

## Judicial Role and Leadership Workshop

Hon. Patrick C. Bowler, ret.

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### The Problem-Solving Court Judge



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**"The Criminal Justice System  
That's a bunch of  
M A L K E R N!  
Is Broken!"**

**Drug Treatment Courts WORK!**

**Our Problem-Solving Courts have  
Revolutionized the Criminal Justice System!**

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### Traditional Criminal Justice Interventions

It has always been a GOAL of the Criminal Justice System to intervene; to identify and (re)habilitate criminal offenders.

The question is: Have we done it EFFECTIVELY?



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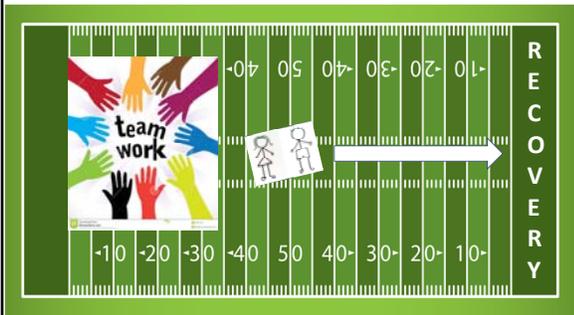
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### The Goal: Recovery



Drug Treatment Courts Work – Beyond A Reasonable Doubt

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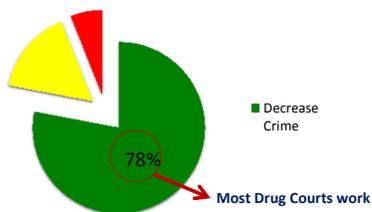
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### The Revolution: Drug Treatment Courts Are We the Best We Can Be?



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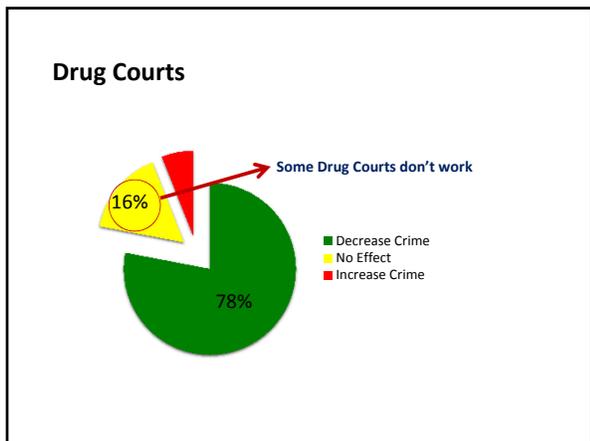
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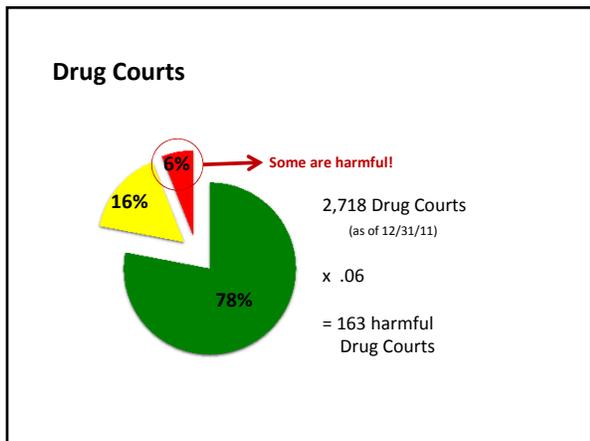
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### Why Is it that some Drug Treatment Courts Don't Work?

A Lack of Judicial Leadership  
A Lapse in Judicial Leadership

*"If the boat misses the dock it is seldom the fault of the dock"*

- Lack of Communication – Judge/Team/Community
- Not following the Law: Some states DTC's shall comply with the ten key components. (*New Mexico Drug Court Standards, August 2016*)
- Not abiding by Best Practices.
- Not abiding by Due Process of Law.
- Not abiding by the Judicial Code of Conduct.

