

# The Role of Defense Counsel in Drug Courts

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American University - Justice Programs Office is the technical assistance provider for the BJA Adult Drug Court Program. This fact sheet is part of a series created to respond to significant issues identified during the provision of technical assistance to the field. For more information about accessing technical assistance services or to learn more about the AU Justice Programs Office, go to [www.american.edu/justice](http://www.american.edu/justice).

The Bureau of Justice Assistance (BJA) Technical Assistance Project housed at American University - Justice Programs Office (JPO) has identified a need to examine the role of defense counsel in drug courts. Based on our interactions with these courts through our provision of training and technical assistance services, we generally encounter two basic approaches to providing defense counsel. While the majority of courts appear to provide individual representation to defendants in the courts, a number of courts have adopted an approach which relies on a defense attorney to provide counsel to the drug court “program.” We have seen confusion in regard to the issue of representing the court program versus representing the individual, the obligations of defense counsel on drug court teams, the unique ethical dilemmas of defense counsel, and effective advocacy for clients in the non-adversarial setting of a drug court. With that framework, we have created this fact sheet to help eliminate confusion and enhance the role of defense counsel in drug courts.

## Role Within the Drug Court Team

Best Practices Standard VIII and Drug Court Key Component 2 emphasize the non-adversarial nature of treatment courts and make clear that defense counsel is an integral part of the drug court team, to be included in pre-court staffings, hearings, team communication and decision making, information sharing, and team training.<sup>1</sup> Drug Court Defense Counsel Core Competency I also highlights the fact that defense counsel is a fully integrated team member — committed to the program mission, goals, and success regardless of the type of drug court program (pre-plea, post-plea/pre-adjudication, post-adjudication).<sup>2</sup>

Being a member of the team in a non-adversarial man-

ner, though, does not mean that defense counsel relinquishes their professional duty and ethical responsibility to their client. It is essential that defense counsel and all team members recognize and actualize this element of defense counsel’s representation of individual clients. It

should be noted that while a member of the team, defense counsel’s primary obligation is to represent and advocate for individual clients, protect their constitutional rights, and represent them zealously and individually, not collectively on behalf of a program.<sup>3</sup>

## Client Representation

Commitment to the program, does not supersede or replace defense counsel’s commitment to the client. The most important issue for a defense attorney is

ensuring the client’s Sixth Amendment Right to Counsel: a client must have a lawyer each and every time he/she is before the court or interacts with the prosecutor. The possibility of incarceration is real at many stages of the program, and therefore it is critical that a defense attorney is present at all hearings to provide effective representation and protect the record and the client’s constitutional rights throughout the duration of the program.<sup>4</sup> Defense counsel’s role does not end after acceptance into the program. Further, the National Association of Drug Court Professionals’ (NADCP) position statement on defense counsel requires counsel’s active involvement in the treatment court to ensure that all participants are informed of their rights and potential consequences they may face throughout the duration of the program.<sup>5</sup>

In addition to protecting due process, defense counsel has a responsibility to make the process more procedurally fair and enhance the legitimacy of the program.<sup>6</sup> To achieve both, defense counsel in drug court must have the knowledge, skills, and training of a committed, seasoned attorney; drug court should not be a learning program for new attorneys. This need is underscored by the

*“Since the inception of the drug court movement in America, arguably no player on the drug court team – be it judge, prosecuting attorney, probation officer or treatment provider – has struggled more with his or her own identity and often conflicted role than the defense attorney.”*

*- Critical Issues for Defense Attorney in Drug Court, Monograph Series 4*

various nuances of drug court programs and the need to adapt accordingly.

### Client Confidentiality

Drug court also presents difficult challenges for defense counsel due to the therapeutic nature, open communication and information sharing, and the need to protect confidentiality and honor privileged information. The program is designed to be therapeutic and rewards honesty even if conditions of the program have been violated; however, defense counsel is still required to maintain attorney-client privilege, which might occasionally conflict with the therapeutic goals of the program. Defense counsel should encourage their clients to be forthcoming and up front about their recovery but should not breach client confidentiality without the consent of the client nor the attorney-client privilege in accordance with Core Competency I.<sup>7</sup> From the outset, attorneys should be

open with their clients and make clear what information is confidential and privileged and what is not.

