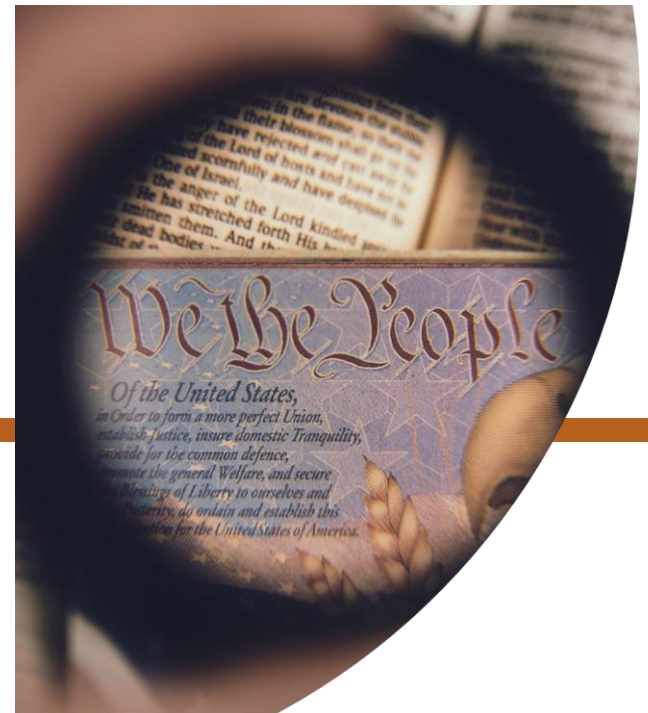
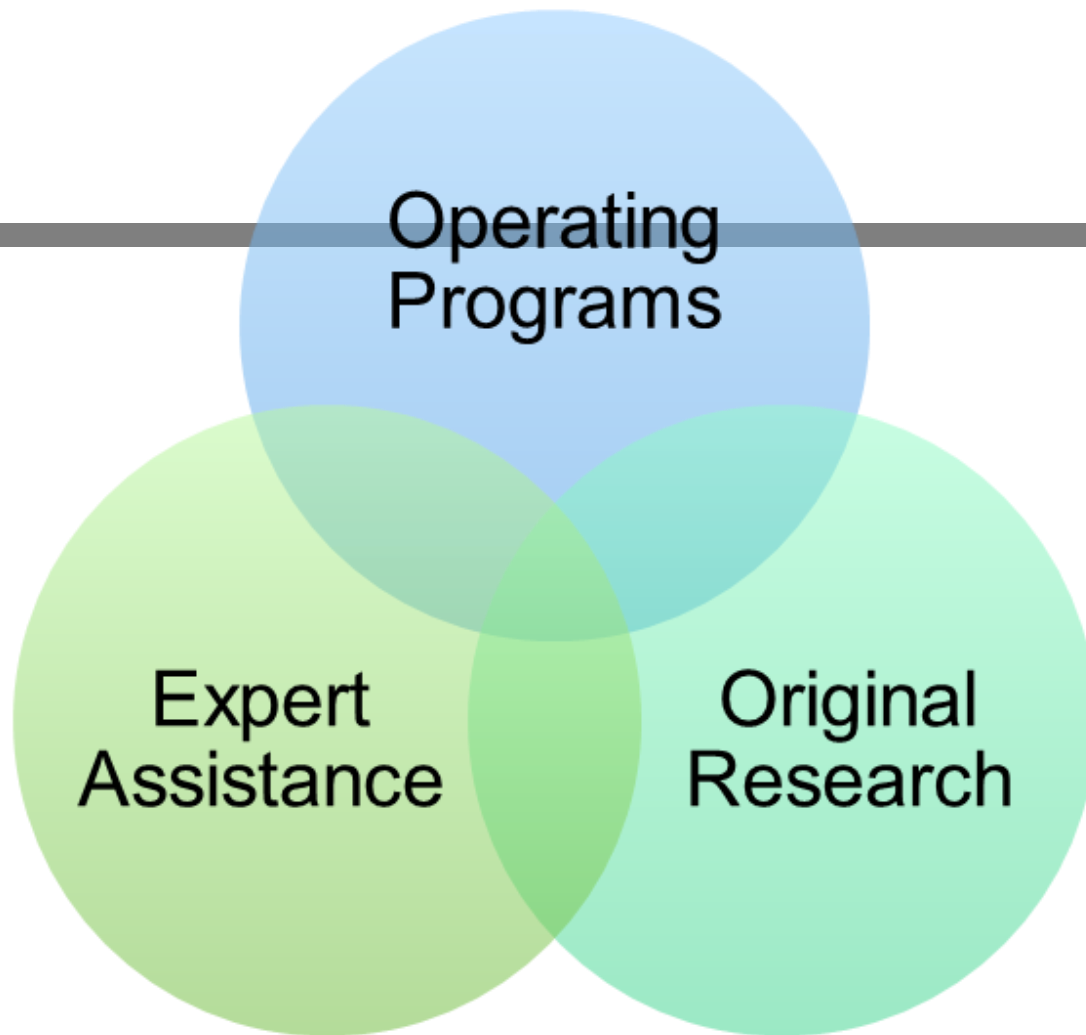