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**A Lapse in Judicial Leadership**

- Not knowing the rules
- Not following the rules – i.e. their own practices and policies; the law (due process); judicial ethics
- A lack of 'team leadership'
  - ✓ Dictatorship in decision making
  - ✓ Top-down attitude
  - ✓ Sloppy delegation
  - ✓ Not understanding team dynamics
  - ✓ Absence of affirmation

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**A Lapse in Judicial Leadership**

- Lack of competency in addiction, alcoholism, mental health issues & pharmacology
- Not knowing what Treatment is doing
- Not paying attention to cultural differences
- Failure to plan for the future-success-failure-evolution
- Failure to understand and to manage program oversight/budgetary issues
- Failure to understand political environment
- Failure to work with the media

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**Challenges for Problem-Solving Judge  
Paradigm shift: A New Way of Judging**

The use of coercive authority in new ways (One of the hallmarks of problem-solving courts)...yet Non-adversarial.\*

- Challenges of working with a dangerous client base.
- Challenges of the addictive/alcoholic participant
- Challenges of monitoring/detecting alcohol/drug use
- Challenge of building 'Relationships' with participants
- Challenge of building community relationships
- Challenge of meeting the Leadership needs on multiple levels (Team, Participant, Community, etc)

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**“Positive Judicial Attributes”**

- Fairness
- Attentiveness
- Respectfulness
- Consistency/Reliability
- Culturally competent
- Knowledgeable
- Caring/compassionate
- Open-minded



Traditional Court Judge

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**Extra “Positive Judicial Attributes”**

- Emphasis on Fairness
- A Listener
- Trustworthy/Genuine
- Understanding of Addiction & Associated Maladies
- Team Leader & Team Builder
- Culturally competent
- Positive Reputation
- Caring/compassionate
- Open-minded
- Educator
- Motivator of Behavior Change



Problem-Solving Court Judge

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**The Dawn of the Drug Court Model**

Pioneers - Dade County Florida 1989

- Inspired
- creative
- dedicated
- committed
- courageous

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**Second Generation Leaders**

Settlers – Around the United States

- Inspired
- creative
- dedicated
- committed
- courageous

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**Third Generation Today---2016**

Some inspired, creative, dedicated, committed, and courageous.

But others  
... maybe.....  
not so much?

- Maybe an appointed Judge unfamiliar with DTC's?
- Maybe judge rotated into the position?
- Maybe an expansion of DTC and new judge?
- Maybe experienced judge suffering burn-out?

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**Research: The Key to DTC Success**

**Judicial Leadership**

*"We need you Judge!"*



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### Judicial Leadership What Type of Leader are You?

<b>What Do You Bring to the Table?</b> <ul style="list-style-type: none"><li>• Personality – You are what you are. You shouldn't try to be somebody else.</li></ul>	<b>What Can Be Improved? How?</b> <ul style="list-style-type: none"><li>• Character – The foundation upon which all leadership is built.</li><li>• Trustworthiness</li><li>• Courage</li><li>• Knowledge/Competency</li><li>• Team Leader</li><li>• Listening Skills</li><li>• Non-judgmental (A judge?)</li><li>• Communicator</li><li>• Educator</li><li>• Institution Builder</li></ul>
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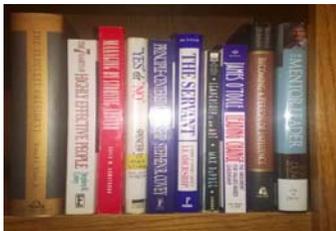
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### Judicial Leadership – Developing Your Leadership Skills



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### Judicial Leadership – Professional Training

**Professional Training** – Legal & constitutional issues, judicial ethics, evidence-based practices; substance abuse and mental health, M.A.T., and best practices.



