 35. See also “Justice Department Finds that Pennsylvania Courts Discriminated Against People with Opioid Use Disorder,” U.S. Department of Justice, *Justice News*, February 7, 2022, <https://www.justice.gov/opa/pr/justice-department-finds-pennsylvania-courts-discriminated-against-people-opioid-use-disorder>; and “U.S. Attorney’s Office Settles Disability Discrimination Allegations with the Massachusetts Trial Court Concerning Access to Medications for Opioid Use Disorder,” U.S. Attorney’s Office, District of Massachusetts, press release, <https://www.justice.gov/usao-ma/pr/us-attorney-s-office-settles-disability-discrimination-allegations-massachusetts-trial>

162 42 C.F.R. Part 2 is different from HIPAA in its scope and requirements. Part 2 protects the confidentiality of substance use disorder patient records by restricting the circumstances under which Part 2 programs or other lawful holders can disclose such records. Part 2 applies to any individual or entity that receives federal funds and holds itself out as providing alcohol or drug use diagnosis or referrals for treatment. Covered information broadly includes anything that would identify a patient as “an alcohol or drug abuser”—in other words, anything that directly or indirectly identifies a patient in a covered program. Part 2 privacy protections are motivated by the understanding that stigma and fear of prosecution might dissuade those who need treatment from seeking treatment.

163 HIPAA is a federal law that protects sensitive patient health information from being disclosed without consent. Congress enacted HIPAA in 1996 to improve the health care system by “encouraging the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health information.” The HIPAA Privacy Rule establishing the standards for privacy of information took effect in 2003.

164 ABA, Model Rules of Professional Conduct, 1.6, Confidentiality of Information. [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_6\\_confidentiality\\_of\\_information/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/)

165 *State v. Plouffe*, 329 P3d 1255 (Mont. 2014) (the prosecutor cannot charge a treatment court participant with a new crime based on confidential information learned in staffing).

166 *State of Washington v. Sykes*, 182 Wash.2d 168 (December 2014).



pellate record. Be careful about discussing protected health information and sensitive issues in staffings. If staffings are closed, indicate this in the policy and procedures manual so that participants are aware of these restrictions.<sup>167</sup>

## 7. Ex Parte Communication

Communication with the drug court judge when defense counsel or the prosecutor is not present is generally prohibited in drug courts. Each state has its own judicial and professional conduct rules that address ex parte communications. These ex parte situations may arise at public activities or in the courthouse. A judge should disclose any unintentional interactions with both parties.<sup>168</sup>

## B. DRUG COURT LITIGATION—DUE PROCESS

### 1. Right to Counsel

The right to counsel attaches at every critical stage of the proceedings.<sup>169</sup> Probation and parole revocation proceedings are not considered a critical stage,<sup>170</sup> but virtually every state requires counsel at probation revocation hearings upon the client's request.<sup>171</sup> Participants do have the option to waive their right to counsel or hearing so long as the court is satisfied that they understand this decision. Any loss of liberty (i.e., jail sanction or punishment) will trigger procedural due process protection under the Fourteenth Amendment. Despite the rehabilitative goals of the drug court program, defense counsel continue to have an essential role of fairness for the client who enters and participates in drug court. Cases involving parole revocation, probation, and supervised release provide meaningful analogies for the drug court setting, particularly when the client faces sanctions or termination.<sup>172</sup>

### 2. Fair Procedures at Hearings

If a drug court participant denies any allegation and the consequence will be jail (which is a possibility at any violation hearing), there needs to be an evidentiary hearing before the court can sanction a participant because liberty is at risk.<sup>173</sup> At a minimum, fair process at the hearing includes written notice of alleged violations, an opportunity to be heard, disclosure of the evidence

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167 Closed staffings depend on circumstances, jurisdiction, and individual guidance.

168 ABA, Model Code of Judicial Conduct, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_code\\_of\\_judicial\\_conduct/](https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/)

169 U.S. Const. Amend VI and XIV.

170 i.e., arraignment, plea, sentencing, pretrial motions, trial, probation hearings, etc.; see also *Kentucky v. Stincer*, 482 U.S. 730 (1987); *United States v. Cronin*, 466 U.S. 648 (1984).

171 Marlowe and Meyer, *The Drug Court Judicial Benchbook*, p. 172; *Gagnon v. Scarpelli*, 441 U.S. 778, 787 (1973).

172 Marlowe and Meyer, *The Drug Court Judicial Benchbook*, p. 171 "Best practice requires a hearing where the facts upon which a sanction may be based are disputed. If the sanctioning process is analogous to modification of probation[.]"

173 Marlowe and Meyer, *The Drug Court Judicial Benchbook*, pp. 169–70. See the analysis of a fair process at revocation or termination hearings and the comparisons to probation or parole hearings.

against the participant, an opportunity to confront and cross-examine the government's witnesses, a neutral and detached decision-maker, and a written statement of reasons for any revocation decision.<sup>174</sup> However, "conventional substitutes for live testimony" can be used in some circumstances.<sup>175</sup>

The *Adult Drug Court Best Practice Standards* recommend that fair procedures include:

- Advance notice
- An opportunity for participants to explain their perspectives
- Consequences that are equivalent to those received by other participants in the same phase of the program who are engaged in comparable conduct; and
- Provided with a professional demeanor<sup>176</sup>

### 3. Preventive Detention

Defense counsel should vigorously oppose a drug court judge's effort to detain a participant solely for preventive reasons. A drug court cannot confine a person without a lawful reason or violation of a program rule. Due process protections must be afforded before any confinement is imposed. Courts have found that it is not lawful to place participants with a substance use disorder in jail solely because they are awaiting placement in a treatment bed.<sup>177</sup>

There is no evidence that preventive detention reduces crime or treats substance use disorders. In *Hoffman v. Knoebel*, an Indiana treatment court was part of a class action lawsuit for court officials concerning unlawful detention practices. The case was ultimately dismissed, but on technical and procedural grounds. The court stated "[t]he jail stays imposed as sanctions for noncompliance [and awaiting placement in treatment facilities] were arbitrary and issued without due process."<sup>178</sup>

### 4. Jail Sanctions

Best practices indicate that drug courts should impose jail sanctions judiciously and sparingly and require a hearing.<sup>179</sup> Unless a participant poses an immediate risk to public safety, jail sanctions are administered after less severe consequences have been ineffective at deterring infractions.<sup>180</sup>

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174 *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973).

175 *Gagnon v. Scarpelli*, 411 U.S. at 782 n.5.

176 All Rise, formerly NADCP, *Adult Drug Court Best Practice Standards*, Vol. 1, IV, Incentives, Sanctions, and Therapeutic Adjustments, commentary on fair procedures, p. 29, citing Burke & Leben, 2007; Frazer, 2006; Tyler, 2007).

177 Research shows the person will be more likely to relapse the minute they get out. Treatment courts cannot do this. They can rely on other conduct.

178 *Hoffman v. Knoebel*, 894 F.3d 836 (7th Cir.2018).

179 All Rise, formerly NADCP, *Adult Drug Court Best Practice Standards*, Vol. 1, IV, Incentives, Sanctions, and Therapeutic Adjustments, p. 28.

180 *Id.*, pp. 28, 32.

- Jail sanctions typically last no more than three to five days.<sup>181</sup>
- Participants are provided defense counsel and a fair hearing if a jail sanction might be imposed, because a significant liberty interest is at stake.<sup>182</sup>

Keeping participants in jail indefinitely without any findings for a violation is unconstitutional. In Mississippi, a judge was removed from office for jailing a participant for 24 days for unspecified violations.<sup>183</sup>

## 5. Fair Procedure for Termination

As in a probation revocation hearing, a participant is entitled to a termination hearing in open court with all the rights and protections of due process.<sup>184</sup>

Accordingly, a drug court cannot require a participant to waive a termination hearing as a condition of participation. In some courts termination amounts to revocation of parole or probation, but in others it is predisposition. A notice of termination or revocation must set forth the reasons with such clarity that defense counsel can determine the grounds alleged for revocation/termination, enabling the preparation of a defense to the allegation.<sup>185</sup> This type of notice requirement is consistent with the requirements of *Morrissey v. Brewer*, 408 U.S. 471 (1972), in the probation and parole revocation context.<sup>186</sup> For example, the Supreme Court of the State of Nebraska rejected a participant's termination from drug court where the termination was based solely on a coordinator's report, did not meet the burden of proof, and did not give the defense the opportunity to cross-examine or offer any witnesses before being terminated.<sup>187</sup>

## 6. Termination Hearing Standards

Defense counsel should consider framing an argument based on the best practice standards at a termination hearing. Participants may be terminated from the drug court if they can no longer be managed safely in the community or repeatedly fail to comply with treatment or supervision requirements.<sup>188</sup>

Participants are not terminated from the drug court for continued substance use if they are otherwise compliant with their treatment and supervision conditions, unless they are not amenable to the reasonably available treatments in their community.<sup>189</sup> One court adopted a five-part test to determine

181 *Id.*, p. 32: "Research in drug courts indicates that jail sanctions produce diminishing returns after approximately three to five days (Carey et al., 2012; Hawken & Kleiman, 2009)."

182 *Id.*, p. 28.

183 *Mississippi Commission on Jud. Perf. v. Thompson*, 169 So.3d 857 (2015).

184 How this is done can be dependent on the state or program.

185 *Hagar v. State of Oklahoma*, 990 P.2d 894, 895 (Ct. Crim. App. Okla. 1999). *People v. Anderson*, 833 N.E.2d 390, 390 (Ill. App. Ct. 2005) (holding that drug court termination requires a hearing); *State v. Perkins*, 661 S.E. 2d 366, 366 (S.C. Ct. App. 2008) (holding that a termination decision is not reviewable, but the defendant is entitled to notice and a hearing on whether the defendant violated conditions of his suspended sentence by being terminated from drug court).

186 *Morrissey v. Brewer*, 408 U.S. at 489 (1972); *Fuentes v. Shevin*, 407 U.S. 67 (1972).

187 *State v. Shambley*, 281 Neb. 317, 333 (2011).

188 All Rise, formerly NADCP, *Adult Drug Court Best Practice Standards*, Vol. 1., p. 28.

189 *Id.*; *Brookman v. State* 232 Md. App. 489 (2017).

whether the evidence supporting termination from a treatment program was sufficiently reliable to meet due process requirements.

