



# The Role of Defense Counsel on the Drug Court Team

A paradigm shift that comes with some ethical,  
legal and practical conundrums

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# Introduction

- The tensions that exist between regimes of partisan advocacy and therapeutic justice are stark. Defense attorneys sometimes walk a delicate, ethical tightrope, if they are to advance the therapeutic ideal that informs drug court, without doing damage to their obligations as zealous advocates for their client. These materials are taken from “Critical Issues for Defense Attorneys in Drug Court”, Monograph Series 4 which is a product of a focus group of public defenders convened by the National Drug Court Institute (NDCI), a division of the National Association of Drug Court Professionals (NADCP), in November 2002.

# Drug Court Defense Counsel Core Competencies

A drug court defense counsel:

- informs the drug court participant about the rigors of drug court
- preserves all legal rights of the client
- advocates for fair and equal treatment of client
- participates in team meetings
- attends non-adversarial court proceedings.

## Competency 1: Participates fully as a Drug Court team member, committing him or herself to the program mission & goals and works as a full partner to ensure their success

- As counsel, shields client from ineffective care; as team member, protects integrity for drug court program by monitoring effectiveness of all components of client care and supervision
- As counsel, serves as “voice of client” in pointing out deficiencies of drug court program; as team member, seeks productive means of addressing deficiencies
- Attends all staffings and actively listens for undue encroachment upon client liberties or disparate treatment of participants
- While never breaching attorney-client privilege, when appropriate, encourages clients to be forthcoming and honest regarding their recovery process

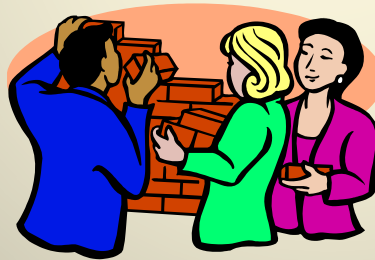
## Competency 2: Evaluates the offender's legal situation and ensures that the offender's legal rights are protected.

- Insists that legal and clinical screens are promptly conducted
- Ensures prompt admittance into program and start of rehabilitative treatment
- Advises client regarding rigors of drug court program
- Advises client regarding all rights waived as participant in drug court in contrast to rights waived in traditional criminal proceedings
- Assure client understands all waivers and contracts prior to execution of said documents
- Advocates for client to have every opportunity for recovery before involuntary dismissal from the program



Competency 3: While in Drug Court, participates as a team member, operating in a non-adversarial manner while in court, promoting a sense of a unified team presence.

- Attends regularly scheduled staffings.
- While in court, allows client to address the bench
- Reaches consensus with team regarding effective means of addressing client behavior



Competency 4: Effectively advises the defendants on their legal rights, legal options, treatment options, program conditions and sentencing outcomes while developing a relationship with the offender that promotes the offender's long term best interest.

- Prior to recommending client to drug court, discusses legal options with client in unbiased manner
- Goes through each waiver and contract with client advising client about appropriate courses of action
- Encourages client throughout the drug court process



## Competency 5: Monitors client progress to support full participation and ensure provision of treatment and other rehabilitative services.

