

Responses to Participant Behavior

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Overview/Goals

- ▶ Review the principles/best practices of behavior change through discussion and demonstrations
- ▶ Identify what the judge and team need to know in staffing and how to address incentives, sanctions and therapeutic adjustments with team members and participants
- ▶ Identify what are optimal PSC practices and procedures for effectuating positive behavioral change

Frequently Used Terms

- ▶ Sanctions – a PSC response to decrease or stop behavior
- ▶ Incentives – a PSC response to motivate/increase/initiate behavior
- ▶ Therapeutic Adjustments – treat the disease of addiction/alcoholism
- ▶ Supervision/Drug tests – monitors participants' behavior

Drug Court Key Components and Mental Health Court Essential Elements

Drug Court Key Component Six

A coordinated strategy governs Drug Court responses to participants' compliance.

Drug Court Key Component Seven

Ongoing judicial interaction with each Drug Court participant is essential.

Mental Health Court Essential Element Nine

Criminal justice and mental health staff collaboratively monitor participants' adherence to court conditions, offer individualized graduated incentives and sanctions, and modify treatment as necessary to promote public safety and participants' recovery.

Effectuating Positive Change

- ▶ To effectuate positive change in their participants, Drug Courts must impose appropriate incentives and sanctions.
- ▶ "Failing to punish misfeasance inevitably makes behavior worse, and failing to reward accomplishments makes those accomplishments less likely to occur."

NDCI Drug Court Judicial Benchbook (2017), Chapter 7, p. 143.

Punishment and Positive Reinforcement

- ▶ Punishment and positive reinforcements serve complimentary functions.
- ▶ Punishment reduces undesirable behaviors such as substance abuse and crime.
- ▶ Positive reinforcement increases desirable behaviors such as treatment attendance and progress on employment or education goals
- ▶ Punishment and positive reinforcement are most likely to be effective when used in combination.

(Defulio, 2013)

Utilization of Incentives and Sanctions to Positively Impact Behavioral Change and Successful Outcomes

- ▶ The goals of improving PSC participants adaptive functioning and reducing their anti-social behavior makes it essential that there is reliable and close monitoring of their conduct and that PSC program policies and procedures facilitate the imposition of certain and immediate rewards for achievements as well as sanctions for infractions.
- ▶ Consequences must be fair, predictable, consistent and without regard to a person's gender, race, nationality, ethnicity, limited English proficiency, disability, socio-economic status or sexual orientation and administered consistently with evidence-based principles of behavior modification.

(Illinois Problem-solving Courts Standard 8.2; NADCP Adult Best Practices Standards, Volume I, Standard IV, 2013)

4:1 Ratio - Incentives to Sanctions

- ▶ Focusing as much on incentivizing productive behaviors as on reducing undesirable behaviors results in significantly better PSC outcomes.
- ▶ A ratio of 4:1 incentives to sanctions in achieving better outcomes has been validated by research studies.
- ▶ Effects of punishment alone typically only last as long as the sanctions are forthcoming—undesirable behaviors often return significantly after the sanctions are withdrawn.

(Gendreau, 1996; Seno & Leip, 2001; Marlowe and Kirby, 1999; Marlowe and Wong, 2008)

Intensity/Magnitude of Incentives and Sanctions

- ▶ To be effective, the intensity of the incentives and sanctions in response to participant behavior must be appropriate.
- ▶ PSC program policies and procedures must set clear and measurable goals for progressing successfully through the program.
- ▶ Appropriateness of the application of incentives and sanctions must be correlated to the participant's level status in the program.

Progressive Sanctions

- ▶ Sanctions that are severe in magnitude can result in a *ceiling effect* where the program runs out of sanctions before treatment can take effect.
- ▶ Sanctions that are weak in magnitude can result in *habituation* where the participant becomes accustomed to and less responsive to punishment.
- ▶ Significantly better outcomes are achieved when sanctions increase progressively in magnitude in response to successive infractions.
- ▶ Gradually escalating sanctions for difficult goals gives treatment a chance to take effect and prepares participants to meet the increasing responsibilities of the program
- ▶ Most effective problem-solving court programs have a wide and creative range of intermediate-magnitude sanctions that can be ratcheted up and down in response to a participant's behavior.

(NADCP Adult Court Best Practice Standards, Vol. 1, Standard IV (2013))

Same Not Necessarily Fair

Treating everyone the same is no guarantee of fairness: the same incentive or sanction could have very different impacts on participants in differing life circumstances.

