

# PRACTICING LAW IN PROBLEM SOLVING COURTS

**Not quite as easy as it once was!**

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## PLAN OF ACTION!

- Confidentiality laws!
- Ethical problems for everyone!
- Recusal issues
- Due Process, Equal Protection and emerging 42 USC 1983 claims
- Emergent Medically Assisted Treatment legal issues.
- Recommended best practices.

# ETHICAL CHALLENGES

# **ETHICS IN DRUG COURT: *THORNY ISSUES***

1. *Ex Parte* Communications and Staffing
2. Judicial Fraternization/Impartiality
3. Role of the Defense Counsel

## EX PARTE COMMUNICATION

- Ex parte communication must be specifically waived or asserted (Model Code Judicial Conduct, Canon 3B(7))
  - Who is present at staffing?
  - Is it ok to attend team meetings w/out client?
  - How many levels of hearsay in staffing?
  - Are 42 CFR waivers executed for everyone present?
- 
- Brown v. State, MD Ct of Appeal 5-18-09

## ***EX PARTE STAFFING-NEW YORK***

- Permissible to have *ex parte* communications at staffing with appropriate waivers and outside of drug court
- Best practice to inform defense counsel of content and nature of communications
- NY has specific administrative orders permitting such communication

## **ABA RULE 2.9(5)**

- No ex parte communications except:

(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.

## **ABA RULE 2.9**

- Comment [4]

A judge may initiate, permit, or consider ex parte communications ...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.



# STATE JUDICIAL ETHICS AMENDMENTS

- Idaho, Maryland, Montana, Minnesota, New York, Indiana and Arkansas
- Amended their Codes to specifically address and permit *ex parte* communications in problem-solving courts including staffings...**but not Court!**
- Perhaps a better approach would be amending the Rules of Prof. Resp. for counsel requiring them to be present at staffing and progress reports
- **JUDICIAL ETHICS CHANGES DO NOT CHANGE COUNSEL ETHICAL MANDATES!**

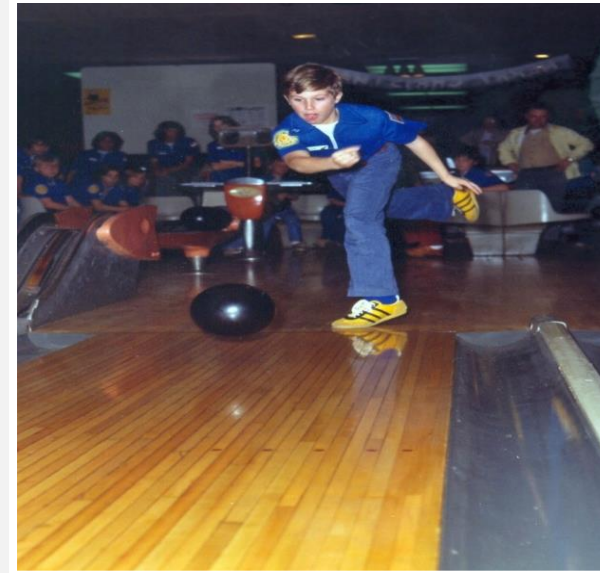
## **EX PARTE CONVERSATIONS?**

- Between participants and judges?
- Between the DA and participants?

# OUT-OF-COURT CONTACT WITH PARTICIPANTS



DTC picnic



Bowling night

Judges and DA's! Heads Up!

# THE JUDGE AND DRUG COURT PARTICIPANTS

Judge attends group activities, softball games, bowling night, holiday party, spring picnic, Disneyland trip, with drug court participants.

**Don't do anything more than a cameo appearance!**

# JUDICIAL DISCIPLINE

- *Matter of Blackman*, 591 A.2d 1339 (N.J. 1991)  
“[J]udges who attends a public or social event will be perceived as endorsing or supporting not only the event itself but also persons associated with the event.”
- *In re Jones*, 581 N.W.2d 876 (Neb. 1998)  
Canon 1 and Canon 2 violation to meet individually with probationers.

# DEFENSE COUNSEL



## DEFENSE'S DUTY

- “Duty of representation” of client
- *C.f.*, reasonable diligence and competence in ABA Model Rule 1.3; “devotion and courage” in advocacy in ABA (“Defense Function Guidelines”)
- To competently represent client in DTC must familiarize self with tx, procedures, bases for sanctions or termination, etc. (ABA Model Rule 1.1)

## **DEFENSE COUNSEL-TOUGH JOB**

- In treatment courts, defense counsel must navigate choppy waters.
  - Ethical duties, privilege issues, confidentiality issues, duty to client can conflict with what happens in Court and staffing
  - Depending on the defense counsel model, this can be VERY challenging.



## **PROSECUTORS ODD ETHICAL STUFF**

- Cannot use information from court or staffing elsewhere
- Cannot share file information for non treatment court purposes.
- Ethical challenges with ex parte contacts with Judges, participants.  
(watch those emails! )
- Monitoring what is said in staffing for evidentiary content (how much hearsay?)

## **ETHICAL RESTRICTIONS ON BOTH COUNSEL**

- As a prosecutor, I cannot:
  - Allow a defendant to suffer a due process violation.
  - Reveal the existence of a search warrant
  - Allow a Brady violation
- As a defense attorney, I cannot:
  - Allow a perpetration of a fraud upon the Court
  - Reveal information subject to privilege.

# **LAWYERS: WE OPERATE IN THREE DISTINCT SPHERES**

- Court
  - Staffing
  - Case management, problem solving, and client relations.
- 
- Each function has a separate set of skills
  - Each function still works within the Key Components and Adult Best Practices

# IN THE COURTROOM

- Protect the record
  - Remember the appeals courts!
- Protect due process
  - This is a COURT, not a program
- Enhance the relationship between the Court and the participant
- Remember the rule of minimization.
- **NO FIGHTING !**
- The Courtroom is a classroom: every word matters.

## **PRE-COURT STAFFING**

- Preparing the execution of the calendar
- Here is where counsel fight over legal issues, and learn what treatment and probation know.
- “can you live with this for two weeks?”
- Here is where the last minute adjustments happen
- Here is where the last minute details change everything.

