

Ethics and Legal Issues for Supervision, Treatment, and Other Professionals



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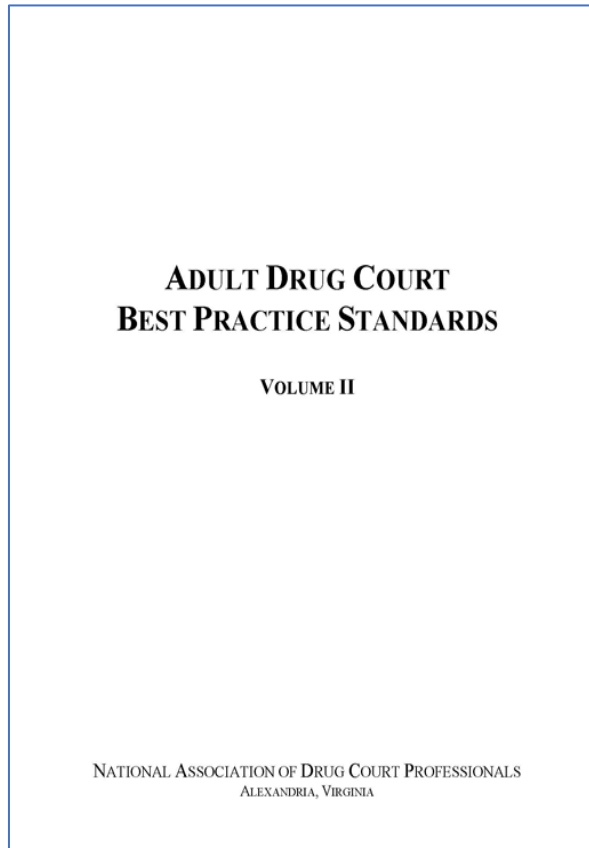


About
Us

A large, dark blue graphic of an upward-pointing arrow, composed of several geometric shapes, positioned to the right of the text 'About Us'.



Interdisciplinary Education



- Treatment providers must understand criminal justice issues
- Criminal justice staff must understand treatment issues



Foundation and Framework

Rules and Roles



Rules – Federal and State



Federal

- Constitution
- American Disabilities Act
- HIPAA
- 42 CFR Part 2

State

- Constitution
- Statutes
- Court Rules
- Case Law
- Probation Policies
- Court Policies

A Practitioner's Guide to Constitutional and Legal Issues in Adult Drug Courts

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Register

Conference Details

Specialized Docket Guidance

Response for Ohio Courts on Opioid and Other Drug Overdoses (2022)

Racial and Ethnic Disparities Guidance for Specialized Dockets (2021)

[Constitutional Rights of Participants Guidance](#) (March 2021)

Substance Monitoring Guidance (March 2021)

Principles for the Use of Medication Assisted Treatment (MAT) in Drug Courts (March 2021)

Adult Drug Court Guidance (March 2021)

Core Components of Domestic Violence Courts: A National Perspective for Ohio Courts (March 2021)

Family Dependency Treatment Court Guidance (March 2021)

Human Trafficking Court Guidance (March 2021)

Juvenile Drug Treatment Court Guidance (March 2021)

Mental Health Court Guidance (March 2021)

Domestic Violence Drug Court Guiding Document (March 2021)

OVI Court Guidance (March 2021)

Reentry Drug Court (March 2021)

Veterans Treatment Court (March 2021)

Specialized Dockets Data Collection

The Specialized Dockets

Networking And Committees

Events

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CONSTITUTIONALITY

First Amendment – Alcoholics Anonymous



WARNING

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

CONSTITUTIONALITY

First Amendment – Alcoholics Anonymous



IT DOESN'T MATTER:

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

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

CONSTITUTIONALITY

First Amendment – Alcoholics Anonymous



Recommendations:

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

Medications for Addiction Treatment



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

2022 DOJ Actions



- [Justice Department Finds that Pennsylvania Courts Discriminated Against People with Opioid Use Disorder](#)
- “Individuals with Opioid Use Disorder are protected by the ADA but too often face discrimination rooted in stereotypes and myths rather than in science. This is exactly the sort of discrimination the ADA was designed to prevent,” said Assistant Attorney General Kristen Clarke of the Justice Department’s Civil Rights Division. “Ensuring that court-involved individuals with Opioid Use Disorder have access to the medications they need is critical to support recovery efforts and to break the cycles of opioid addiction that have harmed families and communities across our country. Ensuring that courts are employing science-driven and data-informed approaches to this crisis is an important priority for the Civil Rights Division.”

2022 DOJ Actions



- [U.S. Attorney's Office Settles Disability Discrimination Allegations with the Massachusetts Trial Court Concerning Access to Medications for Opioid Use Disorder](#)
- Under the terms of the agreement, all 25 of the Massachusetts drug courts will implement the Trial Court's new policy in which
- **only licensed prescribers or opioid treatment programs (OTP) will make decisions regarding a participant's treatment plan, including the type of medication and dosage. Treatment plans will be developed by the licensed prescriber or OTP after conducting an individualized assessment for each participant. Drug courts and their personnel will not interfere with these individualized assessments, and will not express a preference for, or mandate, one form of MOUD over another.**
- Drug courts and their personnel may only require that participants with OUD comply with the treatment recommendations of a licensed prescriber or OTP. Additionally, drug courts will ensure compliance with the policy, including implementing a new procedure for reviewing complaints about decisions related to MOUD, regardless of the source of the complaint.

