

# **WISCONSIN TREATMENT COURTS**

## **Best Practices for Record-keeping, Confidentiality & Ex Parte Information**



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**WISCONSIN TREATMENT COURTS:  
Best Practices for Record-keeping, Confidentiality & Ex Parte Information**

This report recommends best practices for Wisconsin treatment courts regarding record-keeping, confidentiality, and ex parte information. These best practices are offered to help courts strike an appropriate balance between the need for confidentiality for treatment records and the need for public accountability and open records in the criminal justice system.

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This report was prepared by a committee of circuit court judges, clerks of circuit court, and court administrators with experience in treatment courts. It has been approved and adopted by the Wisconsin Court System Planning and Policy Advisory Committee (PPAC) and by its Effective Justice Strategies Subcommittee.

Committee members were Judge Elliott Levine, LaCrosse, chair; Patrick Brummond, District 7 Court Administrator; Judge John Damon, Trempealeau; Judge Joseph Donald, Milwaukee; Judge Kathryn Foster, Waukesha; Diane Fremgen, Winnebago Clerk of Circuit Court; Judge John Markson, Dane; Lori Meyer, St. Croix Clerk of Circuit Court; and Judge Lisa Stark, Eau Claire.

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## Introduction

### a. Defining treatment courts

In 1997, the National Drug Court Institute (NDCI) published *Defining Drug Courts: The Key Components*, to define the work of the growing drug court movement and set benchmarks for performance.<sup>1</sup> NDCI describes the current work of drug courts as follows:

Drug courts represent the coordinated efforts of justice and treatment professionals to actively intervene and break the cycle of substance abuse, addiction, and crime. As an alternative to less effective interventions, drug courts quickly identify substance-abusing offenders and place them under ongoing judicial monitoring and community supervision, coupled with effective, long-term treatment services.

In this blending of systems, the drug court participant undergoes an intensive regimen of substance abuse treatment, case management, drug testing, and probation supervision while reporting to regularly scheduled status hearings before a judge with specialized expertise in the drug court model. In addition, drug courts increase the probability of participants' success by providing a wide array of ancillary services such as mental health treatment, trauma and family therapy, job skills training, and many other life-skill enhancement services.<sup>2</sup>

Similar frameworks have been developed for specialty courts that address intoxicated driving, juvenile drug use, and mental health problems.<sup>3</sup> As used in this report, "treatment courts" encompasses these courts and hybrids of these courts that have a significant focus on the *Key Components*.

Treatment courts use a team approach, employing a collaboration of judges, prosecutors, defense counsel, probation and corrections, law enforcement, evaluators, local service providers, and the greater community. They usually employ a multi-phased treatment process consisting of stabilization (detoxification, assessment, education, and screening for other needs), intensive treatment (individual and group counseling, medication, and other therapies), and transition (social reintegration, employment and education, housing services, and treatment aftercare). Given the complexity of the effort, treatment court programs often employ a coordinator to

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<sup>1</sup> National Drug Court Institute, *Defining Drug Courts: The Key Components* (1997), found at <http://www.ndci.org/sites/default/files/ndci/KeyComponents.pdf>.

<sup>2</sup> National Drug Court Institute, *Painting the Current Picture: A National Report Card on Drug Courts and Other Problem Solving Court Programs in the United States* (2008), found at <http://nicic.gov/Library/024266>.

<sup>3</sup> See Council of State Governments, Criminal Justice/Mental Health Consensus Project, *Improving Responses to People with Mental Illnesses: The Essential Elements of a Mental Health Court* (2007), found at [http://www.ojp.usdoj.gov/BJA/pdf/MHC\\_Essential\\_Elements.pdf](http://www.ojp.usdoj.gov/BJA/pdf/MHC_Essential_Elements.pdf); National Association of Drug Court Professionals, *Ten Guiding Principles of DWI Courts*, found at [http://www.dwicourts.org/sites/default/files/ncdc/Guiding\\_Principles\\_of\\_DWI\\_Court\\_0.pdf](http://www.dwicourts.org/sites/default/files/ncdc/Guiding_Principles_of_DWI_Court_0.pdf).

coordinate the treatment team, manage services, monitor participant behavior, and keep records for the program.

