THE ROLE OF DEFENSE COUNSEL IN DRUG COURT
How To Provide Effective Representation from Initial Contact Through Program Completion

Yvonne Smith Segars

Mike Loeffler
Delivery of Indigent Defense Services

- State Based Public Defender Offices
  - Staff lawyers and combination of assigned counsel or contract
- State Based Commissions (over-sight)
- County Based Delivery Systems
  - Institutional County Public Defender Offices
  - County Based Assigned Counsel
  - County Contract Attorneys – through the county or court
- Private Counsel – dilemma
Are you a good fit for Drug Court?

Skill Set

- Drug Court should be staffed by experience personnel
- Drug Court should not be used as a training ground or resting place
- Experienced in criminal defense
- Able to recognize ethical issues and boundaries
- Able to identify confidential matters and discern between confidential and privileged communications
- Must be cross-trained in substance use, treatment, and mental health
- Able to work in a collaborative environment
- Able to maintain a zealous and diligent work ethic in a non-adversarial environment
Drug Court Models

- Pre-plea diversion courts
- Diversion with a stipulation
- Pre-adjudication model
- Post-adjudication model
- Post-plea/probation revocation
- Combination or mixed model
FIDELITY TO THE TEN KEY COMPONENTS
The Ten Key Components of Drug Courts

- **Key Component #1**
  - Drug courts integrate alcohol and other drug treatment services with justice system case processing.

- **Key Component #2**
  - Using a non adversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights.

- **Key Component #3**
  - Eligible participants are identified early and promptly placed in the drug court program.

- **Key Component #4**
  - Drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services.
Key Component #5
✓ Abstinence is monitored by frequent alcohol and other drug testing.

Key Component #6
✓ A coordinated strategy governs drug court responses to participants' compliance.

Key Component #7
✓ Ongoing judicial interaction with each drug court participant is essential.

Key Component #8
✓ Monitoring and evaluation measure the achievement of program goals and gauge effectiveness.

Key Component #9
✓ Continuing interdisciplinary education promotes effective drug court planning, implementation, and operations.

Key Component #10
✓ Forging partnerships among drug courts, public agencies, and community-based organizations generates local support and enhances drug court program effectiveness.
“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”
DEFENSE COUNSEL MUST CONTINUOUSLY BALANCE RESPONSIBILITIES LIKE NO OTHER MEMBER OF THE TEAM
DRUG COURT DEFENSE COUNSEL CORE COMPETENCIES
(The following tasks are intended to be illustrative and not all inclusive)

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 and 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.

PLANNING PROCESS
- Attends regularly scheduled planning meetings
- Compromises with team members regarding structure of program (including creating a program mission along with goals and objectives) during planning process meetings
- Assists in gathering data relevant to the population that would be impacted by drug court
- Assists in development of efficient method of conducting legal screens on potential drug court participants
- Assures program considers best interest of the client from a legal perspective
- Actively demands participant accountability
- Assists in creating and executing all participant waivers and contracts
- Assures program is not unduly burdensome on client and considers clients integration into law-abiding society

OPERATIONAL DRUG COURT
- Promptly recommends offenders to drug court when appropriate
- Assists in executing all participant waivers and contracts
- Advocates for prompt incentives and sanctions in response to client behavior
- 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
- Maintains up-to-date record of participant performance
- 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
- Solicits information from drug court team members regarding client and share relevant information with team members in appropriate and ethical manner

For all team members' core competencies, see: http://ndcrc.org/sites/default/files/PDF/Core%20Competencies%20Guide.pdf
**INSTITUTIONAL REPRESENTATION**

**INDIVIDUAL REPRESENTATION**

<table>
<thead>
<tr>
<th>Institution</th>
<th>Direct client representation - initial interview</th>
</tr>
</thead>
<tbody>
<tr>
<td>Establish Drug court Model</td>
<td>Must develop trust!</td>
</tr>
<tr>
<td>Enters into MOU’s</td>
<td></td>
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<tr>
<td>Creates policies &amp; procedures</td>
<td>Review underlying case- guilt/investigative</td>
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<tr>
<td>Review discovery</td>
<td></td>
</tr>
<tr>
<td>Works with all other agencies</td>
<td>Initial Screen</td>
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<tr>
<td></td>
<td>Is client an acceptable candidate?</td>
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<tr>
<td></td>
<td>Is the underlying case eligible?</td>
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<tr>
<td>Insure equal access</td>
<td>Discuss with client /make referral</td>
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<tr>
<td>Negotiating eligibility criteria - identify target population</td>
<td>Negotiate plea/ terms</td>
</tr>
<tr>
<td>Client eligibility legal</td>
<td>Discuss program – review consents, waivers, confidentiality agreements arrange court observation</td>
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<tr>
<td>--------------------------</td>
<td>--------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Any immigration issues?</td>
<td>Explain Supervision and probation and 24-7 observation drug testing</td>
</tr>
<tr>
<td>Client eligibility – clinical – knowledgeable about treatment &amp; mental health</td>
<td></td>
</tr>
<tr>
<td>Drug Court Program rigors</td>
<td>Treatment Provider Rules</td>
</tr>
<tr>
<td>Attend staffing</td>
<td></td>
</tr>
</tbody>
</table>
SCREENING CLIENTS “IN”

