The Defense Attorney in Specialty Courts: A New Way to Advocate and Make a Difference in the Criminal Justice System

2015 Colorado Collaborative Justice Conference
May 27, 2015

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Paradigmatic Shift: From Adversarial to Teamwork in accordance with Therapeutic Models of Justice
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. Some of 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 (NDCI), a division of the National Association of Drug Court Professionals (NADCP), in November 2002.

- I am also including some insights from “Participation of Defense Attorneys in Drug Courts- a Practice Commentary,” by Michael Tobin, Deputy Director of the Wisconsin State Public Defender.
Participation of Defense Attorneys in Drug Courts, Practice

Commentary by Michael Tobin

- The recommended best practice for a defender organization is to recognize and implement the collaborative and nontraditional role of a defense representative on a [PSC] team. This representative does not serve as adversary counsel for individual,... participants, but rather as an advocate for evidenced-based practices that advance the court’s therapeutic goals. Editor’s note-The author’s recommendation that “adversary counsel” and “defense representative” functions should ordinarily be performed by different attorneys is not universally agreed upon by defense experts and does not reflect an official position of NADCP or NDCI. ... research does suggest outcomes may be improved by including separately designated defense representatives on the [PSC] team who have substantial training and experience with the Drug Court model, practices, and procedures.
More Comment by Tobin

- As a team member, the defense attorney may have the opportunity to improve the justice policy by expanding opportunities for defendants to have their social service needs addressed effectively and to have their cases dismissed and reduced.

- Attorneys working in treatment courts need to be aware of (and to advocate for) the research-based approaches that lead to successful results for participants.

- Defense attorneys should participate in all aspects of Problem Solving Courts to ensure that these courts treat defendants fairly, following effective and therapeutic procedures. Each treatment court should include a defense representative on a team that oversees the court's policies and operations. Defendants participating in a problem solving court should also have access to adversary counsel, although as a practical matter, the therapeutic model of a problem solving court is inconsistent with traditional litigation procedures.

- Practical and ethical challenges often arise if the same person serves both as the defense representative on a PSC team and as adversary counsel for individual participants in the court. Thus, when possible, the defense representative should refrain from serving in these two roles simultaneously. The dual roles create at least the appearance of a conflict between the duty to assist the PSC (in fulfilling its broad, therapeutic mission) and the duty to advocate at each court session for individual clients.

- If the circumstances of a jurisdiction require an attorney to serve these roles simultaneously he or she should clearly communicate with clients regarding the attorney's responsibilities as a member of the PSC team. The attorney should also advise other members of the team that when serving an individual client, the attorney may challenge the problem solving court's procedures and the specific actions of other teams members.
Tobin’s Thoughts re: Attorney Fulfilling Dual Roles in [Problem Solving Courts]

- For many hearings (particularly for clients in compliance), the clients wishes and the team’s treatment goals for the client identical. So no challenge.

- However, because many clients relapse or commit other infractions during the difficult treatment process, the potential exists for conflict between the two roles.

- When an attorney is required as an advocate to argue against sanctions, he or she may be jeopardizing the collaborative approach that is widely accepted as integral it to the effectiveness of [Problem Solving Courts.]
Accepting sanctions vs. being resentenced

Positive UA’s and incriminating statements> “Defenders will want to ensure that such evidence is used for the limited purpose of treatment and cannot be used against the client” in other contexts

The Problem Solving Court should provide the participant with the right to appointment of adversary counsel at an expulsion hearing

Must argue against increased sentences for non-completion which may deter many defendants from participation in [Problem Solving Courts].

The Defense representative should ordinarily refrain from voting on admission to the court clients represented by attorneys working in his or her office. Similarly, the defense representative should not vote on sanctions or expulsion. If the defense representative intends to vote regarding these decisions, the clients should be notified that the defense representative is acting as a representative of the Problem Solving Court and will vote he applicable standards and policies. Very Difficult Issue
Protecting Due Process in a “Nonadversarial” Context

- The question of how to best preserve fundamental due process in a therapeutic court programs is complicated by the relative informality of the model.

- In the words of one public defender, “[it] is better, morally, to make someone clean graffiti for a week and urinate in a bottle than to keep that person in a cage; but it is still important not to sentence the wrong person.”

- Waiver of fundamental rights
- Equal Access
- Ensure fundamental fairness
- Challenges to testing procedures
- Challenges to AA & NA
Defenders: Ten Tenets of Fair and Effective Problem Solving Courts

- Qualified representatives of the indigent defense bar shall have the opportunity to meaningfully participate in the design, implementation and operation of the court, including the determination of participant eligibility and selection of service providers.

- Qualified representatives of the indigent defense bar shall have the opportunity to meaningfully participate in developing policies and procedures for the problem-solving court that ensure confidentiality and address privacy concerns.

- Problem solving courts should afford resources parity between the prosecution and the defense.

