

## PARTICIPATION OF DEFENSE ATTORNEYS IN DRUG COURTS

Michael Tobin

*[11] Responsibilities of Defense Attorneys in Drug Court—A defense attorney's responsibilities to an individual client may differ from those of a member of a collaborative treatment court team.*

*[12] Decision to Enter Drug Court—In representing a client potentially eligible for treatment court, a defense attorney should be knowledgeable about the court's procedures and explain the potential advantages and disadvantages of treatment court compared to traditional litigation.*

*[13] Defense Representation on a Drug Court Team—Defense representatives must advocate for fair procedures in the Drug Court and educate the defense bar generally regarding Drug Court operations.*

*[14] Defense Attorneys Serving in Dual Roles—Where the same defense attorney acts as adversary counsel for individual clients and a Drug Court team member, the attorney must take precautions to balance potential role conflicts.*

THE ROLE OF A DEFENSE ATTORNEY in a Drug Court is a complex one. General guidelines for defender programs (including assigned-counsel systems) and for individual defense attorneys can be useful, contributing to the effectiveness of Drug Courts. The recommended best practice for a defender organization is to recognize and implement the collaborative and nontraditional role of a defense representative on a Drug Court team. This representative does not serve as adversary counsel for individual Drug Court participants, but rather as an advocate for evidence-based practices that advance the court's

therapeutic goals.<sup>1</sup> Because Drug Courts' primary goals are to help participants overcome addiction and thereby to reduce recidivism, the defense representative helps the Drug Court's participants by advocating for effective court policies and practices.

## General Purposes and Attributes of Treatment Courts

Drug Courts and other treatment courts “were created in response to the perception that the traditional, adversarial criminal justice system does not adequately address”<sup>2</sup> issues such as alcohol or drug abuse, which in turn are risk factors for future criminal involvement. These courts blend attributes of traditional court procedures with therapeutic procedures not generally associated with court hearings. The traditional attributes include mandatory court appearances and the potential for sanctions. The therapeutic procedures include the delivery of support services to participants and the use of incentives to encourage and recognize progress in treatment.

Drug Courts typically conduct frequent review hearings to oversee treatment for drug abuse, which may include abuse of alcohol as well as abuse of controlled substances. The Drug Courts offer participants the opportunity to obtain a lesser sentence or dismissal of charges upon successful completion of the treatment program. The Drug Court model “calls for collaboration among various components

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<sup>1</sup> *EDITOR'S NOTE*—The author's recommendation that “adversary counsel” and “defense representative” functions should ordinarily be performed by different attorneys is not universally agreed upon by defense experts and does not reflect an official position of NADCP or NDCI. Nevertheless, this article presents the considered wisdom of a highly experienced defense expert in addressing thorny ethical dilemmas commonly confronted in Drug Courts. Moreover, research does suggest outcomes may be improved by including separately designated defense representatives on the Drug Court team who have substantial training and experience with the Drug Court model, practices, and procedures.

<sup>2</sup> *Critical Issues for Defense Attorneys in Drug Court*, p. 3 (National Drug Court Institute 2003). Although this article specifically references Drug Courts, many jurisdictions have implemented treatment courts to focus on other issues, such as alcohol abuse, mental illness, or issues unique to veterans. See W. Huddleston & D. Marlowe, *Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Court Programs in the United States*, p. 1 and nn. 1–2 (Bureau of Justice Assistance 2011) (reporting a total of 3,648 problem-solving courts, including 2,459 Drug Courts).

of the criminal justice and substance abuse treatment systems to combine the coercive power of the court with effective and scientifically based treatment practices.”<sup>3</sup> Studies of Drug Courts have confirmed that treatment is more successful than incarceration in preventing recidivism.<sup>4</sup>

The collaborative aspects of Drug Courts often include the participation of a public defender or other defense attorney on a Drug Court team.<sup>5</sup> As a team member, the defense attorney may have the opportunity to improve justice policy by expanding opportunities for defendants to have their social service needs addressed effectively and to have their cases dismissed or reduced. However, the nontraditional role of team member also raises ethical and practical questions regarding the boundaries of this collaborative role and the traditional adversarial role of defense counsel.<sup>6</sup>

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<sup>3</sup> *Drug Courts: The Second Decade*, p. 17 (National Institute of Justice 2006).

<sup>4</sup> See W. Huddleston & D. Marlowe, *Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Court Programs in the United States*, p. 9 (Bureau of Justice Assistance 2011) (citing numerous studies showing that Drug Courts reduce crime in comparison to other justice-system dispositions).

<sup>5</sup> See, e.g., *Defining Drug Courts: The Key Components*, p. 8 (National Association of Drug Court Professionals (NADCP) 1997) (listing defender among important participants in the planning process for a Drug Court); *id.*, p. 11 (prosecutor and defense counsel, as members of drug-court team, must shed adversarial roles and focus on participant’s “recovery and law-abiding behavior”).

<sup>6</sup> See *America’s Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform*, pp. 30–41 (National Association of Criminal Defense Lawyers 2009). The defense attorney is not the only member of the typical Drug Court team who needs to adapt to a nontraditional role. The judge, although still the ultimate decision maker, receives input from all other team members and often seeks consensus from the team. The judge also talks directly to participants about many facets of their lives at the regular review hearings. The prosecutor and law enforcement (including the probation department) refrain from investigating or prosecuting violations of law that come to light as part of Drug Court.

The ability of team members to adapt to the nontraditional role of team member is critical to the success of the court; conversely, an inability to accept a collaborative role is counterproductive. The nontraditional role does not mean that the defense representative should always agree with other team members. The defense representative will generally best understand the barriers that make it difficult for participants to overcome addiction and to manage other life issues while engaged in an intensive treatment program. The defense representative may have the most compassion for and patience with Drug Court participants. Therefore, the defense representative may

Although research conclusively shows the effectiveness of Drug Courts, studies also show that effectiveness depends upon fidelity to specific components of such courts.<sup>7</sup> When key components are dropped or when the treatment programs are “watered down,” lower graduation rates and higher recidivism have occurred.<sup>8</sup> Therefore, attorneys working in treatment courts need to be aware of (and to advocate for) the research-based approaches that lead to successful results for participants.

## SUMMARY OF RECOMMENDATIONS

Defense attorneys should participate in all aspects of Drug Courts to ensure that these courts treat defendants fairly, following effective and therapeutic procedures. Each treatment court should include a defense representative on a team that oversees the court’s policies and operations. Defendants participating in a Drug Court should also have access to adversary counsel, although as a practical matter, the therapeutic model of a Drug Court is inconsistent with traditional litigation procedures.<sup>9</sup>

Managers or staff attorneys of indigent-defense providers often serve on a Drug Court team to represent the interests of participants. This role is referred to as the “defense representative” in the balance of this article, and depending on the features of the jurisdiction, the

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often need to remind and persuade other team members to refrain from unduly punitive actions and policies.

<sup>7</sup> W. Huddleston & D. Marlowe, *Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Court Programs in the United States*, p. 14 (Bureau of Justice Assistance 2011).

<sup>8</sup> *Id.*, pp. 14–15.

<sup>9</sup> See generally *infra* nn. 56–60 and associated section. If the court is operating fairly and effectively, the participants view the Drug Court as collaborative, rather than as adversarial. Conversely, if participants frequently perceive unfairness in the court’s procedures, the court is probably not fulfilling its therapeutic goals (because court participants are not necessarily defendants in pending cases while in Drug Court and are not necessarily formally represented by an attorney during Drug Court proceedings, the term “participants” is used in this article to refer generally to the individuals supervised in the treatment court program; the terms “clients” or “defendants” are used to emphasize either the attorney-client relationship or the pendency of criminal proceedings).

role may also be fulfilled by a private attorney or a representative of a bar association.<sup>10</sup> The defense representative should know the local justice system sufficiently to assess the benefits and risks of a proposed or existing Drug Court. The defense representative should also communicate regularly with the defense bar regarding the Drug Court's policies and practices.

The differences between the roles of defense representative and adversary counsel are discussed in detail below. Practical and ethical challenges often arise if the same person serves both as the defense representative on a Drug Court team and as adversary counsel for individual participants in the court. Thus, when possible, the defense representative should refrain from serving in these two roles simultaneously. The dual roles create at least the appearance of a conflict between the duty to assist the Drug Court (in fulfilling its broad, therapeutic mission) and the duty to advocate at each court session for individual clients.<sup>11</sup>

If the circumstances of a jurisdiction require an attorney to serve in these roles simultaneously,<sup>12</sup> he or she should clearly communicate

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<sup>10</sup> Although indigent defendants and other defendants have common interests in a fair process, indigent defendants have the additional concern that Drug Courts do not impose financial requirements that render their participation impossible or impractical. Thus, the indigent-defense perspective is critical to ensure that any fees imposed on participants are waived or substantially reduced for indigent participants.