*The Key Components* identifies ten elements that should be common to well-run programs.<sup>4</sup> They anticipate that the treatment team will have access to a wide range of information about the participant, including co-occurring problems such as mental illness, medical problems and HIV status, childhood abuse, marital problems, homelessness, unemployment, etc. Information exchange among team members is expected to comply with federal regulations governing the confidentiality of alcohol and drug abuse patient records and compliance is included as a performance benchmark. Ongoing interaction between the judge and the participant is considered essential to the program, and the judge is seen as the leader of the treatment court team.

Approximately 40 treatment court programs are currently operating in Wisconsin, and most have relied on *The Key Components* to guide development of their procedures and structures. Most Wisconsin courts focus on monitoring and treatment for adult criminal defendants with drug and alcohol dependency, while a few focus on intoxicated driving offenses, mental health issues, or juvenile offenders. Although most Wisconsin treatment courts derive from national models, there is wide variation in their procedures and practices, particularly with respect to how the court creates and manages records.<sup>5</sup>

#### **b. Record-keeping issues presented by treatment courts**

Treatment courts operate at the intersection of two very different paradigms. Criminal courts are adversarial in nature, resolving cases with a strong emphasis on the interests of society at large. Wisconsin statutes and case law carefully define the procedures to be followed in criminal cases.

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<sup>4</sup> *Defining Drug Courts: The Key Components* at p. 7. The key components for drug courts are:

1. Drug courts integrate alcohol and other drug treatment services with justice system case processing.
2. Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights.
3. Eligible participants are identified early and promptly placed in the drug court program.
4. Drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services.
5. Abstinence is monitored by frequent alcohol and other drug testing.
6. A coordinated strategy governs drug court responses to participants' compliance.
7. Ongoing judicial interaction with each drug court participant is essential.
8. Monitoring and evaluation measure the achievement of program goals and gauge effectiveness.
9. Continuing interdisciplinary education promotes effective drug court planning, implementation, and operations.
10. Forging partnerships among drug courts, public agencies, and community-based organizations generates local support and enhances drug court program effectiveness.

<sup>5</sup> While this committee looked at Wisconsin courts that follow the *Key Components* model, some recommendations may be relevant to teen courts, domestic violence courts, veterans' courts, or other specialty courts that use treatment information.

Criminal procedures require careful record-keeping, public access to court files, and neutrality on the part of the judge.

The treatment court model is collaborative in nature, with a rehabilitative focus on the individual. The judge is expected to participate in regular treatment team meetings to review the individual's progress and to be familiar with the offender's medical history and treatment plan. The general federal law applicable to drug and alcohol treatment requires that an individual's participation be kept confidential. The federal law does not address drug courts specifically, and so does not explain what should happen when information confidential in the treatment context crosses the threshold into court and the world of open records. This causes confusion among judges and court personnel about which records should be open, sealed, or maintained in a confidential file.

The relationship between the criminal proceeding and the treatment court program is ill-defined. Some judges consider treatment courts to be completely divorced from the criminal case; these programs maintain a separate confidential file for all information and conduct nothing on the record. These judges have expressed concern that conducting treatment court sessions as if they are regular court sessions may invoke all other due process rights inherent in a criminal case, such as right to counsel. Other judges approach treatment courts as an aspect of the criminal case, maintaining an open court file and conducting all proceedings other than treatment team meetings on the record. Most judges operate somewhere in between.

Navigating between the two paradigms leaves many open questions that are not adequately addressed by current statutes, court rules, or model record-keeping procedures. Judges in other states have noted many of the same questions:

- Is treatment court part of the criminal case?
- What goes into the treatment court file?
- Where is the file kept and who is the custodian?
- How long should the file be kept?
- Is all or part of the file confidential?
- Should the courtroom be open or closed?
- What happens in the event of an open records request?
- How much treatment court information can be considered at sentencing?
- Can the information gathered for treatment court be used in other contexts?
- What happens to the information if the person is referred but not accepted?
- What procedures apply as far as taking minutes and keeping a verbatim record?
- Will these court procedures provide an adequate record on appeal?

