

Understanding Team Member Ethics in Treatment Court



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TEAM MEMBER ENGAGEMENT



36%

Cost Savings

The judge spends an average of 3 minutes or more per participants during status review hearings

Recidivism

153%

93%

Cost Savings

Defense attorney attends staffing

Treatment communicates with court via email

Recidivism

119%

171%

Cost Savings

Prosecutor attends staffing

Treatment attends court sessions

Recidivism

100%

All Team Members Attend Staffing

Recidivism

35%

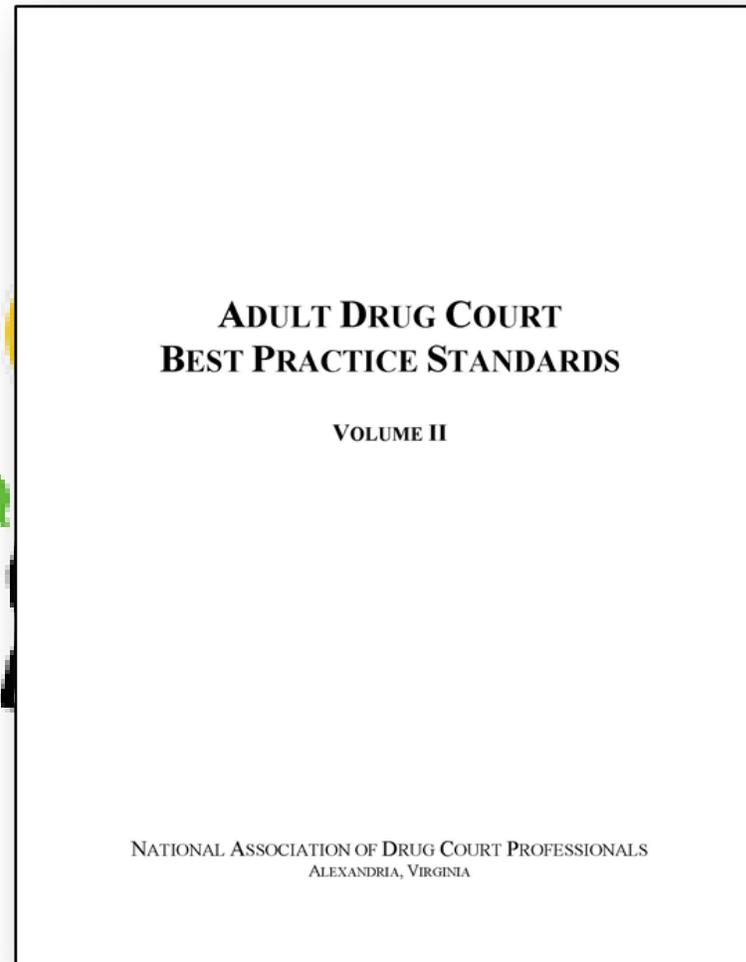
Recidivism reduction and cost savings relative to courts that do not follow these practises.

NADCP Adult Drug Court Best Practice Standards Standard VIII – Multidisciplinary Team



Interdisciplinary Education

Treatment providers must understand criminal justice issues



Criminal justice staff must understand treatment issues

NADCP Adult Drug Court Best Practice Standards

Standard VIII – Multidisciplinary Team



A dedicated, multidisciplinary team of professionals that . . .

- Manages the day-to-day operations
- Reviews participant progress
- Contributes observations and recommendations based on expertise
- Delivers and oversees the delivery of legal, treatment, and supervision services



Ethics in Treatment Court

The Legal Roles



JUDGE OVERVIEW



Relations with Participants

Ex Parte Contacts



RELATIONS WITH PARTICIPANTS



DO NOT take participants to support meetings

DO NOT visit participant homes

DO NOT invite participants to your home to play video games

DO NOT collect participant UAs

STAY IN YOUR LANE!

RELATIONS WITH PARTICIPANTS RECOMMENDATIONS



“But, I want to show my participants that I care...”

If there was a picnic and the district attorney, defense counsel, law enforcement, other members of the drug court team, and drug court participants were present and the judge made a cameo appearance and said a few words of encouragement, such conduct would not violate the Canons.

