

# III. Roles and Responsibilities of the Judge

The treatment court judge stays abreast of current law and research on best practices in treatment courts and carefully considers the professional observations and recommendations of other team members when developing and implementing program policies and procedures. The judge develops a collaborative working alliance with participants to support their recovery while holding them accountable for abiding by program conditions and attending treatment and other indicated services.

- A. Judicial Education
- B. Judicial Term
- C. Precourt Staff Meetings
- D. Status Hearings
- E. Judicial Decision Making

## A. JUDICIAL EDUCATION

The judge attends training conferences or seminars at least annually on judicial best practices in treatment courts, including legal and constitutional standards governing program operations, judicial ethics, achieving cultural equity, evidence-based behavior modification practices, and strategies for communicating effectively with participants and other professionals. The judge also receives sufficient training to understand how to incorporate specialized information provided by other team members into judicial decision making, including evidence-based principles of substance use and mental health treatment, complementary interventions and social services, community supervision practices, drug and alcohol testing, and program performance monitoring.

## B. JUDICIAL TERM

The judge is assigned to treatment court on a voluntary basis and presides over the program for no less than two consecutive years. Participants ordinarily appear before the same judge throughout their enrollment in the program. If the judge must be absent temporarily because of illness, vacation, or similar reasons, the team briefs substitute judges carefully about participants' performance in the program to avoid inconsistent messages, competing demands, or inadvertent interference with treatment court policies or procedures. When judicial turnover is unavoidable because of job promotion, retirement, or similar reasons, replacement judges receive training on best practices in treatment courts and observe precourt staff meetings and status hearings before taking the treatment court bench. If feasible, replacement judges are assigned new participants' cases, while the predecessor judge oversees prior cases to discharge.

## C. PRECOURT STAFF MEETINGS

The judge attends precourt staff meetings routinely and ensures that all team members contribute their observations about participant performance and provide recommendations for appropriate actions. The judge gives due consideration to each team member's professional expertise and strategizes with the team to intervene effectively with participants during status hearings.

## D. STATUS HEARINGS

Participants appear in court for status hearings no less frequently than every two weeks during the first two phases of the program or until they are clinically and psychosocially stable and reliably engaged in treatment. Some participants may require weekly status hearings in the beginning of the program to provide for more enhanced structure and consistency, such as persons with co-occurring mental health and substance use disorders or those lacking stable social supports. Participants continue to attend status hearings on at least a monthly basis for the remainder of the program or until they are in the last phase and are reliably engaged in recovery support activities that are sufficient to help them maintain recovery after program discharge.

During status hearings, the judge interacts with participants in a procedurally fair and respectful manner, develops a collaborative working alliance with each participant to support the person's recovery, and holds participants accountable for complying with court orders, following program requirements, and attending treatment and other indicated services. Evidence reveals that interactions averaging at least 3 minutes are required to achieve these aims. The judge conveys a respectful and collaborative demeanor and employs effective communication strategies to develop a working alliance with participants, such as asking open-ended questions to generate constructive dialogue, keeping an open mind about factual disputes and actions under consideration, taking participants' viewpoints into account, showing empathy for impediments or burdens faced by participants, explaining the rationale for their judicial decisions, expressing optimism about participants' chances for recovery, and providing assurances that staff will be there to support them through the recovery process.

## E. JUDICIAL DECISION MAKING

The judge is the ultimate arbiter of factual disputes and makes the final decisions concerning the imposition of incentives, sanctions, or dispositions that affect a participant's legal status or liberty interests. The judge makes these decisions after carefully considering input from other treatment court team members and discussing the matter with the participant and their legal representative in court. The judge relies on the expertise of qualified treatment professionals when setting court-ordered treatment conditions. The judge does not order, deny, or alter treatment conditions independently of expert clinical advice, because doing so may pose an undue risk to participant welfare, disillusion participants and credentialed providers, and waste treatment resources.

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#### COMMENTARY

Judicial leadership of a multidisciplinary team and one-on-one communication between the judge and participants in court are among the defining features of a treatment court (NADCP, 1997). Although many programs offer community-based treatment and supervision in lieu of prosecution or incarceration, only in treatment courts do judges confer routinely with treatment and social service professionals (often outside of court) to gauge participant performance and share expertise, or offer advice, encouragement, support, praise, and admonitions to participants during extended court interactions. Not surprisingly, therefore, a good deal of research has focused on the impact of the judge in treatment courts and has examined how judicial interactions with participants and other staff members impact public health and public safety outcomes. Results confirm that how well judges fulfill their roles and responsibilities in treatment courts has an outsized influence on program effectiveness, safety, cost-effectiveness, and cultural equity.