Information sharing in drug court extends beyond standard attorney-client conversations to issues pertaining to treatment. Participants entering the drug court are required to sign a release of information to allow team members to review treatment records; however, it is up to the defense attorney to ensure that disclosure is limited only to that which is necessary.<sup>8</sup> While drug court requires waiving certain rights to privacy, participants should never be required to waive the right to counsel. Defense counsel should be present

to insist on this and to ensure that only privatized treatment information that is necessary for the drug court is required to be shared.<sup>9</sup> Furthermore, in accordance with federal law, “protected information may not be used to substantiate criminal charges against a participant or to further a criminal investigation against the participant” in

*“All Drug Court participants are completely informed of their rights and the consequences they face in Drug Court not only as they enter the program but also during the entire time they participate.”*

*- NADCP Position Statement*

### Drug Court Defense Counsel Core Competencies

1. Participates fully as a Drug Court team member, committing him or herself to the program mission and goals and works as a full partner to ensure their success.
2. Evaluates the offender’s legal situation and ensures that the offender’s legal rights are protected.
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.
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.
5. Monitors client progress to support full participation and ensure the appropriate provision of treatment and other rehabilitative services.
6. As part of the Drug Court team, in appropriate non-court settings (i.e. staffing), defense counsel advocates for effective incentives and sanctions for program compliance or lack thereof.
7. Is knowledgeable of gender, age and cultural issues that may impact the offender’s success.
8. Is knowledgeable about addiction, alcoholism and pharmacology generally and applies that knowledge to respond to compliance in a therapeutically appropriate manner.
9. Contributes to the team’s efforts in community education and local resource acquisition.
10. Contributes to education of peers, colleagues and judiciary in the efficacy of Drug Courts.

treatment programs that receive federal funding.<sup>10</sup> Local programs should also refer to state laws to ensure compliance with confidentiality laws.

## Conclusion

The role of defense counsel in drug court is complicated, multi-faceted, and unique from that of other drug court team members. The most effective defense counsel are those individuals who are able to advocate for drug court while protecting the constitutional rights of their clients, maintaining ethical standards, and developing the trust of their clients. Furthermore, in these courts, it is imperative that defense counsel is cross-trained in substance use and mental health to ensure that they completely understand and are full advocates of each clients' specific individual needs.

## Endnotes

<sup>1</sup> NADCP. Adult Drug Court Best Practice Standards. Rep. Vol. 2. N.p.: National Association of Drug Court Professionals, 2013. Print.

<sup>2</sup> National Drug Court Institute. Core Competencies Guide Adult DCPI Training. Rep. N.p.: National Drug Court Resource Center, n.d. Print.

<sup>3</sup> NADCP. Adult Drug Court Best Practice Standards. Rep. Vol. 2. N.p.: National Association of Drug Court Professionals, 2013. Print.

<sup>4</sup> Freeman-Wilson, Karen, Ronald Sullivan, and Susan P. Weinstein. Critical Issues for Defense Attorneys in Drug Court. pg.41. Alexandria, VA: National Drug Court Institute,

2003. Print.

<sup>5</sup> National Association of Drug Court Professionals. Board of Directors. Position Statement of the Board of Directors on Defense Counsel in Drug Courts. National Drug Court Resource Center. N.p., 10 June 2009. Web. 12 May 2016.

<sup>6</sup> NADCP. Adult Drug Court Best Practice Standards. Rep. Vol. 2. N.p.: National Association of Drug Court Professionals, 2013. Print.

<sup>7</sup> National Drug Court Institute. Core Competencies Guide Adult DCPI Training. Rep. N.p.: National Drug Court Resource Center, n.d. Print.

<sup>8</sup> Tobin, Michael. "Practice Commentary: Participation of Defense Attorneys in Drug Courts." Drug Court Review. 1st ed. Vol. VIII. N.p.: Defense Attorneys in Drug Courts, n.d. 96-130. Print.

<sup>9</sup> Freeman-Wilson, Karen, Ronald Sullivan, and Susan P. Weinstein. Critical Issues for Defense Attorneys in Drug Court. Alexandria, VA: National Drug Court Institute, 2003. Print.

<sup>10</sup> Freeman-Wilson, Karen, Ronald Sullivan, and Susan P. Weinstein. Critical Issues for Defense Attorneys in Drug Court. pg.36. Alexandria, VA: National Drug Court Institute, 2003. Print.

See also:

42 C.F.R., NDCI § 2 (1987). Print.

42 U.S. Code, NDCI §§ 6A-290dd-2 (1999). Print.

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