The factors the court considered included the following:

- Whether a hearsay report by the treatment provider was corroborated
- The reliability of the source of the information and, if provided by unnamed informants, the reason for identity nondisclosure
- The provision of a hearing with opportunity to fully cross-examine adverse witnesses
- Whether a preponderance of the evidence supported termination
- The disparity of the sentence upon completion and noncompletion.<sup>190</sup>

In *Brookman v. State*, 460 Md. 291 (Md. Ct. App. 2018), the court held that it was a due process violation to not allow for an adversarial hearing. Defendants wanted to contest sanctions imposed without a hearing for low creatinine results and failure to appear for a drug test. The court held that when termination is considered it must provide a minimum of due process protections, including notice, opportunity to be heard, right to representation by counsel, the opportunity to confront and contest adverse evidence, and the opportunity to have a judge consider mitigating factors.

## 7. Recusal of the Judge

The nontraditional role of the drug court judge may create other legal issues at termination, revocation, or sentencing proceedings. The judge may have received a wide range of information about a participant and may have had personal interactions that could appear to affect their ability to be impartial, resulting in bias.<sup>191</sup> A participant facing this situation may want to file a request for the judge's recusal. It is recommended that the drug court judge allow a participant to request that another judge consider disposition upon termination. Legally, states differ as to whether recusal is required. Attorneys should consult the law in their state.<sup>192</sup>

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190 Marlowe and Meyer, *The Drug Court Judicial Benchbook*, p. 167, citing *People v. Joseph*, 785 N.Y.S.2d 292, 291 (N.Y. Sup. Ct. 2004) (adopting *Torres v. Barbary*, 340 F.3d 63, 63 (2d Cir. 2003)).

191 *L.B. Alexander v. State*, 48 P.3d 110, 114 (Ct. Crim. App. Okla. 2002). An Oklahoma court concluded that a judge who had served on a participant's drug court treatment team should not decide whether the participant should be terminated from the program.

192 For further information, see *Case Law* on the All Rise website, <https://allrise.org/laws/>

## VIII. PRACTICE GUIDANCE FOR LEGAL CHALLENGES TO DRUG TESTING

Frequently, termination or revocation is based upon the results of drug testing.<sup>193</sup> In this situation and others, defense counsel may need to challenge a drug test; when needed, the following issues should be considered:

### A. DRUG TESTING REQUIREMENTS

A condition of bond or pretrial release that requires drug testing implicates the Fourth Amendment and must be reasonable, based upon an individualized assessment that a person may not use drugs during pretrial release. The individualized suspicion can be based upon drug convictions or self-reported drug use. In the pretrial release context, alcohol prohibition clauses have been held to be valid as long as they are reasonably related to assuring the defendant's future appearance in court.<sup>194</sup> Substance use monitoring is a common condition of probation and the *Adult Drug Court Best Practice Standards* provide guidelines for administering this testing.

### B. PROCEDURES<sup>195</sup>

Defense counsel should make sure the government has made a record and provided the following evidence to the participant before a decision is made. These standards provide a helpful framework for contested evidentiary hearings (the standards obviously are not binding in all drug court jurisdictions):

- A copy of the **report on the lab test** before the hearing
- A report on the **chain of custody** of each sample, including the date of collection, the name of the person(s) collecting and labeling the sample, and a description of the label
- A copy of an **affidavit by a responsible laboratory** employee attesting both to laboratory procedures, including chain-of-custody routines, and to whether all required procedures were followed regarding the sample<sup>196</sup>

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193 Marlowe and Meyer, *The Drug Court Judicial Benchbook*, p. 167, citing *People v. Joseph*, 785 N.Y.S.2d 292, 291 (N.Y. Sup. Ct. 2004) (adopting *Torres v. Barbary*, 340 F.3d 63, 63 (2d Cir. 2003)).

194 *Id.*, p. 163.

195 Many drug courts struggle with adhering to these practices, but defense counsel should consider these practice tips.

196 *United States v. Grandlund*, 71 F.3d 507, 511 (5th Cir. 1996), *opinion clarified*, 77 F.3d 811 (5th Cir. 1996) (directives apply only to future revocation hearings that are truly and legitimately contested).

## C. OTHER EVIDENTIARY CONSIDERATIONS

- Request independent retesting or proffer exculpatory information regarding innocent explanations for false positive results.<sup>197</sup>
- Produce evidence to challenge the scientific accuracy of testing results or machinery, under the applicable standards in their jurisdictions.<sup>198</sup>
- In cases where the indicia of reliability are not sufficient to render the reports “business records” within the meaning of the hearsay exception, object to lab reports as constituting impermissible hearsay.<sup>199</sup>
- Assert the right to confront and cross-examine government witnesses regarding chain of custody issues and the accuracy of the testing machine.<sup>200</sup> (Although substitutes for live testimony may satisfy due process in some circumstances, this is not always the case, particularly if a participant has no opportunity for independent retesting and the lab report is not corroborated.)<sup>201</sup>
- Call expert witnesses regarding testing mechanisms.<sup>202</sup>

## IX. TREATMENT

There are a number of treatment issues that defense attorneys who represent current and prospective drug court participants need to understand. To be effective, counsel must learn about the community’s treatment providers, the impact of the client’s criminality level on a course of treatment, treatment of co-existing disorders, how to match clients to appropriate treatment providers, self-help programs, reciprocity, the use of drug court clients as informants, net widening, and the potential links between domestic violence and substance use.

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197 See *United States v. Martin*, 984 F.2d 308, 312 (9th Cir. 1993) (supervised releasee’s confrontation rights violated by court’s refusal to allow retesting); *United States v. Grandlund*, 71 F.3d at 510 (noting that defendant had failed to offer explanation for false positive or to request retesting).

198 *People v. Nolan*, 95 Cal. App. 4th 1210, 1215 (Ct. App. 2d Cal. 2002).

199 See *United States v. Martin*, 984 F.2d at 313.

200 *People v. Nolan*, 95 Cal. App. 4th at 1215. See *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); *Daubert v. Merrill Dow Pharm, Inc.*, 509 U.S. 579 (1993).

201 *United States v. Martin*, 984 F.2d at 312. But see *United States v. Kindred*, 918 F.2d 485, 487 (5th Cir. 1990) (admission of urinalysis reports did not violate due process because they were reliable); *United States v. Burton*, 866 F.2d 1057, 1059 (8th Cir. 1989) (admission of lab urinalysis reports supported by affidavit of lab director did not violate due process); *United States v. Bell*, 785 F.2d 640, 643 (9th Cir. 1986) (good cause shown for introducing urinalysis lab reports without producing people who prepared them because no evidence was presented to contradict defendant’s drug usage and reports had indicia of reliability); *United States v. Penn*, 721 F.2d 762, 765-66 (11th Cir. 1983) (not abuse of discretion to admit lab reports that are regular reports of a company whose business is to do this type of testing).

202 *People v. Nolan*, 95 Cal. App. 4th at 1215.

## **A. TREATMENT ISSUES**

In order to give potential and actual drug court participants the thorough and accurate advice they need to make an informed choice, drug court defense attorneys must understand and be able to explain the rights that their clients will waive as drug court participants as compared with the need for, and availability of, treatment. In brief, drug court defense attorneys must have the ability to:

- Recognize a client's need for treatment and be willing to support treatment as a viable case disposition, while also recognizing that not every client with treatment needs is a drug court candidate.
- Continue to fulfill a client's right to counsel, even in the nonadversarial environment of a drug court proceeding.
- Understand that substance use rarely occurs in a vacuum and that problems relating to health, physical and mental state, history of trauma, culture, family, and circumstances such as housing and employment must be addressed if long-term recovery is to be achieved.
- Understand the spectrum of treatment and maintain an ongoing awareness of all available treatment options both in and out of drug court.
- Understand drug court targeting and eligibility criteria.
- Ensure that each client is offered the treatment options that best suit their individual needs based on a validated clinical assessment and that the treatment provided is not more onerous than required or agreed upon at admission.
- Refer clients who are not appropriate for drug court to suitable alternative treatment.
- Provide updates and needed reminders to the entire drug court team concerning the availability of treatment options and their appropriate uses, strengths, and limitations.

## **B. KEY ELEMENTS OF EFFECTIVE TREATMENT PROVIDERS**

To be effective, a treatment provider must:

- Employ qualified staff. Staff should possess state-recognized certification or licensure. State regulations will identify the appropriate qualifications for clinical staff.
- Employ staff trained in evidence-based practices (EPBs). These research-proven techniques are standardized to ensure proper application. Such practices commonly include motivational techniques, cognitive-behavioral therapy, and medication for addiction treatment (MAT). There are many practices that

focus on specific issues that may be relevant to an individual's need. These can include criminogenic thinking, trauma, co-occurring issues, and others. There are also EPBs that focus on gender, race, and age factors. Effective treatment planning will match the needs of the individual with the various interventions.

- Base treatment planning on the identified needs and strengths of the individual. This is frequently referred to as person-centered care. It recognizes that “one size” does not fit all. Treatment planning should also be based on the client’s multidimensional assessment, including issues in the following areas: intoxication and withdrawal potential; biomedical conditions and complications; emotional, behavioral, and cognitive conditions; readiness to change; relapse; continued use and problem potential; recovery; and living environment (including family dynamics and supports). This planning also recognizes that there are various pathways to recovery, not just one.
- Provide trauma-informed care. Trauma-informed care recognizes that many drug treatment court participants have experienced trauma in their life. This trauma (child abuse/neglect, violence, loss of loved ones, extreme poverty, etc.) has a major impact on a person’s behavior and emotions. It is critical that treatment effectively respond to trauma and ensure that the individual is not retraumatized.
- Provide access to MAT. Particularly for opioid use disorder (OUD), MAT is the “first-line” treatment, not a last resort. Courts should identify what MAT is available to their participants and ensure that there is access.

## **C. LEVELS OF CARE AND TREATMENT PROGRAM TYPES**

There are several different levels of care for substance use disorder (SUD) treatment. These levels provide varying degrees of service intensity and structured settings.

