

America's Problem-Solving Courts:

The Criminal Costs of Treatment and the Case for Reform



NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

September 2009

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The Criminal Costs of Treatment and the Case for Reform

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ABOUT THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. NACDL's core mission is to: *Ensure justice and due process for persons accused of crime ... Foster the integrity, independence and expertise of the criminal defense profession ... Promote the proper and fair administration of criminal justice.*

Founded in 1958, NACDL has a rich history of promoting education and reform through steadfast support of America's criminal defense bar, amicus advocacy, and myriad projects designed to safeguard due process rights and promote a rational and humane criminal justice system. NACDL's 11,000 direct members — and more than 90 state, local and international affiliates with an additional 40,000 members — include private criminal defense lawyers, public defenders, active U.S. military defense counsel, and law professors committed to preserving fairness in America's criminal justice system. Representing thousands of criminal defense attorneys who know firsthand the inadequacies of the current system, NACDL is recognized domestically and internationally for its expertise on criminal justice policies and best practices.

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America's Problem-Solving Courts:

ABOUT THE FOUNDATION FOR CRIMINAL JUSTICE

The Foundation for Criminal Justice (FCJ) is organized to preserve and promote the core values of America’s justice system guaranteed by the Constitution — among them due process, freedom from unreasonable search and seizure, fair sentencing, and assistance of effective counsel. The FCJ pursues this goal by seeking grants and supporting programs to educate the public and the legal profession to the role of these rights and values in a free society and assist in their preservation throughout the United States and abroad.

The Foundation is incorporated in the District of Columbia as a non-profit, 501(c)(3) corporation. All contributions to the Foundation are tax deductible. The affairs of the Foundation are managed by a Board of Trustees that possesses and exercises all powers granted to the Foundation under the DC Non-Profit Foundation Act, the Foundation’s own Articles of Incorporation, and its Bylaws.

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In June 2007, at NACDL’s annual leadership planning meeting, the subject of problem-solving courts arose. At issue was a fundamental question: are they a good thing for the accused and the criminal justice system? Criminal defense lawyers are, by the nature of their work, a strong-willed group. But on core principles of criminal justice, differences in perspective are often slight and highly nuanced. When the question about problem-solving courts was considered, however, heated disagreement was the order of the day. Some thought they are a wonderful advancement. Others were convinced that they are destroying the adversarial system, with the evisceration of fundamental constitutional protections the collateral damage in that swath of destruction. Still others were ambivalent.

Peeling beneath the surface of these divergent views, it became clear that the criminal defense practitioner’s perspective on the emerging phenomenon known as problem-solving courts hinges on how the court operates, the terms of participation, and the ultimate consequences of success or failure. And as the dozen or so defense lawyers from around the country shared their experiences, one immutable fact was clear: virtually every problem-solving court is different. Even within the same state or subdivision, the rules, the practices and the protections for the accused are *ad hoc*, and sometimes are irrational. To the extent that these courts offer some alternative to draconian penalties, no defense lawyer wants to shut off this safety valve. Where, however, the price of admission is a waiver of virtually all rights, and that the consequences of failure may be worse than never pursuing the problem-solving approach, responsible advocates cringe at the Hobson’s choice they must present to their clients.

Somehow, within 18 years after the founding of the first drug court in Miami in 1989, these courts had proliferated. And they did so largely without institutional input from the nation’s criminal defense bar.

Criminal defense is inherently a solitary enterprise, focusing on single-minded representation of individual clients in discrete cases. Most criminal justice “reforms” emanate from the prosecution and law enforcement, usually in combination with judicial administrators. The defense bar is seldom at the table, and even when a defense lawyer is part of the planning process, there is almost never a mechanism for systemic input from the defense. Thus, problem-solving courts swept the nation with the defense bar largely on the sidelines, notwithstanding the profound implications of their impact on defense practice.

NACDL’s leadership resolved at that June 2007 meeting that the organized criminal defense bar could no longer bury its head in the sand and pretend that the problem-solving movement was some fringe or transient development. Rather, the time had come for the third essential leg of the criminal justice system to join with the judici-

ary and the prosecution in understanding and evaluating the efficacy of the problem-solving approach. With strong support from NACDL's Board of Directors and initial seed money from the Foundation for Criminal Justice, a Task Force on Problem-Solving Courts was created to assess the impact of these courts on fundamental rights, to make findings regarding practices in them and to develop recommendations for ensuring that they meet constitutional standards of fairness and due process.

The effort was led by seven outstanding criminal defense lawyers from across the country, embodying an array of practice settings: Adele Bernhard, Jay Clark, Rick Jones, Elizabeth Kelley, Marvin Schechter, Gail Shifman, and Vicki Young. Soon after they began to delve into the research, it became evident that the initial study plan was inadequate. There was simply too much to learn, and variations in practice were too widespread. With additional support from the Ford Foundation, the Open Society Institute, and the Foundation for Criminal Justice, a far more ambitious plan emerged. Eventually, the Task Force conducted public hearings in seven cities, and took testimony from more than 130 witnesses. Task Force members undertook a comprehensive review of existing literature and studies, conducted an Internet survey of practitioners and engaged in countless hours of discussion and debate.

During the course of the project, the Task Force was assisted by Professor Joel M. Schumm of the Indiana University School of Law, who served as the project's reporter. The project could not have been concluded without Professor Schumm's dedication, skill and insightful analysis. His commitment to the project exemplifies the perfect model of collaboration between the legal academy and the practicing bar.

Several key NACDL staff members provided ongoing and indispensable support for the project. NACDL State Legislative Affairs Director Angelyn Frazer, assumed principal responsibility for the project when she was appointed in December 2008, and shepherded it through its

critical latter stages. In the early phases, her predecessor, Scott Ehlers, launched the project and provided the essential foundation and the template for the national hearings. During the interregnum between Scott's departure and Angelyn's arrival, National Affairs Assistant John Cutler provided crucial and dependable support. And, throughout the project, NACDL Associate Executive Director for Policy, Kyle O'Dowd, provided keen insight and leadership.

Additionally, NACDL's Board of Directors supported this project from its inception and closely monitored the work of the Task Force for the past two years. After an extensive period of review, the Board formally adopted the report on August 8, 2009, in Boston, Massachusetts, and authorized its release as the Association's official position.

Without question, however, this report is the result of one of the most remarkable volunteer efforts ever undertaken by a bar association. The seven Task Force members contributed their intellect, experience and literally thousands of hours of effort to this study. The thousands of pages of transcript that will be posted simultaneously with the release of this report provide compelling evidence of their dedication and determination. NACDL, the nation's criminal defense bar and the legal profession, as well as accused persons throughout the country, are enriched by their service.

The Foundation for Criminal Justice and NACDL proudly offer this report and its conclusions and recommendations for consideration by the nation's criminal justice community, secure in the knowledge that it represents the highest aspirations of the criminal defense bar in its noble mission to advocate for the rights of the accused and to safeguard fundamental constitutional protections.

Norman L. Reimer

Executive Director
NACDL

Manager
Foundation for
Criminal Justice

The debate over drug enforcement policy in the United States is almost always framed in stark terms premised on narrow options. Conventional thinking about criminal justice issues—prison, community corrections, probation, or possibly some sort of diversion program for minor offenses and first-time offenders—has not worked, nor has it abated the addiction problem. Drug courts have swept the nation without much debate or input from the criminal defense bar. That input is long overdue.

This report seeks to inform and redefine the debate by considering and challenging the fundamental criminal justice lens through which drug-related issues are evaluated. Because “the definition of the alternatives is the supreme instrument of power,”¹ accepting the criminal justice paradigm legitimizes drug courts while ignoring other smart, fair, effective, and economical approaches. The report also summarizes the history and evolution of drug courts, evaluates their operation and effectiveness, makes an overarching recommendation on the treatment of addiction, and offers a number of recommendations to ensure that the procedures and practices in drug court comply with constitutional and ethical norms. The recommendations include:



Address substance abuse as a public health issue — not a criminal justice issue.

Policymakers, courts, and lawyers must take a step back and examine the problem being solved: drug addiction. Addiction is an illness.² Illnesses should be treated through the public health system — not punished through the criminal justice system. Conditioning treatment on an arrest and entry in the criminal justice system sends a perverse message to the person who is ill and is an enormous waste of scarce public and court resources.

NACDL has long believed that “addiction to any substance, whether legal or illegal, is really a health problem best treated by the medical community and others trained in the causes and treatments of addiction.”³ Thoughtful policymakers from all points on the political spectrum have recommended the decriminalization of all drugs as the best way to combat drug addiction and make effective use of criminal justice resources. The experience of European nations provides powerful support for the soundness of this approach and belies concerns that drug use would increase. Although politicians have been unwilling to engage in a serious debate about legalizing drugs, the broader public has shown interest in the issue. It is time for a serious discussion of decriminalization.



Drug court recommendations

Until decriminalization occurs, the conventional paradigm is likely to continue, and drug courts will have a role. Drug courts are largely well-intentioned efforts to offer substance abuse treatment as an alternative to lengthy prison terms and lifelong felony convictions. Much of the support for drug courts ultimately turns on their existence as the sole, or best, alternative to draconian punishment. Although drug courts may offer some positive benefits to some participants, they also cause problems and engender disparities in many areas, including the admission process, the role and ethical obligations of defense counsel, and the misguided use of limited public resources.

◆ **A defendant should not be required to plead guilty before accessing treatment.**

Most drug courts require a guilty plea as the price of admission. When guilty pleas are required before offering treatment, drug courts become little more than conviction mills. In post-adjudication courts, the defendant must plead guilty before entering drug court, and even if he or she is successful and completes the program, the conviction will never go away. In pre-adjudication courts, the defendant must plead guilty, but then, if he or she successfully completes the program there is a possibility that the plea can be withdrawn and the charge dismissed. Although procedures vary, the hoops through which participants must jump result in dismissals for relatively few defendants. Profound consequences flow from every failure.

A pre-plea, pre-adjudication program preserves due process rights, allows defendants an opportunity to seek treatment, and provides a strong incentive for successful completion. If the participant successfully completes the program, the charge is dismissed. If the participant does not succeed, the traditional court process can be pursued.

Pre-plea, pre-adjudication programs are also the only ones that permit informed, thoughtful decision-making by defendants and counsel. Conversely, in post-plea programs defendants often lack sufficient time to make informed decisions, do not have discovery, and are unable to litigate motions. This often creates impossible ethical quandaries for defense counsel.

◆ **Admission criteria must be objective and fair, and prosecutors must relinquish their role as gatekeeper.**

Criteria for admission to drug court must be transparent and fully disclosed. Currently, many courts have no official criteria or have stated criteria that are backward or counterintuitive. For example, many drug courts exclude all violent offenders, including defendants charged with domestic violence. Excluding domestic violence offenses leads to the odd result of “the domestic violence offender who gets drunk and beats his wife up checking with his probation officer once every six weeks” while nonviolent offenders are appearing regularly for status hearings, giving random weekly urine samples, and attending 90 meetings in 90 days.⁴

In many courts, whether a defendant is permitted to enter drug court is up to the prosecutor. Prosecutors are frequently hesitant to allow higher risk offenders, even those who desperately need and want the treatment and supervision, into drug court out of fear that they will be blamed for participant failure or recidivism. As one witness testified, when prosecutors serve as gatekeepers they face the political risk of “a headline waiting to happen.”⁵

To avoid politics improperly affecting access to drug court programs, prosecutors should not be able to determine access. Admission criteria should be drafted by a panel or commission with broad representation from stakeholders in the criminal justice community, including judges, prosecutors, defense counsel, and social service providers. Admission criteria should be broad, allowing those who need and want treatment access to the program.

◆ **Ethical rules should not change; the drug court framework must accommodate long-standing ethical rules.**

Drug courts seek to impose a team concept on defense lawyers, creating difficult ethical dilemmas and virtually no role for private counsel. In many situations, the current structure of drug courts requires defense attorneys to set aside their ethical obligations to further the purpose and framework of the drug court. That must change. When counsel says nothing in representing the interests of clients, defense lawyers appear headed “to an old Soviet Union model where your job as a lawyer is simply to hold your client’s hand as they go off to the gallows — here’s what’s going to happen next.”⁶

Protecting defendants’ Sixth Amendment right to competent counsel requires a process that allows defense attorneys to satisfy their ethical obligations of loyalty, confidentiality, and zealous advocacy. Doing so will not dismantle the drug court process or its objectives; rather, it will enhance the credibility of the process with both the participants and anyone who observes the court.

◆ **Drug courts must be used for high-risk defendants facing lengthy jail terms; less onerous and expensive alternatives to drug court must be readily available for low-risk defendants and those who commit low-level offenses.**

Too often, the criteria and process for admission into drug court are guided largely by tough-on-crime politics, focusing on first-time or nonviolent offenders, with little consideration of smart-on-crime approaches that target those most in need of intensive treatment who would otherwise spend a long time in prison. The Task Force wholeheartedly agrees with the judge who testified he was “tired of everybody talking about being tough on crime. It’s about time we get smart on crime.”⁷

Courts frequently select those most likely to succeed to participate in drug court — a process called skimming. As one witness noted, when they engage in skimming, the drug courts are “sucking up all the resources that the community has to deal with this very thorny issue of addiction, and . . . using it on cream puffs.”⁸ In fact, drug courts, with their program of intense supervision, should be utilized for high-risk offenders for whom everything else has failed. Courts should focus on those who are facing the longest sentences and most need treatment, “where we would get the biggest bang for our buck.”⁹

Other less intensive alternatives to drug courts must be developed for low-risk offenders, who perform better without intensive judicial intervention.¹⁰ Communities should not “invest all of their addiction resources into one program. You can’t ignore the people who don’t get into drug court who are drug-and alcohol-involved. They have the same needs, the same rights, and impose the same dangers as everyone else.”¹¹

◆ **Drug courts must be open to all people regardless of race, economic status, or immigration status; methodologically sound research must be done to ensure drug courts are open to all.**

After 20 years, significant concerns continue to exist about the populations served by drug courts. Too often it seems that drug court eligibility and admission criteria serve to exclude mostly indigent and minority defendants. Drug courts must address these fundamental and disturbing disparities. Entry requirements must be carefully considered to ensure the same road to success is available to all. Opening doors for a privileged, Caucasian client base without doing the same for minorities, immigrants, and the poor cannot be tolerated. Not only must courts be equally available to all who wish to take advantage of the services, the road to graduation must be a realistic one with reasonable assistance from judges and drug court teams who truly want participants to succeed. Methodologically sound research must be done to ensure these basic requirements of fairness are met.

Despite the significant problems outlined above, there are a number of problem-solving courts that demonstrate best practices. Some problem-solving courts offer opportunities and resources to those who desperately need help through programs that also protect basic due process rights. The drug court in Philadelphia was created with significant contributions from defense lawyers and functions in a way that minimizes many due process and ethical concerns. The newly elected prosecutor in Milwaukee worked with defense lawyers and judges to create diversion and deferral agreements that have dramatically reduced the racial disparity that plagued Milwaukee’s criminal justice system. Finally, mental health courts throughout the country have largely done an effective job of providing integrated services, reducing recidivism, and preserving due process and fairness for participants.

These examples demonstrate the enormous potential of problem-solving courts. Adoption of the recommendations of the Task Force can ensure that, like these examples, drug courts across the country are fair and effective as they endeavor to address the enormous problem of addiction and with it, the problem of crime.

INTRODUCTION

The first drug court opened in Miami in 1989, offering drug treatment as an alternative to incarceration. Today there are more than 2,000 drug courts and hundreds of other courts labeled as problem-solving. The proliferation of these courts has occurred with limited involvement or even engagement of the criminal defense bar. Some defenders were reluctant to become involved in courts that dramatically altered their roles; others were not asked to participate. In many cities, the reticence and exclusion continues today. Because these courts raise fundamental concerns about the function of the criminal justice system, the due process rights of clients, and ethical obligations of counsel, the criminal defense bar must play an active and meaningful role in the discussion of problem-solving courts.

In 2007, the National Association of Criminal Defense Lawyers established a Task Force on Problem-Solving Courts to assess the extent to which these increasingly popular courts impact fundamental rights. Made up of seven experienced criminal defense lawyers from across the country, the Task Force was asked to conduct an extensive inquiry into problem-solving courts, make findings regarding the practices in those courts, and develop recommendations for ensuring that the courts meet constitutional standards of fairness and due process. This report represents the culmination of the Task Force's efforts. Drawing upon the testimony of well over 100 witnesses at seven hearings, a comprehensive review of existing literature and studies, an Internet questionnaire of practitioners and hours of discussion and debate, this report details the procedures utilized in problem-solving courts, highlights best practices, and makes recommendations for change.

Methodology

The Task Force held hearings in San Francisco, Miami, Tucson, New York, Milwaukee, Austin, and Washington, D.C. As detailed in Appendix A, the Task Force engaged in a dialogue with more than 130 witnesses including judges, defense lawyers, prosecutors, professors, policy analysts, treatment professionals, probation and pretrial service personnel, and drug court participants. The transcript of those hearings, which spans more than 3,000 pages, is available on the NACDL Web site at www.nacdl.org/drugcourts.

The Task Force also gathered and considered a wide range of existing studies, reports, and statistics on problem-solving courts, including law review articles, news coverage, governmental studies, and public policy reports. The Task Force reviewed information from problem-solving courts nationwide, including notes from direct observation, annual reports, manuals, and forms.

The Task Force distributed an Internet questionnaire seeking information from defense attorneys on drug court practices in each respondent’s jurisdiction and their overall impressions of the operation of drug courts. In total, 348 lawyers completed the Internet questionnaire. The respondents reported practicing in 40 different states and the District of Columbia.¹²

Finally, in the months after the hearings, the Task Force engaged in several lengthy discussions through meetings and conference calls. Professor Joel Schumm assumed primary drafting responsibility for this report. Multiple drafts were circulated, discussed, and revised through a collaborative process with the Task Force and NACDL staff, with input from the Board of Directors.

Scope of This Report

The Task Force began with a broad mission. At its hearings, the witnesses testified not only about drug courts but also about many other types of so-called problem-solving courts. These include mental health courts, domestic violence courts, community courts, drunk driving courts, and gun courts, to name a few.

Every one of these courts is different. Although they exist in courtrooms and are presided over by a judge, problem-solving courts are not really a new kind of court; they are simply strategies. As a judge who presides over a mental health court aptly explained, her court “is a criminal justice diversionary strategy built around constitutional and consumer-oriented principles.”¹³

Definitions are important but difficult in the problem-solving court context. A few principles provide a useful starting point. Problem-solving courts abandon the traditional model of adjudicating guilt or innocence. Instead, the courts assume guilt and focus on rehabilitation, seeking to address and resolve the underlying cause of the criminal activity, such as drug addiction or mental illness.¹⁴ The key components of any problem-solving court are diversion from the traditional prosecutorial track, treatment (graduated sanctions and rewards, tolerance for relapse), comprehensive rehabilitative services, staffing (a team-oriented approach with all parties involved), and ongoing judicial interaction.¹⁵

The understanding of many terms used in different problem-solving courts varies widely. The inconsistent use of terms sometimes hampers a meaningful discussion of the issues. For the sake of consistency, Appendix B includes a layperson’s glossary of key terms used throughout this report. The Task Force has attempted to craft definitions that reflect the most common usage of the terms, although this was admittedly a difficult and arguably imprecise process.

This report focuses on drug treatment courts and includes a limited discussion of mental health courts. These courts focus on treatment instead of conventional prosecution and include many of the features discussed above. Many other courts labeled as problem-solving courts are really just docketing or integrated courts that merely group defendants charged with similar offenses in the same court.¹⁶ Docketing courts are not problem-solving but are “problem-shifting” or “problem-causing courts.”¹⁷ Courts that focus on domestic violence, habitual offenders, or guns “tend to focus on goals other than defendant rehabilitation, such as increasing judicial expertise, improving stakeholder coordination, expanding services for victims, and holding of-



Witness Testimony: Jurisdictions

fenders accountable.”¹⁸ Courts that simply isolate defendants into specialized conviction mills designed to “make sure the defendant is held accountable for his or her actions”¹⁹ are problem-solving courts in name only and are beyond the scope of this report.²⁰

History and Evolution Of Drug Courts

The First Drug Court

The first drug court emerged from what was described by early proponents as dire necessity when Miami, Florida, was considered the cocaine capital of the world.²¹ Between 1985 and 1989, drug possession arrests increased by 93 percent in Miami-Dade County.²² Seventy-three percent of felony-charged defendants in Dade County tested positive for cocaine when entering the criminal justice system.²³ Law enforcement agencies were overwhelmed. As soon as individuals were prosecuted for drug possession, new cases quickly arose. These seemingly endless drug prosecutions led to overcrowded jails and prisons, which in turn caused the early release of other prisoners.²⁴ Those arrested for felony drug possession would make an initial appearance in court and a familiar and troubling routine would follow:

You are probably released pending trial. You come back when the state files formal charges. You get credit for time served, even if the time served was a few hours. In most cases, you accept that plea. Off you go. We all go to the window, wave goodbye, and say, “Come back and see us again soon,” and you don’t disappoint. You do come back and come back and come back.²⁵

To address the problems of drug addiction and its impact on the criminal justice system, Miami-Dade created the nation’s first drug court with the active involvement of the district attorney and public defender.²⁶ The creation of the court “didn’t come from some benevolent place. A lot of the reasoning behind that court was concern for overcrowding in the prisons”²⁷ Revolutionary at the time, the drug court put forth a simple, pragmatic approach: place defendants in drug treatment rather than in prison.²⁸ As noted by the founding judge, the “answer lay not in finding better ways of handling more and more offenders in the criminal justice system, but in ‘determining how to solve the problem of larger numbers of people on drugs.’”²⁹

The Miami-Dade County Drug Court was grounded in the notion that demand for illicit drugs and the related involvement in crime that led to the revolving door of the criminal justice system “could be reduced through an effective and flexible program of court-supervised drug treatment.”³⁰ The drug court sought to reverse the failure of the

system to address the revolving door problem. This new model incorporated social services and treatment programs under the traditional guise of the court system.³¹ It was “not a court” because it “makes no adjudication whatsoever;” rather, it was “a drug diversion program run under the [a]egis of the court.”³²

Features of Modern Drug Courts

Drug courts leverage the authority of the court to reduce crime by changing defendants’ drug-using behavior.³³ The drug court model was formalized when the National Association of Drug Court Professionals partnered with the U.S. Department of Justice’s Office of Justice Programs in 1997 to publish *The Key Components*,³⁴ which provides 10 guiding principles of operating an effective drug court. To receive federal drug court funding, states and localities must comply with these 10 components.³⁵

The Ten Key Components are:

- (1) **Integration of substance abuse treatment with justice system case processing;**
- (2) **Use of a nonadversarial approach, in which prosecution and defense promote public safety while protecting the right of the accused to due process;**
- (3) **Early identification and prompt placement of eligible participants;**
- (4) **Access to a continuum of treatment, rehabilitation;**
- (5) **Frequent testing for alcohol and illicit drugs;**
- (6) **A coordinated strategy among the judge, prosecution, defense, and treatment providers to govern offender compliance;**
- (7) **Ongoing judicial interaction with each participant;**
- (8) **Monitoring and evaluation to measure achievement of program goals and gauge effectiveness;**
- (9) **Continuing interdisciplinary education to promote effective planning, implementation, and operation;**
- (10) **Partnerships with public agencies and community-based organizations to generate local support and enhance drug court effectiveness.**

U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, DRUG COURTS: THE SECOND DECADE 3 (2006).

The number of drug courts has grown from single digits in the few years after the creation of the Miami-Dade Drug Court to more than 2,000 drug courts today.

Drug courts employ a standardized set of procedures that include initial assessment and continuous monitoring. The drug court judge monitors the progress of the participants through regularly scheduled status hearings.³⁶ Before participants meet with the judge in court, however, the drug court team generally discusses the progress of the participant in a backroom meeting called a “staffing.” Sanctions, such as community service or time in jail, may be imposed by the judge if a participant relapses or violates the program rules. Serious or repeated violations may lead to a termination hearing at which the judge considers whether a participant should be removed from the drug court program.

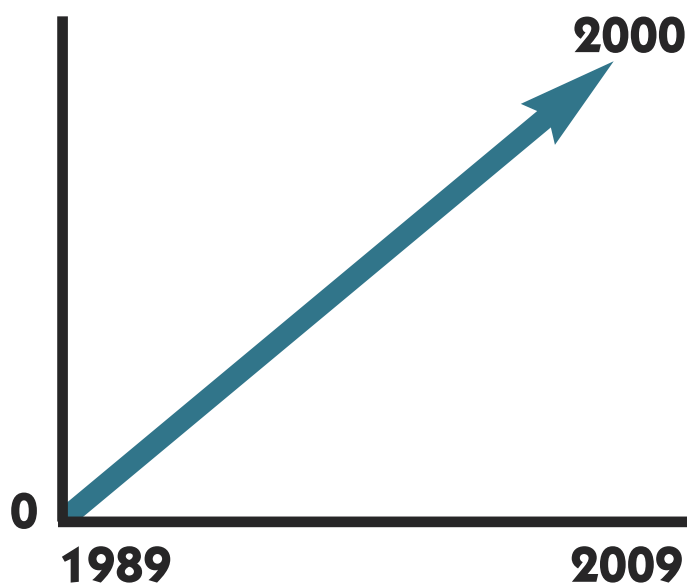
Categories of Drug Courts

Drug courts employ three basic models: (1) pre-plea/pre-adjudication, (2) post-plea/pre-adjudication, and (3) post-adjudication.³⁷ The trend is toward increased use of the post-adjudication model.³⁸

In pre-plea/pre-adjudication programs, the defendant enrolls in drug court without entering a guilty plea or going through the trial process.³⁹ If participants complete drug court, charges are dismissed. If participants fail to complete the program, however, they proceed to the traditional court model and suffer no increased sanction for failure.

Conversely, in post-plea/pre-adjudication programs, participants enter a plea that is held in abeyance while they complete the program. Similar to the pre-plea programs, successful completion leads to dismissal of the charge.⁴⁰ If a participant fails, however, the deferred plea is entered and sentence imposed.

Drug Courts Over Time



Finally, in post-adjudication programs, defendants plead guilty and face a suspended sentence while they participate in the drug court.⁴¹ If they fail to complete treatment as part of the suspended sentence, a prison sentence is imposed. This is much like probation, except the judge is more actively involved, as explained further below.⁴²

Nonadversarial Approach

Drug courts expect everyone in the court to work together through a collaborative or “team” approach. The prosecution, judge, treatment providers, and defense counsel are expected to join and participate as part of the team, working to determine what is in the best interests of each participant.⁴³ “Best interests” looks beyond the narrow focus on the particular charges and instead focuses on the overarching issue of the participant’s sobriety. In exchange for being processed in this type of nonadversarial environment, participants forfeit their traditional substantive or procedural challenges to the charges.⁴⁴

Powerful Judges

Judges are actively involved throughout the drug court process. Drug court participants meet with the judge frequently, often weekly in the early stages, to engage in conversations about their progress and obstacles in their treatment.⁴⁵ Judges often engage in direct conversations with the participant.⁴⁶ Based upon the information provided by the participants and their drug counselors, the judge may provide incentives or levy sanctions.