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### Judicial Leadership – NADCP Standards

- **Length of Term** – Minimum consecutive 2 years.
- **Consistent Docket** – Not switching judges. Participants bring chaos, they need substantial structure and consistency.
- **Participation in Pre-Court Staff Meetings** – Ensure team perspective taken into consideration when important decisions are made, i.e. sharing with team, our expert advisors.
- **Frequency of Status Hearings** – Every two weeks in the beginning.
- **Length of court Interactions** – Three to seven minutes.
- **Judicial Demeanor** – The quality of the interaction with the judge, one of the most influential factors for success.
- **Judicial Decision Making** – Independent discretion, final decision.

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### Judicial Leadership New Mexico Drug Court Standards



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**Judicial Leadership  
Michigan Best Practice Standards**

**Rollout – 2017 MATCP Annual Conference**

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**Best Practice Example:  
The Judge makes the final decision**  
**Example:** Termination and Sanctions. Team may reach consensus but....

**State v Stewart, 2008 WL 4467179:**  
 A trial judge violated the defendant's due process rights when it allowed the defendant's drug court team to effectively decide a matter that was vested by statute in the trial judge's authority."

**Drug Court Judicial Leadership Initiative Vol 1 (American University)**  
 "Drug Courts use a 'team' approach to provide expert advisory guidance to the drug court judge on appropriate therapeutic responses to participant progress and decisions the judge must make regarding each participant. While the team may or may not reach consensus in terms of recommendations, it can provide valuable perspective for the judge.

**New Mexico Drug Court Standards: 7- 7** The drug court judge makes final decisions concerning the imposition of incentives or sanctions that affect a participant's legal status or liberty, after taking into consideration the input of the other drug court team members and discussing the matter in court with the participant or the participant's legal representative. The judge relies on the expert input of trained treatment professionals when imposing treatment-related conditions.

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**Judicial Leadership  
Drug Court Team**

**The judge's Role on the Team – Leader!**

- Continually renew the team's commitment to the Mission of the drug court
- Assure adherence to the 10 key components and the best practices and standards.
- Promote the therapeutic principles underlying the drug court model.
- Insure that team receives up-to-date training and cross-discipline training.
- Insure evidence-based programs and the law are followed.

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**Judicial Leadership  
Drug Court Team**

**The Team Core Competencies**

- Each team member has important roles and core responsibilities for the team and the Drug Court Team – Judge’s job to reinforce those roles.



“All staff must see their job as the facilitation of the participant’s rehabilitation.”  
N.Mex. Drug Court Standards 7.1

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**Judicial Leadership  
Drug Court Team**

**Team Member Expectations**



- Most team members come from other agencies, organizations, or departments; they must adjust to a new environment:  
**The Problem-Solving Court Model.**
- Team members must learn how to participate with empowerment.
- Roles must be clearly defined and included in written policies and procedures.

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**Judicial Leadership  
Drug Court Team**

**Teambuilding-Why is it important?**

A DWI Court team works together to solve problems in order to achieve the common goals and objectives of the organization

Every member of the team has a learning style which can complement someone else’s style

Judicial leaders must know their own style as well as the styles of other team members in order to effectively utilize everyone’s strengths.

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**Judicial Leadership  
Drug Court Team**

How does your leadership style impact your team? Are you a full partner?

Communication  
Success  
Participation



Motivation  
Validation  
Sustainability

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**Judicial Leadership  
Treatment**

Judge must be knowledgeable of addiction, alcoholism, and pharmacology generally and apply that knowledge to respond to compliance in a **therapeutically appropriate manner**.

- Judge and team should be aware of and knowledgeable about services being provided to participants by treatment.
- Judge should ensure Treatment is aware of DTC mission and goals, and the principles and policies guiding the DTC.
- Treatment should be made aware of the expectations of **communication**, delivery of services and collaboration.

