



Treatment Court Prosecutors: Revisiting Evidence-Based Best Practices in 2023

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Disclaimer

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The Prosecutors Charge

**The Pursuit of Justice
Through the Truth.**

The Pursuit of Justice

**“We the People of the United States, in Order to form a more perfect Union, establish Justice...”
United States Constitution Preamble**

**“We the people of South Dakota, grateful to Almighty God for our civil and religious liberties, in order to form a more perfect and independent government, establish justice...”
South Dakota Constitution Preamble**

False Myths About Prosecutors

Prosecutors WANT to send people to jail.

Prosecutors fill prisons with non-violent offenders.

Mandatory prison sentences apply to minor crimes.

Prosecutors can indict a ham sandwich.

Prosecutors charge crimes without evidence.

Prosecutors charge high to pressure plea deals.

Prosecutors are just trying to make a name for themselves.

Prosecutors are sadistic.

Systemic Challenges for Prosecutors in Treatment Courts

**Retributive Justice
vs.
Behavior Modification**

Competence

American Bar Association Model

Rules of Professional Conduct

RULE 1.1 COMPETENCE

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

South Dakota Rules of Professional Conduct

PREAMBLE: A LAWYER'S RESPONSIBILITIES

4. In all professional functions a lawyer should be competent, prompt and diligent.

Competence in a Dynamic Field

Treatment courts have been in existence since 1989... It is essential that lawyers educate themselves as to the availability, requirements, and appropriateness of treatment court programs... It is equally important for the institutions that educate future lawyers, as well as those that educate the other disciplines that play vital roles in the treatment court process to incorporate treatment courts into their curricula...

Competence in a Dynamic Field

For lawyers to do otherwise is for them to become legal dinosaurs. To ignore the need to learn about the drug court process is to ignore the evolution of the justice system.

State v. Smith, 840 So. 2d 404 (Fl. Ct. App. 2003).

Competency Foundation

10 Key Components

Evidence-Based Best-Practices

Constitutional Law

State Law

Case Law

Memorandum of Understanding

Policy Manual

Participant Manual



Confidentiality

What are Part 2 Regulations?

- Title 42, Part 2 of the Code of Federal Regulations addresses use of substance use disorder information in non-treatment settings
- Part 2 ensures a patient receiving substance use treatment does not face adverse consequences in criminal proceedings and civil proceedings such as those related to child custody, divorce, or employment.
- Separate regulations from HIPAA

Does it apply to treatment courts?

- Yes, if the treatment court, its state funding agency or any tax-exempt entity or a treatment provider receives federal funds. This is broadly interpreted. Assume it applies to your court.
- Yes, if it is patient identifying information



Confidentiality

Part 2 Regulations - Disclosure

Treatment Courts Should Use Consent Forms

- Advisement of rights
- Consent must include the patient name, entity, purpose, statement of revocation, expiration, signature and date, and how to report violations
- Ensure the consent form specifically references 42 C.F.R. Part 2

Other means of disclosure are VERY LIMITED

- Civil subpoena – must show good cause
- Criminal subpoena – must show good cause and serious crime

Confidentiality

HIPPA - Summary

Health Insurance Portability Accountability Act

HIPAA does not apply to courts, court personnel, accrediting agencies, jails, or law enforcement personnel

Treatment courts are impacted by HIPAA because it applies to treatment providers and medical providers on the treatment court team and protected health information is re-disclosed to the treatment court team



Confidentiality HIPPA - Disclosure

Sample Forms

Sample Consent Form

Sample Disclosure Court Order

THE DRUG COURT JUDICIAL BENCHBOOK



Edited by:
Douglas B. Marlowe, J.D., Ph.D.
Judge William Meyer (ret.)