Studies in treatment courts have not compared outcomes between judges and other judicial officers such as magistrates or commissioners. Researchers have, however, reported comparable benefits from court hearings presided over by magistrates or commissioners in adult drug courts and other court diversion dockets (Marlowe et al., 2004a, 2004b; Trood et al., 2022). Barring evidence to the contrary, practitioners should assume that the standards contained herein apply to all judicial officers working in treatment courts.

#### A. JUDICIAL EDUCATION

Judges rarely acquire the knowledge and skills required to preside effectively in treatment courts from law school or graduate school curricula (Berman & Feinblatt, 2005; Farole et al., 2004; Holland, 2011). Although most states mandate continuing judicial education (CJE) for judges, a substantial minority of states require only generic continuing legal education (CLE) suitable for all lawyers (Murphy et al., 2021). Where available, most CJE courses focus on substantive knowledge of case precedent, statutory law, evidentiary rules, judicial ethics, and court operations, and they often pay insufficient attention to other critical aspects of judging, such as learning how to communicate effectively with litigants, work collaboratively with non-legal professionals, manage job stress and burnout, and operate in a way that is consistent with best practices for rehabilitation and crime prevention (National Center for State Courts, 2017; National Judicial College of Australia, 2019). Unless judges seek out curricula designed specifically for treatment courts or other

therapeutic justice programs, they are unlikely to encounter actionable information on evidence-based practices in rehabilitation, conflict resolution, or crisis management (Murrell & Gould, 2009). Although judges' temperaments, attitudes, and ethical values have been shown to influence their professional conduct and decision making, studies confirm that specialized judicial education can counterbalance judges' instincts and raise their awareness of the disease model of addiction and the efficacy of rehabilitation (Lightcap, 2022; Maffly-Kipp et al., 2022), resolve implicit cultural biases (Casey et al., 2012; Seamone, 2006), and increase adoption of evidence-based practices (Spohn, 2009; Ulmer, 2019).

Studies have not determined how frequently judges should receive continuing education on specific topics; however, researchers have found that outcomes in drug courts were significantly better when the judge and other team members attended training workshops or conferences at least annually on topics relating generally to treatment court best practices (Carey et al., 2008, 2012; Shaffer, 2011). Studies of probation officers have similarly reported that knowledge retention and delivery of evidence-based practices declined significantly within 6 to 12 months of an initial training (Lowenkamp et al., 2012; Robinson et al., 2012), thus necessitating annual booster trainings to maintain efficacy and ensure that the professionals stayed abreast of new information (Bourgon et al., 2010; Chadwick et al., 2015; Robinson et al., 2011). Given this available evidence, judges should receive training at least annually on practices relating directly to their roles and responsibilities in treatment court, including legal and constitutional standards governing program operations, judicial ethics, methods for ensuring cultural equity in the program, evidence-based behavior modification procedures for applying incentives and sanctions, and strategies for communicating effectively with participants and other professionals (Meyer, 2011a, 2011b; Meyer & Tauber, 2011).

Judges also require sufficient training to understand how to incorporate specialized information provided by other team members into their judicial decision making, including evidence-based principles of substance use and mental health treatment, complementary interventions and social services (e.g., vocational training, housing services), community supervision (e.g., probation field visits, core correctional counseling practices), drug and alcohol testing, and program performance monitoring (Bean, 2002; Hora & Stalcup, 2008). No information is available on how often treatment court judges should receive training on these topics. Judges should receive training on a frequent enough basis to ensure that they comprehend information being provided to them by

program participants and other team members and the implications of that information for fair and effective judicial decision making.

Judges commonly report that inadequate funding and limited ability to spend time away from court are their primary barriers to attending continuing education programs (Murphy et al., 2021). The increasing availability of online webinars and distance-learning programs has made it more affordable and feasible for judges to stay abreast of evidence-based practices. All Rise, the National Treatment Court Resource Center, the GAINS Center of the Substance Abuse and Mental Health Services Administration (SAMHSA), and many other organizations offer open-access publications and webinars on a range of topics related to best practices in treatment courts and other court-based rehabilitation programs. Many courses are preapproved or approvable for CJE and CLE credits, thus avoiding duplication of educational requirements. Treatment court judges should avail themselves of these and other resources to hone their skills and optimize outcomes in their program.