Constitutional Issues in Drug Courts

Monica Christofferson

Associate Director, Technical Assistance





Center
for
Court
Innovation

Operating Programs



Our operating projects are comprised of dozens of different court based, community based, and other programs. These programs serve thousands of New Yorkers and we learn many lessons from their work



Expanding Access to Drug Court

An Evaluation of Brooklyn's Centralized Drug Screening and Referral Initiative

Procedural Justice at the Manhattan Criminal Court: Results and Implications

The New York City Mayor's Office of Criminal Justice Strategic Plan states the city's intention to put into practice principles of fairness and procedural justice and to identify issues concerning how Yorkers' perceptions of the fairness of the justice system. This project led to a baseline effort to enhance perceptions of justice among users of the Manhattan Criminal Courthouse at 100 Centre Street.

Procedural justice theory focuses on the way in which people are treated in the justice system. It emphasizes the importance of being treated with respect and dignity, making one's voice heard, and the consistency of those decisions, ensuring just outcomes. Individuals who perceive justice in their interactions with the system are more likely to comply with the law and to seek help when needed. This report examines the results of a study conducted in the Manhattan Criminal Court to assess the extent to which procedural justice is being achieved in the justice system.

What did we do?
 The Center for Court Innovation, with support from the New York City Mayor's Office of Criminal Justice and the New York State Office of Court Administration, set out to learn if a discrete set of interventions at the Manhattan Criminal Court could improve justice-related attitudes, perceptions of procedural justice and, if so, whether these were greater for those who were Black and Latino. We conducted a series of experiments to test the interventions and understand how work processes that affect the treatment of one's rights and

rights are perceived and how these perceptions affect one's willingness to comply with the law and to seek help when needed. We also explored the extent to which these perceptions are being achieved in the justice system.

1,111 people 89% Black and Latino 74% male

Most were in contact with the justice system and were represented by public defenders. The case concerns charges including assault, petty larceny, drug possession, disorderly conduct, violation of a warrant, theft of services, etc. (pending law research and program).

Prosecutor-Led Diversion

A National Survey

By Michela Lowry and Ashmini Kerodal

A Statewide Evaluation of New York's Adult Drug Courts

Identifying Which Policies Work Best

By Amanda B. Cissner, Michael Rempel, and Alysson Walker Franklin
 Center for Court Innovation

John K. Roman and Samuel Bieler
 The Urban Institute
 Robyn Cohen and Carolyn E. Caggrett
 New York State Unified Court System