- WAYS TO HELP IDENTIFY CLIENTS
- NO ONE HAS A MAGIC BALL TO KNOW WHO WILL SUCCEED OR FAIL
  - Based on client interview
  - Self-report (use of AOD/desire for treatment)
  - Prior history
  - Prior record
  - Does anything in the client’s behavior indicate that competency is an issue?
  - Does anything anything in the client’s behavior indicate that the client is suffering from any mental health disorder or cognitive disability?
  - Will the client be able to knowingly, intelligently and voluntarily waive certain rights – read/write/ understand the language
  - Immigration consequences
REFERRAL PROCESS

Equal Access

Legal Eligibility

- What are the underlying eligibility criteria? Eligibility Criteria should be objective
- Is the criteria clearly written and published?
- Does the underlying case fit the drug court model?
- Does the client meet the underlying legal criteria? (prior record, case type, geography - large drug sales excluded)
- Immigration consequences

Clinical Eligibility

- Requires licensed clinician to conduct a formal assessment
- Are there treatment providers that can provide appropriate support and services
- Can the client submit to the level of care

Suitability Issues

- Medical issues (any reasons to preclude participation?)
- Homelessness and sober living conditions
- Child-care
- Transportation and mobility issues
- Create and execute all necessary forms for the referral process (referral stream – multiple parties: court/police/prosecutor/other lawyers private bar)
Referral Stream

- How does the client get referred to the program?
- Ensure system coordination - protect clients from falling through the cracks
- Generally multiple referral paths are available:
  - Depending on the court model – pre-plea diversion will differ from probation violation
  - Trial counsel
  - Court referral (often following initial appearance or in pre-disposition courts)
  - Prosecutor (some courts the prosecutor identify prospective clients on legal eligibility grounds)
  - Probation revocation
  - Criminal division intake (based on objective information, prior record/charges)
  - Written procedures and protocol
  - Create necessary forms to properly memorialize the referral process

- MOU’s should be crafted to PROTECT THE CLIENT during any referral procedure – careful to protect against unintended incriminating statements
Entry Process

- If the client meets the eligibility requirements:
  - Counsel must discuss the program with the client - in detail
  - Does your client truly understand the rigors? Expectations? Daily demands? Impact on the family?
  - Program details should be reflected in a participant handbook - review with client page by page (initial by page) give client a written copy
  - Discuss in detail – Is your client literate? Understand the language?
    - Waivers
    - Consent forms
    - Confidentiality agreements (42 CFR Part 2)
    - Drug court program rules
    - Treatment provider rules (treatment providers should have a separate rule book)
    - Drug testing rules and impact of positive test
    - 24-7 Supervision
    - Fees
    - Court attendance
    - Impact on employment
    - Graduated sanctions and incentives
    - AA/NA – Religious objections and secular options
STAFFING: General Purposes

- Regular review of procedures and protocols
- Ensure evidenced based approaches are utilized
- Modify rules and regulation
- Monitor treatment providers
- Determine appropriate sanctions
- Organize events within the community or with partners
- Events – outings/commencements/holiday
- Alumni group
- Aftercare
- Addressing systemic issues
  - Clean and sober housing
  - Transportation
- Treatment team makes recommendations
Individual Participant Compliance

- Teams may decide on whether to admit an individual
  - Preferable if objective factors are relied upon
- Regular court event to monitor participant compliance with treatment and supervision
- Monitor substance use
- One-on-one colloquy between the court and the client
- Supervision reports
- Adjustment in treatment modality or care
- Phase advancement
- Alignment of resources
- Imposition of sanctions
- Awarding of incentives
- Treatment team may make recommendations/consensus
- Defense counsel should not “VOTE”
- Judge should never abdicate his or her authority
STAFFING: Role of Defense Counsel

**Individual Representation**

- Defense counsel should represent every client on an individual basis.
- Defense counsel should keep copious notes because this hearing is generally not recorded.
- Defense counsel should not “vote,” in fact “voting” is generally discouraged.
- Defense counsel should keep in regular contact with probation so that they are aware of any complications in advance of staffing.
- Defense counsel should keep in regular contact with the client and speak to the client prior to staffing especially if there are compliance issues.
- The role of defense counsel is to advocate for appropriate services if they are not being provided.
- This is the time to advocate on behalf of the client - you are the voice of the client who is not in the room.
- If defense objects to decisions, counsel must protect the record and place the objections on the record.
- Defense counsel should seek expert opinion if needed.
Incentives & Sanctions

- Aimed solely at changing behavior

Punishment is in the eye of the behaver

- Algorithms = bad
- A la carte menu = good
- This is not about us
Incentives & Sanctions

✓ Certain (ratio)
✓ Immediate (celerity)
✓ Of proper magnitude (vis a vis triggering event)
✓ Delivered Effectively (bedside manner)
✓ Fair
  ➢ Procedurally & Substantively
Due Process Protections

- Non-adversarial nature of drug courts should not negate or preclude protections under afforded under the due process clause
- Key Component 2 recognizes the importance of protecting “participants’ due process rights”

“Best practice is to apply probation revocation standards of due process for drug court terminations”

*The Drug Court Judicial Benchbook, 2011, National Drug Court Institute, The Roles of Judges in Drug Courts, Honorable William G. Meyer (Ret.) Honorable Jeffrey Tauber (Ret.) §8.4, pg. 165*
Due Process Protections

- Guided by state law
- Liberty interests are at stake
- Imposition of sanctions (where jail is the penalty)
- Termination from drug court
- Revocation of probation
  - Right to counsel
  - Require notice
  - Fair hearing
  - On the record
  - Right to cross examine
  - Neutral magistrate
Questions?

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