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**Judicial Leadership  
Community**

**The Criminal Justice Community:**

- Judge must be a leader and advocate in the criminal justice community to extend the benefits of drug courts to all high risk/high needs offenders;

**Government and Community Agencies:**

- The Judge must educate representatives of targeted government and community agencies in an effort to obtain their support and garner the resources necessary to maintain and expand drug courts.

**Advisory Committee**



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### Judicial Leadership Community

#### Judicial outreach and activism

- Judicial leadership requires that you reach out to your community for support
- Judicial leadership requires activism in promoting collaborative justice




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### Judicial Leadership Participant

- Some have described the relationship between the judge and drug court participant as 'Therapeutic.'
- The research is clear: Fairness and the Perception of Fairness are "consistently associated with better outcomes." NADCP Adult Drug Court Best Practice Standards, Vol. II, P 40.
- Due Process means Fundamental Fairness.
- A participant's willingness to obey a court's order is linked to his or her perception of the court's legitimacy. The 'Power' of the four principles of procedural fairness.

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### Judicial Leadership Participant

The 'TOUCHSTONE' of the court's interface with the drug court participant should be 'procedural fairness.'

**Voice** – Engaging the participant in the process.

**Neutrality** – Fair and balanced between both sides.

**Respectful Treatment** – The 'perception' of fairness (Their rights are plainly protected)

**Trustworthy** – Sincerely trying to help the participants

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**Judicial Leadership Participant**

**Open-ended questions:**

- "...Put the clients at ease in court  
When clients come to court, there's often a barrier between them and the judge. The M.I. approach takes down that barrier and allows the clients to build a relationship with the judge and to see that the court is there to help them and not just punish them." – Renee Gillette, lead counselor
- Examples of Open-Ended Questions?
- Staffings – Using your team 'experts'

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**Judicial Leadership Participant**

**Motivational Interviewing - A collaborative conversation style for strengthening a person's own motivation and commitment to change.** Miller & Rollnick, 2012

**The Spirit of Motivational Interviewing (MI)**

- A partnership - Rather than separate 'expert' & 'recipient' roles. Motivation for change is elicited from the client, not imposed.
- It is the client's task, not the counselor's, to articulate and resolve his or her **ambivalence**. The counseling style is an eliciting one.
- Direct persuasion is seldom effective in resolving ambivalence. Instead, the counselor supports a client's autonomy while helping to explore the prospect of change.

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**Judicial Leadership Participant**

**Four Principles Of Motivational Interviewing**

- **R – Resist the righting reflex**
- **U – Understand client's motivation**
- **L – Listen to the client**
- **E – Empower the client**



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**Judicial Leadership Participant**

**Four Elements of Motivational Interviewing**

- Express empathy
- Develop discrepancy – Gap
- Roll with resistance
- Support self-efficacy – Can Do




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**Judicial Leadership Participant**

**Supporting Self-Efficacy**

- Encourage hope and the possibility of change.
- Our expectations about the likelihood of client change has a powerful effect on the outcome.
- We want to enhance the participant's confidence in their capacity to change. The client is responsible for choosing and carrying out change.

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**Judicial Leadership Participant**

**Motivational Interviewing from the Bench**

“Judges should avoid blaming, shaming, discounting, arguing with, confronting, labeling, and belittling defendants. Judges should ask open-ended questions, affirm the defendants’ conduct and views whenever appropriate, reflect back the defendants’ comments, and summarize . . . In summary, our focus should be on eliciting verbalizations of change from the clients. If the judge stays focused on attempting to get the client to vocalize the desire, ability, need, or reason for change, he or she has moved the client toward actually changing.”

Bailin, R. (2006). Motivational Interviewing for Judicial Officers. National Center for State Courts.

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**Judicial Leadership Participant**

**M.I. as a “Best Practice” for Judges**

- “At each session, the [drug court] judge should use motivational interviewing techniques to elicit feedback from the participant on his/her successes and struggles during the past two weeks. The relationship that develops between the judge and the participant in the courtroom is an essential element of changing the participant’s behavior . . . Drug court judges should all be trained in motivational interviewing.” – Best practices for North Carolina Drug Treatment Courts (2010)
- Training and Use by all Members of the Team!