## B. JUDICIAL TERM

Judges, like all professionals, require time and experience to accustom themselves to new roles and perform novel tasks effectively and efficiently. Not surprisingly, therefore, judges tend to be least effective in their first year on the treatment court bench, with outcomes improving significantly in the second year and thereafter (Finigan et al., 2007). A study of 69 drug courts found significantly lower criminal recidivism and nearly three times greater cost savings when judges presided over the programs for at least two consecutive years than for those that served for a shorter period (Carey et al., 2008, 2012). The researchers also reported larger reductions in recidivism when judicial assignments were voluntary and the judge's term on the drug court bench was indefinite in duration.

Studies have also determined that rotating judicial assignments, especially when the rotations occurred every 1 to 2 years, were associated with poor outcomes in drug courts, including increased rates of criminal recidivism in the first year (Finigan et al., 2007; National Institute of Justice, 2006; NPC Research, 2016). Participants in treatment courts often require substantial structure and consistency to change their entrenched maladaptive behavioral patterns. Unstable staffing arrangements, especially when they involve the central figure of the judge, are apt to exacerbate the disorganization in participants' lives. This process may explain why outcomes decline significantly in direct proportion to the number

of judges before whom participants must appear. A long-term longitudinal study of two drug courts found that the best effects on recidivism were associated with appearances before one consistent judge throughout the drug court process, whereas improvements in recidivism were about 30% smaller when participants appeared before two or more judges (Goldkamp et al., 2001).

The above studies addressed regular judicial assignments to the drug court bench and did not focus on temporary absences due to illness, vacations, holidays, or unavoidable scheduling conflicts. Assuming that judicial absences are predictable and intermittent, there is no reason to believe that temporary substitutions of another judge should seriously disrupt participants' performance or interfere with successful outcomes. To avoid negative repercussions from temporary judicial absences, the presiding judge and other staff members should brief substitute judges carefully about participants' progress in the program, so they do not deliver conflicting messages, impose competing demands, or inadvertently interfere with treatment court policies or procedures.

When judicial turnover is unavoidable because of job promotion, retirement, or similar reasons, carefully orienting new judges is critical to avoid erosion in program operations and effectiveness. Before taking the treatment court bench, replacement judges should complete live or online training describing the key components of treatment courts and best practices for enhancing outcomes in the programs (Carey et al., 2012; Shaffer, 2011). If feasible, replacement judges should attend precourt staff meetings and status hearings before the transition to learn how the program operates and why. If possible, newly appointed judges should be assigned the cases of participants who are new to the program, while the predecessor judge oversees prior cases to discharge. This process maintains continuity in case processing, allows the new judge to observe how the predecessor judge intervenes in treatment court cases, and provides opportunities for ongoing advice and consultation from an experienced colleague. If the predecessor judge cannot remain on the treatment court bench long enough for previously enrolled participants to complete the program, the judge should at least continue to oversee the cases until participants are clinically and psychosocially stable and have developed a constructive working alliance with another staff member, such as a treatment professional or supervision officer. (For the treatment court definitions of clinical stability and psychosocial stability, see Standard IV, Incentives, Sanctions, and Service Adjustments.)

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## C. PRECOURT STAFF MEETINGS

Precourt staff meetings are a key component of treatment court (NADCP, 1997). Team members meet frequently in a collaborative setting to review participant progress, share professional observations and expertise, and offer recommendations to the judge about appropriate responses to participants' performance in the program (see Standard VIII, Multidisciplinary Team). Precourt staff meetings enable team members to discuss information that may shame or embarrass participants if discussed in open court, offer tentative recommendations or conclusions that may change upon consideration of additional information, and prepare for their interactions with participants in court (Christie, 2016; McPherson & Sauder, 2013; Roper & Lessenger, 2007). Most important, staff meetings ensure that the judge has sufficient background information about each case to enable the judge to focus attention on delivering informed responses and interventions for participants and reinforce treatment plan goals. Staff should not spend court time tracking down and reviewing progress information or litigating uncontested factual matters (e.g., counseling attendance, confirmed drug test results), as in traditional court hearings.