Proximal Goals

- ▶ Proximal goals are behaviors that:
 - (1) participants are already capable of engaging in, and
 - (2) are necessary for long term objectives to be achieved.
- ▶ Examples of proximal goals are attending treatment groups, attending court, doing drops, meeting with probation

Distal Goals

- ▶ Distal goals are long term in nature.
- ▶ Examples of distal goals are achieving and maintaining recovery, refraining from using mind altering substances, gaining employment, pursuing educational goals, and improving parenting skills.

Phase Specificity: Different Proximal and Distal Requirements

- ▶ Phase One: Initiation into treatment and supervision requirements
- ▶ Phase Two: Initiation into sustained sobriety
- ▶ Phase Three: Initiation into pro-social activities
- ▶ Phase Four: Aftercare planning and relapse prevention

Phase advancement tells the participants what behaviors are proximal and what behaviors are distal

Magnitude of Incentives and Sanctions

- ▶ Low magnitude incentives should generally be administered for proximal behaviors; high magnitude incentives for distal behaviors.
- ▶ Low magnitude sanctions should generally be administered for distal behaviors; high magnitude sanctions for proximal behaviors.

EXAMPLES:

- (1) Low Magnitude Incentive: Verbal praise and encouragement for attending counseling sessions.
- (2) High Magnitude Incentive: Reduced supervision requirements for engaging in prosocial behaviors like returning to school or obtaining gainful employment.
- (3) Low Magnitude Sanction: Essay or jury box for positive drop result
High Magnitude Sanction: Incarceration for missing a drop

Jail Sanctions

- ▶ "Jail sanctions are imposed judiciously and sparingly. Unless a participant poses an immediate risk to public safety, jail sanctions are administered after less severe consequences have been ineffective at deterring infractions. Jail sanctions are definite in duration and typically last no more than three to five days. Participants are given access to counsel and a fair hearing if a jail sanction might be imposed because a significant liberty interest is at stake."
 - ▶ Jail sanction are always appropriate to address willful, proximal behavior
- NADCP Adult Drug Court Best Practice Standards (2013), p. 28.

Procedural Fairness

- ▶ Policies and Procedures must be fair to the individual
- ▶ Policies and procedures must be clearly communicated
- ▶ Consequences must be set in advance—these are the target behaviors, these are the consequences, these are how they build over time
- ▶ Presumptive consequences with flexible application—if there is a good reason to override the presumptive application, that's OK
- ▶ If overriding the presumptive application—EXPLAIN WHY—the individual AND the other participants need to understand why
- ▶ Opportunity to be heard—participant allowed to confer with counsel and given a chance to explain before sanction
- ▶ Participants must be treated with respect and dignity

Procedural Fairness

- ▶ 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:
 - ▶ Given a reasonable opportunity to explain their side of the dispute;
 - ▶ Treated in an equivalent manner to similar people in similar circumstances; and
 - ▶ Accorded respect and dignity throughout the process.
- ▶ (Burke & Lebbin, 2007).

Perception of Fairness

- ▶ By tailoring incentives and sanctions within a predetermined range, you can make certain that your response to a particular type of behavior will have approximately the same impact on each person you supervise.
- ▶ In effect, you are making incentives and sanctions more fair.

Second Chances

- ▶ If other offenders observe you fail to follow through on a planned sanction (or if they hear about your decision second-hand), it will create the appearance that you're playing "favorites".
- ▶ It may also lead to an expectation that you will overlook their infractions as well. And when the judge doesn't, it will be the judge who is perceived as "unfair".

Changing Behavior

In order to bring about a change in behavior, an incentive or sanction needs to be:

- Certain
- Immediate
- Fair
- Of the appropriate intensity.

Drug Court Institute Review, 2(1), (1999), pg. 1-31.

Certainty

- ▶ Research indicates that the most important factor influencing the success of any behavioral intervention is certainty.
- ▶ Certainty requires CONSISTENT DETECTION—detection of the behavior and IMMEDIATE consequence.
- ▶ Certainty also requires RELIABLE DETECTION—the PSC team must have reliable access to critical information in order to determine an appropriate response to behavior

NDCI Drug Court Judicial Benchbook (2017), p. 143.

Certainty

- ▶ CERTAINTY, in the context of problem-solving courts, is the ratio of infractions to sanctions and the ratio of achievements to incentives.
- ▶ In behavioral analysis, this is referred to as the "schedule of reinforcement."
- ▶ The smaller the ratio of enforcement, the more consistent and enduring is the suppression of undesirable behavior and the encouragement of desired behavior.