### **c. Approach taken by this committee**

This committee was convened by the Director of State Courts Office in early 2010. Committee members included six circuit court judges with experience in treatment courts, a district court administrator, and two clerks of circuit court. Three staff were provided by the Office of Court Operations. The work of the committee and staff was as follows:

- At the first meeting on January 22, 2010, the committee discussed the various models used by treatment courts in Wisconsin, heard a staff presentation on legal issues,

identified the types of sensitive information kept by treatment courts, and discussed some of the problems court staff have observed. They agreed to conduct an interview survey of the judges from all known treatment courts, and outlined the interview questions.<sup>6</sup>

- On March 12, the committee reviewed the interview results, discussed ethical issues and the role of the judge, the legal requirements for record-keeping, when proceedings should be on or off the record, and how outcomes can be measured.
- On June 4, some committee members attended a meeting of the Wisconsin Association of Treatment Court Professionals in Eau Claire and participated in a judges' discussion on record-keeping issues.
- Committee staff attended sessions related to confidentiality and ethical issues at the 2010 conference of the National Association of Drug Court Professionals in Boston. The staff also sent questions to a listserv of state drug court professionals to learn how other states have balanced these issues.
- On July 14, the committee reviewed a summary of interview results, discussed a Florida drug court report on these issues, heard a staff report summarizing statutes and court rules from other states, and outlined the recommended best practices for this report.
- On September 29, 2010, the committee refined and approved the recommendations and report and prepared to present them at a breakout session of the Wisconsin Judicial Conference on October 21.

The goal of this report is to help Wisconsin judges strike an appropriate balance between the two paradigms of criminal court and treatment court, and to stay as much as possible within the parameters of state and federal laws on confidentiality, record-keeping, and judicial ethical requirements. These best practices are offered to help navigate the risks involved until statutes or court decisions provide more clarity.

### **1. Wisconsin courts should review their practices for keeping treatment court records to assure their compliance with state and federal laws.**

While federal treatment court trainings always cover HIPAA and the federal regulations governing AODA treatment, they don't address the questions raised by the open nature of criminal court proceedings. Some states have passed statutes to conform their court practices to the federal model, while others have tried to address the disparities through consent forms and waivers.<sup>7</sup>

A Florida supreme court task force on treatment-based drug courts<sup>8</sup> summed up the state of the law as follows:

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<sup>6</sup> A summary of the judicial survey results is attached as Appendix 1.

<sup>7</sup> See Georgia Code Annotated §15-1-15, Drug Court Division and Kentucky Court of Justice Administrative Procedures, AP XII, Sec. 20, Confidentiality, for statutes. Idaho and California are states that rely on waivers.

<sup>8</sup> See Florida Supreme Court Task Force on Treatment-Based Drug Court (2008), found at [http://www.flcourts.org/gen\\_public/family/drug\\_court/bin/Final%20Report%20of%20the%202006-08%20Term%20508%20FINAL.rtf](http://www.flcourts.org/gen_public/family/drug_court/bin/Final%20Report%20of%20the%202006-08%20Term%20508%20FINAL.rtf).

- 42 U.S.C. § 290dd-2(a) provides that records of the identity, diagnosis, prognosis, or treatment of any patient shall be confidential and disclosed only for certain authorized purposes, and 42 CFR § 2.12(a) applies these restrictions apply to substance abuse treatment. These laws are addressed to treatment generally; they were not designed for treatment courts.
- Arguably, all treatment court records should be confidential based upon a broad reading of the federal law, including non-treatment records that simply identify the patient as a treatment court participant, participation agreements, waivers and consents for disclosure, treatment court dockets and court orders.
- However, courts themselves are not treatment providers covered by the federal law, and Florida courts have held that treatment court status hearings are open to the public.<sup>9</sup> Since the hearings are open, any corresponding records such as dockets and court orders are presumably open to the public also.
- The best course of action for the courts is to pursue a state statute that balances these interests by making the offender's treatment and other medical information a confidential part of the criminal file, while treating treatment court participation and court proceedings as open information.

The Wisconsin committee discussed the state and federal law and worked through a variety of questions before reluctantly concluding that there are no easy answers at present.<sup>10</sup>

Q: Does the federal law requiring confidentiality for treatment records make the records confidential under state law?

A: The federal law is so broad that technically the court cannot even say that an offender has been referred to treatment court. This level of confidentiality cannot be squared with the strong public interest in open and accountable criminal court proceedings.