Studies find that the most effective drug courts require ongoing attendance at precourt staff meetings by the judge, defense counsel, prosecutor, treatment representative(s), supervision officer(s), and program coordinator. A study of 69 drug courts found that programs were roughly 50% less effective at reducing crime and 20% less cost-effective when any one of these team members, especially the judge, was absent frequently from staff meetings (Carey et al., 2012). Qualitative studies have similarly reported that when judges did not attend precourt staff meetings, independent observers rated them as being insufficiently informed about participants' progress to interact effectively with the participants in court (Baker, 2013; Portillo et al., 2013). As the leader of the treatment court team, the judge is responsible for overseeing precourt staff meetings, ensuring that all team members contribute pertinent information, giving due consideration to each team member's professional input, reaching tentative conclusions about uncontested factual matters (which may change upon learning additional information from the participant or the participant's legal representative in court), and explaining their judicial reasoning to the treatment court team. Failing to attend precourt staff meetings and perform these vital functions undermines the treatment court model and contributes to ineffective decision making and outcomes. (For a discussion of evidence-based strategies for conducting precourt staff meetings, see Standard VIII, Multidisciplinary Team.)

## D. STATUS HEARINGS

Status hearings are the central forum in treatment courts. It is here that all participants and the multidisciplinary team meet communally to underscore the program's therapeutic objectives, reinforce its rules and procedures, review participant progress, ensure accountability for participants' actions, celebrate success, welcome new graduates back as healthy and productive members of the community, and call upon alumni to be of service in helping current participants find their way to recovery. A substantial body of research underscores the critical importance of status hearings in treatment courts and has identified the optimum frequency of hearings and promising in-court practices to enhance outcomes.

### Frequency of Status Hearings in Adult Drug Courts

Adult drug courts achieve superior outcomes when participants attend status hearings on a biweekly basis (every 2 weeks) during the first one or two phases of the program (depending on how programs arrange their phase structure), and at least monthly thereafter for the remainder of the program or until they are in the last phase and are reliably engaged in recovery support activities to help them maintain recovery after program discharge. (For a description of treatment court phases and phase advancement criteria, see Standard IV, Incentives, Sanctions, and Service Adjustments.) On average, researchers have not found better outcomes for weekly status hearings than biweekly hearings in adult drug courts; however, participants requiring more structure or consistency, such as persons with co-occurring mental health disorders or those lacking stable social supports, may require weekly hearings until they are clinically and psychosocially stable and acclimated in treatment. (For the definitions of clinical stability and psychosocial stability, see Standard IV, Incentives, Sanctions, and Service Adjustments.)

In a series of experiments, researchers randomly assigned adult drug court participants either to appear before the judge every 2 weeks for status hearings, or to meet with a clinical case manager and appear in court only as needed in response to recurring technical violations of program requirements or an inadequate response to treatment. Among high-risk and high-need participants (the appropriate candidates for drug court), persons who were randomly assigned to biweekly status hearings had significantly better counseling attendance, more negative drug test results, and higher graduation rates than those assigned to status hearings only as



needed (Festinger et al., 2002). The researchers replicated these findings in misdemeanor and felony drug courts serving urban and rural communities (Marlowe et al., 2004a, 2004b) and in prospective matching studies comparing biweekly hearings to monthly hearings (Marlowe et al., 2006, 2007, 2008, 2009, 2012). Studies conducted by other investigators have similarly reported better outcomes for biweekly attendance at status hearings in adult drug courts. A meta-analysis of studies of 92 adult drug courts (Mitchell et al., 2012), a multisite evaluation of 69 adult drug courts (Carey et al., 2012), and a randomized trial of an adult drug court in Australia (Jones, 2013) found significantly greater reductions in recidivism and drug-related recidivism for programs scheduling participants to attend status hearings every 2 weeks during at least the first one or two phases of the program (depending on how the programs arranged their phase structure). Researchers have not found better average effects from weekly status hearings than from biweekly hearings in adult drug courts (Carey et al., 2012); however, as noted earlier, participants with exceedingly high treatment needs or those lacking stable social supports may require weekly hearings until they are clinically and psychosocially stable and reliably engaged in treatment.

Studies have not confidently determined the best approach for reducing the frequency of status hearings as participants advance through the successive phases of drug court (for a discussion of evidence-based phases in treatment courts, see Standard IV, Incentives, Sanctions, and Service Adjustments). Evidence suggests that outcomes are better when participants continue to attend status hearings on at least a monthly basis for the remainder of the program or until they have reached the last phase of the program and are reliably engaged in recovery support activities to help them maintain their recovery after discharge (Carey et al., 2008).