DEFENSE OVERVIEW



*Who is the
Client?
Confidentiality*

DEFENSE ATTORNEY OBLIGATIONS



To competently represent a client in treatment court, a defense attorney must be familiar with core treatment court concepts:

- Treatment
- Eligibility criteria and enrollment processes
- Policies and procedures
- Incentives and sanctions
- Due process issues
- Sentencing alternatives (advocating courts to enroll participants)
- Best Practice Standards



DEFENSE ATTORNEY ROLE



- Ensure participant rights are protected (including *ex parte* communication)
- Advocate for participant interests
- Handle day-to-day legal issues
- Attend staffing and court
- Refer participants to treatment court
- Liaison to the bar
- Address due process issues and evidentiary hearings
- Be part of the team, but don't accept "just being a team player"
- Remind team members to stay in their lane



DEFENSE ATTORNEY ROLE



The Consultant and
Advisor to the Team

OR



Attorney Client

Representing the
Client
(COUNSEL)

Ethical dilemmas can arise when functioning in both roles

DEFENSE ATTORNEY ROLE AS CONSULTANT



Advocates for effective court policies and practices.

An advocate for evidence-based practices that advance the court's therapeutic goals.



Oversees the treatment court's policies and operations



DEFENSE ATTORNEY ROLE AS COUNSEL



- Ensures client's 6th Amendment Right to Counsel is protected; a participant must have an attorney present each and every time she/he is before the court or interacts with the prosecutor.
- Advocates for participant's stated interests.

DEFENSE ATTORNEY ROLE AS COUNSEL



A NONADVERSARIAL APPROACH does not mean:

- That defense counsel will have passive involvement once a program contract has been executed between the treatment court and the participant.
- That defense counsel relinquishes their professional duty and ethical responsibility to their client (participant).
- That defense counsel places the needs or commitment to the treatment court program above the commitment to the client.