Stages of the Process

Participants’ cases may spend as long as five years in drug court,⁴⁷ although 18 months is typical.⁴⁸ The time spent in drug court is divided into three stages and varies based on each participant’s circumstances and progress. The three stages are detoxification, stabilization, and aftercare.⁴⁹ Each stage has specific goals: detoxification works to eliminate the participant’s physical dependence on drugs; stabilization focuses on treating the participant’s craving for drugs over a sustained period of time; and aftercare assists the participant in obtaining education or job training and remaining drug free.⁵⁰

Drug courts are generally flexible, working at each individual’s pace. Court personnel and participants understand that the process is a slow track to recovery.⁵¹ Each stage has specific requirements and goals that participants must satisfy before progressing. If participants struggle with staying off drugs after they reach a new stage in the process, they are usually moved back to an earlier phase.⁵²

Those participants who complete all three stages graduate from drug court.⁵³ A graduation ceremony is usually held at the court to recognize the achievement. Some

courts seal the arrest record of participants with no previous felony conviction.⁵⁴ Under existing federal law, however, undocumented immigrants often face deportation.⁵⁵

Judicial Sanctions

Drug courts anticipate that participants may stumble during treatment and revert to using drugs. Consistent with their overarching goal of participant success, drug courts are generally flexible in addressing temporary setbacks, such as when urinalysis tests show the participant has relapsed.⁵⁶ Courts employ a variety of mechanisms to motivate participants, including the proverbial “carrot and stick” technique.⁵⁷ The carrot, or reward, allows individuals sent to drug court to remain in the community and avoid a jail sanction while gaining treatment for their addiction.⁵⁸ This is countered with the stick, or punishment, which provides graduated sanctions for noncompliance with the treatment regimen, up to and including termination from the program and a return to the traditional criminal justice system.⁵⁹

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“The amount of hearsay and gossip that sometimes is discussed at the meetings is troublesome.”

— Maryland lawyer

Drug courts describe sanctions as “smart punishment.”⁶⁰ After meeting with participants, judges impose sanctions to encourage compliance when participants have tested positive for drug use or otherwise failed to comply with program requirements.⁶¹ Sanctions generally start low but increase as the judge deems necessary. These sanctions often include additional educational assignments, work details, and community service.⁶² Further, when the lower-level sanctions are not effective, the judge may impose “motivational jail” for a short period to provide a preview of the possible outcome if the individual does not successfully complete the program.⁶³

Conversely, rewards are offered when participants show progress. For instance, t-shirts, mugs, and key chains may be provided to recognize and reward participant progress.⁶⁴ More substantial rewards may also be provided to aid par-

ticipants in improving their personal situations. For example, free bus passes assist participants in transportation to their drug court obligations.⁶⁵

Participants

Drug courts are unquestionably successful for some substance-dependent defendants. The Task Force heard and read numerous stories from rehabilitated addicts. It is nothing short of “inspiring” that a decade after drug treatment court, individuals are “employed, back with their families, paying taxes, and giving back to the community.”⁶⁶ Some former drug court participants even become counselors and provide help to others.⁶⁷ One such story was from Monica, who completed the Brooklyn Drug Treatment Court. She was 53 years old, had 47 prior arrests, and had failed four prior long-term treatment attempts.⁶⁸ Drug court proponents also tout the successes of other participants, such as “the Texas architect who did not lose his professional license” or “the California mother who, as a drug court graduate, inspired her alcoholic father to seek recovery after 40 years of addiction.”⁶⁹ The successes are impressive.

Even those who succeed, however, are sometimes saddled with a conviction. Drug courts resolve a criminal prosecution without a conviction only for those who graduate from pre-adjudication programs. This is especially important for young people who want to go to college and would otherwise be precluded from receiving a Pell grant and other student aid if they have a felony drug conviction.⁷⁰ Increasingly, however, post-adjudication drug courts are being used,⁷¹ which leave participants with convictions on their record and undermine any true sense of rehabilitation and recovery.

The Task Force did not hear from drug court failures or drop outs. However, it is incontrovertible that for every person who graduates from drug court, others did not qualify or did not complete the program. The Task Force was unable to locate and hear from some of these thousands of people and learn from their stories. Yet, understanding their plight is important to a full understanding of drug courts.⁷²



DECRIMINALIZATION: THE SMART, FAIR, ECONOMICAL, AND EFFECTIVE ALTERNATIVE

The criminal justice system is overwhelmed with cases. Nearly 2,000,000 Americans are arrested each year for drug crimes, and 500,000 are currently incarcerated for a drug offense.⁷³ These victimless crimes should never enter the criminal justice system.

Address substance abuse as a public health issue — not a criminal justice issue.

Drug treatment should be freely available to every person addicted to drugs, not simply those who become ensnared in the criminal justice system. Studies suggest that those who voluntarily seek treatment at the point in their lives when they are most ready for treatment are most likely to succeed.⁷⁴

NACDL has long believed that “addiction to any substance, whether legal or illegal, is really a health problem best treated by the medical community and others trained in the causes and treatments of addiction.”⁷⁵ The editors of the *National Review* aptly concluded more than a decade ago “that the war on drugs has failed, that it is diverting intelligent energy away from how to deal with the problem of addiction, that it is wasting our resources, and that it is encouraging civil, judicial, and penal procedures associated with police states.”⁷⁶ The Task Force reiterates NACDL’s longstanding support for the decriminalization of all controlled substances and the creation of a Department of Drug and Addiction Services (DDAS) which shall sell previously denominated controlled substances to any person over the age of 21 at prices below their street value so as to end the black market in drugs while setting aside a portion of the revenues collected to establish and maintain free clinics nationwide for drug education and the treatment of addiction.⁷⁷

The war on drugs “is diverting intelligent energy away from how to deal with the problem of addiction.”

— National Review

Drug usage would likely decline—not increase—if all drugs were decriminalized. A 2007 Zogby poll asked more than 1,000 Americans if they would be likely to use hard drugs such as heroin or cocaine if they were legalized, and less than one percent responded yes.⁷⁸ *The Economist*, which has supported legalization for the past 20 years, recently reiterated its position and encouraged “providing honest information about the health risks of different drugs,” which “could steer consumers towards the least harmful ones. . . . Legalisation might encourage legitimate drug companies to try to improve the stuff that people take. The resources gained from tax and saved on repression would allow governments to guarantee treatment to addicts”⁷⁹ Economics Professor Jeffrey Miron concluded in a 2005 study that “legalizing marijuana would save \$7.7 billion per year in government expenditure[s] on enforcement of prohibition” and could “yield tax revenue of \$2.4 billion annually if marijuana were taxed like all other goods and \$6.2 billion

annually if marijuana were taxed at rates comparable to those on alcohol and tobacco.”⁸⁰

Comparisons with European nations further suggest that decriminalization would not lead to increased drug use. Although nearly 33 percent of Americans have tried marijuana in their lives, despite it being illegal here, only 15.6 percent of the Dutch population has used marijuana, even though it is legal.⁸¹ Moreover, 5.1 percent of Americans surveyed in 1997 used marijuana within the past month compared to 2.5 percent of those in the Netherlands.⁸² These results hold true for young adults. In the Netherlands, young adults (aged 15-24) consume cannabis less than in the UK and Spain, where drugs are illegal.⁸³

Most telling, Portugal explicitly decriminalized all drugs in 2001.⁸⁴ The rationale included enabling effective treatment options to addicts by removing the stigma attached to criminal prosecution and freeing up resources that could be used for treatment.⁸⁵ Decriminalization has been successful by virtually every measure. Drug usage has decreased among key demographic groups, and the populace has been more willing to seek treatment.⁸⁶

Although U.S. politicians have been unwilling to engage in a serious debate about legalizing drugs, the broader public has shown interest in the issue. During President Obama’s first online town hall meeting, the most submitted questions involved legalizing marijuana.⁸⁷ As voter initiatives in California and Arizona suggest, the public is often ahead of politicians in its willingness to try innovative approaches to solving persistent problems.⁸⁸ Even some law enforcement officials have concluded, “To save lives and lower the rates of disease, crime and addiction as well as to conserve tax dollars, we must end drug prohibition.”⁸⁹

The Task Force is encouraged by recent comments from the nation’s new drug czar, Gil Kerlikowske, who has suggested a shift from incarceration toward treatment.⁹⁰ His shift away from the “War on Drugs” rhetoric and recognition that “[w]e’re not at war with people in this country” is a step in the right direction.⁹¹ These comments must be supported by adequate budget requests and concrete policy proposals.⁹² A vigorous public debate about decriminalization, including the experience of European nations, the associated costs savings, and the availability of treatment, is long overdue.⁹³



DRUG COURTS IN ACTION: OPERATION, ISSUES, AND PROBLEMS

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Criteria and Eligibility for Admission

Drug courts are not available everywhere or to everyone. Prosecutors generally dictate or have a substantial role in establishing the criteria for admission as well as determining which individuals are actually admitted.⁹⁴ Some courts have established criteria while others have unwritten and inconsistently applied criteria.⁹⁵ The extent to which drug courts open their doors and to whom those doors are opened are critical areas in need of sound methodological studies.⁹⁶

Eligibility criteria vary. Some courts accept only individuals charged with misdemeanor drug offenses.⁹⁷ Others cast a wider net and accept those charged with felony drug offenses, as well as with offenses committed while the defendant was under the influence of drugs, even if the charge is not primarily a drug offense. “Notably, a sizeable percentage of felony-level drug treatment courts in [New York] currently accept only first-time felony offenders.”⁹⁸ Similarly, the Pascua Yaqui tribal drug court in Arizona has no written criteria but unofficially prosecutors “do not like repeat offenders. They do not like violent crimes or any offense involving a law enforcement officer.”⁹⁹ In Montgomery County, Maryland, where the judge previously made acceptance determinations after discussion with the team, the prosecutor is now the gatekeeper.¹⁰⁰

Defendants charged with crimes of violence are excluded from drug court in many jurisdictions.¹⁰¹ This can lead to the wholesale exclusion of persons with mental illness. As a lawyer from Florida explained, “People who are bipolar usually hit other people; however, the State Attorney prohibits anyone with a battery charge from getting into any of the programs.”¹⁰² Other jurisdictions exclude those who have previously been convicted of a prior crime of violence. These definitions are often so broad as to exclude those defendants with prior or current offenses that in no way correlate to any clear and present danger of violence. Some of these restrictions were the product of restrictions imposed by the federal government, which offered millions of dollars in grants to programs that met certain requirements.¹⁰³ Currently, a “violent offender” for federal funding purposes is a person who:

(1) is charged with or convicted of an offense that is punishable by a term of imprisonment exceeding one year, during the course of which offense or conduct —

(A) the person carried, possessed, or used a firearm or dangerous weapon;

(B) there occurred the death of or serious bodily injury to any person; or

(C) there occurred the use of force against the person of another, without regard to whether any of the circumstances described in subparagraph (A) or (B) is an element of the offense or conduct of which or for which the person is charged or convicted; or

“[M]any drug courts skim. They . . . have exclusion criteria to pick people who are more likely to do well.”

— Dr. Peter Banys

(2) has one or more prior convictions for a felony crime of violence involving the use or attempted use of force against a person with the intent to cause death or serious bodily harm.¹⁰⁴

The effect of the prosecution’s gatekeeping role combined with prohibitions against admission of defendants charged with or convicted of felonies or so-called crimes of violence can raise insurmountable barriers to defendants wishing to enter drug court. For example, in Pima County, Arizona, defendants are technically eligible for drug court only if they have no prior felonies and no more than two minor drug offenses, but even those meeting that threshold may not be admitted.¹⁰⁵ The County Attorney ultimately makes the decision and has no published criteria for admission but a “preference” for individuals the prosecutor “think[s] will be successful.”¹⁰⁶

As one policy analyst testified, “one of the most frustrating things” is the “different barriers to participation,” some of which are imposed merely for “political reasons.”¹⁰⁷ “[M]any drug courts skim. They . . . have exclusion criteria to pick people who are more likely to do well.”¹⁰⁸ Different prosecutorial personalities should not lead to diversion in one case and a felony in a similar case. Simply put, “[t]hat’s indefensible.”¹⁰⁹

The eligibility criteria and the blanket prohibitions have contributed to serious concerns about racial and socio-economic class discrimination in admission policies. For example, in Pima County, defendants in drug court are largely Caucasian. African-Americans and Hispanics “are way under-represented.”¹¹⁰ Others who have visited many drug courts reported, “I’ve been to drug courts where I have seen not one client of color.”¹¹¹

The admission criteria may also create serious consequences for the immigrant population in drug courts, which may restrict the admission of nonresidents or be unable or unwilling to accommodate those who do not speak English.¹¹² At least one appellate court has reversed a trial judge’s exclusion of an entire class of undocumented defendants.¹¹³

Recommendations — Criteria and Eligibility for Admission

◆ *Admission criteria must be revised to end skimming.*

Many drug courts exclude any person charged with a crime of violence, even though substance abuse treatment may be particularly useful to those charged with crimes of domestic violence. Other courts exclude participants with mental health diagnoses, who could also benefit greatly from appropriate treatment. However, “co-occurring disorders are best served in treatment programs that can simultaneously provide mental health and addiction treatment using practitioners trained in both domains.”¹¹⁴

High-risk offenders are “likely not to do well in treatment,” which means those individuals “need more intensive treatment.”¹¹⁵ As a result, in many jurisdictions, prosecutors will not admit “high-risk” individuals and thereby are “screening out of drug courts exactly the core prognosis cases that need to be in drug court”¹¹⁶ Drug courts should include “the people who would be facing substantial time either in incarceration or some community correctional programming that restricts their freedom”¹¹⁷ President Obama’s desire to offer alternatives to prison is commendable, but limiting diversion options to “first-time, nonviolent offenders”¹¹⁸ leaves out those who most need the help and are likely to cost society the most to incarcerate.¹¹⁹

The Task Force agrees wholeheartedly with the judge who testified he was “tired of everybody talking about being tough on crime. It’s about time we get smart on crime.”¹²⁰

The criteria and process for admission into drug court are guided largely by tough-on-crime politics, focusing on first-time or nonviolent offenders, with little consideration of smart-on-crime approaches that target those most in need of intensive treatment who would otherwise spend a long time in prison.

“I’ve been to drug courts where I have seen not one client of color.”

— **Tim Murray**

Not all drug courts avoid the difficult cases. Some drug courts have adopted policies and practices that belie the criticisms of skimming and playing politics. The drug court in Waterloo, Iowa, for example, was established “purposefully” to deal with individuals who have been to prison at least once if not two or three times.¹²¹ The court hears all kinds of cases including “forgeries, burglaries, thefts” committed by drug-addicted defendants.¹²² Similarly the drug court in Eau Claire County, Wisconsin, decided “to deal with the frequent flyers in the prison, that’s where we would get the biggest bang for our buck.”¹²³ These drug courts are models to emulate in crafting criteria for individuals appropriate for drug court.

◆ *Judges in traditional courtrooms should be encouraged to use innovative drug court techniques in their courtrooms.*

The innovative approaches to solving underlying problems that are used in drug courts can and should be used

in traditional courts as long as participants' due process rights are protected. The Task Force heard from successful drug court participants and also from others who were ineligible for drug court but who managed to resolve their addiction issues in other ways. They were successes, not because of drug court, but despite it. For example, Jeff Jeffery was excluded from drug court because his prior offense involved a drug sale.¹²⁴ He "should have went and served a six-year prison term. Instead, [the judge] hung onto me in her court, kept me in her jurisdiction, [like an] 'independent drug court.'" Rhonda Reagan "had been on drugs for 20 years," including 14 on heroin.¹²⁶ After many failed attempts at treatment, a parole officer gave her a chance with a life-skills program for women.¹²⁷ Candice Singer did not qualify for drug court because of the severity of her crimes but was admitted when she hired a private attorney with "relationships with the prosecutor, relationships with the judge."¹²⁸

Although all three of these individuals impressively completed drug treatment and are now living productive lives, they could never have done so under traditional admission criteria and policies. The judges who presided over the prosecution of these defendants adopted some of what is best in drug court: a desire to look beyond failed traditional approaches and take an innovative and intensive approach to the underlying problem.

"I am tired of everybody talking about being tough on crime. It's about time we get smart on crime."

— Judge Tom Bower

◆ *Prosecutors must relinquish their role as gatekeeper. Admission criteria should be objective and broad.*

Every defendant who needs treatment should be presumed eligible for a drug court program. Currently many courts have no official criteria or stated criteria that are backward or counterintuitive.¹²⁹

Admission criteria must be transparent and fully disclosed. This is not revolutionary. Proposition 36, the voter initiative that mandated treatment instead of incarceration in California, provided "no judicial discretion or prosecutorial discretion regarding who gets into the program."¹³⁰

Prosecutors often take a safe and restrictive approach to eligibility. A new prosecutor who does not approve of the drug court approach can unilaterally abolish it by simply

denying entry, as occurred for several months when a new prosecutor began in the Pascua Yaqui tribe.¹³¹ Prosecutors may worry that drug court cases are "headlines waiting to happen," with significant "political risk" to elected prosecutors.¹³² Expansive criteria for admission to drug courts should be adopted, which would remove the decision-making authority of prosecutors.¹³³ Acceptance decisions must be made instead by a panel or commission with broad representation including the judge, prosecutor, defense, and social services.

◆ *Crimes of violence must not be categorically excluded.*

When those charged with domestic violence offenses are screened out of drug court, where do they go? Probation.¹³⁴ This leads to the odd result of "the domestic violence offender who gets drunk and beats his wife up checking with his probation officer once every six weeks" while nonviolent offenders are appearing regularly for status hearings, giving random weekly urine samples, and attending 90 meetings in 90 days.¹³⁵

Defendants with a history of violence could be assessed based on factors such as "the nature of the offense (isolated minor assault versus arson, robbery, etc.); severity of the offense; years at liberty since the offense occurred; number of previous violent offenses, etc."¹³⁶ Although some recommend this assessment occur on a "case-by-case basis,"¹³⁷ uniform policies are preferable to avoid the wholesale exclusion of defendants who merely have an isolated prior violent offense. Any risk assessment must be based on valid social science.¹³⁸

Timing of Admission And Discovery Issues

Although drug court is potentially a life-altering decision, there is often little time for defendants to decide whether to enroll, especially in those jurisdictions employing a post-plea/pre-adjudication model. Defendants arrested in Brooklyn have one day to decide.¹³⁹ Those arrested in the Bronx generally have three to four days.¹⁴⁰ Although other courts may allow more time,¹⁴¹ time alone is not the issue.

Discovery is essential to allow defense counsel to advise the defendant on the best course of action. As a lawyer from Florida explained, "[d]rug court attempts to short-circuit the discovery process. This is done by not providing complete discovery or even a witness list," which makes it impossible for counsel to advise clients about entry.¹⁴² Those courts that require a decision within days of arrest do not provide discovery to participants. In other courts, discovery must be provided before a decision is made.¹⁴³ As one prosecutor put it, "[t]he earlier we get the discovery to the defendant, the faster an individual consults with their client and gets them into drug court."¹⁴⁴

Discovery is of little value when counsel is precluded from litigating motions. A defense lawyer in Wisconsin testified he was always provided with discovery before a client decided whether to enroll in drug court.¹⁴⁵ However, if motions were litigated, the ability to enroll in drug court could be removed.¹⁴⁶ In Travis County, Texas, defendants “either go in the drug court or you go litigate your case; you don’t do both.”¹⁴⁷ The general guideline of the Pima County Attorney’s Office is to offer a plea at the outset of the case. If the defense files motions, the plea is no longer available.¹⁴⁸ As one county attorney put it, “[I]f you file a motion to suppress, we win, now you’re going to trial.”¹⁴⁹ As a New York lawyer noted, “it doesn’t matter how egregious the stop or search was — you want to litigate, there’s the door to the ‘real’ courtroom. Entry into the ‘program’ is conditioned upon a guilty plea and no motions — period.”¹⁵⁰ Although some prosecutors told the Task Force that cases are carefully screened for search and seizure issues,¹⁵¹ defense attorneys are justifiably unwilling to abdicate the protection of Fourth Amendment rights to the prosecutor.

Recommendations — Timing of Admission and Discovery Issues

◆ *Drug courts must use a pre-plea, pre-adjudication model.*

If society is serious about solving the underlying problem of addiction, treatment must be universally available and never conditioned on an arrest, much less a plea of guilty.¹⁵²

To the extent that the criminal justice system is involved, a pre-plea, pre-adjudication model is superior for many reasons. It is the only model that affords defendants sufficient time to obtain discovery, to investigate the facts, and to carefully and thoroughly evaluate the choices presented. Moreover, the pre-plea, pre-adjudication model provides a valuable incentive for seeking treatment. Upon completion, charges will be dismissed and the record may be sealed.¹⁵³ If participants fail, the traditional court process can be pursued. Pre-plea approaches avoid the significant due process, ethical, and immigration concerns arising in the post-plea models.¹⁵⁴

If, alternatively, drug courts use a post-plea model, they must allow adequate time for review of discovery and litigation of motions. Many post-plea, pre-adjudication models prevent informed, careful decision-making and too hastily extract waivers of fundamental rights. Defendants must choose the drug court option quickly or lose the opportunity for treatment. They frequently lack sufficient time to make informed decisions, are deprived of an opportunity to obtain discovery, and are prevented from litigating motions. Drug courts must not become a perverse game of “Let’s Make a Deal,”¹⁵⁵ forcing defendants to plead guilty without knowing what’s behind door number one (discovery and motions) or door number two (time to reflect on the important decision with the advice of counsel).

“Drug court attempts to short-circuit the discovery process.”

— Florida lawyer

Otherwise, this approach imposes impossible ethical quandaries on defense counsel.¹⁵⁶ Moreover, post-adjudication programs do not offer the incentives of dismissal and expungement available through pre-adjudication programs.¹⁵⁷ This may diminish their effectiveness.¹⁵⁸

In addition, a pre-plea model is necessary to guard against abusive or sloppy police work. When defendants do not receive discovery and cannot litigate motions, police are not held accountable for violations of the Fourth Amendment. Although many street stops are illegal,¹⁵⁹ they go unchallenged when cases go to drug treatment court days after arraignment with no review of discovery or litigation of motions to suppress. Lawyers have stopped trying cases, especially buy-and-bust cases that historically had a high acquittal rate.¹⁶⁰ Risk of trial is simply too high when the penalty for losing is five to 10 years in prison as opposed to no prison time if treatment is successfully completed.¹⁶¹ As a result, “police officers aren’t being held to any kind of questioning anymore in drug cases.”¹⁶² “Very rarely is there a thought that [police are] going to be challenged in a courtroom under oath and questioned and cross-examined by defense lawyers.”¹⁶³

Finally, as explained below, only a pre-plea model will protect immigrants from deportation or refused re-entry under existing standards and criteria that are often confusing, arbitrary, and misleading.¹⁶⁴

In short, nothing is lost by allowing a defendant to enter drug court without first pleading guilty.¹⁶⁵ Any concern that prosecutors may have difficulty in proving a case if a par-

“It doesn’t matter how egregious the stop or search was — you want to litigate, there’s the door to the ‘real’ courtroom. Entry into the ‘program’ is conditioned upon a guilty plea and no motions — period.”

— New York lawyer

“Very rarely is there a thought that [police are] going to be challenged in a courtroom under oath and questioned and cross-examined by defense lawyers.”

— Robin Steinberg

Participant fails drug court is largely overstated. Most drug cases involve police officer testimony, often with surveillance, and physical evidence of drugs. Putting together a case with this type of evidence, which is stored in a secure evidence locker, will not be hampered by delay. Moreover, prosecutors may protect their cases by requiring defendants to waive their right to a speedy trial.

◆ *In order for defense counsel to properly advise clients, adequate time must be provided to allow defendants to decide whether to enroll in drug court.*

Defense counsel must have an opportunity to review discovery, investigate the case, advise clients, and litigate motions before entry into a drug court that requires a guilty plea. The National Association of Drug Court Professionals’ Key Component No. 3 advocates for initial court appearances “immediately after arrest or apprehension” and requires enrollment in treatment “immediately.”¹⁶⁶ Regardless of any possible treatment advantages—and the Task Force heard no specifics—an immediate decision does not permit sensible consideration of the ramifications of a criminal prosecution. The rapid turnaround is similar to and even more troubling than the “meet and plead” approach in many misdemeanor courts.¹⁶⁷

Although rapid entry decisions are required in many drug courts across the country, they appear unnecessary to suc-

“The opportunity to apply for a pretrial diversion/intervention program should be available as soon as possible to eligible defendants from the point of the filing of formal charges through final adjudication.”

— National Association of Pretrial Services Agencies

cessful treatment and make the review of discovery and investigation of the merits of the case impossible. As one treatment professional explained, enrollment in treatment within a couple of weeks or as much as 30 days would be “excellent.”¹⁶⁸ In Philadelphia, prosecutors generally provide discovery within 10 days and defense counsel are given an opportunity to review that discovery and litigate motions before entry.¹⁶⁹ Moreover, some courts “give defendants several weeks to test out treatment while their case is still pending,” which creates a double benefit: counsel can investigate the case and clients can decide whether to opt into or out of the treatment program.¹⁷⁰

If drug courts are truly designed to solve the underlying problem of drug addiction, there is no reason to prevent people from enrolling, getting treatment, and getting well at any point in the proceeding. This occurs in some drug courts as an exception but should instead be the rule.¹⁷¹ The Task Force heard no rationale for limiting enrollment in drug court to the early stages of proceedings. “The opportunity to apply for a pretrial diversion/intervention program should be available as soon as possible to eligible defendants from the point of the filing of formal charges through final adjudication.”¹⁷²

◆ *The state must have a triable case.*

Drug court procedures and protocols must make clear that drug courts cannot be dumping grounds for weak cases that the prosecution would otherwise be unable to win. Providing discovery and allowing time for investigation and the litigation of motions are necessary to ensure that prosecutors do not use drug court to “dump” weak cases. Defense counsel must have time to raise challenges to cases with significant legal or factual difficulties. Prosecutor offices must also review internal decisions about which cases are sent to drug court to make sure that weak cases, which should ethically be dismissed, are not disposed of in drug court.

