

**Drug Treatment Court
Confidentiality & Ethics**

Hon. Patrick C. Bowler, ret.

**The Drug Court Model
The Sharing of Information**

What is Confidential Information?

- 42 CFR: "The restrictions on disclosure in these regulations apply to any information, whether or not recorded, which:
 - (i) Would identify a patient as an alcohol or drug abuser either directly, by reference to other publicly available information, or through verification of such an identification by another person,
 - (ii) Is drug abuse information obtained by a federally assisted drug abuse program for the purpose of treating alcohol or drug abuse, making a diagnosis for that treatment, or making a referral for that treatment."

**The What and Who of
Protected Health Information (PHI)**

<p>Identity</p>  <p>Includes Disclosures and re-disclosures</p> <p>Question: Drug/Alcohol Test Results?</p>	<p>Treatment information</p> <ul style="list-style-type: none"> -Screening -Assessments -Referrals -Treatment -Diagnosis and prognosis
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The Drug Court Model The Sharing of Information

When and Where Does Confidentiality Matter?

All the time:

- Team member discussions
- At Staffings
- At Status Review Hearings
- Protection survives death



Why Does Confidentiality Matter?

A. It's the Law:

- 42 CFR Part 2 – The alcohol and substance abuse treatment confidentiality rule.
- HIPAA – New federal rules covering all health related information

B. New Mexico Drug Court Standards:

- 1-16 Drug courts will follow confidentiality laws and practices as described in Appendix D.

C. It Promotes Recovery



NEW MEXICO DRUG COURT STANDARDS August 2016

Key component #1: Drug courts will integrate alcohol and other drug treatment services with justice system case processing

- 1-18 Drug court information and records shall remain confidential, except as authorized for disclosure under these standards or by state law, or authorized for the purposes of research or evaluation, as allowed for in federal law including HIPAA and CFR 42 Part 2.
- 1-19 Recognizing that as a practical matter most, if not all, drug courts or related agencies or treatment providers receive direct or indirect federal funding or assistance, drug courts shall comply with federal confidentiality laws. (42 U.S.C. 290dd-2; 42 C.F.R. Part 2). The drug court judge, in conjunction with the drug court program manager, shall supervise the application of confidentiality laws and standards in the drug court.

42 U.S. Code 290dd 42 CFR Part 2



- First issued 1975, revised 1987
- Designed to help deal with the stigma of addiction.
- Requires notification of confidentiality and law-prescribed consent forms
- Applies to Drug Treatment Courts
- Prevails if in conflict with state laws

"I'm sorry I cannot acknowledge whether someone is or isn't in our treatment program".

Not Just Disclosure But Also Re-Disclosure



Same Rules Apply As The Original Disclosure

HIPAA



Health Insurance Portability & Accountability Act (1996)

Protect confidentiality and security of patient information

–General Rule

- If DWI Court is in compliance with 42 CFR- it is in HIPAA compliance also (with few exceptions)

Is the DTC Court Program a treatment program for the purposes of the confidentiality regulations? Why?

42 CFR

The 42 CFR General Rule applies

- Screening
- Assessments
- Referrals
- Treatment
- Diagnosis



Issue

How do you share information in staffing yet comply with state and federal confidentiality laws?



General Rule

- Treatment Programs may only release information or records
 - With a knowing and **written consent** from the participant
 - A proper consent can authorize all parties involved in the DWI Court
 - Some limited exceptions



Consent

- HIPAA prohibits a program from conditioning treatment on a patient signing a consent, but judges, probation etc. can condition participation in the DWI Court program on an offender signing the consent form



Consent

New Mexico Drug Court Standard 1 – 17: The drug court has a written consent or release of information form; participants provide voluntary and informed consent about what information will be shared between team members.

Question: How does one obtain a 'voluntary' and 'informed' consent from the participant?



Elements of a Consent

- Who may make the disclosure
- To whom disclosure may be made
- Participant's name
- Purpose of the disclosure
- What kind of information may be disclosed
- Participant's signature
- Written and Dated
- Limited in Time
- (Consent cannot be revoked in a Criminal Court setting)



Client Notice Form

- A second form required by HIPAA/42 CFR in addition to the Consent form
- Participants must be informed of privacy rights in writing and given to the Participant to keep



HIPAA Order

- HIPAA requires that all consents be made revocable.
- Although HIPAA does not apply to courts (does apply to the treatment provider) recommended that the court should issue an 'administrative order' requiring treatment providers disclose relevant treatment information to the drug treatment court team.
- Example: Participant withdraws consent from treatment (can't criminal court) the order allows treatment to disclose information to the court.
- The consent form signed by the participant should reflect HIPAA requirements. (Example of forms: The Drug Court Judicial Benchbook, NDCI)

Even without written consent, under what other circumstances may you release information?