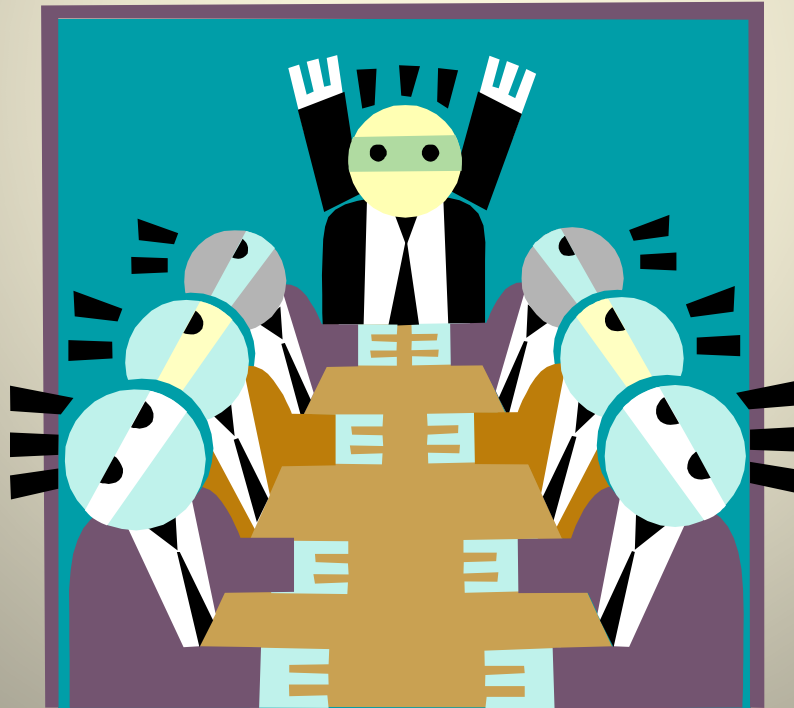
- Questions client regarding effectiveness of treatment and ancillary services
- Conducts quality assurance of treatment and ancillary services





Competency 6: As part of the Drug Court team, in appropriate non-court settings (ie. staffing), defense counsel advocates for effective incentives and sanctions for program compliance or lack there of.

- Advocates for prompt incentives and sanctions in response to client behavior
- Advocates for client's general well being and productive recovery without mitigating and defending client's behavior



Competency 7: Is knowledgeable of gender, age and cultural issues that may impact the offender's success.

- Continues to attend training opportunities to inform team members about cultural competence



Competency 8: Is knowledgeable about addiction, alcoholism and pharmacology generally and applies that knowledge to respond to compliance in a therapeutically appropriate manner

- Continues to research effective treatment modalities
- Conducts regularly quality assurance to ensure appropriate treatment
- Actively participates in staffings
- Attends all court sessions and staffings



## Competency 9: Contributes to the team's efforts in community education and local resource acquisition.

- Ongoing research of potential funding streams



## Competency 10: Contributes to education of peers, colleagues and judiciary in efficacy of Drug Courts.

- Oversees integrity of drug court program through quality assurance
- Disseminates information about drug court as frequently as possible





# Some Ethical Considerations in Drug Court

- Competence
- Communication
- Disposition
- Scope of Representation
- Confidentiality, Candor
- Ability to Make Adequately Considered Decisions

# Competence

- Competence to represent a client who may be eligible for a drug court program requires that the attorney be familiar with the program. The attorney must know the eligibility requirements, the nature of the various treatment programs, the sanctions and incentives that can be imposed and the circumstances of their imposition, circumstances leading to termination from the drug court and the confidentiality waivers and restrictions on the government's use of information obtained in drug court.

# Communication

- Defense counsel should advise the accused with complete candor and not understate or overstate risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea.
- Attorneys should give their clients sufficient information and impart the information in such a manner as to ensure that their clients have a genuine choice. Voluntary choice is the first step in the therapeutic process.
- The duty to communicate is a continuing one and the attorney should consult, advise, explain and counsel the client in a manner consistent with helping the client obtain his or her objectives.

# Disposition

Drug court and other treatment experts contend that the program should intervene while the client is still in midst of a “crisis.” This requires that the attorney conduct an immediate investigation and attempt to gain early access to discovery in order to be able to competently inform the client of the viability of all options.

# Scope of Representation

Once a client had received competent advice and has rendered a decision about whether to enter into a drug court program, the defense shall abide by the client's decision. Upon selecting the drug court option, the client still defines the objectives of the representation.

Whether the client's objective is sobriety and recovery or simple avoidance of a criminal conviction, the lawyer "shall abide" by the client's decisions concerning the objectives of the representation, absent some agreement to the contrary.



