

SPECIAL ETHICAL CONSIDERATIONS FOR THE PUBLIC DEFENDER IN DRUG COURT

INTRODUCTION

There has been a significant increase in the number of drug courts nationwide over the past several years. There are now currently over 1200 drug courts in operation.¹

Wisconsin currently (as of March 2004) has less than a handful of drug courts. This number will increase soon as several counties are in the planning or training stage.

As drug courts increase in Wisconsin, so too will the number of public defenders and private bar attorneys involved in these specialized courts. The public defender or private bar attorney will be involved in the planning and operation of these courts. Most drug courts will have a public defender sitting on the drug court team. In counties that have drug courts in operation, the defense bar will have clients considering or participating in the court.

Because drug courts are relatively new to Wisconsin, it may be beneficial for attorneys who are becoming involved in drug courts for the first time to consider the ethical issues that are involved. The following is not an exhaustive list of the ethical issues, but some of the more likely concerns that may arise.

AS AN ATTORNEY FOR THE DRUG COURT PARTICIPANT, WHO ALSO SERVES ON THE DRUG COURT TEAM, ONE SHOULD BE WARY OF DOING ANYTHING TO THE DETRIMENT OF THE CLIENT

The drug court team public defender will have clients that appear in drug court. Although that attorney is part of the team and subscribes to a team philosophy, the commitment to the team must be under some circumstances limited. The attorney can never take any action that is detrimental to the client. Therefore, the attorney cannot concur with the team on a proposed sanction concerning a client. The attorney cannot agree that the client be held longer in any particular phase or be returned to an earlier phase. The attorney should not participate in any action that has a negative consequence to the client. The attorney operating in this dual role must primarily focus on the client's desires, not the interests of the team or even the best interests of the client.

The Wisconsin Rules of Professional Conduct, SCR 20:1.7(b) provides " a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless the lawyer reasonably believes the representation will not be adversely affected and the client consents in writing after consultation."

The comments to the Wisconsin Rule indicate that under ordinary circumstances the attorney may not act as an advocate against the client. The comment further states that the

¹ Specialized and Problem Solving Courts; Trends in 2002: The Ethics of Problem Solving

loyalty to a client is impaired when a lawyer cannot carry out an appropriate course of action for the client because of the lawyer's other responsibilities.

The Wisconsin Rule clearly provides that the attorney's loyalty must be to the client. Thus despite a position on the drug court team and any commitment the attorney has made to a team philosophy, the attorney can never act in a manner that might cause the client harm. It would be best to avoid even the appearance of a conflict, and thus the attorney may wish to avoid participating with the team anytime a sanction for a current client is discussed. **Instead the defense attorney may want to be present at meetings where sanctions are being discussed as the client's attorney.** Furthermore there is some benefit in refraining in the team discussion on any client. This procedure will avoid the risk of any misconception that the attorney has acquiesced to a sanction or some other adverse effect. It will alleviate any concern by the client that the team's interest supercedes his. The attorney should keep in mind that team discussions occur off the record and behind closed doors. This could generate some suspicion with the client if sanctions are being recommended in meetings that counsel is participating in.

There is a drawback to not participating in client discussions during team meetings, however, because it prevents the attorney / team member from advocating for her client to the team. The attorney of course can still advocate formally in the drug court on behalf of the client if that is warranted.

The attorney who is on the team will have to make a decision on how to address this particular issue. It will benefit the attorney to review the literature and to consult with other attorneys serving on teams around the State. What may help to avoid any confusion is if the attorney discloses early on to the client that she is a member of the drug court team and explains to the client to what extent if any, the attorney will engage in team discussions about that client's case. It will perhaps alleviate concern if the client knows what the attorney's role is with the team from the point that drug court becomes a discussion. **The client should have a clear understanding of the attorney's role on the drug court team. It is possible that the client may want to be represented by a defense attorney who is not a member of the team.**

FOR DEFENSE COUNSEL WHO ALSO SITS ON THE DRUG COURT TEAM, COUNSEL SHOULD BE WARY OF THE DISCLOSURE OF INFORMATION TO THE TEAM ABOUT THE CLIENT

The public defender that sits on the team and has a client participating in drug court cannot provide any privileged information to the team without an appropriate waiver. SCR 20.1.6 (a) provides that a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are otherwise authorized by the rule. The comment to this provision provides that the confidentiality rule applies not only to matters communicated in confidence by the client, but also to all information relating to the representation no matter the source.