Confidentiality - Open Courtrooms

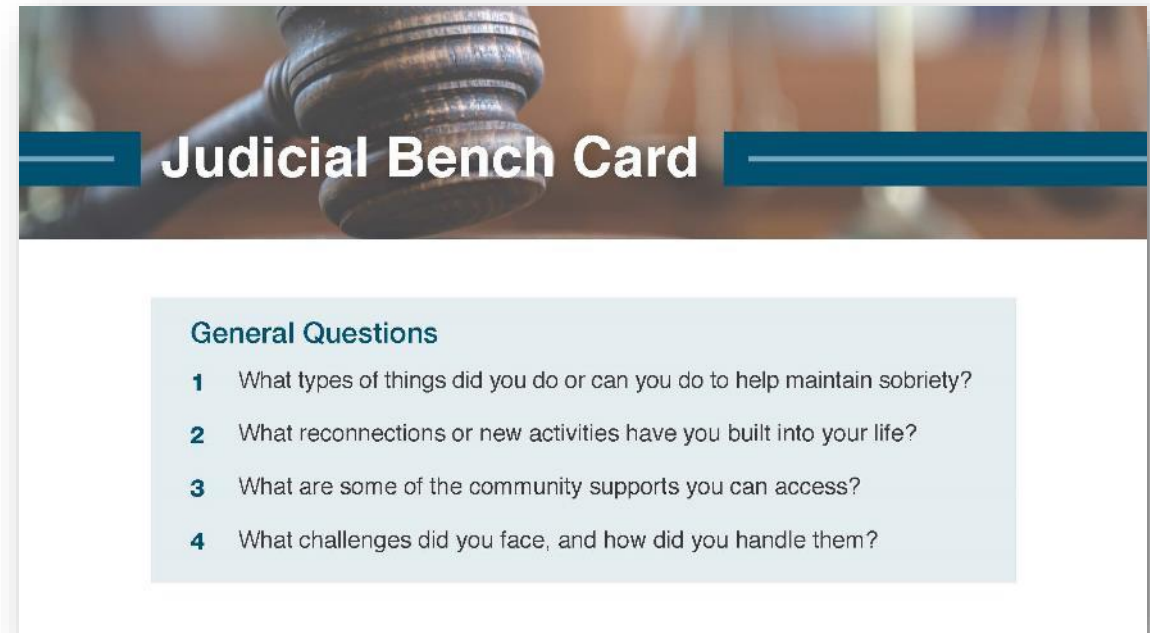
Florida vs. Noelle Bush



- Public access to the courts is paramount
- Treatment court proceedings must be open so participants can learn from others
- If treatment court proceedings are closed, other participants and families would be excluded

Confidentiality Open Courtroom Recommendations

- Don't discuss protected health information
- Be cautious about discussing sensitive matters
- Use the NADCP Judicial Bench Card
- Use motivational interviewing
- Use courtroom as a classroom



Confidentiality - Staffing

Washington cases:

- Participant terminated from treatment court argued the closed staffing violated his constitutional right to open court proceeding
- Court held that treatment courts are philosophically, functionally, and intentionally different from ordinary criminal courts. Staff meetings are not subject to the open courts provision of the state constitution.
- Staffing is not a “critical stage of the proceedings” allowing a defendant to be present





Constitutionality Staffing Recommendations

- **Close treatment court staffing in your policies and procedures manual**
- **Implement a standing order closing treatment court staffing**
- **Require team members to sign in at staffing and acknowledge the confidential nature of the meeting**



Constitutionality Staffing Recommendations

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

Conduct Overview

Ex parte Communication

Judicial Fraternalization and
Impartiality

Role of Prosecutor and Defense
Counsel



Conduct – Ex Parte Communication

Ex parte communication is information a judge receives about a pending case when both the prosecutor and defense attorney are not present. *Ex parte* communication is improper and prohibited.

To address this rule in treatment courts, many states have enacted exceptions in their professional conduct rules to allow for *ex parte* communication:

“A judge may initiate, permit, or consider *ex parte* communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.”