<sup>11</sup> For example, research suggests that direct interaction between the judge and participants furthers the court's therapeutic mission. See, e.g., J. Miller and D. Johnson, *Problem Solving Courts: New Approaches to Criminal Justice*, p. 158 (Rowman & Littlefield 2009) (discussing how a judge in a reentry court promotes success of participants through "unique dialogues that address their individual strengths, needs, and challenges"). However, as adversary counsel, an attorney generally discourages a client from speaking in open court, especially if the judge is asking the client about possible rules violations.

<sup>12</sup> In a rural area, for example, there may be only one public defender in the county. The same attorney often serves both as a member of the Drug Court team and as the adversary attorney for individual participants. Serving in the dual roles may be the only practical way in such a county to operate a Drug Court with a defense attorney participating as a team member. If so, the defense attorney should educate other team members regarding the areas in which duties to individual clients take precedence over the role of a team member. However, when resources allow for separation of the team-member and adversary roles, this separation is the best practice both to avoid

with clients regarding the attorney's responsibilities as a member of the Drug Court team. The attorney should also advise other members of the team that when serving an individual client, the attorney may challenge the Drug Court's procedures and the specific actions of other team members.<sup>13</sup>

## IMPORTANCE OF DEFENSE PARTICIPATION

Principle Eight of the American Bar Association (ABA) Ten Principles of a Public Defense Delivery System recommends that “[p]ublic defense should participate as an equal partner in improving the justice system.” Although the attributes and policies of treatment courts vary widely, national studies show that when operated effectively, treatment courts can benefit individual defendants and the broader community by helping individuals overcome issues often linked to criminal behavior.<sup>14</sup>

A large percentage of defendants in the criminal justice system have a history of irresponsible use of drugs or alcohol.<sup>15</sup> Many others

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ethical conflicts for the attorney and to promote fidelity to effective practices in the Drug Court.

<sup>13</sup> The attorney might, on behalf of a client, challenge a drug-testing procedure or the accuracy of a specific test result, even without any specific evidence that the test result was inaccurate. Depending on their frequency and the litigation methods used, these types of challenges may cause other team members to view the attorney as an adversary instead of a partner on the treatment court team.

In the role of team member, the defense representative should be interested in the accuracy of testing procedures and of specific test results (an interest that all team members should share). Thus, the defense representative should advocate for fair procedures to correct or confirm the results of less-reliable screening tests. The defense representative could also properly suggest ways to eliminate or reduce the ability of participants to use someone else's urine for testing. An adversary attorney, however, would arguably be unable to take steps that the attorney knew or suspected would lead to adverse legal consequences for a client.

<sup>14</sup> See R. Warren, *Evidence-Based Practices to Reduce Recidivism: Implications for State Judiciaries*, p. 15 & n. 86 (Crime and Justice Institute, National Institute of Corrections and National Center for State Courts 2007) (citing numerous “[r]igorous scientific studies and meta-analyses” showing “that Drug Courts significantly reduce recidivism among Drug Court participants in comparison to similar but nonparticipating offenders”).

<sup>15</sup> See, e.g., *Drug Use and Dependence, State and Federal Prisoners*, 2004, p. 1 (U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Spe-

suffer from mental disorders,<sup>16</sup> and some have multiple treatment needs.<sup>17</sup> Drug Courts and other treatment courts have shown the potential to reduce recidivism by combining regular court reviews with evidence-based treatment and case management.<sup>18</sup> These courts are also able to keep defendants in the community instead of serving substantial terms of incarceration.

Generally, these courts are operated by a team comprising representatives of several agencies. For example, a Drug Court team often includes a judge, prosecutor, probation agent, social worker, public defender, and law enforcement officer. “Active defender participation in all phases of the Drug Court, from design to operation, makes it more likely that the program will be client-oriented.”<sup>19</sup>

A resolution of the National Association of Drug Court Professionals (NADCP) also supports the participation of a defense representative in the development and operation of Drug Courts. This resolution identifies eligibility criteria, selection of treatment provid-

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cial Report, October 2006) (citing 2004 statistics that showed 53% of state inmates and 45% of federal inmates met the psychiatric community’s criteria for drug dependence or abuse); *Alcohol and Crime*, p. 1 (U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, April 1998) (citing 1996 statistics that showed 36% of the estimated 5.3 million persons supervised by corrections officials in the U.S. had been drinking when they committed the offense for which they were convicted).

<sup>16</sup> See, e.g., *Mental Health Problems of Prison and Jail Inmates*, p. 1 (U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Special Report, September 2006) (citing 2005 statistics showing that slightly more than half of the inmates surveyed reported either a recent mental-health diagnosis or recent symptoms of a mental disorder).

<sup>17</sup> See, e.g., *id.* (citing 2005 statistics showing that of state prison inmates reporting a recent mental-health diagnosis or recent symptoms of a mental disorder, 74% reported a history of substance abuse).

<sup>18</sup> See, e.g., W. Huddleston & D. Marlowe, *Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Court Programs in the United States*, p. 14 (Bureau of Justice Assistance 2011).

<sup>19</sup> Michael Judge, *Critical Issues for Defenders in the Design and Operation of a Drug Court*, p. 2 (NLADA Indigent Defense, November 1997). See also K. Weibrecht, *Evidence-Based Practices and Criminal Defense: Opportunities, Challenges, and Practical Considerations*, pp. 26–27 (National Institute of Corrections 2008) (discussing how when involved as a policy maker, defense attorney can educate others regarding the needs of defendants).

ers, confidentiality, and other court policies as proper topics for defender input.<sup>20</sup>

## DEFENSE PARTICIPATION IN DEVELOPING A DRUG COURT

Defense representatives often participate in the planning for and development of a Drug Court.<sup>21</sup> This participation may result from membership in a criminal justice coordinating council or from formation of a local ad hoc work group interested in a treatment court. Some grant applications require that planning groups include a defense representative. Defense participation helps to ensure that the Drug Court has a therapeutic focus rather than a punitive focus.<sup>22</sup> To help ensure that the Drug Court provides effective services to participants, the defense representative should address such issues as eligibility criteria, application and admission process, access to treatment and other services, court expectations and procedures, incentives and sanctions, and confidentiality of information that court officials learn about participants in the Drug Court context.

The defense representative must work with representatives of other agencies in the planning and development of a Drug Court (the

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<sup>20</sup> NADCP, Resolution regarding Indigent Defense in Drug Courts (April 19, 2002), reprinted at [nlada.org/Defender/Defender\\_Library](http://nlada.org/Defender/Defender_Library). See also K. Weibrecht, *Evidence-Based Practices and Criminal Defense: Opportunities, Challenges, and Practical Considerations*, pp. 26–28 (National Institute of Corrections 2008) (defense attorney should advocate for matching treatment to the needs of program participants, for use of treatment modalities that have a track record of effectiveness, and for evaluation procedures to ensure that practices remain evidence based).

<sup>21</sup> See G.F. Roper and J.E. Lessenger, Drug Court Organization and Operations, reprinted in *Drug Courts: A New Approach to Treatment and Rehabilitation*, p. 287 (Springer Science and Business Media 2007). But see *America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform*, p. 8 (National Association of Criminal Defense Lawyers 2009) (noting that the criminal defense bar has not consistently had input in development of problem-solving courts throughout the country).

<sup>22</sup> See C.L. Asmus and D.E. Columbini, Juvenile Drug Courts, reprinted in *Drug Courts: A New Approach to Treatment and Rehabilitation*, p. 271 (Springer Science and Business Media 2007) (recognizing that the public defender advocates for rights of participants and “monitors sanctions imposed by the court to ensure that they are within the legal and philosophical parameters of the program”).

court, prosecution, law enforcement, probation and parole, and social services are ordinarily represented on a Drug Court team). Thus, although the defense representative can influence the standards and procedures adopted for the Drug Court, the team must reach a consensus.

Ultimately, for the defense representative to recommend the Drug Court for consideration by the defense bar in individual cases, the court must present potential benefits to defendants when compared to other available means of resolving their cases (litigation or negotiation under preexisting procedures and penalty structures). If the Drug Court has this beneficial potential (for example, it provides both treatment services and the potential to earn dismissal or substantial reduction of charges), defense attorneys and their clients can assess the potential benefits on a case-by-case basis to determine whether to seek admission to the Drug Court. Conversely, if efforts to work in a collaborative manner are ultimately unsuccessful in developing a therapeutic court program with significant benefits for participants, the defense representative should consider withdrawing from further participation as a member of the Drug Court team.<sup>23</sup>

Written policies and other documents are important to provide consistency and fairness in the Drug Court's operations.<sup>24</sup> Written informational materials can assist the defense representative in educating other defense attorneys about the Drug Court. Standard forms

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<sup>23</sup> Because the ability to influence court policies is generally greater for a member of the court team, a defense representative should not take this action lightly or without making every reasonable effort to improve the court's procedures. However, at some point, if the court is not providing effective services to participants, the continued participation of the defense representative sends the wrong message to the defense bar and to defendants. The label "treatment court" is misleading if the court does not follow effective practices.

