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Critical Issues for Defense Attorneys in Drug Court

MONOGRAPH SERIES 4



NATIONAL DRUG COURT INSTITUTE

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Critical Issues for Defense Attorneys in Drug Court

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April 2003

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Critical Issues for Defense 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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NATIONAL DRUG COURT INSTITUTE

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INTRODUCTION

This monograph should act as a reference tool for prospective or current defense attorneys who practice in what is commonly referred to as "drug court." It also will provide useful information to lawyers and policy makers who endeavor to design, implement, modify or improve drug courts in their jurisdictions.

The drug court movement in the United States fairly may be characterized as an attempt to re-invigorate the ideal of rehabilitative justice, an ideal, at one time, formally eschewed by the courts and often resisted by policy makers. At a minimum, drug court represents a paradigmatic shift away from conventional notions that animate this country's adversarial system of adjudication. Rather than insisting that partisans assert their respective positions with zeal and diligence, to be decided by a neutral arbiter, drug court encourages teamwork in accordance with therapeutic models of justice. The client's stated interest, the argument runs, is viewed as subordinate to the client's best interest.

For the defense attorney, this paradigm shift may come with some ethical, legal and practical conundrums. The tensions that exist between regimes of partisan advocacy and therapeutic justice are stark. Defense attorneys sometimes walk a delicate, ethical tightrope, if they are to advance the therapeutic ideal that informs drug court, without doing damage to their obligations as zealous advocates for their client. This monograph exposes such tensions and provides practitioners with the theoretical tools to mediate these divergent, sometimes incommensurable, interests.

This monograph is the product of a focus group of public defenders convened by the National Drug Court Institute (NDCI), a division of the National Association of Drug Court Professionals (NADCP), in November 2002. The public defenders who participated in the focus group and subsequently contributed to the monograph practice in drug courts throughout the United States.

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THE ROLE OF THE DEFENSE ATTORNEY IN DRUG COURT

Since the inception of the drug court movement in America, arguably no player on the drug court team – be it judge, prosecuting attorney, probation officer or treatment provider – has struggled more with his or her own identity and often conflicted role than the defense attorney. The desires of the treatment team and the drug court client are, at times, conflicting and can seemingly put the defense attorney in a box with no way out.

Understanding the role of the defense attorney in a drug court requires an appreciation of what is probably the court's most critical feature. Drug courts were created in response to the perception that the traditional, adversarial criminal justice system does not adequately address the issues of nonviolent drug offenders. Drug courts reject the adversary model – where an impartial judge resolves conflicts between the parties' chosen, stated interests after hearing presentations from the parties' lawyers – in favor of a system where the universally shared goal, the defendant's recovery from drug addiction and increased public safety, is expressed at the outset and shared by the parties and the court alike. In such a system, the judge is responsible not just for resolving disputes identified by the parties but also for actively directing, controlling and supervising the defendant's rehabilitation from drug addiction. Thus, with far fewer procedural limitations, the drug court judge controls the agenda; has informal conversations with the parties, the treatment providers and correctional officials; and ultimately does almost "whatever is needed" to ensure that everyone promotes the shared goal of, among other things, helping the defendant recover from drug addiction.

Arguably, no player on the drug court team – no judge, prosecuting attorney, probation office or treatment provider – has struggled more with his or her own identity and often-conflicted role than the defense attorney.

This sort of informal, flexible system can work toward the long-term benefit of defendants by increasing the chances that they will be able to overcome drug addiction. However, this system of increased power and authority for judges presents, at least, some increased risks for the defendant as well, since drug court judges retain the power, albeit after discussing issues among all team members, to impose a variety of punitive sanctions, which often include removing defendants from the program entirely and requiring them to serve lengthy criminal sentences. Thus, while everyone enters the drug court system with the same stated interest, the interests of the defendant may eventually diverge from those of the judge and the treatment team, especially if and when the judge resorts to the variety of punitive sanctions available in a drug court program. The tension between the need for increased judicial flexibility and authority on the one hand and the risks inherent in this same flexibility and authority on the other, requires a defense attorney participating in the drug court system to strike a constant balance

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between acquiescing to informal procedures and practices that would not be tolerated in the traditional criminal court system and trying to protect the client from the severe punishments that remain available.

Balancing Competing Concerns

Properly balancing these competing concerns gives rise to a host of complex, ethical questions and challenges for the defense attorney. In the traditional adversary system, the defense attorney's role is clear and well established: The defender is required to act as a zealous, partisan advocate for the client's interests, to avoid taking actions that might conflict with the client's interests in any way and to carefully guard and maintain the secrecy of all information learned about the client or from the client during the course of the representation. The drug court system, however, challenges all of these duties. In a drug court, the "proper role" of the defense lawyer remains ambiguous, and the institutional pressures on a defender to be seen as a "team player" by modifying or adapting many of the traditional ethical rules that govern in the adversary setting are significant. In short, the goals and aspirations of the drug court system may appear to conflict with well-established ethical rules formulated in the adversary context and require defense attorneys to try to reconcile their behavior with these competing goals.

Addressing Competing Concerns at the Outset: The Defense Attorney's Role in Providing Sound Advice and Setting Clear Boundaries for the Process Before a Client Chooses Drug Court

A defense attorney can reduce (but not eliminate) some of these dilemmas by providing sound advice and representation at the time when a client must decide whether or not to participate in the drug court process. This includes providing information not only about the benefits of drug court, which include potential leniency and significant assistance in overcoming addiction, but also about the potential costs of participating in drug court. Before choosing drug court, defendants should be made aware that the drug court treatment system could require them to spend substantially more time under the court's supervision than would be required after a negotiated plea bargain or even after a conviction at trial. Defense attorneys also should make their clients aware that, should they choose to enter a drug court program, the court is substantially less likely to allow them to change the individual goal of the litigation than it would be in the adversary context: The only permissible goal of the drug court program is to work toward overcoming addiction, and one of the fundamental premises of this program is that the judge and the treatment team "know best" what actions are necessary to achieve this goal. Thus, drug courts provide judges with the power and the flexibility to "force" a defendant to overcome a powerful addiction despite the difficulty of doing so, and the concerns expressed by defendants may be treated not as true expressions of their legitimate interests but rather as the complaints of addicts in denial about the scope of their problems.

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Before any decision on participation is made, the defense lawyer also should raise and address with the client the confidentiality consequences of entering drug court. Drug courts often require defendants to execute confidentiality waivers that allow relevant portions of their medical treatment information to be distributed not just to the court but to prosecutors, as well. Clients should be made aware of the potential dangers of disclosing such information and informed that it is to help them on the road to recovery. They also should be informed that they have complete power over whether or not to do so and that other than under limited circumstances, disclosure of such information would not be permitted if they were to secure treatment without court supervision. In addition, every defendant needs to know that participation in the drug court system may compel a formal admission of guilt and may result in the waiver of legal defenses should treatment fail and the defendant is eventually brought to trial. Unfortunately, providing competent advice on all of these subjects may be further complicated by the desire of the drug court to place a defendant in treatment as soon as possible after the defendant's arrest. Although this speedy treatment may provide therapeutic benefits, it may hinder the ability of a defense attorney to conduct a factual and legal investigation into the merits of the case. Nevertheless, without such an investigation, it is impossible to make a reasoned assessment of what a likely criminal court disposition would be or to assess the costs of waiving various legal defenses. Lacking some reasonable projection of the possible penalties and the possible defenses at trial, a client cannot make a meaningful decision as to whether to participate in drug court.

Another important function of defense counsel is to investigate and negotiate at the outset the contours of the treatment program that the drug court would provide for the defendant. In some jurisdictions, counsel has some ability to negotiate the drug court "contract," and defense lawyers working in these jurisdictions should attempt to obtain the treatment guarantees and options that will provide their clients with the best possible chance for overcoming their drug addictions. Defense counsel also should attempt to negotiate complete confidentiality of information provided to the court and to the government during the course of drug court proceedings, complete immunity for information provided and the most favorable results for the client upon successful completion of treatment. Defense counsel also may attempt to place some limits on the participation by counsel in the treatment process, so as to ensure that the treatment providers are not expecting counsel to act in a way that is inconsistent with ethical rules, especially those governing the confidentiality of client confidences and secrets. In jurisdictions where the defense attorney is part of the treatment team, the attorney must mediate any tensions between the treatment team member and defendant's counsel by referring to that jurisdiction's relevant ethical rules. *See* Chapter 2 ("Ethical Considerations in Drug Court") and *Ethical Considerations for Judges and Attorneys in Drug Court*, National Drug Court Institute (2001).

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The Defense Attorney's Role after a Client Chooses Drug Court

Even with solid, complete advice and a sound treatment program, complex ethical problems may still remain for the drug court defense lawyer. In many jurisdictions, the drug court model contemplates a defense attorney who acts as part of a team devoted to ensuring the defendant's rehabilitation. This role is far removed from that of the traditional criminal defense attorney, whose sole obligation has been seen as protecting the client's immediate, stated interests. Given these different roles, the drug court judge may try to redefine a defense attorney's duties to conform to a model that may not be considered in a traditional criminal court.

In most drug courts, for example, the defense attorney's active participation in the court as an advocate is discouraged; the judges in these jurisdictions prefer to converse directly with defendants. However, in these courts, there are staffing conferences in which the drug court team meets and discusses each participant's case. It is here where the defense attorney can advocate for his or her client. Nonetheless, a defense attorney faces a host of competing considerations in determining how to handle situations in which he or she cannot actively participate in the courtroom. On the one hand, the unique nature of drug court provides a defense attorney with several sound reasons to acquiesce. The expressly nonadversarial nature of the proceedings makes it less important for the client's interests to be stated to the judge. Moreover, because there is generally no current criminal prosecution, the risks of allowing the client to speak directly with the judge are substantially reduced in drug court, especially if a defendant is granted complete confidentiality and immunity for statements made during the course of the drug court process. Thus, it may often be in the client's best interest to allow direct interaction with the judge. In fact, it can demonstrate that the client is fully cooperating with the drug court team by providing honest and candid information about how the course of treatment is progressing.

Some believe that there is a potential down side of reducing or eliminating the defense attorney's in court role as an advocate, however, even in the nonadversarial context. A client who is progressing well may not be able to articulate and emphasize his or her accomplishments in the same way a skilled defense lawyer could. The same could be true for a drug court defendant who has legitimate complaints about a treatment program or about the manner in which treatment is progressing. Even in cases where defendants are able to articulate their concerns, a drug court judge may not take them as seriously as concerns raised by a lawyer, because the judge can and should properly presume the lawyer has screened out the frivolous complaints. In addition, in those jurisdictions that do not provide for complete confidentiality and immunity for statements made during the course of the drug court process, a drug court defendant may take a substantial risk by speaking directly with the judge and other "team" members, especially when the treatment process appears to be failing. Under such circumstances, the potential for miscommunication and the danger that statements

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will be used in criminal proceedings become heightened, and there will be strong incentives for the defense attorney to intervene in order to protect a client from the potentially serious consequences of misspeaking.