- Inpatient detoxification (“detox”) is a medical setting that focuses on helping individuals for whom withdrawal from a substance can be life-endangering and requires intense medical monitoring. This is most often associated with alcohol and/or benzodiazepine withdrawal, either of which can be life-threatening. For other substances, an inpatient detoxification program is not necessary unless there are potential life-threatening mitigating circumstances. It should also be noted that detox is focused on withdrawal issues. If detox is the only service offered, there is little chance that the person will be successful in efforts to engage in recovery. Detox should always be followed by referral to ongoing SUD treatment.
- Outpatient detoxification is a less intensive detox program in which intense medical monitoring is not necessary. This level of care is often used for substances such as opioids. Again, a referral to ongoing SUD treatment is critical to success.



- Inpatient rehabilitation is frequently thought of as a “28-day rehab” program. In reality, recognition of individuals’ different needs leads to a variety of lengths of stay. Inpatient rehabilitation is appropriate for individuals experiencing medical or emotional issues that require a period of stabilization before they can be successful in the community. Keep in mind that not every person needs inpatient care. As these programs are short in length, continued care, most likely as an outpatient, is important for success.
- Residential services are designed for individuals who need a structured living program in order to develop stability and essential recovery skills before returning to community living. Residential care is often recommended for individuals who have had multiple unsuccessful attempts at treatment or whose living environment is not conducive to early recovery.
- Intensive outpatient is a program that provides a highly intensive schedule of services, meeting for several hours a day three to five days a week. It is meant for individuals with a significant need for structured activities and supports.
- Outpatient treatment is the core modality for the treatment of SUDs. It usually consists of regularly scheduled individual and/or group counseling sessions. The frequency of the sessions depends on the assessed needs of the individual.

The appropriate level of care is determined by assessing the clinical needs, strengths, and resources of the individual. These issues are then applied to a tool like the American Society of Addiction Medicine (ASAM) Criteria.<sup>203</sup> It is important to match the individual with the most appropriate level of care for their clinical needs. It is also important to understand that the purpose of treatment is not to address criminogenic risks. Placing people in higher levels of care than necessary can have adverse effects on the individual as well as on other members of the treatment program. Likewise, placing someone in a level of care that is not high enough can have an adverse effect. Level of care determinations should be made only by clinicians. In some situations, the most appropriate level of care may not be available due to location, lack of openings, etc. In these cases the person should be referred to the best available level of care. If, for example, a person is recommended for residential treatment but that service is not available, an alternative plan could be to refer them to intensive outpatient treatment with additional supports such as peers being made available. If a particular level of care is not available in the community, the court could make the local and state government aware of the need.<sup>204</sup>

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203 David Mee-Lee, chief ed., *The ASAM Criteria: Treatment Criteria for Addictive, Substance-Related, and Co-Occurring Conditions*, 3rd ed., American Society of Addiction Medicine (2013).

204 For more information, see *The ASAM Criteria*.

## D. RESPONSES TO RELAPSE

Dealing with an SUD is difficult. For many participants, relapse can occur. It is important to recognize the difference between proximal and distal goals for participants. Abstinence for most persons diagnosed with an SUD is a distal goal. That is, successfully achieving it will take a while. People need to learn recovery and relapse prevention skills. They need to develop recovery supports (peers, activities, etc.) that can help them achieve their recovery goals. Compliance with other program requirements such as attendance and drug testing can be considered proximal goals that can be achieved more quickly.

When a relapse occurs, what is the best response? The best response will depend on the individual and their circumstances. Many people believe that a relapse should automatically result in a change of treatment intensity or a move to residential care. However, this is not the best response for everyone. Understanding what led to the relapse is key to understanding how to respond. Some relapses occur because someone experiences an emotional situation that they struggle to handle. Or the individual may have been in a social situation that they weren't prepared for. More effective responses to these relapses might be to work within the existing treatment setting to address these circumstances. Again, it is important to individualize relapse responses based on the person's needs.

## E. MEDICATION FOR ADDICTION TREATMENT (MAT)<sup>205</sup>

The impact of the opioid epidemic has demonstrated the importance of using all effective treatments in battling drug overdoses. With approximately 100,000 overdose deaths a year, drug treatment courts play a critical role in saving lives.

For opioids, medications for opioid use disorder (MOUD) are the first-line treatment approach. Unfortunately, the use of MAT has been the subject of much stigma and misunderstanding. Many people have felt that MAT is simply replacing one addiction with another, particularly for medications like methadone and buprenorphine. The evidence is clear that these medications are very effective in reducing fatal overdoses. Studies have demonstrated that when the use of buprenorphine is compared with just detox or counseling alone, the rate of mortality was 20% for those who did not receive the medication, while the mortality rate for those receiving the medication was 0%.<sup>206</sup> Drug courts have a responsibility to ensure access to MAT as the first-line intervention for OUD.

There are two types of MOUD: agonists and antagonists. Agonists, such as methadone and buprenorphine, when appropriately dosed, will eliminate withdrawal symptoms and greatly reduce cravings. At the appropriate dose, individuals will not experience the intoxication that would come with illicit opioid use. In

<sup>205</sup> See also *Medications for Substance Use Disorders*, Substance Abuse and Mental Health Services Administration, <https://www.samhsa.gov/medication-assisted-treatment>

<sup>206</sup> Johann Kakkö, Kerstin Dybrandt Svanorg, Mary Jeanne Kreek, and Markus Heilig, "1-Year Retention and Social Function After Buprenorphine-Assisted Relapse Prevention Treatment for Heroin Dependence in Sweden: A Randomised, Placebo-Controlled Trial," *The Lancet*, Vol. 361, Issue 9358 (2003), pp. 662–668.

fact, someone who is on a stable, effective dose of these medications can be fully functional and would show no signs indicating that they are on an agonist medication. Methadone is available only through certified narcotic treatment programs. These programs are highly regulated, with patients required to appear at the program six or seven days each week for the earlier phases of treatment. Buprenorphine can be prescribed only by physicians who have obtained an “X-waiver” on their U.S. Drug Enforcement Administration registration, which allows them to prescribe controlled substances. Patients can obtain the medication through their regular pharmacy.

Antagonist medication, such as naloxone and naltrexone, block the action of opioids when they are taken. Naloxone (Narcan) is a short-term blocker and is used to reverse overdoses and prevent death. The use of naloxone has saved innumerable lives. Naltrexone comes in daily dose form (Revia) and long-acting injectable form (Vivitrol). The long-acting form is effective for approximately 28 days.

The determination of which medication to use is made solely by physician in collaboration with their patient. There are a variety of indications that would favor selecting one medication over another. Physicians will take these indications into consideration when prescribing.

A critical concern for patients receiving MOUD is that they continue to receive their medication while incarcerated for a sanction. If the jail does not allow continuation of medication, the risks of abruptly discontinuing the medication far outweigh the potential benefit of a jail sanction.

Medications also exist for other addictions such as alcohol use disorder. These medications focus on reducing craving for the various substances. Again, the decision as to which medications to use should be made only by physicians in collaboration with their patients, not the courts.

## **F. KNOWING YOUR TREATMENT PROVIDER**

Drug court defense attorneys must know the rules, regulations, and requirements of each available treatment program, and they must understand what problems each provider can and cannot treat. Clients need this information in order to make an informed choice of programs, and defense attorneys need it in order to deal with client complaints and concerns as well as to ensure that appropriate treatment standards and requirements are met.

## **G. DIFFERENCE BETWEEN CRIMINALITY AND LEVEL OF SUBSTANCE USE**

An offender’s levels of criminality and substance use often differ. A particular drug court candidate’s criminal behavior will be examined during the admission process to a drug court program. Appropriate treatment professionals also must assess the candidate to determine the nature of their substance use issues, the

presence of any co-occurring disorders, and the appropriate treatment modality. Drug court defense attorneys must understand that the level of treatment may vary among participants and that there is not a perfect correlation between criminal behavior and treatment needs. Drug court assessments seek to identify criminogenic risk (likelihood of additional criminal activity) and SUD treatment need. Both issues can be broken into high and low dimension, producing a four-panel grid. This grid would include high criminogenic risk/high treatment need (the primary target group for drug courts), low criminogenic risk/high treatment need (best served by community supervision and enrollment in SUD treatment), high criminogenic risk/low treatment risk (best served by community supervision alone; drug court is not appropriate as the person's substance use would not be a causal factor in their criminal activity), and low criminogenic risk/low treatment need (best served by standard criminal justice diversion programs). For more information on risk and need, see Dr. Douglas Marlowe's work at [www.prainc.com/risk-need-responsivity](http://www.prainc.com/risk-need-responsivity).

## **H. CO-OCCURRING DISORDERS**

Many, if not most, drug court participants also have co-occurring disorders (e.g., mental illnesses, mental retardation, gambling, or sexual addictions). These disorders can greatly impact the person's path to recovery. Successful drug courts tailor treatment to the needs of the individual. Drug courts must be able to assess and, when possible, provide treatment for all issues, in addition to substance use. This includes assessing participants to identify any co-occurring disorders and ensuring that appropriate and available treatment is tailored to the assessed disorder(s) and needs. The failure of substance use disorder treatment that is inappropriate to the assessed needs of the person being treated should not be regarded as a "treatment failure." People with co-occurring issues may have difficulty expressing their feelings, speaking in groups, and progressing at paces that are achieved by individuals without a co-occurring disorder. Recognizing these issues and providing appropriate supports can greatly enhance the chances of positive outcomes. For co-occurring issues, effective treatment may require specialty treatment services and professionals.

Assessment and treatment should not be limited to substance use and mental disorders. Drug court programs also should identify the medical and dental needs of participants and make appropriate service referrals. The defense attorney must advocate for all of the treatment needs of the participant.

## **I. TRAUMA**

As mentioned earlier, trauma, both physical and emotional, can influence someone's use of substances as well as their responses to treatment. Trauma can result from physical abuse, emotional abuse, sexual abuse, and exposure to traumatic experiences (post-traumatic stress disorder). People with a history of trauma may have a very difficult time trusting authority figures, clinicians, and other

participants. They may be very guarded in their disclosures about what they are dealing with. It is vital that the court process not further traumatize participants. An example of a concern could be the practice of observing participants provide urine samples for toxicology. For individuals who have a history of sexual abuse, this can be a highly emotional triggering event and may make the person reluctant to continue in the program. An appropriate clinical assessment for trauma history and program planning tailored to the needs of the individual are critical. Persons with a history of trauma should not be denied the ability to participate in drug court because observing urine samples is not appropriate for them.