Q: Do the releases designed by the federal treatment court institutes take care of the confidentiality problems?

A: An offender may sign waivers of his or her own right to medical privacy so treatment issues can be discussed in open court. However, the opposite is not true: the offender cannot consent to making proceedings confidential if they are not confidential under state law, because the offender cannot waive the public's right to know.

Q: Are treatment records protected by HIPAA?

A: A court is not one of the entities bound by HIPAA obligations. Treatment providers need to obtain a release before submitting a medical record in court, but once it is submitted it is an open record in the absence of a state statute or court order.

Q: Are treatment records confidential under state law?

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<sup>9</sup> *Noelle Bush v. State*, unpublished 9<sup>th</sup> Judicial Circuit case, October 2002, holding that drug court status hearings are open to the public.

<sup>10</sup> A summary of the legal issues pertaining to record-keeping and confidentiality is attached as Appendix 2.

A: The statutory confidentiality given to medical records may not apply automatically once they become part of the court record. It is an open question whether the confidentiality protection for alcohol and drug treatment records provided by Wis. Stat. §51.30 applies when the documents become part of the court file in a treatment court case.

Q: Can the court seal the treatment records in every case?

A: The court can seal treatment records, after applying the balancing test set out in Wisconsin law. The case law is not sympathetic to sealing information in court records, particularly in criminal cases. Confidentiality for a broad class of records is a policy question generally addressed by statute, not by judicial decision.<sup>11</sup>

Q: Can the court write a local rule or blanket order to seal the treatment records?

A: Case law holds that courts cannot make blanket orders or local rules that contravene the public records law. It is uncertain whether a blanket order or rule based on Wis. Stat. §51.30 sealing the treatment records might be permissible.

Q: Can this be treated like a confidential presentence report?

A: Presentence reports are protected by a particular statute; that statute doesn't address treatment court records.

Q: Can the confidential parts of the files be protected as judge's notes?

A: Most treatment records are prepared by someone else and are relied upon by the court in reaching a decision, so the argument that they are the judge's notes is very weak.

- 2. Unless the sentence has already been determined, the treatment court judge should carefully consider whether to sentence a defendant after the defendant is rejected by the treatment court admissions process or after the defendant is terminated from treatment court. If the judge decides to take part in a subsequent sentencing, a comprehensive waiver should be used.**

Many Wisconsin treatment court programs begin after sentencing, as an alternative to incarceration or as part of probation. There are a few that operate as a diversion program, a few that accept a plea of guilty but suspend imposition of sentence, and a few that accept referral to the program at any point.

Judges must carefully consider how participation in treatment court may affect their decisions. A treatment court judge has more information about each offender than in the ordinary criminal case, but most of it is learned in treatment team meetings and reports and is never made part of the court record. Judges also report forming a strong emotional connection with certain offenders after working with them in treatment court, affecting impartiality or at least the appearance of impartiality. If the judge relies on information that is unsupported by the court record, the confidentiality of those records may be compromised by the judge's reliance on them. For these reasons, judges must be very cautious about taking action in the criminal case based on information they have learned from participating in the treatment team.

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<sup>11</sup> See *Newspapers, Inc. v. Breier*, 89 Wis.2d 417, 436-37 (1979).

- In order to maintain a clear separation, the committee recommends that a judge should not sentence an offender after participating in the admissions process or in treatment court. There are several ways this can be achieved without much difficulty.
  - In a number of Wisconsin treatment courts, the judge imposes and stays a sentence before referring the offender to treatment court. If the offender fails the program, the sentence is imposed automatically, without reliance on any information subsequently acquired through the treatment court program.
  - Because most of the background information is collected as part of the admission process to decide if the offender is a good candidate for the program, a judge should not impose and stay a sentence after participating in the admissions process.
  - Some treatment court models impose sentence after termination or discharge from the treatment court program. These courts should work out protocols, with the involvement of other team agencies, to reassign the case to a new judge for sentencing. In one-judge counties, the number of sentencings will be small enough to be easily handled by a visiting judge.
  