Depending on the attorney's philosophy concerning participation with the team on client matters, there may be times when the attorney wants to divulge positive information to the team about a client, in an effort to sway the team to a positive result. For example, the client reports that since treatment has begun things are going very well at home. The attorney has confirmed this with the client's mother who has advised that the client's attitude has improved at home and

things are going well since treatment started. This type of information can be divulged to the team with the authorization of the client.

While there is incentive to disclose positive information about the client, the attorney should be careful with the authorized disclosure of confidential or sensitive information. Most drug courts are set up with a mechanism in an attempt to assure that information is not disclosed any further. The attorney, however, cannot guarantee the information will not be further disclosed, no matter what mechanism is built into the court's procedure. The prohibition against disclosure will only be as good as the procedure established and only as good as the ethics of those involved in the team.

The potential does exist for information disclosed at a team meeting to be further disclosed and later cause some harm to the client. There are those who would suggest that the best practice is for counsel to refrain from disclosing any information about the client at team meetings.² At the very least the attorney should think carefully about any disclosure about the client at team meetings.

ETHICAL OBLIGATIONS OWED TO THE NON-CLIENT PARTICIPANT BY THE PUBLIC DEFENDER TEAM MEMBER

The defense counsel team member has no ethical obligation to the non-client participant because there is not an attorney - client relationship. For the non-client drug court participant, defense counsel can fully participate with the team. There are, however, some appropriate considerations for the public defender to keep in mind as they act as a representative for the agency and as a liaison to the defense bar.

The defense counsel team member should assure that the perspectives of clients as a whole are heard.³ Counsel should also strive to protect the rights of participants generally.⁴ The team member should be careful, however, about creating the impression to any individual participant that you are their attorney, looking out for their rights or acting on their behalf. This is particularly true in some courts where the defense counsel is not encouraged to attend, often does not attend, and thus there may be some temptation for the defense counsel team member to engage with the participant. While SCR 20:4.2 might not explicitly prohibit this type of contact, the attorney runs the risk of creating a relationship with the participant that may be misunderstood.

ACCEPTANCE TO DRUG COURTS IS OFTEN PREMISED ON EARLY ENTRY. CAN DEFENSE COUNSEL, WHEN FACED WITH AN ACCELERATED TIME FRAME, STILL PROPERLY REPRESENT THE CLIENT AND FULLFILL ALL ETHICAL OBLIGATIONS?

² Issues Raised for Defense Counsel In Drug Court Representation Relevant to the ABA Canons of Ethics, Caroline Cooper (1999)

³ Ethical Considerations for Judges and Attorneys in Drug Court, National Drug Court Institute, Professor Robert Tuttle, p. 21 (2001)

⁴ Ethical Considerations for Judges and Attorneys in Drug Court, National Drug Court Institute, Professor Robert Tuttle, p.21 (2001)

Regardless of the time constraints involved in entry to the drug court, counsel must always provide competent and thorough representation to the client. See SCR20:1.1 The attorney has a duty to obtain all relevant facts from the client as soon as possible once representation has commenced.⁵ Counsel also has a duty to investigate, to obtain all discovery and to explore the facts of any given case.⁶

None of the obligations imposed by the professional rules and guidelines are alleviated simply because there is an accelerated time requirement for entry into drug court.⁷ An attorney will not be able to appropriately advise a client on whether the drug court is a good option unless the attorney has a sufficient understanding of the facts of the case. The attorney should do as much as is necessary to assure that the client is making an informed decision, based on all available options.

If the time constraints imposed by any given drug court prevent counsel from fully gathering information from the client, obtaining and reviewing discovery, and investigating facts and defenses, then counsel should not advise the client to waive important rights to enter a plea and proceed into drug court. The attorney should be able to practice in drug court and still use the rules to guide their practice.⁸ Some courts may allow a "conditional plea" pending a full opportunity for defense counsel to explore all options.⁹ Thus a client could enter a plea early and commence enrollment into drug court, while the attorney completes the investigative process. Should counsel discover a motion or defense, the client can return to their status prior to the plea. **The attorney involved in the planning of the drug court must insure these types of safeguards are built into the policies and procedures.**

If the public defender or defense bar participated in the planning of the drug court, it is likely that procedures for early discovery and other processes to assist defense counsel in dealing with an accelerated time frame will be in place. Thus the accelerated time frame will not prevent the attorney from complying with ethical requirements, while still assisting the client in applying for entry into drug court. It is likely, however, that defense attorneys will have to concentrate more time at the early stages of a case than might otherwise be the norm.