## **J. SINGLE VERSUS MULTIPLE TREATMENT PROVIDERS**

Treatment resources available to drug courts vary. Some jurisdictions may have access to only one treatment provider, while others will have a network of multiple providers. Drug court defense attorneys must ensure that appropriate treatment is available for all drug court participants, and they must be vigilant in seeing that participants are appropriately matched to the available resources.<sup>207</sup> If there are limited resources, the court can make the local and state governments aware of the unmet needs.

## **K. PARTICIPATION IN AA, NA, OR OTHER TWELVE-STEP PROGRAMS<sup>208</sup>**

The decision for a participant to attend a twelve-step program or other self-help group should be made by a treatment clinician in collaboration with their client as part of the individual's comprehensive treatment plan. Doing so ensures informed referrals matching clients to mutual support groups that best meet their assessed needs and maximize the likelihood of engagement and positive outcomes. Caution must also be used with individuals with social phobias or those who experience difficulty with groups of strangers. Building recovery capital is important in sustained recovery, so if a client does not feel comfortable attending AA or NA, they should be permitted to attend other self-help alternatives to help build these skills.

## **L. LINKAGES BETWEEN DOMESTIC VIOLENCE AND SUBSTANCE USE**

The goal of drug courts is to treat substance use disorders in order to reduce criminal activity. There is often a link between substance use and violent behavior—especially domestic violence. However, there is a proscription against allowing violent offenders to participate in drug courts that are either funded by federal dollars or governed by certain state statutes. Defense attorneys who represent clients charged with both domestic violence and substance use need to be familiar with

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207 Aubrey Fox, "Is There a Fit? Drug Courts and the Mentally Ill Addict," *Judges Journal*, Vol. 41 (Winter 2002), pp. 26–29.

208 Also known as sober support.

the funding sources and associated restrictions on the drug court program in their jurisdiction. They also need to be aware of alternative programs that can provide similar services but that have no prohibitions against violent offenders. Finally, defense attorneys need to remember that it may be possible to negotiate with law enforcement and the prosecutor concerning the actual charges to be filed.

## **X. POLICY CONSIDERATIONS**

As the role of drug courts in criminal justice evolves, practitioners should continue to track the research of All Rise and updates to its Best Practice Standards and Key Components.<sup>209</sup> Complex policy considerations require continuous education and auditing of programs. Drug court programs must dedicate time to discussing improvements to the program, going beyond the more day-to-day operations in the courtroom and staffing of individual participants. The drug court model is different from the traditional criminal justice system process. As a defense attorney, your responsibilities in a drug court extend beyond the basics of representing an individual client.

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<sup>209</sup> All Rise, formerly NADCP, *Adult Drug Court Best Practice Standards*, Vol. I and II.; All Rise, *Defining Drug Courts*.

## Areas to Consider

Policy considerations have greatly expanded since drug courts first emerged, and they continue to evolve. The following are some areas of policy to consider:

- Eligibility
- Legislation
- Courtroom operations/housekeeping
- Confidentiality
- Funding
- Evolution of evidence-based practices
- Training for team members
- Memorandums of understanding between stakeholders
- Barriers to justice
- Is the court inclusive—is there treatment available to all people?
- Appropriate sanctions levels
- Drug use sanctions
- Dilute urine samples/testing policy
- Termination
- Media, PR, crisis management, and social media
- What will be virtual and what will take place in person?
- Technical innovations, recovery apps, smart start, GPS, etc.
- Others specific to the court's jurisdiction

Defense attorneys play an essential role on the team in creating drug court policy. Every team will likely be structured differently for policy development, including how decisions will be made and who will make them. Still, all team members should have an opportunity for input.

One of the most significant challenges for the defense attorney centers on weighing the client's interests against the program's needs. Effective program creation and implementation address the population's needs and will protect the integrity of the program. Creating good policy at the outset will allow a defense attorney to ethically represent an individual client without battling the issues of the program itself. Ultimately, defense attorneys must represent clients first, not the programs.

The following are areas of consideration and ideas for creating, guiding, and implementing those policies.

## A. CREATING POLICY

Defense counsel can structure participation in policy and steering committees to allow for different forms of advocacy within the program. Team meetings can address the program's daily operations, with a program manager providing updates, auditing practices, and leading discussions. Other governing bodies, such as steering committees and advisory boards, can include stakeholders like public defender agencies or the local defense bar, judges, prosecuting attorneys, case management, program managers, law enforcement, and others. Each stakeholder should have an opportunity to provide oversight on policies and procedures, negotiate memorandums of understanding between partner agencies, and engage in fundraising and budget concerns. Program managers can pursue grants with input from all areas of the team.

## B. HOLDING OPERATIONS MEETINGS (INWARD FOCUS)

Operations meetings with the team members can help protect the program's integrity and stay aligned with best practices.

### **Consider monthly business meetings or yearly retreats for:**

- Education and training
- Daily operations
- Team building
- Policy and procedures manual
- Drug court handbook

## C. ESTABLISHING A STEERING COMMITTEE (OUTWARD FOCUS)

The steering committee can garner political and community support for the drug court while managing a social media presence. This committee will also be familiar with the funding sources and associated restrictions on the drug court program in their jurisdiction.

### **Consider quarterly steering committee meetings to discuss:**

- Public relations (PR)
- Social media presence
- Budgets and funding
- Oversight
- Collaboration with external agencies
- Bylaws and contract



## D. INCORPORATING POLICY GUIDANCE

Teams should consider qualitative and quantitative data provided by All Rise, the *Adult Drug Court Best Practice Standards*, other evidence-based research, and treatment court successes. Maintain minutes and records of discussions. Consider on-site technical assistance to create, audit, and continuously evaluate the program.

## E. IMPLEMENTING POLICY

Once all stakeholders agree, policies and procedures should be in writing and available in manuals for the public, practitioners, and participants. The drug court should provide handbooks for participants with specific program rules and education on how the program works. These handbooks should be easy to read, easily accessed, and available in the courtroom and via the court website.

**Defense counsel should refer to the sections in this monograph to determine these training goals:**

**Core competencies:**

- Criminal law subject matter
- Role of criminal defense—professionalism and ethical obligations (Chapters 1–5)

**Drug court subject matter:**

- Legal issues (Chapters 6–8)
- Treatment and compliance (Chapter 9)
- Lawyering skills in a drug court setting (Chapters 1–5)

**Specific drug court programs:**

- Policy creation and implementation
- Program operation
- Local jurisdiction and community-specific needs

## XI. TRAINING

Defense counsel are responsible for acquiring the training needed to serve their clients when representing current and prospective drug court participants. One of the most significant challenges for defense counsel will be to perform their duties in a multidisciplinary environment while understanding due process protections and ethical obligations. These skill sets and knowledge base are necessary for competent practice in drug court but are not taught or learned in traditional settings.<sup>210</sup> Clients will not present with a textbook legal problem for defense to analyze and solve. Drug court defense counsel need to understand that their clients' issues are multidimensional and that they have a responsibility to be able to recognize the scope of a client's treatment needs and advocate for an appropriate treatment plan. To do this, defense counsel must achieve the level of competence required to appreciate the unique context of each client's life circumstances, background, and perspective.

Best practices indicate that all team members should attend extensive training before working in a treatment court, and each team member should regularly attend continuing education and workshops.<sup>211</sup> This is a critical practice that is often overlooked and not implemented.

To be successful in their new roles, staff members require at least a journeyman's knowledge of best practices in a wide range of areas, including substance use disorder and mental health treatment, complementary treatment and social services, behavior modification, community supervision, and drug and alcohol testing. Staff must also learn to perform their duties in a multidisciplinary environment, consistent with constitutional due process and the ethical mandates of their respective professions. These skills and knowledge sets are not taught in traditional law school, graduate school, or most continuing education programs.<sup>212</sup>

Defense counsel should advocate for training that will enable them to ethically and competently represent their clients in a drug court setting. Ongoing specialized training and supervision are needed for staff to achieve the goals of the drug court and conduct themselves in an ethical, professional, and effective manner. Areas to study go well beyond criminal law jurisprudence and policy. Defense counsel should refer to sections within this monograph to identify areas of training to grow their practice and benefit the client base in their court.

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210 All Rise, formerly NADCP, *Adult Drug Court Best Practice Standards*, Vol. 2, VIII, Multidisciplinary Team, Training, Commentary, p. 46.

211 All Rise, formerly NADCP, *Adult Drug Court Best Practice Standards*, Vol. 2, VIII, Multidisciplinary Team, Training, p. 39: "Before starting a Drug Court, team members attend a formal preimplementation training to learn from expert faculty about best practices in Drug Courts and develop fair and effective policies and procedures for the program. Team members then attend continuing education workshops on at least an annual basis gain up-to-date knowledge on substance use disorders and mental health treatment, complementary treatment and social services, behavior modification, community supervision, drug and alcohol testing, team decision making, and constitutional and legal issues in Drug Courts. New staff hires receive a formal orientation training on the Drug Court model and best practices in Drug Courts as soon as practicable after assuming their position and attend annual continuing education workshops thereafter."

212 *Id.*, p. 46, citing Berman & Feinblatt, 2005, and Holland, 2010.

Best practice suggests preimplementation trainings, continuing education workshops, and tutorials for new staff.<sup>213</sup> Training options have greatly expanded over time, with in-person and virtual options. Many are available at no cost. All Rise also offers an annual conference, training on specialized subject matter, team training, and onsite technical assistance. Defense counsel require the space and time to learn the drug court model and be active treatment court participants. Continued training protects the program's integrity and will help defense counsel support individual clients in achieving the best legal outcome. Without this vital training, the model may not work as designed: more participants may be unsuccessful, and the program itself may end up causing more harm than good.

## XII. UNDERSTANDING BURNOUT AND COMPASSION FATIGUE IN DEFENSE ATTORNEYS

*“To be a good lawyer, one has to be a healthy lawyer. Sadly, our profession is falling short when it comes to well-being.”<sup>214</sup>*

In the early spring of 2020, life in America changed. The coronavirus settled onto both coasts, and seemingly overnight, our country and our lives were on lockdown. The scope of despair caused by this once-in-a-lifetime crisis cannot be overstated. The country witnessed the highest rates of substance use and overdose deaths in decades, along with increases in homelessness, depression, and anxiety.<sup>215</sup> This coincided with a sharp decline in availability and access to behavioral health treatment, harm reduction services, and emergency room care.