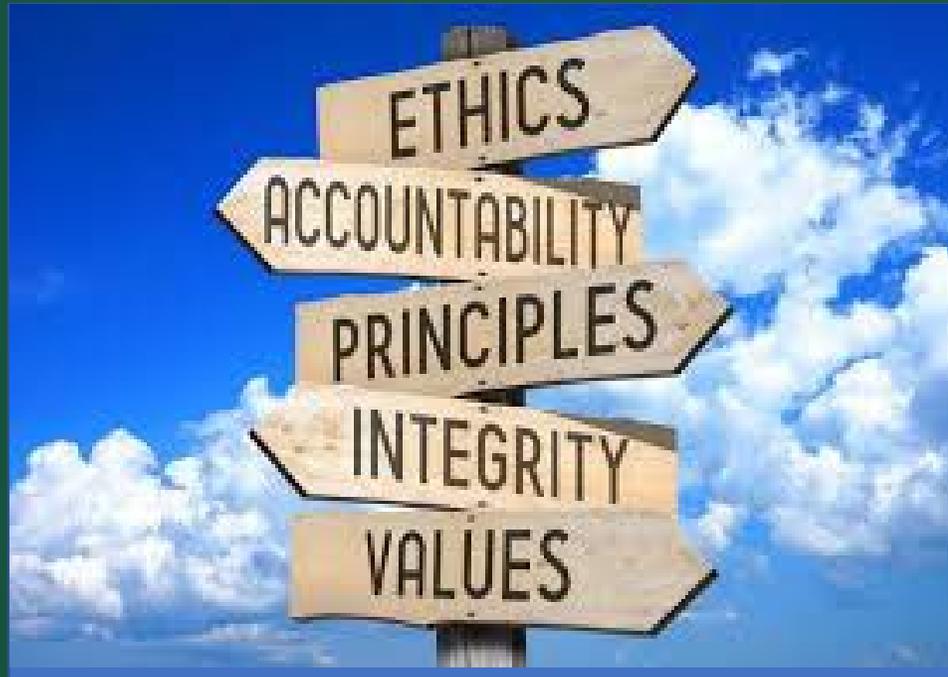
LEGAL, CONSTITUTIONAL AND ETHICAL ISSUES IN TREATMENT COURTS



JUDGE MEYER (RET)
NADCP SR. JUDICIAL FELLOW

WEDNESDAY FROM 1130 TO 1245

NADCP
ALL RISE 20
May 26-29, 2020 **VIRTUAL**



Ethics in Treatment Court

The Treatment Roles



Treatment Provider Role



- Manages delivery of treatment services
- Administers behavioral or cognitive-behavioral treatments that are documented in **manuals and have been demonstrated to improve outcomes**
- **Provides clinical case management** – at least one individual session per week during the first phase of the program
- Provides relapse prevention and continuing care
- Develops a continuing care plan with participants

Providing Individualized Treatment



The Most Effective Programs

Retain sufficient flexibility to accommodate individual differences in each participant's response to treatment

NPC Research 2012



Confidentiality – The Federal Law



CFR 42 Part 2

- 42 Code of Federal Regulations – Part 2 (revised)
- Addresses the stigma of seeking treatment for SUD
- Prohibition of redisclosure
- Requires notification of confidentiality/ consent release forms
- Applies specifically to AOD related information

HIPPA

- Health Insurance Portability and Accountability Act (1996)
- Designed to simplify and standardize the complexity of administrative information management
- Protect and secure patient information
- Applies to all health-related information

Sharing Information



HIPAA and 42 C.F.R. Part 2 do not prohibit treatment professionals or criminal justice professionals from sharing information related to substance use and mental health treatment.

- These statutes control how and under what circumstances treatment professional (and other covered entities) may disclose such information
 - Voluntary, informed, and competent waiver of patient's confidentiality and privacy rights; or
 - Court order (in the absence of patient waiver)

Elements of a Consent



- Name of person or organization that may make the disclosure;
- Name to whom disclosure may be made;
- Participant's name;
- Purpose of the disclosure;
- How much and what kind of information may be disclosed;
- Participant's signature;
- Date on which the consent was signed;
- Date, event, or condition upon which the consent will expire
- Right to revoke*

I understand that I might be denied services if I refuse to consent to a disclosure for purposes of treatment, payment, or health care operations, if permitted by state law. I will not be denied services if I refuse to consent to a disclosure for other purposes.

I recognize that my review hearings are held in an open and public courtroom and it is possible that an observer could connect my identity with the fact that I am in treatment as a condition of participation in drug court. I specifically consent to this potential disclosure to third persons.

I understand that if I refuse to consent to disclosure or attempt to revoke my consent prior to the expiration of this consent, that such action is grounds for immediate termination from drug court.

I have been provided a copy of this form.

I acknowledge that I have been advised of my rights, have received a copy of the advisement, and have had the benefit of legal counsel or have voluntarily waived the right to an attorney. I am not under the influence of drugs or alcohol. I fully understand my rights and I am signing this Consent voluntarily.

Dated: _____
Signature of Drug Court Participant

Witness: _____
(position)

PROHIBITION ON REDISCLOSURE OF CONFIDENTIAL INFORMATION

This notice accompanies a disclosure of information concerning a client in alcohol/drug treatment, made to you with the consent of such client. This information has been disclosed to you from records protected by federal confidentiality rules (42 C.F.R. Part 2). The federal rules prohibit you from making any further disclosure of this information unless further disclosure is expressly permitted by the written consent of the person to whom it pertains or as otherwise permitted by 42 C.F.R. Part 2. A general authorization for the release of medical or other information is NOT sufficient for this purpose. The federal rules restrict any use of this information to criminally investigate or prosecute any alcohol or drug abuse patient.

Sharing Information



- In treatment courts, treatment professionals (and others who are subject to HIPPA and 42 C.F.R. Part 2 stipulations) **may** share specified information with other team members pursuant to a valid waiver (or court order).
- Scope of disclosure must be limited to the **minimum** information necessary to appraise participant progress in treatment and complying with the conditions of the program.