- The committee heard from judges who strongly believe that they can and in fact should be the judge to sentence a treatment court participant after termination from the program. These judges maintain that the additional information and insight they have gained from the process better qualifies them to handle the sentencing.<sup>12</sup> If the judge decides to impose sentence after participating in the treatment court admissions process or after the defendant is terminated from treatment court, a comprehensive waiver should be used.<sup>13</sup>
  
- The offender's willingness to participate in treatment court and cooperate with the collection of information should not be used against him or her.
  - Information obtained from pre-admission and screening assessment should be kept confidential and should not be used in a criminal prosecution or civil proceeding.<sup>14</sup>
  - Treatment team members should enter into a memorandum of understanding that they will not use this information against the offender in other situations.

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<sup>12</sup> This divergence of opinion on the role of the drug court judge in sentencing after termination can also be seen nationally. *Compare Alexander v. State*, 48 P. 3d 110 (Okla. 2002) (if an application to terminate a drug court participant is filed, the participant should be permitted to move for recusal and the motion should be granted), *with Ford v. Kentucky* (*unpublished Kentucky Court of Appeals opinion, April 30, 2010, found at <http://opinions.kycourts.net/coa/2008-CA-001990.pdf>*) (having same judge preside over drug court and the revocation hearing is not a denial of the right to impartial hearing and due process). The Idaho Code of Judicial Conduct contains a restriction on treatment court judges handling sentencing or termination proceedings after participating in treatment court. Canon 3, sec. (7)(f). This committee considered adding such a restriction to the ethics rule proposed in section 4 but decided that it should only be a recommendation, not an ethical prohibition.

<sup>13</sup> An example of the waiver used by the Milwaukee County Drug Treatment Court is included in Appendix 3.

<sup>14</sup> *See, e.g.*, Michigan Comp. Laws 600.1064(4); Missouri Revised Statutes 478.005.

- The treatment court program should keep a record of admission decisions and enough information about each offender to justify the decision, for purposes of evaluation and to protect the program against allegations of favoritism or discrimination.

**3. The court should develop a bifurcated filing system, keeping a complete record of judicial action in the open court file and a record of treatment and other medical information in a confidential treatment file.**

Some Wisconsin treatment courts maintain a single “treatment court file” that is confidential and kept in the judge’s control. Some maintain a single confidential file kept by the treatment court coordinator. Some courts create a new court file for just the treatment court proceedings, while others create a confidential section within the criminal case. Which information goes in which file also varies, depending on whether it is clearly medical in nature, clearly legal, or both.

A key problem for this committee has been the conflict between federal regulations and treatment court models and the strong public policy in Wisconsin favoring open criminal records. These conflicts cannot be entirely resolved without a statutory change defining how treatment court records should be handled. In the meantime, the course most likely to meet both federal and state expectations is the creation of a bifurcated filing system to protect confidential medical and treatment records as much as possible, while still providing a complete record of judicial action in the open court file.

- The criminal court file should be a basic record that adequately documents the progress of the treatment court proceedings in relation to the criminal case and records any judicial action taken in relation to it. In addition to the items usually found in a criminal court file, this may include:
  - Any order referring the defendant to treatment court
  - Any notice admitting or rejecting the defendant to the program
  - Any order staying the criminal court proceedings
  - Any waiver pertaining to court proceedings (waiver of confidentiality regarding discussion of treatment-related issues, waiver of ex parte contact by judge)
  - Any proceedings or orders regarding sanctions
  - Any order or notice of defendant’s voluntary termination from the program
  - Any proceedings or orders regarding involuntary termination from the program
  - Any acknowledgement of successful completion of the program
  - Any letters or information that go directly to the judge
- The criminal court file is kept by the clerk of circuit court. Access to and retention of the file is governed by the laws and procedures pertaining to criminal court cases.<sup>15</sup>
- The treatment court file should be a repository for information related to the defendant’s substance abuse diagnosis, treatment, progress, and related medical and psychological information, including:

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<sup>15</sup> See recommendation #5 for a discussion of how minutes and transcripts are handled in treatment court proceedings.