<sup>24</sup> See G.F. Roper and J.E. Lessenger, *Drug Court Organization and Operations*, reprinted in *Drug Courts: A New Approach to Treatment and Rehabilitation*, p. 286 (Springer Science and Business Media 2007) (stating that benefits of a written manual include notice to participants of court's requirements and permanent record of the respective duties of court personnel).

should address waivers and authorizations that defendants are required to sign as a condition of participation.<sup>25</sup>

The success of Drug Courts depends on adherence to research-based practices. If either the court procedures or the treatment protocols are deficient, the Drug Court is unlikely to reduce recidivism. Therefore, the defense representative needs to learn the underlying principles behind a successful Drug Court and apply that knowledge to the specific criteria adopted or proposed in his or her jurisdiction.<sup>26</sup>

## DEFENSE PARTICIPATION IN DRUG COURT OPERATIONS

Defense representatives often serve as members of a Drug Court team that oversees ongoing court operations.<sup>27</sup> If the planning phase

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<sup>25</sup> See *id.*, p. 292 (recognizing need for waiver if defense attorneys do not appear at regular status hearings; need for waiver of confidentiality of medical information). If a Drug Court is complying with best practices, including participation of an effective defense representative on the court team, participants will rarely request the assistance or presence of an adversary attorney at the status hearings. Nonetheless, it is helpful for all defense attorneys to be familiar with the operations of a local Drug Court, and the court should welcome their attendance.

<sup>26</sup> Without a thorough knowledge of the type of treatment and supervision that is effective for the court's participants, the defense representative is unable to advocate for practices that will maximize the opportunities for participants to succeed. For example, the prevalent model for a Drug Court (including frequent judicial reviews) is most effective for high-risk participants. Michigan Supreme Court Administrative Office, *Best Practices for Standardized Risk Assessment*, p. 9 (2010); see also K. Weibrecht, *Evidence-Based Practices and Criminal Defense: Opportunities, Challenges, and Practical Considerations*, pp. 4, 8 (National Institute of Corrections 2008) (a higher level of treatment is appropriate for individuals who present a high risk of recidivism).

If the court's participants include persons properly classified as low risk, it may be counterproductive to require the same frequency of in-person court appearances. Michigan Supreme Court Administrative Office, *Best Practices for Standardized Risk Assessment*, p. 9 (2010). By keeping current with research findings regarding treatment courts, the defense representative is best able to advocate for effective practices and advise other defense attorneys about the strengths and weaknesses of the local Drug Court.

<sup>27</sup> See G.F. Roper and J.E. Lessenger, *Drug Court Organization and Operations*, reprinted in *Drug Courts: A New Approach to Treatment and Rehabilitation*, p. 288 (Springer Science and Business Media 2007).

has resulted in standards and procedures that benefit clients, the defense representative's main goal on the team may be to ensure that the Drug Court adheres to these standards and procedures (while continuously evaluating the court's benefits to clients and looking for areas for improvement). If the Drug Court's framework does not provide significant benefits to clients, however, the defense representative may need to insist upon substantial changes in the court's operations before he or she agrees to serve on the team.

If the same defense representative serves on the planning team and the operations team, the transition from one role to the other may be relatively seamless. The representative will generally understand the perspectives of the other team members and the reasons behind the written standards and procedures. Conversely, a defense representative without experience on the planning team may lack this base of knowledge and may need to learn enough information to evaluate the beneficial potential for clients.

Changes in Drug Court personnel, such as a new judge or prosecutor, can result in significant changes in court operations. Thus, the defense representative may have an opportunity to promote improvements in court procedures, but may also need to advocate against proposals that dilute the court's effectiveness.

The responsibilities of the Drug Court team may include the selection of treatment providers, admission of participants into the court, review of participants' progress, and regular staffing meetings before each court session. At the staffing meetings, the team generally reviews how each participant has done since his or her last court date and recommends to the Drug Court what action to take or what topics to address with each participant.<sup>28</sup>

For participants who are doing well, the Drug Court action will generally consist of a positive progress report, a brief conversation between the judge and the participant, and scheduling of the next

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<sup>28</sup> See *id.*, pp. 294–96 regarding a typical day of Drug Court review hearings, including the team meeting before court.

court date.<sup>29</sup> The participant may be eligible for modest rewards for his or her positive report, such as a longer interval between court hearings (many Drug Courts have three specified phases for participants, each characterized by its own frequency of hearings and drug or alcohol tests<sup>30</sup>). A participant who has violated the Drug Court's rules may face a sanction, which could be community service work, a written assignment, extra drug or alcohol testing, ineligibility for an incentive, or brief confinement in jail.<sup>31</sup>

The defense representative, although not serving in the role of adversary counsel for each participant, can and should advocate generally for Drug Court practices that benefit participants. For example, the defense representative should advocate for a broad array of supportive services, including help with transportation, housing, and education, to assist indigent participants. Similarly, the defense representative should advocate for adherence to policies that protect participants and can seek to amend the Drug Court's policies and operations to serve participants better.<sup>32</sup>

The defense representative should advocate for policies of graduated sanctions and rewards that recognize the high incidence of relapse during treatment programs.<sup>33</sup> In the team meetings that often

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<sup>29</sup> See generally *id.*, pp. 296–98, regarding the typical interaction between the Drug Court judge and participants at the court's review hearings.

<sup>30</sup> See, e.g., *id.*, p. 293 & Table 19.1.

<sup>31</sup> See generally D. Marlowe, Strategies for Administering Rewards and Sanctions, reprinted in *Drug Courts: A New Approach to Treatment and Rehabilitation*, pp. 317–333 (Springer Science and Business Media 2007) (describing strategies for use of rewards and sanctions in treatment courts in light of research regarding behavior modification).

<sup>32</sup> See *id.*, p. 325 (discussing “ratio burden” that can result from “multiple demands on clients that can be difficult to fulfill simultaneously”). The defense representative should assist participants in voicing practical considerations, such as work or school schedules, child-care duties, and transportation issues, that may limit their ability to attend all the recommended or required programming.

<sup>33</sup> See, e.g., *id.*, pp. 325–26 (distinguishing between “behaviors that clients are readily capable of engaging in,” such as attending court and treatment sessions, and goals that may take longer to accomplish, such as prolonged abstinence from drugs). During the early phases of a client's treatment, rewards and sanctions of a relatively higher magnitude should be reserved for behaviors that the client can readily control. *Id.*, p. 326.

precede the court's review hearings, the defense representative should point out mitigating factors and may suggest potential sanctions other than incarceration.<sup>34</sup>

The defense representative should educate the local defense bar regarding treatment courts.<sup>35</sup> This education should include the Drug Court's potential advantages and disadvantages for clients represented by the local defense bar. Specific topics should include eligibility criteria and processes, legal consequences of successfully completing treatment (and of failure to complete treatment), and general policies and procedures of the Drug Court. The defense representative should encourage defense attorneys to contact him or her for specific information as needed. The defense representative should also encourage attorneys to observe at least one session of the Drug Court to understand the review sessions that their clients will attend if admitted to the program.

Drug Court participants are often not represented by adversary counsel at the court's review hearings. Participants frequently have questions and concerns that they may prefer to share with the defense representative rather than with the judge or with treatment providers. The defense representative should support participants by providing them with information about Drug Court procedures and by encouraging them in their efforts to complete the treatment court program. Where applicable, the defense representative must make clear that he or she is not serving as adversary counsel for program participants.<sup>36</sup>

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<sup>34</sup> See *infra* nn. 71–74 and associated section regarding principles for effective sanctions in drug court.

<sup>35</sup> See NADCP, Resolution regarding Indigent Defense in Drug Courts (April 19, 2002), reprinted at [nlada.org/Defender/Defender\\_Library](http://nlada.org/Defender/Defender_Library) (“Inclusion and training of private counsel appointed to represent indigent defendants in Drug Court is necessary, particularly in jurisdictions which do not have an institutional public defense entity”). See also *America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform*, p. 40 (National Association of Criminal Defense Lawyers 2009).

<sup>36</sup> Although the defense representative protects the general interests of participants in fair and compassionate court procedures, his or her proper role is to work as a collaborative team member to promote the successful rehabilitation of participants. See, e.g., J. Miller and D. Johnson, *Problem Solving Courts: New Approaches to Criminal Justice*, p. 166 (Rowman & Littlefield 2009) (acknowledging team approach as best

## ADVERSARY COUNSEL: ADVICE TO CLIENTS REGARDING DRUG COURTS

All defense attorneys should be reasonably knowledgeable about Drug Courts operating in the jurisdiction where they practice.<sup>37</sup> This knowledge should include a general understanding of the criteria for eligibility, the requirements for successful completion of the treatment program, and the likely consequences for failure to complete the program.