The Allegheny County Mental Health Court Evaluation

Process and Impact Findings

By Antonio B. Cissner, Ashmini Kerodal, & Karan Chis

Beyond the Algorithm

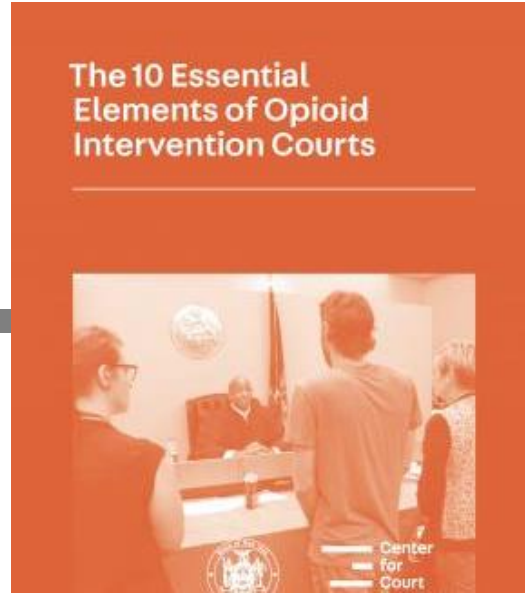
Pretrial Reform, Risk Assessment, and Racial Fairness

by Sarah Picard, Matt Watkins, Michael Rempel, and Ashmini Kerodal



Research

The Center has a prolific research department that has conducted original research to improve the criminal justice system.

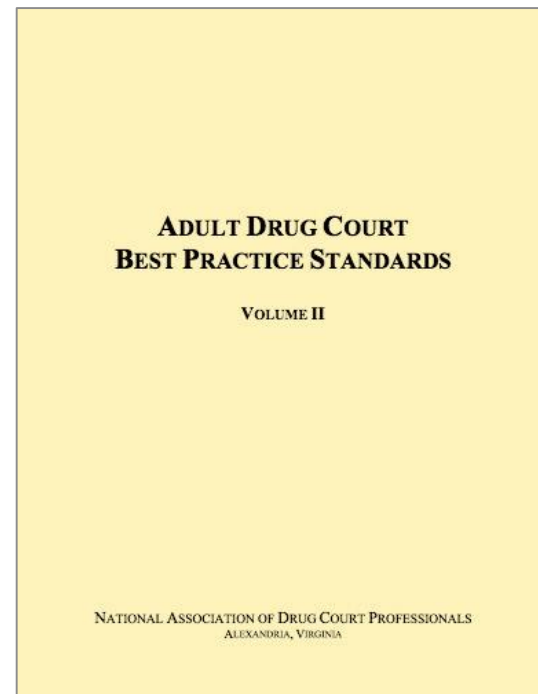
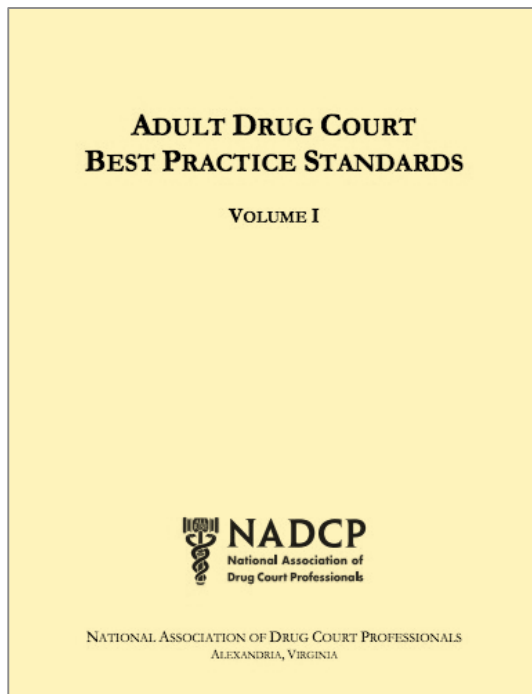


Expert Assistance

- BJA's statewide treatment court TTA provider
- Implementation and enhancement of treatment courts
- Provide TTA around the country for community courts, treatment courts, tribal justice, prosecutor-led diversion, and other problem-solving justice initiatives