IS THERE AN ETHICAL ISSUE WITH THE DRUG COURT TEAM PUBLIC DEFENDER, FORMING A CLOSE RELATIONSHIP WITH THOSE ON THE TEAM, INCLUDING THE JUDGE AND PROSECUTOR?

On the drug court team, the public defender, the prosecutor and even the

⁵ ABA Standards for Criminal Justice, 4-3.2

⁵ Ethical Consideration for Judges and Attorneys in Drug Court, National Drug Court Institute, Professor Robert Tuttle, 2001.

⁶ ABA Standards for Criminal Justice, 4-4.1

⁷ Ethical Considerations for Judges and Attorneys in Drug Court, National Drug Court Institute, Professor Robert Tuttle, p. 33 (2001); Defenders in Drug Courts / Nov/Dec 1997 "Reconciling Drug Court Participation with Defender Ethical Standards," Robert Burke.

⁸ Ethical Consideration for Judges and Attorneys in Drug Court, National Drug Court Institute, Professor Robert Tuttle, p. 33 (2001); Defenders in Drug Courts / Nov/Dec 1997 "Reconciling Drug Court Participation with Defender Ethical Standards," Robert Burke.

⁹ Ethical Considerations for Judges and Attorneys in Drug Court, National Drug Court Institute, Professor Robert Tuttle, p. 27, p.32 (2001)

Judge will leave behind their traditional roles as they focus on the participant's recovery.¹⁰ Because the team is focused on the same goal, it is possible, perhaps probable, that a close working relationship among the team participants will be formed. Just because those with former distinct roles now act towards a common goal (sobriety for the participant as well as a law-abiding lifestyle), that doesn't mean that there is a conflict of interest inherent in a close working relationship.¹¹

Although there is not a conflict of interest posed by the formation of the team, and the close working relationships that may follow, counsel should still be conscious that distinct roles within the team remain. While a harmonious attitude may exist on the team between its members, counsel must retain the ability to assert defense-orientated viewpoints on certain issues.¹² The presence of a defense attorney on the team is likely to benefit participants, as well as the team, but the team public defender must retain a certain independence.¹³

CAN THE TEAM PUBLIC DEFENDER ENGAGE IN EX PARTE COMMUNICATIONS WITH THE JUDGE ON MATTERS CONCERNING THE DRUG COURT OR IT'S PARTICIPANTS?

As members of the drug court team realize positive results derived from their hard work, it is likely that they will grow as a team. As it pertains to drug court, members of the team are likely to realize how their roles have changed. Judges may become very enthusiastic about their problem-solving role.¹⁴ Attorneys who were adversaries now work together.

Because of the nature of the drug court, members are likely to have increased contacts with other members. As the roles change, contacts increase, and relationships are built, the team public defender needs to be especially vigilant about ex parte communications with the Judge.

SCR 20:3.5 states a lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; (b) communicate ex parte with such a person except as permitted by law or for scheduling purposes if permitted by the court. If communication between a lawyer and a judge has occurred in order to schedule a matter, the lawyer involved shall promptly notify the lawyer for the other party, or the party, if unrepresented, of such communication.

Lawyers on the drug court team must avoid ex parte communications with the Judge.¹⁵ There is nothing in the rule that exempt attorneys in specialized courts. Furthermore, there is nothing inherent in the drug court system that alleviates this ethical obligation. While it may be tempting to drop in on the Judge to update her on a participant, or to report positive progress by a participant, ex parte communications are an ethical violation.

¹⁰ Tuttle, p. 20.

¹¹ Tuttle p 44

¹² Tuttle p. 44

¹³ Reconciling Drug Court Participation With Defender Ethical Standards, Robert Burke

¹⁴ Specialized and Problem Solving Courts: Trends in 2002; The Ethics of Problem Solving

¹⁵ Tuttle p. 53; Cooper p. 11

The team should develop a procedure for simultaneous communications with the Judge when it is necessary to provide information outside the team meetings. Otherwise, contact with the Judge on drug court matters should be addressed at team meetings.