Another concern arises when a client's expressed interests change during the course of the treatment process. Drug court teams expect this to occur and often operate on the premise that, because most drug addicts do not understand the existence, nature and scope of their problem, drug court defendants are not capable of recognizing what is truly in their best interests. Indeed, one of the primary reasons for reducing a defense counsel's role as an advocate is to prevent the concerns expressed by the client during drug court proceedings from interfering with the treatment plan. Although this approach is undoubtedly sound from a therapeutic standpoint, it nevertheless places an obligation on the defense attorney to examine closely the ethical rules in his or her jurisdiction that require an attorney to work toward achieving a client's stated interests and to attempt to reconcile the defense attorney's representation of the client in drug court with these ethical concerns.

The defense attorney's participation as a treatment team member may also create concerns in terms of both confidentiality and client perceptions. With regard to confidentiality, the attorney's participation as a full-fledged "team" member creates the risk that the drug court judge will count on the attorney to provide information that might otherwise be deemed privileged and confidential in the traditional criminal court context. Such requests must be handled very carefully. Although some ethical rules and precepts designed primarily for the adversary context (*e.g*., the duties of zealous, partisan advocacy) may be adapted to the legitimate goals of the drug court process, requiring a lawyer to disclose confidences and secrets against the client's stated wishes should raise red flags for any defense lawyer. *See* Chapter 2 ("Ethical Considerations in Drug Court"), *Ethical Considerations for Judges and Attorneys in Drug Court*, National Drug Court Institute (2001) and *Federal Confidentiality Laws and How they Affect Drug Court Practitioners,* National Drug Court Institute (1999). Apart from the ethical concerns presented in such circumstances, clients who see their lawyers disclose secrets and confidences to the treatment team over their objections may believe they cannot trust anyone in the process because no one is truly on their side. It is important, therefore, for defense lawyers participating in the drug court process to draw firm boundaries about the nature and scope of their participation. If a defense attorney, however, practices in a jurisdiction where confidentiality must be waived, the attorney must explain this, and the extent to which confidential information may be used, fully at the beginning of the representation, after consulting the local ethical rules.

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ETHICAL CONSIDERATIONS IN DRUG COURT

Drug court models vary considerably, but they typically involve informal proceedings, require a waiver of certain confidentiality rights for the defendant, have a goal of the recovery of the defendant and, to varying degrees, promote the concept that all the players, including the defense attorney, are part of a team seeking the defendant's recovery.[1] This "problem solving" model presents defense attorneys with difficult choices in formulating an appropriate role for themselves. First, attorneys must decide what posture to take when their clients must choose between entering a drug court program and staying in the traditional adversarial system. When a client chooses to enter into a drug court program, the defense attorney must then determine what role to play during the course of the program. Should the attorney seek to structure the client's involvement in drug court (*e.g.,* the extent of any waivers, the scope of possible sanctions)? If so, what interests should direct the attorney's efforts to structure the program? Should the attorney intervene between the client and the treatment court judge? If so, when and how? How should the attorney handle confidential information or potentially damaging information? Should the attorney play an active or passive role in securing the client's successful completion of the program? What constitutes an active role? Should the attorney encourage the client to work toward sobriety and a drug-free existence, or should the attorney use his or her skills to minimize both poor behavior by the client and the impact of sanctions on the client? What is the attorney's role in advocating for a successful termination?

The problem solving drug court model presents defense attorneys with difficult choices in formulating an appropriate role for themselves.

Although drug court programs may provide an attractive alternative to a traditional resolution of a criminal charge, defense counsel cannot lose sight of the fact that it is a criminal charge that brings the client to drug court and that liberty interests remain throughout the duration of the drug court program. The state's involvement in the development of the program, in determining the conditions of the program and in assessing a client's participation in the program likewise requires that defense attorneys provide competent and careful advice to their clients about the program and that they guard their clients' interests and rights throughout their involvement in the program.

This chapter explores the guidance that certain ethical rules established by the American Bar Association (ABA) provide to defense attorneys who advise clients whether to enter drug court programs or represent clients in drug court programs. At this writing, the ABA has yet to issue any formal opinions regarding

[1] Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 Wash. U.L.Q. 1205, 1210 (Winter 1998).

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ethical considerations in the drug court context. In the absence of such specific guidance, this chapter examines how the *ABA Model Rules of Professional Conduct* and the *ABA Standards for Criminal Justice* inform the advice that defense attorneys give to clients as to whether to enter drug court programs and how the rules and standards affect a defense attorney's representation of a client participating in a drug court program.

The ethical rules and standards explored in this monograph are national in scope. Defense counsel serving clients who are considering, or are already participating in, drug court programs, however, should be familiar with applicable ethical rules in their jurisdictions. (For more information, *see also, Ethical Considerations for Judges and Attorneys in Drug Court*, National Drug Court Institute (2001)).

Competence

Rule 1.1: Competence – A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation.

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. Competence to represent a client who may be eligible for a drug court program requires that the attorney be familiar with the program. The attorney must know the eligibility requirements, the nature of the various treatment programs, the sanctions and incentives that can be imposed and the circumstances of their imposition, circumstances leading to termination from the drug court and the confidentiality waivers and restrictions placed on the government's use of information obtained in drug court. The defense attorney also must be familiar with the charges the client faces, the client's potential sentencing exposure, potential suppression issues and the possible legal defenses to the charges. Facility with both the drug court program and the traditional adversary resolution of the underlying charges renders defense counsel competent to advise the client on the merits of his or her case versus the option of entering into a drug court program.

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Communication

Rule 1.4: Communication – (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Commentary. ABA Standard for Criminal Justice 4-5.1 (Advising the Accused) instructs defense counsel to "advise the accused with complete candor" and not to "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." Taken together, the rule and the standard require attorneys to give their clients sufficient information and to impart that information in such a manner as to ensure that their clients have a genuine choice. A client's choice must be informed by the defense attorney's professional judgment of the case and the client's options, coupled with the client's (not the attorney's) aversion to risk and the client's (not the attorney's) objectives. There are no "client decisions," unless the client has the information and the time to make a genuine choice about how to proceed.

Even fierce drug court proponents recognize the importance of voluntary choice as the first step in the therapeutic process.[2] Defense attorneys' adherence to the rules and standards governing communication and the scope of representation (see discussion below) ensure that the choice made by a client is, in fact, a choice based on the client's assessment of the long-term and short-term costs and benefits of the available options, given the facts of the criminal case, the parameters of the drug court program and the client's personal goals and desires.

An attorney's method for imparting information in order to ensure that a client has a genuine choice will vary from client to client. At a minimum, however:

- Non-English speaking clients must be afforded a bilingual translator or attorney.
- Forms (*e.g.,* waivers) should be read to clients.
- Explanations should be clear and should contain specific examples (*e.g.,* sanctions imposed for the third relapse, prohibited behavior, how the client will be tested for drugs, what will happen if the client "water loads," what will happen if the client fails to submit a sample, the maximum penalty for a conviction on the underlying offense, and trial rights).

In all cases, the defense attorney should probe as necessary to develop a clear understanding of the client's circumstances and objectives.

[2] Hon. Peggy Fulton Hora, et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 Notre Dame L. Rev. 439, 521 (January, 1999).

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The duty to communicate is a continuing one, and the defense attorney must continue, throughout the client's participation in drug court, to consult, advise, explain and counsel the client in a manner consistent with helping the client obtain his or her objectives. This should be done in a manner that protects the client from producing potentially harmful or self-incriminating information absent immunity, waivers or agreements to the contrary.

Disposition

Standard 4-6.1: Duty to Explore Disposition without Trial – (b) . . . 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 analysis of controlling law and the evidence likely to be introduced at trial.

Commentary. Many drug court programs require the client's decision whether or not to participate shortly after arrest. Drug court and other treatment experts contend that this allows the program to intervene while the client is still in the midst of a "crisis."[3] Under these circumstances the rules and standards require that the attorney conduct an immediate investigation and attempt to gain early access to discovery in order to be able to competently inform the client of the viability of all options. Defender organizations should be vigilant in protecting the ability of defenders to provide advice consistent with the rules and the standards when participating in the design of such programs or in negotiating discovery practices for clients who are eligible for drug court programs. Likewise, the individual defense attorney must make efforts to ensure that a client is fully informed before entering into a drug court program or that entry into such a program is conditional and allows for a withdrawal that does not harm the client's ability to proceed on the merits of the criminal case.[4]

Scope of Representation

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. . . . 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.

Rule 1.3: Diligence – A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment – [1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take

[3] *See* Boldt, *supra* note 1, at 1258.

[4] *See id.* at 1289-90; Karen Freeman-Wilson, Robert Tuttle, Susan P. Weinstein, *Ethical Considerations for Judges and Attorneys in Drug Court*, National Drug Court Institute (2001).

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whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with a commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

Commentary. Once a client has received competent advice and has rendered a decision about whether to enter into a drug court program, the defense attorney shall abide by the client's decision. Upon selecting the drug court option, the client still defines the objectives of the representation. Whether the client's objective is sobriety and recovery or simple avoidance of a criminal conviction, the lawyer "shall abide" by the client's decisions concerning the objectives of the representation,[5] absent some agreement to the contrary.

Diligent defense counsel should stay apprised of the client's goals and objectives throughout the client's involvement in the drug court program. The client's goals and objectives are reasonably subject to change, and it is the duty of the defense attorney, in consultation with the client, to devise the means to achieve the client's goals. Because drug court programs operate differently than a traditional adversarial proceeding, defense counsel may have to be creative or "think out of the box" when assessing means to achieve the client's objectives. However, this difference between a drug court and the traditional system does not change the defense attorney's duty of loyalty to the client's goals and objectives.

For example, should defense counsel encounter a client who desires sobriety above all else, who believes that sanctions will assist his or her recovery and who trusts and wants to confide in the treating judge, then a passive role as a virtual spectator in the courtroom (but still more active in the staffing meetings) may be appropriate for defense counsel. On the other hand, should defense counsel have a client who desires above all else to avoid a criminal conviction, or for whom short-term sobriety is simply a means to this end, then competent defense counsel may seek to modify his or her client's participation in the drug court program in myriad ways in order to limit the possibility that the client will be terminated unsuccessfully and/or to minimize the period of treatment. Either role may be inconsistent with the attorney's belief of what is in the client's best interests.[6] The rules of ethics, however, do not distinguish between such clients – both are owed their attorneys' diligence and zeal.[7]

In some instances, a client's objectives may appear to defense counsel to be contradictory, such as the client who desires both sobriety and a minimum of sanctions. Many drug court experts state that sanctions are key to the successful

[5] *See* Boldt, *supra* note 1, at 1289-91.