### **Frequency of Status Hearings in Other Types of Treatment Courts**

Recent evidence suggests that weekly status hearings may be superior to biweekly hearings for treatment courts serving persons with the highest levels of treatment or social service needs, such as persons with co-occurring mental health and substance use disorders, persons without stable housing, or youths lacking adequate adult supervision. A meta-analysis that included studies of adult drug courts, mental health courts, DWI courts, family drug courts, juvenile drug courts, homelessness courts, and community courts reported significantly better outcomes for weekly hearings than for biweekly hearings (Trood et al., 2021). Unfortunately, the investigators in that study did not break out the analyses

separately by the specific type of treatment court, thus preventing conclusions about which court types require weekly status hearings and which may be appropriate for a less intensive and less costly schedule of biweekly status hearings. Until such evidence is available, staff must rely on professional judgment and experience to decide whether to start participants on a weekly or biweekly status hearing schedule. Moreover, no information is available presently on how various treatment courts should reduce the schedule of status hearings as participants advance through the successive phases of the program. Until researchers perform such analyses, treatment courts should follow promising practices from adult drug courts and maintain participants on a monthly status hearing schedule for the remainder of the program or until they have reached the last phase and are reliably engaged in recovery support activities.

### **Objectives of Status Hearings**

Frequent status hearings are necessary for success in treatment courts; however, merely holding frequent hearings is not sufficient. Programs exert their effects through what transpires during the hearings. Critical elements for success have been demonstrated to include (1) interacting with participants in a respectful and procedurally fair manner, (2) creating a collaborative working relationship between the participant and judge to support the person's recovery, and (3) ensuring that participants comply with court orders, follow program requirements, and attend treatment and other indicated services (Gottfredson et al., 2007; Jones & Kemp, 2013; Roman et al., 2020). Judges must deliver equal measures of procedural fairness, alliance-building efforts, and assurances of behavioral accountability to achieve effective results for high-risk and high-need persons (Marlowe, 2018, 2022).

Contrary to the concerns of some commentators (e.g., King, 2009, 2010), there is no irreconcilable tension between these objectives. Treatment court participants report no conflict between their ability to develop a collaborative working relationship with the judge and the judge's role in enforcing program conditions and holding them accountable for their actions through the imposition of incentives and sanctions (Gallagher et al., 2015; Goldkamp et al., 2002; Satel, 1998; Saum et al., 2002; Turner et al., 1999; Witkin & Hays, 2019; Wolfer, 2006). Indeed, many participants view the fair and warranted imposition of incentives and sanctions as being a necessary ingredient for developing a trustworthy alliance with the judge (Crosson, 2015; Ortega, 2018). Focus group participants have reported that their desire to please the judge or avoid disappointing the judge helped to keep

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them on a safe and productive path when their confidence in their recovery was faltering (e.g., Gallagher et al., 2019a, 2019b). Striking an effective balance between alliance building and enforcing court orders and program conditions requires considerable training and expertise on the part of treatment court judges to ensure procedural fairness in the proceedings, treat participants with dignity and respect, elicit pertinent information, and dispense guidance, praise, admonitions, and behavioral consequences in a thoughtful and impactful manner.

#### Length of Court Interactions

Perfunctory interactions are insufficient to ensure procedural fairness, develop an effective working alliance with participants, and enhance their engagement in treatment. Participants spend considerable time, money, and effort traveling to and from court, observing the proceedings, and waiting for the judge to call their case. Fleeting attention from the judge can give the unwarranted and counterproductive impression that the team gave minimal thought to their case or that their welfare is not a principal concern for staff. The judge should take sufficient time and attention to gauge each participant's performance in the program, applaud their successes, intervene on their behalf, impress upon them the importance of treatment, administer appropriate consequences, and communicate convincingly that staff recognize and value their efforts.

Judges do not need to engage in lengthy interactions to achieve these aims. Assuming the team has briefed the judge sufficiently about each case and considered potential actions, programs can achieve effective and cost-efficient results from relatively brief interactions with each participant. A study of 69 drug courts found that reductions in criminal recidivism were two to three times greater when the judge spent an average of 3 to 7 minutes communicating with participants in court (Carey et al., 2012). Three-minute interactions were associated with nearly twice the reduction in crime compared to shorter interactions, and 7-minute interactions were associated with three times the reduction in crime. Notably, programs were also approximately 35% more cost-effective when court interactions averaged at least 3 minutes, indicating that the increased expense of longer court appearances is more than recouped by cost savings resulting from better public health and safety outcomes.