Permitted Disclosures—No Consent

- Medical emergency
- Crimes on the premises
- Crimes against staff
- Administration / qualified service programs working with drug court
- Outside auditors, central registries and researchers
- No re-disclosures unless permitted (Montana v Plouffe)

Mandatory Disclosure—No Consent

- State child abuse laws
- A valid court order (Not subpoena, etc)
- State laws relating to cause of death
- Duty to protect others, to warn of imminent, serious harm

Note: "New Mexico's statutes and rules of evidence provide for specific exceptions in which the public interest may outweigh the duty of confidentiality and allow or require a health-care provider to make a **disclosure**." Eckhardt v Charter Hospital, 953 P2d 722, New Mexico Court of Appeals, 1997

Drug Treatment Courts - Staffings

- What is it?
(Washington v Sykes, supra)
- Who should be present?
- Why worry about Teamwork?
- Establishes the 'framework' for the Status Review Hearing.



When to Have Staffings?

Anytime prior to seeing the participant

- Eligibility
- Arraignment
- Progress Report
- Probation Revocation/Termination
- Regression/Advancement
- Return on Warrant
- Pre-Graduation
- Graduation



Confidentiality Issues

Staffings Closed or Open?

Discretionary with the treatment court team:

1. **Closed Staffings:**
 - ✓ *State of Washington v Adonija Lacrocy 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*, #70168-1-1 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?

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 Caselaw: "[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

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*

Request to See or Get Copies of Probation/Confidential File

- **MCL 791.229 Privileged or confidential communications; access to records, reports, and case histories; confidential relationship (defendant and p.o.) inviolate.**
- To others: In *Howe*, the Michigan Supreme Court held that the plaintiffs, who brought a defamation claim, waived the statutory probation report privilege when the defendant's truth defense was seriously undermined without the report.
- D.O.C. Code v D.Ct. P.O.
- Best Practices: Legal decisions for judge. Put policy in writing. Job of p.o.: supervision and case management. Your only worry is 'what you put in the probation file, is it 'objective' or 'subjective.'

Ethics

Ethics are the principles of conduct governing an individual or group, especially a professional group. Ethical principles help people make appropriate decisions and respond properly in difficult situations. Following the ethical principles of a profession reduces the risk of job loss, criminal charges, and liability for unsuitable behavior.

Michigan Trial Court Administration Reference Guide

- Model Code of Conduct for Court Employees
- Model Code for Probation Officers
- Courage
Responsibility Ethics
Dedication- CREDibly
serving the public
safety of New Mexico

Ethics

- Each person of the various disciplines has both personal and professional ethical standards
 - At times, these can conflict
 - Word most associated with ethics: dilemma
 - The "rules" can change, or be different in different jurisdictions
 - Seek advice of state experts on ethical dilemmas
 - Appoint a compliance officer for your office



Ethics

New Mexico Drug Court Standards:

Confidentiality: Other Applicable Disclosure Restrictions

1-21 Rules of professional conduct and evidentiary privileges shall still apply unless expressly waived by the participant.

Huh?

Prosecutors

- Duty to protect public safety
- Proverbial “rock and a hard place” if confronted with information they should act on ethically, but cannot act on legally



Defense Attorneys

- Unlike Treatment Providers, no federal statute has provided Defense Attorneys with a consent to set aside attorney-client privilege
- Represent the ‘stated interests’ of their clients vs ‘best interests’ as a DTC team member



Treatment Providers Ethical Issues

Treatment Providers

- Consent is permissive, not mandatory
- Information released must be what is minimally necessary to meet the terms and conditions of the consent
- Every staffing is a potential ethical dilemma
- What to do with information about illegal activity? Sexual abuse? Personal health issues?



Judges

- Guardian of legal rights (also applicable: Judicial Code of Conduct)
- Cannot outsource their decision to another person or group of persons, coordinated strategy but the judge must be the final decision maker
- Engage the community (but cannot raise money)
- Stick with 'cameo appearances'



The "Shot(s) heard over the Bow"

✓ Due Process Violations – Misconduct in Office:

"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-act

✓ 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)

New Mexico Ex Parte Rule & ABA Rule 2.9

• 21-300 Adjudicative Responsibilities

(4) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except that: (administrative etc.) New Mexico Code of Judicial Conduct.

