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Ethical Considerations for Judges and Attorneys in Drug Court

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May 2001

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Ethical Considerations for Judges and Attorneys in Drug Court

Prepared by the National Drug Court Institute, the education, research, and scholarship affiliate of the National Association of Drug Court Professionals.

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The National Drug Court Institute (NDCI) is pleased to provide drug court judges and attorneys nationwide with an overview of the ethical considerations, in light of the American Bar Association's (ABA) Model Code of Judicial Conduct, the Model Rules of Professional Conduct and the ABA Standards for Criminal Justice, of practicing in drug court. NDCI owes its sincere gratitude to those who participated in a series of focus groups to produce this publication, as well as the publication entitled, *Federal Confidentiality Laws and How they Affect Drug Court Practitioners.* Without their hard work and keen intellect, this manual would not have been possible. They are:

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INTRODUCTION

Drug courts reshape the professional roles of judges and lawyers working in them. Judges, used to working in relative solitude, become part of a collaborative decision-making team that includes treatment providers, court personnel, and attorneys. Prosecutors and defense counsel learn to coordinate their efforts to achieve a participant's recovery from alcohol or drug addiction, muting their traditional adversarial relationship. In the courtroom, the typical lawyer-dominated hearing gives way to conversations between judge and defendant. These and other changes in the professional roles of lawyers and judges are crucial to the drug court model but raise serious ethical questions. Can one be a good lawyer or judge in the drug court context? This publication seeks to answer that question through a commentary on selected provisions of three American Bar Association (ABA) ethical codes – the Model Code of Judicial Conduct, the Model Rules of Professional Conduct, and the ABA Standards for Criminal Justice. This study concludes that practitioners in drug court need heightened ethical sensitivity in both the design of particular drug court programs and in daily practice, but the proper exercise of the roles of judge or lawyer in drug court need not conflict with the professionals' ethical obligations. Indeed, drug court practice has the potential to fulfill the highest aspirations of judicial and legal ethics.

JUDGES

Overview

Socrates observed:

Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly and to decide impartially.[1]

In all judicial proceedings, the judge bears the ultimate responsibility for ensuring that the parties receive a fair hearing in a dignified forum. Although certain aspects of his or her role may change, the drug court judge's ultimate responsibility is no different. Given the unique nature of drug court practice – and the political visibility of many drug courts – this responsibility may be even greater for the drug court judge. Focusing on selected provisions of the American Bar Association's (ABA) Model Code of Judicial Conduct, this section highlights potential ethical problems for drug court judges, and offers suggested resolutions. Because some jurisdictions have not adopted the Model Code, or have deviated in

[1] Quoted in Wright, *Courtroom Decorum and the Trial Process*, 51 JUDICATURE 378, 382 (1968).

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some respects from the ABA's original formulation, judges should also refer to their own jurisdiction's ethics rules and opinions for guidance.

Three aspects of drug court practice raise special concerns for a judge who would live up to the expectations of the Socratic charge and the Model Code. First, the collaborative nature of drug court decision-making (seen most clearly in staffings) may undermine perceptions of judicial independence and impartiality. Second, the intimacy that develops between participants and members of the drug court team – especially judges – can blur the boundaries between judicial action and personal involvement. Third, the direct contact between judges and participants makes participants vulnerable; while defense counsel remain responsible for protecting participants' rights, the judge must share that responsibility.

Dealing ethically with these and other issues will not prevent the judge from acting effectively in drug court.[2] Instead, the success of drug courts depends on the trustworthiness and integrity of judges who serve in them.

CANON 1

A Judge Should Uphold the Integrity and Independence of the Judiciary[3]

A. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

Commentary

This Canon, which sets forth the general principles that guide interpretation of the Code, defines the judge's ethical responsibility in both personal and institutional terms. The judge must conform his or her own conduct to the legal and ethical demands of the role, and the judge must ensure that those with whom he or she works (and the institution in which he or she works) conform to these

[2] Despite diligent inquiries, the authors have found no judicial opinions critical of ordinary drug court practices. It is hoped that this document will help to maintain the drug courts' unblemished record.

[3] American Bar Association's Model Code of Judicial Conduct (the "Canons"), 1998 Edition, Standing Committee on Ethics and Professional Responsibility and Judicial Code Subcommittee, American Bar Association, 1998.

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ethical and legal obligations. In fulfilling these two sets of obligations, the judge serves as an example for others.

Canon 1 has twofold significance for drug courts. First, as this Canon's official commentary recognizes, "deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges."[4] As non-traditional legal institutions, drug courts may not enjoy the same presumption of legitimacy accorded to other legal institutions and so need to be especially concerned with maintaining public confidence in their integrity. Second, the Canon focuses on independence as an essential characteristic of the judge's professional responsibility, but at least two of the "Key Components" [5] of drug courts seem to undermine judicial independence.

Key Component #6: "A coordinated strategy governs drug court responses to participants' compliance."

The "coordinated strategy" is typically effected through staffings, in which members of the drug court team meet in advance of a participant's hearing to discuss the participant's progress in treatment and to reach consensus about rewards and sanctions. This collaborative decision-making process does not violate the judge's duty of independent judgment so long as the final decision remains with the judge. The judge may not delegate this responsibility for a final decision to other members of the drug court team.[6] In any event, the judgment made at staffing can only be tentative, subject to modification by the court based upon what the participant says during the court proceeding.

Staffings are also considered in light of restrictions on ex parte contacts, found in Section 3(B)(7) of the Code.

Key Component #10: "Forging partnerships among drug courts, public agencies, and community-based organizations generates local support and enhances drug court program effectiveness."

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[4] Canon 1, Commentary.

[5] *Defining Drug Courts: The Key Components,* National Association of Drug Court Professionals, Alexandria, VA; Drug Courts Program Office, Office of Justice Programs, U.S. Department of Justice, Washington, DC, January, 1997 (delineating the 10 key components that are the basic elements that characterize effective drug court programs. These are the seminal standards by which drug court practitioners plan, implement and enhance their drug courts.).

[6] On improper delegation of judicial responsibilities to court staff and others, *see In re* Briggs, 595 S.W.2d 270 (Mo. 1980); *In re* Bristol, *et. al.* (N.Y. Comm'n on Judicial Conduct, Nov. 4, 1992); Shaman, Lubet & Alfini, § 6.10.

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Like the "coordinated strategy" of Key Component #6, the mandate to "forge partnerships" in Key Component #10 reflects the drug court model's commitment to collaborative work among all stakeholders toward a set of common goals. A growing body of research underscores the benefits of this collaboration, but the emphasis on partnerships is not without its ethical pitfalls.

The call for "partnerships between drug courts and law enforcement"[7] raises the most obvious ethical concerns. To the extent that the partnership educates law enforcement officers about drug court practices, the collaboration raises no serious ethical difficulties.[8] However, any such partnership must ensure that the court is neither perceived nor acting as an instrument of law enforcement but maintains its constitutionally mandated role as independent arbiter and guardian of legal rights. In particular, special care should be taken to guard against inappropriate ex parte contacts between the court and law enforcement. Any direct communication between the court and law enforcement about a particular case should be disclosed to all members of the drug court team. For further discussion of ex parte communications, see the discussion following Section 3(B)(7).

Less obvious but no less serious ethical concerns arise from the call for linkages between drug courts and community-based organizations.[9] Coalition building has been a vital part of the drug court movement's success. Drug courts have succeeded in marshalling a wide range of resources in their communities, providing their participants with treatment and social services and at the same time responding to community concerns. These coalitions have provided crucial political support for drug courts. As with the drug court/law enforcement partnership, ethical assessment of these coalitions depends upon the exact nature of the linkages. Where the court/community coalition functions primarily as an exchange of general information, with the court educating the community about its practices and procedures and community organizations educating the court about available resources, ethical concerns are minimized.

However, where community organizations and other institutions take a more active role in providing "guidance and direction to the drug court program," as Key Component #10 contemplates, heightened ethical sensitivity is required. At a minimum, and whether this "guidance and direction" is provided through a

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[7] *The Key Components,* Key Component #10, Performance Benchmark 3.

[8] *See Community Policing and Drug Courts/Community Courts Project: A Three Year Progress Report*, National Association of Drug Court Professionals, Alexandria, VA; Office of Community Oriented Policing Services, U.S. Department of Justice, Washington, DC, May, 2000 (on relationship between police and drug courts in education and training).

[9] *The Key Components,* Key Component #10, Performance Benchmarks 1, 2 and 4.

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formal or informal mechanism, court/community partnerships should never include discussion of particular cases that are pending or impending in the court (*see* Section 3(B)(9), restricting comments on matters before the court by judges and court personnel). Even if particular cases are not discussed, a judge must ensure that the court's participation in formal or informal coalitions with community organizations does not "cast reasonable doubt on the judge's capacity to act impartially as a judge" (Section 4(A)(1)). Thus, the judge or court personnel should not participate in discussions of how to allocate law enforcement resources (*e.g.,* to target certain offenses or geographical areas); participation would imply the court's endorsement of arrests resulting from such reallocations.

Where the court/community partnership is effected through a formal structure, like the steering committee suggested under Key Component #10 (organized as a nonprofit corporation), special ethical issues arise for the drug court judge and court personnel. Ethical aspects of participation in such an organization are covered under Canon 4 of this Code.

CANON 2

A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Commentary

Relations with participants

The judge's personal engagement with each participant is the keystone of the drug court model. "This active, supervising relationship, maintained throughout treatment, increases the likelihood that a participant will remain in treatment and improves the chances for sobriety and law-abiding behavior."[10] This personal engagement stands in tension with a common vision of the judge as a detached arbiter, figuratively "blind" to the parties before the court. However common this understanding of the judge, the Code requires not disengagement but impartiality: the judge may show concern about a participant's progress in recovery – even to the point of celebrating a participant's success, as discussed under Section 3(B)(3) – but must extend the same quality of engagement and concern to each participant.

[10] *The Key Components,* Key Component #7.

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Reporting crimes and other misconduct

One question that frequently arises is whether a judge's obligation to uphold the integrity of the judiciary requires drug court judges to report illegal drug use by participants under their supervision. Some states have statutes requiring judges (and other specified officials) to report crimes; drug court judges should be familiar with any such statutes in their own states. In the absence of such a statute, however, all states that have addressed this issue have held that a judge has no ethical obligation to report criminal activity disclosed during court proceedings.[11] While Canons 1 and 3 require the court to report misconduct by an attorney or a judge in certain circumstances, no duty exists to report criminal activity by others. Moreover, where the prosecutor has the same information as the judge (which will ordinarily be the case in drug court), there is no need to report the offense, because law enforcement officials are already aware of it. A custom of not prosecuting certain offenses disclosed during drug court proceedings is often reflected in memoranda of understanding and in participants' agreements with the court. In any event, to the extent that judges have any duty to report crimes, commentators have distinguished between serious crimes, such as murder, and the less serious offenses, such as possession, that are ordinarily disclosed in drug court.[12]

Private conduct of the judge

Drug court judges should be aware that their conduct, both on and off the bench, may be scrutinized more closely than that of other judges. To comply with Canon 2, judges need to be sensitive to this reality. This requires particular caution with respect to substance abuse. For example, being stopped for driving while intoxicated would be embarrassing for any judge, but particularly for a drug court judge. Judges who themselves need substance abuse treatment (including on-going participation in Alcoholics Anonymous) are not disqualified from presiding in drug courts, so long as their own problems do not interfere with their role in the drug court.

