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LAW SCHOOL 101 FOR TREATMENT COURT PROFESSIONALS

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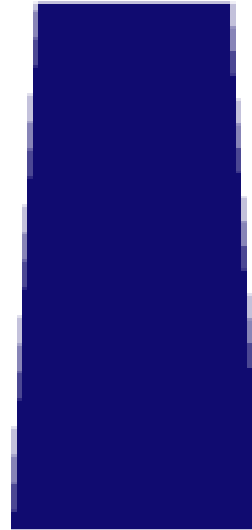
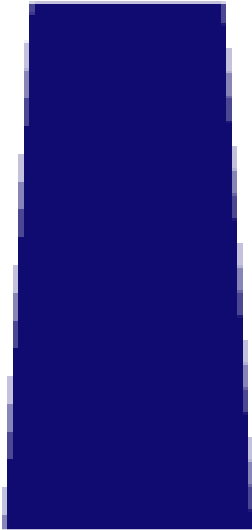
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Confidentiality

Conduct

Constitutionality



3 C's of Law School 101

CONFIDENTIALITY: 42 CFR PART 2 & HIPAA

42 CFR Part 2:

Title 42, Part 2 of the Code of Federal Regulations ensures a patient receiving substance use treatment does not face adverse consequences in criminal proceedings and civil proceedings such as those related to child custody, divorce, or employment.

HIPAA

Health **I**nsurance **P**ortability **A**ccountability **A**ct encourages electronic transmission of certain health information with its own privacy rule

CONFIDENTIALITY

Do they apply to treatment courts?

- **42 CFR Part 2:** Yes, if it is patient identifying information AND if the treatment court, its state funding agency or any tax-exempt entity or a treatment provider receives federal funds. Safest to assume it applies to the court.
- **HIPAA:** No, BUT.... treatment courts are impacted by HIPAA because it applies to treatment providers and medical providers on the treatment court team and the participant's protected health information is re-disclosed to the treatment court team

CONFIDENTIALITY

PART 2 AND HIPAA - DISCLOSURE

Use consent forms, which include:

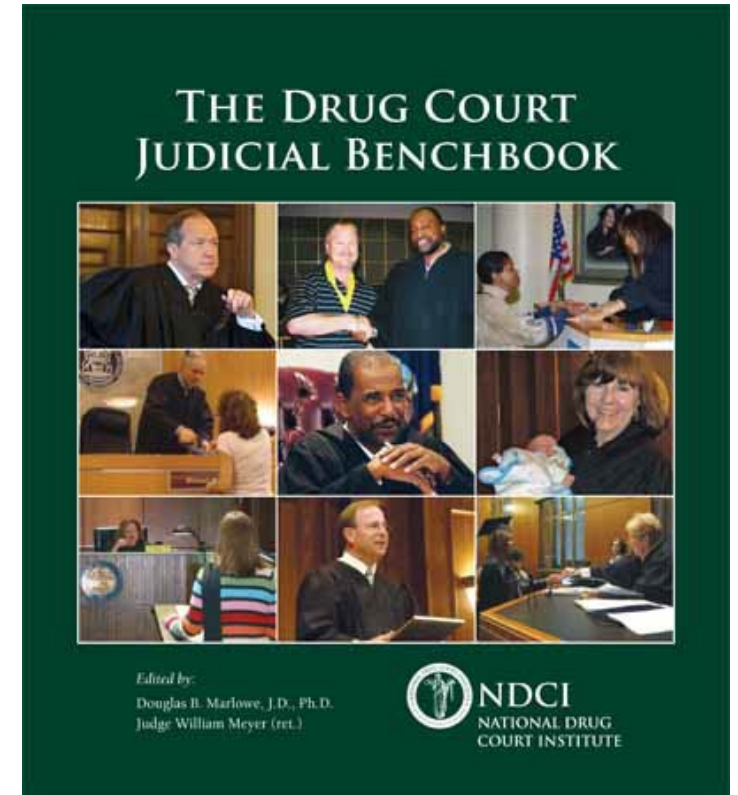
- Advisement of rights; and
- Patient name, entity, purpose, statement of revocation, expiration, signature, date, and how to report violations
- Citation to HIPAA and 42 C.F.R. Part 2