Confidentiality Staffing Recommendations



- Include a provision in the participant handbook that there is no right for a participant to attend staffing
- Control attendance at staffing to key team members
- Don't charge participants with new crimes based on information learned in staffing
- Confidentiality principles apply to all team members
- Create memorandum of understanding contracts with each agency on the team

Memorandum of Understanding



- Direct contracts can be made by the courts with community organizations providing formal services, such as residential and outpatient treatment services, job training, and life skills training
- These are written agreements with other agencies or organizations for services and coordination

SAMPLE MEMORANDUM OF UNDERSTANDING

AGREEMENT between *(list all organizations involved)*.

The parties to this Agreement endorse the mission and goals of the treatment court in order to enhance public safety, ensure participant accountability, and reduce the cost to society. By addressing criminal thinking, substance/alcohol use disorders, trauma, and mental and physical health, the participants will realize improved quality of life. The parties recognize that for the goals and mission of the treatment court to be successful, cooperation and collaboration must occur within a networks of systems.

The parties to this Agreement understand that the confidentiality of participants' alcohol and drug treatment records are protected under Federal regulations: Confidentiality of Alcohol and Drug Abuse Patient Records, 42 CFR Part 2 and the HIPPA Privacy Rule, 45 CFR 160, 162, and 164. The parties agree to comply with all confidentiality requirements.

PROGRAM GOALS

Improve the lives of participants with substance use disorders in the criminal justice system through the integration of intensive supervision, alcohol and drug treatment, mental health services, alcohol and drug testing, and case management services with criminal justice system processing.

The parties agree that the program will follow the *10 Key Components of Drug Courts* in which the respective agencies will work cooperatively. They are:

1. Drug courts integrate alcohol and other drug treatment services with justice system case processing.
2. Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights.
3. Eligible participants are identified early and promptly placed in the drug court program.
4. Drug courts provide access to a continuum of alcohol, drug and other related treatment and rehabilitations services.
5. Abstinence is monitored by frequent alcohol and other drug testing.
6. A coordinated strategy governs drug court responses to participant compliance.
7. Ongoing judicial interaction with each drug court participant is essential.
8. Monitoring and evaluation measure the achievement of program goals and gauge effectiveness.
9. Continuing interdisciplinary education promotes effective drug court planning, implementation, and operations.
10. Forging partnerships among drug courts, public agencies, and community-based organizations generates local support and enhances drug court effectiveness.

INDIVIDUAL AGENCY RESPONSIBILITIES AND STAFF COMMITMENTS

Treatment Court Judge

1. The Judge will ensure a cooperative atmosphere for attorneys, probation officers, law enforcement, and treatment providers to stay focused on the task of providing participants with treatment and rehabilitation opportunities.
2. The Judge will ensure the integrity of the treatment court is maintained by having an understanding of the program's policies and procedures.
3. The Judge will participate as an active member of the Staffing Team and will chair the treatment court team.
4. The Judge will assist in motivating and monitoring the participants of the treatment court.
5. The Judge will gather information from the treatment court team and make all final decisions on incentives, sanctions that effect the participants.

Sharing Information



- Assessment results pertaining to a participant's eligibility for treatment court and treatment and supervision needs
- Attendance at scheduled appointments/sessions
- Drug and alcohol test results conducted by the treatment center, including efforts to defraud or invalidate
- Attainment of treatment plan goals
- Evidence of symptom resolution or exacerbation
- Evidence of treatment-related attitudinal changes
- Attainment of treatment program phase requirements

Sharing Information



- Compliance with supervision requirements that treatment professional may be aware of (e.g., electronic monitoring, home curfews, travel limitations, stay aways, etc.)
- Adherence to legally prescribed and authorized use of medicines—if relevant to team decisions
- Procurement of unauthorized prescriptions or addictive or intoxicating medications
- Commission of or arrests for new offenses that treatment professionals may be aware of
- Menacing, threatening, or disruptive behavior

Medications for Addiction Treatment



- Medication- refers to any FDA-approved medication used to treat addiction
- ASAM recommends MAT be understood as medications for addiction treatment

Medications



- Medication-assisted treatment improves outcomes, and includes buprenorphine, methadone, and naltrexone (Vivitrol).
- Participants are prescribed psychotropic or substance use disorder medications based on medical necessity by a treating physician with related experience.
- Treatment courts discourage participants from obtaining mood-altering medication from general practitioners.