- Any application to participate in the treatment court
- Any information gathered to evaluate the application
- Any treatment court participation contract (i.e. understanding rules of the program)
- All medical information and history of substance abuse: diagnosis, drug and alcohol use, monitoring, medical and psychological reports, prescriptions, etc.
- All treatment team information: weekly progress reports, information provided by team members, team member recommendations
- Any agreement by team members that information in treatment file shall be used only for purposes of treatment court
- The treatment court file should be kept by the treatment court coordinator or case manager, who may be part of the department of health services, probation, a private provider, or other agency. The contract or memorandum of understanding establishing the treatment court should address who will have access to the records, how long the records will be kept, and what happens to the records if the treatment court ends. Access to and retention of the treatment court program file may be governed by the law and procedures pertaining to the coordinator's agency if sufficient to address these issues.
- The extent of the confidentiality provided to treatment records by Wis. Stat. §51.30 is unclear in the treatment court context. If the court believes it is applicable, the court may consider whether to issue a blanket order or local rule sealing the treatment records under the authority of this statute.
- Treatment court files should be maintained as a group and should be separated from any other files kept about the same offender. For example, if treatment court services are provided by the probation department, those records should be maintained separately from the records of any other probation services the individual offender receives.
- The judge should not keep the treatment court files, or any other medical or substance abuse treatment information, in the judge's chambers. Using the judge or clerk of court as a record-keeper lends support to an argument that these files should be considered open records. The judge may keep his or her own notes, separate from the criminal case or treatment court files.
- The treatment team coordinator should not be an employee of the judge or court. Direct court supervision of the coordinator also lends support to the argument that these files are open court records.
- The treatment team members should review the confidentiality policies of the court periodically and should identify a process to follow if a team member receives an open records request with respect to confidential treatment records.

**4. The Code of Judicial Conduct should be amended, as other states have done, to address the judge's special role in treatment court.**

Ongoing interaction between the judge and the offender is considered essential to treatment court, and the judge is seen as the leader of the treatment court team. The judge is expected to be an authority figure who takes a personal interest in the offender's struggles and successes every week, and indeed, most judges feel a greater sense of connection to the offenders in this setting.

In almost all Wisconsin treatment courts, the judge participates in regular team meetings with team members, off the record and outside the presence of the defendant and usually without the presence of his or her counsel. Each participant typically signs a waiver agreeing that the judge

may initiate and consider ex parte communications in conformance with the established protocols for the operation of treatment court programs. While this waiver provides informed consent and satisfies concerns about the substantive rights of the defendant, it only indirectly addresses the ethical obligations of the judge. Ongoing interaction with treatment team members, consistent with the “key components”, should be clearly addressed by the Code of Judicial Conduct.

In 2007, the ABA Model Code of Judicial Conduct included a comment providing expanded latitude for judge’s ex parte communications in therapeutic or problem-solving courts, and approving more interaction with offenders, treatment providers, probation officers, social workers, and others. ABA Rule of Judicial Conduct 2.9, Ex Parte Communications, Comment 4, states:

A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem solving courts, mental health courts, or treatment courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.<sup>16</sup>

In Wisconsin, the judge’s role should be addressed in two ways:

- The offender should sign a waiver agreeing that the judge may initiate and consider ex parte communications in conformance with the established protocols for the operation of treatment court programs.
- Treatment court judges should pursue and support amendment of SCR ch. 60 in the manner provided by the ABA Model Code. This amendment should be broad enough to include other courts such as veterans’ courts and teen courts, so that judges are able to take the initiative and develop new approaches to these issues.<sup>17</sup>

SCR 60.04(1)(g) 5. already includes that part of the model ABA rule that allows ex parte communications expressly authorized by law. Because treatment courts are not codified at present in Wisconsin, a new subsection 6 should be added to SCR 60.04(1)(g) to allow the practice of using participant waivers to permit ex parte contact in treatment court settings:

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<sup>16</sup> This rule has been adopted by Arkansas, Colorado, Hawaii, Indiana, Iowa, Kansas, Minnesota, Nevada, Utah, Washington and Wyoming. Variations have been adopted in Idaho, Maryland, Montana, Tennessee and West Virginia. The Idaho Code of Judicial Conduct adds a restriction on sentencing or termination proceedings: “A judge who has received any such ex parte communication regarding the defendant or juvenile while presiding over a case in a problem solving court shall not preside over any subsequent proceeding to terminate that defendant or juvenile from the problem solving court, probation violation proceeding, or sentencing proceeding in that case.” Canon 3, sec. (7)(f).