◆ *Immunity must be granted to all statements made in drug court.*

Drug court agreements or legislative enactments should ensure that nothing said in drug court can be used against a participant in any future proceeding. Prosecutors largely agreed that statements made in drug court should be off-limits; some even suggested a prosecutor who used incriminating statements made in drug court should be disbarred.¹⁷³ This is largely an unwritten rule, though, which must change. Key Component No. 2 speaks against “the filing of additional drug charges” based on an admission in drug court.¹⁷⁴ The prohibition in Component No. 2 should be broadened to include a ban on filing any type of additional charges.¹⁷⁵ Statements made as part of treatment, often under direct questioning from the judge and sometimes without counsel, should not later be used against a participant in any way. To ensure this occurs, every drug court contract should explicitly state that anything said as part of treatment in drug court cannot be used against a participant in any subsequent proceeding.

America’s Problem-Solving Courts:

Philadelphia: A promising, albeit imperfect, example



Before entering drug treatment court in Philadelphia, the defense receives full discovery and clients are extensively advised of “everything there is to know about the program,” including a day observing status hearings to understand how the court operates.¹⁷⁶ Participants are guaranteed that “everything they said could not be used at all outside of treatment court, not on probation or parole or anything else.”¹⁷⁷ This guarantee is “written into every colloquy and signed by the district attorney.”¹⁷⁸

Clients are not asked to consider drug court until about 10 days after arrest and are given an opportunity to think about the decision while a clinical assessment is scheduled.¹⁷⁹ The clinical assessment is usually completed when the client returns for an appearance 20 days later.¹⁸⁰ Although prompt treatment is often emphasized for drug treatment court, the delay to allow clients to reflect on the important decision and for counsel to review discovery appears not to have taken a toll on the success of the participants, 92 percent of whom “have remained conviction free and drug free for a year to 18 months.”¹⁸¹

The Judicial Role

Drug courts are highly personality-driven, relying on the active involvement of judges. Hundreds of judges have committed years of their lives to tirelessly working for better outcomes for participants in drug courts. Lawyers who appear before them and the participants who have charted new directions in their lives expressed a great deal of satisfaction and thanks to the judges. Participants are successful in no small part because of their regular appearance before judges.¹⁸² The active role of a judge who is genuinely interested in helping a person battle addiction is preferable in many ways to probation officers who may have a law enforcement mentality and an overwhelming caseload. Many defendants view a probationary sentence as a “joke. And what they mean is nobody cares and nobody is watching.”¹⁸³

Drug court graduates often attribute their success not to the program but to the individual judge who presided over their case.¹⁸⁴ However, there is no guarantee that all judges will be “good.” There is no personality test for judges prior to assignment in drug court, and even “good” judges sometimes move to other courts or retire. Simply put, “we can’t be sure that there is always going to be that good and benevolent judge who’s running these courts.”¹⁸⁵ Judges change and so can sanctions and policies, unless they are codified in statute or in drug court agreements.

The pervasive and activist role for judges in drug courts must have limits. When participants enter drug court they would be well-advised to “[p]repare to turn your life over to this judge and her whims for at least the next year or two.”¹⁸⁶ One judge candidly admitted that he did things that were “absolutely over the line in the canons of judicial conduct,” such as midnight curfew checks on participants and sitting in on treatment meetings.¹⁸⁷ Another judge described himself as “a case manager for 2,000 clients. . . . I would get calls from defendants all the time.”¹⁸⁸

The judicial role raises especially troubling questions when unrepresented litigants are involved. Judges should not make a “sales pitch,” subtly pushing litigants into drug court by letting them know if they go to trial and lose, “I could sentence you up to the maximum.”¹⁸⁹ When judges “pressure clients into treatment,” they become “just another coercive arm of the state by adopting principles of ‘harm reduction.’”¹⁹⁰

Moreover, drug courts give rise to serious *ex parte* communication concerns.

A former drug court judge believes this commonly occurs with “all this exchange of information” in which “people think they can just come to a judge and say, hey, you ought to know this, this and this . . .”¹⁹¹ Treatment providers should not discuss matters outside the presence of counsel, which appears to occur with some regularity in drug courts.¹⁹²

The ABA Model Code of Judicial Conduct was significantly revised in February 2007. Rule 2.9 generally prohibits *ex parte* communication, although one provision now

**“Prepare to turn your life over to
this judge and her whims for
at least the next year or two.”**

— Professor Josh Bowers

provides: “A judge may initiate, permit, or consider any *ex parte* communication when expressly authorized by law to do so.”¹⁹³ The comment explains:

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, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.¹⁹⁴

Several states have adopted the revised code, and many others have committees considering its adoption.¹⁹⁵ It is unclear when *ex parte* communication becomes “expressly authorized by law” under the model rule. One reading suggests any problem-solving court provide authorization, but some jurisdictions have adopted specific rules to provide this express authority.¹⁹⁶

Recommendations — The Judicial Role

◆ *Judges must not directly or indirectly coerce defendants to secure waivers of counsel.*

The decision to enroll in drug court must be voluntary and can only be voluntary if it is made after a full explanation of the function and policies of drug court. Detailed handbooks for participants and contracts should be used.¹⁹⁷ Moreover, defendants should be encouraged, if not required, to observe drug court proceedings before an enrollment decision is made. For example, in Dallas County defendants first participate in an orientation during which they observe drug court proceedings and talk with participants.¹⁹⁸

Any waiver of counsel must be knowing, intelligent, and voluntary.¹⁹⁹ Although the Supreme Court has held no specific formula is constitutionally required for a waiver, some state courts have adopted specific rules and warnings that must be provided.²⁰⁰ Counsel has a crucial function throughout the drug court proceedings.²⁰¹ Any waiver of counsel may only occur after a careful and detailed explanation of the important right being waived.

◆ *Drug courts must do everything possible to ensure that every lawyer who wants to appear in drug court has the opportunity to do so.*

Although many judges lamented that counsel frequently failed to appear in drug court, the structure of drug court often discourages appearance of counsel.²⁰² This must change. Courts should insist that counsel attend staffings and hearings by providing notice and sanctioning nonap-

pearance. Notice of positive drug screens and the scheduling of sanction hearings must come directly from the court. Counsel cannot be expected to rely on clients to notify them of test results or hearings. Moreover, courts could engage in “more careful scheduling of staffing hearings so that the clients of a given attorney are all heard on the same calendar”²⁰³ Teleconferences or videoconferences could be used in some circumstances.

◆ *Sanctions must be imposed in a fair and consistent manner.*

Drug courts should promulgate guidelines for the imposition of consistent sanctions and maintain records of sanctions. Failing to follow a graduated sanctions approach “threatens inconsistent and arbitrary outcomes,”²⁰⁴ which may not only lead to poor outcomes but also may lead participants to rightfully question whether they are being treated fairly. Litigants who believe they are treated fairly are more likely to comply with program requirements and succeed.²⁰⁵

◆ *The judge who guides treatment should not be the judge who determines termination or hears the underlying case after termination.*

The drug court judge should generally not be involved in the litigation of issues related to the merits of the criminal case or preside over a hearing regarding the defendant’s termination from the drug court program. The drug court judge will be using some degree of coercion to compel participants to stay clean and complete the program. Pressure and coercion, however, must be constrained by due process and consistency. There is a “hammer” hanging over participants’ heads and that hammer can be “wielded pretty arbitrarily” in some cases.²⁰⁶

Judges may feel personally involved with each participant’s success or failure, which are subjective issues.²⁰⁷ The judge may believe the team has done everything it can to help the person succeed, and as a result the judge may feel angry or offended at a participant’s lack of progress and be inclined to punish what seems like failure. Moreover, the judge will have “a dramatically greater amount of information than a judge would have in a traditional situation.”²⁰⁸ The Idaho judicial canons were recently amended to make clear the judge in drug treatment court who has received *ex parte* information cannot preside over a termination hearing.²⁰⁹ The Oklahoma Criminal Court of Appeals acknowledged the potential for bias when a judge is required to act as a “team member, evaluator, monitor and final adjudicator in a termination proceeding,” which “could compromise the[ir] impartiality”²¹⁰ The Oklahoma approach requires recusal upon request from the defendant.²¹¹ This allows each participant the opportunity to decide. “[I]n many circumstances they will want that particular judge making those ultimate decisions, because that judge understands the individual, and the nature of the addiction, whereas [another judge] down the hall may not, and will bury the individual.”²¹²

◆ *Ex parte communication must never be permitted.*

Although many states have already adopted the 2007 ABA Judicial Code of Conduct, states should not adopt those parts of Rule 2.9 that allow for *ex parte* communications in drug court. There is simply no reason to make an exception to longstanding prohibitions on *ex parte* communications for drug courts. Progress reports should be provided to the judge, defense attorney, and prosecutor at least one day in advance of any proceeding. Moreover, as explained in the defense counsel section of this report, counsel must be kept abreast of drug court staffings and hearings and counsel should be required to attend.²¹³ Making counsel's appearance optional simply harms clients, who are left without an advocate, and encourages *ex parte* communications, which are always problematic, no matter how well-intentioned.

◆ *Drug court assignments must go to experienced, interested judges who remain for more than a year.*

Drug court judges are crucial to the court's success. In systems in which judges are appointed, new judges should not be assigned to drug court. An experienced judge is better equipped to address the many challenges described above. Moreover, only judges who express an interest in drug court should be assigned. The position should not be viewed as an entry level one that judges cannot wait to escape.²¹⁴ Rather, drug court should be seen more as a "career opportunity for a judge who really wants . . . to become an expert at this type of assignment . . ." ²¹⁵

Adequate time must be allowed for training. This includes outside training conducted by organizations that specialize in drug courts as well as on-the-job training with judges who have previously presided in drug court.

For all of these reasons, drug court should be a long-term judicial assignment. Judges should be assigned to drug court for more than one year.

The High Cost of Failure: Paying a Price for Trying

Except in pre-plea, pre-adjudication programs, participants must pay a high price to enter drug court: they must enter a guilty plea. A guilty plea is only part of the cost.

"[P]eople are punished for attempting to treat [themselves and failing]."²¹⁶ The sentences in many courts are significantly higher for those who seek drug treatment and fail than for those who simply avoid drug treatment and take a plea, at both the misdemeanor and felony level.²¹⁷ For example, a simple crack possession case will usually net a 10- to 20-day jail sentence in Manhattan.²¹⁸ A defendant may wait 20 to 30 days for placement in a program.²¹⁹ If defendants enter a treatment program and fail, they may be sentenced to six months in jail.²²⁰ For felony offenses, the disparities are even

more troubling. A lawyer recounted a recent case in which the client could plead upfront for five years or enter a treatment program and face as much as nine years if the client failed.²²¹ In a Nebraska drug court, participants who were terminated from drug court received "the harshest possible sentence regardless of how long someone has participated and regardless of a lesser punishment if they had been sentenced to probation and had violated or had simply been sentenced to jail originally."²²² Similarly, a public defender from California reported that a judge "automatically gave any failure the maximum prison sentence."²²³

Recommendations — The High Cost of Failure

◆ *Sentences for those who attempt drug court must not exceed what would have been imposed if the standard plea was taken.*

A public defender from California reported, "[s]ome drug cases would get 60 days in jail, but because the defendant has offended the court by failing to complete the program, I have seen sentences as long as 10 months."²²⁴ Judges should not be offended at failure in drug court but rather should appreciate and reward genuine attempts to succeed. Longer sentences are inappropriate and cannot be justified as a means to "set an example" for other drug court participants.²²⁵

"[P]eople are punished for attempting to treat themselves and failing."

— Annalisa Mirón

◆ *Some amount of credit time should be applied to the sentence of anyone who spends several months complying with a drug court program and working toward completion before ultimately failing.*

Defendants who are incarcerated pending trial earn credit time toward any sentence imposed against them. Those who spend months or even years working diligently to meet the onerous drug court requirements and conquer their addiction, sometimes even through inpatient programs, are given no credit for their efforts. Some even receive maximum sentences and are ineligible for probation or early release.²²⁶ This should change. Courts should give some amount of credit to those who have demonstrated a commitment to completing the drug court program, even if they ultimately end up falling a little short.

ROLE OF DEFENSE COUNSEL AND ETHICAL CONCERNS

Entry Into Drug Court

In city after city, the Task Force heard deep-seated concerns about the role of defense counsel and the contours of ethical obligations in drug court. Those concerns arose from the fundamental tension between the defense lawyer’s traditional role as a zealous advocate for clients and the drug court’s focus as a “nonadversarial, collaborative approach”²²⁷ among the prosecutor, defense attorney, judge, and others in the attempt to assist participants’ work toward a drug-free future.

Drug court proponents often downplay ethical concerns by focusing on “the best interests of the client,” or those interests “within the given legal framework” of drug treatment court.²²⁸ According to a program lawyer in drunk driving court in Austin, however, “the issue of clients’ rights in these programs is one that is both unclear and . . . very seriously needs to be addressed.”²²⁹ The drug court model raises fundamental ethical concerns about the lawyer’s role as advisor, counselor, and zealous advocate of the client.²³⁰

Key Component No. 2 of the National Association of Drug Court Professionals’ Ten Key Components²³¹ requires a “nonadversarial approach” in which the “prosecution and defense counsel promote public safety while protecting participants’ due process rights.”²³² It continues that the “responsibility” of defense counsel is the simultaneous protection of these rights “while encouraging full participation.”²³³ As a public defender in Texas put it, “the problem has more to do with people wearing two hats and having to be one thing at one point and another thing at another and that the drug courts don’t clarify what that role of the lawyer should be. They say you’re part of the treatment team, you’re not this client’s lawyer, but then they have you sign documents as a defense lawyer.”²³⁴

There are three critical points in the drug court process at which the role of counsel and ethical issues must be examined: (1) entry into drug court, (2) staffings (backroom meetings), and (3) drug court appearances with the participant during which sanctions or termination may be pursued. In many ways throughout the different stages of the proceedings, the prevailing drug court model contravenes ethical obligations of the ABA Model Rules of Professional Conduct.

Under Model Rule 1.1, “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skills, thoroughness and preparation necessary for the representation.” This rule requires defense attorneys to be familiar with the drug court program, including the range of sanctions that could be imposed upon the participant as well as the consequences if the individual fails to complete the program.²³⁵ In the context of drug court, this rule presents difficulty for many attorneys guiding a client through the process without a true understanding of the contours of drug court and the full range of consequences for a client upon failure or noncompliance with the process.

Legal Issues

Under the traditional drug court model, an individual must waive significant rights when entering drug court, even though litigants often do not have access to discovery before being asked to waive these rights.²³⁶

Competent representation in drug court requires, first and foremost, adequate time afforded to and used by counsel. A quick enrollment deadline undermines the ability of counsel to investigate the case and may prevent counsel from uncovering significant legal issues that could affect the disposition of the case. The relinquishment of rights with no opportunity for investigation is troubling: “Either go in the drug court or you go litigate your case; you don’t do both.”²³⁷ Competent representation requires counsel to “fully advise the client of the advantages and disadvantages,” which encompasses informed counsel concerning pretrial motions, the likelihood of conviction, and the consequences of participation.²³⁸

Diagnosing and Counseling

The enrollment decision is compromised by a lack of time and information. Since the decision to enroll in drug court is often required soon after arrest, defendants may be forced to make this decision while still experiencing the shock of arrest.²³⁹ If the defense counsel pushes for treatment rather than traditional adjudication, the client may be unduly persuaded by the attorney’s advice.²⁴⁰

To fulfill their ethical obligations, counsel must fully investigate the case, including review of all discovery. Moreover, the attorney must inform the client of the specific rights being waived upon entering drug court, including release of confidential information, as well as the likely sentence if the case were resolved by a plea or trial.²⁴¹ Defense counsel must be familiar with drug court and should encourage or require a client to attend a drug court session before making the decision.²⁴²

In the context of drug court, “zealous advocacy means presenting these options to the client. It may also mean offering the client advice based on the advocate’s experience or expectation of success or failure or the risks associated with each path”²⁴³ Competent representation is especially challenging when it transcends advising about a legal issue or likely outcome into making assessments about treatment. This is difficult because the drug court model requires counsel “to be a diagnostician, not of trial court success” but “whether someone is going to succeed in treatment,” which “is simply not something that a defense attorney is trained to do.”²⁴⁴ Defense attorneys cannot read their clients’ minds or know their willpower to exercise reason in the face of temptation.²⁴⁵ Although counsel may decide to recommend treatment court, this should occur only after a full explanation and discussion of “every possibility.”²⁴⁶ At other times, the best advice is to litigate the suppression motion to take a guilty plea to time served to avoid a likely drug court failure and longer sentence.²⁴⁷

In sum, in the context of entry to drug court, zealous advocacy means presenting and explaining options to the client. Counsel must be vigilant in avoiding the easy road of disposing of cases by merely convincing clients to enroll in drug court when the drug court “offer seems to hold out the prom-

ise of everything the defendant could want: immediate freedom and the possibility of dismissal.”²⁴⁸ Rather counsel must offer the client the best possible advice based on the lawyer’s experience and thorough investigation of the case.²⁴⁹

Staffings

Drug court participants appear in court frequently, often weekly for the first few months.²⁵⁰ Before the participants appear in court to meet with the judge, however, the “team” meets behind closed doors in a “staffing” to discuss the progress of the participants. This meeting may be “the most animated, knock-down, drag-out fight,”²⁵¹ but participants are not part of this crucial discussion about their lives, which is not on the record.

A researcher from the National Association of Drug Court Professionals emphasized that “zealous advocacy takes place in the staffing.”²⁵² In these backroom meetings defense counsel is supposed to be standing up for his or her client’s rights, albeit outside the client’s presence.²⁵³ Counsel is then expected to report what occurred to his or her client and the arguments the attorney made on the client’s behalf, before the in-court proceeding during which disagreements are not openly expressed.²⁵⁴ These secret backroom meetings exclude participants, prevent them from seeing their lawyer advocate on their behalf, and discourage zealous advocacy by counsel.

“They say you’re part of the treatment team, you’re not this client’s lawyer, but then they have you sign documents as a defense lawyer.”

— Clara Hernandez

The Importance of Showing Up

Advocacy for a client’s stated interest often does not occur in staffings for a variety of reasons. The most fundamental and troubling reason is that many defense lawyers simply do not show up for these backroom meetings. A lawyer from California reported, “I did not attend staffing meetings. Thank God.”²⁵⁵ Once a participant is admitted to some drug courts in Tennessee they “do not see the defense lawyer anymore.”²⁵⁶

Even lawyers who appear for staffings may fail to render minimally competent representation. Effectiveness at

staffings requires that counsel be “involved” and “maintain communication” with clients to be “an invaluable conduit” in explaining their client’s circumstances to the court.²⁵⁷ Counsel may know things the rest of the team does not know and must bring to light that information in order to reduce a sanction or dissuade against termination. As one drug court judge explained, the best lawyers “get to know the clients and really read the reports and educate themselves, really read the literature about addiction and get to know which programs are better and worse.”²⁵⁸ According to another judge, “The defense lawyers who in my view do the best job in drug court are those lawyers who take an interest in treatment court models and an interest in the personal lives of their clients.”²⁵⁹ If a public defender has a heavy caseload and a large number of cases set for staffing,²⁶⁰ taking an active interest and role can be quite difficult, if not impossible.²⁶¹

In drug court “the best advocacy is done in those team meetings and after consultation with the client and after a full understanding of . . . what might happen, and what will happen.”²⁶² At least at the staffing phase, the “really good” lawyers “challenge a lot of things on behalf of their clients.”²⁶³

In short, the staffing model raises serious concerns under Model Rule 1.1, especially when lawyers are unfamiliar with the drug the court model and unlikely to appear, be prepared, or to understand the significance of the staffing.

Pursuing a Client’s Stated Interests

Professor Monroe Freedman is often cited for the criminal defense attorney’s guiding principle: “I am a partisan committed to the client and the client’s expressed interests, whose zealousness and commitment to defend the client’s rights is untempered and unmitigated. . . [T]here is no other avenue that will achieve [the client’s] necessary ends.”²⁶⁴ Despite this widely accepted mantra, this principle is often diminished or disregarded in drug courts.

“My office needs to repeatedly remind the other team members that we are our clients’ attorney, not their parents, so we cannot substitute what we think is ‘in the best interests’ of our clients for our clients expressed interests.”

— California lawyer

Best Interests Versus Stated Interests in Other Contexts

Counsel must pursue clients’ “stated interests” rather than what some might term their “best interests” even when clients are minors or respondents in civil commitment proceedings.

Some United States jurisdictions require court-appointed counsel for children to express their client’s wishes to the court.²⁶⁵ Many others “use the word ‘represent’ in their statutes defining the role of lawyers for children, requiring the attorney to represent either the child or the child’s interests.”²⁶⁶ The Youth Advocacy Project (YAP) in Boston, a group that represents indigent children accused of crimes, strictly represents the minor’s stated interest. YAP believes “not only is loyalty to the client an integrity issue on behalf of the child, but it is also necessary for the integrity of the system. It would undermine the system for the attorney not to do what the client wants.”²⁶⁷ If the attorney did not represent the client’s stated interest, the client would essentially be silenced, and the judge would not be able to take the client’s position into account when rendering a decision.²⁶⁸

In the civil commitment context, “the active and attentive attorney who seeks discharge [at an involuntary commitment] hearing, as opposed to passively concurring to involuntary hospitalization, benefits all individuals involved. . . . Without zealous advocacy on the part of the lawyer, it is unlikely that a clear and full picture of the mentally ill person’s psychiatric treatment and housing needs will be demonstrated.”²⁶⁹ If the attorney fails to advocate on behalf of the client, there is a risk that clients will grow to doubt the value of their own rights and will view the process as a sham because no one is speaking on their behalf.²⁷⁰

A Client’s Stated Interest Must Be Pursued in Drug Court

The ethical obligation to voice clients’ stated interests applies to representation in drug court, just as it does in these other contexts.²⁷¹ If defense attorneys pursue what they believe to be in the client’s best interests rather than the client’s stated interest, clients might justifiably feel the process is a sham and stacked against them. Defendants, even if young or suffering from mental illness, are unlikely to trust a process if they have no voice in it. Our legal system rightfully places

emphasis on personal autonomy and individual decision-making. Allowing the client to control the litigation is consonant with our belief that individuals should be allowed to make the important decisions about their lives for themselves, even though the decisions they make may be unreasonable or shortsighted. While an attorney may counsel his client against a particular decision, ultimately he must allow the client to take responsibility for

his own fate. For in the end, client autonomy reflects a deeply held belief that, just as we jealously guard against the paternalistic state, so, too, we find repugnant the paternalistic lawyer.²⁷²

Although counsel's ethical obligations appear clear, the drug court emphasis on a team approach and its focus on treatment demand acquiescence from counsel simply to ensure clients work toward sobriety. As a lawyer from Ohio put it, "[t]here is an expectation that the defense attorney will act more as a guardian ad litem and be part of the 'drug court team.' Zealous advocacy is considered obstructionist, a misunderstanding of the drug court process and an inability to 'think outside the box.'"²⁷³ In many drug courts, the role of defense counsel "embodies no vestiges of the adversarial defender, and therefore takes on a 'best interests' mantra."²⁷⁴ As a public defender from California explained, "My office needs to repeatedly remind the other team members that we are our clients' attorney, not their parents, so we cannot substitute what we think is 'in the best interests' of our clients for our clients expressed interests."²⁷⁵ The Task Force agrees that lawyers should view clients as a whole person, not simply a case, but must ultimately defer to the client's stated interest rather than imposing counsel's view of the client's "long-term best interest"²⁷⁶ Needless to say, representing a client's stated interests requires a regular dialogue with clients.²⁷⁷

Although the drug court model expects the defense lawyer to be a team player to promote the best interest of the client, defense counsel must challenge any sanctions that conflict with the client's stated interest. This is not happening in many places. The Task Force heard from prosecutors who reported recommending "one more chance" for participants in team meetings while defense attorneys recommended sanctions or termination.²⁷⁸ "And we used to laugh because nothing was as it is expected."²⁷⁹ In other cases where a participant relapses several times, public defenders have said, "I think he has run out of second chances. I think we need to dump him."²⁸⁰ The prosecutor, however, has asked the judge to give the participant "another chance."²⁸¹ The chief of operations for the Dade County Drug Court recounted a recent incident where the judge and defense lawyer agreed to a two-week jail sanction, but the state attorney suggested the participant instead be sent to a living facility.²⁸² These appear not to be isolated events,²⁸³ and these events cannot be reconciled with the zealous advocate standard set forth in the Model Rules.²⁸⁴

The staffing model also raises real and perceived loyalty concerns. "Model Rule 1.7 creates a duty of loyalty on behalf of the attorney. This loyalty is breached when the lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests."²⁸⁵ This loyalty between a client and counsel is eviscerated when a defense attorney suggests that his or her client be subjected to sanctions. Being a "team-player" in drug court as the vocal leader of sanctions defies the purpose of Rule 1.7. It may be

"Zealous advocacy is considered obstructionist, a misunderstanding of the drug court process and an inability to 'think outside the box.'"

— Ohio lawyer

appropriate to recommend additional treatment as a sanction, but it should never be appropriate to recommend jail as a sanction without the express consent of the client.²⁸⁶ As one public defender explained, treatment is seldom available in jails and "I will never rationalize opting or requesting a sanction that is jail."²⁸⁷ If the prosecutor asks for jail time, he responds with a request for additional treatment or more meetings.²⁸⁸

Pursuing a client's stated interest is further compelled by Model Rule 1.2. That rule defines the scope of representation an attorney owes his or her client, stating "[a] lawyer shall abide by a client's decisions concerning the objectives of representation."²⁸⁹ The Model Rules are written in the abstract in order to allow an attorney to evaluate a certain set of facts to the specific situation an individual encounters.²⁹⁰ There is little room for interpretation under this rule, however, once a client provides instruction on his or her objectives. The typical objective for an individual charged with a drug offense is to minimize or avoid incarceration or other penalties that may be imposed. After an individual advises his or her attorney of these objectives, Model Rule 1.2 requires that a lawyer abide by this instruction and try to further these objectives to the best of his or her ability. The defense attorney must be a zealous advocate for the client's stated objective, not the team's objective of the client's supposed "best interest," whatever that might be.

In short, the client decides the objectives of the representation, and counsel is required to remain loyal to the client and pursue the client's interest. Adhering to the teamwork approach that sometimes leads counsel to advocate for sanctions instead of doing everything possible to minimize sanctions, conflicts with Rules 1.2 and 1.7.

"I will never rationalize opting or requesting a sanction that is jail."