Judges must also be vigilant about their ability to maintain focus with each participant. Studies find that judges can become distracted or fatigued over lengthy court dockets and may begin to resort to decision-making shortcuts or fall back on ineffective habits during

later-scheduled appearances (Torres & Williams, 2022). Judges may, for example, become increasingly punitive over successive cases, may be less inclined to explore the nuances of each case, or may begin to lean excessively on the opinions of other professionals (Danziger et al., 2011; Ulmer, 2019). Measures such as taking intermittent recesses and interweaving well-performing or easier-to-resolve cases with struggling or difficult-to-resolve cases enhance session novelty and reduce repetitiveness, which can improve judicial focus and help to retain the attention of fellow participants and other court observers.

#### Judicial Demeanor

The quality of the judge's interactions with participants is crucial for developing an effective working alliance. Since the advent of treatment courts, studies have consistently found that participants perceived the quality of their interactions with the judge to be among the most influential factors for success in the program (Crosson, 2015; Farole & Cissner, 2007; Gallagher et al., 2017, 2019b; Goldkamp et al., 2002; Jones & Kemp, 2013; Satel, 1998; Saum et al., 2002; Turner et al., 1999). Persons have expressed similar views of the judge in focus groups made up solely of female treatment court participants (Gallagher & Nordberg, 2017; Gallagher et al., 2019a, 2022) and Black participants (Gallagher & Nordberg, 2018; Gallagher et al., 2019a), suggesting that perceptions of the judge may not differ by participants' cultural identity or characteristics. Researchers should, however, conduct comparable studies with members of other cultural groups, such as American Indian/Alaska Native persons, Hispanic or Latino/a persons, and LGBTQ+ persons, to gauge their perceptions of judicial interactions.

Outcome studies confirm participants' views of the role and impact of the judge. A national study of 23 adult drug courts reported more than a fivefold greater reduction in crime and a nearly twofold greater reduction in illicit drug use among participants in courts with judges who were rated by independent observers as being respectful, fair, attentive, enthusiastic, consistent, and caring in their interactions with participants in court (Zweig et al., 2012). A statewide study of 86 adult drug courts in New York similarly reported significantly better outcomes when participants rated the judge as being fair, sympathetic, caring, concerned, understanding, and open to learning about the disease of addiction (Farole & Cissner, 2007). Outcomes in these studies were significantly poorer, in contrast, when participants or evaluators rated the judge as being arbitrary, jumping to conclusions, or not giving participants an adequate opportunity to explain their side of factual disputes. Program evaluations have similarly reported that supportive comments from the

judge were associated with better outcomes in drug courts (e.g., Senjo & Leip, 2001), whereas stigmatizing, hostile, or shaming comments were associated with poor outcomes (e.g., Miethe et al., 2000).

These findings are consistent with a broader body of research on procedural fairness or procedural justice. Numerous studies have found that criminal defendants and other litigants were more likely to have successful outcomes and favorable attitudes toward the court system when (1) they were treated with respect and dignity by the judge (*respect principle*), (2) they were given a chance to express their views openly without fear of negative repercussions (*voice principle*), (3) the judge considered their viewpoints when resolving factual disputes or imposing legal consequences (*neutrality principle*), and (4) they believed the judge's motivations were benevolent and intended to help them improve their situation (*trustworthiness principle*; Burke & Leben, 2007; Frazer, 2006; Stutts & Cohen, 2023; Tyler, 2007). This process in no way prevents judges from holding participants accountable for their actions or issuing warnings or sanctions when called for. The dispositive issue is not the outcome of the judge's decision but, rather, how the judge reached the decision and interacted with the participant during the proceeding.

Strict observance of constitutional and evidentiary standards is insufficient, alone, to ensure that participants perceive procedural fairness in the program. Treatment court participants, staff members, and/or evaluators have reported that the following practices impacted participants' perceptions of procedural fairness, working alliance with the judge, program satisfaction, and treatment outcomes (Bartels, 2019; Burke, 2010; Edgely, 2013; Frailing et al., 2020; King, 2009, 2010). Motivational interviewing (MI) is an evidence-based counseling intervention that incorporates many of these practices, and resources are available to educate treatment court judges and other team members about ways to apply MI strategies in their interactions with participants (e.g., Wyatt et al., 2021). (For further guidance on effective strategies for explaining and delivering incentives, sanctions, and service adjustments during status hearings, see Standard IV, Incentives, Sanctions, and Service Adjustments.)