[6] For more about the importance of zealously pursuing client objectives throughout participation in a drug court program, *see* Boldt, *supra* note 1, at 1287-1300.

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

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treatment of the addiction.[8] Nevertheless, upon consultation with the client on the consequences of pursuing potentially conflicting objectives, the defense attorney must pursue these goals diligently and as effectively as the circumstances permit.

Whether he or she acts as a passive participant or as an active advocate, counsel must be present at all staffings and court proceedings in order to provide competent and diligent representation. Without being present, counsel cannot know if a client's objective changes as a court proceeding evolves. Nor can counsel intercede to communicate with the client if the client's conversation with the judge is thwarting the client's aims.[9] Nor can counsel intercede if the client's discussions with the judge cross into areas not covered by the client's waiver or into areas not protected from use by the government. Some jurisdictions that have institutional public defenders are able to provide "stand-in" counsel to ensure that a lawyer is present at every hearing. That is, the local public defender's office provides a lawyer for every time that the drug court is in session. To the extent that the assigned lawyer is not, or cannot be, present, the public defender represents the drug court participant. After the hearing, the public defender conveys the substance of the hearing to the assigned attorney.

Confidentiality, Candor

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:

(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.

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

[8] *See* Hora, et al., *supra* note 2, at 526-27; *See Effective Use of Sanctions in Drug Courts: Lessons from Behavioral Research,* Douglas Marlow, JD, Ph.D. and Kimberly Kirby, Ph.D., National Drug Court Institute Review, Volume II, Issue 1, Alexandria, VA. 2000.

[9] *See* Boldt, *supra* note 1, at 1295 (illustrating the importance of counsel's presence in various drug court scenarios).

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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.

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.

Commentary. Rules 1.6 and 3.3 produce ongoing tension for the defense attorney in both the traditional adversarial system and a drug court program. The opportunity for expression of this tension in the drug court setting is enhanced by the informality of the proceedings and the frequency of contact between the client and the judge. Rule 3.3 prohibits a lawyer from deceiving the court or "assisting" a client or witness to do so. It does not, however, require full disclosure by the lawyer of all information about the client, even if the information would be material to the proceeding. For example, if a client informs the lawyer that the client has suffered a relapse and used either drugs or alcohol but the client's use has not been detected, neither the lawyer nor the client is obligated to disclose this fact.[10] Where a client unambiguously lies under oath to the court, however, Rule 3.3 imposes a duty of candor that supersedes the lawyer's duty of confidentiality.

More perplexing situations arise when an attorney is acting in a passive role, virtually as a spectator to a narrative conversation between the court and the client, when the client shares information but is not placed under oath or when the client speaks with the judge outside the presence of defense counsel and the conversation is only later reported to the attorney. In each instance, defense counsel is not assisting the client, either by questioning the client or by presenting arguments on the client's behalf using information that the client has supplied. If defense counsel is not "assisting a fraudulent or criminal act by the client," then

[10] *See* Freeman-Wilson, et al., *supra* note 4, at 50.

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the obligations of Rule 1.6 would appear to control, requiring defense counsel to maintain his or her client's confidences.

Conflict of Interest

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.

Commentary. The most likely conflict that defense counsel might encounter in drug court is that between clients whose adversity originates in the underlying criminal case. The most obvious example is a pair of co-defendants who both choose to enter the drug court program. An argument could be made that if each client's goal is to achieve recovery and sobriety, then no adversity exists between the two. However, the possibility of a variety of future actions that could create adversity (*e.g.,* termination of one or both clients from the program) suggests that the best course of action is for co-defendants to have separate counsel. There also may be adversity when one client is a witness to another client's relapse or to other behavior that violates the rules governing participation in drug court. Under such circumstances, the attorney cannot provide either client with conflict-free advice and must withdraw. The defense attorney must withdraw from representation of both clients because the attorney is in possession of client confidences from each client that cannot be shared with the other client's attorney without violating Rule 1.6.[11]

Ability to Make Adequately Considered Decisions

Rule 1.14: Client under a Disability – (a) When a client's ability to make adequately considered decisions in connection with the representation is

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

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

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CULTURAL COMPETENCE

Most drug court professionals have had some level of training related to cultural sensitivity or diversity. The purpose of this section is not to teach that subject matter. Rather, the intention here is to illustrate the role that culture plays in the drug court environment and how understanding the way culture functions and aids in maximizing program effectiveness.

There is a tendency to think of culture in terms of race and ethnicity. The importance of race and ethnicity cannot be, and is not here, set aside. However, in this section, culture will be defined more expansively to take into account categories beyond those that we conventionally associate with the term. Before proceeding to give illustrations of the more expansive way culture will be used in this chapter, it is important to first provide the reader with a working definition of culture, as it is being used in this context. Culture, used in this monograph, refers to *a set of customs, beliefs, ideals, linguistic practices and institutional practices deployed within and, in many instances, peculiar to a given community*. It follows, then, that various cultures are always operational where human agency is involved. By way of illustration, note the range and variety of the kinds of cultures operational in the context of the drug court: They include various professional cultures (*e.g.,* law enforcement, judicial, prosecutorial, probation, treatment/medical), institutional cultures (*e.g.,* social services, hospitals and clinics, treatment programs, educational facilities, prison) and lifestyle cultures (*e.g.,* youth, sexual orientation, gang affiliation, religious beliefs). The emphasis here is not on the proper delineation of the various cultures operational in a drug court context (in fact, some might argue that there is no significant difference between what is identified as professional versus institutional culture); but rather, the emphasis is on recognizing the various kinds of cultures already in play in a drug court context.

> *"Culture" refers to a set of customs, beliefs, ideals, linguistic practices, and institutional practices deployed within and, in many instances, peculiar to a given community.*

Recognition of the various cultures operational in the context of drug court is important for several critical reasons. Given the stated goal of drug court (*i.e.,* the recovery of the client from addiction), recognizing the various cultural influences at work in a given client's life will be central to the recovery process. Conversely, a defense attorney's failure to become familiar with the wide range of cultural influences informing and impacting a client's life may contribute to the failure of recovery, and this, in turn, could result in consequences being meted out by the traditional adversarial system. Beyond an awareness of the various cultural influences operational in the clients' lives, it is absolutely imperative that we be self-aware and self-reflective with respect to the various cultural sensibilities shaping the court's decisions, sanctions or incentives as they relate to the client. Finally, it is important to be aware of the cultural assumptions that are a part of

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the various institutions involved in drug court. Given their widely divergent aims, and given the fact that these same institutions interact in fundamentally different ways, with fundamentally different interests, in the more traditional, adversarial context, it should be taken as a given that cultural conflict will arise. What should be kept in mind, and taken as key, is what happens in response to the inevitable cultural conflict; being aware of the various cultures involved in any given conflict will aid the various participants substantially in not losing sight of the goal, which is the recovery of the client. Drug court professionals should have a basic awareness of, and sensitivity to, the ways that culture can contribute to serving the client more effectively and thereby increase the probability of positive outcomes. In fact, the ability to interact professionally and effectively with people who are culturally different should be considered a prerequisite to this kind of work.

Given the uniqueness of any given case in a drug court context, it would be impossible to delineate all of the ways in which cultural awareness affects and conditions the interactions of the various agents involved. In fact, it would not be far from the truth to assert that the number of ways cultural factors could play themselves out in any given drug court context is infinite. This chapter outlines in broad strokes some of the most common ways culture works as a potential barrier to drug court proceedings. It draws upon the three cultural contexts noted above – professional, institutional and lifestyle — to illustrate, again in broad strokes, some of the challenges that may arise in the drug court context and how paying attention to culture can be put to service on behalf of achieving the end goal—the client's recovery from addiction.

Professional Culture

The role that culture plays in our professional lives is very often reflected in the language we use to describe the same. For instance, most people, when asked what they do for a living will answer by replacing themselves for their profession: "I am a police officer; I am a judge; I am a prosecutor." This is the common way of relating what a person does for a living. On the other hand, people also might respond to the same kind of question by saying, "I do police work; I work as a member of the bench; I prosecute crimes for a living," but few do. The point here is to illustrate how easily people can identify with their professions. The danger here is that an individual's identification can become so complete that he or she never takes a step back to see the various biases, assumptions and sensibilities that form the core of a given profession. Given the radically different ends all parties are charged to pursue in drug court, awareness of the cultural biases peculiar to the various professions involved should be an imperative. Prosecutors must bring to drug court an acute awareness that the goal is not to lock up the client, and that, despite the relaxed nature of the proceedings, drug court is not a forum for gathering evidence for the future prosecution of a participant, should that participant fail to measure up to whatever rehabilitative programs are put into place. Failure to rein in what are the usual and appropriate

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goals of a prosecutor, as they would rightly pertain in the traditional court context, could contribute to creating an atmosphere that is not conducive to recovery.

Likewise, the court must be willing to step beyond its normal, appropriate ethos of neutrality. The court must, in a manner of speaking, step down from the bench and risk a personal investment in the client's recovery. This can only be done effectively if the court takes more than a passing interest in the individuals who come before it. Knowing the person in need of recovery can help the court craft a program of recovery that does not, from its inception, doom the person to failure. Moving from the notion of the drug court participant as addict to seeing the drug court participant as a particular human being with an addiction is absolutely necessary, if the court is to be an effective member of the drug court process.[1] These kinds of ends can only be achieved if the various actors bring to drug court not only an awareness of the particular cultural assumptions that inform their professions but also, a willingness, in many instances, to suspend those assumptions for the purpose of putting into place the most effective program of recovery for the drug court participant.

Institutional Culture

Institutional culture, though not necessarily difficult to identify, is perhaps the most difficult to remedy in those instances where remedy is necessary. Persuading a particular individual to change or suspend a particular set of assumptions is difficult enough; persuading an institution, or a set of practices or protocols is, to put it mildly, bewildering. The absence of any discernible person is, in part, where we derive the name "institution" in the first instance. Here, because of the difficulty of attaching a person to a set of practices, it is important for those involved in drug court proceedings to be aware of the various, frequently competing ends that institutions pursue. One should not take incommensurability of institutional ends as a measure of the possibility, or lack thereof, of recovery. Neither should one pursue commensurability of ends as the only measure by which to judge the possible effectiveness of a particular program of recovery. Different people will respond differently to different kinds of treatments, and it is of paramount importance that a defense attorney learn enough about a client to help place him or her in the proper institutional context. Failure to consider a client's chances of recovery in any given institutional context is tantamount to neglect and will, in many instances, result in a failure to recover.