— Jeff Thoma

Representation in drug court requires careful consideration of client confidentiality. Counsel may have information about a client's progress, including information about drug relapses or noncompliance with the drug court guidelines, which should be guarded. Counsel must decide when, if ever, to disclose such information. Under Model Rule 1.6, "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent [or] the disclosure is impliedly authorized in order to carry out the representation"291 The importance of the implications of this rule is discussed in the commentary to Model Rule 1.6, which notes a "fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter."²⁹²

Participants may feel betrayed by the defense attorney who, as a team player in drug court, was an active participant in those discussions that led to the sanctions, especially if confidential information was disclosed.²⁹³ The purpose of Model Rule 1.6, to encourage a participant to disclose potentially damaging information to an attorney, is likely destroyed if participants see their attorney actively participating as a "team player" in a process that sanctions, incarcerates, or ultimately terminates them from the drug court program.

In sum, the drug treatment court currently requires the defense attorney to play two roles: advisor to the participant and team player. The latter role has the propensity to diminish, if not destroy, the ability to serve in the trusted advisor role, the aim and purpose of Rule 1.6

"Private counsel don't really know what they're getting into."

— Peter Rose

The Exclusion of Private Counsel

Much of the work of drug court is done in staffing meetings during which "the team" discusses cases and decides on possible sanctions. Despite the importance of staffing to a client, many private lawyers are either not invited or do not show up, leaving clients unrepresented or added to the large docket represented by the public defender. The drug court model favors institutional players;²⁹⁴ some even forbid appearances by private counsel.²⁹⁵ Moreover, the required frequent appearances, sometimes with little or no notice, further discourage private counsel from representing clients.

In some communities, the custom of the local defense bar is not to appear in drug treatment court or merely to "check in" from time to time.²⁹⁶ As the Bronx Drug Court judge explained, "the vast majority just don't come."²⁹⁷ A drug court judge in Florida "feels like a daycare center" where the private bar drops "their clients off and I never see them again."²⁹⁸ The root of the problem seems to be that "private counsel don't really know what they're getting into."²⁹⁹ Surprisingly, judges often accept counsel's absence as part of drug court practice. There was no judicial testimony about ordering counsel to appear or sanctioning counsel for nonappearance, as commonly occurs in any other proceeding.

More troubling, drug courts are grounded in a team model that minimizes or excludes private counsel. The drug court model is premised on the presence of the same defense member of the team. Key Component No. 2 focuses on the "nonadversarial approach" and emphasizes the importance of consistency and stability within drug court. "[T]he judge, prosecutor, and court-appointed defense counsel should be assigned to the drug court for a sufficient period of time to build a sense of teamwork and to reinforce a nonadversarial atmosphere."³⁰⁰ This appears to leave no role for private counsel or multiple defenders from a public defender organization. Indeed, one private lawyer who regularly showed up to status hearings in a case was asked repeatedly, "Why are you here? You don't need to be here," to which he appropriately responded "[n]o, that's my client. I've been paid to represent this person."³⁰¹

Limited Retainer Agreements

Related to the problem of the persistent absence of counsel is the confusion about private counsel's role, which sometimes may be addressed in a retainer agreement.

Piecemeal representation does not work in the drug court setting. A public defender assigned to drug court will not know the specifics of cases of privately retained counsel and will be unable to render competent and effective representation. Clients suffer as a result. As one participant recounted, "[t]he defense attorney that was assigned to drug court didn't get involved in any of my case because I had a privately retained attorney. So I hadn't called the attorney. I didn't know I was going to jail, and suddenly I was in jail."³⁰² Moreover, it is unfair to overburdened public defenders to require them to stand in, often on a regular basis, for private counsel who do not appear in drug court. This also cheats public defender clients. In Marin County, California, public defenders recently made clear they would not represent participants with retained counsel: "The reality is that they have the money to hire counsel, and the time that we spend with them we are not spending with indigent clients who don't have the money to afford counsel."³⁰³

The Task Force recognizes the possibility that limited retainer agreements may be used in some drug court cases. In this “unbundled legal services” model, a “lawyer and client agree, implicitly or explicitly, that the lawyer will handle discrete tasks which may be less than complete representation.”³⁰⁴ In cases involving pro se litigants without the financial means to hire counsel, such as family law cases, advocates of unbundled legal services argue “some legal advice and representation is better than none at all.”³⁰⁵ In the drug court setting, however, participants have hired private counsel and often have the financial means to pay for full representation. Private counsel, for a variety of reasons including the local custom in some courts or standard agreements in others,³⁰⁶ often fail to appear or represent clients once enrolled in drug court.³⁰⁷ The approaches in two neighboring counties in Texas highlight just a few of the variations. In Travis County, Texas, after enrollment “the hired attorney goes about his way or goes his way and the program attorney takes over representing [the participant] in court.”³⁰⁸ However, in Williamson County, the program attorney represents all participants at staffing but not in the event of a revocation hearing.³⁰⁹ In cases where more is expected, the realities of private practice make it challenging for retained counsel to make several appearances, often on short notice, required by drug court.

Private counsel must decide at the outset of a drug case whether they are in for the long haul.³¹⁰ Dumping clients at the doorstep of drug court to fend for themselves or possibly be picked up by an overburdened public defender is not appropriate. Drug courts should accommodate private counsel whenever possible, through flexible scheduling or possibly conference calls. However, the optional or discouraged appearance of private counsel cannot continue.

As a matter of sound policy and competent client representation, the Task Force believes limited retainer agreements are unacceptable in drug courts. As a general proposition, “[u]nbundled legal services raise questions concerning the existence and adequacy of client autonomy, confidentiality, competence, continuity of representation, communication with represented parties, and candor to the court.”³¹¹ This is especially a concern “where the scope of the representation is not clear and the client and lawyer share different expectations about the lawyer’s responsibilities.”³¹² Confusion about the proper role of counsel comprises several pages of this report. Moreover, as explained above, clients and public defender offices suffer a real impact as a result of the limited or unclear role of retained counsel.

Caseload Concerns

As explained throughout this section, effective representation in drug court requires regular communication with clients and an understanding of the complexities of their addiction and compliance with drug court rules. Many drug courts have massive dockets and the public defender(s) assigned to those courts are expected to represent hundreds of clients. For example, the Dade County Drug Court has a

“The defense attorney that was assigned to drug court didn’t get involved in any of my case because I had a privately-retained attorney. So I hadn’t called the attorney. I didn’t know I was going to jail, and suddenly I was in jail.”

— A drug court participant

caseload of 2,000 for two assigned public defenders.³¹³ Not only is the caseload “big,” but the cases are complicated and often extend far beyond a year.³¹⁴

Several ethical rules are implicated by excessive caseloads. “Model Rules of Professional Conduct 1.1, 1.2(A), 1.3, and 1.4 require lawyers to provide competent representation, abide by certain client decisions, exercise diligence, and communicate with the client concerning the subject of representation,” which require public defenders to control “their workload so that each matter can be handled competently.”³¹⁵ At some point defense attorneys are no longer able to provide competent representation because of their caseload. There are two different approaches to determining when the line is crossed. The first, more traditional, approach focuses strictly upon the number of cases a defense attorney has at one time. The second approach, which has begun to evolve over the past decade, is a more subjective analysis.

“There is a role for the private bar, just none of them care to take it very often.”

— Judge Kathy Foster

According to the National Advisory Commission on Criminal Justice Standards and Goals (NAC),

[t]he caseload of a public defender attorney should not exceed the following:

- ◆ felonies per attorney per year: not more than 150;
- ◆ misdemeanors (excluding traffic) per attorney per year:

- ◆ not more than 400;
- ◆ juvenile court cases per attorney per year: not more than 200;
- ◆ Mental Health Act cases per attorney per year: not more than 200³¹⁶

Many states have chosen to adopt similar approaches by adopting ceilings beyond which public defenders are not allowed to accept additional cases. For example, Indiana limits the number of felony cases a public defender can represent to 200 and 400 cases for misdemeanors, while Georgia has limits of 150 and 400, respectively, and Colorado has a sliding scale of 80-241 felony cases and 310-598 misdemeanors depending upon the circumstances of the case.³¹⁷ At least 15 states have similar limitations for public defenders.³¹⁸

The significant criticism for this hard-and-fast standard for public defenders is that each case a public defender undertakes is different, and depending upon the circumstances, might take significantly more time than a traditional case. This is particularly a concern in the drug court context. Individuals who enter drug court may require more time than a client in a traditional court. A client will likely be in the program not only for months, but years, and the client will require representation for that entire time.

“The public defender . . . furnishes stand-in counsel for sanction hearings. . . .[s]o they are there to represent people who they are often seeing for the first time.”

— Judge Michael Rankin

Attempting to reconcile concerns about the blanket standards, a new approach has emerged to help determine when an attorney’s caseload is too large. In 2006, the ABA Standing Committee on Ethics and Professional Responsibility drafted a formal opinion that appears to take a more subjective approach to determine when a public defender has a caseload that does not allow the attorney to provide adequate assistance to his or her indigent clients. The committee concluded “whether a public defender’s workload is excessive often is a difficult judgment requiring evaluation of factors such as the complexity of the lawyer’s case and other factors.”³¹⁹ Further rejecting the approach of numerical caseload limits, the committee observed that “although such standards may be considered, they are not the

sole factor in determining if a workload is excessive...[other factors include] case complexity, the availability of support services, the lawyer’s experience and ability, and the lawyer’s nonrepresentational duties.”³²⁰

If lawyers believe their workload precludes them from meeting the basic ethical obligations required in the representations of a client, the attorney must not continue representation or must decline representation if representation has not begun.³²¹ Adopting a similar approach to the ABA Opinion, the Florida courts have explained that “[w]hen excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is inevitably created.”³²² The court made clear “[t]he rights of defendants in criminal proceedings brought by the state cannot be subjected to the fate of choice no matter how rational that choice may be because of the circumstances of the situation.”³²³ As a result of this decision, the court held that it was proper to relieve the public defender’s office of 143 of the 286 unassigned cases that had not been briefed within the time periods set forth in the Florida Appellate Rules.³²⁴

Whether applying a blanket restriction on the number of cases or the more subjective ABA approach, caseloads in drug court must be carefully scrutinized. To fulfill counsel’s ethical obligations at staffing, counsel must have a thorough understanding of each participant’s specific and nuanced addiction and personal issues. Conversations must occur before each staffing, and counsel must be available for discussions throughout the one or many years the client is enrolled in drug court. That the judge is taking an active role in no way lessens defense counsel’s role; if anything, it requires more work and vigilance on the part of counsel to ensure the client’s interests are being advanced and rights are being preserved.

Court Appearances

Defense counsel must appear in drug court and advocate for clients. The diminished and distorted role of defense counsel in staffings cannot continue when the case is called in the courtroom. In several courts visited by a Wisconsin professor, he “never once saw a defense attorney in the hearing.”³²⁵ Being present is a good starting point, but effective representation in drug court requires much more. The drug court courtroom is a different universe that encourages direct communication between the participant and judge with virtually no role for defense counsel.³²⁶ Nevertheless, defense counsel has an important role in preparing the client for the appearance and speaking on the client’s behalf when necessary to render competent and zealous representation. Upon one of his first opportunities to view drug treatment court in action, the Chief Counsel of the Maryland Public Defender’s office observed: “Another [defense] attorney stepped up who was an underling to represent someone who had been talked about in a staffing meeting *ex parte*, and there was a decision about sending this man to jail, and I almost threw up right there.”³²⁷

Preparing Clients for Court

There are inherent dangers when judges speak exclusively to clients with no participation by counsel. This dialogue can have dire consequences for participants and should not be casually approached by them or their counsel. Before participants appear in court, counsel should prepare the client by having the client observe drug court, discussing the types of questions likely to be asked, and warning clients that statements may be used against them.³²⁸ Counsel must have enough time to talk with the client.³²⁹ If counsel is not prepared, a continuance should be requested. Moreover, judges should not “discount” the client’s answer because it seemed prepared.³³⁰ Prepared comments demonstrate that a participant was concerned enough to take time to prepare for a hearing.

An attorney representing an individual in drug court cannot be prevented from fully representing his or her client simply because a judge wants to directly communicate with the client. Model Rule 1.3 requires diligent representation of the client,³³¹ which at times means that the attorney needs to have the opportunity to communicate the interests and circumstances of the client because clients are not able to provide those communications on their own. As a lawyer from California noted, difficulties arise “when a person with minimal education or poor language skills (sometimes speaking through interpreters) interacts with a judge and is trying to explain something (a missed meeting, unpaid payment, lost paperwork) and is unable to properly explain.”³³² More generally, some people are uncomfortable speaking in public, which is especially true for individuals facing a possible jail sentence or termination from drug court in a room full of strangers. There are times when a client’s best interest is to stop talking, and effective representation should permit counsel to signal to a client when that time has come.

Counsel in Name Only

Counsel must appear and advocate for clients in drug court. In some jurisdictions, “the public defender . . . furnishes stand-in counsel for sanction hearings. . . [s]o they are there to represent people who they are often seeing for the first time.”³³³ As explained above, a public defender is usually a member of the drug court “team,” which discusses cases through staffing meetings.³³⁴ Representation is generally horizontal, with counsel representing every client appearing in court on a specific day.³³⁵

Defense lawyers are at most seen and seldom heard in drug court. When counsel dare speak up, they are sometimes quickly put in their place. For example, the following terse exchange occurred in one case in the District of Columbia:

The lawyer: “I’m here to advocate for my clients.”

The Court: “But these are not your clients. You’re here standing in.”

The lawyer: “They’re my—”

The Court: “Call the next case.”

The lawyer: “May I be heard, Your Honor?”

The Court: “No.”³³⁶

Other defenders reported having “colleagues called aside for trying to fight too hard . . . against sanctions, for instance, spending a weekend in jail. What’s worse, I think defense attorneys’ involvement in the status hearing was seen as optional. Clients had their cases called without lawyers being present”³³⁷ Not surprisingly, one defender cited the following as the biggest problem in drug courts: “standing up to the judge and demanding hearings and demanding due process” as opposed to playing along as a member of the team.³³⁸

Breakdown of the Attorney-Client Relationship and the Importance Of Preserving the Role of Counsel as an Advocate

Perception is often not far from reality, and the Task Force is deeply troubled by both the perception and reality of the role of counsel in drug treatment courts. A lawyer not only represents clients but is also “an officer of the legal system and a public citizen having special responsibility for the quality of justice.”³³⁹ How can a client know their stated interest has been advanced in staffing when the client is not there and no record is made? It is not surprising that some drug court participants do not view their lawyers as an advocate; they have never seen their lawyer, or any lawyer, advocate in drug court. Clients have only counsel’s word that advocacy occurred minutes or hours earlier in a backroom meeting as part of a “team” that explicitly excludes the participant.

“I think defense attorneys’ involvement in the status hearing was seen as optional. Clients had their cases called without lawyers being present”

— Professor Mae Quinn

The public does not regard the legal profession as particularly trustworthy, and a client’s skepticism in the high stakes world of drug court is completely understandable. Clients may not trust lawyers or simply may not regard them as real lawyers. As one drunk driving court participant put it, “We have a volunteer lawyer so if we have questions, we can go to him.”³⁴⁰ Client confusion is understandable. As a public defender in Wisconsin explained, “I know where I wear my team hat; I know where I wear my lawyer hat. But my clients don’t necessarily have the sophistication to get that.”³⁴¹

The confusion about the role of defense counsel is troubling, although not surprising. Although drug courts generally require participants to sign a contract with several specific provisions, those contracts rarely say a word about defense counsel, much less an explanation of the role of defense counsel.³⁴² Despite the “team approach” and dramatically different role explained above, contract provisions wholly fail to explain to the participant the role of counsel. In a sampling of 15 contracts reviewed by the Task Force, contracts at most include a passing reference to “the Public Defender’s Office” as part of the team.³⁴³ Telling the participant the public defender is on the drug court team in no way explains that counsel will not be serving in a traditional defense attorney role as a zealous advocate for the client.

Further, many contracts say nothing about the individuals included on the drug court team, much less describe the collaborative approach. The three contracts that mentioned the defense attorney raise even more troubling concerns. One stated that participants were completely waiving the right to have their lawyer present,³⁴⁴ while another stated that the participant waived the right to an attorney if they did not show up to any hearing or staffing meeting.³⁴⁵ The final contract, which mentioned the defense attorney, included a statement informing the participants they could talk to their lawyer at any time, but did nothing to explain the role that the lawyer would be playing within the drug court context.³⁴⁶

Judges expressed the view that defense attorneys are important to “reinforce and encourage compliance. . . . I think the defendant needs somebody standing next to them who is repeating to them everything I say. I think we all need to hear things said to us by different people in different ways.”³⁴⁷ Defense counsel should seldom, if ever, assume the role of a parrot. Counsel regularly do and should choose their own words and course of action, which may and must complicate the judge’s job when counsel stands up against anything not in a client’s stated interest. When counsel says nothing, the courts appear headed “to an old Soviet Union model where your job as a lawyer is simply to hold your client’s hand as they go off to the gallows — here’s what’s going to happen next.”³⁴⁸

**“I know where I wear my team hat;
I know where I wear my lawyer hat.
But my clients don’t necessarily
have the sophistication to get that.”**

— Liesl Nelson

Best Practices for All Defense Counsel

Counsel must be mindful of, but not co-opted by, the drug court approach. Counsel can and must remain a zealous advocate for clients from the beginning to the end of the process. This need not be inconsistent with the drug court approach. Where zealous advocacy and the drug court approach or judge’s instructions conflict, counsel must be a zealous advocate.

Far too often, defense counsel is viewed as optional or is relegated to a nonadvocacy role in drug court. This must change.

The Task Force recommends the following best practices for representing participants in drug courts:

Entry

1. Counsel must insist they be given adequate time to consult with clients fully about the merits of their case and the drug court process.³⁴⁹
2. Counsel must insist they be provided enough time to investigate the case including the review of all discovery.
3. Counsel must insist they have an opportunity to litigate motions.
4. Counsel must inform the client of the specific rights being waived, including release of confidential information and the likely sentence if the case were resolved by a plea or trial.³⁵⁰
5. Defense counsel must be familiar with drug court and should encourage or require a client to attend a drug court session before making an entry decision.

Staffing

1. Counsel must insist they be given notice of staffing hearings.
2. Counsel must insist they be provided progress reports at least one day in advance of any scheduled staffings.
3. Counsel must consult with clients before attending a staffing meeting.
4. Counsel must attend and participate in staffing meetings.
5. Counsel must advocate for a client’s stated interests.
6. Counsel must maintain client confidentiality.

Court Hearings

1. Counsel must be permitted adequate time to prepare for hearings and speak to clients in advance of hearings.

2. Although drug court judges may speak directly to a participant, counsel must insist they be given the opportunity to intervene and advocate for clients when necessary.

Training

1. Counsel must avail themselves of training opportunities.

Best Practices for Retained Counsel

1. Retained counsel must have the opportunity and be encouraged to participate in drug court. Timely notice of positive drug screens and the scheduling of sanction hearings must come directly from the court.
2. Retained counsel must recognize the special nature of drug court and the significant time commitment involved.
3. Retained counsel must not take a drug case and then abandon a client upon entry to drug court.
4. Limited retainer agreements should not be used in drug court.³⁵¹
5. Retained counsel who appear in drug court must take the initiative to secure training and continuing legal education courses focusing on drug court practice.

Recommendations — Role of Defense Counsel and Ethical Concerns

◆ *Drug court “theater” must include a leading role for defense counsel.*

Drug courts cannot continue to be a proceeding at which defense counsel is given a non-speaking role. In many drug courts, the judge will engage and interrogate the participant, purportedly for his or her own good, in what was aptly described to and viewed by the Task Force as drug court “theater.”³⁵² The show is partially for the benefit of the participant, but also for the benefit of the many other drug court participants in the courtroom. What is rarely included in the script, however, is an opportunity for the defense lawyer to advocate. Defense counsel advocacy in the open courtroom defines that role and is essential to the attorney-client relationship. Allowing everyone else in the courtroom, especially all the participants, the opportunity to observe defense counsel truly advocating for clients contributes to the overall process in a positive way.

The existing drug court show must end or the script must be dramatically revised to ensure that counsel has a leading role as an advocate for each participant. Even if much of this role plays out during staffing, defense counsel cannot

“Who needs special rules? . . . There are the rules of professional conduct.”

— Julia Leighton

be wholly written out of the courtroom script. Counsel must be able to meaningfully consult with clients before court appearances and intervene in court appearances to communicate on behalf of the client who otherwise would have no meaningful voice.

◆ *Ethical rules should not change; the drug court framework must accommodate the rules.*

The current structure of drug courts requires defense attorneys to compromise their ethical obligations to further the purpose and framework of the drug court. Counsel cannot continue to be forced into a nonadversarial “team” approach when it conflicts with their ethical obligations to clients. Rather than amending the ethical principles that have governed the legal profession far longer than drug courts have existed, the drug courts should embrace these principles and ameliorate the issues by altering the drug court process.³⁵³ “Who needs special rules? . . . There are the rules of professional conduct.”³⁵⁴

Providing a process that allows a defense attorney to satisfy the ethical obligations of loyalty, confidentiality, and zealous advocacy to his client will not dismantle the drug court process or its objectives, but will instead enhance its credibility with both the participants and anyone who happens to observe the court. “[T]he adversarial defender, who is seen by his client as insuring the individualized fairness of the process, can have a real impact on satisfaction with the court outcome, acceptance of the result, and empowerment of the client.”³⁵⁵ By providing a participant a defense attorney in his or her traditional role, the participant will understand and appreciate having an advocate throughout the entire process, someone who will completely keep his or her confidence and always be on their side. This provides the reinforcement for the participant to fully invest in the process, knowing counsel will always serve as an advocate, especially when obstacles arise.

Moreover, the Key Components must be modified to allow defense counsel to fulfill their ethical obligations.³⁵⁶ Key Component No. 2, which requires a nonadversarial, team approach, must be modified to make clear that “consistency and stability” through “teamwork” cannot trump zealous advocacy. Although a “sense of teamwork [may] reinforce a nonadversarial atmosphere,”³⁵⁷ it cannot undermine counsel’s ethical obligations or preclude appearances by all but one assigned lawyer. Multiple defenders or private counsel must be permitted to appear in drug court.

“The adversarial defender, who is seen by his client as ensuring the individualized fairness of the process, can have a real impact on satisfaction with the court outcome, acceptance of the result, and empowerment of the client.”

— Professor Tamar Meekins

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Key Component No. 3 must be amended to allow sufficient time for defense counsel to review discovery and litigate motions. Key Component No. 3 currently advocates for initial court appearances “immediately after arrest or apprehension” and requires enrollment in treatment “immediately.”³⁵⁸ Although this approach is used by many drug courts across the country, it appears unnecessary to successful treatment and makes the review of discovery and investigation of the merits of the case impossible. As one treatment professional explained, enrollment in treatment within a couple of weeks or as much as 30 days would be “excellent.”³⁵⁹ Moreover, some courts “give defendants several weeks to test out treatment while their case is still pending,” which creates a double benefit: counsel can investigate the case and clients can decide whether to opt into or out of the treatment program.³⁶⁰

◆ *The defense bar must have a significant role in the creation of any new drug courts.*

Participation by the defense bar must begin at the earliest stages of drug court planning. This does not mean that the courts, law enforcement, prosecutors, and others construct the court and then seek the defense bar’s input and comments in what is essentially a *fait accompli*. Including defense bar insight from the beginning offers the advantage of constructing a fair model and would eliminate later time-consuming efforts to undo problems that could have been avoided in the first instance.

Defense counsel must be involved in the drafting of court procedures, contracts, and forms to ensure that due process rights are preserved. Many judges recognize the importance of including defense lawyers in the planning of new problem-solving courts.³⁶¹ Philadelphia and Milwaukee provide strong examples of how this can be done effectively.³⁶²

◆ *Training for defense lawyers must be readily available and broad enough to cover the key aspects of representing clients in drug court.*

Although training is offered for defense lawyers who appear in drug court, lawyers are sometimes turned away because of limited capacity.³⁶³ Training should be more readily available not only for public defenders who regularly appear in drug courts, but also for counsel who appear

less frequently. Moreover, at least some specialized training should be sponsored by defender organizations, which could be offered through partnerships with drug court advocacy groups.³⁶⁴

◆ *The same lawyer should represent a client throughout a drug case.*

Vertical representation, through which the same lawyer represents a client from the beginning to end of a case, is preferable to the model currently used in many jurisdictions, which assigns a lawyer to all cases in a specific court or all cases heard on a specific day.³⁶⁵ When lawyers are constantly changing for a participant, there is no opportunity for a meaningful attorney-client relationship to be established.³⁶⁶ With vertical representation, the attorney has the opportunity to get to know his or her client, learn the case, and will likely provide better representation as a result.³⁶⁷ Although every attorney may not be exceptional at establishing a positive attorney-client relationship, attorneys who represent clients over the entire process instead of a single stage of the process are more likely to develop a meaningful client relationship.

Most drug courts employ horizontal representation, where the same defense attorney is always in the same courtroom. This type of system creates a negative perception by the client of “being processed through an assembly line.”³⁶⁸ “The defender who must stay all day, day after day, in the same courtroom, is not likely to risk antagonizing the judge or the prosecutor in the name of zealous representation of his client. The desire for pleasant, amiable working conditions may well lead the defender to act in harmony with his fellow ‘employees.’”³⁶⁹ Some defender organizations refuse to assign one lawyer to drug court because “attorneys feel useless” when they “learn that the judge always does the same thing and they just stop fighting.”³⁷⁰ Not only will the client receive better representation in the preparation of the case when the same attorney represents him or her, but the actual representation will likely be more vigorous and objective. The attorney is not constantly appearing before the same judge, who is also the leader of a team of individuals with whom the defender must constantly work. Finally, having different lawyers appear in drug court need not affect the court’s success rate.³⁷¹

◆ *Senior and highly skilled lawyers should be assigned to drug court.*

The Task Force agrees that “drug treatment court calls out for ‘the best lawyers, most experienced lawyers’ to take on [this] important role.”³⁷² Experienced lawyers are best positioned to know “when it’s time to walk across the line and sing [K]umbaya and when it’s time to stay on this side of the line and throw the gauntlet down.”³⁷³ Assigning junior lawyers and new judges to drug court is an “invitation to disaster.”³⁷⁴ Fortunately, at least some public defender agencies assign senior trial lawyers best positioned to deal with the complicated issues described throughout this report.³⁷⁵

◆ *Caseloads of lawyers representing clients in drug court must take into account the special nature and demands of drug court.*

To comply with both the Model Rules of Professional Conduct and the Sixth Amendment, counsel must ensure they have adequate time to represent clients in drug court. Case-load concerns are not unique to drug courts. The Constitution Project’s recent report, *Justice Denied*, highlights many broad and deep shortfalls in indigent defense systems around the country.³⁷⁶ The issue is further complicated in the drug court context. The length of time for each drug case is significant, and to provide adequate representation the attorney should have a substantial understanding of each client’s circumstances to properly represent him or her in staffing and in court. Achieving these goals is time consuming and cannot be done by overburdened counsel with hundreds of clients. If a public defender is overburdened with cases and unable to render competent and effective assistance, counsel must withdraw.