## **PREP FOR THE STAFFING! REPORTS MATTER.**

- Work together to address legal issues up front
- Unless there is a serious legal issue of
  - Constitutional due process dimensions
  - Program integrity
  - Public safety

Counsel's job is to make the law meet the needs of the treatment team.

# BE PREPARED

- You don't have time to waste
- Settle legal matters
- Determine facts up front
- Work out responses consistent with research. All 3 responses should be worked out before Court.
- What are the three responses?

## UNDERSTAND THE OTHER ROLES

- Lawyers are there for legal reasons. Protect the record. Protect the Constitution. Motivate positively.
- DA's are there to assert public safety concerns (with probation, Court and LE)
- The people who are doing direct services are the ones who know what is going on. **Their recommendations are paramount.**



- Unless public safety or due process is compromised, follow their lead.
- If you can live with the consensus, do so.
- Fighting **does not occur** in open court.
- Making a record must happen but should happen in a manner consistent with the Court design.
- The worst possible thing? The team is wrong and in two weeks, you can fix it.

## THE BENCH

- Cannot delegate decisions
- Should be the predominant voice in the room in Court.
- Should spend a minimum of three minutes with each person...good or bad.
- Should focus on teachable moments and be clear about what is good and bad.
- focus on and build engagement with each participant
- Should engage and instill hope.

WE MAY BE ON A TEAM

- **But ethics are NEVER changed.**

# CONFIDENTIALITY

The joys of medical information.

## CONFIDENTIALITY MANDATES

- In problem solving courts, we work with treatment providers and make referral to treatment. That triggers the protections of 42 USC, and HIPAA.
- We can get waivers of confidentiality statutes. It should be the first thing we do!
- Sample waivers can be located in the Judicial Bench Book from NDCI.
- Note there has been new guidance from the feds on this issue. Consult you treatment providers. Your waivers will need to expand to include all members of your office who may appear in Court.

## CONFIDENTIALITY/PRIVACY

42 CFR Part 2 – The alcohol and substance abuse treatment confidentiality rule.

HIPAA – New federal rules covering all health related information.

## CONFIDENTIALITY LAWS & HIPAA

- This is simply a bunch of laws that can be read, understood, and waived.
- There is no REAL clarity
- In some places it conflicts with the Constitution
- Nobody was contemplating Drug Courts
- Really not the real challenge for counsel in the “big picture”.

## 42 U.S. CODE 290DD 42 CFR PART 2

- First issued 1975, revised 1987, new guidelines updated a couple of areas (2017)
- Designed to help deal with the stigma of addiction.
- Requires notification of confidentiality, consent forms, prohibition of redisclosure
- “I’m sorry I cannot acknowledge whether someone is or isn’t in our treatment program”.



## WHAT 42 CFR COVERS:

- “Any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation or research which is directly or indirectly assisted by any department or agency of the United States.”

# HIPAA

- Health Insurance Portability and Accountability Act of 1996
- 45 CFR Parts 160 and 164, Subparts A and E
- Designed to ensure maintenance of health insurance coverage when you change jobs.
- Administrative simplification – Healthcare processes becoming very complex – look to standardize information – make it easier.
- Protect confidentiality and security of patient information

## PRIVACY STANDARDS

- Places restrictions on the use and/or disclosure of “Protected Health Information” –PHI
- Effective 4/14/03
- Essentially applies “42 CFR p.2-like” requirements to all health care.

# PROTECTED HEALTH INFORMATION (PHI)

- Any health information:
  - *Oral , paper, or electronic*
- Including identifying demographic information
- Relating to:
  - Physical or mental health (treatment) of individual,
  - Provision of health care to an individual (operations)
  - Payment for provision of health care to individual

## SECURITY STANDARDS

- Security of information against non-approved access
- Electronic creation, transmission, and storage of information a significant concern – hackers
- Requirements for logging of access, automatic log offs, encryption of information sent by internet.
- Regulations took effect in 4/05

## MINIMUM NECESSARY STANDARD

- When using/disclosing PHI, only the minimum necessary information should be shared.
- The disclosure should cover only the authorized information
- Individuals, family, visitors, etc. who do not have a need to know PHI should not have access to it.

## HIPAA V. 42 CFR PART 2

- The laws cover a lot of the same material.
- Some points of difference – more specific or more recent rule usually applies.
- For the CD Treatment providers, in most cases the rules of 42 CFR Part 2 are more stringent
- In several cases HIPAA wins.

DO THESE LAWS APPLY TO PROBLEM-  
SOLVING COURT PRACTITIONERS?

HOW DO WE KNOW THEY APPLY?



## HIPAA DOESN'T APPLY TO COURTS

- Contrary to myth, HIPAA covered entities do not include the courts, court personnel, accrediting agencies like JCAHO and law enforcement personnel including police or probation officers.
- GAINS CENTER, “Dispelling the Myths...” Feb. 2007

## PERSONS WHO ARE PROTECTED AS “PATIENTS”

- A person is a “patient” if they have sought or received a treatment programs services.
- If someone fails to appear for an initial appointment, that information is protected because they have “sought” treatment.

## DEFINING THE PROGRAM

- I. A unit or office of the problem-solving court itself provide diagnosis, treatment or makes referrals to CD treatment.
  - Is a “Program” under 42 CFR Part 2.
  - Is a “Covered Entity” if it transmits PHI electronically.
  - Requires a valid multi-party consent to disclose information to the problem-solving court team.

## DEFINING THE PROGRAM

2. The program is independent of the problem-solving court.
  - Requires valid multiparty consents for re-disclosure of information to the problem-solving court team.

## GENERAL RULE OF DISCLOSURE

- “Treatment Programs may only release information or records that will directly or indirectly identify a problem-solving court participant as a substance abuser:
  - With a knowing and written consent from the participant,  
AND
  - limited exceptions

HOW DO YOU OBTAIN WRITTEN  
CONSENT FROM YOUR  
PARTICIPANTS?