Medications



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

Federal Guidance & Grant Requirements Medications for Addiction Treatment



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

NADCP Position

Medications for Addiction Treatment



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

Board Position Statement: Treatment court professionals must:

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

Legal Challenges Medications for Addiction Treatment



MAT PROHIBITIONS ARE INVALID UNDER:

- Americans with Disabilities Act (ADA)
- Rehabilitation Act of 1973
- Fourteenth Amendment due process guarantees
- Eighth Amendment cruel and unusual punishment

Rules - Ethical



- Principles of Medical Ethics of the AMA as applicable to Addiction Medicine (ASAM)
- NAADAC/NCC AP Code of Ethics
 - Peer Recovery Support Specialists
- APPA Code of Ethics for the Field of Community Corrections
- ABA – Model Code of Judicial Conduct, Model Rules of Professional Conduct, Standards for Criminal Justice



Confidentiality

The Federal Law



Confidentiality – The Federal Law



CFR 42 Part 2

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

HIPAA

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

Sharing Information



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

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

Sharing Information



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

Sharing Information – State Laws and Rules



Confidentiality of treatment information is also regulated by each state's laws.

States have unique constitutional amendments, statutes, and case law that address the privacy of treatment information, as well as the public records law and policies of the states' court systems and probation departments.

Consult with the leaders of your courts systems, probation departments, and legal community.



Ethics in Treatment Court Supervision

Community Supervision Overview



- Good Supervision Practices are Good Supervision Practices.
- You do not leave them at the door when you become part of a treatment court team

Four Types of Probation Officer



1. The punitive or law enforcement officer
 - Places society's interests above client's interest
2. The social worker officer
 - Focuses on offender treatment and rehabilitation regardless of consequences to the community
3. Passive time saver
 - Concerned about themselves
4. The combined officer
 - Combines treatment and control to seek a middle ground between client welfare and community protection

Ethic of Care



- Goal to reintegrate individuals into the community
- Recognize individual's basic rights and values, but it does not elevate them above those of society.

APPA and Code Ethics



- I will render professional service to the justice system and the community at large in effecting the social adjustment of the offender
- I will uphold the law with dignity, displaying an awareness of my responsibility to offenders while recognizing the right of the public to be safeguarded from criminal activity.
- I will strive to be objective in the performance of my duties, recognizing the inalienable right of all persons, appreciating the inherent worth of the individual and respecting those confidences which can be reposed in me.

APPA and Code Ethics, cont.



- I will conduct my personal life with decorum, neither accepting nor granting favors in connection with my office
- I will cooperate with my co-workers and related agencies and will continually strive to improve my professional competence through the seeking and sharing of knowledge and understanding.
- I will distinguish clearly, in public, between my statements and actions as an individual and as a representative of my profession

APPA and Code Ethics, cont.



- I will encourage policy, procedures and personnel practices, which will enable others to conduct themselves in accordance with the values, goals and objectives of the American Probation and Parole Association
- I recognize my office as a symbol of public faith, and I accept it as a public trust to be held as long as I am true to the ethics of the American Probation and Parole Association.
- I will constantly strive to achieve these objectives and ideas, dedicating myself to my chosen profession.

APPA and Code Ethics, cont.



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Community Supervision



- Use validated risk and need assessment tools.
- Go **BEYOND** compliance monitoring.
- Develop plans and goals based on need and responsivity factors.


Community Supervision




Community Supervision



Probation Practices In Treatment Courts

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CHANGE

**Drug Court Practitioner
Fact Sheet**

December 2016

Vol. XI, No. 4

**Tips for Transferring Probation Practices
to Drug Court Programs to Enhance
Participant and Program Outcomes**

By Kimberly A. Cobb, AFS
Research Associate, American Probation and Parole Association

At the time this fact sheet was written, Ms. Cobb was research associate for the American Probation and Parole Association (APPA). APPA is the preeminent professional organization for probation, parole, and community justice agencies. APPA is a departmental unit within the Council of State Governments (CSG), and has contracted with CSG for the purposes of providing complete staff services. The association has highly trained and educated staff with several decades of cumulative experience and knowledge of community justice services, specializing in conducting research and evaluation and providing quality training and technical assistance to probation and parole professionals on the latest evidence-based strategies and practices in the field.