◆ *Drug courts should consider allowing participants to attend staffings.*

Although staffings appear to be a longstanding and widely used aspect of drug court, their use is not universal.³⁷⁷ The National Association of Drug Court Professionals believes any court without staffings is not a drug court.³⁷⁸ However, a judge affiliated with NADCP acknowledged the significant criticism of staffing, at which issues are prejudged and the participant is excluded.³⁷⁹ “Some judges feel so strongly about it they don’t go to staffing. The staffings are held with the team, minus the judge.”³⁸⁰ The efficacy of staffing should be studied and reconsidered in light of the impact on clients.³⁸¹

Backroom staffing meetings have been described as “the most animated, knock-down, drag-out fight,” but the person most affected by that discussion, the drug court participant, is excluded.³⁸² “The amount of hearsay and gossip that sometimes is discussed at the meetings is troublesome.”³⁸³ Discussing cases in a backroom meeting before appearing in court as a united “team” for the participant’s best interest is riddled with problems as detailed above. Drug court participants may be confused or frustrated by the procedure

“The defender who must stay all day, day after day, in the same courtroom, is not likely to risk antagonizing the judge or the prosecutor in the name of zealous representation of his client.”

— Professor Richard Klein

through which their case is discussed and decided in a secret meeting they cannot attend. Any value from a unified team front can be diminished, if not destroyed, if a participant believes they have been treated unfairly by a process that explicitly excludes them.

If drug courts want participants to take responsibility for their addiction and their lives, they should allow participants to be part of the critical discussion surrounding their addiction and lives that occurs at staffing meetings. Participants are in the best position to provide immediate feedback to the discussion of their case during a staffing meeting. Their participation would result in a fuller, richer discussion.

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“Drug treatment court calls out for ‘the best lawyers, most experienced lawyers.’”

— Howard Finkelstein

CONCERNS ABOUT MINORITIES, THE POOR, AND IMMIGRANTS

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Widening the Net

Research has not squarely addressed “whether drug court participants would have ended up in the criminal justice system if not for the drug court.”³⁸⁴ Drug courts arguably process “discretionary crimes” that police might otherwise not bother enforcing at all.³⁸⁵ In so doing, drug courts may provide “window dressing for politicians,”³⁸⁶ rather than long-term solutions to underlying problems of poverty, homelessness, and the lack of educational opportunities.

Net-widening refers to “an expansion in the number of offenders arrested and charged after the implementation of [a drug court] because well-meaning police and prosecutors now believe there to be something worthwhile that can happen to offenders once they are in the system (i.e., treatment instead of prison).”³⁸⁷ When drug courts are created, police in some cities have arrested more people and prosecutors have filed more charges.³⁸⁸ “The very presence of the drug court, with its significantly increased capacity for processing cases, has caused police to make arrests in, and prosecutors to file, the kinds of \$10 and \$20 hand-to-hand drug cases that the system simply would not have bothered with before, certainly not as felonies.”³⁸⁹

Racial Disparity

Racial prejudice pervades the criminal justice system,³⁹⁰ and drug courts are no exception. For example, in a study of four counties within California, drug courts admitted a proportionately greater number of Caucasian offenders, “even though persons of color comprise a disproportionately large percentage of the low-level drug offender population eligible for drug courts services.”³⁹¹ In Pima County, Arizona, there were no African-Americans in drug court and Hispanics “are way under-represented.”³⁹²

“The very presence of the drug court, with its significantly increased capacity for processing cases, has caused police to make arrests in, and prosecutors to file, the kinds of ten-and-twenty-dollar hand-to-hand drug cases that the system simply would not have bothered with before, certainly not as felonies.”

— Judge Morris Hoffman

Drug courts were not created to reduce racial disparity. As a drug court judge candidly testified, drug courts “would never have come to being had not middle class kids been arrested because we had kids of color...arrested and no one gave — you know”³⁹³ The extent of this problem cannot be adequately analyzed because the data simply does not exist.³⁹⁴ These concerns, however, appear at all age levels: “[I]n early reporting of juvenile drug court numbers, white children constituted the largest racial group receiving [drug court] treatment.”³⁹⁵ As a public defender from Utah explained about adult clients,

My minority clients rarely get accepted in the first place. For whatever reason, they are more apt to have prior criminal history that keeps them out of drug court. The problem I've seen is that for whatever reason, I have been able to get the drug court to waive admissions rules for some clients and those clients are always white. In one case, I didn't even refer a guy because of his problematic record and the drug court cop called me and asked why I hadn't referred him and said that since my client's mom was a cop, my client would get into drug court if I would only refer him.³⁹⁶

The disparity may continue throughout the case, including sanctions and termination. As a different Utah lawyer noted, "I have seen white defendants who re-offend offered second and third chances, while members of minority groups are treated immediately as being in violation."³⁹⁷

Drug courts are not likely to reduce racial disparity in the criminal justice system.³⁹⁸ First, drug courts have no direct effect on police practices (such as targeting crack cocaine or open-air dealing) that cause African Americans to be dramatically overrepresented at the front-end of the system.³⁹⁹ "Police focus on certain communities because it is simply easier and cheaper to make arrests and find crime in those communities."⁴⁰⁰ Moreover, drug courts have a high failure rate in general, but the failure rate for blacks is as much as 30 percentage points higher in some courts.⁴⁰¹ The effect of this disparity is stark because, as noted above, failure (or even problems along the way to success) may result in longer incarceration than nonparticipation.⁴⁰²

The Poor

Lawyers who testified and those who responded to the questionnaire expressed serious concerns about the ability of poor clients to complete drug court, which requires frequent court appearances, self-help meetings, and travel for random drug screens.⁴⁰³ A lawyer from Arizona aptly noted, "The standard by which success is measured is against the Beaver Cleaver, white-middle-class-suburban standard. Cultural differences and differences based on poverty are not properly considered."⁴⁰⁴ Moreover, jumping through all the required drug court hoops may be impossible for someone without transportation and very difficult for someone trying to maintain full-time employment to provide for their family.⁴⁰⁵

As a general proposition, drug courts "make it too hard for indigent people to hold down a job and go to drug court and make all their appointments. Transportation is a big issue for these people and there is no assistance in transportation."⁴⁰⁶ As a lawyer from Pennsylvania explained, "[t]he fees and transportation requirements of this court preclude indigent participation."⁴⁰⁷ Treatment often includes three

"I have seen white defendants who re-offend offered second and third chances, while members of minority groups are treated immediately as being in violation."

— Utah lawyer

group sessions and two individual therapy sessions each week. Participants are further "required to seek employment, yet the types of jobs they may accept are restricted. Those who are unable to find work have to enroll in job training classes that meet five days a week."⁴⁰⁸ Moreover, participants "must appear 5-7 days a week for urine testing and attend weekly court appearances."⁴⁰⁹ In short, "participants without transportation have to arrange transportation to many different places, several days a week in order to satisfy their obligations."⁴¹⁰

The difficulties are especially acute for single mothers. As a public defender from Missouri observed,

You can't take children to treatment court. Consequently, a poor woman without reliable child care would have problems because the court requires the participants to phone in every weekday in the morning and find out if they have been the randomly selected person who was required to submit a urine sample before the close of business hours. It is hard for a poor woman to find childcare on such short notice.⁴¹¹

The burdens for some can make completion of the program impracticable. At a minimum "missing appointments leads to jail sanctions and holds up a participant's progress significantly."⁴¹² Being poor may lead to termination for others. As a public defender from California noted, "Most indigent or minority participants were unable to make the payments assessed by the programs. Rather than work with the participants to scale payments to match ability to pay, many minority and indigent participants are just dropped from the programs."⁴¹³

Immigrants

Drug courts are especially troubling for the immigrant population. Drug convictions often result in mandatory deportation even if the plea is later vacated or withdrawn.⁴¹⁴

“The standard by which success is measured is against the Beaver Cleaver, white-middle-class-suburban standard. Cultural differences and differences based on poverty are not properly considered.”

— Arizona lawyer

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Although a “conviction” is required for deportation,⁴¹⁵ that term is often interpreted in a manner that leads to deportation of those who participate in drug court. According to 8 U.S.C. § 1101(a)(48):

The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where —

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

“Participants without transportation have to arrange transportation to many different places, several days a week in order to satisfy their obligations.”

— Maryland lawyer

Immigration concerns may arise at different times: when a person is taken into custody for a violation during drug treatment; when applying for U.S. citizenship; when seeking adjustment to legal status; or when attempting to re-enter the United States after traveling abroad.⁴¹⁶ These draconian measures do not establish a time limit or statute of limitation for how remote a prior conviction may have been.⁴¹⁷

For many immigrants, drug court is never an option under existing federal law. The web of confusion and inconsistency makes it nearly impossible for defense counsel to advise clients about entry into drug courts. Moreover, beyond the severe immigration consequences, many immigrants may be destined for failure in drug courts that “require defendants to obtain lawful employment during the course of an individual’s treatment” because “many undocumented clients cannot obtain ‘lawful’ employment”⁴¹⁸ Immigrants who do not want to be deported are forced to go to trial rather than avail themselves of treatment opportunities.

Recommendations — Concerns About Minorities, the Poor, and Immigrants

◆ *Admission criteria must be carefully created and reviewed to ensure drug courts are open to all people regardless of race, economic status, or immigration status.*

Admission criteria cannot exclude those who most need treatment, including racial minorities, the poor, and immigrants. “In identifying target populations, drug courts need to be sensitive to class and race bias, real or apparent. Unless care is taken, diversion courts may tend disproportionately to work with the white and middle class substance abusers.”⁴¹⁹ Other types of restrictions also need to be re-examined. Specifically, individuals who commit crimes of violence may be excluded when courts receive federal or state funds.⁴²⁰ Some witnesses candidly testified they are “concerned about our funding sources. We don’t want to do anything to jeopardize that.”⁴²¹

Even in the absence of funding restrictions, some prosecutors have imposed similar restrictions. These admission criteria often disproportionately exclude persons of color.⁴²² Although funding is important, it cannot take priority over fairness. Courts should consider refusing grant funds that prohibit entry of defendants on probation or with a prior crime of violence.⁴²³ In Milwaukee, where racial disparity in the criminal justice system was among the worst in the nation, the newly elected prosecutor took an aggressive approach to diversion and deferred prosecution agreements eradicated the disparity in less than two years.⁴²⁴

◆ *The intensive supervision of drug court cannot create impossible obstacles for participants to succeed.*

The number of court sessions and required meetings is a heavy burden for participants in smaller communities without well-developed public transportation systems.⁴²⁵ Although drug court is inherently intensive, the requirements imposed on participants should not force participants to quit jobs or otherwise raise insurmountable barriers to their success. In larger cities, transportation vouchers should be available. In less urban areas, courts should provide transportation or adopt schedules that make it possible for participants to secure transportation that allows them to complete programs.

◆ *Immigrants who successfully complete drug treatment courts must not be deported on the basis of the drug court “conviction,” no matter how defined.*

The possibility of deportation upon entry into drug court could be avoided by pre-plea diversion agreements, prosecution-based contracts, or by a plea to a nondeportable offense.⁴²⁶ The United States Code could also be amended with language similar to: “this section does not apply to defendants who successfully complete drug treatment programs that result in the dismissal or expungement of the charge.” Finally, another approach could “[r]equire the immigration courts to grant full faith and credit to the laws of the states in their determination of what constitutes a ‘conviction’ and the parameters of that state court action.”⁴²⁷

Additional training must be provided to judges and defense lawyers to ensure incorrect advice is not given to immigrants.⁴²⁸ The consequences of bad advice are life-altering. If selecting drug court is likely to result in deportation, counsel must so advise the defendant to allow the pursuit of other options. If in doubt, counsel should consult with an expert or refer the client to another lawyer who understands the immigration implications.⁴²⁹

“Rather than work with the participants to scale payments to match ability to pay, many minority and indigent participants are just dropped from the programs.”

— California lawyer

“In identifying target populations, drug courts need to be sensitive to class and race bias, real or apparent. Unless care is taken, diversion courts may tend disproportionately to work with the white and middle-class substance abusers.”

— National Institute of Justice report

MISALLOCATION OF PUBLIC RESOURCES

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Drug courts may provide political cover to elected officials or convince the public that the underlying problem of drug addiction is being addressed. Drug courts, however, are not the only solution to drug-related crime. Decriminalization must be seriously discussed.⁴³⁰ Other options must also be considered.

Drug court is intensive, expensive, and often not effective. Drug court control over a participant stretches over a long period of time, longer than usual for a low-level offense.⁴³¹ As explained above, difficulties during drug treatment can cause a participant to return to earlier phases of treatment,⁴³² and participants may remain enrolled in drug court for as long as five years.⁴³³ The longer the shadow of a court looms over a defendant, the more likely the defendant will end up incarcerated for some sort of violation.⁴³⁴ Drug court cases “simply never go away.”⁴³⁵

Drug courts usurp resources that could be used for community-based solutions that do not involve court control and the micro-management of the lives of clients.⁴³⁶ Currently, many communities are willing to fund treatment, especially in communities of color, only through the criminal justice system with the accompanying control over the person and added cost. This is “not only inefficient, it’s unfair and unnecessary.”⁴³⁷ Limited public resources should be spent most efficiently. Communities should be “providing social services in a way that is unlinked, uncoupled from conventional criminal justice.”⁴³⁸ Drug courts “may function as a distraction for more proactive change that is necessary.”⁴³⁹ Robert Hooker, the late public defender for Pima County, Arizona, put it best:

What we’re doing by setting up these courts is backloading the issue, backloading the treatment, when in fact we ought to be front-loading the treatment . . . I fear that by setting up problem-solving courts like this, we are enabling our legislators and our leaders to fail to properly fund treatment programs, education, and health services, because we have given them the excuse not to do that.⁴⁴⁰

Judge Espinoza, the long-serving judge of the Bronx Treatment Court, would “absolutely” prefer a shift to the public health approach.⁴⁴¹ Governments working toward providing housing, health care, educational, and economic opportunities for its citizens could combat the “in-

credible influx” of people otherwise arrested for drug offenses.⁴⁴²

If drug treatment were freely available, a significant number of nondrug cases would never enter the system. As a long-time addict who later completed treatment testified, “[i]f treatment is available, you will divert many people before they ever get to the drug court system. Treatment is not available.”⁴⁴³

Recommendations — Misallocation Of Public Resources

- ◆ *Drug courts must be used for high-risk defendants facing lengthy jail terms; less onerous and expensive alternatives to drug court must be readily available for low-risk defendants and those who commit low-level offenses.*

Last year corrections were the fastest growing expenditure in state budgets, and the recent fiscal crisis has led to cuts and will likely lead to many more cuts.⁴⁴⁴ These limited dollars should be used effectively.⁴⁴⁵

President Obama has pledged to support drug court funding to give “first-time, nonviolent offenders a chance to serve their sentence, where appropriate, in drug rehabilitation programs that have proven to work better than a prison term in changing behavior.”⁴⁴⁶ The Task Force certainly supports the President’s emphasis on alternatives to prison but is concerned about a continuation or expansion of “drug courts” as currently constituted. The vast majority of first-time offenders do not have a drug addiction that requires the intensive approach of drug court.⁴⁴⁷

“Drug courts should be the intensive care units wherein regular courts should be the emergency rooms.”⁴⁴⁸ The “highly recidivistic group” should be in the more intensive setting.⁴⁴⁹ This is currently not happening. In many communities, drug courts are “sucking up all the resources that the community has to deal with this very thorny issue of addiction, and . . . using it on cream puffs.”⁴⁵⁰ Communities should not “invest all of their addiction resources into one program. You can’t ignore the people who don’t get into drug court who are drug-and alcohol-involved. They have the same needs, the same rights, [and] impose the same dangers as everyone else.”⁴⁵¹

Drug courts should be limited to the few high-risk offenders for whom everything else has failed. Courts should not

“We are enabling our legislators and our leaders to fail to properly fund treatment programs, education, and health services, because we have given them the excuse not to do that.”

— Robert Hooker

skim those most likely to succeed but rather focus on those who are facing the longest sentences and most need treatment, namely “where we would get the biggest bang for our buck.”⁴⁵² Governments and private entities should not fund programs simply because they report high success rates. “Success is not 90 percent. A program that has 90 percent success is going after soft cases and it is wasting a lot of money and supervising a lot of people. If traditional case process has a success rate of 30 percent, if I come in with 37, all hail.”⁴⁵³

Misdemeanor drug courts are a particularly poor use of resources. They require a costly bureaucracy of personnel and court appearances when the participants “are not really jail bound,” which means the programs are not saving society money or diverting people from prison.⁴⁵⁴ A drug prosecution would cost much less if a case is diverted to programs that do not require probation supervision, such as requiring a defendant to complete a class and return months later with proof of completion to secure a dismissal.

Other less intensive alternatives to drug courts must be developed for low-risk felony offenders, who perform better without judicial intervention.⁴⁵⁵ Studies show an active judicial role is important for high-risk offenders who require “consistent and intensive judicial supervision to succeed,” while low-risk offenders perform better without judicial intervention.⁴⁵⁶

- ◆ *Fair and effective alternatives must be offered to low-level offenders.*

Although drug courts may represent a progressive alternative to the rigid, tough-on-crime-and-criminals approach of traditional adjudication, they presume that all cases belong in the criminal justice system and all charged defendants require system supervision. Defendants with no criminal record who are not addicted to drugs should have the same opportunity as drug court participants to avoid a conviction and its collateral consequences. When courts “overtreat and overmanage a low-risk offender . . . you have a statistically significant risk of creating recidivism.”⁴⁵⁷

Diversion programs take many forms and have occurred

in many other courts. They reach much further than the drug court model. The newly elected prosecutor in Milwaukee, working with the Circuit Court judge and public and private defense bar, created a highly effective diversionary program. Elsewhere, diversion is mandated by statute. For example, in Tennessee a person who has not previously been granted diversion and does not have either a prior misdemeanor conviction for which confinement was served or a prior felony conviction within a five-year period after completing the sentence or probation period may be diverted.⁴⁵⁸ In other jurisdictions, including Washington, D.C., “under the radar diversion programs” exist.⁴⁵⁹ Judges appropriately lean on prosecutors to dismiss or reduce charges to allow defendants to get probation or continue treatment.⁴⁶⁰

◆ *Sufficient resources must be available to permit drug treatment for all who qualify.*

The availability of drug courts and alternatives varies widely across the country and within states.⁴⁷⁶ There is a “checkerboard pattern of justice,” illustrated by seven California counties without a drug court or “access to anything,” while those arrested in other counties may have many options.⁴⁷⁷ Further, although counties with a population over 200,000 in Texas must have a drug court, each of those counties structures its own court and many smaller counties do nothing.⁴⁷⁸ A recent report in New York concluded that “diversion options should be made available to nonviolent felony drug offenders regardless of the county in which a case is prosecuted.”⁴⁷⁹ To rectify the current disparity of programs in the patchwork county-by-county systems, the report recommended “a statewide program for judicial diversion should be codified.”⁴⁸⁰

Diversion and deferred prosecution agreements in Milwaukee

When John Chisholm was elected prosecutor in Milwaukee, racial disparity in his county in the criminal justice system was among the worst in the nation.⁴⁶¹ Chisholm took an innovative, smart, fair, and ultimately effective approach to resolving the issue with the broad involvement of the defense bar and judiciary. Protocols were developed to allow for diversion or deferred prosecution before charges are filed.⁴⁶²

Diversion means that charges are never filed. This is a “win-win situation” for the defense. If the participant fails to complete the program, “you can come back and you can litigate the hell out of the case.”⁴⁶³ Even police officers sometimes urge the prosecutor to offer diversion agreements.⁴⁶⁴ At the end of a diversion program, participants are given a “success letter,” which they can show to potential employers or others as proof that no charges were ever issued.⁴⁶⁵

If charges are filed, a deferred prosecution agreement may be offered. Deferred prosecution agreement is a misnomer. The participant is charged, enters a plea, rights are waived, but judgment is deferred.⁴⁶⁶ The prosecutor has open file discovery and police reports are provided immediately.⁴⁶⁷ The defense is never required to make a decision blindly.⁴⁶⁸ If motions are litigated, however, the deferred prosecution agreement may no longer be available.⁴⁶⁹



The agreements last for six to eight months. Participants are monitored by a third party, such as pretrial services, and appear in court for periodic reviews.⁴⁷⁰ At the end of the designated period, cases are reduced to a less serious charge or dismissed.⁴⁷¹

The program was created with input from the public and private defense bars. The forms are widely available to all defense counsel.⁴⁷² Public defenders “are trying very hard to educate as many lawyers to do these as possible.”⁴⁷³

At the end of 2007, more than 700 people had benefited from a diversion or deferred prosecution agreement, with a 65 percent success rate.⁴⁷⁴ Within the first 18 months of Milwaukee’s program, the racial disparity was eliminated.⁴⁷⁵

Moreover, some drug treatment courts are full and cannot accept all who want treatment.⁴⁸¹ There has been a six-month waitlist for drug court in some counties in Wisconsin.⁴⁸² When a court is at capacity, it is unlikely to retain the high-risk addicts who most need it. Instead, some courts apply arbitrary and even counterintuitive criteria, such as exclusion of two-time felons.⁴⁸³

◆ *Defendants who do not suffer from chemical dependency must be provided with alternative programs to avoid criminal prosecution.*

Defendants who do not suffer from true chemical dependency may gain entrance into drug courts for their own perceived strategic advantage.⁴⁸⁴ The majority of those who experiment with drugs do not become addicted.⁴⁸⁵ Although Judge Espinoza favors opening the door “as wide as we can” because “treatment court is the best game in town” for addressing the problems of crime and criminality,⁴⁸⁶ other approaches must be considered. Requiring intensive treatment and extensive court monitoring of a nonaddict is not a wise use of limited resources.

◆ *Sound research on important topics related to the diversion of cases, including drug courts, must be pursued.*

Although the Task Force heard from a wide range of drug court experts, judges, and practitioners, many significant questions went unanswered. Data simply does not exist to answer many significant questions about the racial and social background of drug court participants. For example, what happens to those who are not admitted to drug court? Why do participants drop out?⁴⁸⁷

The Task Force could find little more than anecdotal information about racial disparity, and that information was typically troubling. One witness reported, “I’ve been to drug courts where I have seen not one client of color.”⁴⁸⁸ A leading drug court researcher agrees the studies have not been done, but need to be done.⁴⁸⁹

Drug courts, as well as traditional courts and police organizations, should be required to maintain and report data relevant to these issues. “A number of evaluators [have] cited problems with extensive missing data, inconsistent data, data entry errors, or the need to merge information from a number of different agencies and data sources.”⁴⁹⁰

Moreover, there must be appropriate comparison groups.⁴⁹¹ For example, there appears to be little or no data kept on those rejected from drug court. The purpose of the comparison group is significant; determining whether the recidivism rate, for example, decreases by completing a drug court program requires a group with which to compare the successful drug court participants.⁴⁹²

“If treatment is available, you will divert many people before they ever get to the drug court system.

Treatment is not available.”

— Candice Singer

Merely keeping the data is an important step in allowing the federal and state governments as well as private entities to fund research to address significant topics including:

- ◆ Do minorities and the poor have equal access to problem-solving courts, and are sanctions, termination, and graduation rates similar?
- ◆ Would outcomes be affected if participants were allowed to attend staffings?⁴⁹³
- ◆ Are sentences for those terminated from drug treatment court more severe than those who do not participate in drug treatment?
- ◆ Do sentences imposed after termination differ if the drug court judge hears the case or a separate judge presides over the hearing?
- ◆ Must a participant enter drug court within days of arrest or are success rates similar for those who enter drug court weeks later after being given an opportunity to consult with counsel and litigate motions?⁴⁹⁴

MENTAL HEALTH COURTS

The Task Force heard far more about drug courts than it did about mental health courts. Although some of the problems associated with drug courts apply to mental health courts, others are less of a concern. This report concludes on a mostly positive note in this discussion of mental health courts.

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History

Broward County, Florida, created the first mental health court in the United States in 1997. The idea was advanced by Public Defender Howard Finkelstein with active support from the bench to address “the failure of the community-based mental health system and the failure of the criminal justice system to divert people.”⁴⁹⁵ The deficiencies in the system were highlighted by tragic deaths in the county jail and in a scathing grand jury report detailing the inadequacies of the community mental health system.⁴⁹⁶ The court was created after a task force studied the problem.⁴⁹⁷

Today there are more than 150 mental health courts in the United States.⁴⁹⁸ As with the first court, they “focus on mental health services and resources for defendants whose mental illness [i]s the primary purpose for their recidivism.”⁴⁹⁹

Entry and Procedures

Mental health courts vary considerably in their procedures but are generally uniform in their commitment to address issues surrounding mental illness from the beginning to end of the case.⁵⁰⁰ This includes bringing multiple sources of information to the table.⁵⁰¹

Mental health courts may allow entry at arrest, charging, or after conviction.⁵⁰² Each court has its own procedures to screen individuals who may be eligible. Although some courts refuse defendants charged with felonies, others have become more willing to accept individuals charged with minor felonies.⁵⁰³

Unlike drug courts, where the prosecutor is largely the gatekeeper, mental health courts frequently accept referrals from a wide range of individuals. For example, in Broward County, referrals come from the jail, community mental health managers, family members, other judges, attorneys, or any person “who has information that somebody may be in need” of the mental health court services.⁵⁰⁴ In Brooklyn the court is “mostly defense-driven,” which allows the defense to “identify cases where we think the client not only has mental illness, but would benefit from that court.”⁵⁰⁵ Mental health courts generally require a diagnosis recognized by the DSM-IV.⁵⁰⁶ The referral process generally includes a clinical interview of the individual who may be suffering from mental illness.⁵⁰⁷

“I will not have nor do I have any desire to require any kind of plea to access this court.”

— Judge Ginger Lerner-Wren

Once enrolled, participants “receive outpatient treatment at local clinics, have regular meetings with court or probation officers, make appearances in court to confer with the judge over their treatment progress, and

participate in group counseling programs.”⁵⁰⁸ Moreover, everyone in a mental health courtroom is “much more sensitive, much more tuned in” to mental illness issues.⁵⁰⁹

Programs that involve misdemeanor charges may be as short as six months.⁵¹⁰ The mental health court in the Bronx, which includes felonies, requires an 18- to 24- month individualized treatment program.⁵¹¹

Assessment of Mental Health Courts

Although the Task Force heard from many critics of drug courts, most witnesses who testified about mental health courts had largely positive reviews. Their comments were wide-ranging, including the provision of integrated services, reduction in recidivism, and the generally lower due process cost involved.