Federal Guidance & Grant Requirements Medications for Addiction Treatment



Beginning in 2015, treatment courts receiving federal funding must attest in writing that they will not deny an otherwise eligible participant's use of MAT and they will not require discontinuance of medications as a condition of graduation.



NADCP Position Medications for Addiction Treatment



Best Practice Standard I(E): “...numerous controlled studies have reported significantly better outcomes when addicted offenders received medically assisted treatments including opioid antagonist medications such as naltrexone, opioid agonist medications such as methadone, and partial agonist medications such as buprenorphine.”

Board Position Statement: Treatment court professionals must:

- Learn about MAT
- Consult with experts on MAT options
- Eliminate blanket prohibitions of MAT
- Recognize that MAT decisions are based on medical evidence
- Impose consequences for abuse or unlawful use of MAT medications

Legal Challenges Medications for Addiction Treatment



MAT prohibitions are invalid under:

Americans with Disabilities Act (ADA)

Rehabilitation Act of 1973

Fourteenth Amendment due process guarantees

Eighth Amendment cruel and unusual punishment

CONSTITUTIONALITY

First Amendment – Alcoholics Anonymous



WARNING

Treatment courts can *refer* participants to deity-based programs such as Alcoholics Anonymous[®], but courts cannot *require* participation in such programs without violating the First Amendment.

CONSTITUTIONALITY

First Amendment – Alcoholics Anonymous



IT DOESN'T MATTER:

- Treatment court is voluntary
- AA doesn't require belief in God, just a higher power
- It's just a reference to God
- Treatment providers require AA, not the treatment court

Courts have uniformly held that requiring attendance at AA/NA violates the First Amendment

CONSTITUTIONALITY

First Amendment – Alcoholics Anonymous



Recommendations:

- Courts have held that if a secular alternative is available, there is no First Amendment violation by referring to AA/NA.
- Secular alternatives include, among others, LifeRing Secular Recovery[®], Rational Recovery[®], Smart Recovery[®]



LEGAL RESOURCES FOR TREATMENT COURTS



The screenshot shows the NDCI website's 'LAW' resource page. At the top left is the NDCI logo (National Drug Court Institute). To the right are navigation links for 'ABOUT NDCI', 'RESOURCES', and 'CONTACT', along with a search bar containing the text 'SEARCH THE WEBSITE' and a 'SEARCH' button. Below the navigation is a breadcrumb trail: 'Home / Resources / Law'. A dark green header bar contains the word 'LAW' in white. The main content area features a section titled 'Legal Guidance from the Experts' with a paragraph explaining NDCI's commitment to providing up-to-date case law. Below this is a section titled 'Constitutional and Other Legal Issues in Drug Court:' followed by the name and title of Hon. William G. Meyer (ret.), Senior Judicial Fellow at NDCI, and the date 'Updated: June 7, 2018'. A note instructs users to 'Click on each section to see relevant cases.' Below this are four expandable sections, each with a small upward-pointing arrow and a title:

- I. Cases holding that mandating individual to Alcoholics Anonymous/Narcotics Anonymous (AA/NA) is a violation of the First Amendment
- II. Cases discussing providing a secular alternative as an option will validate a referral to religious based programs like AA/NA as a component of treatment
- III. Cases holding that attendance at AA/NA does not establish a cleric-congregant relationship subject to protection by an evidentiary privilege
- IV. Cases holding that place restrictions on the Drug Court participant are constitutional, when reasonably related to rehabilitative needs.

<https://www.ndci.org/resource/law/>

NAVIGATING ETHICAL CHALLENGES¹



- Respect Colleagues
- Educate First, before adversarial position
- Raise issue informally, and then formally, before there is a case in dispute
- Clarify the nature of the ethical conflict
- Take reasonable steps to resolve the conflict
- Always be prepared to step back to education
- Abiding vs. contributing to sub-standard care and practices



¹From Doug Marlowe MAT, Ethics and Law



QUESTIONS?



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**JUSTICE
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