- Practicing active listening*—Simple gestures like leaning forward while participants are speaking, making eye contact with them, reflecting on what they said, requesting clarification, and taking notes (without detracting attention from the participant) can go a long way toward demonstrating that participants are being heard and their views are valued and worthy of consideration.
- Asking open-ended questions*—Yes-or-no questions usually elicit yes-or-no answers and rarely lead to constructive dialogue. Open-ended questions, such as, “Tell me more about the challenges you’re having in your new job,” yield opportunities for further discussion and can lead to a mutual understanding between the judge and participant about possible barriers to success in participants’ lives, strengths they might draw upon, and promising avenues to improve their performance. An All Rise judicial bench card provides examples of open-ended questions that judges can use to elicit productive information from treatment court participants (<https://allrise.org/publications/judicial-bench-card/>).
- Avoiding “why” questions*—Treatment court participants are commonly anxious when speaking to the judge, may be experiencing cognitive impairments from mental health symptoms or extensive substance use, and often have low insight into the motivations for their actions. Asking them why they did or did not do something often leads to impoverished answers such as “I don’t know” or “It just happened.” “What” or “how” questions, such as, “What things helped you handle the stress of the holidays and avoid using drugs?” call for concrete information that participants can recall readily from memory and provide a basis for reaching a mutual understanding about the causes (or whys) of their actions.
- Being open-minded*—Participants know that the treatment court team has discussed their case in staff meetings, and they may believe that the team’s views are unalterable (e.g., Witkin & Hays, 2019). If they hold this belief, then simply agreeing with the judge’s assertions might seem like the easiest and safest course to avoid conflict or to avoid coming across as unmotivated or provocative, which participants may fear could lead to punitive consequences. Such acquiescence, however, cuts off genuine communication and puts distance between the participant and judge. Judges should review with participants what factual matters (e.g., treatment attendance, drug test results, police contacts) the team discussed and the tentative actions under consideration. The judge should give participants a chance to respond to these matters and express their sentiments about appropriate responses. Assistance from defense counsel might be needed if participants are too nervous, reticent, or confused to explain their position clearly or confidently. If newly



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obtained information raises questions about the accuracy of staff reports or the propriety of contemplated actions, then a sidebar with staff or open discussion in court might be appropriate to demonstrate the team's willingness to take all relevant information into consideration to reach the best decision. Such actions communicate a genuine concern for participant welfare, ensure fairness and accuracy in decision making, lessen participant defensiveness, and help to develop a collaborative working relationship between the participant and staff.

- *Expressing empathy*—If changes were easy, we would not need treatment courts. Persons rarely overcome mental health or substance use disorders by will alone, and participants often face serious and longstanding obstacles to success, including poverty, trauma, insecure housing, illiteracy, and social isolation. Recognizing these obstacles and praising participants' determination in the face of such challenges goes a long way toward creating rapport with the judge and enhancing social and emotional support. Overlooking or paying mere lip service to such hurdles puts distance between the participant and judge, makes the judge seem out of touch with the realities of participants' lives, and makes program conditions and expectations seem unrealistic and unattainable.
- *Remaining calm and supportive*—Verbal warnings and admonitions can be effective in reducing undesirable conduct, but only if the judge delivers them calmly and without shaming or alarming the participant (Marlowe, 2011). Embarrassment and shame are potent triggers for substance cravings, hostility, anxiety, and depression, which increase the likelihood of further infractions (Flanagan, 2013; Snoek et al., 2021). Anger or exasperation, especially when expressed by an authority figure like a judge or clinician, can arouse trauma-related symptoms including panic or dissociation (feeling detached from oneself or the immediate environment), which interfere with a person's ability to pay attention to what others are saying, process the message, or answer questions coherently (Butler et al., 2011; Kimberg & Wheeler, 2019). The judge and other staff should deliver admonitions calmly, emphasizing that the person is safe and that services are available to help them achieve their goals and avoid punitive consequences in the future.
- *Focusing on conduct, not traits, and avoiding stigmatizing language*—Warnings or admonitions should focus on what a participant did and not on who they are as a person. The judge should admonish participants, for example, because they were untruthful or missed a counseling session, rather than calling them a "liar" or saying they are "irresponsible" or are showing "addict behavior." Name calling is stigmatizing and beneath the dignity of a judge, and sanctioning persons for their personality traits or symptoms of an illness lowers their motivation for change because it implies that they are unlikely to change for the better. Adjusting one's behavior is an achievable way for a participant to avoid future reprimands or sanctions. Changing one's attitude, character, or illness is much more difficult.
- *Explaining decisions*—Participants may believe that staff render decisions haphazardly, fail to consider their unique circumstances, or treat them more harshly than other persons in the program. Explaining the rationale for a decision demonstrates that staff have taken the participant's welfare into account, have given the matter experienced thought, and are not unfairly picking on the person. When delivering sanctions and incentives, the judge should begin by reminding participants of the program's expectations based on their current phase in the program, recap their progress to date, and explain why their actions merit a particular response. One participant, for example, might warrant a higher magnitude sanction for a willful and avoidable infraction like eloping from treatment, whereas another who is experiencing severe drug cravings might warrant a treatment adjustment for a positive drug test, and not a sanction, to address compulsive symptoms that are difficult to resist. Articulating the logic behind seemingly inconsistent responses reduces perceptions of unfairness and increases confidence in staff expertise.
- *Expressing a therapeutic motive*—Participants often report that optimism from staff about their chances for success (especially from the judge) and an honest desire to help them were critical for their recovery (Gallagher et al., 2019a, 2019b; King, 2009; Tyler, 2007). When delivering warnings or sanctions, the judge should stress that these consequences serve rehabilitative goals and that staff are not imposing them because they dislike