Sample Forms:

- Consent form
- Disclosure court order


Other means of disclosure are VERY LIMITED

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



CONFIDENTIALITY

OPEN COURTROOMS -RECOMMENDATIONS

- 
- **Don't discuss protected health information**
 - **Be cautious about discussing sensitive matters**
 - **Use the NADCP Judicial Benchcard**
 - **Use Motivational Interviewing**
 - **Use courtroom as a classroom**

CONFIDENTIALITY ~ STAFFING

Washington cases:

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

CONFIDENTIALITY ~ STAFFING

LAW ENFORCEMENT ISSUES

Law enforcement may not participate in staffing and then investigate and charge participants with new crimes based on confidential information they learn in staffing.

- *State v. Plouffe*, 329 P.3d 1255 (Mont. 2014) – the prosecutor cannot charge treatment court participant with a new crime based on confidential information learned in staffing.

CONFIDENTIALITY

STAFFING RECOMMENDATIONS



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

CONFIDENTIALITY

STAFFING RECOMMENDATIONS



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

CONDUCT OVERVIEW

Ex parte communication

Judicial fraternization and
impartiality

Role of defense counsel



CONDUCT ~ EX PARTE COMMUNICATION

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

Example: state professional conduct rule exception to allow for *ex parte* communication in a treatment court:

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

CONDUCT

EX PARTE COMMUNICATION RECOMMENDATIONS



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

CONDUCT ~ 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!

CONDUCT ~ RELATIONS WITH PARTICIPANTS RECOMMENDATIONS

**“But, I want to show my participants
that I care...”**

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



CONDUCT ~ 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 while ensuring that the client's constitutional rights and interests are protected
- Remind team members to stay in their lane

CONDUCT ~ DEFENSE ATTORNEY OBLIGATIONS

To competently represent a client in treatment court, a defense attorney must be familiar with core treatment court concepts:

- Treatment
- Eligibility criteria and enrollment processes
- Policies and procedures
- Incentives and sanctions
- Due process issues
- Sentencing alternatives (advocating courts to enroll participants)
- Best Practice Standards

COURTROOM BEST PRACTICES

¶ 4 During a hearing on February 24, 2017, Lemke reported that he had a sore shoulder from being on work crew. The judge told him he could “stop with the shoulder bullshit now.” Lemke admitted he had been drinking and said he needed anger management counseling. The judge said, “I think you’re a fucking addict and maybe you need treatment. I don’t think it’s got nothing to do with anger management. You think I’ll give you anger management 126 and that’s going to get you clean and sober? ... What the hell are you talking about?” The judge said, “You can’t even give me a clean date you’re so fucked up.”

7 Wash.App.2d 23

STATE of Washington, Respondent,

v.

David Wayne LEMKE, Appellant.

No. 76633-3-I

Court of Appeals of Washington,
Division 1.