Conduct

Ex Parte Communication Recommendations

- Disclose *ex parte* information to the entire team
- Establish channels of communication (*e.g. require participants to talk with their attorney or probation officer before communicating with the court*).
- Maintain ethical boundaries, even if there is an exception to the rule
- Use e-mails to communicate information between team members
- Require participants to read letters or assignments in court



Conduct: Engaging Participants

DO NOT take participants to support meetings

DO NOT visit participant homes

DO NOT invite participants to your home to play video games

DO NOT collect participant UAs

STAY IN YOUR LANE!



Conduct

Relations with Participant Recommendations

“But I want to show participants I care...”

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

Constitutionality

Medically Assisted Treatment

First Amendment

Due Process



Constitutionality

Medically Assisted Treatment

Can a treatment court prohibit Medication Assisted Treatment (MAT) because it substitutes one addiction for another?

NO!

Constitutionality

Medication Assisted Treatment Grant Requirements

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



Constitutionality

Medication Assisted Treatment NADCP Position

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

Board Position Statement: Treatment court professionals must:

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

Constitutionality

Medication Assisted Treatment Valid Prohibitions

When can a treatment court prohibit MAT and retain federal funding?

- The client is not receiving the medications as part of treatment for a diagnosed substance use disorder; or
- A licensed prescriber, acting within the scope of their practice, has not examined the client and determined the medication is an appropriate treatment for their substance use disorder; or
- The medication was not appropriately authorized through prescription by a licensed prescriber.

Constitutionality

Medication Assisted Treatment Legal Challenges

MAT prohibitions are invalid under:

Americans with Disabilities Act (ADA)

Rehabilitation Act of 1973

Fourteenth Amendment due process guarantees

Eighth Amendment cruel and unusual punishment

Constitutionality

First Amendment

Alcoholics Anonymous

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



Constitutionality

First Amendment – Alcoholics Anonymous

Why does *requiring* attendance at deity-based programs violate the First Amendment?

The First Amendment Establishment Clause prohibits the government from establishing or requiring religious practices.

Deity-based programs like Alcoholics Anonymous® require:

- Confess to God “the nature of our wrongs” (Step 5)
- Appeal to God to “remove our shortcomings” (Step 7)
- By “prayer and meditation” make “contact” with God to achieve the “knowledge of the will” (Step 11)

Constitutionality

First Amendment – Alcoholics Anonymous

IT DOESN'T MATTER:

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

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

Constitutionality

First Amendment – Alcoholics Anonymous

Recommendations:

Courts have held that if a secular alternative is available, there is no First Amendment violation by referring to AA/NA.

Secular alternatives include, among others, LifeRing Secular Recovery[®], Rational Recovery[®], Smart Recovery[®]

Constitutionality

What is Due Process

**Before depriving a citizen
of life, liberty, or property,
the government
must follow fair procedures**



Constitutionality

Due Process - Termination

**A hearing is required before
terminating a participant from
treatment court**



Constitutionality

Due Process - Requirements

What fair procedures are required?

- Probable cause determination
- Written notice
- Right to appear
- Cross-examine and call witnesses
- Burden of proof
- Independent magistrate
- Reasons for decision
- Right to counsel (state-by-state determination)



Constitutionality

Due Process - Waiver

**A treatment court cannot
require participants to waive a
termination hearing as a
condition of participation**

**Source: *State v. LaPlace*, 27 A.3d 719 (N.H. 2011);
Staley v. State, 851 So. 2d 805 (Fla. Ct. App. 2003).**



Constitutionality

Due Process – Judicial Impartiality

Can a treatment court judge preside over a participant's termination hearing and probation revocation hearing?

Oklahoma Supreme Court: Requiring the district court to act as treatment court team member, evaluator, monitor, and final adjudicator in a termination proceeding could compromise the impartiality of a district court judge assigned the responsibility of administering a treatment court participant's program.