WHAT DUTY DOES DEFENSE COUNSEL HAVE FOR CLIENTS THAT WILL BE APPEARING IN DRUG COURT ON A REGULAR BASIS WITHOUT COUNSEL?

In most drug courts, participants will be making regular appearances in court. It depends on the court, but once every two weeks is not unusual. Often these appearances are without counsel by the design of the drug court.

At these routine court appearances the participant will face questions by the Judge. The client will be answering those questions and perhaps volunteering information. This is something the defense attorney needs to be cognizant of. Counsel is required to protect the rights of the client while the client is in drug court.¹⁶ If the client will be going to court without counsel, the client must understand that prior to entry into the program and the client should consent to it.¹⁷

When drug court procedures call for participants to appear without counsel, at the very least defense counsel should prepare the client for these hearings. **That preparation should include clients observing the drug court and being able to consult with the defense attorney prior to entry.** The client should be aware in advance what will take place. Clients should be prepared for the types of questions that will be asked.

Certainly one of the most important concerns is that clients are warned that statements they make in court could harm them. Many, if not most drug courts will have policies on confidentiality concerning information gained via the drug court process. Courts are likely to have agreements that provide that when a participant discloses information in court, that information will not be used against them. However, there can be no absolute guarantee that a disclosure in court will not in some manner cause the client some harm later on.

Drug court is usually open court. There may be persons in court that are not subject to a restriction on the use of information or its confidential nature. Should a client confess to a past crime in court, the statement might initiate an investigation or assist a pending investigation. A "no use" agreement will not, with certainty, guarantee immunity.

Thus it is important for the defense attorney, who has a client in drug court, to prepare the client for the series of court appearances that will occur, especially if counsel will not be present for most or all of those appearances. There is still a duty in drug court to provide competent representation. That includes the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Good advice for the client might be that if they are in doubt as what to reveal in court, to discuss it with the attorney. Clients may be admitting to use if a test comes back positive, or perhaps a rule violation associated with drug court. That is to be expected. But clients should be counseled about using prudence on other matters, such as past criminal actions.

¹⁶ Tuttle p. 21

¹⁷ Tuttle p. 34

The defense attorney should stay in contact with the client while they are involved in drug court. That will encourage questions if there is doubt on an issue as to disclosure of information or other problems. Defense counsel should also be familiar with exactly what type of confidentiality and non-use agreements are in place with the drug court. The defense attorney should also be prepared to appear in court with the client as needed. If the client needs to get a certain perspective to the Judge on an issue, counsel may want to appear in court to assist with that. Sanctions are a common part of drug court. If a client faces a sanction the attorney should discuss the situation with the client and determine if a defense is warranted or if there is mitigation. If the client denies the violation a defense should commence.¹⁸

DIVERSION OF WEAK CASES TO DRUG COURT

Part of the reason the public defender is willing to abandon the adversarial role in drug court is because of the anticipation of joining other criminal justice members in assisting clients in becoming clean, sober and participating members of society through a treatment model in court. This laudable goal, however, will not be realized if the D.A. diverts weak cases to drug court.

The public defender team member has an obligation and responsibility to try to assure that case dumping does not occur. If all team members initially agreed to certain guidelines, the D. A. should be held to that agreement. If the D. A. strays from that initial commitment, the public defender should attempt to use the persuasion of the team to get the program back on course. Considering that the Judge is likely to have committed a fair amount of time to training, team building, etc....., the Judge may be a helpful advocate.¹⁹

FRAUDULENT APPLICATION TO THE DRUG COURT

There may be occasions when your client wishes to apply for drug court, yet you as defense counsel / drug court team member, know enough about the client and the criteria to realize that the client will not meet the requirements if the client is honest in the application. Once the client is advised that they will not meet the criteria but they wish to apply nevertheless, with less than honest application, the attorney is left in a difficult position.

Counsel cannot assist in perpetuating a fraud upon the Court.²⁰ Counsel must also understand that the client is not applying to the typical form of treatment, but is in some sense applying to a form of treatment monitored by the court. Thus false information used to gain entry to the drug court could be considered a "fraudulent act."

When faced with a client that is insistent on fraudulently applying to the drug court, counsel should disassociate himself or herself from the application process. Counsel should also advise the client that they cannot participate in or assist in providing false and inaccurate information to the court. If the client intends to pursue admission, counsel should probably

¹⁸ Tuttle p. 34

¹⁹ Quinn p. 59.