# ELEMENTS OF A CONSENT

1. Name of person or organization that may make the disclosure;
2. Name or title of person (or organization) to whom disclosure may be made;
3. Participant's name;
4. Purpose of the disclosure;
5. How much and what kind of information may be disclosed;
6. Participant's signature;
7. Date on which the consent was signed;
8. Date, event, or condition upon which the consent will expire

(Consent cannot be revoked unless in a civil or juvenile court setting)

## AND UNDER HIPAA

- Must be in plain language
- Can be signed by a personal representative (then, must contain a description of the representative's authority to act on patient's behalf)
- Patients must be given copy of written form
- Programs must keep copy of form for six years from expiration date
- Program must ensure that consent complies with applicable requirements of 45 CFR section 164.508



## CONSENTS

- A proper consent can authorize all parties involved in the problem-solving court to share information necessary to monitor treatment progress and compliance.
- To be effective the consent form should be signed at the earliest possible time.
- Judge, coordinator, probation, etc., should get consent and fax it to treatment before 1<sup>st</sup> appointment.

## REQUIRING CONSENTS

- HIPAA prohibits a program from conditioning treatment on a patient signing a consent, *but*
- The judge (problem-solving court) can condition participation in the court program on the defendant signing the consent form.

# CONSENT GUIDELINES

- Criminal Justice System (CJS) consents
  - Determine whether assessment and treatment participation is an official condition that the person must meet.
  - CJS consents have special rules under 42 CFR part 2 – irrevocable until expiration.
  - HIPAA requires all consent be revocable.

## SATISFYING 42 CFR AND HIPAA

- HIPAA requires all consents to be revocable, but
- HIPAA also allows for the use of an administrative order for information disclosure. Therefore,
- Programs that provide both substance abuse and mental health treatment services can pair their 42 CFR consent with a HIPAA administrative order and/or build HIPAA language into their consent

## **OPTION I- COURT ORDER & IRREVOCABLE CONSENT**

- Use of Court Order (court or administrative body) – Satisfies HIPAA
  - “Standing order”
  - “Limited HIPAA Order”
  - Irrevocable consent – 42 CFR Part 2

## OPTION 2 – REVOCABLE CONSENTS

- “Unlikely” the individual will revoke consent if it means they will be in violation of terms of sentence.
- Saves Court work – no orders
- If revoked, programs will have to inform court that a 42 CFR Part 2 court order is needed.
- Consent needs to describe specifically how disclosed info will be used.

## USE AND REDISCLOSURE

- Under 42 CFR § 2.35, information from a CJS release may be redisclosed and used only in connection to their official duties with respect to the particular criminal proceeding.
- The information may not be used in other proceedings, for other purposes or with respect to other individuals. (42 CFR § 2.12(d)(1))

**WHAT HAPPENS IN VEGAS.....**

**WHEN CAN WE  
DISCLOSE  
INFORMATION?**



## **MANDATORY DISCLOSURE -NO CONSENT**

- State child or elder abuse laws
- A valid court order
- State laws relating to cause of death
- Duty to protect others, to warn of imminent, serious harm

# PERMITTED DISCLOSURES -NO CONSENT

- Medical emergency
- Crimes on the premises
- Crimes against staff
- Administration / qualified service programs working with treatment facility (must have business associate agreement under HIPAA—see 67 Federal Register 53264 for sample contract language—published by HHS office for Civil Rights)
- Outside auditors, central registries and researchers
- No re-disclosures unless permitted
- All disclosures must be documented

## SUBPOENAS V. COURT ORDERS

- Part 2 allows information to be released by subpoena if patient has signed consent permitting release
- If no consent, then see 42 CFR Part 2, Subpart E for procedures the court must follow, findings, and limits
- HIPAA allows information release under subpoena with assurance patient has been given notice (or reasonable efforts made to give notice) with the opportunity to object

# CAN A JUDGE SHARE TREATMENT INFORMATION IN OPEN COURT?

- The Judge may decide that sharing information about progress/difficulty in treatment is a “legitimate part of the court’s official duties and responsibilities with respect to the criminal proceedings”.
- Remember the Minimum Necessary Information standard and rule of minimization.

**CONFIDENTIALITY  
EXCEPTION: BRADY  
ISSUES !**



# **RECUSAL ISSUES**

The law is moving!

# THE DEBATE

- Drug Court Judge knows too much.
- Drug Court Judge knows what is important for sentencing.
- Referral Judge may reduce sentence creating “escape route” and undercut treatment court
- Referral Judge may not distinguish between persons referred.
- Traditional recusal issues
- Defense request for recusal.

# FIRST CASES FAVORED RECUSAL

## FIRST CASES FAVORED

- [Alexander v. State, 48 P.3d 110, 115 \(Okla. Crim.App. 2002\)](#)
- [Edgar v. K.L., 93 F.3d 256, 259 \(7th Cir. 1996\)](#) (extra judicial facts)

## TREND

- [IN RE DISQUALIFICATION OF BLANCHARD, 2017 Ohio 5543 \(Ohio Supreme Court 2017\)](#)
- [State v. Horne, \(Tenn. Court of Criminal Appeals 2017\)](#)
- [State v. Barraza, \\_\\_\\_\\_\\_ P.3d \\_\\_\\_\\_\\_ \(NM Court of Appeals 2017\)](#)
- [State v. Watson, No. M2015-00108-CCA-R3-CD., \(Tenn: Court of Criminal Appeals 2016\)](#)
- [State v. McGill, No. M2015-01929-CCA-R3-CD. \(Tenn: Court of Criminal Appeals 7/18/2016\)](#)
- Plus many more.....



## THE BASIC RULES REMAIN THE SAME

- Judges know how to recuse when they have a personal interest or “feeling”.
- If the defendant requests another Judge, get them one. No big deal.

DUE PROCESS, EQUAL PROTECTION,  
CONSTITUTIONAL ISSUES.

So many issues!