In the criminal legal system, the pandemic exposed gaping holes in our social safety net. The effects have been felt acutely in treatment courts that seek to address the root causes of criminal behavior. For decades, the emotional weight of our broken behavioral health and criminal legal systems has fallen disproportionately on lawyers and judges who run problem-solving courts. The attorneys assigned to those courtrooms witness our most vulnerable citizens struggling with substance use, mental illness, and poverty day after day. We can safely assume that they are bearing an increased physical and psychological toll from the trauma of the pandemic—making an awareness of these pervasive stressors more important than ever.

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213 *Id.*, pp. 46–47.

214 National Task Force on Lawyer Well-Being, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* (2017), p. 1.

215 Rebekah Levine Coley and Christopher F. Baum, “Trends in Mental Health Symptoms, Service Use, and Unmet Need for Services Among US Adults Through the First 8 Months of the COVID-19 Pandemic,” *Translational Behavioral Medicine*, Vol. 12, Issue 2 (2022), pp. 273–283; NPR, “HUD: Growth of Homelessness During 2020 Was ‘Devastating,’ Even Before the Pandemic” (March 18, 2021), <https://www.npr.org/2021/03/18/978244891/hud-growth-of-homelessness-during-2020-was-devastating-even-before-the-pandemic>; National Institute on Drug Abuse, *Drug Overdose Death Rates, 1999–2021*, <https://nida.nih.gov/drug-topics/trends-statistics/overdose-death-rates>.

Some communities have reached a breaking point. In an interview for this chapter, the Honorable Nan Waller expressed despair about a system in crisis. A treatment court judge in Multnomah County, Oregon, Waller said that her community is witnessing a mass exodus of defense lawyers and prosecutors. The situation is so dire that it has prompted the dismissal of criminal charges because there are simply no lawyers available to take the cases. Even those who have representation are experiencing excessively long wait times for precious beds in residential treatment. Others are being released to the streets with no connection to services at all. Only a week before the interview, Waller said, a potential mental health court participant was found dead of an overdose while waiting for a psychiatric assessment to determine his eligibility. These stories are, sadly, all too common for lawyers and judges in courts like Judge Waller's, and the effects of the collective trauma ripple across the entire system.

This chapter focuses on the well-being of attorneys in treatment courts, with a primary focus on defense attorneys. In Section A, we identify risk factors for distress that are specific to attorneys working in a profession that is not inclined to introspection or change. Section B defines terms like *burnout*, *compassion fatigue*, and *secondary trauma* and describes the neurobiological effects of chronic stress. In Section C, we examine the unique dynamics of treatment courts that put attorneys at greater risk for secondary trauma and at the same time build resilience to mitigate against the negative consequences of long-term stress.

## A. A PROFESSION IN CRISIS

*“For too long, the legal profession has turned a blind eye to widespread health problems. Many in the legal profession have behaved, at best, as if their colleagues’ well-being is none of their business. At worst, some appear to believe that supporting well-being will harm professional success. Many also appear to believe that lawyers’ health problems are solely attributable to their own personal failings, for which they are solely responsible.”<sup>216</sup>*

Long before the shadow of the pandemic, the ABA shined a spotlight on a rarely acknowledged truth: The legal profession is dysfunctional. So dysfunctional, in fact, that it is at risk of losing credibility in the eyes of the public: “Research suggests that the current state of lawyers’ health cannot support a profession dedicated to client service and dependent on the public trust.”<sup>217</sup>

In 2017, the ABA convened the National Task Force on Lawyer Well-Being after two groundbreaking studies showed extraordinary rates of chronic stress, substance use, and depression among both practicing lawyers and law students.<sup>218</sup> While high rates of alcoholism, divorce, and suicide among lawyers have long been

<sup>216</sup> *Path to Lawyer Well-Being*, p. 12.

<sup>217</sup> *Id.*, p. 1.

<sup>218</sup> Patrick R. Krill, Ryan Johnson, and Linda Albert, “The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys,” *Journal of Addiction Medicine*, Vol. 10, Issue 1 (2016), pp. 46–52; Jerome M. Organ, David B. Jaffe, and Katherine Bender, “Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns,” *Journal of Legal Education*, Vol. 66, No. 1 (2016), pp. 116–156.

recognized,<sup>219</sup> the studies revealed two stark new truths: Future lawyers are at risk the day they start law school, and the health crisis in the legal profession is more dire than previously reported.

## 1. Profile of a Law Student

Law students by their nature tend to be academically oriented high achievers. Those are, after all, the very qualities that get a person into law school in the first place. Once there, however, students are immersed in a hyper-competitive environment where a heavy workload and little free time are the norm. The experience can be lonely and isolating, and students often feel a dissonance between their initial expectations and the reality of legal education. There is little to counterbalance the high-pressure atmosphere and intense curriculum. Students lament that they rarely receive positive feedback from professors and that they lack resources and avenues for support. Legal education defines success by external measures such as grades, on-campus interviews, moot court, and trial competitions, leaving little room for prioritizing intrinsic values such as personal satisfaction, personal growth, and community.

Despite the brave face law students may wear, research shows that they are suffering. The 2016 Survey of Law Student Well-Being found that “law students are among the most dissatisfied, demoralized, and depressed of any graduate student population.”<sup>220</sup> The study found high rates of alcohol and drug abuse among students and a reluctance to seek treatment. One quarter of participants were at risk for problem drinking, yet only 4% sought help.<sup>221</sup> The 2016 survey confirmed high rates of anxiety and depression among those surveyed, echoing the results of earlier research on law students. According to the data, law students start school with relatively normal rates of depression. Those levels skyrocket in the first year of school, peak in the third year, and never return to the baseline.<sup>222</sup>

## 2. Profile of a Lawyer

The drive and commitment that carry lawyers through legal education and the bar exam are the same attributes they take into practice. At the heart of the oath we take is the duty to provide competent representation. Because we handle matters of consequence that involve the lives and liberty of those we serve, the oath itself can be a risk factor for distress. Specifically, the dual duties of zealous advocacy and confidentiality can make us vulnerable.<sup>223</sup>

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219 Dan P. Ly, Seth A. Seabury, and Anupam B. Jena, “Divorce Among Physicians and Other Healthcare Professionals in the United States: Analysis of Census Survey Data,” *BMJ* 350 (2015); C. Stuart Mauney, “The Lawyer’s Epidemic: Depression, Suicide, and Substance Abuse,” *GWB Abnormal Use* blog (March 8, 2012), <http://abnormaluse.com/2012/03/the-lawyers-epidemic-depression-suicide-and-substance-abuse.html>.

220 *Path to Lawyer Well-Being*, p. 34.

221 Organ et al., “Suffering in Silence.”

222 Susan Swaim Daicoff, *Lawyer, Know Thyself: A Psychological Analysis of Personality Strengths and Weaknesses*, American Psychological Association (2006), p. 9.

223 Lee Norton, Jennifer Johnson, and George Woods, “Burnout and Compassion Fatigue: What Lawyers Need to Know,” *UMKC Law Review*, Vol. 84, No. 4 (2016), p. 996.

Lawyers take an oath to zealously advocate for their clients. Most lawyers working in the justice system have little choice in whom they are assigned to represent. For defense attorneys, that decision may turn on something as random as what courtroom they are assigned to on a given day. The limited ability to choose our clients and cases can feel depersonalizing, and the lack of agency can cause internal conflict and stress. Also, the ethical duty to advocate for a person or a cause may force a lawyer to subordinate his or her own emotional response to the needs of the case.<sup>224</sup>

We are also bound by a duty of confidentiality to our clients. The attorney-client privilege is a sacred part of our legal system. Defense lawyers are privy to sensitive information learned from their clients and not shared with anyone. While these rules are obviously in place to protect the privacy of victims and witnesses and to honor the constitutional rights of a criminal defendant, they can take an emotional toll on the keepers of that information. The inability to share painful, disturbing, or even confusing information with close family or friends can cause us to experience our own mental health issues.<sup>225</sup>

### 3. Profile of a Profession

As much as we are shaped by our education and work life, our vulnerabilities as individual lawyers do not exist in a vacuum. We work in a profession that is founded on an adversarial system where personality traits such as competitiveness, dominance, and aggression are richly rewarded—for better or for worse. While the warrior mentality is useful in front of a jury, living in an adversarial state of mind and body has negative physiological and emotional consequences. According to noted traumatologist Dr. Lee Norton:

Adversarial thinking is useful in trials when the lines have already been drawn. But, when it prevails within the workplace, it undermines essential social engagement and fluid, generative problem solving. Habitual adversarial thinking often generates a chronic oppositional posture. This brittle stance is characterized by a black-and-white, either-or, good-bad, yes-no, win-lose world view that damages personal and professional relationships, is physically destructive, and leaves the affected individual at much higher risk for medical and emotional health conditions.<sup>226</sup>

To be sure, many of the stressors that criminal defense attorneys experience exist in other areas of law—high workload, little time, pressure to perform. But over the last several decades, our justice system has been flooded with defendants who come from impoverished communities, are using drugs and alcohol, and may suffer from both mental and physical health problems. Seldom do clients present with one identifiable problem, and often the criminal charges

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<sup>224</sup> *Id.*, p. 989.

<sup>225</sup> *Id.*, p. 996.

<sup>226</sup> *Id.*, p. 995.

are the least of their worries. Criminal defense attorneys wear multiple hats: social worker, therapist, counselor, confidant, and attorney. The expectations of a criminal lawyer are high, and the limitations on our time and resources make it difficult to deliver on those expectations. Beyond that, listening day after day to tragic stories of human-induced violence, racism, injustice, and inequality adds an additional layer of trauma to an already difficult job.