Constitutional vs. Recommended

- ▶ 25+ years of research
- ▶ Adult Drug Court Best Practice Standards



1. Eligibility

Eligibility Considerations

Practical considerations

- ▶ Current charge and criminal history
- ▶ Criminogenic risk-need profile (usually HR/HN)
- ▶ Availability of appropriate treatment services
- ▶ Drug court's overall capacity

Legal considerations

- ▶ Equal protection

Equal Protection

- ▶ 14th Amendment EP clause: requires states to treat similarly situated persons in like manner.
- ▶ Courts use three tests:
 - Strict scrutiny: used when there's a "fundamental right" or a "suspect class" at issue (race, religion, national origin, alienage)
 - Intermediate scrutiny: used when there is a "semi-suspect" class at issue (gender)
 - Rational basis: all other cases

Is there a “fundamental right” to participate in drug court?

- ▶ No fundamental right
 - Lomont v. State, 852 N.E.2d 1002 (Ind. Ct. App. 2006)
- ▶ Likewise, drug offenders are not a suspect class
- ▶ Therefore, courts use the “rational basis” test in EQ cases re: drug court eligibility

Equal Protection

- ▶ Moreover, a jurisdiction has no obligation to open a drug court.
 - State v. Harner, 103 P.3d 738 (Wash. 2004) (decision not to create a drug court because of budgetary consideration was rational)

Exception: Burdening a Suspect Class

- ▶ If drug court eligibility policies/practices disproportionately burden a suspect class.
- ▶ Obviously, categorical exclusions of a suspect class (e.g., based on race) are not permissible.
- ▶ Issue is policies/practices that have the unintended effect of excluding a suspect class.
 - E.g., Policy excluding pregnant individuals → disparate impact on women → intermediate scrutiny

Exception: Burdening a Suspect Class

- ▶ Bottom line: look carefully to ensure that your eligibility policies/practices are not disproportionately excluding members of a suspect class

Equal Protection and Alienage

- ▶ “Alienage” refers to a person’s status as a non-citizen of the U.S.
- ▶ Alienage is a suspect class → strict scrutiny
- ▶ Therefore, a ban on non-citizens entering drug court would be impermissible.

- ▶ BUT...what about illegal aliens?
- ▶ NOT a suspect class → rational basis review

So can drug courts exclude illegal aliens?

- ▶ Yes, if there is a legitimate government purpose for excluding
- ▶ Likelihood of deportation
 - People v. Espinoza, 132 Cal. Rptr. 2d 670 (Cal. Ct. App. 2003) (upholding exclusion where the substantial likelihood of the defendant's deportation would prevent him from completing the program)

Equal Protection and Indigence

- ▶ Can a drug court exclude a person on the grounds that they cannot afford to pay fines/fees?
- ▶ Indigence is not a suspect class
- ▶ BUT, excluding a person from an alternative-to-incarceration program on the basis of inability to pay violates equal protection
 - State v. Shelton, 512 S.E.2d 568 (1998) (finding a violation of equal protection when defendant was denied home detention because he could not afford a monitor and was therefore remanded to jail).

Equal Protection and Health Conditions

- ▶ Can a drug court exclude a person on the basis of their physical or mental health condition
- ▶ Health condition is not a suspect class
- ▶ So, drug courts can exclude if there is a legitimate government purpose
 - Evans v. State, 667 S.E.2d 183 (Ga. Ct. App. 2008) (finding no equal protection violation where exclusion was based on the program's lack of resources to handle "serious mental health issues" as well as the program's lack of access to HIV-related resources).

What about the Americans With Disabilities Act?

- ▶ It is unclear whether the ADA applies.
- ▶ ADA has 3 major requirements:
 1. Physical or mental impairment (substance use disorders and emotional illness qualify)
 2. Impairment must substantially limit a major life activity (caring for oneself, manual tasks, walking, seeing, hearing, speaking, breathing, learning, working)
 3. Qualified individual (otherwise eligible for the government service being offered)

What about the Americans With Disabilities Act?