B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of the judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

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[11] 18 No. 3 Judicial Conduct Reporter 3, "A Judge's Obligation to Report Criminal Activity" (1996).

[12] *Ibid*.

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Commentary

Providing information and references

Section 2(B) applies to information and references that a judge or the judge's staff may provide on behalf of a participant. A court ordinarily should not act as a conduit for information about participants to those outside the drug court team, particularly where, as in drug courts, strict confidentiality laws may apply. Drug courts should develop forms, agreed upon by all members of the drug court team, for the release of information about participants (where such releases are appropriate). Each participant must sign the release.[13] The entire drug court team should review all other inquiries submitted to the judge or court personnel.

References raise even more serious concerns because they place the court's stature behind an individual who has been (and may still be) subject to the court's jurisdiction. It is particularly inappropriate for a judge to aid a participant in other litigation. Thus, one drug court judge was disciplined for sending an unsolicited character reference to another judge who was about to sentence a participant in an unrelated case.[14] While less egregious, it would still be troubling for a judge to serve as advocate for a participant by, for example, asking the participant's employer to be patient while the participant undergoes treatment. The best way to avoid ethical problems is to have the prosecutor perform these services in lieu of the judge. A prosecutor's word in this context will carry nearly as much weight as a judge's, because the prosecutor is also a public official and is in some respects the participant's adversary.

CANON 3

A Judge Shall Perform the Duties of a Judicial Officer Impartially and Diligently

B. Adjudicative Responsibilities.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

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[13] For more information about releases from participants, *see Confidentiality Laws and How they Affect Drug Court Practitioners,* National Drug Court Institute, Alexandria, VA, April 1999.

[14] *In re Fogan,* 646 So.2d 199 (Fla. 1994).

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Commentary

The drug court judge does not function as a therapist and should not seek to develop a therapeutic relationship with individual drug court participants. Nevertheless, effective performance as a drug court judge requires continuing interdisciplinary education: the judge and drug court staff need to understand both the range of available treatment options "and the theories and practices supporting specific treatment approaches."[15]

(3) A judge shall require order and decorum in proceedings before the judge.

Commentary

Impartiality and decorum: courtroom conduct

Conduct within the courtroom that can raise concern ranges from simple praise to clapping for participants to coming down from the bench to shake hands with, or hug, participants. These practices, which seem inconsistent with normal courtroom restraint and impersonality, reflect the underlying nature of drug court. A drug court judge's primary role is not to mediate a dispute between two litigants; rather, drug court judges actively promote the successful treatment of participants. The law does not prohibit a judge from assuming this orientation; a judge must be impartial but not indifferent. Applause, handshakes, and hugs do not suggest partiality when they promote the objectives of the drug court and are distributed without favoritism. Applause and physical contact may, however, negatively impact the court's dignity. There are no clear guidelines for protecting courtroom decorum. Judges must listen to their own instincts and respect community standards.

Impartiality and decorum: conduct outside the courtroom

Concerns about impartiality and dignity may arise from a judge's contacts with participants outside of the courtroom, in activities such as picnics (which are customary in some drug courts). Here, it is possible to enunciate guidelines. First, judges should not transact business with participants outside the courtroom, nor should they, in any manner, imply that a participant will receive special treatment during judicial proceedings. Second, extra-judicial contact between judges and participants should not be conducted in a secretive manner, lest outsiders suspect that the judge is concealing inappropriate conduct. Third, gatherings outside the courtroom should be open to all participants, or else invitations should be extended

[15] *The Key Components,* Key Component #9.

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based on clearly identified criteria (even if the judge plays no role in preparing the invitation list), in order to avoid the perception that the judge is favoring some participants over others. Moreover, notwithstanding any selection criteria, a judge should never be alone with a single participant outside the courtroom or the judge's chambers.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

Commentary

Due to the continuing personal engagement between participants and the drug court judge, the judge runs the risk of being influenced by factors other than the merits of each participant's case. Participants with friendly dispositions or particularly compelling experiences may attract the judge's compassion and leniency, while those with less friendly personalities may provoke the opposite response. Psychological concepts of transference and counter-transference further complicate the judge's engagement with participants – a judge's identification with a participant (which may be unconscious) may lead to disparate treatment, including excessively harsh treatment through counter-transference. The same concerns with favoritism or prejudice apply to other court personnel, such as the drug court coordinator, who will also have ongoing personal engagement with participants. Drug court judges and personnel should be trained to recognize such bias in themselves and others.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the ex parte communication and allows an opportunity to respond.

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(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

Commentary

Ex parte contacts

Case law concerning prohibited and unethical ex parte communication focuses on the most egregious conduct. For example, in *Briesno v. Superior Court*,[16] in a case involving allegations that police officers beat a motorist, the trial judge sent his law clerk to the prosecutor with the message, "don't stay up all night, that the judge says trust him, he knows what he is doing." In another case, a judge kept a telephone on the bench and called people whom he described as "friends of the court" during the trial to get information on how he should rule. The Arizona Supreme Court had no difficulty in determining that this conduct violated Canon 1 (proceedings lacking in order and decorum) and Canon 3 (prohibited ex parte communications).[17]

The informal nature of drug court proceedings should not be construed to relax the limitations on ex parte contacts. On the contrary, judges should scrupulously observe the guidelines quoted above. In particular, the judge should not initiate any extra-judicial factual inquiries, should not initiate legal inquiries without the consent of all parties, and should immediately report all unsolicited ex parte contacts to all parties. Because staffings include more than simply court personnel (as defined in Section 3(B)(7)(c)), the rules on ex parte contacts apply: thus, all parties or their representatives should be entitled to attend, and those who do not attend should receive prompt notice of the substance of the communications.

[16] 284 Cal. Rptr. 640 (Ct. App. 1991).

[17] *Matter of Anderson*, 814 P.2d 773 (Ariz. 1991).

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Contacts between judges and probation officers require additional comment. Generally, the probation department acts as an arm of the court, so it is not improper for a judge to communicate with probation officers outside of regular court proceedings. Not all ex parte communications with probation officers are protected, however.[18] Cautious judges will observe the limitations listed above – that judges should not initiate contact and should insure that all parties are made aware of the substance of ex parte contacts – even in communications with probation officers.

Personal knowledge of facts

Related to the issue of ex parte contacts is the question of a judge having independent knowledge of disputed facts in a case. When a drug court judge receives information from a treatment provider or other source, this would be subject to the rules on ex parte contacts, not Section 3E(1)(a)'s statement concerning a judge's "personal knowledge."[19] The reason this does not qualify as "personal knowledge" is that the judge has not personally observed the events in question; therefore, the judge can conduct an evidentiary hearing without having to testify or otherwise place his or her own credibility in issue.[20] Judges should, however, recuse themselves from any adjudications arising out of events that they did witness, such as a participant appearing in court intoxicated or a participant attempting to escape.[21]

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

[18] *U.S. v. Gonzales,* 765 F.2d 1393 (9th Cir. 1985); *People v. Smith*, 378 N.W.2d 384 (Mich. 1985).

[19] Section 3(E)(1)(a) provides that a judge who has "personal knowledge of disputed evidentiary facts concerning the proceeding" shall disqualify himself or herself in that proceeding.

[20] Shaman, *et al., supra*, at 121.

[21] *Board v. Snyder,* 523 A.2d 294 (Pa. 1987); *In re Crane*, 324 S.E.2d 443 (Ga. 1985).

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Commentary

The scope of permissible public activism by judges is discussed in more detail under Canon 4, which concerns the extra-judicial conduct of judges. For the present, it is sufficient to note that judges should avoid commenting on pending cases but have greater latitude in addressing general matters such as the nature and value of drug courts.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

Commentary

All members of the drug court team, including judges and court personnel, should recognize the highly sensitive nature of participants' disclosures in treatment and, occasionally, in court. The judge should ensure compliance with federal and state regulations concerning the confidentiality of information disclosed in treatment, including waivers of confidentiality that strictly limit disclosures to information necessary to carry out the court's mission.

Whether or not court proceedings are in open court or are open to the public depends on the type of case (juvenile or adult) as well as state law. In general, most adult court proceedings are open to the public and drug courts are no exception.[22] The value here is freedom of information and a desire not to have the perception of "star chamber" proceedings.

In actuality, this requirement places special considerations on the shoulders of the drug court team to handle participant information in open court with utmost care. For example, the team should be careful not to discuss personal issues in open court, limiting review hearings to program compliance facts. Participants can be called to the podium by their first names. It is crucial that each participant sign a consent wherein the public nature of the open court proceedings is made clear. Calendars could be labeled, "Department 2 Review Hearings" as opposed to "Drug Court Cases." What the team needs to do is take a close look at its own proceedings and determine how best to protect the confidential nature of the treatment issues and operate in a public courtroom if their state law requires. The approximately 700 operational drug courts in the United States have shown that these issues can be successfully resolved.[23]

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[22] *See generally, Argersinger v. Hamlin,,* 407 US 25 (1972); *see also generally, Gannett Co. Inc. v. DePasquale*, 43 NY2d 370, *aff'd* 443 US 368 (1979).

[23] For further information about confidentiality in drug court, *Confidentiality Laws,* National Drug Court Institute, 1999.

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CANON 4

A Judge Shall So Conduct the Judge's Extra-Judicial Activities as to Minimize the Risk of Conflict With Judicial Obligations

A. Extra-Judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast doubt on the judge's capacity to act impartially as a judge;
(2) demean the judicial office; or
(3) interfere with the proper performance of judicial duties.

Commentary

The personal engagement between the drug court judge and participants must be limited to the judicial role and context: a judge may not enter into a relationship with participants apart from that established by (and confined to) the drug court context. *In re Jones* provides an egregious example of improper relationships: a judge who professed concern for the alcohol problems of defendants that he had sentenced to probation, met privately with several of the probationers and even visited and shared meals with them at their homes.[24] Contact with participants in drug court-sponsored programs outside the courtroom is covered under Section 3(B)(3).

B. Avocational Activities. A judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code.

Commentary

Publicity and educational activities

Section 4(B) authorizes judges to act as educators. It is especially important for drug court judges to assume this role, both because drug courts should be part of larger community efforts and because the public is entitled to understand why drug courts deviate from certain legal traditions. At the same time, the judge's public comments must be circumscribed by concerns about the appearance of partiality.[25] There are two primary constraints on judicial

[24] *In re Jones*, 255 Neb. 1, 581 NW2d 876 (1998). For this and other misconduct, the judge was removed from office.

[25] Canon 3B(9); *see also* Shaman, Lubet, Alfini, *Judicial Conduct & Ethics*, §10.03, (Michie 1990).

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utterances: first, a judge should not indicate an unwillingness to obey the law. Second, a judge should not manifest a predisposition toward a particular outcome in a pending case. Ultimately, judges must maintain a delicate balance. They should not isolate themselves from their communities. They must, however, heed the line between non-judicial activities that interfere with the business of judging and those that enrich judicial institutions or at least do no harm to them.