Defense counsel should be familiar with a wide range of potential dispositions that may benefit his or her clients. Thus, knowledge about a local Drug Court is a specific example of an attorney's obligation to investigate potential ways of resolving cases to his or her clients' benefit.<sup>38</sup> The attorney need not have an encyclopedic knowledge of the specific details of the potential treatment programs offered or available through the court, but should have general knowledge and should be able to respond to reasonable questions from clients about the Drug Court. The attorney may wish to communicate with the defense representative on the Drug Court team regarding specific questions.

In advising a client about potential participation in a Drug Court, defense counsel should provide competent and zealous representation, which should include reasonable factual investigation, consideration of potential legal and factual defenses, consideration of other dispositional alternatives, and communication with the client about the potential advantages and disadvantages of the Drug Court.<sup>39</sup>

Participation in a treatment court often occurs as a result of a negotiated agreement to settle a pending case. The client must ultimate-

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practice in a problem-solving court); J.L. Nolan, Jr., *Reinventing Justice: The American Drug Court Movement*, pp. 75–76 (Princeton, N.J. 2001) (successful Drug Courts rely upon a collaborative team approach).

<sup>37</sup> See ABA Model Rules of Professional Conduct 1.1 (lawyer shall provide competent representation, which includes necessary knowledge and preparation).

<sup>38</sup> See *id.*

<sup>39</sup> See ABA Model Rules of Professional Conduct 1.1 (competence), 1.4 (communication).

ly decide whether to seek admission to the Drug Court, to proceed to trial, or to pursue another disposition. Counsel's obligation is to prepare the client to make an informed choice. Counsel meets this obligation by preparing the case thoroughly, by negotiating effectively, and by communicating with the client regarding the range of possible ways to proceed.<sup>40</sup> In addition to describing the Drug Court, counsel may help the client make an informed choice by arranging for the client to attend a Drug Court session<sup>41</sup> and to meet with current or former participants of the Drug Court program.

As part of the adversary representation, counsel should advise the client about any waiver of rights in the Drug Court. In large part, the waiver of rights may be similar to any waiver of rights that accompanies a plea of guilty or no contest. However, there may be specific rights waived in connection with the Drug Court procedures, including the right to counsel at court hearings and the right to confidentiality of treatment records.<sup>42</sup>

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<sup>40</sup> The timeline for applying to enter a Drug Court can be a concern for adversary counsel in advising a client (and for the defense representative, in the broader context of promoting fair procedures). A legitimate therapeutic purpose is served by encouraging a prompt commitment to treatment. See, e.g., La Crosse County Drug Treatment Court Program, *Policies and Procedures Manual*, p. 5 (May 2009) ("Addicts are most vulnerable to successful intervention when they are in the crisis of initial arrest and incarceration, so intervention must be immediate and up-front"). Further, for a defendant with a serious addiction or a pattern of abusing drugs or alcohol, a delay in starting a treatment program may be detrimental. The defendant will be either in jail unable to post bail or at risk of arrest for additional offenses because of his or her drug or alcohol use.

However, an arbitrary deadline can interfere with counsel's ability to investigate the facts of the case, to investigate other possible dispositions, and to consult adequately with the client. See generally *America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform*, p. 38 (National Association of Criminal Defense Lawyers 2009) (recommending that Drug Court should allow adequate time for case preparation, including litigation of motions). One possible approach is an opt-out period during which a client may enter Drug Court while adversary counsel continues to investigate the case, obtain and review discovery, and discuss with the client potential legal and factual defenses.

<sup>41</sup> See *id.*

<sup>42</sup> See *infra* n. 46 for sample language regarding a waiver of the right to counsel at review hearings in Drug Court. Regarding treatment records, the Drug Court will ordinarily require participants to sign an agreement that information may be released to specific individuals and agencies. Although the judge often will discuss aspects of a

Adversary counsel does not generally attend all Drug Court sessions.<sup>43</sup> Counsel should clearly communicate to his or her client, before the client seeks admission in the Drug Court, the extent to which counsel will be available to attend court hearings or to answer questions while the client is a participant.<sup>44</sup> If the client is required to request a new appointment of an adversary attorney for any issue that arises in the Drug Court, counsel should advise the client regarding the process for such a request.

Adversary counsel should also advise the client regarding the consequences of an unsuccessful termination from the Drug Court. The client needs to know the sentence or the range of potential sentences that he or she could face in a future sentencing hearing. Similarly the client needs to know the potential sentence that could follow future revocation of probation or parole. Counsel should also discuss with the client that if the client is unsuccessful in Drug Court, the client will have spent a period of time in a challenging and structured treatment program, after which the client may still face the applicable sentence. In sum, although the benefits of success may be substantial, the client also needs to understand that if he or she is unsuccessful, the overall consequences for the underlying charge may be more onerous than if the client has received a traditional sentence.

## ADVERSARY REPRESENTATION IN DRUG COURT

The best practice for an indigent-defense program is to offer adversary representation whenever a Drug Court participant faces incarceration as a sanction.<sup>45</sup> If adversary representation is limited or

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participant's treatment at the review hearings, in the presence of team members and the other participants, the records are not made available to the general public.

<sup>43</sup> See *infra* nn. 52–53 and accompanying text.

<sup>44</sup> See ABA Model Rules of Professional Conduct 1.4(b) (a lawyer shall explain an issue sufficiently that the client may make an informed decision). Access to the assistance of counsel could be a pertinent factor for a client to consider when deciding whether to participate in a Drug Court.

<sup>45</sup> See State of New Jersey Drug Court Program, Participation Agreement, ¶ 17 (participant has “right to an attorney during court proceedings”). See *generally* Rothgery

unavailable in Drug Court proceedings, prospective participants should be notified before entering the Drug Court. Participants may knowingly and voluntarily waive the right to counsel as part of an agreement to follow the rules of the Drug Court.<sup>46</sup> Despite this type of waiver, the attorney who served as adversary counsel on the underlying case should remain available to answer his or her client's questions during the time that the client is participating in the Drug Court.<sup>47</sup>

Ideally, Drug Court participants should have access to adversary counsel throughout the process. Regardless of the court's therapeutic purpose, the availability of adversary counsel is important, especially when a sanction will impact the client's liberty (for example, jail or an inpatient program). Participants may not need to consult frequently with counsel, especially when they are progressing well in their treatment programs or when they are satisfied with the court's measured response to infractions. However, their conduct in treatment and in the court hearings can affect the ultimate disposition of their under-

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v. Gillespie County, 554 U.S. 191, 128 S. Ct. 2578, 2591 n.16 (2008) (constitutional right to counsel applies to critical stages of a criminal proceeding that amount to "trial-like confrontations") (citations omitted). When the court confronts a treatment court participant with information regarding a failed drug test or other alleged rules violations, the proceeding arguably meets the criteria for a "critical stage," thus implicating the constitutional right to counsel. As a practical matter, however, the court may have authority to modify bail (or the probation department may have authority to hold the participant in jail) pending an adversary hearing. Thus, if the participant is facing a sanction of one or two days in jail, he or she may agree to the sanction instead of requesting a formal hearing.

<sup>46</sup> Several Wisconsin counties include the following standard language in their participant contracts: "For purposes of regular drug court review hearings, I agree to waive my right to have my attorney of record present. I understand that my case may be discussed without my attorney or the prosecutor present." See, e.g., *Dunn County Diversion Court Participant Contract*, ¶ 21; *Eau Claire County Drug Court Program Participant Contract*, ¶ 21; *Jackson County Drug Court Participant Contract*, ¶ 20; *Polk County Drug Court Participant Contract*, ¶ 20; *Trempeleau County Drug/OWI Court Participant Contract*, ¶ 20.

<sup>47</sup> See generally *supra* nn. 37–44 and associated section. The defense representative should be available to answer the questions of participants regarding the Drug Court. However, adversary counsel can best answer questions regarding the underlying case and the likely effect on its ultimate resolution if the client does or does not successfully complete the court program.

lying criminal cases and can affect their status in the Drug Court from week to week. Therefore, the ability to confer confidentially with adversary counsel can benefit participants while they participate in a Drug Court.

Because of differences among both the structures of defender programs and the procedures of treatment courts, local practices vary regarding the availability of appointed counsel throughout an individual defendant's participation in a Drug Court.<sup>48</sup> The defense representative should provide interested parties (including the local defense bar, prospective participants in the Drug Court, and other justice agencies) information regarding the scope of adversary representation that attorneys appointed for the indigent will provide in the Drug Court.<sup>49</sup> This communication should include providing access to materials such as policy manuals, participant contracts, and authorization forms for release of treatment information to specified parties.