- ▶ It seems like a defendant with a substance use disorder who can't work because of their addiction would be eligible, right?
- ▶ Maybe
 - Hard to show a substantial impairment of a major life activity. E.g., *Evans v. State*, 667 S.E.2d 183 (Ga. Ct. App. 2008) (mental illness and HIV-positive status did not affect a major life activity)
 - Also, there's some suggestion that the ADA may not apply to criminal sentencing matters. *State v. Barclay*, 2017 Iowa App. LEXIS 43 (Iowa Ct. App. 2017)

Prescription Drugs

- ▶ Can a drug court exclude a person on the basis of their use of lawfully-prescribed medications (e.g., oxycodone for chronic pain)?
- ▶ Use of prescription drugs is not a suspect class
- ▶ So, drug courts can exclude if there is a legitimate government purpose.
 - People v. Webb, 2011 Cal. App. Unpub. LEXIS 1896 (2011) (upholding exclusion from drug court, in part, because of defendant's inability to focus as a result of strong pain medications).

Medical Marijuana

- ▶ Similar to prescription drug analysis.
 - People v. Beaty, 105 Cal. Rptr. 3d 76 (Cal. Ct. App. 2010) (when medical marijuana is legal, its use cannot serve as the “sole basis” for excluding defendant from drug court; however, exclusion is permitted based on related factors, such as current or past abuse of marijuana, relation between marijuana use and abuse of other substances, or interference with treatment progress could provide an adequate basis for exclusion).

Medication-Assisted Treatment

- ▶ Similar to prescription drug analysis
- ▶ Rational basis only
- ▶ BUT...
 - It's possible that a challenge based on the ADA, Rehabilitation Act, 14th Amendment, or 8th Amendment could succeed.
 - More importantly, it's bad practice to deny MAT

Medication-Assisted Treatment



*Legality of Denying Access to
Medication Assisted Treatment
In the Criminal Justice System*

2. Admission

Waiver of Rights

- ▶ Defendants traditionally have to waive several constitutional rights when pleading guilty:
 - Right to trial
 - Right to confront witnesses
 - Right against self-incrimination
 - Right to appeal

Waiver must be knowing, voluntary, and intelligent.

“It is essential that lawyers education themselves as to the availability, requirements, and appropriateness of drug court program... to ignore the need to learn about the drug court process is to ignore the evolution of the justice system” –Smith v. State

Waiver of Rights

- ▶ But there are special considerations for drug courts.
- ▶ Waiver of appeal may be limited
 - People v. Kitchens, 46 A.D.3d 577 (N.Y. App. Div. 2007) (waiver of right to appeal does not foreclose appellate review of due process claim that sentencing court failed to hold a hearing regarding the circumstances surrounding defendant's failure to complete drug treatment program)

Waiver of Rights

- ▶ No waiver of right to termination hearing
 - State v. Laplaca, 27 A.3d 719 (N.H. 2011) (rejecting waiver of the right to a hearing because it was impossible for the defendant to have knowledge of the allegations brought against him when the facts giving rise to those allegations had yet to occur)

Search Waivers

- ▶ Can drug courts require participants to submit to warrantless searches? To random searches?
- ▶ Yes, search waivers are a reasonable condition of probation and/or post-plea drug court.
 - Griffin v. Wisconsin, 483 U.S. 868 (1987) (holding search of probationer valid on the grounds that probation qualifies as a “special need” of the state and mandates a decreased expectation of privacy).
 - People v. Ramos, 101 P.3d 478 (Cal. 2004) (by accepting probation, defendant waives Fourth Amendment rights and has no reasonable expectation of traditional Fourth Amendment protection”)

3. Participation

Mandatory Drug Testing

- ▶ Can drug courts require random drug testing.
- ▶ Yes, of course, or we would all be out of business!
- ▶ Drug testing is permitted as a condition of probation/release as long as it is “reasonably related” to the case.