In the drug court context, it is common for judges to attempt to build public support for treatment-oriented programs. The clear import of these presentations is that this method of case processing is preferable to that which otherwise exists in the criminal justice system. Often, these comments include success stories about past or current drug court participants. Such comments do not violate Canons 3 or 4, so long as the judge is not foretelling a future result or disclosing confidential information that could be used to identify a drug court participant. Indeed, Canon 4 specifically allows judges to speak, teach, write, and participate in extra-judicial activities concerning the law, the legal system, and the administration of justice.[26] Canon 4 also authorizes judges to attend hearings on behalf of drug court programs, drug courts in general, or affiliated treatment agencies. Moreover, Canon 3 permits general informative explanations on pending cases, so long as the judge does not suggest an inclination toward a particular result.[27]

A judge's speech is most often questioned when it approaches activist support for a particular cause. The opinion by Circuit Judge J. Posner of the U.S. Court of Appeals for the 7th Circuit, in *Buckley v. Illinois Judicial Inquiry Board,*[28] makes clear that those who become judges or candidates for judicial office do not forfeit their free speech rights under the First Amendment of the United States Constitution. A blanket prohibition on judicial statements about controversial issues in law or politics would not survive constitutional scrutiny. Any limitation on judicial speech must be closely linked to the specific harms identified in Section 4(A): speech that would "cast doubt on the judge's capacity to act impartially;" "demean the judicial office;" or "interfere with the proper performance of judicial duties."

Cases interpreting the limits of permissible judicial speech vary by jurisdiction. For example, the Washington Supreme Court held that it was permissible for a judge to attend, and speak at, an anti-abortion rally. The remarks of the judge at the rally included: "Nothing is, nor should be, more fundamental in

[26] Canon 4B.

[27] *See* 19 No. 1 Judicial Conduct Reporter 1, "Appropriate Explanations in Pending Cases," spring 1997.

[28] 997 F.2d 224 (7th Cir. 1993).

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our legal system than the preservation and protection of innocent human life." The court found that the comments did not call into question the judge's ability to be impartial in an abortion case.[29] The California Commission on Judicial Performance, however, disciplined a judge who "authorized the use of his name and title in an advertisement celebrating the anniversary of *Roe v. Wade*."[30] *In re Bonin*[31] is a close case: the Massachusetts Supreme Judicial Court disciplined the chief judge of the Massachusetts Superior Court for attending a lecture by Gore Vidal on sex and politics that was sponsored by a gay activist group. The court explained that discipline was warranted not because of the content of the lecture but the fact that the lecture was being held as a fundraiser for defendants currently awaiting trial in superior court, even though Judge Bonin was not assigned to hear the case.[32] Because the case was not before Judge Bonin, the concern about lack of impartiality must be diminished, but as chief judge of the court in which the case was pending, public perception of the entire court's bias seems a reasonable concern.[33]

It seems clear that judges may advocate changes in the law so long as they make clear their own intention to adhere to the existing law. In *In re Gridley*,[34] the Florida Supreme Court declined to sanction a judge who wrote about his moral opposition to the death penalty in his church newsletter; the court noted that, in the same writing, the judge had reaffirmed his duty to follow the state's law. Thus, a judge may criticize mandatory minimum sentences, so long as the judge acknowledges that he or she is bound to impose them while they remain in effect.

Because drug courts may attract opposition (particularly, though not exclusively, in the context of political campaigns), understanding the boundaries of appropriate judicial commentary is important. The authors suggest, in discussing Canon 5, that a drug court may avoid concerns about inappropriate judicial

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[29] *In re Sanders*, 955 P.2d 369 (Wash. 1998).

[30] Shaman, Lubet, et.al. *Judicial Conduct & Ethics* §10.19 (2000) (citing *In re Velasquez*, Decision and Order (Cal. Comm'n, Apr. 16, 1997)). The treatise authors note, however, that the "judge was also charged with multiple other incidents of unrelated misconduct, and did not challenge his censure." *Id.*

[31] 375 Mass. 680, 378 N.E.2d 669 (1978).

[32] *Id.* at 685; Shaman, Lubet, §10.21.

[33] This concern was magnified by the significant publicity surrounding the judge's attendance at the lecture. Shaman, Lubet note that "a photograph of the judge [with the lecturer] did, in fact, appear the next day in a Boston newspaper under the headline 'Bonin at benefit for sex defendants.'" Shaman, Lubet, *id*.

[34] 417 So.2d 950 (Fla. 1982). Discussed in Shaman, Lubet, §10.28.

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participation in political conflicts by establishing a media relations office outside the judge's supervision. Nevertheless, judges may find themselves called on to respond to critics, and Canon 4 offers basic guidance. The judge is permitted to explain the law and the court's procedures.[35] However, in responding to criticisms, the judge must be truthful[36] and the explanation "[m]ust be limited to a moderate and dignified response to the attack made upon the judge and may not be of a nature in quantity or substance that creates more harm than benefit to the judicial system."[37] Ad hominem replies, such as questioning critics' competence, should be avoided as they call into question the judge's impartiality and demean the court's character.

(C) Governmental, Civic or Charitable Activities.

(2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

Commentary

Because of their involvement in drug treatment, drug court judges may be asked to serve on the board of directors for a treatment provider. They should abstain. If the provider is a governmental agency, service is precluded by Section 4(C)(2). If the provider is private, the judge should not be on its board because the treatment provider may seek a contract with the drug court, placing the judge in violation of Section 4(D)(1).

(3) A judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice or of an educational, religious, charitable, fraternal or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Code.

(a) A judge shall not serve as an officer, director, trustee, or non-legal advisor if it is likely that the organization

(i) will be engaged in proceedings that would ordinarily come before the judge, or

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[35] Shaman, Lubet §10.35. See Office of Disciplinary Counsel v. Souers, 611 N.E.2d 305 (Ohio 1993) (no sanction for judge who made public statements explaining a sentencing order).

[36] *See Office of Disciplinary Counsel v. Ferreri*, 710 N.E.2d 1107 (Ohio 1999).

[37] *In re Conrad*, 944 S.W.2d 191 (Mo. 1997) (quoted in Shaman, Lubet §10.35).

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(ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

Commentary

Key Component #10 recommends the formation of a drug court steering committee, established as a non-profit corporation, that "provides policy guidance and acts as a conduit for fundraising and resource acquisition." Subject to restrictions on fundraising described below under Section 4(C)(3)(b), a drug court judge may serve on the steering committee or on the board of other organizations operating drug education programs. However, the judge's participation becomes more complicated if the steering committee or other organization "engages in advocacy toward the adoption, repeal or modification of particular substantive laws or towards the courts' use and application of existing laws in a particular manner."[38] The line between permitted advocacy of improvements in the legal system and forbidden political engagement is notoriously hard to draw. Resolution of difficult cases, however, should return to the principles articulated in Canon 1: Does advocacy of (or against) a particular change in the law reasonably call into question the judge's independence and impartiality?

(b) A judge as an officer, director, trustee or non-legal advisor, or as a member or otherwise:

(i) may assist such an organization in planning fundraising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fundraising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority;

(ii) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system or the administration of justice;

(iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Section 4C(3)(b)(i), if the membership solicitation is essentially a fundraising mechanism;

[38] California Judges Association, Committee on Judicial Ethics, Opinion No. 46, "Judicial Participation in Organizations and Governmental Boards which Address Issues Involving the Administration of Justice and Social Problems in the Community," July 28, 1997.

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(iv) shall not use or permit the use of the prestige of judicial office for fundraising or membership solicitation.

Commentary

Operating a drug court often requires fundraising. The role that judges may play in that fundraising is limited by this provision and its underlying rationale, which is that judges should not use their office to pressure potential donors into making contributions. To avoid such pressure, as well as any appearance of coercion, judges should not personally solicit funds. A judge may serve on the board of the organization that conducts the fundraising, but neither the judge nor any other person acting on behalf of the organization should rely on the judge's office to encourage donations.

The commentary to Canon 4 describes practical limitations on a judge's participation in fundraising. Basically, judges should not directly solicit funds. It is appropriate, however, for a judge's name to appear on organizational letterhead used in a fundraising solicitation.

D. Financial Activities

(1) A judge shall not engage in financial and business dealings that:

(a) may reasonably be perceived to exploit the judge's judicial position, or

(b) involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves.

Commentary

The underlying purpose of the provisions of Canon 4 regarding personal finances is to avoid conflicts between judges' legal duties and their personal financial interests. In the drug court context, this provision bars the judge from investing in local treatment providers or any seller of equipment or services used to maintain the drug court (such as a manufacturer of urinalysis equipment). It is not clear whether this provision prevents a judge from investing in a large conglomerate that makes equipment used by drug courts as one part of a much larger enterprise; judges should consult their own state's laws to resolve that issue.

CANON 5

A Judge or Judicial Candidate Shall Refrain from Inappropriate Political Activity

A. All Judges and Candidates

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(1) Except as authorized in sections 5B(2), 5C(1) and 5C(3), a judge or a candidate for election or appointment to judicial office shall not:

(a) act as a leader or hold an office in a political organization;

(b) publicly endorse or publicly oppose another candidate for public office;

(c) make speeches on behalf of a political organization;

(d) attend political gatherings; or

(e) solicit funds for, pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions.

(3) A candidate for judicial office:

(d) shall not:

(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;

(ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or

(iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent;

(e) may respond to personal attacks or attacks on the candidate's record as long as the response does not violate Section 5A(3)(d).

Commentary

Canon 5 merits attention from drug court judges because the drug court concept remains a fairly political one, and some candidates for public office have criticized drug courts. Because of the political context, any response to these criticisms will itself appear to be political activity, implicating the restrictions in Canon 5. If the criticisms arise from a political campaign in which the drug court judge is not a candidate (*e.g.,* an election for district attorney or a different judicial position), the judge may respond to the criticisms but must ensure that the response does not constitute public opposition to the candidate. It may seem less like a particular judge's involvement in political action if the drug court establishes a media relations operation outside of the judge's supervision. However, as long as the media relations operation remains within a part of the drug court sphere, the judge has a duty to ensure that the operation does not undertake political activity (as defined by Canon 5) that the judge himself or herself would be forbidden to undertake. Although applicable only to candidates for judicial office, Section 5A(3)(b) makes clear that a judge should not attempt to accomplish through others what the judge himself or herself cannot do.

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If the drug court judge is a candidate for judicial election and the judge's opponent in the election has made criticisms, the judge may respond to the criticisms as provided under Section 5A(3)(d) & (e). The most difficult question in this respect is balancing the judge's appropriate defense of his or her past record with the prohibition under Section 5A(3)(d)(ii) on statements that commit, or appear to commit, the judge to future decisions. At minimum, the judge may both explain and defend the drug court model in general terms.[39] The judge may not state an intention to decide future cases in a particular manner (*e.g.,* "I will enroll all first-time drug offenders in treatment") unless the statement simply reflects an intention to follow established law. In states where the judge is permitted to discuss past cases, the drug court judge should take particular care to ensure that confidential information about drug court participants is not disclosed. In no case should a judge comment on a case pending before him or her.

LAWYERS

Overview

From the perspective of an ordinary courtroom observer, legal practice in drug court differs dramatically from ordinary criminal representation. Instead of taking center stage, prosecutors and defense counsel watch from the wings, spectators to the conversation between participants and the drug court judge. The proceedings have an air of relative informality, both in the conversation between judge and participant and in the relationships among lawyers and other professional staff. The drug court literature celebrates this shift in lawyers' roles and attitudes, proclaiming a "nonadversarial approach" to the proceeding as a "key component" of drug courts. "To facilitate an individual's progress in treatment, the prosecutor and defense counsel must shed their traditional adversarial courtroom relationship and work together as a team. Once a defendant is accepted into the drug court program, the team's focus is on the participant's recovery and law-abiding behavior – not on the merits of the pending case."[40] The authors' review of ethical considerations for lawyers who practice in drug court asks whether this shift in lawyers' roles conflicts with the fundamental requirements of legal ethics, as reflected in the American Bar Association's Model Rules of Professional Conduct and further explicated in the ABA Standards for Criminal Justice.