In many Drug Courts, a defendant's participation in the court follows a negotiated agreement, such as a plea agreement or a diversion agreement.<sup>50</sup> If the defendant successfully completes the treatment

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<sup>48</sup> Drug Courts follow one of three different models regarding the phase of the criminal proceeding at which the defendant is admitted to the court: pre-plea, between plea and adjudication, or postadjudication. See G.F. Roper, Roadblocks to Success, reprinted in *Drug Courts: A New Approach to Treatment and Rehabilitation*, p. 342 (Springer Science and Business Media 2007). The model of a particular court may affect whether the appointment of the attorney on the original charge continues throughout the time that the client is in the treatment court. For example, an appointment might continue for a case in which no adjudication of guilt has yet occurred, but not for a case in which the client has already been convicted and placed on probation.

<sup>49</sup> For staff public defenders, office policies may define the scope of representation that they are required or expected to provide. The high volume of cases assigned to public defenders make it difficult for them to appear regularly at review hearings for each client whom they represented before admission to treatment court. For appointed private attorneys, local rules regarding reimbursement and the attorneys' duties to other clients may influence whether or not attorneys ordinarily attend review hearings. However, the main reason for the rare attendance of adversary counsel may be the fairness of the procedures followed in many Drug Courts. See *infra* n. 53.

<sup>50</sup> See W. Huddleston & D. Marlowe, *Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Court Programs in the United States*, pp. 24-25 (Bureau of Justice Assistance 2011) (noting that the participants in most adult Drug Courts have entered a plea of guilty as a condition of entering the court program). The agreement may call for dismissal of charges, reduction of charge-

program, the charge is often reduced or dismissed.<sup>51</sup> An indigent defendant is eligible for appointment of an attorney on the underlying charge. The attorney may negotiate on the client's behalf regarding participation in Drug Court. (Although the appointment is not for the specific purpose of seeking admission to Drug Court, the attorney advises the client of this option as part of representation on the pending charge.) However, in most Drug Courts, the attorney does not attend the court's regular review hearings, even when the defendant faces a sanction for noncompliance.<sup>52</sup> Nonetheless, Drug Courts should permit attendance and participation of adversary counsel.<sup>53</sup>

Defendants should be advised when a defense representative attends the Drug Court as a member of the court team, rather than as adversary counsel, for each individual defendant.<sup>54</sup> Although an attor-

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es, and/or a lesser sentence upon successful completion of the treatment court program. Some Drug Courts accept individuals who are on supervision (parole or probation) and who seek to participate in Drug Court as an alternative to revocation of supervision.

<sup>51</sup> See, e.g., Michael O'Hear, Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice, 20 *Stan. L. & Policy Rev.* 463, 479 (2009).

<sup>52</sup> See, e.g., *America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform*, p. 34 (National Association of Criminal Defense Lawyers 2009) (describing some jurisdictions in which the custom for defense attorneys is not to appear in Drug Court). The absence of adversary counsel at these hearings is consistent with the collaborative approach characteristic of Drug Courts. See *Defining Drug Courts: The Key Components*, p. 11 (NADCP, Drug Court Standards Committee 1997) (recommending that the defense counsel and prosecutor "shed their traditional adversarial courtroom relationship and work together as a team").

<sup>53</sup> See G.F. Roper, Roadblocks to Success, reprinted in *Drug Courts: A New Approach to Treatment and Rehabilitation*, pp. 348–49 (Springer Science and Business Media 2007) (recommending that judge offer to adjourn hearing on imposition of sanctions until adversary counsel is available, but sharing experience that defendants and defense bar rarely contest sanctions when "satisfied that the judge will not impose sanctions heavy-handedly or without abundant, clear evidence of a violation"). Conversely, if participants are frequently contesting alleged violations or the severity of the sanctions, the court may lack that shared confidence in a fair process.

<sup>54</sup> Cf. *Defining Drug Courts: The Key Components*, p. 12 (NADCP, Drug Court Standards Committee 1997) (defense counsel should explain to the defendant the rules of the Drug Court and all rights that he or she is relinquishing as part of an agreement to enter the court program). Although *The Key Components* does not explicitly differentiate between a defense attorney serving in a representative capacity and serving as adversary counsel, many of the actions recommended for defense

ney who has served for a long time on a Drug Court team may understand his or her nontraditional role at the review hearings, the attorney should ensure that Drug Court participants also understand that the attorney's role is not to provide individual representation in Drug Court. If the Drug Court is not treating defendants fairly at the review hearings, the defense representative should seek improvements in the court process and should advise the defense bar of the concerns about the court's actions.<sup>55</sup>

A major distinction exists between an ordinary review hearing and an expulsion hearing, the latter generally occurring only after a participant has failed repeatedly to comply with treatment expectations or has been imprisoned for a new violation (and thus is unavailable for community-based treatment). Depending upon the original charges, a participant may face months or years of incarceration following expulsion rather than the day or two in jail he or she might receive as a Drug Court sanction. Thus, prompt access to adversary counsel is especially critical when a participant faces either an expulsion hearing or a sentencing hearing following expulsion.

## ATTORNEY FULFILLING DUAL ROLES IN DRUG COURT

In some jurisdictions, the same attorney may simultaneously serve as adversary counsel and as the defense representative on the Drug Court team. For many Drug Court hearings (particularly for clients in compliance with the court's requirements), the client's wishes and the team's treatment goals for the client are identical. In this common situation, the dual roles do not present a challenge for the attorney. However, because many clients relapse or commit other infractions during the difficult treatment process, the potential exists for conflict between the two roles.

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counsel are consistent with the role of defense representative described in this report. *See id.*, pp. 11–12.

<sup>55</sup> In addition to the efforts of the defense representative to improve court processes or to discourage further referrals to the court, adversary counsel may pursue litigation on behalf of clients aggrieved by actions of the Drug Court.

The attorney's adversarial role, ethically required for direct client representation, may be counterproductive for the therapeutic goals of the Drug Court.<sup>56</sup> Therefore, when the attorney is required as an advocate to argue against sanctions, he or she may be jeopardizing the collaborative approach that is widely accepted as integral to the effectiveness of Drug Courts.<sup>57</sup>

The different roles impact how the defense attorney perceives the direct conversations that regularly occur between the Drug Court judge and the individual participants. The success of Drug Courts stems in part from this interaction, which increases participants' belief that they are being treated fairly.<sup>58</sup> However, an attorney providing adversary representation does not ordinarily encourage a client to

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<sup>56</sup> See *Defining Drug Courts: The Key Components*, p. 6 (NADCP 1997) (observing that the traditional role of defense counsel may contribute to alcohol or drug abuse by reinforcing the client's denial of the underlying problem). See also *Critical Issues for Defense Attorneys in Drug Court*, p. 3 (National Drug Court Institute 2003) ("desires of the treatment team are, at times, conflicting and seemingly put the defense attorney in a box"). For example, despite believing that a client needs long-term or intensive treatment to achieve and maintain sobriety, adversary counsel will ordinarily advocate for a lesser treatment dosage if consistent with the client's wishes. See K. Weibrecht, *Evidence-Based Practices and Criminal Defense: Opportunities, Challenges, and Practical Considerations*, p. 31 (National Institute of Corrections 2008) (interpreting ethical standards for defense counsel to presume that counsel should advocate for the dispositional result preferred by the client)

<sup>57</sup> See, e.g., *Defining Drug Courts: The Key Components*, p. 3 (NADCP 1997) (after the participant is accepted into the Drug Court, the team's focus is "on the participant's recovery and law-abiding behavior"); J. Miller and D. Johnson, *Problem Solving Courts: New Approaches to Criminal Justice*, p. 158 (Rowman & Littlefield 2009) (stating that Drug Court team members must step outside their ordinary professional roles to work collaboratively).

<sup>58</sup> See, e.g., D.C. Gottfredson, B.W. Kearley, S.S. Najaka, and C.M. Rocha, *How Drug Treatment Courts Work: An Analysis of Mediators*, p. 26, 44:1 *Journal of Research in Crime and Delinquency* (2007) (number of judicial hearings increases participants' perceptions of procedural fairness, which in turn reduces drug usage and criminal activity); *Defining Drug Courts: The Key Components*, p. 15 (NADCP 1997) (Key Component # 7 addresses ongoing judicial interaction with each participant to demonstrate that the judge cares about the participant and is keeping track of his or her progress).

communicate directly with the judge, particularly if the attorney does not know in advance the substance of the client's statements.<sup>59</sup>

Another challenge for a dual-role attorney is the simultaneous representation of all or most of the Drug Court participants. For example, if multiple participants face sanctions during the same review session, it may be difficult for the attorney to present a credible argument that each one has a unique mitigating circumstance.<sup>60</sup>

If a Drug Court consistently follows fair procedures and relies more heavily on incentives than on sanctions, many participants will become comfortable with direct and candid conversations with the presiding judge. Thus, the conflicts between the adversary role and the defense representative role may be relatively infrequent during the court's staffing meetings and review hearings. Nonetheless, when possible, an individual attorney should refrain from serving simultaneously in both roles.