The legal profession has been aware of dysfunction in its membership for decades. According to the blunt assessment of the National Task Force on Lawyer Well-Being:

Historically, law firms, law schools, bar associations, courts, and malpractice insurers have taken a largely hands-off approach to these issues. They have dealt with them only when forced to because of impairment that can no longer be ignored. . . . we have not done enough to help, encourage, or require lawyers to be, get, or stay well. However, the goal of achieving increased lawyer well-being is within our collective reach. The time to redouble our efforts is now.<sup>227</sup>

It is only in the last few years that the ABA has highlighted the grave physical and mental health statistics among lawyers and raised an alarm about the need for reform in the profession.

## 4. The Pandemic Effect

The pandemic added to the already toxic mix of factors that put our health at risk. Conditions such as isolation, remote work, shuttered courtrooms, and the rapid spread of the virus through the criminal courts and jails rendered lawyers more vulnerable. According to Azita Ghafourpour, a San Francisco attorney with years of experience in treatment courts, the rapid shift to online court and the shutdown of the Hall of Justice have been both a convenience and a curse. The obvious ease of working from home also means that the workday has no beginning, no middle, and no end. According to Ghafourpour, without those divisions, it is not uncommon to work all day without taking a break. Meanwhile, lawyers have felt pressure to be available at all hours and are expected to do more, such as participate in remote seminars and training sessions that they would never have been required to attend in person.

The work itself has also been complicated by the pandemic. When clients don't appear in court or meet with their lawyers and clinicians, it becomes more difficult to resolve charges and assess participants for treatment. This can result in long delays and a disconnect in meeting the needs of participants. Clients also fall off the radar and wind up subject to bench warrants or, worse yet, as Judge Waller recounted, die on the streets. Ghafourpour noted that remote case conferences in treatment courts are less effective. The parties are more

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<sup>227</sup> Path to Lawyer Well-Being, p. 11.

distractible, and more distracted, than when they are actually sitting in a team meeting. The team dynamic and interaction among the various disciplines is lost. Importantly, it is difficult for virtual court appearances to capture the magic of the personal interaction between judge and client, which is the hallmark of a therapeutic courtroom.

In addition to these stressors, the lack of residential treatment beds—exacerbated by the pandemic—led to clients staying in jail for excessive periods of time or being released to the streets with no services in place. Treatment courts are often a defendant’s last chance to connect to treatment, to find community, and to get positive reinforcement on the journey to recovery. “If we don’t do something, then what?” Ghafourpour said. “People need the right services and supports. As lawyers, when we can’t provide that, it leaves us feeling powerless.”

The unique combination of both individual and institutional risk factors for lawyer distress, compounded by the effects of the pandemic, makes us susceptible to suffering from both burnout and compassion fatigue. In Section B, we explore the ways that stress affects our bodies in the short term and how chronic stress can impact our lives outside of the office.

## **B. THE NEUROBIOLOGY OF STRESS**

*“Chronic fight, flight, or freeze reactions become ingrained in our nervous system, making us inclined to perceive a threat where one does not exist. This means we react instead of respond, act instead of reflect, speak instead of think, and accuse instead of consider, and that we do so in a way that is highly inflammatory to all aspects of our physical body. In short, we make ourselves mentally and physically ill.”<sup>228</sup>*

Left unaddressed, chronic stress can cause serious mental health and physical health problems and even send lawyers looking for refuge in inappropriate relationships or pain-numbing substances. More than that, continuous, uninterrupted stress on our bodies can impair our cognitive functioning and diminish our problem-solving and critical thinking abilities—the very skills we count on to be competent attorneys.

### **1. Responses to Stress**

Our biological response to stress is an evolutionary adaptation that serves us well. When confronted with a threat or a dispute, the “fear center” of our brain called the amygdala activates our central stress response system. Our bodies go into a state of high alert commonly known as “fight, flight, or freeze” mode. This prompts a series of neurological and chemical reactions designed for our survival. The responses take place in our autonomic nervous system, which is divided into the sympathetic and parasympathetic systems. The sympathetic nervous system acts as a gas pedal, increasing our heart rate, pulse, and

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228 Norton et al., “Burnout and Compassion Fatigue,” p. 992.



respiration and causing a spike in blood sugar. It increases blood flow to the muscles in our arms and legs, our pupils dilate, and we release the stress hormones adrenaline and cortisol. Our bodies are armed for battle.<sup>229</sup>

When the threat passes, our parasympathetic nervous system engages and acts as a brake, slowing down our heart rate, pulse, and respiration and conserving sugars that give us energy. The parasympathetic nervous system is governed by the vagus nerve, the longest and most complex of our cranial nerves. It runs from the brain through the face and thorax and down to the abdomen and acts as a freeway carrying information between the organs of the body and the brain. The vagus nerve controls the body's relaxation system and counteracts the stress response produced by the sympathetic nervous system. The parasympathetic nervous system calms the stress hormones and puts us in a relative state of relaxation.<sup>230</sup>

Under normal conditions, threats are intermittent. For lawyers who appear in court daily, however, the perception of threat is constant. When we enter a courtroom and argue, fight, disagree, or blame, we activate the stress response. If our relaxation mechanism does not have an opportunity to return the body to a resting state, we are at risk of living in that heightened state. Over time, the body's response can become generalized, putting us in a constant vigilant and reactive state. That uncontrolled negative cycle eventually erodes our ability to solve problems and resolve conflicts, which can compromise our skills as lawyers.<sup>231</sup>

## 2. Burnout and Compassion Fatigue

Criminal defense attorneys are at risk of developing burnout and compassion fatigue—two related conditions that can exist individually or together. It is important to understand the nuances between them in order to recognize our own symptoms and counteract the effects of stress.

Burnout is a state of emotional, mental, and physical exhaustion brought on by prolonged work stress. It stems from a gap between expectations and outcomes or situations where perceived demands are greater than perceived resources. Burnout is caused by a number of factors, including long hours, lack of support, lack of control over the job, high levels of scrutiny, unclear job expectations, and a lack of resources. The condition is characterized by a diminished interest in work, decreased sense of personal accomplishment, increased cynicism, and loss of personal identity. It may result in fatigue, anxiety, loss of hope, feelings of detachment, and reduced performance and productivity. Burnout can happen in any job at any level and is connected to the demands rather than the nature of the job.<sup>232</sup>

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229 Jennifer K. Johnson, "The Price of Empathy: Learning to Cope with Trauma in the Criminal Courtroom," Chapter 1 of *Suicide and Its Impact on the Criminal Justice System*, Elizabeth Kelley and Francesca Flood, Eds., ABA Book Publishing (2021), pp. 11–12.

230 *Id.*, p. 12.

231 Norton et al., "Burnout and Compassion Fatigue," p. 992.

232 Johnson, "The Price of Empathy," pp. 12–13.

Compassion fatigue is the cumulative physical, emotional, and psychological effect of exposure to traumatic stories when working in a helping capacity. It is sometimes called secondary or vicarious trauma and is described as “the emotional residue or strain of exposure to working with those suffering from the consequences of traumatic events.”<sup>233</sup> Unlike burnout, compassion fatigue is directly related to the content of the material rather than job conditions.<sup>234</sup>

### 3. Signs, Symptoms, and Consequences of Compassion Fatigue

The signs and symptoms of compassion fatigue are wide ranging and can be divided into three domains: emotional symptoms, physical symptoms, and cognitive symptoms. Emotional symptoms of compassion fatigue include chronic anxiety, self-doubt, inexplicable guilt and shame, withdrawal and isolation, irritability and anger, powerlessness, and a feeling of numbness. People suffering from compassion fatigue are overwhelmed by small challenges and may have persistent intrusive concern about cases and clients.<sup>235</sup>

In response to these symptoms, we may engage in self-destructive emotional regulation strategies. We may turn to the numbing effects of drugs and alcohol or engage in other forms of self-medication such as sexual compulsions, reckless spending, gambling, and binge eating. The emotional symptoms of compassion fatigue can also lead us into transient relationships or extramarital affairs or otherwise interfere with our primary relationships. The high rate of divorce among attorneys is evidence that these strategies of coping with work stress can contribute to trouble at home.

Physical symptoms of compassion fatigue include changes in breathing, changes in heart rate, difficulty sleeping, problems of the immune system, changes in appetite, decreased libido, headaches, and chronic musculoskeletal pain. These symptoms come about because of the overactivation of the autonomic nervous system, which directs the body to produce adrenaline and cortisol and puts the body in perpetual fight, flight, or freeze mode.<sup>236</sup>

Over time, these physical symptoms can translate into serious medical problems. Excess adrenaline and cortisol can cause digestive problems such as ulcers, acid reflux, ulcerative colitis, and irritable colon. Chronic stress affects the circulatory system, leading to high blood pressure, heart disease, high cholesterol, abnormal heart rhythms, and stroke. Our respiratory system may also be impacted, causing ailments such as asthma, allergies, and pneumonia. Chronic inflammation caused by stress can lead to a compromised immune system.<sup>237</sup>

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233 The American Institute of Stress website, “Definitions,” <https://www.stress.org/military-for-practitionersleaders/compassion-fatigue>

234 Johnson, “The Price of Empathy,” p. 13.

235 *Id.*, p. 13.

236 *Id.*, pp. 13–14.

237 *Id.*, p. 14.

Cognitive symptoms are the third domain of compassion fatigue symptoms and are very concerning, given the nature of the work we do as attorneys. Cognitive symptoms include rigid, black-and-white thinking; difficulty concentrating; confusion and memory loss; inability to recognize cause and effect; loss of sense of direction and purpose; minimization of problems; lack of insight; and preoccupation with events and stressors that cannot be controlled.<sup>238</sup> Given the demands of the profession, we rely on our ability to think clearly and to problem solve. When those skills are impaired, we risk compromising our duty to provide competent representation.

Too often, we excuse, minimize, or ignore the symptoms of burnout and compassion fatigue and just tough it out: *I can handle it, this is just part of the job, self-care is nice but I don't have time, I'm not good at meditation, I haven't seen a doctor in years.* Because these conditions develop over time, the symptoms may be subtle and changes may happen quietly and incrementally. Lawyers may not realize anything is wrong. Worse yet, they may think these signs and symptoms of compassion fatigue are normal. The profession conditions us to think this way, and the culture of the criminal law reinforces it. We are also surrounded by people who are responding in a similar way and may be adopting similar maladaptive coping strategies. The ubiquitous image of the drunken lawyer is real, and we have all experienced it: *Good verdict? Let's have a drink. Bad verdict? Let's have a drink!* For many, the isolation of the pandemic stripped away the social aspect of easy escape mechanisms, leaving a reliance on self-numbing in stark relief.