The image of drug court lawyers as members of a team attracts supporters and incites critics of drug court, who see in this image a marked departure from

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[39] *See* Ala Judicial Inquiry Comm'n, Advisory Op. 80-86; Shaman, Lubet & Alfini, § 11.09 (discussing statements related to a judge's conduct in office).

[40] *The Key Components,* Key Component #2.

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traditional principles of ethical representation.[41] The team member idea is interpreted as a kind of shared practice (critics often mistakenly interpret them as interchangeable roles) in which defense counsel regularly endorse sanctions and prosecutors reach out to participants as therapists. This image contrasts with an equally caricatured vision of traditional "zealous" adversarial practice as total war, in which nothing is spared to achieve victory for the client. These caricatures distort both normal understandings of ethical lawyering and normal legal practice in drug court. First, zealous advocacy does not require hostility or antagonism. As the Restatement provides: "The term [zealous representation] . . . should not be misunderstood to suggest that lawyers are legally required to function with a certain emotion or style of litigating, negotiating, or counseling. For legal purposes, the term encompasses the duties of competence and diligence."[42]

Second, the "team player" image does not reflect interchangeable roles, though it does represent an important change in perspective for both prosecutors and defense counsel. 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 justice system by addressing the defendant's addiction to alcohol or other drugs (AOD). This shared goal gives rise to the team concept, but prosecutors and defense counsel maintain distinct roles within the team. The prosecuting attorney "protect[s] the public's safety by ensuring that each candidate is eligible and appropriate for the program and complies with all drug court requirements."[43] Within the drug court team, the prosecutor has primary responsibility for representing the community's concerns. These concerns certainly focus on public safety and shared obedience to law but also extend to the defendant's recovery and successful reintegration into the community. The defense counsel "protect[s] the participant's due process rights while encouraging full participation."[44] Defense counsel's two duties reflect the normal, bi-directional nature of legal representation. 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. The distinctive roles of

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[41] *See, e.g.,* Richard C. Boldt, *Rehabilitative Punishment and the Drug Court Movement,* 76 Wash. U. Law Qtly 1205 (1998) (criticizing ethics of drug court practice).

[42] Restatement (Third) The Law Governing Lawyers § 16 comment d.

[43] *The Key Components,* Key Component #2.

[44] *Id.*

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prosecutor and defense counsel respect traditional principles of ethical representation, even as their justified expectation of a shared goal in drug court allows both sides to consider themselves part of the drug court team.

This text highlights provisions of the ABA's Model Rules of Professional Conduct and Standards for Criminal Justice that have special relevance for lawyers practicing in drug court. Although most provisions of the Model Rules have been widely adopted, practitioners should consult the applicable rules of ethics in their own jurisdiction, and opinions of their jurisdiction's bar, for further guidance. In the commentary following each rule, the authors identify ethical issues that may arise in the drug court context and offer suggestions on how those issues should be resolved. The approach follows that recommended in the Preamble to the Model Rules: "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself."[45]

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.

Relevant provisions from the ABA Standards for Criminal Justice

Prosecutors

> Standard 3-2.3: Assuring High Standards of Professional Skills
>
> (a) The function of public prosecution requires highly developed professional skills. This objective can best be achieved by promoting continuity of service and broad experience in all phases of the prosecution function.
>
> Standard 3-2.5: Prosecutor's Handbook; Policy Guidelines and Procedures
>
> (a) Each prosecutor's office should develop a statement of (i) general policies to guide the exercise of prosecutorial discretion and (ii) procedures of the office. The objectives of these policies as to discretion and procedures should be to achieve a fair, efficient, and effective enforcement of the criminal law.
>
> Standard 3-2.6: Training Programs

[45] American Bar Association's Model Rules of Professional Conduct, 2000 Edition, Preamble.

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Training programs should be established within the prosecutor's office for new personnel and for continuing education of the staff. Continuing education programs should be substantially expanded and public funds should be provided to enable prosecutors to attend such programs.

Standard 3-2.7: Relations With Police

(a) The prosecutor should provide legal advice to the police concerning police functions and duties in criminal matters.

(b) The prosecutor should cooperate with police in providing the services of the prosecutor's staff to aid in training police in the performance of their function in accordance with law.

Standard 3-3.8: Discretion as to Noncriminal Disposition

(b) Prosecutors should be familiar with the resources of social agencies which can assist in the evaluation of cases for diversion from the criminal process.

Defense counsel

Standard 4-6.1: Duty to Explore Disposition Without Trial

(a) Whenever the law, nature, and circumstances of the case permit, defense counsel should explore the possibility of an early diversion of the case from the criminal process through the use of other community agencies.

Standard 4-8.1: Sentencing

(a) Defense counsel should, at the earliest possible time, be or become familiar with all of the sentencing alternatives available to the court and with community and other facilities which may be of assistance in a plan for meeting the accused's needs. Defense counsel's preparation should also include familiarization with the court's practices in exercising sentencing discretion, the practical consequences of different sentences, and the normal pattern of sentences for the offense involved, including any guidelines applicable at either the sentencing or parole stages. The consequences of the various dispositions available should be explained fully by defense counsel to the accused.

Commentary

Drug court model and practice

In addition to the competence demanded of any attorney who would practice in criminal, juvenile or family court, attorneys who serve in drug courts

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need to have a thorough understanding of both the drug court model in general and the particular practices of the court in which he or she serves. This is especially important for those who represent participants in drug court, because the attorney will be expected to counsel prospective participants on the risks and benefits of enrollment in drug court.

Substance abuse and treatments

Effective legal practice in drug court requires interdisciplinary training. Lawyers should understand the nature of substance abuse and the available treatment options.[46] Education in substance abuse and its treatment not only offers lawyers technical competence to facilitate their interaction with treatment providers, but it also proves indispensable for the core roles lawyers serve in drug court. Defense counsel must understand substance abuse in order to appreciate the psychological pressures facing their clients, both in the decision to enter treatment and during the course of treatment.[47] Prosecutors, too, need adequate education in substance abuse and its treatment in order to make reasonable decisions about participants' continued enrollment in the program after relapse. Because drug courts remain open to innovations in treatment strategies, lawyers' competence requires continuing education.

Defense counsel should be familiar not only with the drug court procedures and general therapeutic strategies but also with the particular treatment providers and programs (when more than a single source provider is) available for drug court participants. By understanding differences between these programs, defense counsel can better help the court to monitor a treatment regime that is appropriate to each client.

Institutional obligations

Beyond education of individual lawyers in drug court practices and substance abuse treatments, achieving competent representation in drug court depends on the engagement of prosecutors and defense counsel at an institutional level. First, the offices of the prosecutor and public defender (along with the private defense bar, where possible) should be involved in the formulation of the drug court. Active involvement at the developmental stage will make it more likely that legitimate concerns of prosecutors and defense counsel can be addressed in the drug court's basic design. Second, whenever possible, the offices of the

[46] *The Key Components,* Key Component #9.

[47] Winick, *Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, 5 Psych. Pub. Pol and L. 1034, 1038-41 (1999).

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prosecutor and public defender should help to insure competent representation by assigning experienced practitioners to drug court on a full-time basis. Significant prior criminal justice experience is important for both prosecuting and defense attorneys in drug court, who face the sensitive and sometimes complicated task of reconciling the participant's interests and the goal of achieving the participant's recovery. A full-time commitment is important because of the special training required for drug court practitioners and also because such commitment helps the attorneys to build effective relationships with other members of the drug court team.

For prosecutors whose offices participate in drug court programs, the office handbook should address the following subjects:

1) drug court eligibility requirements;

2) the schedule of sanctions and incentives, and the circumstances for their application;

3) requirements for graduation;

4) circumstances leading to termination from the drug court;

5) confidentiality; and

6) restrictions on the use by prosecutors of information obtained in drug court.

With regard to each of these topics, the handbook should delineate the drug court's rules, any memorandum of understanding the prosecutor's office has signed, and the office's internal policies. By including drug court policies and practices in the handbook, the prosecutor's office guides the exercise of discretion of those who serve in drug court and also helps to educate all prosecutors about drug court.

Training of police

The potential for success of a drug court can be substantially enhanced with support from local law enforcement. In some jurisdictions, the police perform critical tasks including enforcement of drug court rules (such as area restrictions, under which participants are barred from drug trafficking venues); verifying addresses; and ensuring that participants are in drug-free environments. To obtain the necessary support, the drug court prosecutor should serve as a liaison between the court and the police department, help structure the activities of the police in support of the drug court, and participate in officer training. As liaison, the prosecutor's chief role is to help police understand and embrace the drug court model, in particular the less-adversarial nature of relations with drug court participants. The prosecutor can also help by recommending structural changes that will enable the police to better support drug court, such as giving priority to warrants relating to drug court participants.

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Prosecutors make their greatest contribution to police/drug court relations by training the police for their drug court operations. In particular, prosecutors should instruct officers working with drug courts about confidentiality laws and any court rules governing the dissemination of information, to prevent unlawful disclosures. Prosecutors should instruct the police that they should not use drug court participants as informants for other investigations. (On this point, it may be useful for the drug court to issue an order barring the use of participants as informants; officers who violate this order would be subject to contempt sanctions.)

Rule 1.2: Scope of Representation

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. 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.

*****

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

(d) 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.

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Relevant provisions from the ABA Standards for Criminal Justice

Defense counsel

Standard 4-3.1: Establishment of Relationship

(a) Defense counsel should seek to establish a relationship of trust and confidence with the accused and should discuss the objectives of the representation. . . .

Standard 4-3.7: Advice and Service on Anticipated Unlawful Conduct

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(a) It is defense counsel's duty to advise a client to comply with the law, but counsel may advise concerning the meaning, scope, and validity of a law.

(b) Defense counsel should not counsel a client in or knowingly assist a client to engage in conduct which defense counsel knows to be illegal or fraudulent but defense counsel may discuss the legal consequences of any proposed course of conduct with a client.

Standard 4-5.2: Control and Direction of the Case

(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:

(i) what pleas to enter;
(ii) whether to accept a plea agreement;
(iii) whether to waive jury trial;
(iv) whether to testify in his or her own behalf; and
(v) whether to appeal.

Commentary

Decision to enter drug court

In most drug court jurisdictions, defendants have the option of entering drug court or remaining in a typical criminal justice track;[48] defense counsel should ensure that the option of entering drug court is extended to all eligible defendants. Because of the demands placed on participants in drug court, defense counsel have a special obligation to provide eligible clients with an adequate basis for exercising their option of entering drug court. This obligation has two facets: first, as developed in the commentary to Rule 1.3, the lawyer must have a sufficient understanding of the factual basis of the charge to advise the defendant on entry into drug court; second, as developed in the commentary to Rule 1.4, the lawyer must enable the client to make a competent and informed choice about entering drug court.

Counsel should be acutely aware of the pressures bearing on a client's decision to enter drug court. The first is timing: the drug court model sees arrest as a moment of crisis that can spur the defendant into therapy and emphasizes quick entry of eligible defendants into the drug court program. However, this urgency

[48] Some jurisdictions, however, have mandatory drug court treatment tracks. (*See, e.g.*, the Denver (Colorado) Drug Court in which all drug-using offenders receive some type of drug treatment through a drug court system. For more information, contact the Denver Drug Court at 720-913-8274).