## MAJOR ISSUES FOR THE DEFENSE ATTORNEY IN DRUG COURT

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### Eligibility for Participation

A critical and difficult issue for a Drug Court is the eligibility criteria. A Drug Court that limits eligibility to defendants charged with minor offenses may not provide sufficient incentives for many defendants to complete a long period of intense treatment and supervi-

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<sup>59</sup> Cf. ABA Standards for Criminal Justice, Defense Function, § 4-6.2 (Commentary) (3<sup>rd</sup> ed. 1993) (because statements made by the defendant during plea negotiations may be used against the defendant in future proceedings, "the accused should be cautioned by counsel against making any statements that have not been carefully explored in advance with counsel").

<sup>60</sup> ABA Model Rules of Professional Conduct 1.7(a)(2) prohibits representation of a client when a substantial risk exists that the representation will be materially limited by obligations to another client. For example, in the context of arguing against sanctions that the Drug Court generally imposes, an attorney might have to argue on behalf of one client that her brief time in the court is a mitigating factor (she is still under the powerful effects of addiction) and then to have to argue that another client's substantial time in the court without a violation is a mitigating factor. Arguably, both clients would be better served by separate attorneys who would not have to argue seemingly inconsistent positions before the same judge.

sion.<sup>61</sup> Conversely, a Drug Court that accepts defendants charged with serious offenses (and defendants with prior records) may achieve a higher rate of program completion because defendants are motivated to complete the program instead of serving a substantial term of imprisonment.<sup>62</sup> A defense representative, through familiarity with research regarding this risk–reward principle, may influence other members of the Drug Court team regarding eligibility criteria.

A defense representative is expected, as a member of the Drug Court team, to support agreed-upon eligibility criteria (particularly if he or she participated in establishing them). Therefore, a conflict of interest may arise if the defense representative (or a colleague in the same defender organization) acts as adversary counsel for clients seeking admission to the Drug Court.<sup>63</sup> The defense representative has an institutional interest in supporting the agreed-upon admission criteria, which support successful treatment outcomes and favorable dis-

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<sup>61</sup>See, e.g., Michael O’Hear, Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice, 20 *Stan. L. & Policy Rev.* 463, 480 (2009) (a Drug Court is “less a diversion from prison than a diversion from other alternatives” if it focuses on possession offenses and on defendants without serious prior records); G.F. Roper, Roadblocks to Success, reprinted in *Drug Courts: A New Approach to Treatment and Rehabilitation*, p. 348 (Springer Science and Business Media 2007) (some defense attorneys recommend a straight sentence of “weeks or months” to their clients instead of a longer period of participation in Drug Court).

Furthermore, the Drug Court should take into account the risk level and risk factors (needs) of participants to determine the appropriate level and type of treatment. See L. Gutierrez and G. Bourgon, *Drug Treatment Courts: A Quantitative Review of Study and Treatment Quality 2009-04*, p. 3 (Public Safety Canada 2009). Low-risk individuals do not need (and should not receive) the same treatment programming as high-risk individuals. *Id.*

<sup>62</sup> See *Drug Courts: The Second Decade*, p. 2 (National Institute of Justice 2006) (Drug Courts have moved from “low-level first-time offenders to focusing on those whose substance abuse and criminal activity may be more serious”). See also R. Warren, *Evidence-Based Practices to Reduce Recidivism: Implications for State Judiciaries*, pp. 21–22 (Crime and Justice Institute, National Institute of Corrections and National Center for State Courts 2007) (“Effective recidivism-reduction programs target moderate- and high-risk offenders”; participation of low-risk offenders in intensive treatment can actually increase their risk of reoffending).

<sup>63</sup> ABA Model Rules of Professional Conduct 1.7(a)(2) prohibits representation of a client when a substantial likelihood exists that the attorney’s ability to represent the client will be materially limited by the attorney’s other responsibilities. See *supra* n. 11 and accompanying text.

positions for participants. However, adversary counsel for an individual client has an obligation to advocate for admission to the Drug Court, if the client wishes to participate, even if the circumstances of the client's case do not appear to meet the admission criteria.<sup>64</sup>

Regardless of the specific eligibility criteria and screening procedures, the defense representative should communicate to other Drug Court personnel that defense attorneys are ethically required to seek admission for clients on a case-by-case basis. By learning about practices and outcomes in other jurisdictions, the defense representative may persuade the team to expand the eligibility criteria or to apply them more flexibly. If other members of the Drug Court team respect the defense representative's duty to individual clients, he or she may be effective in advocating for their admission to the Drug Court.

The defense representative may also seek to persuade policy makers to allocate additional resources to the Drug Court, which may expand its capacity to accept new applicants. The court's track record in reducing recidivism can be used to show whether that jurisdiction should support the Drug Court as a viable option to traditional prosecution and punishment.

## Cultural Competency in Drug Court

Drug Courts should provide services that effectively meet the needs of all participants, regardless of race, gender, age, or ethnicity. By collecting demographic information of participants and by track-

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<sup>64</sup> See generally ABA Model Rules of Professional Conduct 1.2(a) (lawyer shall generally abide by decisions of the client regarding the objectives of the representation, including whether to settle a case or proceed to trial). As an adversary attorney, an attorney may be ethically required to seek admission to Drug Court for a low-risk client, if the client prefers that disposition. Thus, if the same attorney also serves as the court's defense representative, he or she may be precluded from advocating for the best practice regarding the population served by the treatment court. See *supra* nn. 61–62 and accompanying text regarding the reasons for accepting moderate-risk and high-risk defendants as participants in Drug Court.

A jurisdiction with a Drug Court may also provide other diversion options for low-risk defendants. If so, adversary counsel may seek a favorable disposition that does not require the intensive treatment and the frequent court appearances characteristic of Drug Courts.

ing outcomes, a Drug Court team can assess whether it is providing services that lead to success for participants from all cultural backgrounds.

NADCP has recognized that Drug Court teams should continually review their programs for evidence of racial or ethnic disparity and, if necessary, take corrective action to address such disparity.<sup>65</sup> In recommending that Drug Courts focus on this issue, NADCP noted the disproportionate incarceration of racial and ethnic minorities nationwide.<sup>66</sup> NADCP also noted lower success rates reported for minority participants in some Drug Courts<sup>67</sup> and the importance of training Drug Court personnel “on how to identify and administer evidence-based, culturally sensitive and culturally competent interventions and assessment tools.”<sup>68</sup>

## Incentives and Sanctions for Drug Court Participants

Drug Courts generally use incentives and sanctions to shape participants’ behavior, rewarding compliance and imposing negative consequences for noncompliance. The defense representative can help temper the tendency that other team members may have to recommend or impose unnecessarily harsh sanctions. Familiarity with research regarding incentives and sanctions can help in ensuring that the Drug Court does not overreact to the inevitable instances of noncompliance. This knowledge of the research can also help other team members to understand the importance of incentives to provide positive reinforcement.

Defense attorneys, whether serving as a defense representative on a Drug Court team or as adversary counsel, should be aware of the likely consequences for participants for conduct occurring after they enter the Drug Court. Negative consequences can occur either as sanctions (within the framework of the Drug Court) or as a sentence

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<sup>65</sup> NADCP, *Resolution of Board of Directors on the Equivalent Treatment of Racial and Ethnic Minority Participants in Drug Courts*, p. 2 (June 2010).

<sup>66</sup> *Id.*, p. 1.

<sup>67</sup> *Id.*, p. 2.

<sup>68</sup> *Id.*, p. 3.

following expulsion from the Drug Court. Both types of consequences need to be considered in light of the dispositional alternatives other than Drug Court (for example, a participant might face short periods of incarceration as a sanction in Drug Court, but might face a prison sentence for the underlying offense if expelled).