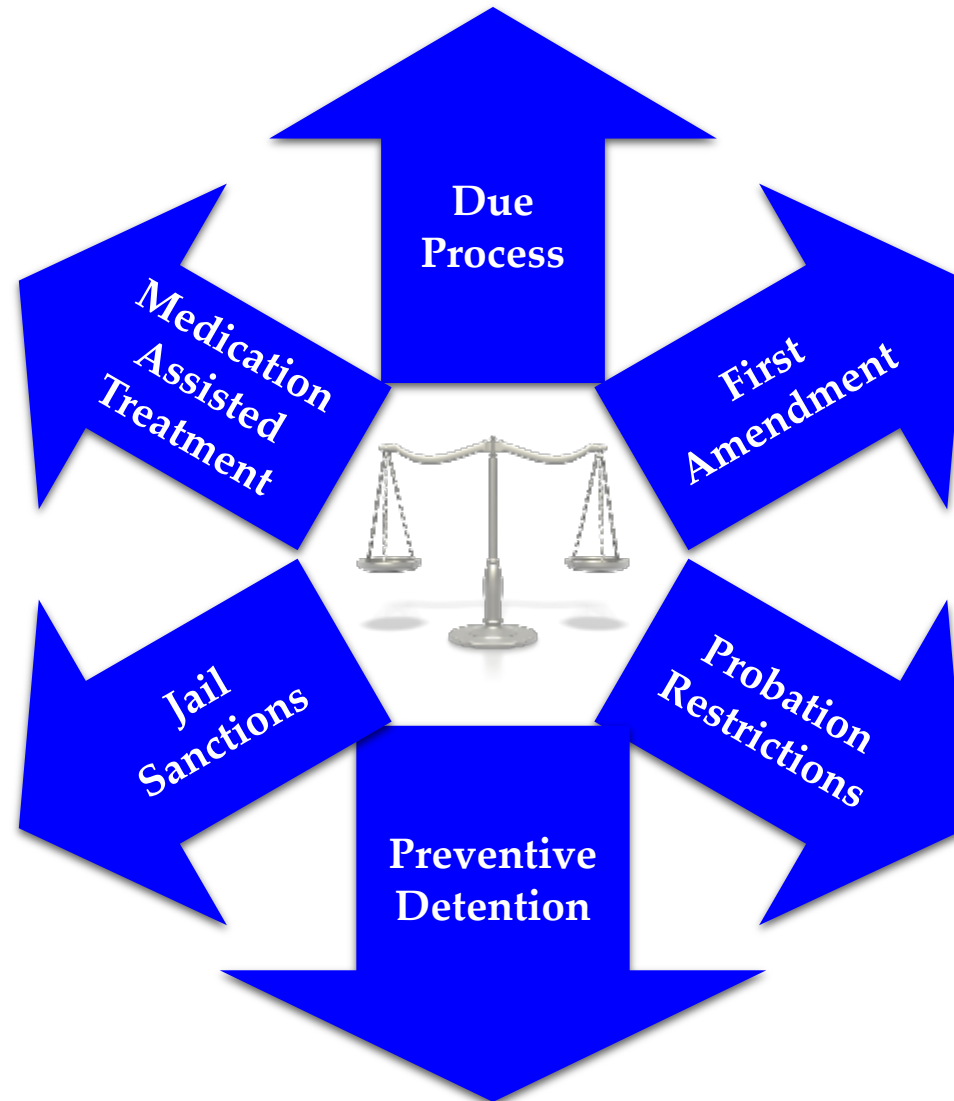
Filed December 3, 2018

Publication Ordered January 7, 2019

COURTROOM BEST PRACTICES

[7] ¶ 14 No judge wielding the power of the State in any courtroom has any good reason to call a litigant a 128“fucking addict” and “just a criminal.” The judge’s manifestation of personal animosity toward Lemke is not something we can write off as a byproduct of the informal and confrontational culture of drug court. A “fair trial in a fair tribunal is a basic requirement of due process.” In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955). The sentence must be reversed.

CONSTITUTIONALITY OVERVIEW



CONSTITUTIONALITY MEDICATION ASSISTED TREATMENT

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



NO!

CONSTITUTIONALITY

MEDICATION ASSISTED TREATMENT GRANT REQUIREMENTS

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



CONSTITUTIONALITY

MEDICATION ASSISTED TREATMENT NADCP POSITION



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

Board Position Statement: Treatment court professionals must:

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

CONSTITUTIONALITY

MEDICATION ASSISTED TREATMENT VALID PROHIBITIONS

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

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



A grayscale photograph of a courtroom interior, featuring wooden paneling, a high ceiling with a central light fixture, and rows of empty wooden benches. The image is used as a background for the text overlay.

CONSTITUTIONALITY

MEDICATION ASSISTED TREATMENT LEGAL CHALLENGES

MAT prohibitions are invalid under:

Americans with Disabilities Act (ADA)

Rehabilitation Act of 1973

Fourteenth Amendment due process guarantees

Eighth Amendment cruel and unusual punishment

TREATMENT COURTS DENYING MAT

DEPARTMENT
OF
JUSTICE

- **Dept. of Justice investigating treatment courts in violation of American Disabilities Act (ADA) by prohibiting or limiting the use of medication to treat Opioid Use Disorder**
- **Courts denying MAT creating liability for program**

CONSTITUTIONALITY

MEDICATION ASSISTED TREATMENT CASELAW

Pesce v Coppinger: “...Pesce is, therefore, likely to succeed on the merits of his ADA claim against Defendants. ...the Court concludes that, on the present record, Pesca is likely to succeed on the merits of his Eighth Amendment claim. .”