EXAMPLE: If a participant is sanctioned every time he/she fails to attend a treatment session, the ratio is 1:1 or a fixed ratio-FR1. If the client is sanctioned for every two missed sessions, that is an FR2 schedule and so on.

(National Drug Court Institute Review, Volume 2, Issue 1 (1999; NDCI Judicial Benchbook (2017) p. 143).

Unearned Leniency--Fidelity to the PSC Model

- ▶ "Some Drug Court professionals may feel ambivalent about administering punishment. They may view their role as providing treatment and not policing misconduct. Although such sentiments may be appropriate for certain team members, such as defense counsel or clinicians, it is not appropriate for the Drug Court team as a whole. A critical function of any Drug Court is to closely monitor offenders and hold them meaningfully accountable for their behavior."

(NDCI Drug Court Benchbook (2017), p. 145.)

Impact of Unearned Leniency

- ▶ Unearned leniency manifests when, for example, a participant misses an appointment with probation to submit a urine sample, but the judge elects not to administer a sanction because he was in a good mood that day.
- ▶ This would shift the participant from an FR1 schedule to an FR2 schedule, and reduces the efficacy of the program.

Immediacy/Celerity

- ▶ After certainty, the second most important element of effective behavior modification is immediacy – often referred to as celerity.
- ▶ The effectiveness of a sanction or incentive declines dramatically as the length of time between the behavior and the response increases.
- ▶ During the delay, other behaviors will intervene and the sanction or incentive may become associated with those behaviors rather than the behavior requiring modification.

(NDCI Drug Court Benchbook (2017), p. 146.; National Drug Court Institute Review, II (1), p. 11-29)

Incorporating Immediacy/Celerity into Program Policies and Procedures

- ▶ Steps to help effectuate immediacy/celerity:
 - ▶ Frequent court appearances – during the first three to six months of the program, participants should appear in court no less frequently than once every two weeks
 - ▶ Constant communication among team members and flexibility to bring a participant into court on non-PSC court dates to address behavioral issues (i.e. relapse)
- * may be easier with Public Defender clients than with clients represented by private attorneys*
- ▶ Frequent, random and accurate drug testing

Impact of Judicial Interaction

- ▶ Studies confirm that Drug Court participants perceive the quality of their interactions with the judge to be among the most influential factors for success in the Drug Court Program.

(Farole & Cissner, 2007; Jones & Kemp, 2013; National Institute of Justice, 2006)

Impact of Judicial Interaction

- ▶ One study found that significantly greater reductions in crime and substance use were realized when the judges – rated by independent observers – were respectful, fair, attentive, enthusiastic and caring in their interactions with the participants in open court. Zweig (2012).
- ▶ In contrast, outcomes were significantly poorer for judges who were perceived as being arbitrary, jumped to conclusions, or not giving participants an opportunity to explain their side of the controversies.

(Farole & Cissner (2007).

Effective Judicial Interaction

- ▶ Program evaluations have reported that supportive comments from the Bench were associated with significantly better outcomes in Drug Courts
- ▶ On the other hand, stigmatizing, hostile, or shaming comments from the Bench were associated with poor outcomes.

(Senjo & Leip, 2001; Miethe (2000).

Judicial Tips

- ▶ Spend at least three minutes interacting with each participant in open court;
- ▶ Ask open-ended questions;
- ▶ Always allow the participant to express his or her point of view;
- ▶ Listen attentively;
- ▶ Engage in motivational interviewing whenever practicable;
- ▶ Always remember to point out the good – as well as bad - when the participant's behavior since last court appearance consists of both.

Judicial Tips Getting the Clients Engaged

- ▶ White Board
 - ▶ Inspirational Quotes
 - ▶ Keep it secular
 - ▶ Check your spelling
- ▶ Motivational Interviewing
 - ▶ Move from one-word answers to an actual conversation
- ▶ A-Team
- ▶ Step Jeopardy
 - ▶ Works equally well for clients engaged in secular support groups, i.e. Smart Recovery
- ▶ Stump the Drug Court Team
 - ▶ Steps
 - ▶ Currents Events
 - ▶ Music

Treatment and Accountability

- ▶ Treat sick behavior—we do not punish sickness.
- ▶ Punish bad behavior—use graduated sanctions to address distal infractions.
- ▶ Reward good behavior—use of positive reinforcement to encourage people to engage in behaviors we desire.