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may hinder the lawyer's ability to investigate and assess the defendant's case and provide the defendant with sufficient information to make a knowing and voluntary judgment about entering drug court. Second is the consequences of entry: defendants frequently waive significant rights by agreeing to enter drug court, even when entry is not predicated on a guilty plea. Third is the defendant's competence: compounding the pressures of time and consequences, addiction to alcohol or other drugs surely casts some doubt on defendants' ability to make a voluntary decision to enter drug court. As discussed in the commentary to Rule 1.4, these concerns about a defendant's consent to enter drug court do not render morally flawed the participation of defense counsel in drug court (or the drug court model itself). They do, however, suggest that counsel should not rely on a defendant's consent as an excuse to limit his or her scrutiny of drug court practices.

The fact that the decision to enter drug court belongs to the client does not mean that the lawyer should be indifferent about the client's choice. Consistent with a proper allocation of authority in the representation, the lawyer may strongly urge the client to enter (or refuse to enter) drug court, so long as the final decision is the client's. However, encouragement to the client to enter drug court must be predicated on counsel's judgment about the client's best interests in the matter at hand, rather than counsel's general support for the drug court program.[49]

Limits on representation

In deciding whether to enter drug court, a defendant should be informed not only about the overall nature of drug court participation (*see* commentary to Rule 1.4) and the effect of participation on a defendant's expectations of confidentiality (*see* commentary to Rule 1.6) but also about the structure of legal representation in drug court. Some aspects of representation in drug court appear to be significant departures from normal criminal defense representation, especially the practice of direct communication between judges and participants in drug court.[50] While these differences require greater client counseling (*e.g.,* to understand the significance of disclosures in open court), they do not indicate material limitations on the lawyer's duties of competent, diligent, and loyal representation. The defense lawyer's protective function is not diminished, although primary exercise of this function may shift to staffing conferences, where counsel may question alleged violations and proposed sanctions without impairing the participant's recovery. Nonetheless, defense counsel should prepare their clients for drug court hearings and should

[49] For further discussion of the lawyer's counseling function, *see* the commentary to Rules 1.4 and 2.1, along with Defense Standard 4-5.1 (found in the commentary to Rule 1.4).

[50] Satel, MD, Sally L., *Observational Study of Courtroom Dynamics in Selected Drug Courts,* National Drug Court Institute Review, Vol. 1, Issue 1, Summer 1998.

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insure that judicial questioning in drug court does not cross accepted lines.[51] (*See also* the commentary to Rule 1.3 on representation agreements that release counsel from obligation to attend all drug court hearings with their participant-clients).

That said, the duty of zealous representation 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.

Advice on non-compliance

Rules 1.2(d) and (e) further define the counseling role. In drug court, the participant's lawyer should discuss the consequences of non-compliance with drug court rules but may not assist the participant to evade detection for non-compliance. Improper assistance will often be governed by Rule 3.3 (prohibiting fraud on the tribunal). The participant's lawyer should explain that the lawyer's inability to assist in evading sanctions for non-compliance has two bases. First, as in all litigation, the lawyer's duty of loyalty to the client does not override the lawyer's duty to obey the law and uphold the legal system. Second, and of equal importance, evading detection for non-compliance in drug court is self-defeating: if the client continues to believe that sobriety is the goal of the representation, then deceiving the court diverts the participant from that goal.

Rule 1.3: Diligence

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

Relevant provisions from the ABA Standards for Criminal Justice

Prosecutors

> Standard 3-2.9: Prompt Disposition of Criminal Charges
>
> (a) A prosecutor should avoid unnecessary delay in the disposition of cases. A prosecutor should not fail to act with reasonable diligence and promptness in prosecuting an accused.

[51] Defense counsel needs to ensure that the judge only speaks with his or her client about matters that are relevant to the participant's success in the drug court program. Defense counsel should delineate "rules" with the judge on the type of inquires that are acceptable. If the judge crosses the boundaries of acceptable inquires, counsel should interject himself or herself into the conversation between the judge and the client.

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Standard 3-3.1: Investigative Function of Prosecutor

(f) A prosecutor should not promise not to prosecute for prospective criminal activity, except where such activity is part of an officially supervised investigative and enforcement program.

Standard 3-3.8: Discretion as to Noncriminal Disposition

(a) The prosecutor should consider in appropriate cases the availability of noncriminal disposition, formal or informal, in deciding whether to press criminal charges which would otherwise be supported by probable cause; especially in the case of a first offender, the nature of the offense may warrant noncriminal disposition.

Standard 3-3.9: Discretion in the Charging Decision

(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction.

Standard 3-3.11: Disclosure of Evidence by the Prosecutor

(a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

(b) A prosecutor should not fail to make a reasonably diligent effort to comply with a legally proper discovery request.

Defense counsel

Standard 4-1.3: Delays; Punctuality; Workload

(a) Defense counsel should act with reasonable diligence and promptness in representing a client.

Standard 4-3.2: Interviewing the Client

(a) As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused. In so doing, defense counsel should probe for all legally relevant information without seeking to influence the direction of the client's responses.

Standard 4-3.6: Prompt Action to Protect the Accused

Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the

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accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights.

Standard 4-4.1: Duty to Investigate

(a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

Standard 4-6.1: Duty to Explore Disposition Without Trial

(b) Defense counsel may engage in plea discussions with the prosecutor. Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.

Commentary

Entry into drug court – prosecutor

The prosecutor's charging decision frequently has a determinative impact on a defendant's eligibility for drug court, and it is a decision over which the prosecutor frequently has discretion. Prosecutors should consider forgoing charges that might be appropriate in the absence of drug court where those charges would render a potential candidate ineligible for drug court. For example, offenses carrying mandatory minimum sentences will often bar drug court participation, especially in post-plea jurisdictions. The discretion afforded prosecutors in charging allows them to withhold charges that would prevent offenders from entering suitable diversionary programs. As noted in the commentary to Standard 3-3.8, "it has long been the practice among many experienced prosecutors to defer prosecution upon the fulfillment of certain conditions, such as a firm arrangement for the offender to seek psychiatric assistance where a disturbed mental condition may have contributed to the aberrant behavior."[52]

As Key Component #3 indicates, timing of a participant's entry into drug court can be crucial to the success of the participant as well as of the drug court. "The period immediately after an arrest, or after apprehension for a probation

[52] ABA Criminal Justice Standard 3-3.8, Commentary.

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violation, provides a critical window of opportunity for intervening...."[53] The "window of opportunity" requires prompt action on the part of both prosecutors and defense counsel. Within this relatively short time, prosecutors need to review available information about the defendant's case, determine the defendant's eligibility for drug court, and, if eligible and suitable, file the necessary paperwork for the defendant's enrollment. Whenever possible, prosecutors should seek to expedite both charging and drug court screening (especially lab testing). Failure to carry out these tasks in a timely fashion can delay entry and forfeit the therapeutic advantages of addressing the defendant in the crisis of arrest. The process of accelerating drug court admissions will vary depending on the drug court model in use. In pre-trial diversion jurisdictions, appropriate cases should be referred to drug court as soon as they are filed, subject to withdrawal from the program if lab tests prove negative. In the post-plea setting, immediate referral may not be possible, but the prosecutor should actively search for suitable drug court candidates and handle their cases in a manner that enhances their prospects for entering drug court.

Entry into drug court – defense counsel and participants

The "window of opportunity" places an even greater demand on defense counsel, if they are to fulfill their professional obligations within the drug court context. The urgency contemplated by Key Component #3 admittedly creates some tension with respect to the lawyer's duty under Rules 1.2 and 1.4 to insure that the client has the opportunity to make a fully informed choice about entering drug court.[54] However, it is quite simple for attorneys to reconcile these demands. The client's informed choice depends on the lawyer possessing sufficient factual and legal information about the client's case. Even if the client admits a history of alcohol and other drug (AOD) abuse and is eager to enter treatment, the lawyer still has a duty to investigate the charges pending against the client and determine the client's full range of legal defenses to those charges. Where significant legal defenses are available, but the client desires drug treatment, the lawyer should advise the client that treatment outside of the criminal justice context of drug courts may have significant advantages, especially in heightened protections for confidentiality and the absence of criminal sanctions for relapse. If counsel cannot obtain the information necessary to provide the client with all of his or her options in the time allowed for entering drug court, the attorney should try to arrange for conditional enrollment. This will allow the client to withdraw or the court to determine whether or not this potential participant is, in fact, a good candidate for

[53] *The Key Components,* Key Component #3.

[54] Of course, at the onset, defense counsel should make an informed decision as to whether the client is competent to stand trial. For more detail, *see* pp. 37 in this publication (Rule 1.4, "Understanding, not just information").

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drug court. Whenever drug court enrollment requires irrevocable waivers of legal rights before counsel has an opportunity to make an adequate investigation and assessment of a defendant's case, counsel should not advise clients to enroll. *See* Defense Standard 4-6.1 (following this commentary). In practice, this concern about informed consent has not significantly limited lawyers' (or their clients') participation in drug court. Experienced defense counsel in drug court report that, in most cases eligible for drug court, they are able to gain sufficient information about the client's case within the "window of opportunity" contemplated by Key Component #3 to permit the client to make an informed choice about entering drug court.

Diligent representation in drug court – prosecutors

Criminal Justice Standard 3-3.1(f), which forbids prosecutors to "promise not to prosecute for prospective criminal activity" appears to conflict with a central feature of the prosecutor's role in drug court. The text of Drug Court Key Component #2 provides that the prosecuting attorney "agrees that a positive drug test or open court admission of drug possession or use will not result in the filing of additional drug charges based on that admission."[55] The conflict is only apparent, not real: drug court prosecutors do not agree not to prosecute future crimes of use or possession but simply agree to a form of use immunity for information obtained through drug court hearings or tests. Prosecutors may also, in the exercise of ordinary prosecutorial discretion, choose not to bring charges or seek convictions for offenses committed by drug court participants. They may even declare that they are inclined not to prosecute participants who commit certain types of offenses but are otherwise advancing in the recovery process. So long as prosecutors do not promise not to bring charges, but promise only not to use certain information against the participants, prosecutors do not violate Standard 3-3.1(f).

Diligent representation in drug court – defense counsel

Once the participant enters drug court, the goals of defense representation expand to include the participant's successful completion of the drug court program. As noted in this publication's commentary to Rule 1.2(c), this expanded understanding of representation, by itself, does not constitute a limitation on counsel's responsibility to the client/participant. Diligence in drug court representation requires counsel's continuing engagement with clients, monitoring, and keeping careful notes of the client's progress (or failures) in the drug court program.

[55] *The Key Components,* Key Component #2, Performance Benchmark 3.

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Ideally, lawyers will be present at every staffing conference and drug court hearing in which their clients' cases are addressed and especially at every court appearance by their clients. At minimum, however, an attorney who, by prior consensual arrangement with his or her client, does not attend all proceedings involving the client should arrange to receive advance notice whenever the court contemplates sanctioning one of his or her clients. All attorneys, regardless of whether they plan to attend every proceeding, should brief their clients about the significance of disclosures in drug court proceedings. Attorneys should insist that their clients be truthful in all statements to the court, both because Rule 3.3 requires candor in statements to the tribunal and the client's therapeutic program depends on such honesty. Truthfulness does not, however, imply unrestrained confessions. Clients should be advised of possible consequences if they admit to serious crimes (although a client who is asked about such crimes may not falsely deny them). In addition, attorneys should inform their clients that some drug court personnel may not be covered by confidentiality restrictions (*e.g.,* interns), so the client should be circumspect in communications with those personnel.