Lifestyle Culture

Considerations of lifestyle apply equally to all actors in drug court, but the focus here is on the importance of having an awareness of the client's lifestyle and how this may affect the chances of recovery. Although the demographic markers of a client may be relatively obvious (*e.g.,* age 23, unemployed, female,

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

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unmarried, mother of two and Caucasian), what may not be obvious is how the client herself understands these various markers. Moreover, it will be important to know how her community or her family understands these markers. Does her family support her efforts to raise her children? Does her family consider her to be an embarrassment? Does she have the parenting tools necessary to be a fit mother? These are some of the more significant questions that need answering if a defense attorney is truly committed to finding a program of recovery that will best meet the needs of this particular, hypothetical client. Take, as another example, a 17-year-old Latino male who is a gang member. It will be important to move beyond understanding this client's gang affiliation as strictly a kind of social pathology and to ask questions about what needs (*i.e.,* fundamental needs) are being met by his gang affiliation. Likewise, it will be important to ask this client other questions, such as, "Are there any language barriers here?" Another question for this client might be, "Are you the son of immigrants?" which is another way of asking, "Are you struggling with the challenges of assimilation?"

Any number of questions may be asked of a given client in the context of drug court. What is important is that there is a desire to ask and that the asking is representative of a desire to know the particular person who is seeking help with his or her addiction.

Although the challenges of cultural sensitivity are not to be underestimated, the possible benefit to the client who is a part of a drug court team that is culturally aware is immense. For this reason, and this reason alone, it ought to be considered in all drug court proceedings.

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TREATMENT ISSUES

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

In brief, drug court defense attorneys must have the ability to:

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

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

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Knowing Your Treatment Provider

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

Difference Between Criminality and Level of Substance Abuse

An offender's levels of criminality and substance abuse often differ. A particular drug court candidate's criminal behavior will be examined during the admission process to a drug court program. Appropriate treatment professionals also must assess the candidate to determine the nature of his or her substance abuse issues, the presence of any co-occurring disorders and the appropriate treatment modality. Drug court defense attorneys must understand that the level of treatment may vary among participants and that there is not a perfect correlation between criminal behavior and treatment needs.

Co-occurring Disorders

Drug court candidates and participants sometimes couple substance abuse problems with co-existing disorders (*e.g.,* mental illnesses, mental retardation, gambling or sexual addictions). Successful drug courts tailor treatment to the needs of the individual. Drug courts must be able to assess and, when possible, provide treatment for all issues, as well as substance abuse. Drug court defense attorneys must ensure not only that candidates are properly assessed to identify any co-existing disorders but also that appropriate treatment tailored to the assessed disorder(s) and needs is made available. The failure of substance abuse treatment that is inappropriate to the assessed needs of the person being treated should not be regarded as a "treatment failure." [1]

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

Single Versus Multiple Treatment Providers

The treatment resources available to drug courts vary. Some jurisdictions may have access to only one treatment provider while others have a network of multiple providers. Drug court defense attorneys must ensure that appropriate treatment is available for all drug court participants, and they must be vigilant in

[1] *See e.g.*, Aubrey Fox, *Is There A Fit? Drug Courts and the Mentally Ill Addict*, Judges Journal (Winter 2002).

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seeing that participants are appropriately matched to the available resources. When resources are limited, there should be a corresponding limit on the type and number of participants in a drug court program.

Cultural Competence

Drug court defense attorneys must understand that culture differs from ethnicity. Many cultures will be represented in drug court, and assessment and treatment must be provided in a manner that respects the cultures of the individual participants. The drug court defense attorney must advocate for cultural competence. He or she may also be in a unique position to provide the kind of information concerning a participant's culture that could provide the court and its treatment providers with an enlightened understanding of the individual's choices and actions within the appropriate cultural context. *See* Chapter 3 ("Cultural Competence").

Participation in AA, NA or Other Twelve Step Programs

Participation in certain twelve-step programs can be required for drug court participants, provided that such programs do not violate the Establishment Clause of the First Amendment. Programs with explicit religious components may be part of a constellation of programmatic options for drug court participants, so long as participants are given a choice of secular or non-faith-based programs.[2] Courts have found that the Establishment Clause of the First Amendment precludes requirements that defendants take part in religion-based substance abuse treatment programs, such as certain Alcoholics Anonymous or Narcotics Anonymous programs.[3]

Reciprocity

Reciprocity is a special issue in drug court. Drug court defense attorneys should ensure the competence and quality of treatment in the receiving jurisdiction when participants transfer from one program to another.

Widening the Net

The manner in which law enforcement and prosecutors choose to charge criminal behavior has a direct impact on whether an offender can, or will, be accepted into drug court. Drug court defense attorneys must consider the propriety of charges brought against clients in advising clients about the drug court option. They must also be strong advocates for drug court agreements and memoranda of understanding (MOU) that reflect appropriate, fair and equal access to drug court.

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[2] *E.g., O'Connor v. California*, 855 F. Supp. 303, 308 (C.D. Cal. 1994); *Freedom from Religion Foundation, Inc. V. McCallum*, 214 F. Supp. 2d 905, 916 (W.D. Wis. 2002).

[3] *Warner v. Orange County Department of Probation*, 173 F.3d 120 (2d Cir. 1999); *Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996). U.S. Const. Amend. I ("Congress shall make no law respecting an establishment of religion").

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Linkages between Domestic Violence and Substance Abuse

The goal of drug courts is to treat substance abuse in order to reduce criminal activity. There is often a link between substance abuse and violent behavior – especially domestic violence. However, there is a proscription against allowing violent offenders to participate in drug courts that are either funded by federal dollars or governed by certain state statutes. Defense attorneys who represent clients charged with both domestic violence and substance abuse need to be familiar with the funding sources and associated restrictions on the drug court program in their jurisdictions. They also need to be aware of alternative programs that can provide similar services but that have no violent offender prohibitions. Finally, defense attorneys need to remember that it may be possible to negotiate with law enforcement and the prosecutor concerning the actual charges to be filed.

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TRAINING FOR DRUG COURT ATTORNEYS

Defense attorneys who represent clients who participate in drug court programs or who may weigh the drug court option in the future have a responsibility to acquire the training they need to suit their clients' best interest. They must learn to recognize a client's treatment needs, build a knowledge base of the treatment alternatives in the communities in which they practice and study applicable compliance issues. Adequate training in these areas is one of the keys to serving clients' interests well in the drug court arena.

Core Competencies

First, attorneys must be trained in the history and development of drug courts and other specialty courts around the country. They must be instructed in the history of the systemic criminal justice problems that resulted in recourse to these courts and the manner in which these courts developed to address inadequacies in the traditional system (and both the successes and failures in meeting them).

Defense attorneys who represent clients who participate in drug court programs or who may weigh the drug court option in the future have a responsibility to acquire the training they need to serve their clients' interests well in the drug court arena.

Second, core competency training must address the ethical issues, responsibilities and limits of the defense attorney in drug court. Counsel must understand that the non-adversarial nature of some of the proceedings does not change the client's right to counsel.

Third, core competency training should include learning about the practice of the program itself. Counsel should be acquainted with and understand the policy and procedures manual for their local drug court programs and understand how these policies and procedures translate into the day-to-day program operation.

Recognizing Client Treatment Needs

Treatment that fails to address all dimensions of a problem all too often results in failure that is unjustly attributed to the person being treated. A sound treatment plan recognizes its subject as a bio-psycho-social person and addresses dysfunction in each dimension. For example, symptoms of significant psychiatric distress or cognitive limitations (*e.g.*, mental retardation) may be impossible to separate from substance-abusing behavior. Treatment must address the co-occurring disorders.

Drug court defense attorneys need to understand that both their clients and their clients' problems are multidimensional and that they have a responsibility to

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be able to recognize the scope of their clients' treatment needs and advocate for a treatment plan that addresses all of those needs. To do this, defense attorneys must achieve the level of cultural competence required to appreciate the life context that explains the client's life perspectives. They also must have the knowledge and skills required to recognize co-occurring disorders that relate to substance abuse.

Knowledge of Available Treatment Alternatives

Defense attorneys need to be aware of the range of treatment alternatives available in their communities and understand what each of the alternatives can, or cannot, provide for their clients. This includes visiting facilities and interviewing staff to determine the content and circumstances of treatment accorded.

Maintaining awareness of the options available in the treatment community is an ongoing process. Resources tend to be limited, and programs tend to come and go. Counsel therefore has a responsibility to stay abreast of the status of existing programs and the creation of new ones.

Counsel also must have the ability to help make a program work for a client. The program chosen must fit the client's needs. To do that, the treatment plan must recognize the full range of the client's needs and work with the client accordingly, building upon strengths and shoring up weaknesses. Programs that address one need but ignore or work at cross-purposes with others must be identified and avoided. Finally, counsel must ensure that a client's failure in a treatment program that does not address the full range of a client's needs be attributed to the program and not the client.

Compliance Issues

Drug court defense attorneys must be trained to understand and assist their clients in addressing all compliance issues that may arise. This includes thoroughly investigating, and appropriately addressing, the impact of alleged non-compliance (*e.g.,* failure to keep appointments or positive drug tests). It also includes assisting clients in explaining their position and asserting available defenses for non-compliance (*i.e.,* the manner in which clients describe meeting, or not meeting, their program responsibilities). For example, counsel must help to provide a coherent framework for any explanation that might involve, *inter alia*, culturally confounding circumstances and/or co-occurring disorder exacerbations.

To provide proper representation to clients in a drug court program, counsel also must understand, and be able to present to the court, the reliability limits of individual drug tests *(e*.g., potential false positive reads, standard error of measurement of the procedure, exceeding the minimum testable quantity, or

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shoddy lab procedures).[1] Counsel also must ensure that sanctions remain realistic and appropriate to the case at hand, taking into account, for example, co-occurring disorders and considering a client's multidimensional needs. Inappropriate sanctions can be self-defeating.[2]

[1] *The Impact of Problem Solving on the Lawyer's Role and Ethics*, Fordham Lib. 1992 at 1920-1921 (June 2002)

[2] *Ten Tenets of Fair and Effective Problem Solving Courts*, American Council of Chief Defenders, National Legal Aid & Defender Association, http://www.nlada.org/omt/documents/10195011909s; *see* Appendix 1.