- The accused individual’s decision to enter a problem solving court must be voluntary.
The Ten Tenets, cont’d

♦ The accused individual shall not be required to plead guilty in order to enter a problem solving court (Not in practice) This is consistent with diversion standards adopted by the National Association of Pretrial Service Agencies. See Pretrial Diversion Standard 3.3 at 15 (1995). The standards stress, “requiring a defendant to enter a guilty plea prior to entering a diversion program does not have therapeutic value.”

♦ The accused individual shall have the right to review with counsel the program requirements and possible outcomes. Counsel shall have a reasonable amount of time to investigate cases before advising clients regarding their election to enter a problem solving court

♦ The accused individual shall be able to voluntarily withdraw from a problem solving court at any time without prejudice to his or her trial rights (Not in practice) This is consistent with the standards adopted by the National Association of Pretrial Services Agencies. See Pretrial Diversion Standard 6.1 at 30 (1995).
The Ten Tenets, cont.

- The court, prosecutor, legislature or other appropriate entity shall implement a policy that protects the accused’s privilege against self-incrimination.

- Treatment or other program requirements should be the least restrictive possible to achieve agreed-upon goals. Upon successful completion of the program, charges shall be dismissed with prejudice and the accused shall have his or her record expunged in compliance with state law or agreed upon policies. *(Subject to program type)*

- Nothing in the problem solving court policies or procedures should compromise counsel’s ethical responsibility to zealously advocate for his or her client, including the right to discovery, to challenge evidence or findings and the right to recommend alternative treatments or sanctions.
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 clients
• Advocates for fair and equal treatment of client
• Participates in team meetings
• Attends non-adversarial court proceedings
But... (and not without controversy)

- Some specialty courts are set up differently and the core competencies must be interpreted in a way that corresponds to that set up.
- Consider full-fledged team member vs. some kind of hybrid.
- There currently exists a many hybrids of the defense role in various specialty courts across the state.
- Some specialty courts are Post-Conviction and the attorney may play a different role.
  - Member of the Team vs.
  - Advocate for the participant.
Competency 1: Participates Fully as a team member, committing to the program mission & goals and works as a full Partner to ensure their success

- As counsel, shields client from ineffective care; as a team member, protects integrity for the program by monitoring effectiveness of all components of client care and supervision
- As counsel, serves as “voice of client” in pointing out deficiencies of program; as a 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 (Universal Application)

- Insists that legal and clinical screens are promptly conducted
- Ensures prompt admittance into program and start of rehabilitative treatment
- Advises client regarding rigors of the program
- Advises client regarding all rights waived as participant in the specialty 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 the Specialty Court, participates as a team member, operating in a non-adversarial manner while in court, promoting a sense of a unified team presence

- Not universal
- Attends regularly scheduled staffings
- While in court, allows client to address the bench
- Reaches consensus with team regarding effective means of addressing client behavior (This is tricky and there should be well-defined rules for this)
Competency 4: Effectively advises clients re: legal rights, legal options, treatment options, program conditions and sentencing while developing relationship promoting client’s best interest

- Prior to recommending client to program, 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 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 Court Team, in appropriate non-court setting (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 (**Tricky**)
- Advocates for client’s general well being and productive recovery without mitigating and defending client’s behavior (**Tricky**)
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
- Duty to educate other defense attorneys who will be involved in advocating for their clients before and after entrance to the program
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 appropriateness 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 Problem Solving Courts

- Oversees integrity of the program through quality assurance
- Disseminates information about the court program as frequently as possible
Some Ethical Considerations in Problem Solving Courts

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

- Must be familiar with the program
- Must know eligibility requirements, the nature of the various treatment programs, the sanctions and incentives that can be imposed and circumstances of their imposition, circumstances leading to termination from the court program and the confidentiality waivers and restrictions on the government’s use of information in the 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.

- Should give 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 you should consult, advise, explain and counsel your client in a manner consistent with helping the client obtain his or her objectives.
Disposition

- Should intervene while the client is still in the 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 all options.

- Can be very difficult. Work on early intercept concepts with all stakeholders.
Scope of Representation

- Once received competent advice and has rendered a decision-you must abide by the decision.

- Upon selecting specialty court option, your client still defines the objectives of the representation. (Not universal)

- Whether the client’s objective is sobriety and recovery or simple avoidance of a criminal conviction or other criminal consequence, you should abide by your 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 confidence.
Ability to Make Adequately Considered Decisions

- Intoxication or withdrawal may affect your 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 interest 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 court participant as an addict or mentally ill person etc... to seeing them as a particular human being with addiction or mental illness is absolutely necessary.
Treatment Issues

- 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 court program candidate.

- Understand that substance abuse, mental illness etc... 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 the program.

- Understand problem solving 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 that admission.
Am I selling out my Client?

- The high accountability and structure of problem solving court will expose the client to more supervision and drug testing increasing the likelihood that she or he will “get caught.” How is this concern 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?

- 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?
Once the client is a participant...

- Court involved addicts and/or mentally ill persons 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 a defense attorney disagrees with some of the policies or practices of the treatment court?
Your Questions...