Minnesota Court of Appeals: If probation is revoked based on treatment court termination, the defendant is entitled to a judge other than the treatment court judge to preside over the probation revocation proceedings.

CONSULT STATE ETHICS OPINIONS!

Constitutionality

Due Process – Judicial Impartiality

Recommendations

Ask a participant whether he or she wants the treatment court judge to recuse from the termination hearing

Provide an opportunity to consult with counsel

Notify the participant of their rights at the hearing

Constitutionality

Due Process – Jail Sanction

If a treatment court participant denies misconduct, is a hearing required before a jail sanction is imposed?

YES

Constitutionality

Due Process – Jail Sanction

The Constitution GUARANTEES Due Process!

Key Component 2: “Using a nonadversarial approach, prosecution and defense counsel promote public safety while protecting participants’ due process rights.”

Courts require evidentiary hearings when jail is a possible sanction and the participant denies the factual basis for the sanction.

An evidentiary hearing with basic procedural protections is required because the participant may suffer a loss of a liberty or property right.

Constitutionality

Due Process – Preventative Detention

It is lawful to place a participant with a substance use disorder in jail while you are waiting for a placement bed to become available?

NO!

Constitutionality

Due Process – Preventative Detention

“But, if I release her, she will OD...”



Preventive detention is UNCONSTITUTIONAL!

Treatment courts CANNOT jail participants because they need inpatient treatment and a bed is not available without basic due process protections.

Constitutionality

Due Process – Preventative Detention

Why Is Preventive Detention Wrong?

- The Sixth Amendment guarantees the right to a speedy and public trial and arrested persons cannot be detained for extended period without a trial.
- The Eighth Amendment allows for reasonable bail and prohibits cruel and unusual punishment.
- Jail is not treatment.
- There is no evidence that preventive detention reduces crime, treats substance use disorders or instills fear.

Constitutionality

Due Process – Preventative Detention

Recommendations

- Hold a hearing with testimony by a treatment provider concerning the participant's substance use or mental health needs.
- Document the efforts taken to secure a treatment bed placement.
- Make a probable cause determination.
- Set bail.
- Exhaust other less restrictive alternatives (*e.g. house arrest, halfway house, GPS monitoring, etc.*)
- Rely on other non-compliance issues to justify the sanction (*e.g. missing appointments, curfew, etc.*)

Constitutionality

Due Process – Preventative Detention

- Rely on treatment provider recommendations for alternatives.
- Allow consultation with an attorney.
- Set review dates, as well as an automatic release condition when a treatment bed is available.
- Explore a civil commitment proceeding.

Constitutionality Resources for Treatment Courts



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LAW

Legal Guidance from the Experts

NDCI understands how important it is for treatment court professionals to remain informed about the latest statutes, case authority and how treatment courts are impacted. We maintain an up-to-date webliography of the relevant case law pertaining to treatment court operations to help guide court professionals as they navigate the ever-shifting legal landscape.

Constitutional and Other Legal Issues in Drug Court:

Hon. William G. Meyer (ret.)

Senior Judicial Fellow
National Drug Court Institute
Updated: June 7, 2018

Click on each section to see relevant cases.

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

<https://www.ndci.org/law-2-2/>

Challenges

Decriminalization of Drugs

Funding

Fentanyl

Homelessness

Commitment to Justice

**To Seek Justice for All
Through Unrelenting Proactive
Efforts**

**To Know the Truth
And Incorporate the Truth
Into an Ever-Evolving System of
Justice.**



NADCP

National Association of
Drug Court Professionals

QUESTIONS?



Evaluation



<https://cvent.me/9LAdLA>

1. On your compatible phone or tablet, open the built-in camera app.
2. Point the camera at the QR code.
3. Tap the banner that appears on your phone or tablet.
4. Follow the instructions on the screen to complete the evaluation.
5. After completion, you will be provided with a certificate that can be saved and printed.