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**Judicial Leadership Participant**

**New Mexico Drug Court Standards**

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

**Standard 7 - 5**

- The adult drug court judge offers supportive comments to participants,
- stresses the importance of their commitment to treatment and other drug court requirements, and
- expresses optimism about their abilities to improve their health and behavior. The judge
- does not humiliate participants or subject them to foul or abusive language. The judge
- allows participants a reasonable opportunity to explain their perspectives concerning
- factual controversies and the imposition of sanctions, incentives and therapeutic adjustments.

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**MOTIVATIONAL INTERVIEWING**  
[www.motivationalinterview.org](http://www.motivationalinterview.org); [www.msleaders.org/ms-leaders/ce/motivational.asp](http://www.msleaders.org/ms-leaders/ce/motivational.asp)

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**Judicial Leadership Program Oversight**

- Is the program operating with:  
Consistency? Transparency?
- Is the program abiding by its own policies and procedures?
- Is there continued oversight in the targeting of the population/ Eligibility criteria adjustment.
- Are you maximizing the programs outreach and service to the volume and nature of all offenders who need the program's services?
- Are there Evaluations? Internal and External?
- Are you Ensuring that program materials, documents and forms are revised periodically to reflect current practices and operations.

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**Program Oversight**

**Administrative – Funding**

- Are you following the budgeting process working with Chief Judge and Court Administrator
- Are you seeking funding from other governmental agencies through grants OR by their in-kind contributions of personnel, travel, etc.
- Are you seeking other ways to attract resources including nonprofits

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**Judicial Leadership  
Court of Law**



**A Drug Treatment Court is a Court of Law!**

(c) **Drug treatment court** - "A drug court is a specially designed court calendar or docket, the purposes of which are to achieve a reduction in recidivism and substance abuse...." New Mexico Drug Court Standards.

Note: *The Kentucky Supreme Court has stated that drug court "is a **court function**, clearly laid out as an alternative sentencing program under the applicable statutes."*

*Commonwealth v Nicely, 326 SW3d 441, 444 (Ky 2010)*

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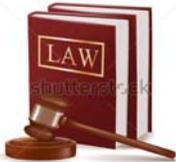
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**Judicial Leadership  
Court of Law**

**Legalities:**



- Federal, state and local laws
- Due process requirements
- Confidentiality
- State Code of Judicial Conduct

- ✓ Judges can be activists in improving the administration of justice
- ✓ Judges cannot fund raise or lend the name or prestige of the office for that purpose
- ✓ Independence of the Judiciary, judge makes the final decision

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**Judicial Leadership  
Court of Law**

**Why Talk About Due Process?**

1. A Drug Treatment Court is a Court of Law
2. Key Component #2 of Drug Courts
  - Use of a nonadversarial approach by prosecution and defense that promotes public safety while **protecting any participant's due process rights**.
3. The Appellate Courts Are Speaking
  - "Due Process issues related to judicial decision making in a drug court context are beginning to be addressed in state court decisions throughout the country." Maine v Gross, infra*
4. Fairness promotes good outcomes

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## Due Process: Substantive and Procedural

Procedural protections are due under the 5<sup>th</sup> and 14<sup>th</sup> Amendments when the defendant will **potentially suffer a loss to a recognized liberty or property right.**

If due process applies, the question remains:

**what process is due?**

*"When we talk about Due Process we are referring to the procedural protections which ensure that the defendant is **treated fairly** by the criminal justice system."*

*Fuentes v. Shevin, infra; Morrissey v. Brewer, infra.*

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## When Does Due Process Arise?