# Confidentiality, Candor

- The duty of candor prohibits a lawyer from deceiving the court or “assisting” a client or witness to do so. It does not however, require full disclosure by the lawyer of all information about the client, even if the information would be material to the proceeding.
- If defense counsel is not “assisting a fraudulent or criminal act by the client,” then the duty of confidentiality would appear to control, requiring defense counsel to maintain his or her confidence.

# Ability to Make Adequately Considered Decisions

- Intoxication or withdrawal may affect a client's ability to make adequately considered decisions. Defense counsel should be familiar with the signs of intoxication and withdrawal and be prepared to seek additional time to allow a client to recover from the immediate effects of intoxication or withdrawal before he or she must decide on a specific course of action.
- When seeking additional time, defense counsel should be mindful of the tactical and ethical considerations involved in revealing information about the client's current mental or physical state to the court or the state.
- However, in no event, should an attorney substitute his or her own judgment of the client's best interests for an informed choice by the client.

# Cultural Competence

- “Culture” refers to a set of customs, beliefs, ideals, linguistic practices, and institutional practices deployed within and, in many instances, peculiar to a given community.
- A defense attorney’s failure to become familiar with the wide range of cultural influences informing and impacting a client’s life may contribute to the failure of recovery, and this, in turn, could result in consequences being meted out by the traditional adversarial system.
- Moving from the notion of the drug court participant as addict to seeing the drug court participant as a particular human being with an addiction is absolutely necessary.

# Treatment Issues

Drug Court defense attorneys must have the ability to:

- Recognize a client's need for treatment and be willing to support treatment as a viable case disposition, while also recognizing that not every client with problems is a drug court candidate.
- Understand that substance abuse rarely occurs in a vacuum and that the problems relating to health, physical and mental state, culture, family and circumstances such as housing and employment must be addressed if long-term recovery is to be achieved.
- Understand the spectrum of treatment and maintain an ongoing awareness of all available treatment options both in and out of drug court.
- Understand drug court targeting and eligibility criteria.
- Ensure that clients are offered the least restrictive treatment options and that the treatment provided is not more onerous than required or agreed upon at admission.

# Frequently Asked Questions

- If a client informs the lawyer that the client has suffered a relapse and used either drugs or alcohol but the client's use has not been detected, what should the attorney do?
- Am I selling out my client?
- The high accountability and structure of drug court will expose my client to more supervision and drug testing increasing the likelihood that she or he will "get caught." How is this concern best handled?
- How can someone who is actively using alcohol and other drugs and who most likely also has a mental health diagnosis make an "informed consent" to participate in treatment court?
- Court-involved addicts are not always the best judge of what they want or the benefits of a good choice. How is this concern best handled?
- What if I disagree with some of the policies or practices of the treatment court?



# Resources and Training Opportunities

- National Drug Court Institute: This four day, comprehensive training is designed for defense attorneys to assist them in their often complex role of representing a client in Drug Court and other problem-solving courts. All presentations and information is cutting-edge and research based. Training participants will hear seasoned defense counsel discuss the paradigm shift that occurs in Drug Court. Through real-life scenarios, participants will have the opportunity to evaluate legal and ethical dilemmas in the Drug Court Arena. Topics include constitutional issues, ethics and federal confidentiality laws, incentives and sanctions, screening and eligibility and role of defense counsel in Drug Court.
- Critical Issues for Defense Attorneys in Drug Court-Monograph 4-National Drug Court Institute
- Meeting the Challenges of Being a Defender in Drug Court: How participating in a Drug Treatment Court Can Benefit You and Your Client, Kirstin Frescoln, NC State DTC Manager and James Egar, Monterey County, CA Public Defender
- Ethical Issues for Attorneys in Drug Court: Who's Team am I on? Hon. Peggy Fulton Hora (ret.)(NADCP, 18<sup>th</sup> Annual Training Conference, May 30, 2012 to June 2, 2012.
- Constitutional Issues, Jim Egar, Best Practices Meets the Community, 2012, Denver, Colorado5