Integrated Services

Mental health courts have been effective in offering many services to participants with mental illness. Without mental health courts, “a lot of people [are] falling through the system.”⁵¹² They might otherwise plead guilty and face a short, time-served sentence but “they’re right back out on the streets with no place to get a meal, no place to have shelter, no one to talk to.”⁵¹³ Those with mental illness lack a “safety net” because of the lack of coordination between treatment, probation, and the court system.⁵¹⁴

Mental health courts provide multiple services, such as treatment and housing, in the same place. The mental health court in Miami-Dade, for example, “has done wonders obtaining outpatient treatment for mentally ill offenders who otherwise would be subjected to incarceration.”⁵¹⁵ A defense lawyer in Austin told of an elderly man with longstanding mental health issues: “We got his SSI benefits reinstated. We found him a group home . . . and he hasn’t been arrested in . . . 14 months.”⁵¹⁶ A prosecutor praised public defenders for doing “a really good job of trying to find a lot of these people housing, places to live, hooking them up with counseling, [and] making sure they stick with their [mental health] programs”⁵¹⁷

Reduced Recidivism

Once the treatment process is completed, participants may be provided continuing treatment options, which will continue to reduce the recidivism rate.⁵¹⁸ Many participants would likely have continued to commit crimes without the involvement of mental health courts.⁵¹⁹ In the Broward Mental Health Court, only 27 percent of participants were rearrested upon successful completion of the program, none of them for a violent offense.⁵²⁰

“What we need most is people not even entering into the criminal justice system”

— Doug Brawley

Due Process Rights Often Preserved

These advantages often come without the due process costs frequently associated with drug courts. The Broward Mental Health Court, like many, is pre-plea, and the defense and prosecution maintain “their traditional role and function from an ethics standpoint.”⁵²¹ As the judge there explained, “[w]e do not have problematic standards like the drug court model. It’s purely voluntary. I will not have nor do I have any desire to require any kind of plea to access this court.”⁵²²

The Dallas Mental Health Court is “a true diversion program. It’s a six-month program and their case is dismissed at the end of the six-month period if they successfully complete the program.”⁵²³ Maricopa County mental health court is post-conviction and “geared toward getting people through probation.”⁵²⁴ As a public defender there noted, however, it would be a “great advantage to having a pre-conviction diversion program,”⁵²⁵ which would not saddle the participant with a conviction.

Recommendations — Mental Health Courts

◆ *Treat persons with mentally illness; do not incarcerate them.*

Mental illness should not be treated through the criminal justice system. As a judge testified, “many of us feel that a lot of these people don’t belong” in the criminal justice system.⁵²⁶ Just as drug courts would be unnecessary if society treated addiction as an illness through the public health system, mental health courts would be unnecessary if society properly addressed mental illness as an illness.⁵²⁷

Police officers should be trained to divert persons with mental illness, especially those who have committed minor offenses, into treatment programs instead of processing them through the criminal justice system.⁵²⁸ The Memphis Police Department has rightfully received national acclaim for doing this well.⁵²⁹ Some persons with mental illness in Miami are similarly diverted into treatment.⁵³⁰

Taxpayers should not be “investing in the courts and lawyers,” but rather a “more effective treatment system”⁵³¹ This is especially true when many individuals with mental illness are in jail “on petty, low-level offenses, quality of life, nuisance type of offenses” and unable to post even a \$25 bond.⁵³² As the public defender instrumental in creating the first mental health court observed, mental health courts should not exist if proper community-based mental health systems and diversionary programs were in place.⁵³³

◆ *Devote sufficient and appropriate resources.*

Treating mental illness requires a commitment of necessary resources. An impressive example is Travis County, Texas, where the sheriff has 28 social workers on his staff and in corrections facilities, not to mention many officers who have special training in mental health issues.⁵³⁴ Among other things, this ensures persons with mental illness get their medication.⁵³⁵ The resources and properly trained staff must continue after arrest. As detailed above, mental health court teams have been effective in providing invaluable services, including housing and treatment, to participants.

◆ *Screening should occur early, include multiple referral sources, and allow for broad access.*

In many jurisdictions, an assessment is done at the jail and then cases are screened by a clinical team in the mental health court.⁵³⁶ Just as with drug court, prosecutors should not be the gatekeeper.

Although mental health courts wish to avoid public safety risks, they should not exclude individuals with mental illness merely because they have been arrested for offenses involving violence.⁵³⁷ As one judge explained, “[w]e all know who deal with the mentally ill that it’s very normal for them perhaps to have an episode when they’re going to be violent, maybe with a caretaker or with someone else. That doesn’t mean that like a typical Defendant, they are prone to violence”⁵³⁸ Many types of activity are declared “violent” even if it does not present a clear and present danger of harm to anyone.⁵³⁹ This is of special concern for individuals with mental illness. If violent individuals are excluded, they will continue through the revolving door, and once released back onto the streets may well commit another violent crime.⁵⁴⁰

Although some courts hear only misdemeanors, others have begun and should continue to hear felony cases.⁵⁴¹

◆ *Counsel and the court must ensure that participation is voluntary.*

Enrollment in mental health courts must be voluntary to ensure they do not become mere vehicles for “coerced treatment.”⁵⁴² Significant concerns surround the ability of some

persons with mental illness to make a voluntary choice between the traditional court process and mental health court.⁵⁴³ “If a requirement for voluntary participation in the special courts is not only competency as legally defined, but also an ability to understand and make reasonable decisions, then achieving voluntariness among mentally ill or disabled treatment candidates is a challenging proposition indeed.”⁵⁴⁴

◆ *Counsel must zealously represent each client’s stated interest.*

Any pressure to be part of a team may not supplant or diminish counsel’s ethical obligation to represent a client’s stated interest. Counsel must ensure that clients with mental illness understand their options.⁵⁴⁵ Moreover, as in any other court, lawyers must always argue on behalf of clients “as zealously, frankly, and strongly” as possible.⁵⁴⁶

A public defender who regularly represents clients in drug court and mental health court emphasized the importance of education on the proper role of counsel.⁵⁴⁷ The public defenders in Travis County, Texas, include the private bar in monthly training sessions on topics such as “basic diagnoses, the meds, collateral consequences of criminal convictions, all those sorts of things.”⁵⁴⁸

Finally, counsel must be sure not to divulge confidential or privileged information. The same rules of professional conduct must apply to mental health courts and require adherence to the attorney-client privilege, even if players are expected to share information to further treatment or as part of a team approach.

CONCLUSION

What began 20 years ago in Miami as a revolutionary and laudable opportunity for defendants to receive much-needed treatment and avoid costly and ineffective incarceration has evolved into something much different and dangerous. As detailed throughout this report, problem-solving courts often create far more problems than they attempt to solve—for defendants, lawyers, judges, and the public at large.

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Although decriminalization remains the smartest, fairest, and most economical solution, significant reforms must be made to these courts until that occurs. These courts cannot continue to be conviction mills that require defendants to abandon fundamental constitutional rights and lawyers and judges to modify or disregard longstanding ethical obligations. Access must be available without requiring a guilty plea to all who seek treatment, regardless of race, or immigration or socioeconomic status.

The recommendations in this report are intended to offer useful guideposts for defense lawyers, judges, prosecutors, and policymakers. The adoption of one or a few recommendations may improve the problem slightly, but any meaningful reform will require significant changes to the structure and function of these courts. NACDL is committed to leading this effort through the wide dissemination of this report, engagement and education of the defense bar, and targeted efforts in Congress, state legislatures, bar associations, advocacy organizations, and courts throughout the country.

SUMMARY OF RECOMMENDATIONS

DECRIMINALIZATION: THE SMART, FAIR, ECONOMICAL, AND EFFECTIVE ALTERNATIVE

Address substance abuse as a public health issue — not a criminal justice issue.

Drug Courts in Action: Operation, Issues, and Problems

- ◆ *Admission criteria must be revised to end skimming.*
- ◆ *Judges in traditional courtrooms should be encouraged to use innovative drug court techniques in their courtrooms.*
- ◆ *Prosecutors must relinquish their role as gatekeeper. Admission criteria should be objective and broad.*
- ◆ *Crimes of violence must not be categorically excluded.*
- ◆ *Drug courts must use a pre-plea, pre-adjudication model.*
- ◆ *In order for defense counsel to properly advise clients, adequate time must be provided to allow defendants to decide whether to enroll in drug court.*
- ◆ *The state must have a triable case.*
- ◆ *Immunity must be granted to all statements made in drug court.*
- ◆ *Judges must not directly or indirectly coerce defendants to secure waivers of counsel.*
- ◆ *Drug courts must do everything possible to ensure that every lawyer who wants to appear in drug court has the opportunity to do so.*
- ◆ *Sanctions must be imposed in a fair and consistent manner.*
- ◆ *The judge who guides treatment should not be the judge who determines termination or hears the underlying case after termination.*
- ◆ *Ex parte communication must never be permitted.*
- ◆ *Drug court assignments must go to experienced, interested judges who remain for more than a year.*
- ◆ *Sentences for those who attempt drug court must not exceed what would have been imposed if the standard plea was taken.*
- ◆ *Some amount of credit time should be applied to the sentence of anyone who spends several months complying with a drug court program and working toward completion before ultimately failing.*

Role of Defense Counsel and Ethical Concerns

- ◆ *Drug court “theater” must include a leading role for defense counsel.*
- ◆ *Ethical rules do not need to change; the drug court framework must accommodate the rules.*
- ◆ *The defense bar must have a significant role in the creation of any new drug courts.*
- ◆ *Training for defense lawyers must be readily available and broad enough to cover the key aspects of representing clients in drug court.*
- ◆ *The same lawyer should represent a client throughout a drug case.*
- ◆ *Senior and highly skilled lawyers should be assigned to drug court.*
- ◆ *Caseloads of lawyers representing clients in drug court must take into account the special nature and demands of drug court.*
- ◆ *Drug courts should consider allowing participants to attend staffings.*

Concerns About Minorities, the Poor, and Immigrants

- ◆ *Admission criteria must be carefully created and reviewed to ensure drug courts are open to all people regardless of race, economic status, or immigration status.*
- ◆ *The intensive supervision of drug court cannot create impossible obstacles for participants to succeed.*
- ◆ *Immigrants who successfully complete drug treatment courts must not be deported on the basis of the drug court “conviction,” no matter how defined.*

Misallocation of Public Resources

- ◆ *Drug courts must be used for high-risk defendants facing lengthy jail terms; less onerous and expensive alternatives to drug court must be readily available for low-risk defendants and those who commit low-level offenses.*
- ◆ *Fair and effective alternatives must be offered to low-level offenders.*
- ◆ *Sufficient resources must be available to permit drug treatment for all who qualify.*
- ◆ *Defendants who do not suffer from chemical dependency must be provided with alternative programs to avoid criminal prosecution.*
- ◆ *Sound research on important topics related to the diversion of cases, including drug courts, must be pursued.*

Mental Health Courts

- ◆ *Treat persons with illness; do not incarcerate them.*
- ◆ *Devote sufficient and appropriate resources.*
- ◆ *Screening should occur early, include multiple referral sources, and allow for broad access.*
- ◆ *Counsel and the court must ensure that participation is voluntary.*
- ◆ *Counsel must zealously represent each client’s stated interest.*

Problem-Solving Court Witness List

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Gerianne Abriano, Bureau Chief, Red Hook, Kings County District Attorney's Office; New York, NY
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Amy Arnold, Victim/Witness Representative, Pima County Domestic Violence Court Team; Tucson, AZ
Judge Carl Ashley, Milwaukee Circuit Court; Milwaukee, WI
Vicki Ashley, Assistant County Attorney for Travis County; Austin, TX
Dr. Peter Banys, Health Sciences Clinical Professor of Psychiatry at UCSF and the Director of Substance Abuse Treatment Programs and the Substance Abuse Physician Fellowship Program at the VA Medical Center; San Francisco, CA
Richard Baron, Friends of Miami-Dade Drug Court; Miami, FL
Erica Bartlett, Assistant Defender, Defender Association of Philadelphia; Philadelphia, PA
Sam Benedict, First Assistant Public Defender, Wisconsin State Public Defender, Waukesha Office; Waukesha, WI
Bill Bennett, Travis County DWI Court Participant; Austin, TX
Judge Joel Bennett, Travis County Drug Diversion Court, Austin; Austin, TX
Tom Bomba, Staff Attorney, Legal Aid Society; New York, NY
Judge Tom Bower, Black Hawk County (Iowa) District Court; Waterloo, IA
Professor Josh Bowers, University of Virginia School of Law; Charlottesville, VA
Judge John Bozza, Erie County; Erie, PA
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Anne Brockett, Community Justice Assistance Division, Texas Department of Criminal Justice; Austin, TX
Bennett Brummer, Miami-Dade Public Defender; Miami, FL
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Gary Butchen, Executive Director, Bridge Back to Life Center; New York, NY
Judge Alex Calabrese, Presiding Judge at Red Hook Community Justice Center; New York, NY
Nina Carlow, Chief of the Intake Bureau, Bronx District Attorney's Office; New York, NY
Judge Brent Carr, Tarrant County Mental Health Diversion Court; Fort Worth, TX
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John Chisholm, District Attorney; Milwaukee, WI
Ana Yanez-Correa, Executive Director, Texas Criminal Justice Coalition; Austin, TX
Judge David Crain, Travis County Mental Health Court; Austin, TX
Judge John Creuzot, Dallas DIVERT Court; Dallas, TX
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Layperson's Definitions of Key Terms

The following is a nonexhaustive list of terms that appear in the Task Force Report. Many of these are terms of art with specialized and debatable definitions. This glossary is simply offered to provide a general understanding of the terms.

Case dumping: The prosecutorial unloading of difficult cases (because of weak evidentiary support or significant grounds for defense litigation) in drug court.

Client confidentiality: The ethical obligation of lawyers not to reveal information about clients to others without the client's consent.

Creaming: See skimming.

Crime of violence: Although definitions vary from jurisdiction to jurisdiction, crimes of violence are generally ones that involve the use of a weapon or the use of force against another person. Many drug courts exclude persons who are charged with or have been convicted of a crime of violence.

Discovery: The process through which parties in a lawsuit provide relevant information to opposing counsel.

Diversionsary program: A general term for programs in which participants admit their responsibility for a crime but complete a program instead of having their case processed through the traditional court system. Successful completion may result in dismissal of the charge.

Ex parte communication: The communication of information about a pending case with the judge outside the presence of counsel. *Ex parte* communication is generally prohibited by Judicial Canon 2.9.

Gatekeeper (or gatekeeping function): The role, usually played by the prosecutor, of deciding which defendants or types of cases are eligible for admission to a problem-solving court.

High-risk offender: A person who, based on prior attempts at treatment and other factors, is unlikely to succeed in treatment.

Horizontal representation: A system for assigning appointed counsel in which the same defense attorney represents all clients in the same court on a given day.

Low-risk offender: A person who, based on the lack of previous attempts at treatment and other factors, is likely to succeed in treatment.

Model Code of Judicial Conduct: Model rules from the American Bar Association that provide ethical standards for judges and include commentary. They have no force of law until adopted by individual states.

Model Rules of Professional Conduct: Model rules from the American Bar Association that provide standards governing all aspects of a lawyer's ethical obligations and include commentary. They have no force of law until adopted by individual states.

National Association of Drug Court Professionals: A not-for-profit organization founded in 1994 that advocates for the creation, study and funding of drug courts. It currently has a membership of more than 2,100 drug courts nationwide.

Net-widening: The concern that the number of drug prosecutions will increase after the creation of a drug court because treatment will be offered instead of incarceration.

Pre-plea, pre-adjudication model: A problem-solving court program that admits participants while charges are pending without requiring a guilty plea.

Post-plea, pre-adjudication model: A problem-solving court program that admits participants after they enter a guilty plea, which is held in abeyance while they complete the program.

Post-adjudication model: A problem-solving court program, commonly as part of probation, which admits participants only after a final sentence has been entered. This model may only be post-plea and is the opposite of the pre-adjudication model, which can be either pre- or post-plea.

Retainer agreement: A written agreement between private counsel and a client, which specifies the terms and costs of representation.

Sanctions: Penalties, such as community service or time in jail, imposed by a judge when a participant relapses or violates programs rules.

Skimming: The process through which some problem-solving courts gain cases involving low-risk defendants most likely to succeed rather than high-risk defendants who most need treatment.

Staffing (backroom meeting): Meeting of the drug court “team” to discuss the progress of the participant before the participant appears in court to meet with the judge.

Team (drug court team): The prosecution, judge, treatment providers, defense counsel and sometimes others, who are expected to work together to determine what is in the best interests of each participant.

Ten Key Components: Ten guiding principles for operating an effective drug court developed by the National Association of Drug Court Professionals, partnered with the U.S. Department of Justice’s Office of Justice Programs, in 1997. Government funding often requires compliance with these key principles.

Termination hearing: A hearing at which the judge considers whether a participant should be removed from the problem-solving court for violating one or more of the rules. If terminated from the program, the participant returns to court for conventional processing (pre-plea programs) or faces imposition of sentence (post-plea programs).

Vertical representation: A system for assigning appointed counsel in which the same lawyer represents a client from the beginning to end of a case.

Violent offender: See crime of violence.

1. E.E. Schattschneider, *THE SEMISOVEREIGN PEOPLE* 68 (1960).
2. *See generally* *Robinson v. California*, 370 U.S. 660, 667 (1962) (“In this Court counsel for the State recognized that narcotic addiction is an illness. Indeed, it is apparently an illness which may be contracted innocently or involuntarily.”).
3. National Association of Criminal Defense Lawyers, *Board Resolution to End War on Drugs* (Nov. 4, 2000), available at <http://www.nacdl.org/public.nsf/26cf10555dafce2b85256d97005c8fd0/e57009319de167ee85256d97005c8195?OpenDocument>.
4. Douglas Marlowe, Testimony at 2983.
5. *See generally* John Chisholm, Testimony at 1734.
6. Bennett Brummer, Testimony at 520.
7. Hon. Tom Bower, Testimony at 1758.
8. Tim Murray, Testimony at 2603.
9. Hon. Lisa Stark, Testimony at 1760.
10. *See, e.g.*, David S. DeMatteo, et al., *Secondary Prevention Services for Clients Who Are Low Risk in Drug Court: A Conceptual Model*, 52 *CRIME & DELINQUENCY* 114, 123 (2006); Douglas B. Marlowe, et al., *A Sober Assessment of Drug Courts*, 16 *FEDERAL SENT’G REP* 1, 4 (2003).
11. Tim Murray, Testimony at 2616.
12. The questionnaire was distributed to NACDL members and a variety of other defense organizations. The goal was to learn what was happening in as many jurisdictions around the country as possible. The purpose was not to secure statistically accurate responses. Individuals who participated in the questionnaire were assured that their identities would be kept confidential. Questionnaire results may be found at www.nacdl.org/drugcourts.org.
13. Hon. Ginger Lerner-Wren, Transcript at 245-46.
14. As a leading professor on problem-solving courts explained, the focus is on “the underlying problem and not the crime.” Mae C. Quinn, Transcript at 2174.
15. *See generally* John A. Bozza, *Benevolent Behavior Modification: Understanding the Nature and Limitations of Problem-Solving Courts*, 17 *WIDENER L.J.* 97, 98-102 (2007).
16. Hon. Judy Harris Kluger, Testimony at 873.
17. Leonard Noisette, Testimony at 942.
18. Mike Rempell, Testimony at 1246.
19. Hon. Judy Harris Kluger, Testimony at 874; Valerie Raine, Transcript at 1249 (“There is no rehabilitative goal in domestic violence courts. It is strictly about protecting the victim, delivering services to the victim . . .”).
20. These cases give rise to other concerns as well. Perhaps most troubling, when a “gun court” was created in the Bronx, the same judge heard all the cases—and sentences went up dramatically. Robin Steinberg, Transcript at 946.
21. Hon. Jeffrey Rosinek, Testimony at 404.
22. Michael M. O’Hear, *Federalism and Drug Control*, 57 *VAND. L. REV.* 783, 823 (2004).
23. John S. Goldkamp, *Miami’s Treatment Drug Court for Felony Defendants: Some Implications of Assessment Findings*, 73 *THE PRISON JOURNAL* 110, 112 (1994).
24. O’Hear, *supra* note 22, at 824.
25. Tim Murray, Testimony at 2556-57.
26. Bennett Brummer, Testimony at 521; *see generally* Peggy Fulton Hora, et al., *Therapeutic Jurisprudence and the Drug Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 *NOTRE DAME L. REV.* 439, 481 (1999).
27. Mae C. Quinn, Testimony at 2151.
28. Norma Jaeger, *Where We Have Been and Where We Are Going: A Review of Idaho’s Drug and Mental Health Courts*, 48 *ADVOCATE* 26, 26 (2005); Hon. Judy H. Kluger, Panelist, *The Impact of Problem Solving on the Lawyer’s Role and Ethics*, 29 *FORDHAM URB. L.J.* 1892, 1893 (2002).
29. Hora, *supra* note 26, at 481 (quoting Peter Finn & Andrea K. Newlyn, U.S. Dep’t of Justice, Pub. No. NCJ-142412, Miami’s “Drug Court”: A Different Approach 3, 10 (1993)).
30. Goldkamp, *supra* note 23, at 112.
31. Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 *GEO. J. LEGAL ETHICS* 401, 432 (2001).
32. Bennett Brummer, Transcript at 521.
33. U.S. GEN. ACCOUNTING OFFICE, *DRUG COURTS: OVERVIEW OF GROWTH, CHARACTERISTICS, AND RESULTS* 22 (1997) (“The main purpose of drug courts is to use the authority of the courts to reduce crime by changing defendants’ drug-using behavior.”).
34. U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, *DRUG COURTS: THE SECOND DECADE* 3 (2006).
35. Trent Oram and Kara Gleckker, *An Analysis of the Constitutional Issues Implicated in Drug Courts*, 42 *IDAHO L. REV.* 471, 475-76 (2006).
36. *DRUG COURTS: OVERVIEW OF GROWTH, CHARACTERISTICS, AND RESULTS*, *supra* n. 33, at 24.
37. Peggy Fulton Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution*

in *Problem-Solving Courts*, 42 GA. L. REV. 717, 725-26 (2008); Douglas B. Marlowe, Testimony at 2952-53.

38. Douglas B. Marlowe, Testimony at 2953; see also C. West Huddleston, III, et al., *Painting the Current Picture: A National Report Card on Drug Courts and Other Problem-Solving Court Programs in the United States* at 4 (2008), available at <http://www.ndci.org/publications/paintingcurrentpicture.pdf> (observing that “today only 7 percent of adult drug courts are diversionary programs compared to 59 percent which are strictly post-conviction”).

39. Hora & Stalcup, *supra* note 37, at 725.

40. Douglas B. Marlowe, Testimony at 2953.

41. Hora & Stalcup, *supra* note 37, at 725. For example, all the courts in Maricopa County are post-conviction. Participants have been placed on probation and have “zero choice” about enrollment. Dan Carrion, Testimony at 616-17.

42. Excluded from this summary are those programs created by voter initiative in Arizona and California. With nearly 65 percent of the vote in 1996, the citizens of Arizona enacted Proposition 200, entitled “The Drug Medicalization, Prevention, and Control Act of 1996.” Michael M. O’Hear, *When Voters Choose the Sentence: The Drug Policy Initiatives in Arizona, California, Ohio, and Michigan*, 14 FED. SENT. REP. 337 (2002). The central feature of Proposition 200 required “any person who is convicted of the personal possession or use of a controlled substance” be placed on probation instead of incarceration and required to undergo drug treatment under court supervision. *Id.* Following in the footsteps of Arizona, 61 percent of the Californian voters approved Proposition 36 in 2000. *Id.* at 338. Similar to the Arizona proposition, mandatory probation was offered in lieu of incarceration for those drug offenders that qualified. Those arrested for drug possession for personal use qualified, while those convicted of possession of a controlled substance for sale, production, or manufacturing were excluded. *Id.*

43. Hora & Stalcup, *supra* note 37, at 789.

44. See Timing of Admission and Discovery Issues, *infra*.

45. O’Hear, *supra* note 22, at 824.

46. See *infra* notes 331-35 and accompanying text.

47. Clara Hernandez, Testimony at 1934; Hon. Jeffrey Rosinek, Testimony at 427 (discussing a participant who remained four and a half years).

48. Clara Hernandez, Testimony at 1934.

49. GAO, *supra* note 33, at 24.

50. *Id.* at 25.

51. *Id.* at 24.

52. Goldkamp, *supra* note 23, at 115.

53. Hora, *supra* note 26 at 483-84.

54. *Id.* at 484.

55. See Immigrants, *infra*.

56. Barbara E. Smith, *Introduction to Special Issue*, 17 JUST. SYS. J. v, viii (1994).

57. *Id.*

58. O’Hear, *supra* note 22, at 824.

59. *Id.*

60. Thomas F. Asbury, *Spiritual Outputs Approach to Rehabilitation: Alternative Sentencing Theory*, 3 FLA. COASTAL L.J. 41, 48-49 (2001).

61. *Id.*

62. *Id.*

63. O’Hear, *supra* note 22, at 824.

64. Daniel M. Filler & Austin E. Smith, *The New Rehabilitation*, 91 IOWA L. REV. 951, 967 (2006).

65. Hon. Jeffrey Rosinek, Testimony at 411.

66. Gary Butchen, Testimony at 1480.

67. *Id.*

68. Monica Holmes, Testimony at 1384.

69. Huddleston, *supra* note 38, at 3.

70. Dan Abrahamson, Testimony at 125.

71. Huddleston, *supra* note 38, at 4 (observing that “today only 7 percent of adult drug courts are diversionary programs compared to 59 percent which are strictly post conviction”).

72. Mae Quinn, Testimony at 2164 (“We never hear from the defendants who failed out. We never have gotten data collected from them to say, hey, what was told to you by your lawyer, what were you thinking about when you went into this court, and how has it affected you now in terms of your desire to stay clean? . . .”).

73. Marc Mauer, *The Changing Racial Dynamics of the War on Drugs* at 1, 9 (2009), available at http://sentencingproject.org/Admin/Documents/publications/dp_raceanddrugs.pdf.

74. Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 803-04 (2008) (discussing “aging out”).

75. National Association of Criminal Defense Lawyers, *Board Resolution to End War on Drugs*, *supra* note 3.

76. Editorial, *The War On Drugs Is Lost*, NATIONAL REVIEW, Feb. 12, 1996, available at <http://www.nationalreview.com/12feb96/drug.html>.