## Incentives

Not all justice professionals instinctively embrace the idea of a court providing tangible incentives such as gift cards or movie passes to a participant for having a clean urine test and appearing in court as scheduled. After all, millions of people obey the law every day without receiving these rewards. However, to counteract the power of chemical addiction and dependency, immediate and tangible rewards are important ways for a Drug Court to show some benefits of abstinence.<sup>69</sup>

## Sanctions

Four general principles for effective sanctions within a treatment program are certainty, promptness, magnitude, and fairness.<sup>70</sup> Certainty and promptness of sanctions are the most important principles.<sup>71</sup> Therefore, the Drug Court's ability to identify and to respond

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<sup>69</sup> M. Stitzer, Motivational Incentives in Drug Courts, *reprinted in Quality Improvement for Drug Court: Evidence-Based Practices*, p. 99 (National Drug Court Institute 2008). See also Strategies for Administering Rewards and Sanctions, *reprinted in Drug Courts: A New Approach to Treatment and Rehabilitation*, pp. 326–328 (Springer Science and Business Media 2007) (discussing the value of tangible rewards for Drug Court participants, particularly to help new participants before they begin to experience intrinsic rewards of sobriety and other prosocial behaviors).

<sup>70</sup> D. Marlowe, Strategies for Administering Rewards and Sanctions, *reprinted in Drug Courts: A New Approach to Treatment and Rehabilitation*, pp. 319–324 (Springer Science and Business Media 2007).

<sup>71</sup> *Id.*, pp. 319–322. Frequent and random drug tests for participants create a high degree of certainty that the Drug Court will discover a participant's drug usage. Conversely, if testing is conducted infrequently or on a predictable schedule, the certainty of a sanction for drug usage is greatly reduced. The promptness principle reflects that the more quickly a sanction occurs, the greater likelihood that the participant recognizes that connection between the sanction and the underlying conduct. Conversely, when a criminal defendant is sentenced months or years after an offense, "the effects of sanctions should be expected to be minimal." *Id.*, p. 321.

quickly to misconduct is more critical than the severity of the sanctions imposed.

The magnitude of the response, in a Drug Court environment, should take into account the strength of the participant's drug or alcohol dependency and the expectation that relapse is a common occurrence during treatment. During the early phase of treatment, "clients might receive verbal reprimands or writing assignments for providing drug-positive urine samples but might receive community service or brief jail detention for failing to show up for counseling sessions or failing to provide urine samples."<sup>72</sup> The fourth principle, fairness, calls for fair procedures and professional, respectful communication with participants when imposing sanctions.<sup>73</sup>

Indiscriminate use of incarceration as a sanction can result in substantial incarceration for participants in a Drug Court, even for those who successfully complete the treatment program.<sup>74</sup> In advising a client regarding potential participation in a Drug Court, defense counsel should be aware not only of the range of sanctions generally used, but also the likelihood that most participants will experience some setbacks during their time in the court-sponsored program.

Conversely, counsel should consider and discuss with the client the likely outcome if he or she receives a traditional sentence. This

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<sup>72</sup> *Id.*, p. 326; see also T.J. Kelly, J.M. Gaither, and L.J. King, Relapse, reprinted in *Drug Courts: A New Approach to Treatment and Rehabilitation*, p. 386 (Springer Science and Business Media 2007) ("it is not necessary or desirable that a participant be incarcerated for every drug use episode"). The harsher sanctions during the early phase of treatment should be reserved for intentional violations of court procedures, such as skipping an appointment, rather than for succumbing to a powerful addiction of dependency.

<sup>73</sup> D. Marlowe, Strategies for Administering Rewards and Sanctions, reprinted in *Drug Courts: A New Approach to Treatment and Rehabilitation*, p. 324 (Springer Science and Business Media 2007). A Drug Court's failure to follow fair procedures, including the opportunity to respond to alleged violations, may adversely affect the commitment of participants to their treatment programs. *Id.* If participants perceive that they have been treated fairly and respectfully, they are likely to accept sanctions for misconduct. *Id.*

<sup>74</sup> See, e.g., M. O'Hear, Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice, 20 *Stan. L. & Policy Rev.* 463, 481 (2009) (citing studies from Santa Clara and Baltimore that showed an average time in excess of 50 days' incarceration for sanctions).

consideration should encompass not only the length of the initial period of incarceration, but also whether the client is likely to comply with probation or parole requirements. Most clients eligible for a Drug Court have a history of court involvement that suggests, absent an intensive and successful course of treatment, the potential for future legal difficulties.

## Confidentiality of Information Disclosed in Drug Court

Participants may have concerns not only about use of information within the justice system (e.g., in a future sentencing or revocation proceeding), but also about public access to information stemming from their participation in a Drug Court. Local law and procedures may differ regarding specific practices such as whether review hearings are transcribed, whether members of the public may attend the review hearings, whether records are accessible under local law on public records, and whether the judge orders attendees not to disclose information communicated in these hearings.

Although members of the Drug Court team need to receive information about participants, such as treatment records and results of drug tests, the defense representative should seek to protect confidentiality through adoption of procedures limiting access to information, disclosure of information, and use of information.

When a defendant agrees to participate in a Drug Court, he or she is required to sign release forms to allow members of the court team to review treatment records. Despite the legitimate purpose for requiring this consent to disclosure of records, the defense representative should ensure that disclosure is no broader than is necessary. A policy manual, written contract, or memorandum of understanding can be a valuable resource to document the limits on disclosure of treatment records.<sup>75</sup>

The frequency of treatment sessions, tests for alcohol and drug use, and review hearings results in members of the treatment court

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<sup>75</sup> See, e.g., *La Crosse County (Wisconsin) Drug Court Manual*, p. 10 (2009) (“Drug Court files are separate and distinct from Circuit Court files...All Drug Court files are confidential and are not open to the general public”).

team learning when participants relapse. Members of the team thus commonly encounter evidence of positive drug tests and incriminating statements during the participant's gradual and uneven path to recovery. "Defenders will want to ensure that such evidence is used for the limited purpose of treatment and cannot be used against the client" in other contexts.<sup>76</sup>

## Criteria and Procedures for Expulsion from Drug Court

The criteria for expulsion from Drug Court contribute to the completion rate for participants. The therapeutic model anticipates relapse and uses a range of sanctions and incentives to enhance the chances for successful completion of treatment. If a Drug Court is impatient with the uneven progress of participants and expels them after a specified number of violations, the court will likely have a lower completion rate. Because the length of time that a person participates in treatment is directly related to the likelihood of future success,<sup>77</sup> Drug Courts should use the motivational tools of incentives and sanctions to retain participants and to optimize their chances for success.

The success of an individual participant depends in large part upon his or her conduct while in the Drug Court. A participant who regularly adheres to the court's expectations will ordinarily complete the program; a participant who regularly skips court sessions, who is imprisoned for a new crime, or who is unable to benefit from treatment is much less likely to succeed. Nonetheless, the court's overall completion rate and its general policies regarding expulsion are pertinent information for defense attorneys in advising their clients regarding participation in a Drug Court.

Expulsion from Drug Court may result in substantial incarceration. Depending upon the stage of the criminal proceeding at which the participant entered Drug Court, he or she may face sentencing in an adjourned felony case or may face revocation of parole. Further-

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<sup>76</sup> M. Judge, *Critical Issues for Defenders in the Design and Operation of a Drug Court*, *Indigent Defense*, p. 4 (National Legal Aid and Defender Association 1997).

<sup>77</sup> See, e.g., W. Meyer, *Developing and Delivering Incentives and Sanctions*, p. 1 (National Drug Court Institute, April 2007).

more, the postexpulsion decision of the sentencing court or parole board may be influenced by the participant's failure to complete the treatment court program successfully. Therefore, the Drug Court should provide the participant with the right to appointment of adversary counsel in an expulsion hearing.<sup>78</sup>

## Sentence Following Expulsion from Drug Court

Although Drug Courts have shown success at reducing recidivism,<sup>79</sup> not all participants successfully complete the court program. The unsuccessful participant typically faces a sentencing hearing on the original charge (or faces imprisonment in the revocation proceeding) that precipitated the referral to the treatment court. In some jurisdictions, an unsuccessful participant may face a greater penalty than if he or she had never participated in the Drug Court.<sup>80</sup> However, absent a new conviction, a participant's failure to complete the program should not be a basis for an increased sentence.<sup>81</sup> The defense repre-

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<sup>78</sup> Some Drug Courts have adopted specific policies to notify participants of the right to counsel in this type of hearing. See, e.g., *Brown County (Wisconsin) Drug Court Program Manual*, p. 13 (2009) (expulsion hearing, if requested, occurs on the record, "and the participant is entitled to legal representation"); *La Crosse County (Wisconsin) Drug Court Participant Handbook*, p. 10 (2009) (attorney may appear both for initial hearing before Drug Court team and, if the matter proceeds further, for judicial hearing on expulsion).

<sup>79</sup> See *supra* nn. 4, 14, and accompanying text.

<sup>80</sup> See, e.g., M. O'Hear, Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice, 20 *Stan. L. & Policy Rev.* 463, 481& n. 100 (2009) (citing studies from New York that showed failing participants receiving longer sentences than non-participants receive).