**BASIC CON. LAW STUFF**

# FIRST AMENDMENT:

- **Religion**

**Ex: NO** mandatory AA/NA without alternatives being offered as well.

- This is settled law.
- It does not matter that this is a voluntary program
- This is settled law. Adapt.
- Civil liability may attach for intentional violation. (Sacramento CA, again 8/13)

## SO, WHAT TO DO?

- The law says you cannot force them if they object. You must provide an alternative as well. There are plenty.
- Change your order! *“You must attend AA, NA or other community based self help program, as approved by your probation officer.”*
- *REALITY*: this is very few people and they get over it quickly. Recognize the law, make the new order, enforce the order.
- *COVER YOUR RECORD.*

## **ANOTHER FIRST AMENDMENT ISSUE:**

- **Area and place restrictions:**

*Ex: Do not enter any establishment where ....*

- Valid if narrowly drawn and related to rehabilitation needs of the offender.
- Must have allowances for compelling needs of probationer such as child visitation.
- Should be reasonable in size and duration.

# FIRST AMENDMENT

- **Freedom of association**

*Ex: Do not associate with any person on probation or parole, or any person who uses drugs, except in the context of treatment*

- Valid if narrowly drawn and related to rehabilitation needs of the offender.

## **FOURTH AMENDMENT**

“You are subject to a search of your person, place of residence, vehicle, or any item under your dominion and control any time, day or night, with or without probable cause, or your then and there presence, by any peace or probation officer.”

“You are subject to testing for the presence of banned items and controlled substances for the duration of your participation in the program.”

Get a waiver of electronics and password disclosures.



# SEARCH

- Post conviction: 4<sup>th</sup> Amendment waivers are valid under Federal law-reduced expectation of privacy Sampson (2006).
- Pre conviction and non-conviction cases, must be individualized findings to apply search on a case by case basis (also true on some local state cases post conviction)
- Make it a program rule.

## **ELECTRONIC DEVICES**

- May require special orders, and waivers

## OTHER BANS:

- Alcohol- OK: People v. Beal (CA 1997)
- Articulate why “medical” marijuana cannot be used on record, and place as a term of probation. (interferes with cognition) (Interferes with motivation)(Except:Arizona )
- Articulate why folks cannot consume any item “not for human consumption”, poppy seeds, or other items that will mess up drug testing.

## DUE PROCESS CONCERNS

- Juveniles have the same rights as adults regarding due process, except for jury.

Program violation: probation-full panoply of rights apply. (PC, counsel, notice, appear, cross exam and witnesses, magistrate, findings)

## WATCH OUT! AS THE TARGET POPULATION CHANGES, SO MAY THE RULES!!

- Is a sanction a potential loss of a recognized liberty or property right?
- Does it invoke the same level of due process as a VOP?
- Certainly if you are a post adjudication probation model. Probably if you are not. Best practice: do it. Adds about 45 seconds to the colloquy.

# **WHAT PROCESS IS DUE WHEN DEFENDANTS POTENTIALLY SUFFER A LOSS TO A RECOGNIZED LIBERTY OR PROPERTY RIGHT?**

## ***Q: What is happening?***

- Sanction in program?
- Termination from program?
  
- Different rules may apply depending on the model!
  - DEJ
  - POST CONVICTION

# DUE PROCESS

- Procedural protections are due under the 5<sup>th</sup> and 14<sup>th</sup> Amendments when the defendant will potentially suffer a loss to a recognized liberty or property right.
- If due process applies, the question remains what process is due.

*Fuentes v. Shevin*, 407 U.S. 67 (1972).

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

**THIS IS AN ETHICS ISSUE!**

**THE QUESTION IS:  
WHAT PROCESS IS DUE?  
TERMINATION VS. SANCTIONS**

- [Neal v. State, 2016 Ark. 287 \(Ark. Sup. Ct. 6/30/16\)](#) (Citing *Laplaca* and *Staley, infra*, Ark. Sup. Ct. holds: “[T]he right to minimum due process before a defendant can be **expelled** from a drug-court program is so fundamental that it cannot be waived by the defendant in advance of the allegations prompting the removal from the program.”)



- [Gross v. State of Maine, Superior Court case # CR-11-4805 \(2/26/13\)](#) (drug court procedures relating to **termination** violative of due process and, therefore, unconstitutional. Drug Court participant entitled to: notice of the termination allegations and the evidence against him, right to call and x-examine witnesses, a hearing at which he is present, a neutral magistrate, written factual findings and the right to counsel. Here, the drug court team discussed the termination decision during the termination hearing, without defendant's presence or that of his counsel. That procedure coupled by the fact the Superior Court felt that the drug court judge should have recused, resulted in a finding of constitutional infirmity. Moreover, the appellate court ruled the defendant did not, arguably could not prospectively waive his rights, citing LaPlaca and Staley.

## SANCTIONS ?

- [Brookman v. State, Md: Court of Special Appeals 2017](#) (Sanctions imposed reversed and remanded for a hearing. Defendants wanted to contest sanctions imposed without a hearing for low creatinine results and failure to appear for a drug test. Court held it was a due process violation to not accord an adversarial hearing, including the right to counsel, the ability to call witnesses and a continuance, if necessary for preparation.)

## DUE PROCESS CONCERNS

- Termination is LIKE a VOP hearing in most cases
- Watch your record! Incentives and Sanctions should be noted. Contract analysis does not settle the issue
- States are divided on hearings for non probation programs. Best practice: follow the VOP procedure.
- Clear majority now moving toward due process.

## QUESTION:

- Is a sanction a potential loss of a recognized liberty or property right?
- Does it invoke the same level of due process as a VOP?
- Certainly if you are a post adjudication probation model. Probably if you are not. Best practice: do it. Adds about 45 seconds to the colloquy.
- Get the notice of violation on your report forms! Provide due process!