77. National Association of Criminal Defense Lawyers, *Board Resolution to End War on Drugs*, *supra* note 3.

78. Common Sense for Drug Policy, available at <http://www.csdp.org/publicservice/zogby2007.htm>.
79. *How to Stop the Drug Wars*, THE ECONOMIST, Mar. 5, 2009, available at http://www.economist.com/opinion/displaystory.cfm?story_id=13237193.
80. Jeffrey A. Miron, *The Budgetary Implications of Marijuana Prohibition* (2005), available at http://economics.about.com/gi/dynamic/offsite.htm?zi=1/XJ&sdn=economics&cdn=education&tm=29&gps=474_262_1276_629&f=00&su=p649.3.336.ip_&tt=2&bt=1&bts=1&zu=http%3A//www.prohibitioncosts.org/mironreport.html.
81. Common Sense for Drug Policy, available at <http://www.csdp.org/ads/dutch2.htm>.
82. *Id.*
83. European Monitoring Center for Drugs and Drug Addition, *2007 Annual Report: The State of the Drugs Problem in Europe* at 41 (2007), available at http://www.emcdda.europa.eu/attachements.cfm/att_44705_EN_TDAC07001ENC.pdf.
84. Glenn Greenwald, *Drug Decriminalization in Portugal: Lessons for Creating Fair and Successful Drug Policies* at 2 (2009), available at http://www.cato.org/pubs/wtpapers/greenwald_whitepaper.pdf. Decriminalization subjects those using or possessing drugs to police intervention, although “they are treated as purely administrative violations, to be processed in a noncriminal proceeding.” *Id.* This differs from legalization, in which no prohibitions of any kind are imposed or depenalization, in that decriminalization excludes imprisonment as a sanction but continues to allow for fines, probation, and police records. *Id.*
85. *Id.* at 9.
86. *Id.* at 11, 15.
87. See generally *Obama Addresses Marijuana Question in Online Town Hall*, available at <http://latimesblogs.latimes.com/technology/2009/03/obama-addresses.html>.
88. See *supra* note 42 (describing Arizona Proposition 200 and California Proposition 36).
89. Law Enforcement Against Prohibition, available at <http://leap.cc/cms/index.php?name=Content&pid=2>.
90. Gary Fields, *White House Czar Calls for End to “War on Drugs,”* WALL ST. J., May 14, 2009, at A3, available at <http://online.wsj.com/article/SB124225891527617397.html>.
91. *Id.*
92. See generally Bob Curley, *Obama’s First Drug Budget Fails to Shift Priorities*, Join Together, May 29, 2009, available at <http://www.jointogether.org/news/features/2009/obamas-first-drug-budget.html>.
93. In his August 3, 2009, remarks to the ABA, Attorney General Holder emphasized: “Getting smart on crime requires talking openly about which policies have worked and which have not. And we have to do so without worrying about being labeled as too soft or too hard on crime.” available at <http://www.usdoj.gov/ag/speeches/2009/ag-speech-090803.html>. In addition, Senator Webb recently proposed a “top-to-bottom review of our entire criminal justice system.” The Commission would be charged with proposing “wide-ranging reforms designed to . . . restructure our approach to drug policy . . .” <http://webb.senate.gov/email/incardocs/FactSheeti.pdf>.
94. Bowers, *supra* note 74, at 798-801; see generally Steve Meyer, Testimony at 1673 (explaining that in Dane County, Wisconsin, “[t]he district attorney is the gatekeeper. You can’t get in without them saying a-okay”).
95. See *infra* notes 97-109 and accompanying text.
96. See generally *Role of Defense Counsel and Ethical Concerns, infra*.
97. See generally Hon. John Cruzot, Testimony at 2003 (explaining that defendants with prior felony convictions are excluded in Dallas).
98. N.Y. STATE COMM’N ON SENTENCING REFORM, THE FUTURE OF SENTENCING IN NEW YORK STATE: RECOMMENDATIONS FOR REFORM 88 (2009), available at http://criminaljustice.state.ny.us/pio/csr_report2-2009.pdf.
99. Nick Fontana, Testimony at 833-34.
100. Paul DeWolfe, Testimony, at 2251.
101. See, e.g., Julia Leighton, Testimony at 2246 (discussing the District of Columbia).
102. Questionnaire response 27, question 8.
103. See generally Caroline S. Cooper, 2000 Drug Court Survey Report, Executive Summary 21 (2001) available at <http://spa.american.edu/justice/publications/execsum.pdf>. Federal funding became available to drug courts with the passage of the Omnibus Crime Control and Safe Streets Act of 1994, which authorized the Attorney General to make grants to states, localities, and tribal authorities to establish drug courts for nonviolent drug offenders. 42 U.S.C. § 3769 (1994).
104. 42 U.S.C. § 3797u-2 (including amendments made by the Second Chance Act of 2007, Pub. L. No. 110-199; see also <http://www.ojp.usdoj.gov/BJA/grant/09DrugCourtResearchSol.pdf> (BJA grant solicitation)).
105. Robert Hooker, Testimony at 651-52.
106. *Id.* at 645. There are many other restrictions throughout the country. In Brooklyn, the District Attorney will not consent to treatment in many types of drug cases including “those involving search warrants, drug sales during school hours near school property, drug sales inside a location, and drug sales occurring through the use of a beeper.” Brooklyn Treatment Court: Policies and Procedures at 3, available at <http://www.nycourts.gov/courts/2jd/brooklyntreatment/policies.pdf>.
107. Ryan King, Testimony at 1727.
108. Peter Banys, Testimony at 71.
109. Ben Kempinen, Testimony at 1603.
110. Robert Hooker, Testimony at 645.
111. Tim Murray, Testimony at 2602.

112. Vicki Ashley, Testimony at 1993; Dee Hobbs, Testimony at 1993.
113. *People v. Cisneros*, 100 Cal. Rptr. 2d 784, 788-89 (Cal. Ct. App. 2000).
114. New York State Unified Court System, Office of Drug Treatment Programs, RECOMMENDED PRACTICES FOR NEW YORK STATE CRIMINAL DRUG TREATMENT COURTS 17 (draft version of report, on file with NACDL).
115. Douglas B. Marlowe, Testimony at 2416.
116. *Id.* at 2417.
117. *Id.* at 2424-25.
118. The White House, *Civil Rights*, available at http://www.whitehouse.gov/agenda/civil_rights/.
119. Douglas Marlowe, Testimony, at 2966 (observing that 60 or 70 percent of first-time offenders never re-offend and that the National Association of Drug Court Professionals “didn’t tell Obama, ‘We need more drug courts for first-time offenders’”).
120. Hon. Tom Bower, Testimony at 1758.
121. *Id.* at 1755.
122. *Id.* at 1756.
123. Hon. Lisa Stark, Testimony at 1760.
124. Jeff Jeffery, Testimony at 2807.
125. *Id.* at 2810.
126. Rhonda Reagan, Testimony at 2814.
127. *Id.* at 2816.
128. Candice Singer, Testimony at 2820.
129. *See, e.g.*, Robert Hooker, Testimony at 651; Ryan King, Testimony at 1727.
130. Daniel Abrahamson, Testimony at 108.
131. Nick Fontana, Testimony at 837-38.
132. John Chisholm, Testimony at 1734.
133. A less appealing but still worthwhile option would be empowering individual judges to make admission decisions. A New York Task Force recently proposed a “Judicial Diversion” model in which the prosecutor could offer input but the judge makes the ultimate decision. N.Y. STATE COMM’N, *supra* note 98, at 118.
134. Douglas Marlowe, Testimony at 2983.
135. *Id.*
136. New York State Unified Court System, *supra* note 114 at 16.
137. *Id.*
138. Risk assessments are widely used “to identify appropriate individuals for diversion placement.” National Association of Pre-trial Services Agencies, PRETRIAL DIVERSION IN THE 21ST CENTURY: A NATIONAL SURVEY OF PRETRIAL DIVERSION PROGRAMS AND PRACTICES at 16 (2009). The Task Force did not have an opportunity to hear from risk assessment experts.
139. Gerianne Abriano, Testimony at 1128.
140. Nestor Ferreiro, Testimony at 1124.
141. The Dade County judge suggested that defendants who enter drug court have 21 days to try it out “because at arraignment if you want to get out, you get out no matter what.” Hon. Jeffrey Rosinek, Testimony at 456. After defendants sign a waiver, however, “[t]he only way they get out is if they’re clean.” *Id.*
142. Questionnaire response 267, question 13.
143. *See* page 27 (discussing the provision of discovery in Philadelphia).
144. Keith Farmer, Testimony at 1828. *See also* Jessica Skemp, Testimony at 1829; Michael Steuer, Testimony at 1830.
145. Steve Meyer, Testimony at 1686.
146. *Id.* at 1687.
147. Jeanette Kinard, Testimony at 1912.
148. Hon. Nanette Warner, Testimony at 787.
149. Bruce Chalk, Testimony at 787.
150. Questionnaire response 171, question 8.
151. Nestor Ferriero & Gerianne Abriano, Testimony at 1128-29.
152. *See* Decriminalization: The Smart, Fair, Economical, and Effective Alternative, *supra* (discussing decriminalization).
153. Hora, *supra* note 26, at 483-84.
154. *See* Role of Defense Counsel and Ethical Concerns, *infra*.
155. <http://www.letsmakeadeal.com/>.
156. *See* Role of Defense Counsel and Ethical Concerns, *infra*.
157. Douglas B. Marlowe, Testimony at 2953.
158. *Id.*
159. Jeffery Fagan, Testimony at 930.
160. Robin Steinberg, Testimony at 958.
161. *Id.* at 959.
162. *Id.*

163. *Id.* at 992.

164. *See* Concerns About Minorities, the Poor, and Immigrants, *infra*.

165. This is consistent with the standards adopted by the National Association of Pretrial Services Agencies. *See* NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES, PERFORMANCE STANDARDS AND GOALS FOR PRETRIAL DIVERSION/INTERVENTION, Standard 4.3 (2008), available at http://www.napsa.org/publications/diversion_intervention_standards_2008.pdf.

166. *See* page 16; BUREAU OF JUSTICE ASSISTANCE, DEFINING DRUG COURTS: THE KEY COMPONENTS 5 (2004).

167. National Association of Criminal Defense Lawyers, *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts* at 31 (2009).

168. Terrence Walton, Testimony at 2399.

169. *See* page 27 (summarizing Philadelphia's drug court).

170. Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer* 12-13 (2001), available at http://www.courtinnovation.org/pdf/prob_solv_courts.pdf.

171. In Broward County defendants have litigated motions to suppress and then enrolled in drug court after the motion was denied: "It's happened but it's not supposed to happen." Hon. Giselle Pollack, Testimony at 291-92; Eric Schwartz, Testimony at 293 ("Sometimes they have to go up the chain of command and speak to someone in the State Attorney's Office to get back into the program."). In Brooklyn, enrollment can informally occur at any time. "There are a lot of cases in Brooklyn that don't end up with a drug treatment option until the day before trial when all of a sudden we get a phone call . . ." Gerianne Abriano, Testimony at 1132.

172. NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES, PERFORMANCE STANDARDS AND GOALS FOR PRETRIAL DIVERSION/INTERVENTION, Standard 2.1 (2008).

173. Nestor Ferrero & Gerianne Abriano, Testimony at 1110-11.

174. *See* page 16; BUREAU OF JUSTICE ASSISTANCE, DEFINING DRUG COURTS: THE KEY COMPONENTS (2004).

175. *See generally* David Paulus, Testimony at 453 (discussing a hypothetical in which drug court defendant admits to murder while "cracked out" and concludes "the public would want the prosecutor in that scenario . . . to get that information because it would be relevant to the murder charge").

176. Mary Defusco, Testimony at 1439.

177. *Id.* at 1440.

178. *Id.*

179. Erica Bartlett, Testimony at 1450.

180. *Id.*

181. Hon. Louis J. Presenza, Testimony at 1457. The court's caseload is 99 percent felony cases. *Id.* at 1460.

182. Valerie Raine, Testimony at 1272.

183. Peter Banys, Testimony at 88.

184. *See generally* Michael W. Finigan, *et al.*, *The Impact of a Mature Drug Court Over 10 Years of Operation: Recidivism and Costs (Final Report)* at 52-53 (2007), available at http://www.npresearch.com/Files/10yr_STOP_Court_Analysis_Final_Report.pdf.

185. Mae C. Quinn, Testimony at 2154.

186. Bowers, *supra* note 74, at 820.

187. Hon. William Meyer, Testimony at 592-93.

188. Hon. Jeffrey Rosinek, Testimony at 443. Those calls are now taken by a case manager who may call the judge late at night. *Id.* at 260 ("It's now 11:30 on a Saturday night. . . I'm speaking to this kid's manager who is speaking to the police trying to stop the arrest because it's truly a stupid arrest.").

189. Bennett Brummer, Testimony at 510.

190. Michael C. Dorf & Jeffrey A. Fagan, *Problem Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501, 1510 (2003).

191. Hon. William G. Meyer, Testimony at 591.

192. This is especially troubling when "[t]he treating contractor becomes the judge; in other words, if the treatment facility says the client is noncooperative, the judge believes it." Questionnaire response 45, question 8. As a public defender from Nevada explained:

I had a client in Drug Court who used drugs, he said, because he could not cope with the death of his infant. The counselor recommended he attend grief counseling in addition to their substance abuse counseling; my client hated the grief counseling — it just made him depressed and feeling more helpless, and he asked to quit — the counselor brought that to the attention of the judge who immediately terminated his participation in the program and sentenced him to the underlying prison sentence.

Id.

193. MODEL CODE OF JUDICIAL CONDUCT R. 2.9(A)(5) (2007), available at http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf.

194. MODEL CODE OF JUDICIAL CONDUCT R. 2.9 cmt. 4 (2007).

195. State Adoption of Revised Model Code of Judicial Conduct, <http://www.abanet.org/cpr/jclr/map.html>; *see also* BJA Drug Court Clearinghouse, October 24, 2008, memo on "Ex parte communication in drug court/problem solving court matters and, specifically, states' position on Comment 4 under Rule 2.9 'Ex Parte Communications' of the 2007 ABA Model Code of Judicial Conduct" (summarizing responses from Alaska, Arkansas, California, Delaware, Idaho, Indiana, Missouri, and West Virginia).

196. Idaho Code of Judicial Conduct, Canon 3B(7), *available at* <http://www.isc.idaho.gov/IdJudicialCodeOfConduct.pdf>; Marion County, Indiana Local Rule 309, *available at* <http://www.in.gov/judiciary/marion/marion-all-030509.pdf>.
197. For example, the Brooklyn Treatment Court has a 25-page handbook for participants, which includes an explanation of such topics as the court, its rules, treatment phases, sanctions, and graduation. Brooklyn Treatment Court, PARTICIPANT HANDBOOK (on file with NACDL).
198. Hon. John Creuzot, Testimony at 2014-15.
199. *Iowa v. Tovar*, 541 U.S. 77, 88 (2004).
200. *Id.* at 91-94.
201. *See* Role of Defense Counsel and Ethical Concerns, *infra*.
202. *See* Staffings, *infra*.
203. Hora & Stalcup, *supra* note 37, at 795-96; Hon. Laura Safer Espinoza, Testimony at 1569 (explaining that counsel “can come at 9:30 . . . I’m there every morning from like 9:30 to about 10:15 and some of them do stop by”).
204. Ryan S. King & Jill Pasquarella, *Drug Courts: A Review of the Evidence* at 10 (2009), *available at* http://www.sentencing-project.org/Admin/Documents/publications/dp_drugcourts.pdf.
205. Mike Rempel, Testimony at 1243-44.
206. Robert Hooker, Testimony at 675.
207. Liesl Nelson, Testimony at 1703 (explaining that termination may occur not because of a specific act or omission of the participant but when the court has “exhausted all resources” in a case).
208. Hon. William Meyer, Testimony at 568.
209. IDAHO CODE OF JUDICIAL CONDUCT Canon 3B(7), *available at* <http://www.isc.idaho.gov/IdJudicialCodeOfConduct.pdf>.
210. *Alexander v. State*, 48 P.3d 110, 115 (Okla. Crim. App. 2002).
211. *Id.*
212. Hon. William G. Meyer, Testimony at 568.
213. *See* Role of Defense Counsel and Ethical Concerns, *infra*.
214. *See generally* Michael Finigan, Testimony at 2667-68 (explaining poor results of a drug court that used short-term rotating judges, many of whom were disengaged); Finigan & Carey, *supra* note 184, at 52-53 (“Judges did differ in their success rates in terms of reducing recidivism, suggesting that drug court results may vary depending on the judges involved. . . . Of great interest is the finding that judges who had more than one rotation through drug court had better results their second time on the drug court bench.”).
215. Jose Varela, Testimony at 36.
216. Annalisa Mirón, Testimony at 1319.
217. *See generally* Michael M. O’Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL’Y REV. 463, 482-83 (2009); Bowers, *supra* note 74, at 792-93 (summarizing New York data and observing “the typical failing participant [in the Bronx] was sentenced to two-to-six years in prison, which was (at the time of the relevant studies) the maximum sentence on the maximum drug-court eligible charge”).
218. Annalisa Mirón, Testimony at 1316-17.
219. *Id.* at 1317.
220. *Id.*
221. *Id.* at 1320.
222. Questionnaire response 5, question 8.
223. Questionnaire response 402, question 8.
224. Questionnaire response 379, question 7.
225. Questionnaire response 312, question 7.
226. Questionnaire response 212, question 8.
227. Hora & Stalcup, *supra* note 37, at 788.
228. *Id.* at 789.
229. Leon Grizzard, Testimony at 2139.
230. Tamar M. Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75, 76 (2007).
231. *See* page 16; BUREAU OF JUSTICE ASSISTANCE, DEFINING DRUG COURTS: THE KEY COMPONENTS 3 (2004).
232. *Id.*
233. *Id.*
234. Clara Hernandez, Testimony at 1927.
235. NATIONAL DRUG COURT INSTITUTE, *Critical Issues for Defense Attorneys in Drug Court*, April 2003, at 10.
236. *See* Timing of Admission and Discovery Issues, *supra*.
237. Jeanette Kinard, Testimony at 1912.
238. Paul DeWolfe, Testimony at 2229.
239. Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1288 (1998).
240. *Id.*
241. David Dickmann & Elliott Levine, *Roles of the Defense Attorney in Drug Treatment Courts*, 13 THE WISCONSIN DEFENDER 7 (Summer 2005).

242. For example, in Dallas County defendants first participate in an orientation during which they observe drug court proceedings and talk with participants. Hon. John Creuzot, Testimony at 2014-15.
243. Adam Mansky, Testimony at 1008-09.
244. Josh Bowers, Testimony at 2701.
245. *Id.* at 2702.
246. *See generally* Sarah Mayer, Testimony at 2134. Other witnesses spoke in favor of developing guidelines to help lawyers counsel clients about entry into drug court. Barry Wax, Testimony at 346.
247. Barry Wax, Transcript at 348-49.
248. Bowers, *supra* note 74, at 820.
249. *See generally* Adam Mansky, Testimony at 1008-09.
250. *See* History and Evolution of Drug Courts, *supra*; Liesl Nelson, Testimony at 1694 (discussing weekly appearances before the judge during the first six months).
251. Jeff Thoma, Testimony at 172.
252. Douglas B. Marlowe, Testimony at 2493.
253. *Id.* at 2493-94.
254. *Id.* at 2494.
255. Questionnaire response 370, question 10.
256. Mae C. Quinn, Testimony at 2157; questionnaire response 246, question 10 (“I did not attend staffing meetings [b]ecause I was not allowed to.”).
257. Hon. Laura Safer Espinoza, Testimony at 1533-34.
258. *Id.* at 1566-67.
259. Hon. Michael Rankin, Testimony at 2772.
260. *See generally* Howard Finkelstein, Testimony at 381-82 (discussing caseloads for public defenders).
261. *See* Caseload Concerns, *infra*.
262. Paul DeWolfe, Testimony at 2295.
263. Hon. Laura Safer Espinoza, Testimony at 1567.
264. Tamar M. Meekins, “*Specialized Justice*”: *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 9 (2006).
265. Jean Koh Peters, *Concrete Strategies for Managing Ethically-Based Conflicts Between Children’s Lawyers and Consulting Social Workers Who Serve the Same Client*, 1 KY. CHILD. RTS. J. 15, 18 (1991).
266. *Id.*
267. Tamar Ezer, *Delivery of Legal Services to Children in the Boston Area*, 8 U.C. DAVIS J. JUV. L. & POL’Y 95, 147 (2004).
268. *Id.*
269. Donald H. Stone, *Giving a Voice to the Silent Mentally Ill Client: An Empirical Study of the Role of Counsel in the Civil Commitment Hearing*, 70 UMKC L.R. 603, 617-18 (2002).
270. Michael L. Perlin, *et al.*, *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?*, 1 PSYCHOL. PUB. POL’Y & L. 80, 117 (1995).
271. Paul DeWolfe, Testimony at 2230 (explaining that counsel’s advocacy in staffings must be for “the stated interest of the client, despite pressure to be a team player concerned with the best interests of the client”).
272. Martin Guggenheim, *The Right to Be Represented but Not Heard: Reflections on Legal Representations for Children*, 59 N.Y.U. L. REV. 76, 81 (1984).
273. Questionnaire response 352, question 8.
274. Meekins, *supra* note 264, at 38.
275. Questionnaire response 361, question 8.
276. *See generally* Hon. John Creuzot, Testimony at 2018.
277. *See generally* Hon. Elisabeth Earle, Testimony at 2140 (observing that counsel “has usually either talked to the participants or is going to when they get there”).
278. Gerianne Abriano, Testimony at 1102.
279. *Id.*
280. Ben Kempinen, Testimony at 1612.
281. *Id.*
282. Sandy Lonergen, Testimony at 451.
283. Judge Judy H. Kluger, Panelist, *The Impact of Problem Solving on the Lawyer’s Role and Ethics*, 29 FORDHAM URB. L.J. 1892, 1893 (2002) (recounting situations where “prosecutors congratulat[e] defendants who were doing well and defense attorneys agree that maybe a few nights in jail would be just the thing to make sure that their client stays clean”).
284. *See generally* MODEL RULES OF PROF’L CONDUCT (2007) (Preamble).
285. 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, 71 (2000-01).
286. Jeff Thoma, Testimony at 178.

287. *Id.*
288. *Id.* at 178-79.
289. MODEL RULES OF PROF'L CONDUCT R. 1.2 (2007).
290. *See* MODEL RULES OF PROF'L CONDUCT (2007) (Preamble and Scope).
291. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2007). The rule also includes other limited circumstances that do not include drug court proceedings.
292. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2007).
293. As noted above, sometimes prosecutors argue for no jail time when the defense member of the team argues for jail. *See, e.g.,* Gerianne Abriano, Testimony at 1102.
294. *See* page 16; BUREAU OF JUSTICE ASSISTANCE, *DEFINING DRUG COURTS: THE KEY COMPONENTS* 3 (2004).
295. A lawyer from Kentucky explained,
- If I get someone in Drug Court, they are on their own in all further proceedings and I am not allowed to attend the Drug Court sessions that involve my client. They have no advocate to speak for them against whatever the Drug Court Committee decides with regard to their case. And, if they are tossed from Drug Court because of too many problems or violations, that is when I get notice to re-appear for sentencing. I will have no idea what has happened and will be in the dark and unable to argue effectively against imprisonment.
- Questionnaire response 79, question 8. As a lawyer from Florida put it, "we are not invited as attorneys to participate. Once the client enrolls, I am out of the case." Questionnaire response 260, question 10.
296. Hora & Stalcup, *supra* note 37, at 795.
297. Hon. Laura Safer Espinoza, Testimony at 1567.
298. Hon. Jeffrey Rosinek, Testimony at 404.
299. Peter F. Rose, Testimony at 2288. Hon. Carey Hyatt, Testimony at 632 (observing that retained counsel appear in court "kind of like, oh, my God, what is this?" Public defenders must then do "a little tutorial to the private bar right there in court.").
300. *See* page 16; BUREAU OF JUSTICE ASSISTANCE, *DEFINING DRUG COURTS: THE KEY COMPONENTS* 3 (2004).
301. Barry Wax, Testimony at 339.
302. Candice Singer, Testimony at 2822.
303. Jose Varela, Testimony at 27-28.
304. Mary Helen McNeal, *Unbundling and Law School Clinics: Where's the Pedagogy?*, 7 CLINICAL L. REV. 341, 343 (2001).
305. Hon. Judith L. Kreeger, *To Bundle or Unbundle? That Is the Question*, 40 FAM. CT. REV. 87, 89 (2002).
306. Jeff Thoma, Testimony at 166 (observing that retained counsel are welcome in drug court but "almost never" appear); Robert Hooker, Testimony at 647 (noting that the Pima County Public Defender's Office takes over cases of private bar once a client is enrolled in drug court).
307. Hon. Kathy Foster, Testimony at 1863 ("There is a role for the private bar, just none of them care to take it very often."). As one private lawyer explained, if participants are "going to their meetings, dropping clean urine, there's really not much of a role for defense counsel. . . . If they tell me they have a dirty urine, then I go to court with them." David Markus, Testimony at 476.
308. Hon. Joel Bennett, Testimony at 2016.
309. Dee Hobbs, Testimony at 1984.
310. *Cf.* Barry Wax, Testimony at 340-41 (explaining that requiring appearances would be "tortious interference with a business relationship or something like that" but emphasizing he would not take a standard retainer for a drug court case when he merely spends a couple of hours advising a client about possible entry into drug court).
311. Hon. Fern Fisher-Brandveen & Rochelle Klempner, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 FORDHAM URB. L.J. 1107, 1115 (2002).
312. *Id.*
313. Hon. Jeffrey Rosinek, Testimony at 443-44.
314. Dan Carrion, Testimony at 628-29 (noting the court is an "open system" in which public defenders represent "whatever clients are in the court"); Robin Steinberg, Testimony at 957 (observing "the pending caseloads are growing and growing and growing. These cases simply never go away").
315. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441 at 3 (2006), *available at* http://www.abanet.org/cpr/06_441.pdf.
316. US DOJ, OFFICE OF JUSTICE PROGRAMS, *KEEPING DEFENDER WORKLOADS MANAGEABLE* 8 (2001) (quoting National Advisory Commission on Criminal Justice Standards and Goals, *Task Force on Courts* at 186 (1973)).
317. *Id.* at 11.
318. *Id.* at 11-12.
319. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441 at 6 (2006).
320. *Id.* at 4. On August 3, 2009, after the Task Force had completed this report, the ABA House of Delegates approved Recommendation 119, which adopted Eight Guidelines of Public Defense Related to Excessive Workloads. Those guidelines build upon Formal Opinion 06-441 while providing "the kind of detailed action plan . . . to which those providing public defense should adhere as they seek to comply with their professional responsibilities."
321. Norman Lefstein & Georgia Vagenas, *Restraining Excessive Defender Caseloads: The ABA Ethics Committee Requires Ac-*

tion, *THE CHAMPION*, Dec. 2006, at 12.

322. *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So.2d 1130, 1135 (Fla. 1990). More recently, a Florida appellate court reversed a trial court's order permitting a public defender's office to decline representation in all future third-degree felony cases. *State v. Public Defender, Eleventh Judicial Circuit*, No. 3D08-2272 (May 13, 2009), 2009 WL 1311014 (Fla. Dist. Ct. App. 2009).