Historically, professional ideologies of crime have had significant impacts on the role of probation in working with drug- and alcohol-involved individuals in the criminal and juvenile justice systems. These ideologies have ranged from the 1960s, when the "get tough on crime" movement dictated severe sentences, to the 1970s, when it was proclaimed that "nothing works," to what we have today, which is commonly referred to as the era of evidence-based practices. This dramatic evolution and fluctuation in ideologies has affected the role of probation in significant ways. The role of today's probation officer can be described as a dual one (Trotter, 1999), in that they are charged with serving as officers of the court and enforcing probationer compliance, yet they are also charged with assisting probationers on their path to behavior

change. Recent research indicates that when probation officers, in any supervision context, use a balanced approach to supervision (i.e., compliance and behavior change functions), their supervisees experience more positive outcomes (Dowden & Andrews, 2004; Faganuzzi & Gendreau, 2005; Petersilia & Turner, 1993).

Drug court programs have remained steadfast in supporting and promoting programs that are grounded in their originating ten Key Components. These components outline a core set of practices for programs to follow while also providing a measure of flexibility that allows individual drug court programs to meet the needs and/or trends of their local communities (National Association of Drug Court Professionals, 1997). Over the past decade, the National Association of Drug Court

E-Learning



Core Correctional Practices (CCP) are a set of skills for correctional practitioners that have been shown to help the therapeutic potential of those on court supervision. This module educates those working in treatment courts on the fundamentals of CCP.





Ethics in Treatment Court

The Treatment Roles

Treatment Provider Role



- Obtain and maintain consent to release information
- Utilizes appropriate mental health, substance use disorder, and other relevant assessment tools
- Manages delivery of treatment services
- Administers behavioral or cognitive-behavioral treatments that are documented in **manuals and have been demonstrated to improve outcomes**
- **Provides clinical case management** – at least one individual session per week during the first phase of the program
- Provides relapse prevention and continuing care
- Develops a continuing care plan with participants
- Shares Information with the Treatment Team

Providing Individualized Treatment



THE MOST EFFECTIVE PROGRAMS

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

NPC Research 2012

Sharing Information



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

Sharing Information



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



Ethics in Treatment Court

The Legal Roles

Judge Overview



RELATIONS WITH PARTICIPANTS

- Ex Parte Contacts

Relations With Participants



- **DO NOT** take participants to support meetings
- **DO NOT** visit participant homes
- **DO NOT** invite participants to your home to play video games
- **DO NOT** collect participant UAs

STAY IN YOUR LANE!

Ex Parte Communication



- *Ex parte* communication is information a judge receives about a pending case when both the prosecutor and defense attorney are not present. *Ex parte* communication is improper and prohibited.
- To address this rule in treatment courts, many states have enacted exceptions in their professional conduct rules to allow for *ex parte* communication:
- “A judge may initiate, permit, or consider *ex parte* communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.”

Ex Parte Communication- Judicial Rule



Ohio Rules of Judicial Conduct

Rule 2.9 (A)(6):

A Judge may initiate, receive, permit, or consider *ex parte* communication when administering a *specialized docket*, provided the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage while in the specialized docket program as a result of the *ex parte* communication.

Ex Parte Communication - Recommendations



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

The Drug Court Judicial Benchbook

THE DRUG COURT JUDICIAL BENCHBOOK



Edited by:

Douglas B. Marlowe, J.D., Ph.D.

Judge William Meyer (ret.)



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The ABA Criminal Justice Standards



- Standard 3-1.2 Functions and Duties of the Prosecutor:

(e) The prosecutor should be knowledgeable about, consider, and where appropriate develop or assist in developing alternatives to prosecution or conviction that may be applicable in individual cases or classes of cases.....

- Standard 4-1.2 Functions and Duties of Defense Counsel:

(f) Defense counsel should be knowledgeable about, consider, and where appropriate develop or assist in developing alternatives to prosecution or conviction that may be applicable in individual cases, and communicate them to the client.

The ABA Criminal Justice Standards



Standard 3-1.2 Functions and Duties of the Prosecutor:

...The prosecutor's office should be available to assist community efforts addressing problems that lead to, or result from, criminal activity or perceived flaws in the criminal justice system.

Standard 4-1.2 Functions and Duties of Defense Counsel:

...Defense counsel should be available to assist other groups in the community in addressing problems that lead to, or result from, criminal activity or perceived flaws in the criminal justice system.

The ABA Criminal Justice Standards



Standard 3-1.2 Functions and Duties of the Prosecutor:

(f) The prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system. The prosecutor should seek to reform and improve the administration of criminal justice...

Standard 4-1.2 Functions and Duties of Defense Counsel:

e) Defense counsel should seek to reform and improve the administration of criminal justice...

CONSULTANTS TO THE PROGRAM



Advocates for effective court policies and practices.

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



Oversees the treatment court's policies and operations

Defense Attorney Role



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

Defense Attorney Role As Counsel



A NONADVERSARIAL APPROACH DOES NOT MEAN:

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

Monograph Series: Critical Issues x Monograph-Critical-Issues-F_WE x

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Treatment Court Institute

MONOGRAPH:

Critical Issues for Defense Attorneys in Drug Courts

Jamie Kvistad, J.D.
Heidi Rettinghouse, J.D.
with Steve Hanson, Anne Dannerbeck Janku, and
Jennifer K. Johnson

Revised edition, April 2023

Treatment Court Institute
Alexandria, Virginia

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