Peace



Conflict



Non-Adversarial TO Adversarial

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## Due Process and Termination from Drug Court

*"The consequences of termination from drug court are comparable to those sustained in a probation revocation." The Drug Court Judicial Benchbook, p 164.*

Majority of appellate rulings favor probationary rights. *Gosha v. State, infra; State v. LaPlaca, infra; Staley v. State, infra.*

1. P/C determination
2. Written notice of the claimed violations\*
3. Disclosure of the evidence against him
4. An opportunity to be heard and present evidence
5. The right to confront and cross-examine witnesses, and
6. A neutral and detached hearing body
7. (What about 'right to counsel?' See MCR 6.445(B)(2)(b))

*"Due process requires only that the revocation proceedings be conducted in a fundamentally fair manner." People v. Belanger, 227 Mich App 637 (1998); i.e. "minimum requirements of due process" Gagnon v. Scarpelli, infra.*

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### Due Process and Sanctions

#### What 'process' is due?

Answer: It depends

1. Is there a 'contest' on the facts underlying the alleged violation or is it simply a matter of mitigation? And,
2. If there is a contest on the facts, what will the proposed sanction be?

←

 No Liberty Interest  
 i.e. Community service,  
 Tether, SCRAM, Inpatient\*
 
→

 Yes Liberty Interest  
 Jail

The Critical Issue: Will the participant potentially suffer a loss to a recognized liberty or property right under the 14th Amendment?

*Gaanan v. Scarpelli, infra; Wolff v. McDonnell, infra;*  
*Sandlin v. Conner, infra;*

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### Due Process and Sanctions

- *Taylor v. State*, CR-15-0354 (Ala. Crim. App. 9/9/16) Concurrence: "I realize that developing specific procedures for handling drug-court sanctions can be an arduous task — especially given the dearth of case law in this State addressing drug-court programs. I would encourage other drug-court judges in this State either to use or to develop a drug-court-sanction procedure similar to the one outlined in this Court's opinion (ie: provision of a hearing). I would also recommend to other drug-court professionals that they take advantage of the vast training resources and educational opportunities available through the National Association of Drug Court Professionals."
- Some States – If liberty interest at stake there is a right to a hearing by analogy to laws and procedures governing probation.

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### Due Process and Sanctions

<p><b><u>Right to a Hearing</u></b></p> <ul style="list-style-type: none"> <li>• If there is a factual challenge to a violation and,</li> <li>• liberty interest at stake</li> </ul> <p>Note:</p> <ul style="list-style-type: none"> <li>• Hearing may be <u>informal</u>, as long as,</li> <li>• Participant has a right to be heard and the evidence challenged.</li> </ul>	<p><b><u>No Right to a Hearing</u></b></p> <ul style="list-style-type: none"> <li>• If there is a factual challenge to a violation but</li> <li>• There is NO liberty interest at stake</li> </ul> <p>Or</p> <ul style="list-style-type: none"> <li>• There is no factual dispute as to the violation but participant wishes to express a reason for mitigation</li> </ul>
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## Hearing

Full panoply of Constitutional Rights



Summary, Informal and Flexible



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### Judicial Leadership Court of Law

**Waiver of Rights – Contracts Law?**

1. What rights can a participant ‘waive’ in signing a drug court agreement?
2. Is there a difference between waiving the right to search without ‘reasonable suspicion’ vs. the right to an attorney?
3. Can a waiver of some rights be revoked? (i.e. Right to counsel, see NADCP “Adult Drug Court Best Practice Standards,” Vol. II, p 40)
4. Can one ‘knowingly’ waive a right that has not yet been ‘implicated?’

*“Waiver upon entry to a Treatment Court could not contractually waive the substantive due process rights attendant to a revocation hearing.” Staley v State, infra; State v LaPlaca, infra, Gross v Maine, infra.*

*“We indulge every reasonable presumption against waiver of fundamental constitutional rights...We acquiesce in a waiver only if it has been knowing, intelligent, and voluntary.” Johnson v Zerbst, 304 U.S. 458 (1938)*

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### The Participant’s Waiver Agreement and the Prospective Waiver Doctrine

Issue: When is the ‘Right’ Implicated?