Preliminary injunction issued on basis of likelihood of deliberate indifference when prison authorities "implemented a blanket policy prohibiting the use of methadone treatment ... without any indication that they would consider [the plaintiff's] particular medical history and prescribed treatment in considering whether departure from such policy might be warranted“

Smith v. Aroostook: Court granted a preliminary injunction against a jail using a similar ADA rationale and citing Pesca, where the detention facility refused to provide the defendant MAT (buprenorphine) during the defendant’s 40 days of incarceration.

CONSTITUTIONALITY

RECOMMENDATIONS ON PRESCRIPTION MEDICATIONS



Participant Use of Prescriptions:

- Use a prescription notification form
- Use releases to obtain records
- Refer participants to providers with MOUs with the treatment court
- Control and monitor use

CONSTITUTIONALITY

FIRST AMENDMENT – ALCOHOLICS ANONYMOUS

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

WARNING

CONSTITUTIONALITY

FIRST AMENDMENT – ALCOHOLICS ANONYMOUS

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

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

Deity-based programs like Alcoholics Anonymous® require:

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

CONSTITUTIONALITY

FIRST AMENDMENT – ALCOHOLICS ANONYMOUS

IT DOESN'T MATTER:

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

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

CONSTITUTIONALITY

FIRST AMENDMENT – ALCOHOLICS ANONYMOUS

Recommendations:

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



CONSTITUTIONALITY

FOURTH AMENDMENT ~ SEARCHES

The Fourth Amendment guarantees freedom from unreasonable searches and seizures.

Probationers have greatly diminished expectations of privacy and warrantless searches are permitted.

Mandatory search waivers are constitutional and totally suspicionless searches are permitted.



CONSTITUTIONALITY

WHAT IS DUE PROCESS?

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



CONSTITUTIONALITY

DUE PROCESS ~ TERMINATION

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

Sonnier v. State,
2014 OK CR 13 (22 O.S.2011 471.7(F))



CONSTITUTIONALITY

DUE PROCESS ~ REQUIREMENTS

What fair procedures are required?

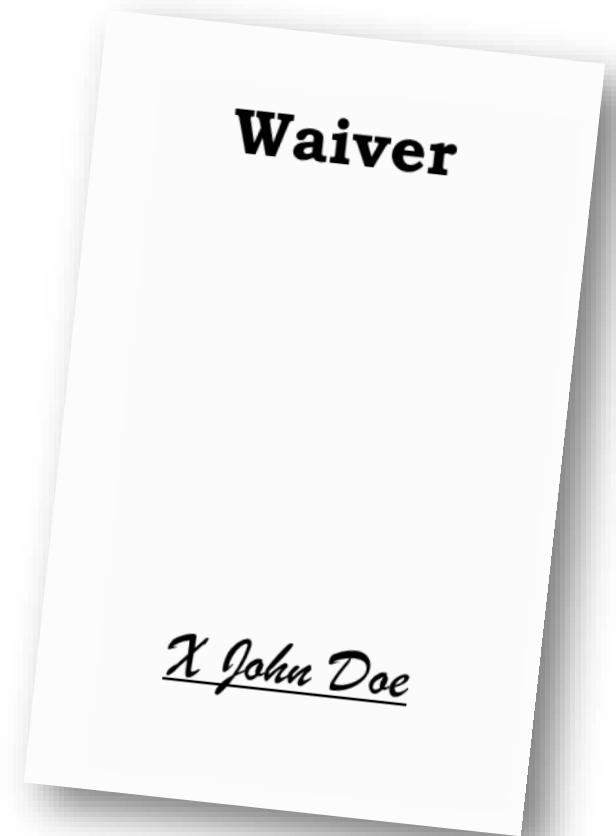
- Probable cause determination
- Written notice
- Right to appear
- Cross-examine and call witnesses
- Burden of proof
- Independent magistrate
- Reasons for decision
- Right to counsel (state-by-state determination)



CONSTITUTIONALITY

DUE PROCESS ~ WAIVER

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



CONSTITUTIONALITY

DUE PROCESS ~ JUDICIAL IMPARTIALITY

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

However, we recognize the potential for bias to exist in a situation where a judge, assigned as part of the Drug Court team, is then presented with an application to revoke a participant from Drug Court. Requiring the District Court to act as Drug Court team member, evaluator, monitor and final adjudicator in a termination proceeding could compromise the impartiality of a district court judge assigned the responsibility of administering a Drug Court participant's program.