the individual. Importantly, research on the *recency effect* reveals that persons are most likely to recall the last thing that someone said to them (e.g., American Psychological Association, 2022). Therefore, the last communication from the judge should be an assurance that the team believes the person can get better and is optimistic about their future. Ending on a sour note, such as imposing a jail sanction, gives the wrong message that jail is where the team expects the person to wind up. To take advantage of the recency effect, the last—and thus most lasting—thing participants hear should be a heartening prediction for the future and an assurance that staff will be there to help them through the process.

## E. JUDICIAL DECISION MAKING

Due process and judicial ethics require judges to exercise independent discretion when resolving factual disputes, ordering conditions of supervision, and administering sanctions, incentives, or dispositions that affect a person's fundamental liberty interests (Meyer, 2011a, 2011b). A judge may not delegate these responsibilities to other members of the treatment court team. For example, having the team vote on whether to admit a candidate to the program, or on what sanction to impose for an infraction, would be impermissible unless the judge considers the results of the polling to be merely advisory.

Judges must, however, consider probative evidence or relevant information when making these determinations. When the subject matter of an issue is beyond the common knowledge of laypersons, judges typically receive scientific, technical, or other specialized knowledge from experts who are qualified by knowledge, experience, or training to help the court understand and resolve the matter (e.g., Federal Rules of Evidence 702). In treatment courts, the multidisciplinary team serves this function by providing clinical, scientific, and other specialized expertise for the judge (Bean, 2002; Hora

& Stalcup, 2008; Meyer & Tauber, 2011). The judge may overrule team members' recommendations, but this authority does not absolve the judge of responsibility for giving due weight to the information presented.

Evidence pertaining to substance use and mental health treatment is ordinarily beyond the knowledge of non-clinically trained professionals. Judges are not competent through education, experience, or credentials to make clinical diagnoses, choose from among promising or evidence-based treatments, or adjust treatment services; therefore, judges should always rely on qualified treatment professionals for these actions. If a judge is concerned about the quality or accuracy of treatment-related information being provided by the team, the court should seek additional input or a second opinion from another qualified treatment provider or technical assistance consultant. Under no circumstance should a judge order, deny, or alter treatment conditions independently of expert clinical advice, because doing so is apt to waste treatment resources, disillusion participants and credentialed providers, and pose an undue risk to participant welfare. Health risks are especially grave for medication decisions, because ignoring or overruling medical judgment undermines treatment compliance and success, and it can lead to serious adverse medication interactions, increased overdose rates, and even death (National Academies of Sciences, Engineering, and Medicine, 2019; Rich et al., 2015; SAMHSA, 2019). The collaborative nature of the treatment court model brings experts together from several professional disciplines to share knowledge and observations with the judge, thus enabling the judge to make rational and informed decisions. Failing to heed this expert advice undercuts the treatment court philosophy and is unlikely to achieve public health or public safety aims. (For further guidance on methods for incorporating team member expertise into judicial decision-making, see Standard VIII, Multidisciplinary Team.)

# III. Roles and Responsibilities of the Judge

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