**A)** Act → Charge → Right to Hearing/Trial:  
Waive Rights → O.K.? Yes or No

**B)** Waive Rights → Act → DTC Violation  
Right to Hearing → O.K.? Yes or No

The Prospective Waiver Rule: cannot waive a future right not yet implicated. It is ‘unknown’ at the time of drug court entry.  
(Analogy: Termination - Florida v Staley, etal)

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### Judicial Leadership Court of Law

**Confidentiality**

- ✓ 42 CFR Part 2
- ✓ HIPAA
- ✓ Consent





- ✓ Judicial Code of Conduct
- ✓ Professional Ethics

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### Confidentiality Issues



**Status Review Sessions – Closed or Open?**

Excluding public from the courtroom:

- Case law New Mexico: In discretion of trial court? *State of New Mexico v Richard Velasquez*, 412 p2d 4, 76 NM 49, NM Sup Ct 1966
- Other Case law: "[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." (People v Vaughn, 491 Mich 642 (2012) citing Presley v Georgia, 558 US at 214, quoting Waller v Georgia, 467 US 39, 48 (1984))

Standard of  
Minimization

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### Confidentiality Issues



**Staffings - Closed or Open?**

**1. Closed Staffings:**

- ✓ *State of Washington v Adonija Lacroy Sykes* (filed 12/18/14) Closed staffings are not a violation of Constitution requirement of open courtrooms. However this should be added to your waiver; participant waives right to staffing operating as an open court proceeding and his or her presence at staffing.
- ✓ Defense Counsel should be present. (Def. right to be at every critical stage of the proceeding? See *State of Washington v Michael Joseph Leclech*, #70168-1-I unpub'd 06/15/15)
- ✓ No final decisions concerning disputed facts or legal issues in the case, (Judge Meyer, NDCI Benchbook)

**2. Open Staffings**

- ✓ Policies should include who may be allowed to attend a staffing if allowed by the treatment court team; participants, interested organizations? Waivers?

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### Standard of Minimization

Despite the high level of protection afforded to information regarding substance abuse treatment, within confines of current confidentiality legal provisions:

1. DTC team can obtain the level of information they need to determine if participants are complying with drug court program criteria.
2. "However, there may be instances in which compliance with these provisions will require limiting the extent of information disclosed as well as the forum in which it is presented." Drug Court Resource Series, Practical Guide for Applying Confidentiality Laws to Drug Court Operations. OJP, U.S. Department of Justice.

**Example:** Open and public courtroom trumps federal confidentiality requirements. [State of Florida v Noelle Bush](#), *infra*

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### Judicial Leadership Court of Law

#### Drug Court Judges Removed From Office

**Due Process Violations:** *"Judge Thompson's conduct of depriving participants in drug court of their due-process rights when he signed orders of contempt without the persons being properly notified of the charge of contempt or a right to a hearing, and by conducting "hearings" immediately after "staffing meetings" without adequate time for the persons to have proper counsel or evidence presented, violated Canons 1, 2A, 3B(1), 3B(2), 3B(4), 3B(8), and constitutes willful misconduct in office and conduct prejudicial to the administration of justice."* Performance Commission on Judicial Ethics v. Rickey W. Thompson, The Supreme Court of Mississippi, no. 2014-jp-01309-sct

**Preventive Detention:** 42 USC §1983 damages and injunctive relief suit against Drug Court Judge and team for incarcerating participants for lengthy periods of time, while awaiting placement in drug treatment facilities. Plaintiffs allege that the decision to hold them in jail pending placement was made without counsel, hearing, consideration of bond, or other rights of due process) (Injunctive relief moot—Court Closed—Judge forced to Resign 4/22/16) [Hoffman v. Jacobi](#) (S.D. Ind., 9/29/2015)

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### When is 'Good Enough' Good Enough?




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Contact Information:

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