Therefore, in the future, if an application to terminate a Drug Court participant is filed, and the defendant objects to the Drug Court team judge hearing the matter by filing a Motion to Recuse, the defendant's application for recusal should be granted and the motion to remove the defendant from the Drug Court program should be assigned to another judge for resolution. It is the defendant's responsibility, when presenting this claim of bias and his request for recusal, to provide facts sufficient to support his claim that the judge assigned to his Drug Court termination proceeding was a member of the defendant's Drug Court Team. Failure to request recusal waives the issue for appellate review.

Alexander v. State, 48 P.3d 110 (Okla. Crim. Ct. App. 2002)

CONSTITUTIONALITY

DUE PROCESS ~ JUDICIAL IMPARTIALITY

Recommendations

- Ask a participant whether he or she wants the treatment court judge to recuse from the termination hearing
- Provide an opportunity to consult with counsel
- Notify the participant of their rights at the hearing



CONSTITUTIONALITY

DUE PROCESS ~ JAIL SANCTION

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

YES!



[illegible]

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

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

CONSTITUTIONALITY

DUE PROCESS ~ JAIL SANCTIONS

Besides violating a participant's constitutional rights, YOU can be sanctioned too!

A Mississippi judge was removed from office for:

- Jailing a participant for 24 days for unspecified violations
- Keeping participants in treatment court indefinitely, some for over four years
- Refusing to conduct jail sanction hearings

“We agree that Judge Thompson’s lack of understanding and appreciation for basic legal principles ... of due process safeguards cannot be overlooked.”

– Mississippi Supreme Court

CONSTITUTIONALITY

DUE PROCESS ~ PREVENTIVE DETENTION

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

NO!



CONSTITUTIONALITY

DUE PROCESS ~ PREVENTIVE DETENTION

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

NO!

Preventive detention is **UNCONSTITUTIONAL!**

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



CONSTITUTIONALITY

DUE PROCESS ~ PREVENTIVE DETENTION

Why Is Preventive Detention Wrong?

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

CONSTITUTIONALITY

DUE PROCESS ~ PREVENTIVE DETENTION

Unlawful Preventive Detention Exposes Treatment Courts to CLASS ACTION LAWSUITS

Seventh Circuit Court of Appeals, regarding a treatment court in Indiana:

“... the court ran roughshod over the rights of participants who frequently languished in jail for weeks and even months without justification. The jail stays imposed as sanctions for noncompliance [and awaiting placement in treatment facilities] were arbitrary and issued without due process.”