(Marlowe, NADCP Annual Conference 2018)

Non-Compliance versus Non-Responsiveness

- ▶ If a participant is a no call/no show for a counseling session or a urine screen, and the absence was unexcused, he or she may be engaged in willful NON-COMPLIANCE, warranting a sanction.
- ▶ If the participant is attending all required sessions, but is not responding to clinical interventions (i.e. still using drugs/alcohol), the participant may be NONRESPONSIVE to the treatment he or she is receiving warranting a change in the treatment plan.

▶ Scenario One Video – Staffing

Barry's Staffing on Response to Relapse – Video 1

- ▶ Judge gives each team member with information on relapse an opportunity to be heard.
- ▶ Each team member advocated his/her position without interruption.
- ▶ Judge faced question of which sanction (jail or public service) is more appropriate based upon participant behavior and history.

Scenario Two Video--Staffing

Demario's Eligibility Staffing Discussion

- ▶ Judge elicited opinions from each team member in a respectful manner
- ▶ Judge defused State's "fiery" objection to enrolling Demetrius and "angst" over no longer having veto power
- ▶ Judge noted probation not offering opinions and drew opinions out
- ▶ Staffing discussion focused on objective eligibility requirements
- ▶ Judge relied on objective eligibility requirements in making the final decision
- ▶ Judge respectfully acknowledged the differing opinions of team members

*BTW, this scenario is based upon an actual Drug Court participant who is doing very well in the program

Judge as Decision-Maker

- ▶ Due process and the canon of ethics demand that judges exercise independent discretion when resolving factual controversies, administering sanctions or incentives that affect a participant's fundamental liberty interests, or ordering the conditions of supervision. *Meyer* (2011).
- ▶ The judge may not delegate these responsibilities to other members of the team. For example, it is not permissible for a Drug Court team to vote on what consequences to impose on a particular participant unless the judge considers the results of the vote to be merely advisory.

(NADCP Adult Drug Court Best Practice Standards (2013), p. 23.)

Judge as Team Leader

- ▶ Maintain fidelity to the program policies and procedures
- ▶ Give every team member a voice—each has a unique and important perspective
- ▶ Elicit opinions and recommendations from each team member
- ▶ Set the tone and expect and require professionalism from all team members
- ▶ Protect the rights of the participants
- ▶ Act as the final decision-maker

Team Dynamics

- ▶ Each team member has a specific role
- ▶ Boundaries MUST be respected
- ▶ Disagreement is healthy and needed
- ▶ We all share common goals—Protect public safety and Promote successful program completion
- ▶ Understand other team members roles and ethics

Team Communication in Staffings

- ▶ Each team member is a subject matter expert and must be required to participate in staffing discussions.
- ▶ Judge must ensure that the "sabotager" and "dominator" dynamics do not occur in staffing.
- ▶ When determining eligibility, subjective opinions, speculation on motivation and willingness to change, and past failures on probation are inappropriate bases to deny someone enrollment in a PSC.
- ▶ Focus must be on the individual
- ▶ Sidebar discussions are to be discouraged
- ▶ Team members must understand and respect that the Judge is the final decision-maker

Target Population Eligibility/Exclusions

- ▶ Eligibility criteria MUST be defined objectively
- ▶ Specified in writing
- ▶ Communicated to referral sources
- ▶ NO to subjective criteria or personal impressions
- ▶ Eligibility assessed using validated risk-assessment and clinical assessment tools
- ▶ High risk/high need
- ▶ Evaluator trained and proficient in the administration of the tools and the interpretation of the results

(NADCP Adult Drug Court Best Practice Standards, Standard 1
Illinois Problem-solving Courts Standards, Standard 4.4)

▶ Scenario 3 Video

Due Process and Freddie

- ▶ Judge immediately accused Freddie of relapse without providing the participant with an opportunity to be heard.
- ▶ Genuine question as to the validity of the test result.
- ▶ Imposition of sanction without due process.
- ▶ Severity of the proposed sanction based upon the alleged violation and the participant's phase in the program.
- ▶ Use of terms "clean" and "dirty" versus "positive" and "negative" when referring to drug test results.