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LEGAL ISSUES/DUE PROCESS

More than 40 years ago, in *Robinson v. State of California*, the U.S. Supreme Court invalidated a California statute that criminalized the "status" of narcotics addiction on Eighth Amendment grounds.[1] The *Robinson* court concluded, however, that, "a State might establish a program of compulsory treatment for those addicted to narcotics"[2] and that "penal sanctions might be imposed for failure to comply with established compulsory treatment procedures."[3] The Supreme Court's decision opened the door to treatment programs that included the use of penal sanctions[4] but also recognized that drug addiction is an "illness which may be contracted innocently or involuntarily."[5]

It is essential that defense attorneys remain vigilant in protecting civil liberties – even in the relatively nonadversarial context of drug court.

The *Robinson* decision highlights the tensions inherent in addressing the complex problem of addiction within the context of the criminal justice system – tensions that have only increased in recent years. When the first drug court was founded in Miami in 1989, the nation was battling the advent of crack cocaine and had declared a "war on drugs."[6] The rise of drug courts across the United States coincided with a massive increase in the nation's reliance on incarceration, with the number of incarcerated Americans growing from 330,000 in 1980 to nearly 1.4 million by 1999.[7] At the same time, several noted death row exonerations linked to DNA evidence and other findings have made Americans increasingly aware of failures in our criminal justice system.[8] In this climate, it is essential that defense attorneys remain vigilant in protecting civil liberties – even in the relatively nonadversarial context of drug court.

This chapter explores due process for drug court participants and many of the legal issues that defense attorneys may confront as they guard the civil liberties of clients in drug court settings. These issues include protection of due process in a nonadversarial context, waiver of fundamental rights, equal access to treatment and diversion programs, preservation of fundamental due process

[1] 370 U.S. 660, 666 (1962).

[2] *Id.* at 665.

[3] *Id.*

[4] *The Critical Need for Jail as a Sanction in the Drug Court Model,* II (3) Drug Court Practitioner Fact Sheet 1 (National Drug Court Institute: June 2000).

[5] 370 U.S. at 667.

[6] Boldt at 1207-08.

[7] James P. Lynch & William J. Saybol, *Prisoner Reentry in Perspective* 4 (Urban Institute 2001).

[8] Robert E. Pierre and Kari Lyderson, *Illinois Death Row Emptied: Citing 'Demon of Error,' Ryan Commutes Sentences*, The Washington Post, January 12, 2003, at A01.

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protections (including challenges to testing procedures and treatment requirements) and confidentiality. Relevant authority is cited where applicable.

Protecting Due Process in a "Nonadversarial" Context

The question of how best to preserve fundamental due process in drug court programs is complicated by the relative informality of the model. Participants necessarily waive many trial rights when they enter drug court.[9] Other protections are less rigid in the rehabilitative setting.[10] Moreover, defense attorneys and their clients may fear, although unfounded, that the court will view an attempt to challenge inculpatory evidence, present exculpatory evidence or object on due process grounds as a failure to accept responsibility, resulting in a stiffer sanction.[11] However, the danger of *never* putting the government to its proof is that the process of adjudication erodes and the Constitution itself is no longer enforced.[12] In the words of one public defender, "[it] is better, morally, to make someone clean graffiti for a week and urinate in a bottle than to keep that person in a cage; but it is still important not to sentence the wrong person."[13]

The Drug Court Decision: Waiver of Fundamental Rights

Protecting fundamental due process begins before the client enters drug court. As delineated in Chapters 1 ("The Role of Defense Attorneys in Drug Court") and 2 ("Ethical Considerations in Drug Court") of this monograph, one of a defense attorney's most important roles in the drug court process is to ensure that his or her client makes an informed decision regarding whether to enter the program. In many jurisdictions, the decision to enter drug court involves a guilty plea, which necessarily entails the waiver of the right to a jury trial[14] and the waiver of Fifth and Sixth Amendment rights.[15] Although some jurisdictions may allow a defendant to litigate suppression motions through a mechanism such as a conditional plea, other jurisdictions require waiver of potential claims under the Fourth Amendment as a condition of drug court participation.[16] In many circumstances, the decision to enter drug court could result in a longer entanglement with the state than traditional probation.[17] In order to ensure a knowing, voluntary and intelligent plea, defense attorneys need to be able to provide clients with information regarding the range of treatment options and

[9] *See* notes 14 and 15 and accompanying text, *infra*.

[10] *See* Chapter 1, "The Role of Defense Attorneys in Drug Court."

[11] Boldt at 1259-60.

[12] John Stuart, *Problem Solving Courts: Public Defender's View*, 41 Judges' Journal (Winter 2002).

[13] *Id.*

[14] U.S. Const. Art. III, § 2, cl. 3.

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

[16] Stuart at 23.

[17] Boldt at 1255.

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possible sanctions that may be used in the drug court.[18] As noted in Chapters 1 and 2, attorneys must have time to investigate the case sufficiently in order to advise the client regarding possible defenses.

Equal Access

Another threshold legal issue is whether there are any limits on prosecutorial discretion regarding the question of who participates in drug court. This question raises two concerns: 1) ensuring that the makeup of people entering the criminal justice system reflects the population of those involved in drug consumption and distribution as a whole; and 2) ensuring that similarly situated defendants already in the system are afforded an equal opportunity to decide whether to participate in drug court.

It has long been acknowledged that there are racial disparities in drug arrests in this country[19] and that the patterns of drug arrests do not accurately reflect patterns of usage. Perhaps, as some commentators have suggested, these disparities are a result of law enforcement techniques that target the public drug trade in urban areas.[20] Because the criminal justice system statistically tends to sweep in our most disadvantaged populations (*e.g.,* the homeless and the mentally ill), it is almost inevitable that poor people, oftentimes people of color, with drug problems will be subject to penal sanctions through, for example, a public drug court, while addicts who are more well-off will pay for private treatment.[21]

In 1996, the Supreme Court decided in *United States v. Armstrong* that, in order to make out a case of selective prosecution, a defendant had to demonstrate "that there was a discriminatory effect and that it was motivated by a discriminatory purpose."[22] In order even to merit discovery, a defendant must show "some evidence that similarly situated defendants of other races could have been prosecuted, but were not."[23] This is a difficult standard to meet.

Once defendants enter the criminal justice system, the question becomes whether similarly situated people are afforded an equal opportunity to opt for diversion programs such as drug court. Although prosecutors possess wide discretion to make charging decisions and offer plea bargains,[24] these decisions

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[18] Mae C. Quinn, *Whose Team Am I On Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. Rev. L. & Soc. Change 37 (2000-2001).

[19] *See, e.g.,* Michael Tonry, *Sentencing Reforms and Racial Disparities*, 78 Judicature 118 (1994).

[20] *Alternatives to Incarceration for Drug-Abusing Offenders*, 111 Harv. L. Rev. 1898, 1901-02 (May 1998).

[21] *Id.*

[22] 517 U.S. 456, 465-66 (1996).

[23] 517 U.S. at 469.

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

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cannot be based on impermissible factors,[25] such as race or disability.[26] However, proving such claims remains a challenge.

Navigating Drug Court: Preserving Fundamental Protections

Despite the rehabilitative goals of the drug court program, the defense attorney continues to have an important role in ensuring fundamental fairness for the client who enters drug court. Cases involving revocation of parole, probation and supervised release provide important analogies for the drug court setting, particularly when the client faces sanctions or termination. At a minimum, these cases provide for written notice of alleged violations, an opportunity to be heard, disclosure of the evidence against the participant, an opportunity to confront and cross-examine the government's witnesses, a neutral and detached decision maker and a written statement of reasons for any revocation decision.[27] However, "conventional substitutes for live testimony" can be used in some circumstances.[28]

Challenges to Testing Procedures

Not surprisingly, drug testing is a major issue in drug court. In the context of supervised release revocation, the Fifth Circuit has exercised its supervisory authority to direct that, in revocation hearings involving contested drug tests, the government must provide the following to the defendant, making them a part of the record: 1) a copy of the report on the lab test at least five days before the hearing; 2) a report on the chain of custody of each sample, including the date of collection, the name of the person(s) collecting and labeling the sample and a description of the label; and 3) a copy of an affidavit by a responsible laboratory employee attesting both to laboratory procedures, including chain-of-custody routines and to whether all required procedures were followed regarding the sample.[29] Although these standards obviously are not binding in all drug court jurisdictions, they nevertheless provide a helpful framework for considering the types of information that can contribute to reliability.

A number of recourses are available to defendants who challenge drug rest results. For instance, defendants might:

[25] *Id.* at 1047.

[26] U.S. Const. Amend. XIV. Americans With Disabilities Act (ADA), 42 U.S.C. § 12131 *et seq.* (2002).

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

[28] *Gagnon,* 411 U.S. at 782 n.5.

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

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- Consider requesting independent retesting or proffering exculpatory information regarding innocent explanations for false positive results.[30]
- Produce evidence to challenge the scientific accuracy of testing results or machinery, under the applicable standards in their jurisdictions.[31]
- In cases where the indicia of reliability are not sufficient to render the reports "business records" within the meaning of the hearsay exception, object to lab reports as constituting impermissible hearsay.[32]
- Assert their right to confront and cross-examine government witnesses regarding chain of custody issues and the accuracy of the testing machine.[33] (Although substitutes for live testimony may satisfy due process in some circumstances, this is not always the case, particularly if a defendant has no opportunity for independent retesting and the lab report is not corroborated.[34])
- Call expert witnesses regarding testing mechanisms.[35]

Challenges to Requirements: AA and NA

Courts have found that the Establishment Clause of the First Amendment precludes requirements that defendants take part in religion-based substance abuse treatment programs.[36] Accordingly, courts have held that clients should not be required to participate in Alcoholics Anonymous or Narcotics Anonymous, which have express, religious components, as a condition of participating in drug court.[37]

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

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

[32] *See Martin,* 984 F.2d at 313.

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

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

[35] *Nolan*, 95 Cal. App. 4th at 1215.

[36] *Warner v. Orange County Department of Probation*, 173 F.3d 120 (2d Cir. 1999); *Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996). U.S. Const. Amend. I ("Congress shall make no law respecting an establishment of religion").

[37] *Id.*

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Other Issues Relating to Termination/Revocation

Termination/revocation proceedings may raise notice issues that participants want to litigate. Oklahoma's drug court programs, for example, require that the written notice of revocation "must set forth the reasons for termination with such clarity that the defense is able to determine what reason is being submitted as grounds for revocation/termination, enabling preparation of a defense to the allegation."[38] This type of notice requirement is consistent with the requirements of *Morrissey* in the probation and parole revocation context.[39]

The nontraditional role of the drug court judge may create other legal issues at termination/revocation or sentencing. The judge may receive a wide range of information about a participant and may have personal interactions that could result in bias. An Oklahoma court recently concluded that a judge who had served on a participant's drug court treatment team should not decide whether the participant should be terminated from the program.[40] A participant facing this situation may want to file a request for the judge's recusal.