When notified of possible sanctions, the attorney should confer with the client to assess possible defenses or mitigating circumstances. During these consultations, the attorney should avoid interfering with the treatment process, which requires participants to take responsibility for relapse, while at the same time formulating appropriate defenses. For example, if a client denies new allegations of drug usage, the attorney might wish to request an on-site drug test to ascertain immediate results regarding the truth of the client's denials.

Rule 1.4: Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Relevant provisions from the ABA Standards for Criminal Justice

Prosecutors

> Standard 3-3.2: Relations With Victims and Prospective Witnesses
>
> (c) The prosecutor should readily provide victims and witnesses who request it information about the status of cases in which they interested.
>
> (g) The prosecutor should seek to insure that victims of serious crimes or their representatives are given timely notice of (i) judicial proceedings relating to the victims' case; (ii) disposition of the case,

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including plea bargains, trial and sentencing; and (iii) any decision or action in the case which results in the accused's provisional or final release from custody.

Defense counsel

Standard 4-2.1: Communication

Every jurisdiction should guarantee by statute or rule of court the right of an accused person to prompt and effective communication with a lawyer and should require that reasonable access to a telephone or other facilities be provided for that purpose.

Standard 4-3.1: Establishment of Relationship

(a) Defense counsel should seek to establish a relationship of trust and confidence with the accused and should discuss the objectives of the representation and whether defense counsel will continue to represent the accused if there is an appeal.

Standard 4-3.8: Duty to Keep Client Informed

(a) Defense counsel should keep the client informed of the developments in the case and the progress of preparing the defense and should promptly comply with reasonable requests for information.

(b) Defense counsel should explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Standard 4-5.1: Advising the Accused

(a) After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

(b) Defense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea.

Standard 4-8.1: Sentencing

(c) Defense counsel should also insure that the accused understands the nature of the presentence investigation process, and in particular the significance of statements made by the accused to probation officers and related personnel. Where appropriate, defense counsel should attend the probation officer's interview with the accused.

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Commentary

Prosecutors' duty of communication

Victims of crime are not the prosecutor's clients, of course, but many jurisdictions and the ABA Criminal Justice Standards require prosecutors to keep victims informed about the progress of the case in which they are involved. Because many drug courts focus on offenses for which there is no discrete victim, the prosecutor's duty to communicate with victims will not ordinarily arise. However, an increasing number of jurisdictions permit enrollment of those charged with offenses against identifiable victims. Victims of offenses committed by those enrolled in drug court deserve the same consideration that they would receive in other criminal or juvenile cases.

In communicating with victims, however, prosecutors must observe confidentiality requirements established by law, the drug court's rules, and the court's memorandum of understanding. In some instances, it will be necessary to provide information in general terms (*e.g.,* "the defendant is doing well in probation," rather than "the defendant is doing well in drug court"). The potential for difficulty in balancing communication with victims against the confidentiality rules of the drug court provides another reason for appointing full-time drug court prosecutors (as recommended in this publication's commentary to Rule 1.1; *see also* Criminal Justice Standard 3-2.3).

Defense counsels' duty of communication

Effective representation in drug court requires ongoing and trusting communication between participants and their counsel. This requirement has both legal and therapeutic implications. First, the client's entry into drug court requires informed consent to a number of complicated measures, not just the disposition of charges facing the defendant but waiver of certain confidentiality protections otherwise afforded patients in treatment for alcohol and other drug (AOD) addiction. Without the assistance of counsel, the court (and the community more generally) would have much less reason to be confident that the defendant voluntarily and knowingly waived these protections. Second, defense counsel's duty to communicate with the client has therapeutic significance. By informing the client about the choices available to the client and the consequences that likely follow from those choices, the lawyer helps the client to participate in the process as a moral agent – a person responsible for his own conduct, rather than a passive object of the court's action. For further analysis of the lawyer's counseling function, see the commentary to Rules 1.2 and 2.1.

Three aspects of the defense counsel's duty to communicate require additional attention: first, the duty to promote understanding, rather than just

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providing information; second, the duty, at the client's choice, to enter drug court; and third, the duty while a client participates in drug court.

Understanding, not just information

The legal and therapeutic benefits of defense counsel's communication depend on the client's comprehension. To promote understanding, defense counsel should be attentive to the range of barriers that impede full communication in the drug court context. A particularly significant barrier for drug court defense counsel, also reviewed in the commentary to Rule 1.14, is participant's history of AOD abuse. Particularly at an early interview, the client may be under the influence, preventing the full communication contemplated by this Rule. In addition, counsel should also recognize symptoms of a client's withdrawal from AOD addiction, which may impede communication as much as intoxication.

Language and reading skills pose additional obstacles to communication. A significant number of drug court participants do not read at their age level. Thus, attorneys discussing written waivers with their clients should read all documents aloud or at least be sensitive to the possibility that such readings may be necessary. Defense counsel should be especially attentive to the vocabulary used in waiver documents and in their own conversations with clients. To the extent possible, concrete examples (*e.g.,* a scenario in which the client relapses) should be used to help explain the alternatives facing the client. As in contexts outside drug court, counsel for clients who do not speak English should make sure that a translator is available for both attorney/client communications and the drug court program.

The client's decision to enter drug court

As reviewed in the commentary to Rule 1.2, the decision to enter drug court typically belongs to the client, but defense counsel plays a crucial role in informing (or ensuring that others have informed) the client about this choice. Specifically, defense counsel must help the client understand the charges pending against him or her, criminal sanctions that the client faces and treatment possibilities available to the client outside of drug court, the rules of drug court and the consequences for breaking those rules, the benefits obtained by completing drug court, and the penalties imposed on the client should he or she fail to complete the drug court program.[56] Defense counsel also should ensure that the client has a sufficient understanding of the therapeutic process and how that process is carried out in drug court.

[56] *See the Key Components,* Key Component #2, Performance Benchmark 4 (on defense counsel's duty to inform the client).

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Communicating with the client in drug court

Defense counsel's duty to communicate with a client does not end when the client enters drug court. Because clients do not attend drug court team meetings (*i.e.,* staffings) at which their cases are discussed, counsel should meet periodically with clients in order to bring the client's perspective and concerns to the team meetings and also to explain and interpret for the client the court's perception of the client's progress. Because clients are expected to speak directly with the judge in drug court hearings, it is especially important for counsel to remind clients about the expectation of, and limits on, candor in open court. Candor with respect to AOD use is both necessary and appropriate in drug court, and counsel can ethically encourage clients to be truthful in such disclosures because of the prosecutor's commitment not to use those admissions for further prosecutions. However, counsel should also inform clients that this immunity is limited – not all disclosures of criminal conduct in treatment or open court are so protected. While clients may not lie (*see* Rule 3.3), clients should be informed and reminded of the need to limit harmful disclosures (absent a broader agreement on immunity for admissions made in treatment or open court). Finally, counsel should explain the privilege against self-incrimination and the extent to which that privilege may be asserted in drug court hearings.

Client assessments

For attorneys with large drug court practices (especially public defenders), periodic anonymous surveys of clients may prove useful in improving communication in particular and drug court representation in general. A sample survey follows.

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SAMPLE MEMBER INPUT SURVEY

Team DC:

Name (Optional - May be done anonymously):

Month: Program:

Please tell us what you do in your program:

Comments/Criticism:

Has this program helped you? Yes ____ No ____

In what ways?

How, if at all, would you change it?

What comments/criticism do you have for drug court?

Overall, how would you say your recovery is progressing?

Do you have problem areas that aren't being addressed?

Can you see problems other participants have that should be handled differently?

Do you have questions or concerns about which we should know? (If yes, do you wish to speak to us privately?)

What do you think should constitute grounds for termination from drug court?

How can participants show sincerity to allow them to stay in after relapsing or otherwise demonstrating poor behavior in drug court?

RULE 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

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(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) 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.

Relevant provisions from the ABA Standards for Criminal Justice

Defense counsel

Standard 4-3.1: Establishment of Relationship

(a) Defense counsel should seek to establish a relationship of trust and confidence with the accused and should discuss the objectives of the representation and whether defense counsel will continue to represent the accused if there is an appeal. Defense counsel should explain the necessity of full disclosure of all facts known to the client for an effective defense, and defense counsel should explain the extent to which counsel's obligation of confidentiality makes privileged the accused's disclosures.

Commentary

Defense counsel's duty of confidentiality

Just as in other contexts of representation, the duty of confidentiality provides the moral and practical foundation for the relationship between defense counsel and his or her client. The full conversation contemplated by Rules 1.2, 1.4, and 2.1 depends on trust that the substance of that conversation will not be disclosed, absent the client's consent, outside of the attorney/client relationship. Nothing in the structure of drug court, including defense counsel's membership in the drug court team, weakens this duty of confidentiality. Although counsel should encourage participants to be truthful in drug court treatment and hearings, counsel should not be the conduit of confidential information about the client, unless the client consents to the particular disclosures. Of course, the traditional attorney/client privilege remains in tact, and it transcends any role that the drug court defense counsel has as a member of the drug court team. As in traditional cases, defense counsel must explain this privilege, and any circumstances that justify its breach, to his or her client.

Counsel's duty to protect confidential information about the client is enhanced by federal and state laws on confidentiality of alcohol and other drug (AOD) treatment information, along with the court's rules and memorandum of

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understanding. Defense counsel should learn the extent of these protections[57] and ensure their observance by the drug court team. In addition, because participation in drug court requires waiver of protections afforded by these regulations, counsel should advocate for the narrowest possible waivers consistent with effective functioning of the drug court. Participants should not, and cannot under federal law, be asked to execute blanket waivers of their rights to confidentiality in AOD treatment.

Ethics rules provide two relevant limitations on counsel's duty of confidentiality.[58] The first, found in Rule 3.3(a)(2), requires the lawyer to rectify a client's fraud on the court even if doing so would involve disclosure of confidential information. Thus, a lawyer who knows that his client has submitted adulterated urine for a urinalysis would be required to counsel the client to disclose the fraud, and if the client refused to do so, to disclose the fraud to the court. *See* Rule 3.3 for further analysis. Second, the lawyer may disclose a client's intention to commit a criminal act that is "likely to result in imminent death or substantial bodily harm." For example, a lawyer would be permitted (but not required under the Model Rules) to disclose his or her knowledge of a client's intention to harm a fellow drug court participant or treatment provider. Importantly, the limitation in Rule 1.6(b)(1) does not apply to the lawyer's knowledge of past criminal acts by the client, only to future crimes. Knowledge of past crimes, except for a fraud on the court under Rule 3.3(a)(2), remains confidential.

The defense counsel may waive his or her attendance at staffings or status hearings. However, such waiver prevents his or her full participation in the team approach to working with each participant. As delineated under Rule 1.3 of this text, it is advisable to obtain the informed, written consent of the participant prior to counsel's non-appearance.

The prosecutor's duty of confidentiality

Like the defense counsel, the prosecutor owes drug court participants a duty of confidentiality. However, the prosecutor's duty does not arise out of Rule 1.6. Instead, this duty arises from the web of federal and state rules protecting information about recipients of AOD treatment and the drug court's rules and memorandum of understanding. With few, narrowly defined exceptions, these rules generally prohibit redisclosure of confidential treatment information to

[57] *See Confidentiality Laws,* National Drug Court Institute, 1999.