²⁰ SCR 20:3:3(a)(2)

withdraw. If counsel is also a drug court team member, she probably should avoid any team involvement with that participant, if that person is accepted to the program.²¹

ETHICAL CONSIDERATIONS FOR THE CASE THAT HAS A DEFENSE, BUT COULD BE DEFERRED TO DRUG COURT

The defense attorney who practices in drug court will at some point have a case where there is a viable defense or suppression motion, but the client and the case meets the criteria for drug court and the client wants to apply. The question may become one of how to proceed and the bottom line is that this decision is left to the client.

In criminal cases the lawyer must abide by the client's decision, on certain matters, after consultation.²² The decision to enter into drug court is a decision for the client. The defense attorney, however, has the obligation to advise the client on all options available, including drug court and treatment alternatives outside of drug court.²³

Therefore it is important for the attorney to educate the client as much as possible, so that the client has all the available information on which to base a decision about entry to drug court. The attorney can also consider and discuss with the client whether in the attorney's opinion the client is a good candidate for successfully completing the drug court program.²⁴ The attorney can certainly give advice that is considered in the best interests of the client, as long as it is within a larger discussion that includes all legal issues and the facts of the case.²⁵

The defense attorney involved in the planning will need to develop procedures with the drug court to ensure that all Constitutional issues will be addressed. The overall desire to provide treatment as soon as possible cannot preclude the full investigation of these issues.

HOW TO ETHICALLY ASSURE A CLIENT'S ENTRY INTO DRUG COURT IS FULLY KNOWLEDGABLE

One of the most important tasks that a defense attorney will do for their client considering entry into drug court, is assure that the client's decision to enter into the program will be knowingly and voluntarily made. Most drug courts require a guilty plea on a charge prior to entry.²⁶ If the drug court that the client is contemplating entry into requires a plea and irrevocable waiver of legal rights, this must be emphasized to the client.²⁷ Because the process is so different for drug court in that it involves court and treatment working together, it is possible that clients could become confused about the fact that they can't go back to square one if terminated from the program.

Clients should also be aware that as part of the program they would be giving up certain confidential protections concerning their treatment. Clients should also be willing to accept that

²¹ SCR 20:4:1(b)

²² ABA rule 1.2: Scope of Representation

²³ Tuttle p. 32

²⁴ Quinn at p. 62

²⁵ Tuttle p. 32

²⁶ Critical Issues for Defense Attorneys in Drug Court; National Drug Court Institute, April 2003 p. 32

²⁷ Tuttle p. 33

confidential issues will be discussed by the drug court team. This too may be a departure from prior experiences.

In order for the client's waiver to be a knowledgeable one, the attorney should advise the client on the likely disposition of the case if it were to proceed via the normal criminal court process.²⁸ A full discussion on all aspects of the case should take place.²⁹ The benefits and drawbacks of the program should be discussed, as well as the likelihood of reoffending without treatment.³⁰

The client should be aware of the drug court rules prior to making the decision to enter.³¹ The client should also be aware of the routine drug-testing regimen that will take place.³² Additionally, clients should be aware of the range of sanctions for rule violations or positive drug tests.³³

Clients should be educated about the ramifications for failing drug court. Often, the results will be significant. In some cases the outcome might be more serious than if the client had proceeded outside of drug court.

What may be most important to the client is what they will get out of completing drug court. Most jurisdictions will spell out clearly what the benefit is for completion.³⁴ The client should thoroughly understand what they receive in return for successfully completing the program.

There are of course other ethical issues that have not been discussed here. There are probably ethical issues that will be unique to any given drug court. What is perhaps the key to ethical issues in drug court is that the attorney is aware that there will in fact be some ethical concerns. The common ethical dilemmas can for the most part, be planned for, and those that arise unexpectedly, they can be addressed by the team at that given point in time.

²⁸ Cooper p. 2

²⁹ Id; ABA Standards for Criminal Justice 4-5.1(a)

³⁰ Cooper p. 2

³¹ Quinn p. 56

³² Critical Issues for Defense Attorneys in Drug Court; National Drug Court Institute, April, 2003, p.32

³³ Tuttle p. 37

³⁴ Quinn p. 55