Confidentiality

Information divulged in drug court is protected by a number of federal and state confidentiality provisions. Federal law prohibits the disclosure of "the identity, diagnosis, prognosis or treatment of any patient" by "any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation or research, which is conducted, regulated or directly or indirectly assisted by any department or agency of the United States."[41] Drug courts may be subject to this provision if they receive federal funding and if they conduct assessments and refer or order participants to treatment.[42] Under the provision, protected information may not be used to substantiate criminal charges against a participant or to further a criminal investigation against the participant.[43] However, this does not prohibit a participant from obtaining access to his or her own drug court records.[44] State laws also may protect information disclosed in drug court, including information relating to mental health or HIV status.[45] Defense attorneys in drug court may need to be aware of these provisions in order to comply with their mandates but also so that they can adequately advise clients regarding release forms, protect them against illegal disclosure and gain access to client records.

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[38] *Hagar v. State of Oklahoma*, 990 P.2d 894, 895 (Ct. Crim. App. Okla. 1999).

[39] *Morrissey,* 408 U.S. at 489.

[40] *L.B. Alexander v. State*, 48 P.3d 110, 114 (Ct. Crim. App. Okla. 2002).

[41] 42 U.S.C. § 290dd-2 (2002).

[42] Jeffrey Tauber, Susan P. Weinstein & David Taube, *Federal Confidentiality Laws and How They Affect Drug Court Practitioners* (National Drug Court Institute 1999).

[43] 42 C.F.R. § 2.12 (a)(2) (2002).

[44] 42 C.F.R. § 2.23 (a) (2002).

[45] *See, e.g.,* D.C. Code § 7-1201.01 *et seq.* (2002).

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All of these issues can be addressed adequately and resolved properly by open and candid discussion among all team members in the drug court. Working collaboratively does not mean that defense attorneys must relinquish all of the rights of their clients, and educating fellow team members on the role of the defense attorney will go a long way in accomplishing the goals of all who are involved in the program.

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POLICY CONSIDERATIONS

A defense attorney who practices in a jurisdiction that is planning a drug court program should consider raising a number of policy considerations, including, *inter alia*, program eligibility, assistance of counsel, voluntary versus forced program participation, confidentiality, reciprocity and credit for time served in sanctions.

Program Eligibility

Having a voice in determining which defendants will be eligible for the drug court program may be the best opportunity that a defense attorney has to shape a helpful and effective program. Particularly if the drug court program structure will provide for a dismissal of all charges or even probation upon successful completion of drug court, the defense attorney's goal would be to have as many clients eligible to participate in the program as possible.

Having a voice in determining which defendants will be eligible for the drug court program may be the best opportunity a defense attorney has to help shape a helpful and effective program.

It is important to understand that the jurisdiction also may be required to limit eligibility in response to programmatic restrictions imposed by the funding source. For example, all or part of the funding may be in the form of a grant (government or private) that requires the drug court program to target a particular group (*e.g.,* nonviolent offenders) or excludes a particular group (*e.g.,* defendants with prior convictions). A clear understanding of the defined limits of the program will guide the defense attorney in the direction of what advocacy still is possible in structuring the eligibility requirements of the program.

Another significant issue that the defense attorney should be aware of when taking part in the design of a drug court is "net widening." In jurisdictions where funding sources permit expanded eligibility criteria, the defense attorney should advocate for a drug court to permit broader classes of defendants to enter drug court.

Advocating for so-called net widening, however, could have an ironic consequence. That is, increased availability of any number of "problem solving" courts could result in visiting upon defendants a more onerous alternative than would have been imposed under the traditional, adversary model. To use an example from the context of pre-trial detention, a program of home electronic monitoring (*i.e.,* ankle bracelets) may be initiated to create a pre-trail alternative to detention, but the program is actually used more to monitor defendants who would otherwise have been released on their personal recognizance with imposed conditions. The electronic monitoring program then becomes overutilized (perhaps even exclusively utilized) for those defendants who otherwise would

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have been released on personal recognizance, with no room left for those for whom the program was designed (*i.e.*, individuals facing pre-trial detention in a jail).

In the drug court context, the existence of this court should not be used by prosecutors to keep defendants under the jurisdiction of the court if a case would have otherwise been dismissed. Similarly, that the drug court option exists should not preclude otherwise eligible defendants from entering different diversion programs (for example, mediation or a program requiring community service with no drug treatment component but also no possibility of graduated sanctions), which may be a better fit for the client and are less onerous than drug court.

To avoid, or at least minimize, this unintended consequence of net widening, the defense attorney must be knowledgeable about the other diversion programs in the criminal justice system. The defense attorney must find answers to a number of questions. For example:

- What charges are eligible for these diversion programs?
- What conduct might exclude a client from eligibility? (For example, a simple assault charge might be eligible except when the assault occurs in a domestic violence context.)
- How does the diversion program benefit the client? Does it result in a dismissal of the charge or in a recommendation for probation?
- What program best serves the client's interests on the whole?

Assistance of Counsel

If all the policy considerations at issue for defense attorneys were to be ranked in importance, ensuring that the client has a lawyer present *each and every* time he or she appears before the court or has contact with a prosecutor might well tie with determining eligibility as the most important. Legal representation is particularly important because, in addition to incentives and rewards for good behavior, another feature of drug court is graduated sanctions, increasing amounts of incarceration as a sanction for positive drug tests or other lapses from the drug court rules. As the client faces the possibility of incarceration at multiple stages of the drug court process, ensuring legal representation is critical. This is a key area of advocacy for the defense attorney who has a voice in the initial structuring of a drug court program. During staffings, the defense attorney can ensure that the appropriate sanction is administered. At the staffing, the entire drug court team meets to discuss the details of each case. This way, the attorney can ensure that his or her client is adequately represented and treated fairly.

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Voluntary Versus Forced Participation

The defense attorney also should advocate for voluntary participation in drug court. "Voluntariness" is clearly a relative word in the criminal justice context. A certain amount of coercion is always involved in the decision-making process when the client does not have the choice to plead not guilty and get the case dismissed with no other consequences. Even relatively speaking, however, the defense attorney should advocate for a drug court program that allows clients to choose between the program and treatment and pursuing their cases as they would normally proceed in the criminal justice system (*i.e.,* guilty plea or trial). One argument in favor of a more voluntary model would be the efficacy of a model that forces the client to accept unwanted treatment.

If possible, the defense attorney should advocate for a drug court model that allows the client as much time as possible to assess the choices at hand. As noted in Chapters 1 ("The Role of the Defense Attorney in Drug Court" and 2 ("Ethical Considerations in Drug Court"), it is difficult for the defense attorney to advise a client about which option to choose if the attorney has not had an opportunity to investigate the underlying case. So, for example, if entering the drug court program requires a guilty plea, the defense attorney has an ethical duty to investigate the underlying charge in order to advise the client properly about the advisability of pleading guilty in light of any weaknesses in the government's case and the strengths of the defense case. In fact, it would be a violation of the client's Sixth Amendment right to effective assistance of counsel for a defense attorney to advise the client to plead guilty without having done any investigation to inform that advice. That being said, clients' Sixth Amendment rights are probably an excellent starting point in the advocacy of the defense attorney for more time to help clients decide whether to enter drug court or to remain in the usual criminal justice channels.

Confidentiality

Client confidentiality in the drug court context raises numerous issues. Federal and state laws and regulations address many of the issues related to the confidentiality of medical information and records and specifically about the confidentiality of substance abuse information. The defense attorney should be aware of the confidentiality statutes for a few reasons. First, a review of the statutes and regulations will inform the defense attorney of the types of issues that must be considered when designing a program. For example, how must the program be designed in order for the substance abuse counselor to inform the court of the client's progress in treatment? If applicable laws bar the counselor from making such a disclosure, then obtaining the client's consent in each instance or having the client sign a more general waiver are likely the only option. Second, if the program is designing waiver forms, the defense attorney should be aware of the contours of the law so that clients do not sign forms so general that they give away more than they should. For example, the applicable federal statute, 42 U.S.C. § 290dd-2(c) states that, "except as authorized by a court order granted

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under subsection (b)(2)(C), no [confidential] record …may be used to initiate or substantiate any criminal charges against a patient or to conduct any investigation of a patient." Clearly, this is a confidentiality provision that a client would not want to waive generally, at least not without being specifically informed about the consequences of such a blanket waiver. Third, the defense attorney needs to be aware of the duties and restrictions imposed on the defense bar by the confidentiality laws. In addition to the ethical duty to maintain client confidences, the confidentiality laws restrict the sort of information that a defense attorney can disclose without the express consent of his or her client. The penalty subsection of the 42 U.S.C. § 290dd-2 mandates that any person who violates the section shall be fined in accordance with Title 18, U.S.C. *See* 42 U.S.C. §290dd-2(f). For more information, *see Confidentiality Laws and How They Affect Drug Court Practitioners,* National Drug Court Institute (1999).

As a starting place for becoming familiar with the applicable laws, the defense attorney should review 42 U.S.C. §290dd-2 and 42 CFR §§ 2.1 *et seq*. Section 290dd-2, as stated earlier, makes confidential "records of the identity, diagnosis, prognosis or treatment of any patient which are maintained in connection with the performance of any program or activity *relating to* substance abuse education, prevention, training, treatment, rehabilitation or research, which is conducted, regulated or *directly or indirectly assisted* by any department or agency of the United States…." (Emphasis added.) Given the broad contours of the statute, its strictures would apply to practically every drug court program. *See* 42 CFR §§ 2.11, 2.12 for specific guidance on the scope of the information covered by § 290dd-2 and the applicability of § 290dd-2 to a particular court or program.

Note also that "redisclosure" (*i.e.,* the disclosure of confidential information by someone *not* directly subject to the statute but who learned the information from a person subject to the statute) also is prohibited. Thus, even if somehow the drug court program itself escapes from being covered by § 290dd-2, the treatment providers are likely subject to the statute. Information provided to a subjected person or entity would still be covered and could not be redisclosed by the drug court program and parties. Section 290dd-2 allows for disclosure of the confidential information only for specific purposes in express circumstances. *See Confidentiality Laws and How They Affect Drug Court Practitioners,* National Drug Court Institute (1999).

The defense attorney also should research the specific state laws and regulations for the jurisdiction to determine if stricter provisions control. Certain evidentiary privileges also may be recognized in the jurisdiction, and the defense attorney should be aware of these, as well. In addition to being mindful of the attorney-client privilege, the defense attorney should know whether any medical-related privileges apply to a client's drug court treatment information. For example, one state might recognize a doctor-patient privilege, which would cover disclosures to a psychologist but not to a licensed social worker. Another state

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might recognize privileges related to psychotherapy, therapy or even drug treatment, specifically.