12-Step Programs

- ▶ Can drug courts mandate participation in Alcoholics Anonymous/Narcotics Anonymous?
- ▶ No. Why? Because of 1st Amendment's Establishment Clause
 - Kerr v. Farrey, 95 F.3d 472 (7th Cir. 1996) (holding that a prison violates the Establishment Clause by requiring attendance at Narcotics Anonymous meetings which used "God" in its treatment approach).

12-Step Programs

- ▶ Also can't condition other benefits on participation in AA/NA.
 - Griffin v. Coughlin, 673 N.E.2d 98 (N.Y. 1996) (finding a violation of the Establishment Clause where privileges such as family visitation were conditioned on prisoner's participation in a program that incorporated Alcoholics Anonymous).

What to do, then?

- ▶ Offer secular alternatives
 - ▶ O'Connor v. California, 855 F. Supp. 303 (C.D. Cal. 1994) (finding that the Establishment Clause was not violated because the DUI probationer had several choices of programs, including self-help programs that are not premised on monotheistic deity).
 - ▶ In re Garcia, 24 P.3d 1091 (Wash. Ct. App. 2001) (concluding that the Department of Corrections did not coerce participation in a religious program where non-religious classes were available to defendant).

Secular Alternatives

- ▶ LifeRing Recovery (www.lifering.org)
- ▶ Rational Recovery (www.rational.org)
- ▶ Secular Organizations for Sobriety (www.secularhumanism.org/sos)

Geographic Restrictions

- ▶ Can a drug court prohibit a person from going to certain locations?
- ▶ Yes, if the restriction is reasonably related to the participants rehabilitation needs and narrowly drawn.
- ▶ Factors:
 - Geographic size of the area
 - Whether there is a compelling need to enter the area
 - Whether supervised entry is feasible

Geographic Restrictions

▶ Examples:

- State v. Morgan, 389 So. 2d 364 (La. 1980) (prohibiting entrance into the French Quarter, noting that it is a relatively small geographic area and is known for prostitution, the defendant's charged offense).
- State v. Wright, 739 N.E.2d 1172 (Ohio Ct. App. 2000) (invalidating a probation term that prohibited entry to any place where alcohol is served or consumed; ambiguous condition; could subject him to punishment for innocent conduct such as going to the grocery store or gas station).

Association Restrictions

- ▶ Can a drug court prohibit a person from associating with specific individuals?
- ▶ Yes, if the restriction is reasonably related to the participant's rehabilitation needs and narrowly drawn.
- ▶ Must be specific.



Association Restrictions

▶ Examples:

- U.S. v. Soltero, 510 F. 3d 858 (9th Cir. 2007) (condition prohibiting defendant from associating with “any known member of any criminal street gang” is permissible; but condition prohibiting defendant from associating with any known member of “any disruptive group” was overbroad)
- U.S. v Showalter, 933 F. 2d 573 (7th Cir. 1991) (upholding condition of probation barring defendant from association with neo-Nazis and skinheads)
- U.S. v. Schiff, 876 F. 2d 272 (2d Cir. 1989) (upholding condition of special release for defendant convicted of tax evasion from associating with organizations advocating non-compliance with tax law)

Association Restrictions

- ▶ Incidental contact with prohibited associates is not enough to revoke probation.
 - Arciniega v. Freeman, 404 U.S. 4 (1971) (reversing defendant's parole revocation, which was based on his association with ex-convicts who worked at same restaurant)
 - U.S. v. Green, 618 F. 3d 120 (2nd Cir. 2010) (finding that condition only applied to association with gang members known to defendant)

Dress Restrictions

- ▶ Dress restrictions are permitted as long as they are reasonably related to the offense and to the goal of preventing future criminality.
- ▶ Must give the offender adequate notice of what kinds of dress permitted.
 - U.S. v Brown, 223 Fed. Appx. 722 (9th Cir. 2007) (restriction on clothing “which may connote affiliation or membership in” specific gangs was overly vague, failed to give adequate notice of precisely what apparel is prohibited”)