## HE WAIVED HIS RIGHTS! NOPE!

- **Hendrick v. Knoebel, (SD Indiana 5/10/2017)** (“Though we need not rule on Defendants' argument concerning the waiver provision in the DTC Agreement, we note our serious doubts as to its enforceability under Indiana contract law, given the conspicuous lack of parity between the parties, the absence of specificity in the provision's language, the fact that it purports to absolve the DTC's employees of liability for intentionally tortious conduct, and the fact that the DTC Program is an entity of the local government performing a public service. See generally *LaFrenz v. Lake Cty. Fair Bd.*, 360 N.E.2d 605, 608 (Ind. Ct. App. 1977). Moreover, because the provision implicates federal common law by purporting to waive federal statutory and constitutional rights, the likelihood of its enforceability is increasingly remote. Federal courts are rightly skeptical, albeit not uniformly dismissive, of claims that a plaintiff has waived his constitutional rights or has released a defendant from liability for violating them. We "indulge every reasonable presumption against waiver of fundamental constitutional rights," *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Bayo v. Napolitano*, 593 F.3d 495, 503 (7th Cir. 2010), and we acquiesce in a waiver only if it has been "knowing, intelligent, and voluntary." *Schriro v. Landrigan*, 550 U.S. 465, 484 (2007). The lack of specific language in the agreement before us, in conjunction with its prospectivity, not only falls short of eliciting "an intentional relinquishment or abandonment of a known right or privilege," *Patterson v. Illinois*, 487 U.S. 285, 292-93 (1988), but also encourages DTC staffers to violate the DTC participants' constitutional rights, knowing they are acting with impunity. Enforcing such an agreement is inconsistent with the public interest given its potential for abuse and cancellation of the participants' primary means of vindication.”)

# OUCH

Mississippi Commission on Judicial Performance v Thompson 169 So.3d 857  
(5/2015)

**(Drug Court Judge removed from office** for, inter alia, sanctioning individuals to jail without according due process of hearing. Judge Thompson's conduct of depriving participants in drug court of their due-process rights when he signed orders of contempt without the persons being properly notified of the charge of contempt or a right to a hearing, and by conducting "hearings" immediately after "staffing meetings" without adequate time for the persons to have proper counsel or evidence presented, violated Canons 1, 2A, 3B(1), 3B(2), 3B(4), 3B(8), and constitutes willful misconduct in office and conduct prejudicial to the administration of justice.)

## **CONSIDER THIS**

- Is really about the factual basis or about the factors in mitigation and sanctions?
- What would you prefer if it was you in the client's shoes? Full due process?

## REMEMBER YOUR RECORD!

- You need to document not just the sanctions but the good reviews and incentives in some manner for potential review.
- If someone questions what happened in a couple of years, how will they know *why* you did, what you did?



## EQUAL PROTECTION ISSUES:

- Poverty-you cannot deny access to indigents. Admission based on ability to pay is a denial of equal protection.
- Discretionary admission criteria must not violate due process (suspect class, semi-suspect class)
- Monitor disparate impacts in admission and program.
- DA may be gatekeeper for admission, and unless constitutional violation, no right to hearing to challenge rejection. *This area is changing rapidly.*

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

**UPDATED EVERY 6 MONTHS**

## **BEST PRACTICE:**

- Keep your lawyers involved
- This is how we protect the program, protect the clients, and protect the Constitution.
- It turns out that lawyers also improve outcomes!!!

## PROSECUTORS

- Attend staffing? Cost savings up 171%
- Attend Court? Recidivism drops 35%

***If your prosecutor is interested in public safety, they should show up***

## DEFENSE COUNSEL

- Defense attends staffing: Cost savings up 93%
- Defense attorney attends court: Recidivism down 35%

***Defense counsel: necessary***

## OTHER DUE PROCESS STUFF:

- A drug test is a search.
- Some drug tests do not meet Daubert/Kelly/ Frye standards.
- Be sure that the testing meets legal standards for admission in a court of law.
- No information should go to a Judge without notice to counsel. THAT creates the legal nightmare.
  - What if it must be challenged?
  - What if it is not competent evidence?
- Then you buy trouble! Attorneys are there to prevent trouble and facilitate the needs of the treatment team! They protect due process.
- Again, this is a court, not just a program.

## OTHER DUE PROCESS ISSUES:

- Drug testing: must meet legal standards for adjudications. Not all tests are up to legal standards.
- Get confirmation via GC/MS if there is a question or challenge.
- If they pass you pay, if they flunk they pay...and they get sanctioned for lying.



## OTHER STUFF

- Open Courtroom? Absolutely (Noelle Bush) (rule of minimization)
- Closed staffing? Yes. (State v. Sykes, 182 Wn2d 168)



## RECENT SERIOUS TROUBLE SPOTS

- Blanket prohibitions or policies regarding MAT.
  - Pay attention to ADA, RA, 1983 Civil rights claims, 8<sup>th</sup> A issues.
  - Criminal violations for practicing medicine w/o license.
- Lack of due process on hearings for violations and revocations.
- 1983 Civil Rights claims on 1<sup>st</sup> Amendment issues, et alia.  
(Constitutional rights claims) Mandatory damages, no immunity.
- WAIVERS OF RIGHTS as condition of admission.

## 42 USC 1983 CIVIL RIGHTS PROCEEDINGS.

- Quasi-immunity for 1983 action extinguished if violates an established constitutional right
- Notice is assumed that requiring AA is a violation of the First Amendment
- Drug court case manager not immune (*Hanas v. Inner City Christian Outreach, Inc.* 542 F.Supp.2d 683, 701 (E.D. Mich. 2008))

## HE WAIVED HIS RIGHTS! NOPE!

- Hendrick v. Knoebel, (SD Indiana 5/10/2017) (“Though we need not rule on Defendants' argument concerning the waiver provision in the DTC Agreement, we note our serious doubts as to its enforceability under Indiana contract law, given the conspicuous lack of parity between the parties, the absence of specificity in the provision's language, the fact that it purports to absolve the DTC's employees of liability for intentionally tortious conduct, and the fact that the DTC Program is an entity of the local government performing a public service. See generally *LaFrenz v. Lake Cty. Fair Bd.*, 360 N.E.2d 605, 608 (Ind. Ct.App. 1977). Moreover, because the provision implicates federal common law by purporting to waive federal statutory and constitutional rights, the likelihood of its enforceability is increasingly remote. Federal courts are rightly skeptical, albeit not uniformly dismissive, of claims that a plaintiff has waived his constitutional rights or has released a defendant from liability for violating them. We "indulge every reasonable presumption against waiver of fundamental constitutional rights," *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Bayo v. Napolitano*, 593 F.3d 495, 503 (7th Cir. 2010), and we acquiesce in a waiver only if it has been "knowing, intelligent, and voluntary." *Schriro v. Landrigan*, 550 U.S. 465, 484 (2007). The lack of specific language in the agreement before us, in conjunction with its prospectivity, not only falls short of eliciting "an intentional relinquishment or abandonment of a known right or privilege," *Patterson v. Illinois*, 487 U.S. 285, 292-93 (1988), but also encourages DTC staffers to violate the DTC participants' constitutional rights, knowing they are acting with impunity. Enforcing such an agreement is inconsistent with the public interest given its potential for abuse and cancellation of the participants' primary means of vindication.”