323. *In re Order on Prosecution*, 561 So.2d at 1135.

324. *In re Order on Motions to Withdraw Filed by Tenth Circuit Public Defender*, 612 So.2d 597 (Fla. Dist. Ct. App. 1992).

325. Ben Kempinen, Testimony at 1588.

326. Some states have gone so far as to codify the noncourtroom nature of drug court. *See, e.g.*, TENN. CODE ANN. § 16-22-103(3) (West 2009) ("Any disagreements are to be resolved prior to court, and not in front of the participants.").

327. Peter F. Rose, Testimony at 2206.

328. Dickmann & Levine, *supra* note 241, at 5.

329. Austine Long, Testimony at 1296.

330. *See generally* Julia Leighton, Testimony at 2247.

331. Accompanying this rule is commentary that suggests that a lawyer "should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2007).

332. Questionnaire response 377, question 17.

333. Hon. Michael Rankin, Testimony at 2774.

334. *See* History and Evolution of Modern Drug Courts, *supra*.

335. BUREAU OF JUSTICE ASSISTANCE, *DEFINING DRUG COURTS: THE KEY COMPONENTS 3* (2004) ("For consistency and stability in the early stages of drug court operations, the judge, prosecutor, and court-appointed defense counsel should be assigned to the drug court for a sufficient period of time to build a sense of teamwork and to reinforce a nonadversarial atmosphere.").

336. Julia Leighton, Testimony at 2220.

337. Mae C. Quinn, Testimony at 2155.

338. Paul DeWolfe, Testimony at 2292-93.

339. MODEL RULES OF PROF'L CONDUCT (2007) (Preamble).

340. Sarah Mayer, Testimony at 2134. A prosecutor explained when defendants with private counsel enroll in drug court, the clients "sign a Motion to Substitute Counsel, which then goes to our contract attorney. The contract attorney is nonadversarial." Dee Hobbs, Testimony at 1960-61.

341. Liesl Nelson, Testimony at 1703.

342. San Diego Superior Court Adult Drug Court Program, Participant Contract, *available at* http://www.dcp.ncjrs.gov/dcp/dcp_adult.html#pc; Charleston County Adult Drug Court Treatment Program, Basic Understanding, Waivers, and Agreements, *available at* http://www.dcp.ncjrs.gov/dcp/dcp_adult.html#pc; Syracuse Community Treatment Court Contract, *available at* http://www.dcp.ncjrs.gov/dcp/dcp_adult.html#pc; Weld County Drug Court Participant Contract, *available at* http://www.courts.state.co.us/userfiles/File/Court_Probation/19th_Judicial_District/ADC_Participant_Contract.pdf; Williamson County DWI/Drug Court Program, *available at* <http://www.wilcogov.org/LinkClick.aspx?fileticket=zjM1VnbiMPo%3D&tabid=678&mid=2037&language=en-US>; Client Contract 22nd Judicial District of Louisiana, *available at* http://www.dcp.ncjrs.gov/dcp/dcp_adult.html#pc; Superior Court of Dawson County, State of Georgia, Drug Court Contract, *available at* http://www.dcp.ncjrs.gov/dcp/dcp_adult.html#pc; Sixteenth Judicial Circuit Drug Court Treatment Program, Drug Treatment Program Agreement of Participation, *available at* http://spa.american.edu/justice/document_center.php; Boone County Drug Court Entry Questionnaire, *available at* http://spa.american.edu/justice/document_center.php; Bernalillo County Metropolitan DWI/Drug Court General Condition of Release, *available at* http://www.dcp.ncjrs.gov/dcp/dcp_adult.html#pc; In the Superior Court of State of Washington for Yakima County, Drug Court Contract and Order Establishing Court Costs, *available at* <http://www.yakimacounty.us/superiorcourt/Forms/DrugCourt/Drug%20Court%20Program%20Contract%20Revised%20%20January%202007.pdf.pdf>; Lancaster County Court of Common Pleas Adult Probation & Parole Services, Adult Drug Court Participant Contract, *available at* <http://www.co.lancaster.pa.us/courts/lib/courts/apps/drugcourt/drugcourtparticipantcontract.pdf>; Berrin County, Drug Court Voluntary Diversion Program Sample Document, *available at* http://spa.american.edu/justice/document_center.php; Escambia County, Florida Drug Court Treatment Program Participation Agreement, *available at* http://spa.american.edu/justice/document_center.php; 17th Judicial Circuit of Florida, MDCP, *available at* http://www.17th.flcourts.org/VI-06-1-2_Misdemeanor_Drug_Court_01-26-0666.pdf; Sacramento Superior and Municipal Courts, Drug Court Contract, *available at* http://spa.american.edu/justice/document_center.php; St. Johns County Adult Treatment Program Participation Application and Disclosure, *available at* http://www.dcp.ncjrs.gov/dcp/dcp_adult.html#pc.

343. St. Johns County Adult Treatment Program Participation Application and Disclosure, *available at* http://www.dcp.ncjrs.gov/dcp/dcp_adult.html#pc.

344. San Diego Superior Court Adult Drug Court Program, Participant Contract, *available at* http://www.dcp.ncjrs.gov/dcp/dcp_adult.html#pc.

345. Syracuse Community Treatment Court Contract, *available at* http://www.dcp.ncjrs.gov/dcp/dcp_adult.html#pc.

346. Charleston County Adult Drug Court Treatment Program, Basic Understanding, Waivers, and Agreements, *available at* http://www.dcp.ncjrs.gov/dcp/dcp_adult.html#pc.

347. Hon. Jo Ann Ferdinand, Testimony at 1169.

348. Bennett Brummer, Testimony at 520.

349. Bruce Winick, Testimony at 216 (“[Y]ou should not rush these things so quickly, and you should have adequate time and resources and opportunity for the kind of counseling that we all know should occur between attorney and client. . .”).

350. Dickmann & Levine, *supra* note 241, at 7.

351. Private counsel must decide at the outset of a drug case whether they are in for the long haul or not at all. Dumping clients at the doorstep of drug court—to fend for themselves or possibly be picked up by an overburdened public defender—is not an option, whether written into an agreement or not.

352. Tim Murray, Testimony at 2603-04 (“Unfortunately, one of the aspects of drug court, undeniably, is the element of theater. It’s a big part. We didn’t realize it when we started, but the drug courts are great theater.”).

353. *Cf.* IDAHO CODE OF JUDICIAL CONDUCT Canon 3B(7) (addressing *ex parte* communications).

354. Julia Leighton, Testimony at 2306.

355. Meekins, *supra* note 264, at 52.

356. *See* page 16. State statutes that have adopted the Ten Key Components or otherwise conflict with the role of defense counsel as a zealous advocate should similarly be amended. *See, e.g.,* TENN. CODE ANN. § 16-22-103(3) (West 2009) (“Any disagreements are to be resolved prior to court, and not in front of the participants.”).

357. BUREAU OF JUSTICE ASSISTANCE, *DEFINING DRUG COURTS: THE KEY COMPONENTS 3* (2004).

358. *Id.* at 5.

359. Terrence Walton, Testimony at 2399.

360. Berman & Feinblatt, *supra* note 170, at 12-13.

361. Hon. Giselle Pollack, Testimony at 284 (observing it was “[v]ery important that the defense attorney and the state attorney [were] invited to all the planning meetings when you’re planning this court”).

362. *See* pages 27 and 48.

363. Tim Jeffries, Testimony at 2174; Hon. William G. Meyer, Testimony at 590.

364. Specialized training is especially important in the area of immigration consequences. *See, e.g.,* Manny Vargas, Testimony at 2925-26. A number of resources are available as well. <http://www.immigrantdefenseproject.org/webPages/crimJustice.htm> (representing immigrant defendants in New York). A national manual will soon be available through the Defending Immigrants Partnership. Manny Vargas, Testimony at 2937.

365. STANDARDS FOR CRIMINAL JUSTICE PROVIDING DEFENSE SERVICES 5-1.1 (1992).

366. Scott Wallace & David Carroll, *The Implementation and Impact of Indigent Defense Standards*, 31 S.U.L. REV. 245, 263 (2004).

367. Overturning a conviction on ineffective representation grounds, a federal court illustrated the serious issues that arise from the lack of an attorney-client relationship with horizontal representation:

[P]etitioner was assigned Legal Aid counsel and an attorney named Richter, whom he never saw again, spoke to him hurriedly on that occasion. Petitioner was remanded then, and has been locked up ever since.

From the morning of October 18 until December 15, no lawyer came to speak to petitioner about his plight. He was indicted on November 1. . . . Thereafter, he came to court several times to hear that his case was being postponed, evidently ‘represented’ for these purposes by a series of Legal Aid attorneys, but never having an opportunity to consult with any of them.

On March 11, 1968, a Legal Aid attorney, whose name we do not know, handled a calendar call of petitioner’s case and told him that a new staff attorney, William Harrison, had been assigned to represent him. According to the pertinent court record, petitioner’s case was marked ‘ready’ for trial at the time of that March 11 call, but neither Mr. Harrison nor anyone else even supposedly knowledgeable was present to handle the matter, and another of many adjournments was ordered.

Still unaware of what, if anything, was being done for him, petitioner drafted a paper for move of relief [sic] of the Legal Aid Society and assignment of different counsel. He wrote: ‘I have been locked up for five months and each time I come back to court I have another lawyer handling my case.’ At the cursory oral hearing of his motion on March 22, 1968, asked why he was dissatisfied, petitioner said: ‘It seems to me that they are not interested at all.’

Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L. Q. 625, 677-78 (1986) (quoting *United States ex rel. Thomas v. Zelker*, 332 F. Supp. 595, 596-98 (S.D.N.Y. 1971)).

368. Paul S. Petterson, *Indigent Defense*, CHAMPION, July 1997, at 35.

369. Klein, *supra* note 367, at 678. Questionnaire response 352, question 8 (“The right to counsel is seriously undermined when the court attempts to have just one defense attorney of the court’s choosing assigned to all drug court cases.”).

370. Lisa Schreibersdorf, Testimony at 964, 965.

371. *See generally* Hon. Larry Gist, Testimony at 1898.

372. Howard Finkelstein, Testimony at 366; *see also* Hon. Judy Harris Kluger, Testimony at 871 (“Problem-solving courts shouldn’t be the assignment of the least experienced lawyers; it should be an assignment for the best.”).

373. Howard Finkelstein, Testimony at 366.

374. Douglas B. Marlowe, Testimony at 2466.

375. Howard Finkelstein, Testimony at 366; Erica Bartlett, Testimony at 1441.
376. The Constitution Project, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* (2009), available at <http://tcpjusticedenied.org/>.
377. Hon. Michael Rankin, Testimony at 2793-94 (noting that drug court team staffing meetings are not used in the District of Columbia).
378. Douglas B. Marlowe, Testimony at 2428.
379. Hon. William Meyer, Testimony at 592.
380. *Id.*
381. The Task Force is unaware of programs that allow defendants to attend staffing meetings, much less studies of the efficacy of such an approach.
382. Jeff Thoma, Testimony at 172.
383. Questionnaire response 332, question 10. As a Texas public defender explained, "some decisions (like sanctions or promotions) are based on the staff members' feelings and speculations, rather than a dispassionate investigation of the circumstances." Questionnaire response 432, question 8. Moreover, "when the staff members are discussing cases, sometimes they 'pile up' the worst speculations about the participant without considering the participant's side of the story." *Id.*
384. Ryan King, Testimony at 1719.
385. Tony Thompson, Testimony at 896.
386. *Id.*
387. O'Hear, *supra* note 217, at 483.
388. Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1505 (2000).
389. *Id.* at 1503.
390. See generally Marc Mauer & Ryan S. King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity* (2007), available at http://www.sentencingproject.org/Admin/Documents/publications/rd_stateratesofincbyraceandethnicity.pdf.
391. Gerald Uelmen, *et al.*, *Substance Abuse and Crime Prevention Act of 2000 Progress Report*, Mar. 2002, at 14, available at <http://www.prop36.org/pdf/SACPA.pdf>.
392. Robert Hooker, Testimony at 645.
393. Hon. Jeffery Rosinek, Testimony at 405.
394. Ana Yanez-Correa, Testimony at 2058 (explaining that data would have to be compiled county by county in Texas).
395. Filler & Smith, *supra* note 64, at 989.
396. Questionnaire response 95, question 15.
397. Questionnaire response 321, question 17.
398. O'Hear, *supra* note 217, at 479.
399. *Id.*
400. Josh Bowers, Testimony at 2734.
401. O'Hear, *supra* note 217, at 480.
402. *Id.* at 481. A recent study showed a 21.6 percent decrease in the number of African Americans incarcerated in state prisons for drug offenses between 1999 and 2005 while the number of Caucasians increased by 42.6 percent. Marc Mauer, *The Changing Racial Dynamics of the War on Drugs* at 3 (2009), available at http://sentencingproject.org/Admin/Documents/publications/dp_raceanddrugs.pdf. The disparities, however, are still significant and troubling.
403. Dee Hobbs, Testimony at 1995-96 ("Transportation is a huge issue").
404. Questionnaire response 136, question 17.
405. See generally Questionnaire response 199, question 17 ("In my rural county, unless a participant has reliable transportation, there is little chance of meeting the requirements of the court.").
406. Questionnaire response 97, question 17; *accord* Questionnaire response 206, question 17 ("Many of my poorest clients or clients without means of transportation will not be able to participate and therefore are not in drug court by personal choice and sometimes because the [j]udge will see this as a problem and will discourage the referral.").
407. Questionnaire response 160, question 17.
408. *Id.*
409. *Id.*
410. Questionnaire response 202, question 15.
411. Questionnaire response 18, question 17.
412. *Id.*
413. Questionnaire response 373, question 15.
414. Manny Vargas, Testimony at 2905, 2907; *In re Roldan-Santoyo*, 22 I. & N. Dec. 512 (Interim Decision), 1999 WL 126433 (B.I.A. 1999); *cf.* N.Y. Crim. Proc. Law § 160.60 (McKinney 2004) ("the arrest and prosecution shall be deemed a nullity and the accused shall be restored, in contemplation of law, to the status he occupied before the arrest and prosecution"). Convictions for some offenses, such as the simple possession of marijuana, do not have immigration consequences. 8 U.S.C. § 1227(a)(2)(B)(i) (2006).
415. 8 U.S.C. § 1101(a)(48)(A).
416. Manny Vargas, Testimony at 2909.

417. *Id.* at 2917.
418. Questionnaire response 428, question 8.
419. NATIONAL INSTITUTE OF JUSTICE, *THE REBIRTH OF REHABILITATION: PROMISE AND PERILS OF DRUG COURTS 5* (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/181412.pdf>.
420. Clara Hernandez, Testimony at 1934.
421. Hon. Kathryn Foster, Testimony at 1856.
422. Keith Farmer, Testimony at 1835.
423. *Id.*
424. John Chisholm, Testimony at 1736-37.
425. Hon. Kathryn Foster, Testimony at 1854.
426. Alina Das, *Immigrants and Problem-Solving Courts*, 33 CRIM. JUST. REV. 308, 321 (2008).
427. Tova Indritz, *Six Immigration-Related Ideas for the New Administration and Congress*, THE CHAMPION Jan. 2009, at 53.
428. This training can and should include immigration experts, such as those at the Immigration Defense Project. Manny Vargas, Testimony at 2921.
429. Manny Vargas, Testimony at 2926.
430. See Decriminalization: The Smart, Fair, Economical, and Effective Alternative, *supra*.
431. Peter F. Rose, Testimony at 2203.
432. See Features of Modern Drug Courts, *supra*.
433. Clara Hernandez, Testimony at 1934; Hon. Jeffrey Rosinek, Testimony at 427 (discussing a participant who remained four and a half years).
434. Leonard Noisette, Testimony at 952 (explaining it is best to “get your client out of the system as fast as you humanly can because no good will come from it”).
435. Robin Steinberg, Testimony at 957.
436. Leonard Noisette, Testimony at 944-45.
437. Tony Thompson, Testimony at 900.
438. Josh Bowers, Testimony at 2700. See also Jonathan Simon, GOVERNING THROUGH CRIME (Oxford Press 2007).
439. Josh Bowers, Testimony at 2698.
440. Robert Hooker, Testimony at 640. See also David Gonzalez, Testimony at 1930-31; Jeanette Kinard, Testimony at 1931.
441. Hon. Laura Safer Espinoza, Testimony at 1546.
442. *Id.* at 1545; Clara Hernandez, Testimony at 1932.
443. Candice Singer, Testimony at 2842.
444. The Pew Center on the States, *One in 31: The Long Reach of American Corrections* at 1 (2009), available at http://www.pew-centeronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_2-27-09.pdf.
445. *Id.* at 2 (explaining that supervising an individual on probation costs only a few dollars per day while incarceration costs approximately \$79 each day).
446. The White House, *Civil Rights*, available at http://www.whitehouse.gov/agenda/civil_rights.
447. Douglas Marlowe, Testimony, at 2966 (observing that 60 or 70 percent of first-time offenders never re-offend and that the National Association of Drug Court Professionals “didn’t tell Obama, ‘We need more drug courts for first time offenders’”).
448. Peter Banys, Testimony at 70.
449. *Id.* at 72.
450. Tim Murray, Testimony at 2603.
451. *Id.* at 2616.
452. Hon. Lisa Stark, Testimony at 1760.
453. Tim Murray, Testimony at 2616.
454. Douglas B. Marlowe, Testimony at 2421; Howard Finkelstein, Testimony at 396-97 (“It’s a stupid court. . . . It’s like eight months, 10 months. . . . It’s a waste of resources.”).
455. See generally DeMatteo, *supra* note 20, at 123; Marlowe, *supra* note 20, at 4.
456. DeMatteo, *supra* note 20, at 123.
457. Patrick McGee, Testimony at 2591.
458. TENN. CODE ANN. § 40-15-105(a)(1)(B)(i)(a)-(b) (West 2009). Diversion rests in the discretion of the prosecutor, but any denial must be explained in writing focusing on delineated factors such as the defendant’s criminal record, social history, and amenability to correction. A denial may be appealed to the trial court and then the appellate courts. See, e.g., *State v. Curry*, 988 S.W.2d 153 (Tenn. 1999) (affirming the trial court’s conclusion that diversion had been improperly denied).
459. Spurgeon Kennedy, Testimony at 2397.
460. *Id.*
461. John Chisholm, Testimony at 1730.
462. Craig Mastantuono, Testimony at 1634.
463. Dawn Rablin, Testimony at 1639.
464. *Id.* at 1649.

465. *Id.* at 1640.
466. *Id.* at 1643.
467. Barbara Due, Testimony at 1646.
468. *Id.* at 1645.
469. Robin Dorman, Testimony at 1647 (“There are some exceptions. It is not a hard-and-fast rule.”).
470. Craig Mastantuono, Testimony at 1636.
471. Hon. Carl Ashley, Testimony at 1622-23; Craig Mastantuono, Testimony at 1636.
472. Greg Mastantuono, Testimony at 1655.
473. Dawn Rablin, Testimony at 1658.
474. Craig Mastantuono, Testimony at 1630.
475. John Chisholm, Testimony at 1736-37.
476. *See, e.g.*, Hon. John Bozza, Testimony at 2323.
477. Dan Abrahamson, Testimony at 100.
478. Hon. Larry Gist, Testimony at 1885, 1889-90.
479. N.Y. STATE COMM’N, *supra* note 98, at 93.
480. *Id.*
481. *See, e.g.*, Hon. Louis J. Presenza, Testimony at 1465.
482. Keith Farmer, Testimony at 1828; Ben Kempinen, Testimony at 1604.
483. *See generally* Hoffman, *supra* note 388, at 1509.
484. Richard Baron, Testimony at 481, 487 (“I’ve had clients that really were at the wrong place, wrong time, got busted for possession, and they weren’t drug addicts, yet they have to go through the entire system, urine, go to meetings, and it’s unfortunate that’s the way it is.”). As one public defender aptly explained, “Nobody has ever done that interview and said, ‘You don’t need our services. Go and be well.’ Everybody’s got a problem.” Howard Finkelstein, Testimony at 396.
485. Hoffman, *supra* note 388, at 1471.
486. Hon. Laura Safer Espinoza, Testimony at 1547; *see also* Bowers, *supra* note 74, at 797-98 (discussing the “Dealer’s Game” in which “prosecutors and court personnel in New York City did almost nothing to ensure that treatment offers went to the addicted”).
487. *See, e.g.*, Laurie Ekstrand, Testimony at 2407; Mae Quinn, Testimony at 2164 (“We never hear from the defendants who failed out. We never have gotten data collected from them to say, hey, what was told to you by your lawyer, what were you thinking about when you went into this court, and how has it affected you now in terms of your desire to stay clean . . .”).
488. Tim Murray, Testimony at 2602.
489. Douglas B. Marlowe, Testimony at 2504.
490. Steven Belenko, *Research on Drug Courts: A Critical Review 2001 Update* at 53 (2001), available at <http://www.drugpolicy.org/docUploads/2001drugcourts.pdf>.
491. US GAO, *supra* note 33, at 70-72 (1997).
492. *Id.*; Mae Quinn, Testimony at 2164.
493. *See* Role of Defense Counsel and Ethical Concerns, *supra*.
494. Dr. Douglas Marlowe mentioned some of these and other topics in an e-mail to the Task Force on February 3, 2009. The e-mail is on file with NACDL.
495. Howard Finkelstein, Testimony at 357, 360; Hon. Ginger Lerner-Wren, Testimony at 240, 242.
496. Judge Ginger Lerner-Wren, *Broward’s Mental Health Court: An Innovative Approach to the Mentally Disabled in the Criminal Justice System (2000)*, available at http://www.ncsconline.org/WC/Publications/KIS_ProSol_Trends99-00_FlaMentalPub.pdf.
497. *Id.*
498. Andrea M. Odegaard, *Therapeutic Jurisprudence: The Impact of Mental Health Courts on the Criminal Justice System*, 83 N.D. L. REV. 225, 237 (2007).
499. Meekins, *supra* note 264, at 24-25.
500. *See, e.g.*, Hon. David Crain, Testimony at 2075.
501. *Id.* at 2076-77.
502. *Mental Health Courts and the Trend Toward a Rehabilitative Justice System*, 121 HARV. L. REV. 1168, 1171 (2008).
503. *Id.* at 1171-72.
504. Hon. Ginger Lerner-Wren, Testimony at 251.
505. Lisa Schreibersdorf, Testimony at 963.
506. *See, e.g.*, Jeanette Kinard, Testimony at 1903, 1937; Hon. Kristin Wade, Testimony at 2088.
507. Stacey M. Faraci, *Slip Slidin’ Away? Will Our Nation’s Mental Health Court Experiment Diminish the Rights of the Mentally Ill?*, 22 QUINNIPAC L. REV. 811, 828-29 (2004); US DOJ, EMERGING JUDICIAL STRATEGIES FOR THE MENTALLY ILL IN THE CRIMINAL CASELOAD viii (2000).
508. *Mental Health Courts*, *supra* note 502, at 1171. For example, the mental health court in Pima County includes meetings with the defendant, “possibly defendant’s family members, the treatment providers, the probation officer, and a Public Defender.” Hon. Nanette Warner, Testimony at 770. It appears a staffing meeting without the defendant sometimes occurs prior to court proceedings. *Id.* at 805 (“[T]he attorneys participate, both of them, the providers, and sometimes even go into court and ask the probationer about it, but most of the time

we make the decision . . .”).

509. Howard Finkelstein, Testimony at 363.

510. Hon. Kristin Wade, Testimony at 2089.

511. Nina Carlow, Testimony at 1120. The potential sentence on the charge in some cases has been as high as 20 years to life. Nina Carlow, Testimony at 1121.

512. Hon. Nanette Warner, Testimony at 764.

513. Hon. Michael Mery, Testimony at 2117.

514. Hon. Nanette Warner, Testimony at 765.

515. Barry Wax, Testimony at 318.

516. Jeanette Kinard, Testimony at 1904.

517. Jason Steans, Testimony at 1964.

518. Odegaard, *supra* note 498, at 250-51.

519. *Id.*

520. Gregory L. Acquaviva, *Mental Health Courts: No Longer Experimental*, 36 SETON HALL L. REV. 971, 990-91 (2006).

521. Hon. Ginger Lerner-Wren, Testimony at 254, 256.

522. *Id.* at 245. This does not always result in a dismissal, however, which is a separate issue that requires prosecutorial approval. Hon. Ginger Lerner-Wren, Testimony at 263-64; Howard Finkelstein, Testimony at 372 (“The state attorney is really the one who gets to choose.”).

523. Hon. Kristin Wade, Testimony at 2089.

524. Tammy Wray, Testimony at 729.

525. *Id.* at 730.

526. Hon. Michael Mery, Testimony at 2119.

527. Howard Finkelstein, Testimony at 360.

528. Bruce Winick, Testimony at 222 (observing police should be trained “not to arrest these people. They do not belong in the criminal justice system”); Doug Brawley, Testimony at 369 (observing “what we need most is people not even entering into the criminal justice system”).

529. In Memphis, the “Crisis Intervention Team (CIT) program is a community partnership working with mental health consumers and family members.” Its self-described “goal is to set a standard of excellence for our officers with respect to treatment of individuals with mental illness.” *available at* <http://www.cityofmemphis.org/framework.aspx?page=302>.

530. Barry Wax, Testimony at 318.

531. Ira Burnim, Testimony at 1428.

532. Hon. Ginger Lerner-Wren, Testimony at 240.

533. Howard Finkelstein, Testimony at 360.

534. Jeanette Kinard, Testimony at 1941.

535. *Id.* at 1941-42.

536. *See, e.g.*, Hon. Ginger Lerner-Wren, Testimony at 250-51.

537. Hon. Jack Peyton, Testimony at 701 (explaining that participants in mental health court charged with a subsequent domestic violence offense no longer qualify).

538. Hon. Michael Mery, Testimony at 2083.

539. *See* Criteria and Eligibility for Admission, *supra*.

540. Faraci, *supra* note 507, at 852-53.

541. *Mental Health Courts*, *supra* note 502, at 1171.

542. US DOJ, *supra* note 507, at xi.

543. Odegaard, *supra* note 498, at 253.

544. US DOJ, *supra*, note 507, at xi.

545. Howard Finkelstein, Testimony at 370.

546. *Id.* at 372.

547. Robert Lerman, Testimony at 759-760 (“I don’t see that as much of a problem in the mental health court as I do in drug court. That’s where, at least in our drug court, it tends to slip. . . . [W]e’re part of a team, and then they start to forget, that role, of the attorneys . . .”).

548. Jeanette Kinard, Testimony at 1904.

Appendix available at www.nacdl.org/drugcourts



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