Whether or not we see it, the risk to our health and mental health is very real. By understanding how our bodies react to threats, we can learn to counterbalance stress in ways that allow us to thrive in our profession rather than being made sick by it. In Section C, we turn to treatment courts and look at how the unique dynamics anchored in the philosophy of therapeutic jurisprudence can act as both a risk factor for distress and a resilience factor that buffers us from the negative consequences of the job.

## **C. COLLABORATIVE JUSTICE AS A RISK FACTOR AND A RESILIENCE FACTOR**

*"There is a cost to caring."*<sup>239</sup>

The movement toward treatment courts that started in the 1990s was a response to the behavioral health crisis in our criminal justice population. Public policy failures in both mental health and criminal justice created an influx of people whose crimes were directly or indirectly related to unmet social service needs. Treating the root causes of that behavior became a necessary component of our criminal legal system.

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<sup>238</sup> Norton et al., "Burnout and Compassion Fatigue," p. 989.

<sup>239</sup> Charles R. Figley, Ed., *Compassion Fatigue: Coping with Secondary Traumatic Stress Disorder in Those Who Treat the Traumatized*, Taylor & Francis (1995), p. 2.

The intensity of working in a treatment court and the concentration of clients with serious mental health and physical health issues pose additional risks for defense lawyers. At the same time, the therapeutic atmosphere of these courts offers much-needed relief from the day-to-day grind of traditional criminal courtrooms.

## 1. Risk Factors for Defense Attorneys

Before defense lawyers even step into a treatment court, many face resistance from within their own offices. Management and other colleagues may not understand how problem-solving courts work, may not agree with the philosophy of these programs, and may even disparage or mistrust the attorneys who practice in them. Formal or informal hierarchies are embedded in many public defender offices based on a warrior culture where trial work is prized and rewarded over all else. Collaborating across the aisle with a team of professionals to solve problems is often not valued in the same way. Lawyers assigned to treatment courts generally make up a tiny minority of office staff, and so are isolated from peers and distanced from the traditional practice of criminal defense. The novelty of the role and the relatively small number of attorneys who practice in this area mean that we often miss out on the collegiality and camaraderie of defense practice.

Beyond that, once the lawyer steps into a treatment court, the risk factors for distress begin to accumulate. Unlike a regular criminal docket, where a defendant has a fairly predictable and time-limited path to resolution of the charges, treatment courts require participants to make frequent court appearances, and their winding journey to stability and sobriety can take years. Individualized treatment takes center stage in treatment courts. So as long as the client is in treatment, the criminal charges they face are no longer the focal point of the court proceedings.

The emphasis on client well-being requires defense lawyers to forge deeper and more personal professional relationships with the court participants than they might in another context. In fact, the entire courtroom is witness to the struggle of a population whose lack of access to community-based behavioral health treatment landed them behind bars. These clients often live with layer upon layer of trauma and misfortune, and defense counsel experience these traumas vicariously. Even in the best of times, it is common for treatment court lawyers to see clients resume using drugs and alcohol, overdose, commit suicide, or fall victim to violence on the streets. The pandemic heightened those risks.

For treatment court clients, remote court appearances and treatment during the pandemic came with some advantages—no need to find child care or transportation and no need to skip work for an entire day to sit in court. But the impact was still devastating. As noted above, the shutdown abruptly ended personal interaction with the judge, visits with lawyers, in-person treatment with therapists, and engagement with other program participants. No one was

spared, but particularly for those struggling to maintain sobriety, the already difficult journey to recovery was made that much harder. And, as Waller and Ghafourpour noted, the heavier burden on clients has affected the entire treatment court framework.

## 2. Resilience Factors for Defense Attorneys

While there is a cost to caring, treatment courts may be a welcome antidote to the traditional criminal justice process. Because treatment courts are by definition nonadversarial, the process provides relief for lawyers. Prosecutors, defense attorneys, and judges are allowed to put aside the instinct to argue, object, overrule, and fight in favor of finding common purpose and working together. While this may not come naturally to criminal lawyers, it may play a key role in reducing the stress that leads to secondary trauma, because being adversarial runs counter to our biology.

As noted earlier, working as a treatment court lawyer can lead to isolation inside public defender offices. But the dynamics of the court provide a different—and potentially healthier—type of camaraderie. Beyond escaping the stress of the adversarial process, being part of a multidisciplinary group of professionals working to solve the challenges of a high-need population often provides a sense of purpose and a measure of comfort to counsel. In a traditional criminal case, attorney-client communications would never be shared among the parties. But information sharing is essential to the success of treatment courts. However unintentional, that may provide a relief valve for attorneys and judges who are exposed to the intimate traumas and struggles of clients and witnesses. The ability to process painful information with the other members of a treatment court team allows for a measure of closure not possible in the regular criminal justice process. It provides a protective antidote to what might otherwise become vicarious trauma.

An additional factor that can build resilience in treatment court defense attorneys is the opportunity to participate on oversight boards and steering committees that help guide the courts toward greater success. These generally comprise lawyers, judges, treatment professionals, members of the community, local elected officials, and law enforcement, among others. Working with a diverse set of stakeholders committed to resolving key social issues—lack of adequate care, homelessness, poverty, mental illness, and addiction—is empowering and can foster a sense of optimism and hope in lawyers who may be short on both.

Azita Ghafourpour noted that treatment courts also empower the participants. By asking clients “*What happened to you?*” rather than “*What is wrong with you?*” these courts encourage clients to tell their stories. Giving treatment court participants the gift of narrative autonomy is humanizing and humbling for everyone in the courtroom. Transparency between the participant and the court team helps reduce the stigma of mental health and substance use disorders.

Open communication also allows lawyers to let their guard down and come together across the criminal justice divide to work toward a common goal: to give every participant the opportunity to live a meaningful life in the community free from criminal justice involvement.

Lawyers assigned to problem-solving courts are the keepers of a great secret. Collaborative justice is about *potential*, not *pathology*, and the process is infused with possibility. For every tragedy a treatment court lawyer can point to, there is an equally powerful narrative of triumph in the face of tremendous odds. That fact alone may provide the resilience a lawyer needs to come to work every day in a treatment court.

### 3. Prevention and Mitigation

By acknowledging the risk factors that come with working in the justice system and facing our own vulnerability as lawyers, we can learn to build resilience. The negative outcomes described in this chapter are not inevitable. In fact, with proper awareness and attention, they are avoidable.

The April/May 2022 issue of the *ABA Journal* featured a cover story entitled “Stress Busters: 40 Wellness Tips to Help Lawyers Cope with Job Pressure.”<sup>240</sup> Clearly, attorney wellness is top of mind in the profession, and resources for attorneys are readily available and growing. The fact that this topic is so prevalent in contemporary literature about lawyers will go far to destigmatize mental health in the profession and encourage professionals to seek help. Likewise, a good understanding and awareness of the neurobiology of stress will alert lawyers to physical and emotional distress before it leads to symptoms of burnout and compassion fatigue. Early intervention is key.

In addition to the valuable tips proposed by the ABA, we can take other simple steps to mitigate the consequences of chronic stress or prevent symptoms altogether. While these examples are by no means exhaustive, they are realistic, achievable, and effective. For example, defense attorneys should make every effort to maintain a strong supportive social network outside of the office and engage in activities and hobbies that are *not* work related. Being surrounded by work colleagues on personal time inevitably leads us right back to discussing the job. We can and should consciously and purposefully draw good boundaries between work time and personal time. In addition to establishing a good work-life balance, we need to set reasonable expectations of ourselves and our cases. It is all too easy to get consumed in the work and subordinate our own health and well-being to the needs of our clients. We should purposely take time off that is commensurate with the nature of the work.

Lawyers can and should learn to incorporate simple stress reduction techniques during the workday to alleviate stress in the moment. Self-care exercises like mindfulness and meditation can be practiced any time during the

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<sup>240</sup> “Stress Busters: 40 Wellness Tips to Help Lawyers Cope with Job Pressure,” *ABA Journal*, Vol. 108, Issue 2 (April/May 2022).

day to engage our parasympathetic nervous system. By stimulating the vagus nerve discussed in Section B, we can set the body's natural relaxation system in motion and coax it out of chronic fight, flight, or freeze mode.

Along with focusing on our own well-being, we should work together to hold our profession accountable. We are at a crossroads. It is incumbent upon us to insist that our agencies and institutions evolve and prioritize the health and wellness of the workforce. From the top down, our workplaces need to promote self-care and train management accordingly. Vacation policies should reflect a willingness to give lawyers adequate time away from the office to recover and return with renewed hope and energy. Our work environment should be collaborative and supportive, with adequate staffing and resources to meet the demands of the work. We need to create a culture of compassion where lawyers are free to admit that they need help without fear of negative repercussions to the job. The work culture in a public defender office may tilt toward battle metaphors, but we should not feel that we are fighting a battle when we're not even in the courtroom. In the office, we should feel safe.

Lawyers working in the justice system are a tough population to reach, and the profession of law is slow to evolve. The pandemic heightened our individual vulnerabilities and further pulled back the cloak on a profession in desperate need of change. As we emerge into a changed world, we have no choice but to address the long-simmering physical and mental health crisis in the profession and find ways to support the lawyers that allow the criminal legal system to function. We strive to be good lawyers, and we deserve to be healthy ones.

## **XIII. PRACTICE GUIDANCE: PROFESSIONAL RESILIENCY**

### **A. LEAN INTO YOUR DRUG COURT TEAM**

- Rely on and use the expertise of the other multidisciplinary professionals on your team.
- Participate on oversight boards or steering committees that help guide the courts toward greater success.

### **B. WORK-LIFE BALANCE MATTERS**

- Maintain a strong, supportive social network outside of the office, and engage in activities and hobbies that are not work related.
- Set reasonable expectations of yourself and your cases.
- Take time off that is commensurate with the nature of the work.

## C. PROMOTE SELF-CARE IN THE WORKPLACE

- Incorporate simple stress reduction techniques during the workday to alleviate stress in the moment—mindfulness and meditation.
- We should work together to hold our profession accountable, such as training management, demanding adequate staffing and resources, and creating a culture of compassion.