[58] Lawyers should pay special attention to their own jurisdictions' limitations on the duty of confidentiality, which differ substantially from one another. *See generally,* Morgan & Rotunda, *2001 Selected Standards on Professional Responsibility* 134-51 (detailing differences among state ethics rules on client confidences).

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persons outside the drug court team, including others in the prosecutor's office (who are not working in drug court).[59]

Just like defense counsel, prosecutors (or any other member of the drug court team except for the judge, treatment provider or case manager) may waive their appearance at staffings or status hearings. (*See* text under Rule 1.3).

RULE 1.7: Conflict of Interest: General Rule

(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.

Relevant provisions from the ABA Standards for Criminal Justice

Prosecutors

Standard 3-1.3: Conflicts of Interest

(a) A prosecutor should avoid a conflict of interest with respect to his or her official duties.

(f) A prosecutor should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests.

Defense counsel

Standard 4-3.5: Conflicts of Interest

(a) Defense counsel should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests.

[59] *Confidentiality Laws,* National Drug Court Institute, 1999.

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(c) Except for preliminary matters such as initial hearings or applications for bail, defense counsel who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another.

Commentary

Adverse representation of multiple clients

Representation of multiple participants in drug court proceedings ordinarily does not raise different conflict of interest problems than other legal settings. As long as clients are not "defendant(s) in the same criminal case" a lawyer may represent multiple participants in the same drug court program. Absent special circumstances, such representation of one client is neither directly adverse to representation of other clients in the same program nor materially limited by obligations to those other clients. Instead, the clients share a common goal of recovery.

While routine events in criminal and juvenile drug courts are unlikely to present conflicts, it is possible that clients interests' may become adverse. As a general matter, lawyers should consider any situation in which advancing the interests of one client harms another as a conflict of interests. For example, if one participant accuses another of selling drugs, one of the two is likely to be severely sanctioned (either the accused for dealing or the accuser for lying). Separate attorneys should be appointed for the hearing on this matter (and possibly for all future proceedings, if neither participant is expelled). If defendants have conflicting defenses to the charges pending against them in the same criminal case, they should have separate counsel advising them on entry to drug court. If the charges are resolved by entry into drug court (*i.e.*, the program is post-plea), the same counsel may then represent the clients while in the drug court program after obtaining the informed consent of both defendants. If the charges are not resolved by entry into drug court, however, separate counsel should continue to represent the defendants in drug court, or at minimum should be provided where termination of the program is at issue.

Counsel in family drug courts may be more likely to encounter conflicts of interest than lawyers in criminal or juvenile drug courts. For example, multiple representation of parents may be impossible where an initial harmony of interests gives way to competition for custody or disparate progress in treatment (if both parents have AOD addictions). Not only at the outset of the representation but throughout, the lawyer should ask whether representation of one client's best interests will interfere with representation of another client's best interests. Within the criminal context, any perception of conflict should be resolved in favor of separate representation. The other option, client consent, should be used only

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when there is little risk of prejudice. Outside of the criminal context, the lawyer may seek client consent for most conflicts, but such consent requires full disclosure of the nature and risks of the conflict.

Conflicts and the lawyer as "team member"

To some, the idea of the prosecutor and defense counsel collaborating as drug court "team members" raises at least the appearance of a conflict of interest: the lawyer's membership in the team interferes with loyal performance of the lawyer's primary duties to the client (whether the defendant or the state). As noted in the Overview to the lawyers' section of this publication, this concern rests on a misunderstanding of the concept of team membership and possibly also on a misunderstanding of the concept of zealous representation. Within the drug court team and its shared goal of reducing participants' AOD use and involvement with the criminal justice system, prosecutors and defense counsel have distinct roles and distinct loyalties. The fact that these roles are carried out with a (rebuttable) presumption of cooperation does not constitute a conflict of interest. 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.

RULE 1.14: Client under a Disability

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client/lawyer relationship with the client.

Commentary

Disability due to intoxication

Because drug court participants are, by definition, substance abusers, the possibility that a client will be incapacitated is always present. This is a particular concern during early stages of the program – at precisely the time that the defendant is expected to make significant decisions about entry into the program and waiver of legal rights. Drug court lawyers should learn to recognize signs that their clients are under the influence. When alcohol or drug ingestion has temporarily disabled a client, the client is legally incapable of executing waivers or participating in judicial proceedings. The attorney should postpone consultation

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with the client until the client recovers. If the client is severely intoxicated, the attorney should seek medical treatment for the client.

Dual diagnosis

Alcohol or drug abuse can often mask, and sometimes exacerbates, underlying mental illnesses such as depression and schizophrenia.[60] Counsel should be aware of programs that specialize in treating patients with both AOD addiction and mental illness and recommend placement in such programs when appropriate. The fact that a client may be suffering from mental illness "does not diminish the lawyer's obligation to treat the client with attention and respect. A client with a mental infirmity may still possess the ability to understand, deliberate upon, and reach reasonable conclusions about matters affecting his or her own well-being."[61] Counsel should work with other drug court team members to encourage that same level of understanding of the special challenges facing dually diagnosed participants.[62]

RULE 2.1: 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.

Relevant provisions from the ABA Standards for Criminal Justice

Defense counsel

> Standard 4-5.1: Advising the Accused
>
> (a) After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

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[60] *See generally*, *Assessment and Treatment of Patients with Coexisting Mental Illness and Alcohol and Other Drug Abuse,* Treatment Improvement Protocol (TIP) Series 9, Center for Substance Abuse Treatment, Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services, Washington, DC, 1995.

[61] ABA Criminal Justice Standard 4-3.1 comment.

[62] For more information on dual diagnosis, contact the National Mental Health Association at 703-684-7722 or www.nmha.org.

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(b) Defense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea.

Commentary

Rules 1.2 and 1.4 focus on the lawyer's duty to support the client's informed choices. Rule 2.1 broadens the definition of the information that the lawyer is expected to provide to the client. In communicating with defendants eligible for, or participating in, drug court, counsel should provide complete information about the client's legal predicament and options. However, consideration of risks and benefits need not be limited to the short term (*i.e.*, the sanctions that the defendant faces in the matter at hand). Consistent with the duty to provide "independent professional judgment and render candid advice," the lawyer may "discuss[] with the defendant the long-term benefits of sobriety and a drug-free life." A lawyer who encourages suitable clients to enter drug court does not act paternalistically (*i.e.*, usurping the client's autonomy) so long as the lawyer truthfully states the client's options outside of drug court and that the ultimate choice belongs to the client.

It is appropriate that the attorney advise the client of the advantages of the drug court, regardless of the attorney's personal opinions, and any attorney who does not do so may not be serving his/her client's best interests. This advice, however, must be given within the context of full discussion of the legal issues presented by the case, alternative dispositions open for the client's consideration and the legal and other implications of these various alternatives. The advice provided by the defense attorney to a client who is eligible for drug court must meet the standards of providing adequate counsel. This assures that, in the event that the client decides to enter the drug court, any informed consent forms that he or she may execute are fully voluntary and knowing of their implications and consequences.[63]

Once in drug court, the lawyer's counseling role includes not only encouraging the client to progress in treatment but also helping the client to address other problems that may be impeding his or her recovery, such as homelessness or unemployment.

RULE 3.1: Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification

[63] *Confidentiality Laws*, National Drug Court Institute, 1999.

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or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Commentary

The last sentence of Rule 3.1 raises squarely the question of zealous advocacy in drug court: must defense counsel mount a vigorous legal challenge to every threatened sanction against a client? This provision of Rule 3.1 should be understood as an exception to the first sentence's prohibition of frivolous claims and defenses and is merely permissive. Defense counsel cannot be sanctioned for "putting the government to the test," but ethical responsibility to the client does not mandate such a response. Use of available defenses, like other attributes of representation, should be guided by the client's best interest. This is a norm determined through the lawyer's consultation with the client, rather than an abstract understanding of zealous representation.

At times, vigorous defense of the client may be required. Although the drug court is often described as a "nonadversarial proceeding," it is nonadversarial only in terms of the relationships of the treatment providers and the justice system officials involved in the program. It takes into account their recommendations regarding the treatment regime and responses to noncompliance and progress that the drug court "team" believes to be in the client's best interests.

Even if the client admits to certain allegations that may be lodged against him or her, the attorney should object if the sanctions imposed are disproportionate to the offense or inconsistent with sanctions imposed on similarly situated participants. Likewise, the attorney should interpose himself or herself between the client and the court if the judge asks questions likely to elicit irrelevant and prejudicial information from the client or if the court bases its decision on information that the attorney deems unreliable.[64] In these situations, it may be better to ask for a sidebar rather than directly contradict the judge in front of the participant.

In other circumstances, a vigorous legal effort can be counterproductive for the client's progress in treatment. For example, if a client admits to the lawyer that he or she has relapsed, and the relapse has been detected through urinalysis, but the lawyer perceives procedural defects in the urinalysis collection and reporting, the lawyer should discuss with the client the possibility of admitting to the relapse and accepting the court's sanction. The lawyer should directly address the problem of

[64] Burke, Robert, "Reconciling Drug Court Participation with Defender Ethical Standards, *Indigent Defense*, Vol. 1, No. 3 Nov/Dec. 1997), p. 6.

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relapse rather than raise the available defenses. The decision to forego the procedural defense, however, should be made by the client (*see* Rule 1.2), subject to the attorney's right to withdraw from the representation under Rule 1.16.

RULE 3.2: Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Relevant provisions from the ABA Standards for Criminal Justice

Prosecutors

> Standard 3-2.9: Prompt Disposition of Criminal Charges
>
> (a) A prosecutor should avoid unnecessary delay in the disposition of cases. A prosecutor should not fail to act with reasonable diligence and promptness in prosecuting an accused.

Defense counsel

> Standard 4-1.3: Delays; Punctuality; Workload
>
> (a) Defense counsel should act with reasonable diligence and promptness in representing a client.
>
> Standard 4-3.2: Interviewing the Client
>
> (a) As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused. In so doing, defense counsel should probe for all legally relevant information without seeking to influence the direction of the client's responses.
>
> Standard 4-3.6: Prompt Action to Protect the Accused
>
> Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights.

Commentary[65]

As stated in Key Component #3, the effectiveness of drug court depends in part on compressing the time between arrest, a participant's entry into the program, and commencement of treatment. Expediting the time for the screening, program

[65] For further review, *see* ABA Model Rule 1.3 and Commentary.

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eligibility determination, and initial drug court hearing is therefore a critical component of the drug court process. In order to have adequate legal advice regarding the appropriateness of the drug court, it is vital that clients meet with counsel as soon as possible after their arrest or other event precipitating entry into drug court. As noted in this publication's commentary to Rules 1.2 and 1.3, the need for a client's consent may arise before counsel has adequate information regarding the case. In that situation, counsel should contact informed parties (usually police officers or prosecutors) to obtain additional information. Where adequate information still is not available, counsel may arrange for conditional entry into a drug court program, subject to withdrawal for defined factual grounds (*e.g.,* a negative urinalysis). Defense counsel and prosecutors should establish mechanisms for rapid exchanges of information with safeguards for confidentiality and other interests of both parties.

RULE 3.3: Candor toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) 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

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

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

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

Relevant provisions from the ABA Standards for Criminal Justice

Prosecutors

Standard 3-5.6: Presentation of Evidence

(a) A prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity.

Defense counsel

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Standard 4-7.5: Presentation of Evidence

(a) Defense counsel should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to take reasonable remedial measures upon discovery of its falsity.