<sup>81</sup> The defense representative may wish to consider whether unsuccessful participants should have the option of having their cases transferred from the Drug Court judge to another judge for sentencing. In some jurisdictions, cases may routinely be returned to another judge when the defendant (whether successful or unsuccessful) has ended his or her participation in Drug Court. If the defendant has the option of remaining before the Drug Court judge or having the case transferred, the decision is a tactical one to make in consultation with adversary counsel.

Another potential safeguard is to let the defendant know, before he or she enters Drug Court, what the sentence will be if the defendant does not complete the court program. This alternative depends on local sentencing law and practices, as well as the phase of the proceedings at which the participant enters the Drug Court (for example, if the participant enters Drug Court in lieu of revocation of parole, the potential in-

sentative (and the defense bar in general) should advise judges and prosecutors that increased sentences for noncompletion may deter many defendants from participation in Drug Court.

## Defense Representative's Role in Decisions about Individual Participants

The defense representative on a Drug Court team should ordinarily refrain from voting to admit to the court clients represented by attorneys working in his or her office. Similarly, the defense representative should not vote on sanctions or expulsion of these clients. If the defense representative intends to vote (or otherwise advocate) regarding these decisions, the clients should be notified that the defense representative is acting as a representative of the Drug Court and will vote according to the court's applicable standards and policies. Present or former clients of the public defender agency should be given the same access and consideration as clients of the private bar.

In general, the interests of indigent defendants are better served if a defense representative participates in admission decisions. The defense representative may be more receptive than other team members to accepting defendants with serious charges or significant criminal records. Also, the defense representative may advocate for criteria and policies that provide access regardless of financial status (for example, procedures to waive or defer fees that might otherwise preclude participation by indigent persons). However, when the defense representative's colleagues are serving as adversary counsel for defendants seeking admission to the Drug Court, ethical and practical concerns make the defense representative's recusal preferable to voting on the admission decision.

If the defense representative opposes admission into the Drug Court of a colleague's client, ethical issues arise regarding conflict of interest and confidentiality. A conflict of interest arguably exists between the defense representative's responsibility as part of the Drug Court team (which may include adherence to specified admission cri-

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carceration time may be predetermined by the sentence originally imposed and the local parole law.

teria) and his or her responsibility to take no action adverse to a colleague's client (this responsibility exists whenever attorneys work together in the same office).<sup>82</sup> The confidentiality issue arises because attorneys in the same office generally have access to information regarding all clients of the office,<sup>83</sup> and the defense representative may not ethically use client-related information adversely in the decision regarding admission to the Drug Court.<sup>84</sup>

The ethical issues are magnified if the defense representative supervises the attorney providing the adversary representation. The defense representative must not discourage adversary counsel from seeking admission to the Drug Court on behalf of his or her clients (even for clients who may appear not to meet the stated admission).

Practical considerations also support the recommendation that the defense representative has a policy of not voting on the admission of a colleague's client. If the representative invariably votes in favor of admission, he or she will lose credibility with other members of the Drug Court team. However, if the representative votes against admission (or abstains) only in some cases when the prospective participant is a client of a colleague, others on the Drug Court team may believe that the representative has confidential and negative information about the client derived from working in the same office with adver-

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<sup>82</sup> ABA Model Rules of Professional Conduct 1.10(a) provides that for attorneys "associated in a firm," a conflict of interest precluding representation by one attorney is generally imputed to his or her colleagues. An exception exists, however, that allows other attorneys in the firm to represent the client if the conflict "is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining members of the firm. *Id.* 1.10(a)(1). Thus, whether other public defenders may represent a client in Drug Court (or seeking admission to the court) despite a conflict affecting their colleague depends on the interpretation of this rule on imputed disqualification (some states have adopted the ABA Model Rules with changes, so attorneys should review local rules and opinions).

In analyzing this ethical issue and others, attorneys must be familiar with the specific rules and ethics opinions applicable in their respective jurisdictions.

<sup>83</sup> *Id.*, 1.6, Comment ("Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm," unless the client has given contrary instructions).

<sup>84</sup> *Id.*, 1.6(a) (general rule of confidentiality, which broadly prohibits a lawyer from revealing "information relating to the representation of a client").

sary counsel. Furthermore, multiple clients of the office may be applying for a single place in the Drug Court.<sup>85</sup>

Participation in decisions on expulsion or sanctions can be similarly problematic. The defense representative can support the therapeutic goals of the Drug Court by reminding other team members that overcoming addiction or dependence is generally an uneven journey, interrupted by relapse.<sup>86</sup> However, voting on potential expulsion or sanction for each individual creates the same dilemma as with admission decisions. The defense representative may lose credibility by opposing all negative consequences for violations.<sup>87</sup> Conversely, if the

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<sup>85</sup> Because of limited resources (e.g., staff, treatment providers, or funding), Drug Courts may have a maximum number of participants at a given time. Therefore, if the number of applicants exceeds the court's capacity, the team may need to make admission decisions from among a pool of applicants all of whom meet the eligibility requirements. Ethical issues related to admission decisions may be minimized if the court uses criteria such as a diagnosis of addiction and a risk determination (from a standardized assessment instrument) to select participants. Another possible approach to address these ethical issues is to screen the defense representative from confidential information about treatment court applicants represented by colleagues (other members of the Drug Court team should then be informed of this screening procedure, so that they do not draw any inferences from the statements or votes of the defense representative).

The defense representative may also work with other team members to seek additional resources to expand the Drug Court's capacity. If the court can document its success in reducing recidivism, policymakers may increase funding to allow the court to serve additional participants.

<sup>86</sup> See T.J. Kelly, J.M. Gaither, and L.J. King, *Relapse*, reprinted in *Drug Courts: A New Approach to Treatment and Rehabilitation*, p. 386 (Springer Science and Business Media 2007) (stating that Drug Court judge "should carefully consider the consequences of incarceration and not allow traditional notions of 'tough on crime' to interfere with the effective use of treatment."); see also K.R. Lay and L.J. King, *Counseling Strategies*, reprinted in *Drug Courts: A New Approach to Treatment and Rehabilitation*, p. 170 (Springer Science and Business Media 2007) ("Relapse is an expected part of recovery in Drug Courts and might not occur at any stage and require return to an earlier stage").

<sup>87</sup> For example, the defense representative might be called upon to vote on potential sanctions for misconduct that occurred during a treatment session or for failure to show up to provide a urine sample. Members of the Drug Court team may reasonably conclude that the failure to impose some sanctions for violations potentially undermines not only the court's ability to promote participant compliance, but also the court's relationship with the service provider (for example, an agency providing treatment or drug testing). See D.A. Reilly, *Building Supportive Services in Drug*

defense representative votes for such consequences in selected cases, other team members may infer that the representative has confidential and negative information about the client.

In a jurisdiction in which the local public defender staff represent a large percentage of defendants, this issue can be difficult. The defense representative should consider reasonable alternatives to preserve a defense voice in these decisions without creating the ethical and practical issues discussed above. The participation of a private defense attorney in admission decisions may be an option in some Drug Courts. Another option may be that the applicant's adversary counsel, after having reviewed the eligibility criteria, presents the application to other members of the team, with the defense representative refraining from any formal vote.

In sum, the defense representative can advocate generally for fair criteria in all aspects of Drug Court's operations without formally advocating for specific actions requested by a client (or colleague's client). If participants have been fully informed of and agreed to the Drug Court's procedures, the defense representative can ethically, collaboratively, and effectively support the court's evidence-based practices.

## CONCLUSION

Drug Courts provide a potentially beneficial option to persons who would otherwise be at high risk of substantial incarceration and recidivism. By addressing underlying risk factors such as addiction or a mental disorder, Drug Courts can benefit both the individual participants and the public safety of the broader community. Public defenders (and other representatives of the defense bar) can and should play an important role in ensuring the fairness and effectiveness of Drug Courts.

*Points of view, opinions, and conclusions in this paper do not necessarily reflect those of the NADCP, National Legal Aid and Defender Association (NLADA,) or the Office of the Wisconsin State Public Defender.*

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Courts, reprinted in *Drug Courts: A New Approach to Treatment and Rehabilitation*, p. 212 (Springer Science and Business Media 2007).

*Michael Tobin is the deputy director of the Wisconsin State Public Defender and previously served this agency as a staff attorney, a supervising attorney, and a division director. He has taught law school courses at the University of Puget Sound and the University of Wisconsin. He coauthored the Wisconsin Criminal Defense Manual and Thomson West's treatise on Wisconsin Criminal Practice and Procedure. He earned his undergraduate degree at Swarthmore College and law degree at the University of Texas.*

Direct correspondence to Michael Tobin, Deputy Director, State Public Defender, 315 N. Henry Street, Madison, WI 53704. (608) 266-8259. [tobinm@opd.wi.gov](mailto:tobinm@opd.wi.gov)