Scenario 4 Video

Due Process and Sandra

- ▶ Defense counsel reached out to Sandra to explain the team's staffing discussion and possible responses to the positive drop and her failure to disclose heroin use before she appeared in court.
- ▶ Sandra was given an opportunity to address the court and explain the circumstances.
- ▶ All team members—Judge, State, Defense Counsel, Probation and Treatment— addressed the gravity of the situation and supported a treatment response while acknowledging the possibility of a sanction going forward for her failure to be fully honest.
- ▶ The expectations of Sandra were clearly articulated to her and her commitment to follow the expectations was elicited.
- ▶ Other responses could have included stepping down from the bench to confer with the team, allowing a brief continuance and reserving a response to allow for further staffing

Staffing Considerations

- ▶ Who are they in terms of risk and need?
- ▶ Where are they in the program (phase)?
- ▶ Why did this happen (circumstances)?
- ▶ Which behaviors are we responding to (proximal or distal)?
- ▶ What is the response choice/magnitude?
- ▶ How do we deliver and explain the response?

Procedural Due Process

- ▶ Procedural due process is relaxed but not abrogated. A participant is entitled to a fair hearing commensurate with the imperiled interests.
- ▶ Procedural due process requires that they have a reasonable opportunity to present their side of the story and to present evidence.
- ▶ Procedural due process also gives the participant the right to counsel.

(Marlowe, NADCP Conference 2018)

Substantive Due Process

- ▶ Unwaivable.
- ▶ A participant has the right to be treated rationally, reasonably and fairly.
- ▶ The guiding standard is a rational basis test.
- ▶ A PSC response to a participant's behavior must be reasonably, logically and rationally related to the likelihood of recidivism, the nature of his/her crime or his/her rehabilitation.

(Marlowe, NADCP conference, 2018)

Scenario Five Video

Discussion of Phillip's New Charges

- ▶ Defense counsel was appointed and made available to Phillip for consultation.
- ▶ Bond on the petition was to be addressed after 402 admonitions were given and the participant consented to the judge continuing to participate in future staffing discussions.
- ▶ 402 admonitions were given and the new charges were continued for further staffing discussions.

Impact of New Charges for a PSC Participant

- ▶ Bring the new charges into the PSC for monitoring and resolution
- ▶ State file a Petition to Revoke Probation (or Petition to Renew Prosecution if deferred prosecution or Petition to Lift Stay on Mittimus if alternative disposition program) based upon the new charges and keep the Petition pending as a motivator for future compliance.
- ▶ State file a Petition and proceed to hearing at a later date.

What Is Required for Due Process?

Upon the filing of a petition, the Judge must ensure that the participant is informed of and understands:

- ▶ The specific allegations in the petition;
- ▶ That the participant has the right to a hearing with defense counsel present;
- ▶ At the hearing, the participant has the right to confront and cross-examine witnesses and to present witnesses and evidence in his/her behalf;
- ▶ At the hearing, the State must prove the alleged violation by a preponderance of the evidence;
- ▶ If admitting the petition, the court must determine that the evidence is sufficient to establish a probation violation and that the participant is knowingly, intelligently and voluntarily waiving his/her rights.

Role of the Judge

- ▶ The Judge can only continue to participate in staffing discussions if the participant is given Supreme Court rule 402 admonitions and the participant gives his/her consent to the Judge to participate in staffing discussions.
 - ▶ A PSC Judge should disqualify him/herself under the circumstances listed in Rule 63C (circumstances where the judge's impartiality might reasonably be questioned).
 - ▶ Disqualification isn't automatic and the PSC Judge must evaluate whether he/she can be fair and impartial or whether recusal is necessary.
 - ▶ A participant has the right to move for substitution of the PSC Judge pursuant to 725 ILCS 5/114-5(d)
- (Illinois Problem-solving Court Standard 9.3 and commentary)*

AND ALWAYS REMEMBER THE MOST IMPORTANT CONTRIBUTOR TO CHANGETHE CLIENT

- ▶ "Researchers have bemoaned the fact that inquiries of treatment outcomes over several decades have studied all the wrong elements – the models, techniques, and staff – while ignoring the most important contributor to change: the offender and his or her family. The obsessive question: **How do we get drug court participants sober?** – is answered simply: **'We don't.'** This common factors research is clear: **change rests with the clients. Drug court staff and community treatment providers have the responsibility of creating the structure and the atmosphere that are conducive to change.**"
- ▶ *Change-Focused Drug Courts: Examining the Critical Ingredients of Positive Behavioral Change*, by Michael Clark [National Drug Court Institute Review, Vol. III, Issue 2 (2001)], page 78.