## CONCLUSION

Defense counsel should successfully practice in drug court without forgoing any ethical, legal, or practical duties that they have in a traditional criminal court. While being active members of drug court teams, defense counsel have a dual responsibility to advise and advocate for legal outcomes while also supporting the possibilities of behavioral change. This role is more than legal advocacy. It provides the opportunity to create new policies and assist clients in other ways: by creating a life of recovery, wellness, and reintegration into a safer community.

While this work can be inspiring, there is always a toll to serving others. Maintaining professionalism, meeting legal and ethical obligations, and working in a team—while also carrying the weight of a client’s burden—is hard, but it’s worth it. To be truly successful, defense counsel must find a way to maintain health and well-being while balancing the innumerable needs of their clients. This is arguably as important to representing a client as any other legal standard or requirement.

We hope the chapters in this monograph provide assistance to every defense attorney, whether they be new or a seasoned professional in a drug court. There will always be limits on how much guidance can be provided in writing. It is not inclusive of every legal issue and scenario or exclusive to the ideas of the individual contributors and authors. The nuances of this practice are always evolving and require continued commitment to understanding the core competencies and principles of the drug court model. Defense counsel should use this monograph as a starting point for effective advocacy.



# RESOURCES FOR FURTHER REFERENCE

## General Resources for Defense Attorneys Working in Treatment Courts

- *Essential Lawyering Skills: Interviewing, Counseling, Negotiation, and Persuasive Fact Analysis*, 6th Ed. (2020), Stefan H. Krieger, Richard K. Neumann Jr., and Renee McDonald Hutchins, Wolters Kluwer.
- National Association of Criminal Defense Lawyers:  
<https://www.nacdl.org/>
- Substance Abuse and Mental Health Services Administration (SAMHSA) Practitioner Training:  
<https://www.samhsa.gov/practitioner-training>
- Center for Justice Innovation:  
<https://www.courtinnovation.org/>

## All Rise (Founded as NADCP) Publications

- *Adult Drug Court Best Practice Standards*, Vol. 1 and 2 (text revision, 2018).  
<https://allrise.org/publications/adult-drug-court-best-practice-standards/>
- *A Practitioner's Guide to Constitutional and Legal Issues in Adult Drug Courts*, All Rise and Center for Justice Information (2023).  
<https://allrise.org/publications/constitutional-and-legal-issues-in-adult-drug-courts/>
- *Case Law*, an up-to-date webliography of case law pertaining to treatment court operations, by Hon. William G. Meyer (ret.), Hon. Peggy Davis (ret.), and Hon. Margaret Spencer (ret.).  
<https://allrise.org/laws/>
- *Defining Drug Courts: The Key Components*, Drug Court Standards Committee (1997).  
<https://allrise.org/publications/defining-drug-courts-the-key-components-2/>
- *The Drug Court Judicial Benchbook*, Douglas B. Marlowe and Hon. William G. Meyer (2011, 2017).  
<https://allrise.org/publications/the-drug-court-judicial-benchbook/>

- Drug Court Practitioner Fact Sheets:
  - *Targeting the Right Participants for Adult Drug Court* (February 2012), Douglas B. Marlowe.  
<https://allrise.org/wp-content/uploads/2023/05/Targeting-The-Right-Participants.pdf>
  - *Alternative Tracks in Adult Drug Courts: Matching Your Program to the Needs of Your Clients* (February 2012), Douglas B. Marlowe.  
<https://allrise.org/publications/alternative-tracks-in-adult-drug-courts/>
- *Journal for Advancing Justice*.  
<https://allrise.org/resources/the-journal-for-advancing-justice/>

## National Drug Court Resource Center Publications

- *Painting the Current Picture: A National Report on Treatment Court in the United States*, Kristen DeVall, Ph.D., Christina Lanier, Ph.D., and Lindsay J. Baker, M.A., National Drug Court Resource Center (2022).  
<https://ndcrc.org/pcp/>

## Treatment Courts in Journals and the Media

- *America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform*, Cynthia H. Orr, John W. Hall, Norman L. Reimer, Edward A. Mallett, Kyle O'Dowd, and Angelyn G. Frazer (2009), National Association of Criminal Defense Lawyers.  
<https://www.nacdl.org/Document/AmericasProblemSolvingCourtsCriminalCostsofTreatme>
- "Taking Stock of Drug Courts: Do They Work?" Matthew W. Logan and Nathan W. Link, *Victims & Offenders*, Vol. 14, Issue 3 (2019):  
<https://www.tandfonline.com/doi/full/10.1080/15564886.2019.1595249>

## Mental Illness and Treatment Courts

- *Therapeutic Justice: Crime, Treatment Courts, and Mental Illness*, Karen A. Snedker, Springer (2018).
- "Criminalization of the Mentally Ill: The Challenging Role of the Defense Attorney in the Mental Health Court System," Christin E. Keele, *University of Missouri-Kansas City Law Review*, Volume 71 (2002).
- "Toward a New Understanding of Mental Health Courts," Carol Fislser, *Judges' Journal*, Volume 54, Issue 2:  
[http://www.courtinnovation.org/sites/default/files/documents/JJ\\_SP15\\_54\\_2\\_Fislser.pdf](http://www.courtinnovation.org/sites/default/files/documents/JJ_SP15_54_2_Fislser.pdf)

- *The Impact of Mental Health Court on Recidivism and Other Key Outcomes: An Evaluation of the King County District Court Regional Mental Health Court*, Paula D. Henzel, Jim Mayfield, Callie Black, and Barbara E. M. Felver (2018), Washington State Department of Social and Health Services: <https://www.dshs.wa.gov/ffa/rda/research-reports/impact-mental-health-court-recidivism-and-other-key-outcomes>
- “Mental Health Courts: Bridging Two Worlds,” Hon. Matthew J. D’Emic, *Touro Law Review*, Vol. 31, No. 3 (July 2015): <https://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?article=2654&context=lawreview>

## References on Mental Health and Substance Use Disorder

- *Diagnostic and Statistical Manual of Mental Disorders*, 5<sup>th</sup> ed. (DSM-5) (2013), American Psychiatric Association.
- American Society of Addiction Medicine (ASAM): <https://www.asam.org/>

## ABA Model Rules of Professional Conduct

Referred to in this work: 1.1, 1.2, 1.3, 1.4, 1.6, 1.7, 1.8, 1.14, 2.1, 3.3, and 5.3  
[https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/)

## Case Law

- *State v. Sykes*, 695 N.W.2d 277, 279 Wis. 2d 742, 2005 W.I. 48 (2005).
- *State v. Cassill-Skilton*, 94 P3d 407, 122 Wash. App. 652 (Ct. App. 2004).
- *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).
- *State v. Abd-Rahmaan*, 111 P3d 1157, 154 Wash. 2d 280 (2005).
- *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

## 2020 Social Movement

- “Black Lives Matter May Be the Largest Movement in U.S. History,” *New York Times*, July 3, 2020: <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>

## Opioid Epidemic

- “Justice Department Finds that Pennsylvania Courts Discriminated Against People with Opioid Use Disorder,” *Justice News*, U.S. Department of Justice, February 7, 2022:  
<https://www.justice.gov/opa/pr/justice-department-finds-pennsylvania-courts-discriminated-against-people-opioid-use-disorder>
- “U.S. Attorney’s Office Settles Disability Discrimination Allegations with the Massachusetts Trial Court Concerning Access to Medications for Opioid Use Disorder,” press release, U.S. Attorney’s Office, District of Massachusetts, March 24, 2022:  
<https://www.justice.gov/usao-ma/pr/us-attorney-s-office-settles-disability-discrimination-allegations-massachusetts-trial>
- “The Opioid Epidemic: A Crisis Years in the Making,” *New York Times*, October 26, 2017:  
<https://www.nytimes.com/2017/10/26/us/opioid-crisis-public-health-emergency.html>
- “‘The Numbers Are So Staggering.’ Overdose Deaths Set a Record Last Year.” *New York Times*, November 29, 2018:  
<https://www.nytimes.com/interactive/2018/11/29/upshot/fentanyl-drug-overdose-deaths.html>
- “How to Win a War on Drugs,” Nicholas Kristof, *New York Times*, September 22, 2017:  
<https://www.nytimes.com/2017/09/22/opinion/sunday/portugal-drug-decriminalization.html?ref=collection/sectioncollection/opinion&action=click&contentCollection=opinion&region=rank&module=package&version=highlights&contentPlacement=6&pgtype=sectionfront>
- “Drug Deaths in America Are Rising Faster Than Ever,” *New York Times*, June 5, 2017:  
[https://www.nytimes.com/interactive/2017/06/05/upshot/opioid-epidemic-drug-overdose-deaths-are-rising-faster-than-ever.html?\\_r=0](https://www.nytimes.com/interactive/2017/06/05/upshot/opioid-epidemic-drug-overdose-deaths-are-rising-faster-than-ever.html?_r=0)
- *Chasing Heroin*, Frontline, PBS (video):  
<https://www.pbs.org/wgbh/frontline/film/chasing-heroin/>









**Treatment  
Court Institute**  
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**Impaired  
Driving Solutions**  
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**Justice  
for Vets**  
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**Center for  
Advancing Justice**  
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All Rise is the leading training, membership, and advocacy organization for advancing justice system responses to individuals with substance use and mental health disorders. All Rise impacts every stage of the justice system, from first contact with law enforcement to corrections and reentry, and works with public health leaders to improve treatment outcomes for justice-involved individuals. Through its four divisions—the **Treatment Court Institute, Impaired Driving Solutions, Justice for Vets**, and the **Center for Advancing Justice**—All Rise provides training and technical assistance at the local and national level, advocates for federal and state funding, and collaborates with public and private entities. All Rise works in every U.S. state and territory and in countries throughout the world.

Founded as the National Association of Drug Court Professionals (NADCP) in 1994, All Rise has been at the forefront of justice system transformation for nearly three decades. As the leader of the treatment court movement, All Rise helps prove that a combination of evidence-based treatment and accountability is the most effective justice system response to individuals with substance use and mental health disorders. All Rise has trained over 800,000 public health and public safety professionals, and the number of treatment courts in the United States has grown to more than 4,000, helping more than 1.5 million people access treatment.

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