HOFFMAN V KNOEBEL  
US DISTRICT COURT  
SOUTHERN DISTRICT INDIANA  
NO.4:14-CV-00012-SEB-TAB JULY 27, 2017

- **It is undisputed that Plaintiffs suffered deprivations of their constitutional due process rights.**
- Judge Jacobi testified that participants never received written warning of the allegations against them before sanctions of jail time were imposed at the status hearings.
- Judge Jacobi never gave a DTC participant an advisement of rights or a re-advisement of rights when any DTC participant was given a **sanction**. >>>It was not practice to advise a DTC participant of their right to have counsel. >>>no legal counsel was ever appointed prior to a petition to terminate being filed. ...could not recall a time where the judge or anyone else in the courtroom asked a participant if they wanted legal assistance.
- (case decided on other issues, including immunity)

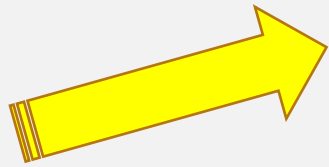
## EQUAL PROTECTION

- Poverty-you cannot deny access to indigents. Admission based on ability to pay is a denial of equal protection.
- Discretionary admission criteria must not violate due process (suspect class, semi-suspect class)
- DA may be gatekeeper for admission, and unless constitutional violation, no right to hearing to challenge rejection.
- Watch your data! Your court should match your jail pop. There is a profound inequity in treatment courts around historically disadvantaged populations. Gender, ethnicity, race, etc.

**MEDICALLY ASSISTED TREATMENT**

## MAT: LEGAL ISSUES ABOUND!

**My  
advice!**



Always start from here:

1. **Are you a medical doctor?**
2. Do you have a license to practice medicine?
3. Do you specialize in addiction medicine?

# BE CAREFUL

- Beisel v. Espinosa, Florida, 2017, United States District Court Tampa Division, case No.8:17-cv-51-T-33TBM, pro per misfires, but has instructive language. **[Adult Drug Court allows MAT but local FDC does not-equal protection and discrimination]**
- ADA, Rehabilitation Act of 1973, and some of 42 USC Section 1983 applies to FTC. Some tort claims may also lie.
- Monitor the Legal Action Center, NY NY for updates



## Can we mandate cessation as a condition of Drug Court graduation?

NO- In all cases, MAT must be permitted to be continued for as long as the prescriber determines that the medication is clinically beneficial. Grantees must assure that a drug court client will not be compelled to no longer use MAT as part of the conditions of the drug court, if such a mandate is inconsistent with a licensed prescriber's recommendation or valid prescription.

## The Bottom Line

Under no circumstances may a drug court judge, other judicial official, correctional supervision officer, or any other staff connected to the identified drug court deny the use of these medications when made available to the client under the care of a properly authorized physician and pursuant to regulations within an Opioid Treatment Program or through a valid prescription.

# CHALLENGING BLANKET MAT PROHIBITIONS:

- The Americans with Disabilities Act (ADA)
  - Prohibits discrimination by state and local governments
- Rehabilitation Act of 1973 (RA)
  - Prohibits discrimination by federally operated or assisted programs.
  - See: *Discovery House, Inc. v. Consol. City of Indianapolis*, 319 F.3d 277, 279 (7<sup>th</sup> Circuit, 2003) (“the ADA and The RA...fun along the same path, and can be treated in the same way”).
- Due Process protections of the 14<sup>th</sup> Amendment
  - 1983 Civil Rights violations....
- 8<sup>th</sup> Amendment-cruel and unusual punishment.

# “THIS DRUG COURT ISN’T A PROGRAM UNDER THE ADA AND RA”

## Wrong.

- Pennsylvania Dep’t of Corrections v. Yesky 524 U.S. 206, 210 (1999) (ADA applies to correctional programs)
- People v. Brathwaite, 11 Misc. 3d 918, 816 N.Y.S. 2<sup>nd</sup> 331 (Crim. Ct., Kings County 2006) (Brooklyn’s alternative sentencing program falls under Title II’s definition of “state service or program.” )
- Evans v. State, 667 S.E. 2d 183, 186 (Ga.App. 2008) (A drug court is a “public entity” under the ADA).

**BUT THEY AREN'T DISABLED  
SIMPLY BECAUSE THEY NEED MAT!**

**WRONG!** Addiction is a disability.

MX Group, Inc. v. City of Covington, 293 F.3d 326, 336 (6<sup>th</sup> Circuit 2002)

*It is well established that drug addiction constitutes and “impairment” under the ADA and that drug addiction necessarily substantially limits major life activities of “employability, **parenting**, and functioning in everyday life”. (emphasis added)*

US v. City of Baltimore, 845 F. Supp. 2<sup>nd</sup> 640 (D. Maryland 2012) Residents of substance abuse facility were individuals with a disability.

**ELIGIBLE PARTICIPANTS DISQUALIFIED  
DUE TO BLANKET MAT POLICY BUT  
WOULD BE OTHERWISE QUALIFIED?**

- Thompson v. Davis, 295 F.3d 890, 896 (9<sup>th</sup> Circuit, 2002) Incarcerated individuals who were illegally denied parole because of their disability (drug addiction) sufficiently alleged that there were otherwise qualified for parole.