CONSTITUTIONALITY

DUE PROCESS ~ PREVENTIVE DETENTION

Recommendations

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



CONSTITUTIONALITY

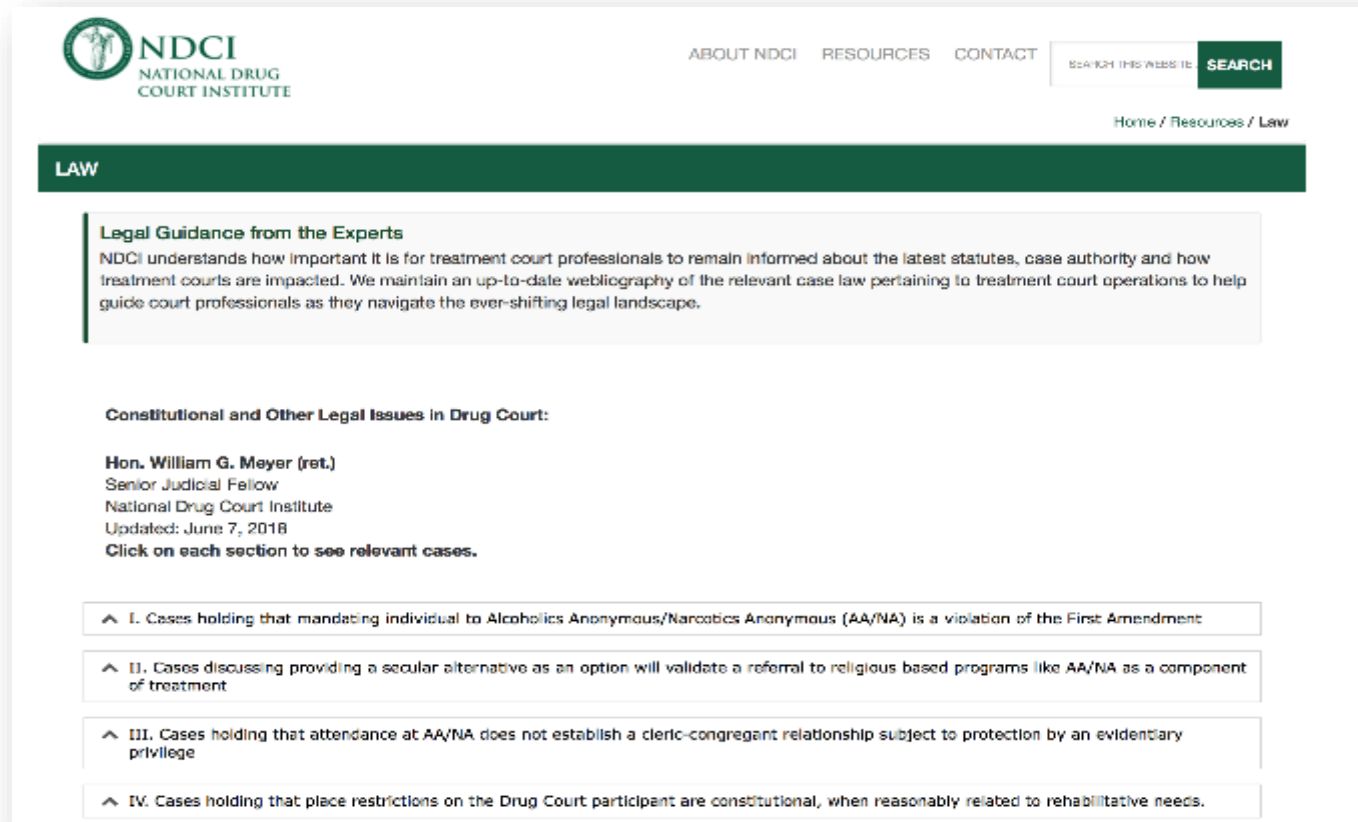
DUE PROCESS ~ PREVENTIVE DETENTION

Recommendations

- Rely on other non-compliance issues to justify the sanction (e.g. missing appointments, curfew, etc.)
- Rely on treatment provider recommendations for alternatives.
- Allow consultation with an attorney.
- Set review dates, as well as an automatic release condition when a treatment bed is available.
- Explore a civil commitment proceeding.



CONSTITUTIONALITY RESOURCES FOR TREATMENT COURTS



The screenshot shows the NDCI (National Drug Court Institute) website. The header includes the NDCI logo, navigation links for 'ABOUT NDCI', 'RESOURCES', and 'CONTACT', and a search bar. Below the header, a green bar with the word 'LAW' is visible. The main content area features a section titled 'Legal Guidance from the Experts' with a paragraph explaining the importance of staying informed about case law. Below this, a section titled 'Constitutional and Other Legal Issues in Drug Court:' lists four categories of cases, each with a brief description and a link to see relevant cases.

NDCI
NATIONAL DRUG
COURT INSTITUTE

ABOUT NDCI RESOURCES CONTACT

SEARCH THIS WEBSITE **SEARCH**

Home / Resources / Law

LAW

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

Constitutional and Other Legal Issues in Drug Court:

Hon. William G. Meyer (ret.)
Senior Judicial Fellow
National Drug Court Institute
Updated: June 7, 2018
Click on each section to see relevant cases.

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

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