Reciprocity

The defense attorney should advocate for a drug court program that has reciprocity with other drug courts. This would allow local people who may have committed a crime in another jurisdiction to "transfer" their "drug court commitment," if possible. Obviously, this requires a reciprocal drug court program, as no drug court is likely to agree to take over the responsibility (and expense) of managing people accused of committing crimes in a jurisdiction that has no drug court. The benefit of reciprocity is that it, by definition, works both ways. Thus, if a local drug court has a participant who resides in a jurisdiction with a reciprocal drug court, then the participant can transfer to the court in his or her jurisdiction of residence, relieving a burden on the local drug court. More importantly, being able to participate in a drug court closer to the client's residence may increase the chance of the client's success in the program. Reciprocity would be particularly beneficial from the client's point of view if a residence (or at least relative proximity) were a requirement for eligibility for the drug court program. If a client is ineligible because he or she has no place to reside in the area of the arrest (*e.g.,* the client, whose home is three states away, was traveling through the jurisdiction at the time of the arrest), then a reciprocal drug court would still allow the client to take advantage of the diversion and treatment opportunity offered by the drug court program.

Credit for Time Served in Sanctions

The defense attorney also should advocate for an explicit policy stating that credit will be given on any ultimate prison sentence for days spent in jail as drug court sanctions. That is, a client participating in a drug court program may serve a cumulative number of days in jail as sanctions for positive drug tests. If that client ultimately fails in the program and gets sentenced on the underlying charge, then the client ought to be given credit for time served in jail, just as defendants who are detained in jail pending trial are given credit for time served.

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CONCLUSION

Defense attorneys can successfully practice in drug court without forgoing any of their ethical, legal or practical duties that they uphold in the traditional criminal court setting. Working as a member of a team does not mean that a defense attorney must subordinate his or her client's rights, and the attorney can remain true to his or her client's stated interests.

By being an integral member of the drug court team, helping to effectively operate the court at all stages, the defense attorney can help to promote therapeutic jurisprudence and assist his or her client in the road to recovery and subsequently, a better life without committing crime. Drug courts present a unique opportunity for defense attorneys and their clients, and properly implemented and operated, represent a successful shift in the treatment of drug-addicted defendants in the criminal justice system.

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APPENDICES

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APPENDIX 1

NATIONAL LEGAL AID AND DEFENDER ASSOCIATION'S "TEN TENETS OF FAIR AND EFFECTIVE PROBLEM SOLVING COURTS"

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American Council of Chief Defenders (ACCD)

Ten Tenets of Fair and Effective Problem Solving Courts

Introduction

"Problem Solving Courts" are spreading across the country. Though the current wave of interest started with the creation of Miami's Drug Court in 1989, the nation's courts had a long prior history of seeking to solve the problems of offenders and communities through the imposition of sentences with rehabilitative conditions or indeterminate sentences with a chance for early release based on rehabilitation. The advent of mandatory minimums and determinate sentencing foreclosed many such options, leading to the establishment of Problem-Solving Courts as a new vehicle for effecting established rehabilitative objectives.

There currently are more than 500 drug courts operating, and more than 280 others currently in the planning process, in all 50 states. Although drug courts have existed the longest and been studied the most, "Community Courts," "Mental Health Courts," and other specialty courts are beginning to proliferate.

Despite Department of Justice and other publications that urge inclusion of defenders in the adjudication partnerships that form to establish "Problem Solving Courts," the voice of the defense bar has been sporadic at best. Although defense representation is an important part of the operation of such courts, more often than not, defenders are excluded from the policymaking processes which accompany the design, implementation and on-going evaluation and monitoring of Problem Solving Courts. As a result, an important voice for fairness and a significant treatment resource are lost.

The following guidelines have been developed to increase both the fairness and the effectiveness of Problem Solving Courts, while addressing concerns regarding the defense role within them. They are based upon the research done in the drug court arena by pretrial services experts and others and the extensive collective expertise that defender chiefs have developed as a result of their experiences with the many different specialty courts across the country. There is not as yet, a single, widely accepted definition of Problem Solving Courts. For the purposes of these guidelines, Problem Solving Courts include courts which are aimed at reducing crime and increasing public safety by providing appropriate, individualized treatment and other resources aimed at addressing long-standing community issues (such as drug addiction, homelessness or mental illness) underlying criminal conduct.

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The Ten Tenets

1. **Qualified representatives of the indigent defense bar shall have the opportunity to meaningfully participate in the design, implementation and operation of the court, including the determination of participant eligibility and selection of service providers**. Meaningful participation includes reliance on the principles of adjudication partnerships that operate pursuant to a consensus approach in the decision-making and planning processes. The composition of the group should be balanced so that all functions have the same number of representatives at the table. Meaningful participation includes input into any on-going monitoring or evaluation process that is established to review and evaluate court functioning.

2. **Qualified representatives of the indigent defense bar shall have the opportunity to meaningfully participate in developing policies and procedures for the problem-solving court that ensure confidentiality and address privacy concerns**, including (but not limited to) record-keeping, access to information and expungement.

3. **Problem solving courts should afford resource parity between the prosecution and the defense.** All criminal justice entities involved in the court must work to ensure that defenders have equal access to grant or other resources for training and staff.

4. **The accused individual's decision to enter a problem solving court must be voluntary.** Voluntary participation is consistent with an individual's pre-adjudication status as well as the rehabilitative objectives.

5. **The accused individual shall not be required to plead guilty in order to enter a problem solving court.** This is consistent with diversion standards adopted by the National Association of Pretrial Services Agencies. See Pretrial Diversion Standard 3.3 at 15 (1995). The standards stress, "requiring a defendant to enter a guilty plea prior to entering a diversion program does not have therapeutic value." Id.

6. **The accused individual shall have the right to review with counsel the program requirements and possible outcomes. Counsel shall have a reasonable amount of time to investigate cases before advising clients regarding their election to enter a problem solving court.**

7. **The accused individual shall be able to voluntarily withdraw from a problem solving court at any time without prejudice to his or her trial rights.** This is consistent with the standards adopted by the National Association of Pretrial Services Agencies. See Pretrial Diversion Standard 6.1 at 30 (1995).

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8. **The court, prosecutor, legislature or other appropriate entity shall implement a policy that protects the accused's privilege against self-incrimination.**

9. **Treatment or other program requirements should be the least restrictive possible to achieve agreed-upon goals. Upon successful completion of the program, charges shall be dismissed with prejudice and the accused shall have his or her record expunged in compliance with state law or agreed upon policies.**

10. **Nothing in the problem solving court policies or procedures should compromise counsel's ethical responsibility to zealously advocate for his or her client, including the right to discovery, to challenge evidence or findings and the right to recommend alternative treatments or sanctions.**

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APPENDIX 2

THE NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS' BOARD OF DIRECTORS' RESOLUTION REGARDING INDIGENT DEFENSE IN DRUG COURTS

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The National Association of Drug Court Professionals

RESOLUTION REGARDING INDIGENT DEFENSE IN DRUG COURTS

Whereas, defendants in drug courts are entitled to the same rights as defendants in conventional criminal or juvenile cases, including the right to counsel.

Whereas, the basic duties of counsel in conventional criminal proceedings are undiluted in drug court proceedings, including the ethical duties of zealous legal representation, the duty to confer with the client and keep the client informed of all options and of the progress of the case, the duty to fully investigate the case, conduct discovery, research the law and prepare a defense.

Whereas, counsel in drug court has the additional duty, as contemplated under *Defining Drug Courts: The Key Components*, to serve as the client's counselor as well as advocate, to advise the client of conditions, consequences and alternatives prior to entry into drug court and to work together with the prosecutor as a non-adversarial team toward the goal of the client's recovery, during the process of drug treatment and participation in drug court.

Whereas, the lack of national guidance regarding the role of defenders in drug court has led to wide disparities in defense services, and hence in the quality of justice, particularly for low-income people who have no choice in the lawyer assigned to them, and this resolution is intended to stress the importance of defense counsel's role in drug court and to provide guiding principles.

Whereas, drug courts are a partnership, requiring commitment of both time and resources by agencies including indigent defense.

NOW, THEREFORE BE IT RESOLVED, that it is the sense of the NADCP Board of Directors that;

Defenders' zealous fulfillment of their legal and ethical duties to their clients is preparatory to, and not inconsistent with, the non-adversarial, team-oriented nature of drug courts.

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Drug courts should not usurp the vital functions of defense counsel in criminal cases, and defendants should not be required to waive the right to counsel in order to be admitted into drug court.

The defense function should be involved in the design and ongoing development of processes governing the implementation and operation of drug courts, including participant eligibility criteria, processes for the selection of service providers and the development of policies and procedures, including those relating to confidentiality and privacy.

When exploring resources for drug courts, whether by grant or state or local appropriation, consideration should be given to funding any increased indigent defense costs directly occasioned by participation in drug courts, including training on issues specific to drug court.

Inclusion and training of private counsel appointed to represent indigent defendants in drug court is necessary, particularly in jurisdictions which do not have an institutional public defense entity.

Adopted by the Board of Directors, June, 2001, at New Orleans, LA.

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APPENDIX 3

MISSOURI DEFENSE ATTORNEYS' GUIDELINES FOR REPRESENTATION IN DRUG COURT

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XII. DRUG COURTS

12.1 Guidelines for Representation in Drug Court

(a) Unless different guidelines are established within this section XII. Drug Courts, the general Guidelines for Representation represent what is expected of the Public Defender in drug court.

(b) The focus of these Guidelines for Representation in Drug Court is on adult drug *treatment* courts, not on expedited case management docketing systems for drug cases.

12.2 The Role of the Public Defender in Drug Court

(a) Chapter 600: The Missouri State Public Defender System is obligated to provide representation to an indigent person with a case pending in drug court so long as the case is encompassed by Chapter 600 RSMo. Persons are represented only after having been determined indigent by the Public Defender or thereafter by the court. If a case is concluded in drug court, then the Public Defender shall seek a lien against the client at the conclusion of representation unless a promissory note for Public Defender legal services has been secured.

(b) The Public Defender has dual roles in drug court: attorney for the client; and participant in the planning and operation of a drug court.