Employment Requirements

- ▶ Can a drug court require a participant to try and get a job?
- ▶ Yes.
 - U.S. v. Melton, 666 F.3d 513 (8th Cir. 2012) (finding that “a defendant’s failure to put forth a good faith effort to seek employment is a valid ground for revoking a supervised release”)
 - Garrett v. State, 680 N.E.2d 1 (Ind. Ct. App. 1997) (vacating defendant’s probation revocation because there was insufficient evidence that her failure to secure employment was due to her lack of effort)

Employment Restrictions

- ▶ Can a drug court prohibit a participant from getting certain types of jobs?
- ▶ Yes, when the restriction is reasonably related to the defendant's crime and the goals of probation.
 - Thomas v. State, 710 P.2d 1017 (Alaska Ct. App. 1985) (upholding a condition of probation that prohibited the offender from working in commercial fishing following his conviction for theft crimes that were related to his work in that industry).

Community Service Requirements

- ▶ Can a drug court require a participant to perform community service work?
- ▶ Yes, generally permitted as reasonably related to the rehabilitation of the offender.
 - U.S. v. Restor, 679 F.2d 338 (3rd Cir. 1982) (community service may serve the rehabilitative purpose of probation by helping to reinstate offenders in society, integrate them in a working environment, and inculcate a sense of social responsibility).

Community Service Requirements

- ▶ But, community service requirements can be excessive.
 - In re Ragland, 973 S.W.2d 769 (Tx Ct. App. 1998) (requiring weekly community service over the course of a year constitutes a restraint on liberty entitling probationer to pursue relief by petition for writ of habeas corpus”)

Staffing Meetings

- ▶ Staffing meetings are typically:
 - Held outside regular court sessions
 - Informal, off the record meetings
 - For the team to share information about clients
 - To prepare for formal status hearings
 - NOT for making formal findings or decisions

Staffing Meetings

- ▶ When conducted properly, normal due process rights do not apply to staffing meetings
 - Defendant is not entitled to be present
 - Defense counsel need not be present
 - Need not be open to the public or on the record

Staffing Meetings

▶ Cases:

- In re Interest of Tyler T., 781 N.W.2d 922 (Neb. 2010) (therapeutic goals of drug court make it unnecessary for every action to be a matter of record but that a hearing must be on the record “when a liberty interest is implicated”).
- State v. Sykes, 339 P.3d 972 (Wash. 2014) (drug courts are different from ordinary courts; because of their unique characteristics, staffing meetings need not be open to the public).

Ex Parte Communications

- ▶ Normally, ex parte communications are strictly forbidden.
- ▶ But the ABA and many states have made an exception for problem-solving courts.

Ex Parte Communications

- ▶ Colorado Code of Judicial Conduct: Rule 2.9
 - Comment 4: A judge may initiate, permit, or consider ex parte communications expressly authorized by law or by consent of the parties, including when serving on therapeutic or problem-solving courts such as many mental health courts, drug courts, and truancy courts. In this capacity, judges may assume a more interactive role with the parties, treatment providers, probation officers, social workers, and others.

4. Sanctions

Sanctions and Due Process

- ▶ Some cases say that sanctions can be imposed without a formal hearing and full due process protections
 - State v. Rogers, 170 P.3d 881 (Idaho 2007) (holding that intermediate sanctions do not implicate the same due process concerns as termination and approving the use of informal hearings)
 - Commonwealth v. Nicely, 326 S.W.3d 441 (Ky. 2010) (holding that “the elements of due process normally accorded a defendant at a probation revocation hearing are not followed” for a drug court sanction because “defendants who enter drug court waive those rights while in the program)

Sanctions and Due Process

▶ But others disagree

- State v. Brookman, 460 Md. 291, 190 A.3d 282 (2018)
- In re Miguel R., 63 P.3d 1065 (Ariz. Ct. App. 2003)
- Judge William Meyer: When a participant challenges allegations of noncompliance, “the court should give the participant a hearing with notice of allegations, the right to be represented by counsel, the right to testify, the right to cross-examine witnesses, and the right to call his or her own witnesses.”