Commentary

This Rule prohibits a lawyer from deceiving the court or allowing a client or witness to do so. The Rule does not 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 used a prohibited substance but the use has not been detected, neither the lawyer nor the client is obligated to disclose this fact. Where a client unambiguously lies to the court, however, Rule 3.3 imposes a duty of candor that supercedes the lawyer's duty of confidentiality.

This situation is likely to arise with some regularity in drug courts. It is important to keep in mind that drug court defense attorneys, as in traditional courtrooms, should always encourage the client to be honest. This candor, however, takes on additional importance in drug court, as client honesty is a critical element to his or her recovery and to the success of the drug court program.

In some cases, clients may falsely deny having used drugs recently, or they may affirmatively deny that they have "water loaded" to distort urinalysis results. Drug court attorneys should handle these situations just as attorneys in other court proceedings would. First, they should privately exhort the client to be truthful, emphasizing the benefits of doing so and the possible consequences of attempting to perpetrate a fraud on the court. This is the best and recommended practice for drug court defense counsel. If that fails, however, the attorney should seek to withdraw from representing the client. (However, this may pose a problem to the client and the attorney on two levels. First, it signals the judge that the client is not being truthful. Second, it is difficult to assign another defense attorney to a drug court client.) Then, as a last resort, the attorney must disclose the client's fraud. Although crises of this nature will undoubtedly strain the lawyer/client relationship, demanding honesty from the client both fulfills the attorney's ethical duty and promotes the client's recovery.

A more difficult issue arises with respect to a client's criminal history. Where a client has a criminal record that would render the client ineligible to participate in drug court, but the prosecution has not discovered the client's record, must the defense counsel disclose to the court the client's ineligibility? Resolution of this question turns on whether the client or defense counsel can be deemed to have impliedly represented the client's eligibility to the court. Counsel who knows of a client's ineligibility because of criminal history, and knows that the court is

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unaware of the client's record, should ensure that the client has not misrepresented the client's history in a screening interview. Failure to correct such a misrepresentation clearly violates Rule 3.3.

RULE 3.4: Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of acts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Relevant provisions from the ABA Standards for Criminal Justice

Prosecutors

Standard 3-3.11: Disclosure of Evidence by the Prosecutor

(a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guile of

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the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

(b) A prosecutor should not fail to make a reasonably diligent effort to comply with a legally proper discovery request.

Defense counsel

Standard 4-4.5: Compliance with Discovery Procedure

Defense counsel should make a reasonably diligent effort to comply with a legally proper discovery request.

Commentary

The adversarial system contemplates that the evidence in a case is to be marshaled competitively by the contentious parties. However, drug courts are "nonadversarial." Despite the "nonadversarial" nature of the drug court proceedings, however, the attorney's ethical obligation to maintain the privilege of all communication with his or her client conducted in the course of his or her representation overrides any request to disclose information that might otherwise be available. The attorney, nevertheless, must not take any action to falsify or affirmatively withhold evidence from the court that materially bears on the defendant's situation, his or her eligibility for the program, or his or her performance while participating.

RULE 3.5: Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person except as permitted by law; or

(c) engage in conduct intended to disrupt a tribunal.

Relevant provisions from the ABA Standards for Criminal Justice

Prosecutors

Standard 3-2.8: Relations With the Courts and Bar

(b) A prosecutor's duties necessarily involve frequent and regular official contacts with the judge or judges of the prosecutor's jurisdiction. In such contacts the prosecutor should carefully strive to preserve the appearance as well as the reality of the correct relationship which

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professional traditions, ethical codes, and applicable law require between advocates and judges.

(c) A prosecutor should not engage in unauthorized ex parte discussions with or submission of material to a judge relating to a particular case which is or may come before the judge.

Standard 3-5.2: Courtroom Professionalism

(a) As an officer of the court, the prosecutor should support the authority of the court and the dignity of the trial courtroom by strict adherence to codes of professionalism and by manifesting a professional attitude toward the judge, opposing counsel, witnesses, defendants, jurors, and others in the courtroom.

Defense counsel

Standard 4-7.1: Courtroom Professionalism

(a) As an officer of the court, defense counsel should support the authority of the court and the dignity of the trial courtroom by strict adherence to codes of professionalism and by manifesting a professional attitude toward the judge, opposing counsel, witnesses, jurors, and others in the courtroom.

(b) Defense counsel should not engage in unauthorized ex parte discussions with or submission of material to a judge relating to a particular case which is or may come before the judge.

Commentary

Ex parte contacts

Because of the nature of the drug court process, ex parte contacts with the drug court judge are not uncommon. For example, treatment providers often provide the judge with information relating to participants without counsel for any of the parties present. Ex parte contacts involving non-lawyers are governed by Canon 3B(7) of the Code of Judicial Conduct.[66] With few, narrowly circumscribed exceptions, the fact and substance of all ex parte contacts should be disclosed promptly to all parties to the matter.

While some ex parte contacts may be appropriate in the drug court context, lawyers on the drug court team should avoid all ex parte contacts with the judge. The court should develop a mechanism to provide notification to the team in

[66] *See* this publication's commentary on Canon 3B(7) at pp. 9-11 of this text.

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situations that warrant emergency action. Ideally, the mechanism should permit simultaneous notice to all team members.

Courtroom decorum

The requirements of decorum in Rule 3.5 and Criminal Justice Standards 3-5.2 and 4-7.1, like the parallel requirement in Canon 3B(3) of the Code of Judicial Conduct, may be raised by those who witness clapping and other celebrations in drug court. However, decorum does not mean staid detachment; it indicates conduct appropriate to the dignified and effective functioning of the court. Where celebrations of success are consistent with principles of impartial treatment of participants and respect for the judicial office, both prosecutors and defense counsel may participate in these celebrations.

RULE 3.6: Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

RULE 3.8: Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

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(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6;

(g) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

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Relevant provisions from the ABA Standards for Criminal Justice

Prosecutors

> Standard 3-1.4: Public Statements
>
> (a) A prosecutor should not make or authorize the making of an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the prosecutor knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding.
>
> (b) A prosecutor should exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under this Standard.

Defense counsel

> Standard 4-1.4: Public Statements
>
> Defense counsel should not make or authorize the making of an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if defense counsel knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding.

Commentary

Drug courts often experience tension between the benefits and costs of publicity. On the one hand, drug courts need to develop ties to, and support within, the community, connections that depend on public awareness of drug court. On the other hand, participants have significant expectations of confidentiality (expectations backed by law) that could be damaged by even the most positive publicity. For example, the common practice of inviting media to drug court graduations creates a risk that protected information about participants, including the fact of their alcohol and other drug (AOD) treatment, will not only be disclosed but broadcast. To assure compliance with applicable law, each drug court should establish procedures for media and public relations and develop guidelines about the types of information that can be disclosed and the persons entitled to make such disclosures.[67] The best practice with respect to the media is to let the participants

[67] For further information about confidentiality in drug court, *see Confidentiality Laws*, National Drug Court Institute, 1999.

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know, in advance, that the media will be present. Ask each participant if he or she would like to be featured on television, the radio or in print and ask him or her each to sign a consent form with respect to the specific media event. All efforts to shield participants from identification should be made unless the individual specifically agrees, in writing, to appear.

The risks associated with discussing specific cases in public are not present when a lawyer speaks about the justice system in general terms. Attorneys in drug courts should try to educate members of their local bar about drug courts, such as by conducting training sessions or writing articles in local legal publications. Public defenders and other attorneys with large drug court practices should encourage and assist other lawyers in enrolling eligible clients in the drug court program.

Rule 4.1. Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of a material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 1.6.

Relevant provisions from the ABA Standards for Criminal Justice

Prosecutors

Standard 3-3.11: Disclosure of Evidence by the Prosecutor

(c) A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.

Standard 3-4.1: Availability for Plea Discussions

(c) A prosecutor should not knowingly make false statements or representations as to fact or law in the course of plea discussions with defense counsel or the accused.

Standard 3-5.2: Courtroom Professionalism

(a) As an officer of the court, the prosecutor should support the authority of the court and the dignity of the trial courtroom by strict adherence to codes of professionalism and by manifesting a professional attitude toward the judge, opposing counsel witnesses, defendants, jurors, and others in the courtroom.

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Defense counsel

Standard 4-3.7: Advice and Service on Anticipated Unlawful Conduct

(b) Defense counsel should not counsel a client in or knowingly assist a client to engage in conduct which defense counsel know to be illegal or fraudulent but defense counsel may discuss the legal consequences of any proposed course of conduct with a client.

Standard 4-6.2: Plea Discussions

(c) Defense counsel should not knowingly make false statements concerning the evidence in the course of plea discussions with the prosecutor.

Standard 4-7.5: Presentation of Evidence

(a) Defense counsel should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to take reasonable remedial measures upon discovery of its falsity.

Commentary

A lawyer is required to be truthful when dealing with others on a client's behalf but generally has no affirmative duty to inform an opposing party of relevant facts. This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6.

During the course of representing a drug court client, the defense attorney may become aware of numerous facts that bear directly or indirectly on the client's recovery (*e.g.,* past sexual exploitation or drug use by family members). This information, obtained during the course of the attorney/client relationship, is subject to the attorney/client privilege. The defense attorney, however, may also learn of criminal activities of the client (*e.g.,* actively selling drugs) which might otherwise preclude the client's participation in the drug court program as well as subject him or her to prosecution for these criminal acts.

Unless requested by the client, the attorney does not have a duty to disclose information that has no bearing on the client's eligibility for the drug court program or does not contribute to the perpetration of a fraud upon the court. In situations in which the information contributes to a fraud perpetrated upon the court or to the concealment of a crime, the requirements of Rule 3.3 apply.

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RULE 4.2: Communicating with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Relevant provisions from the ABA Standards for Criminal Justice

Prosecutors

> Standard 3-3.10: Role in First Appearance and Preliminary Hearing
>
> (a) A prosecutor who is present at the first appearance (however denominated) of the accused before a judicial officer should not communicate with the accused unless a waiver of counsel has been entered, except for the purpose of aiding in obtaining counsel or in arranging for the pretrial release of the accused. A prosecutor should not fail to make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel.

Commentary

Because of an atmosphere of cooperation that often (and rightly) surrounds drug court proceedings, a participant may attempt to discuss his or her case with a prosecutor[68] rather than his or her own counsel. Though the prosecutor may provide the participant with strictly factual information (*e.g.,* about the requirements for progress to the next phase of treatment), a better practice is for the prosecutor to refer all inquiries from participants to defense counsel or the drug court coordinator. It is important for both participants and the lawyers themselves to understand that observance of distinct roles promotes the unity of the ultimate purpose in drug court.

CONCLUSION

As delineated throughout the text of this publication, the ethical duties of judges and attorneys in drug court do not significantly differ from those in traditional courtrooms. However, it is important for these practitioners to be aware of, and practice, a heightened ethical obligation in the drug court program. With

[68] This also occurs when a participant tries directly to contact the judge. For more information on judicial contact, *see* Code of Judicial Ethics, Canon 3B(7) on ex parte contacts with participants.

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some education on key issues, drug court judges and lawyers can operate in drug court and adhere to the strict ethical standards set forth for them in the Model Code of Judicial Conduct, the Model Rules of Professional Conduct, and the ABA Standards for Criminal Justice. Drug court practice can enable judges and attorneys to fulfill the highest aspirations of their professional ethics while embarking on an innovative way to stop the cycle of drug addiction and crime.

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