## **MAT USERS ARE NOT A SIGNIFICANT RISK TO HEALTH OR SAFETY**

- New Directions Treatment Services v. City of Reading, 490 F.3d 293, 305 (3<sup>rd</sup> Cir. 2007) (NIMBY case) General statements about heroin users does not establish substantial risk to community. Must establish nature, severity and duration of risk, based on current medical knowledge and best evidence.
- Start, Inc. v Baltimore County, Md. Et alia, 295 F. Supp.2d 569, 577-78 (D.Md. 2003) Risks of diversion and concerns can be mitigated by protocols and administration.
- There are several cases in this area.

# **BLANKET DENIAL OF MAT ACCESS IS DISCRIMINATION BECAUSE OF A DISABILITY.**

- Disparate treatment
  - Thompson v. Davis, 295 F.3d 890 (9<sup>th</sup> Circuit 2002) denial of parole because of addiction is subject to disparate treatment analysis of ADA.
- Reasonable Accommodation
  - ADA requires reasonable accommodation to avoid discrimination.
- Disparate Impact
  - Title II ADA prohibits eligibility requirements that screen out or tend to screen out individuals with a disability, unless the criteria are essential to the provision of services.



## **WATSON V. KENTUCKY, E.D KENTUCKY, 7/7/15 (F. SUPP.2D)**

- Watson requires the state court take her off the conditional release terms or remove the “blanket prohibition on her taking suboxone, methadone or any other drugs that she needs to treat her addiction. The state attorney clarified that there was not a Blanket prohibition on MAT, but agreed that “it’s generally the Court’s practice to allow MAT if the doctor will show medical need.”
- Relief denied. Her challenge on federal grounds was denied stating the claim could be handled on the state level.

## **SUMMARY:**

- Drug Court blanket prohibitions of MAT offend the ADA and RA.
- Drug Court is a program covered by the statutes
- Drug Court eligible persons have a disability. (DUI Court too)
- Drug Court eligible persons do not as a class, constitute a substantial risk
- Blanket denial of MAT is discrimination because of a disability.

## DUE PROCESS AND BLANKET PROHIBITIONS OF MAT

***Constitutional due process requires reasonableness or a rational basis for conditions of treatment and supervision of persons on probation or in drug court.***

- Probation terms and conditions should be reasonably related to the crime and the rehabilitative needs of the individual and protection of the community People v. Beaty, 181 Cal.App.4th 644, 105 Cal.Rptr.3d 76 (2010)
- Judge must impose individualized conditions to meet community and individual needs. Commonwealth v. Wilson, 11 A.3d 519 (Pa. Super. 2010).

# BLANKET DENIAL OF MAT IS A DUE PROCESS VIOLATION-WHAT ABOUT OBJECTIONS?

- All Judges should:
  - Consider relevant information before making a factual decision.
  - Hear arguments from all sides of the controversy and receive evidence from scientific experts, if the subject matter is beyond that of lay person knowledge.

There is a **federal presumption** tied to funding.

- The matter is settled (Presumption) in most instances if: (1) the physician has legal authority to write the prescription, (2) the medication is indicated to treat the patient's illness, (3) the prescription was not obtained fraudulently, and (4) the patient agrees to take the medication as prescribed. If prescribed: Presumption in favor of MAT **Burden of proof is on the objector to show it is inappropriate by preponderance.**

## **NO FEDERAL FUNDING:**

- (1) the physician has legal authority to write the prescription, (2) the medication is indicated to treat the patient's illness, (3) the prescription was not obtained fraudulently, and (4) the patient agrees to take the medication as prescribed.
- But the burden is different. The moving party makes a prima facie case, then opposition may introduce evidence of prior abuse of MAT, or MAT deception in treatment.

## **GENERAL RULE:**

- blanket prohibitions of MAT are a due process violation because they are not rationally (scientifically based).
- They are not reasonable because they are not consistent with individualized sentencing and treatment
- They do not give parties a fair opportunity to present their case, since one alternative is foreclosed.

# 8<sup>TH</sup> AMENDMENT-CRUEL AND UNUSUAL PUNISHMENT-GROWING AREA

- Correctional officials and health care providers may not act with deliberate indifference to an inmate's serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104 (1976);.
- Deliberate indifference has both an objective and a subjective element: the inmate must have an objectively serious medical condition, and the defendant must be subjectively aware of and consciously disregard the inmate's medical need. Farmer v. Brennan, 511 U.S. 825, 837 (1994)

## WHAT IS A SERIOUS MEDICAL NEED?

- Withdrawal symptoms can qualify as a serious medical need. See, e.g., Boren v. Northwestern
- Regional Jail Authority, No. 5:13cv013, 2013 WL 5429421, at \*9 (W.D.Va. Sept. 30, 2013) (alcohol withdrawal states serious medical need); Mayo v.
- County of Albany, 357 F.App'x 339, 341-42 (2d Cir. 2009) (heroin and alcohol withdrawal); Sylvester v. City of Newark, 120 F.App'x 419, 423 (3d Cir.2005) (acute drug withdrawal); Foelker v.
- Outagamie County, 394 F.3d 510, 513 (7th Cir. 2005) (methadone withdrawal).



## WHAT IS DELIBERATE INDIFFERENCE?

- The failure to provide methadone to an inmate exhibiting symptoms of withdrawal may constitute deliberate indifference to a serious medical need by intentionally ignoring the effects of withdrawal. Foelker v. Outagamie Cnty., 394 F.3d 510, 513 (7th Cir.2005);
- Alvarado v. Westchester County, 22 F. Supp. 3d 208 (SD New York 2014)
- Messina v. Mazzeo, 854 F. Supp. 116, 140 (E.D.N.Y. 1994) (pretrial detainee, whose participation in methadone program was interrupted by arrest, stated deliberate indifference claim against prison doctor who refused to continue methadone treatment).
- See also Mellender v. Dane County, \_\_\_\_ F. Supp. \_\_\_\_ (W. D. Wisc. 2006); Norris v. Frame, 585 F.2d 1183, 1188 (3d Cir. 1978)

## CAN THE COURT COMPEL THE USE OF MAT?

- **Question one: are you a physician who is an expert in MAT?**
- That should answer your question.
- The answer is NO.
- Sell v United States 539 U.S. 166 (2003)
  - There are some recent changes for psychotropic meds, but not these.