--From *The Drug Court Judicial Benchbook*

5. Termination

Termination and Due Process

- ▶ Due process protections are required whenever a defendant faces the possible loss of a recognized “liberty interest”
- ▶ Freedom from jail is certainly a liberty interest
- ▶ So due process is required for drug court termination

Termination and Due Process

- ▶ What about pre-plea court models?
 - ▶ Liberty interest is not limited to incarceration
 - ▶ Meyer v. Neb., 262 U.S. 390 (1923) (noting that “liberty” is manifest not only in freedom from bodily restraint but also as the right of the individual “to enjoy those privileges long recognized...as essential to the orderly pursuit of happiness by free men.”)

Termination and Due Process

- ▶ What process is due?
 - Mathews v. Eldridge, 424 U.S. 319 (1976) (explaining that due process is flexible and calls for “such procedural protections as the particular situation demands.”)
- ▶ Not very helpful?

Termination and Due Process

▶ Let's try again...

- written notice of the alleged violations
- disclosure of evidence
- right to appear
- present witnesses and confront adverse witnesses
- neutral and detached magistrate
- written findings with reasons

Morrissey v. Brewer, 408 U.S. 471 (1972)

Termination and Due Process

- ▶ That standard may sound familiar...
 - Based on parole revocation due process standard Morrissey v. Brewer, 408 U.S. 471 (1972)
 - Extended to probation revocation Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973)
 - Held as the standard for termination from drug treatment court in several states State v. Shambley, 281 Neb. 317 (2011)
 - Also incorporated into state statute
 - N.J. Stat. Ann. § 2C:35-14f(1)-(6) (requires a finding on the record, considers the nature and seriousness of the violations, and gives special weight to treatment provider's termination recommendation).

Termination and Due Process

- ▶ What if the defendant waived a termination hearing as a condition of entering drug court?
- ▶ Waiver not valid
 - State v. Laplaca, 27 A.3d 719 (N.H. 2011) (rejecting waiver of the right to a hearing because it was impossible for the defendant to have knowledge of the allegations brought against him when the facts giving rise to those allegations had yet to occur)

Termination and Evidence Needed

▶ Preponderance of the evidence standard

- State v. Varnell, 155 P.3d 971 (Wash. Ct. App. 2007) (in drug court termination, “the burden is on the State to prove noncompliance with the agreement by a preponderance of the evidence”)

▶ Hearsay evidence permitted

- State v. Rogers, 170 P.3d 881 (Idaho 2007) (revocation process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial).
- State v. Shambley, 795 N.W.2d 884 (Neb. 2011) (hearsay evidence is admissible, but the court may not rely solely on hearsay).

Termination and Judicial Recusal

- ▶ Can the drug court judge preside over the termination/sentencing hearing?
- ▶ The case law is split, but here's the recommended approach:
 - Alexander v. State, 48 P. 3d 110 (Okla. Crim. App. 2002) (holding that “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.”)

Basis of Termination

▶ Basis of termination

- Valid penological justification

Is there a difference between termination based on unwillingness to attend treatment v. unavailability of treatment?

Basis of Termination

- ▶ If a participant is terminated from Drug Court because adequate treatment was unavailable to meet his or her clinical needs, fairness dictates the participant should receive credit for the efforts in the program and should not receive an augmented sentence or disposition for the unsuccessful termination.
 - ▶ (Bowers, 2007; Justice Policy Institute, 2011; National Association of Criminal Defense Lawyers, 2009)

Resources

▶ The Drug Court Judicial Benchbook

https://www.ndci.org/sites/default/files/nadcp/14146_NDCI_Benchbook_v6.pdf

▶ NDCI's legal resource webpage

<https://www.ndci.org/resources/law/>

▶ Legal Action Center resources (www.lac.org)

- Medication Assisted Treatment in Drug Courts
- Confidentiality and Communication

Monica Christofferson

Associate Director

National Technical Assistance

Center for Court Innovation

520 8th Ave.,

New York, NY 10018

(440) 864-6259

christoffersonm@courtinnovation.org