12.3 The Public Defender as Attorney for the Client

(a) The paramount role of the Public Defender in drug court is to act as attorney for the client, maintaining the traditional defense attorney's function of protecting the client's legal interests, while adding the dimension of promoting the client's physical and mental well being and any interest the client has in recovering from his or her substance abuse. While strategies and approaches in fulfilling that role may be nontraditional and less adversarial, the Public Defender is not a guardian ad litem, but is representing the client as his or her attorney. The Public Defender should never abandon his or her role as attorney for the client and is bound by the same ethical obligations as any other criminal defense attorney. At the same time, the Public Defender is a member of the treatment team, in regards to his or her clients, working in collaboration with the judge, prosecutor, and other members of the criminal justice system and the treatment community in advancing shared objectives, including providing a beneficial legal disposition and tending to the client's substance abuse. However, for participants in drug court who are not

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Public Defender clients, the Public Defender should not participate in proceedings regarding those defendants and should not advise those defendants. For those participants, the Public Defender is not the attorney and is not a member of the treatment team.

(b) Initial client consultation: The Public Defender shall meet with the client in an appropriate and private setting prior to a client's decision to enter the drug court treatment program. The Public Defender shall:

1. Secure a completed application for public defender services and client initial interview form.

2. Provide the client with a copy of all available legal documents and discovery, and review those and the charges with the client.

3. Discuss with the client the drug court program, its nature and purpose as well as the rules governing eligibility and participation, fees, the therapeutic courtroom, staffings, and the adversity or nonadversity of the process.

4. Review with the client any drug court contract and related documents.

5. Discuss with the client the consequences of complying with or failing to comply with drug court rules, including any system of graduated sanctions and rewards, and discuss the nature of any proceedings to impose sanctions or to terminate the client's drug court participation.

6. Discuss with the client the legal consequences of successful completion of drug court or voluntary or involuntary termination from the program.

7. Explain any requirement that the client waive preliminary hearing, waive speedy trial, waive jury trial, stipulate to facts or evidence, or plead guilty prior to entering into drug court and explain any other rights that the client will give up by entering drug court.

8. Explain to the client the role of the Public Defender in drug court, both in court and in staffings, including any departures from a criminal defense attorney's traditional role, his or her role as a member of the treatment team, his or her possible agreement to or advocacy of sanctions, and possible disclosures of attorney-client communication in the course of representation.

9. Explain to the client the nature and extent, if any, of investigation and other trial preparation that will occur prior to or during the client's participation in drug court.

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10. Discuss with the client whether certain pretrial motions, including motions to suppress physical evidence and statements, may be litigated prior to entry into or during participation in drug court.

11. Review the client's alternatives to drug court, discuss his or her likelihood of success, explain the advantages and disadvantages of drug court, and offer advice on whether to enter drug court, focusing on the client's legal interests and the client's interest in recovering from substance abuse.

12. Encourage, if sufficient legal protections exist, the client to be open and truthful with the judge and with treatment staff regarding substance use.

13. Secure an informed and voluntary decision from the client on whether to enter drug court, unless the drug court program is not voluntary, explaining to the client that entry into the program is a commitment to recovery from substance abuse and is an acceptance of the role of the Public Defender as explained to the client.

14. Explain that, unless the drug court program is not voluntary, it is the client's decision whether to enter drug court and whether to continue in drug court.

(c) Continuing client consultation: While a client is in drug court the attorney shall consult with the client as necessary.

(d) Obligation to maintain a complete, organized and current file: For drug court clients a Public Defender has the same obligation as for those clients not in drug court to maintain a complete, organized and current file on each client. In addition, insofar as pertinent, the file must contain a copy of any drug court contract, available progress and treatment records, and summaries of staffing comments and court action.

(e) Preliminary discovery: The Public Defender should ensure that, prior to a client waiving any significant rights and before entering drug court, discovery is received or reviewed by counsel. Where such prior receipt is not feasible, the Public Defender should strive to ensure that, once such discovery is received, a client is able to withdraw his or her waiver of any significant rights and reverse any decision to enter drug court without any negative consequence.

(f) Investigation: As necessary for a client to make an informed decision of whether to enter into or continue in drug court, and as necessary to preserve exculpatory evidence in the event of termination, the Public Defender shall conduct independent investigation of a client's case. The extent, if any, of the investigation will be influenced by the nature of the drug court program, the

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benefits of participation, the consequences of failure, what rights are required to be waived, whether a guilty plea is required, and the immediacy of entry into drug court.

(g) Representation within drug court: The Public Defender shall ensure that he or she is fully prepared for all drug court proceedings, shall ensure that all beneficial information is presented if permitted, and shall advocate on behalf of the client where appropriate and reasonable.

(h) Conflicts: All ethical rules apply in drug court, including those pertaining to representation of clients with conflicting interests. Generally, however, the representation of a client in drug court will not be directly adverse to other drug court clients.

12.4 The Public Defender as a Participant in the Planning and Operation of a Drug Court

(a) The Public Defender also has an institutional role in drug court: to ensure that a drug court is designed and operated to serve the interests of Public Defender clients, to ensure rights are fully protected and advanced, and to promote recovery from substance abuse. In this role, the Public Defender shall work in cooperation and collaboration with other members of the criminal justice system and the treatment community to promote recovery through a coordinated response to offenders dependent on licit and illicit drugs. The Public Defender's institutional role shall continue so long as in the interests of his or her clients.

(b) The Public Defender shall strive to ensure that a drug court is planned and operated by an interdisciplinary team from the criminal justice system and treatment community. If a drug court is being designed or operated without Public Defender participation, the Public Defender shall strive to include himself or herself in the planning and operation.

(c) In planning for a drug court, the Public Defender shall attempt to ensure that all major policy issues of importance to the defense are resolved before supporting the program and before commencement of the program. The Public Defender shall strive to resolve these issues most beneficially to the participants' interests. With individual issues each Public Defender will have to gauge whether something less than the optimum still provides a better legal alternative than traditional local practices. Issues to consider include:

1. *Pre-adjudication versus post-adjudication, and the legal benefits of successful completion:* Strive to maximize the legal benefits of successful completion, optimally a pre-adjudication, diversionary drug court that results in dismissal of charges (with no prerequisites of a stipulation of

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facts or evidence, waiver of jury trial, or guilty plea). If necessary to broaden eligibility requirements, strive for a program that includes both elements, pre-adjudication and post-adjudication. Strive to guarantee the promised benefits to participants successfully participating in a program that ceases to exist.

2. *Negative consequences of failure:* Strive to impose no negative consequences upon voluntary or involuntary termination from the program, beyond the negative consequences of termination itself, the loss of the potential benefits of completion, and the time and energy of the attempted completion. A drug court should not punish a participant's failed attempt at completion. Minimizing negative consequences will encourage entry into drug court and thereby promote the community's safety and well being by maximizing the number of persons benefiting from the program.

3. *Eligibility:* Strive for broad participant eligibility requirements, including prior criminal histories, more serious offenses, and non-drug offenses, without sacrificing the likely success of participants and the viability of the program.

4. *Immediacy:* To promote the therapeutic value of the drug court, strive for early intervention, without unduly sacrificing participants' legal rights and with sufficient time to consult with an attorney before deciding whether to participate, and strive for personal recognizance bonds.

5. *Voluntary versus involuntary participation:* Strive to allow potential participants to decide whether to enter and whether to continue in the program.

6. *Guilty pleas and waiver of rights:* Strive for no requirement of a guilty plea, no stipulation of facts or evidence, and no waiver of jury trial as prerequisites to entry into drug court. Otherwise, the negative consequences of failure may be severe and participants may be deterred from entering drug court. It likely will be necessary to agree to waive rights to speedy trial and perhaps to preliminary hearing.

7. *Legal protections:* Strive to ensure that evidence as well as statements secured as a result of a participant's involvement in drug court are not admissible against a participant outside of the drug court program, both to protect the participant's legal interests and to encourage openness and truthfulness. Strive to ensure to the extent possible that all promises of benefits are legally enforceable by the making of an adequate record, including the prosecutor's signed agreement to any promised benefits through a drug court contract. Where necessary, strive to ensure that by agreeing to enter into a drug court overseen by a certain judge, a

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participant is not waiving his or her rights to a change of judge from that same judge in the event of termination from drug court.

8. *Costs and fees:* Strive to ensure that the costs of participation and associated fees are not unduly burdensome and that no person is prohibited from participating due to poverty.

9. *Evaluation and monitoring:* Strive to design and implement a system of effective evaluation and monitoring of the performance of the drug court measured by agreed-upon criteria, including, for example, completion rates, failure rates, and recidivism rates.

(d) Once a drug court program is implemented, the Public Defender should continue his or her involvement in its operation and continue to move the drug court to the desired ideal and to strive to make other changes in the drug court deemed necessary through experience. The Public Defender, through careful review of cases, also should guard against prosecutorial dumping of otherwise weak evidentiary cases into drug court.

12.5 Guidelines for Representation in Other Therapeutic Courts

(a) These Guidelines for Representation in Drug Courts offer guidance for Public Defender representation in other therapeutic courts such as juvenile drug courts, family drug courts, parenting courts, DUI courts, mental health courts, and domestic violence courts.

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APPENDIX 4

GENERAL INFORMATION ON OTHER THERAPEUTIC OR PROBLEM SOLVING COURTS

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OTHER THERAPEUTIC / PROBLEM SOLVING COURTS

Problem solving, or specialty, courts have sprung up in courthouses across the country to target societal problems inadequately addressed by the traditional criminal justice system. These courts seek to focus attention and resources either on root causes of criminal behavior, as in drug and mental health courts, or on a particular constellation of problems best addressed in a single context, as in domestic violence and family courts. These courts break with tradition in their therapeutic perspective on the criminal act alleged, placing it in a larger context of services and rehabilitation, attempting to lessen cycles of re-offending.

Problem solving and specialty courts often increase the case resolution options available to defenders, presenting new treatment opportunities to our clients. They also require that counsel understand the ways in which these courts differ from the traditional criminal justice system as well as the trade-offs necessitated by participation. Well informed attorneys lead to clients able to make the best decisions based on available information.

Examples of problem solving and specialty courts are:

Drug Courts	using positive reinforcements coupled with ever increasing sanctions for noncompliance, the court seeks to assist the addict in recovery.
Family Courts	recognizing problems of delinquency, abuse and neglect as problems of the larger familial unit, the court attempts to treat the whole family and address systemic issues.
Mental Health	generally non-sanction based, the court requires that the public mental health system provide appropriate treatment to mental health consumers.
DUI	using education and counseling, the court reinforces driving responsibility.
Domestic Violence	recognizing circumstances unique to intimate interpersonal relationships, the court crafts appropriate solutions to protect the community.
Community	keeping prosecution of low level crime in the community setting, the court assists clients in availing themselves of appropriate social services.

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Homeless	providing the client an array of social services and housing, the court adjudicates quality of life crimes generally linked to homelessness.
Re-entry	understanding that some criminal behavior results from life skills lost through institutionalization, the court seeks to ease the transition back into the community, providing skills and incentives to participate appropriately.

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