## **WHAT IF THE PROSECUTION OR A PARTY OBJECTS?**

- Set a hearing, follow guidelines supra.

## **NET MESSAGE:**

- Beware of blanket MAT issues:
- Make a record of denials, or policies
- Be aware that your “beliefs” are not medicine.
- Failure to recruit/obtain accessible MAT may be a growing area of liability.

**BEST PRACTICES  
ADULT BEST PRACTICES STANDARDS.**

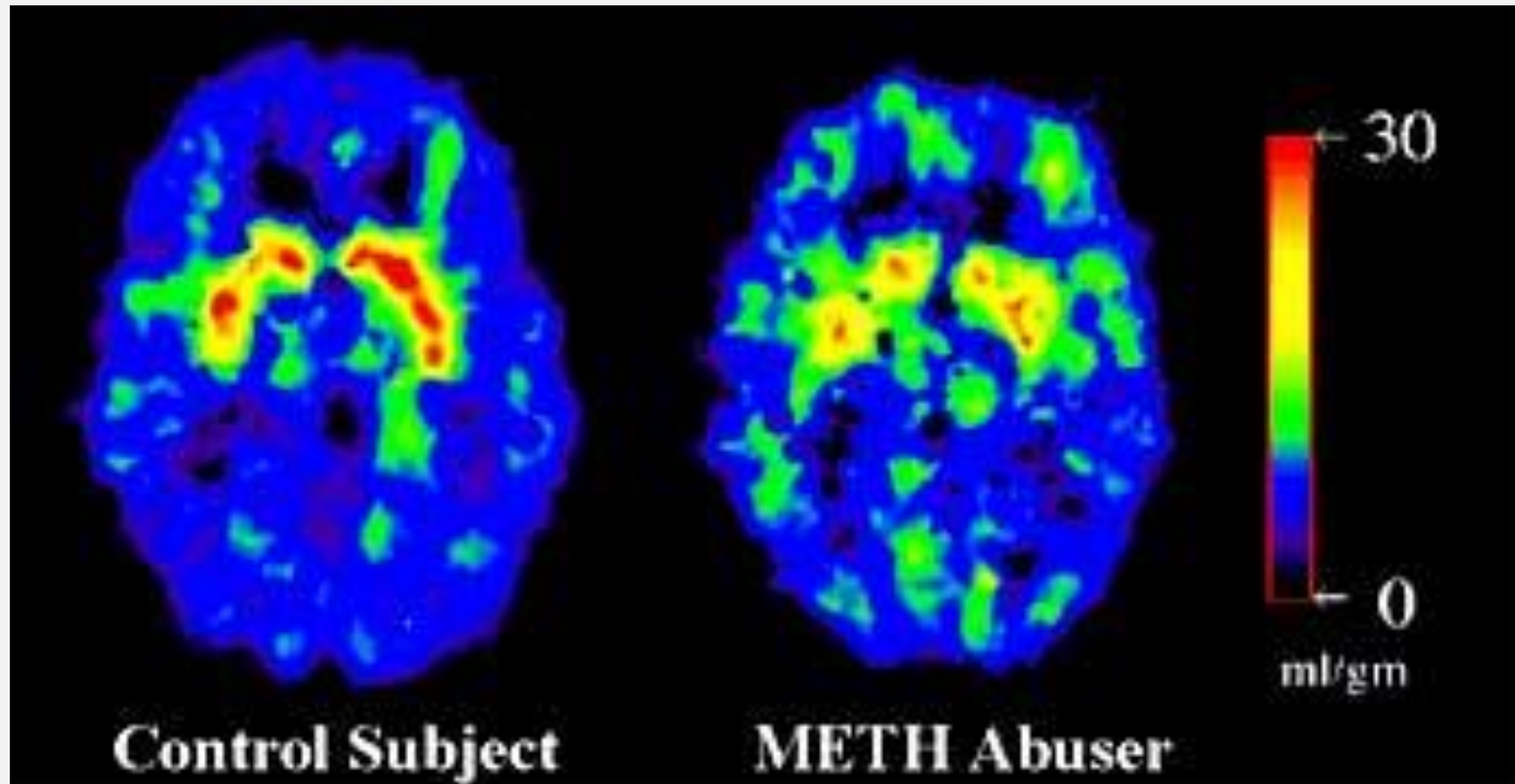
## **BEST PRACTICES**

- Ensure that DA and Defense Counsel attend staffings and review hearings
- Judges/Prosecutors: avoid public activities (non-judicial) with participants, except for cameo appearance
- Respect ethical obligations of defense counsel
- Stay in your lane, and follow the law.

## **BEST PRACTICES**

- Ensure that DA and Defense Counsel attend staffings and review hearings
- Advocate change in Canons and rules of professional responsibility.
- Judges: avoid public activities (non-judicial) with participants, except for cameo appearance
- Respect ethical obligations of defense counsel
- Mind the law and the boundaries!

- **Understanding addiction and the psychopharmacology of drugs. Addiction is truly a disease of the brain. It is treatable.**





Courts that use jail greater than 6 days have **worse**  
(higher) recidivism

Percent decrease in recidivism between courts that use differing amounts of jail sanction time



## **ATTORNEY ROLES:**

1. Protect the Constitution
2. Maximize outcomes
  - Facilitate the treatment team and the plan when it meets #1 and #2
  - Only counsel can find the legal way to get treatment and probation's goals implemented.

## CALIFORNIA SPECIFIC CONCERNS

- Changing target population: move up to the NON-NON-NON who assess as HR/HN
- EXPAND your services. This population needs a full continuum. MRT...Trauma, Maslow's basics, massive life skills.
- Heavily improve engagement-the lesson of Proposition 36
- Prop 47 and new diversion statutes- at least FIVE passes through diversion type programs before things can get serious. Only way out?: Engagement.
- AB 1810? Modifications coming?

# RESOURCES

Legal Action Center  
NDCI Law Webliography

QUESTIONS?