• ABA Rule 2.9 Comment [4]

A judge may initiate, permit, or consider ex parte communications ...when serving on **therapeutic or problem-solving courts, mental health courts, or drug courts**. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.

Due Process & Judicial Impartiality

Test?

U.S. v. Ayala, 289 F.3d 16, 27 (1st Cir. 2002)

“Would the facts, as asserted, lead an objective reasonable observer to question the judge’s impartiality?”

Split of Opinion!

What is the trend on recusal?

Recusal Not Required

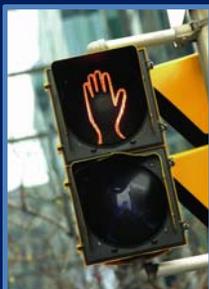
1. *State v. Belyea*, 160 N.H. 298, 999 A.2d 1080 (N.H. 2010)
2. *Mary Ford v. Kentucky*, (Ky. Appellate April 30, 2010)
3. *Grayson v. Kentucky*, No. 2011-CA-000399-MR. Court of Appeals of Kentucky UNPUBLISHED (June 29, 2012)
4. *Arizona v. Tatlow*, No. 1 CA-CR 11-0593, Court of Appeals of Arizona, Division One, Department C, (December 4, 2012)
5. *Arizona v. Perez Cano*, No. 1 CA-CR 11-0473 Court of Appeals of Arizona (September 20, 2012) UNPUBLISHED
6. *State v. Rogers*, 170 P. 3d 881 (Idaho 2007)
7. *State v. McGill*, No. M2015-01929-CCA-R3-CD. (Tenn. Court of Criminal Appeals 7/18/2016) (rejecting Stewart)

Recusal Required

1. *Minnesota v. Cleary*, No. A15-1493 (Court of Appeals of Minnesota July 5, 2016.) (When the sole basis for revoking probation is a probationer’s termination from drug court and the drug court judge participated in the drug court team’s decision to terminate the probationer from drug court, a probationer is entitled to have a judge other than the drug court judge preside over the probation revocation hearing, because of the appearance of lack of impartiality)
2. *State v. Stewart*, W2009-00980-CCA-R3-CD (Tenn. Crim. App. 8-18-2010)(not selected for publication)

General Issues

- For everyone on the team, it’s necessary to maintain a professional relationship with the participants.
 - Don’t lend money
 - Don’t co-sign loans
 - Don’t develop intimate relationships



Training Issue: Probation Officer (Staff) Liability

It is "Establishment of Religion" to order participant to AA/NA. Well settled. Fundamental/CANNOT order as condition of probation (Warner), parole (Inouye).



VIP: There are certain fundamental rights that cannot be 'contracted' away.

Confidential Records

- Secure room and/or locked file cabinet: Keep separate
- Written procedures for access and use
- No public access
- Label drug court files "confidential"
- Educate courthouse staff



Computerized records

- Password-protected records
- Consult computer specialist
- Limit access to records even further after consent expires or is revoked
- Seal by changing the password
- Written procedure



Operational Checklist

- Disclosure consent form
- Client Notice Form
- Qualified Service Provider Form
- Written procedure for information request
- Written procedures for data storage



Practice Tips

- Designate a team "confidentiality expert"
- Written procedures
- Video permission/consent
- Written consent and notice form for DWI Court visitors and observers
- Safeguard your records as well as your words

MOU on Confidentiality
Signed by ALL team Members (Remember new Members) and review it annually!

Practice Tips

New Mexico Drug Court Standards:

1-20 Drug courts should receive training on federal and New Mexico confidentiality requirements and how they affect drug court practitioners and contractors.

Remember:
A Need to Know!

Federal Regulations require that the scope of the disclosures be limited to information necessary to carry out the purpose of the disclosures. 42 CFR, 2.13(a)



Same Rules for Re-disclosure!

Law of Confidentiality Resources

- [The Drug Court Judicial Benchbook](http://www.ndci.org) www.ndci.org
- Drug Court Resource Series: Practical Guide for Applying Federal Confidentiality Laws to Drug Court Operations. OJP, U.S. Department of Justice.
- Federal Confidentiality Law and How They Affect Drug Court Practitioners. National Drug Court Institute
- Legal Action Center (<https://lac.org>)
- SAMHSA (www.samhsa.gov)



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