<sup>17</sup> The Reporter’s Notes to the ABA Model Code recognize the wide variation in problem-solving and therapeutic courts and the need for individual jurisdictions to devise special rules for these courts.

Current 5. A judge may initiate, permit engage in or consider ex parte communications when expressly authorized by law.

New 6. A judge may initiate, permit, engage in or consider ex parte communications knowingly waived by a participant when serving on therapeutic or problem solving courts, mental health courts, or treatment courts. In this capacity, judges may assume a more interactive role with participants, treatment providers, probation officers, social workers, and others.

As an additional best practice regarding treatment team meetings, the committee recommends:

- Observers present at team meetings should sign a form agreeing to maintain confidentiality.

## **5. Proceedings that involve the judge should be made as open and transparent as possible, in keeping with the law governing Wisconsin criminal cases.**

Most Wisconsin treatment courts consider courtroom proceedings to be open to the public. Most are staffed by a court clerk who takes minutes of the proceedings. Formal termination proceedings are almost always taken by the court reporter on the record, but courts are less consistent about conducting weekly court updates or other proceedings on the record.

The committee recommends the following best practices:

- Given the strong case law favoring open courtrooms and the strong public interest in the resolution of criminal cases, treatment court proceedings should be open to the public.<sup>18</sup>
- Minutes of all court proceedings should be taken. The judge may wish to direct the clerk on the type of information and level of detail in the minutes, particularly if the minutes will appear on the Wisconsin Circuit Court Access website.
- Because there is no applicable exception in SCR 71.01 to taking the record in a criminal case, the better practice is to have the court reporter take the record for all proceedings, including the weekly updates. At a minimum, proceedings involving imposition of confinement and termination from the program should be on the record.
- As noted in the introduction to this report, treatment courts are not typical criminal courts but rather a unique hybrid. SCR 71.01 should be reviewed with this in mind to determine which treatment court proceedings should be reported.
- Treatment team meetings should be confidential and not on the record, given the need for candid discussion and full understanding of defendant's substance abuse and other problems to run effective treatment court.
- When in open court, the judge should refer to information gained from team meetings with care.

## **6. Additional recommendations and conclusion**

Some states have enacted statutes that outline treatment court procedures and protect the confidentiality of treatment records. Some states close treatment court proceedings to the public and make all related court records confidential. Some allow the judge to determine on a case-by-case basis what information is publicly available, and some allow each court to make a blanket

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<sup>18</sup> See Wisconsin Judicial Benchbook, Criminal and Traffic, chapter 5, *Public Trial*.

rule. Some house all treatment court information in a confidential section of the court case file. Finally, some follow the practice suggested here, creating an open file to be kept by the court and a treatment file to be kept by the service provider or court coordinator.

While it would be desirable to settle the unresolved record-keeping issues as soon as possible, Wisconsin treatment court programs are still under development and treatment teams are still learning about what works for their communities. For that reason, this committee chose to issue best practices recommendations now, to allow courts test these procedures before moving forward to request statutory procedures from the legislature. Alternatively, a statute specifying when medical and psychological reports are considered confidential in court case files would help treatment courts come closer to the practices envisioned by the key components.

The committee makes these additional recommendations:

- Model forms should be developed for a waiver of confidentiality regarding discussion of treatment-related issues in open court and a waiver allowing ex parte contact between the judge and the treatment team. Appendix 3 contains examples that may be modified to meet the needs of each treatment court.
- To promote consistency, model forms should be developed for all stages of the proceedings for inclusion in the court record: referral, admission, voluntary termination, involuntary termination, graduation or other successful completion.

### **Conclusion**

This committee was convened to address the concern that Wisconsin treatment courts may not be well-positioned to meet challenges such as answering an open records request, providing an adequate record on appeal, or responding to a federal review of treatment court confidentiality. The ability to meet these challenges requires acknowledgement of the problem and a thoughtful and consistent rationale for the practices chosen. The committee hopes these best practices are a helpful step in that direction.

## **Appendix 1: Survey of Wisconsin treatment court record-keeping practices, May 2010**

### **a. Interview questions for Wisconsin Treatment Court Judges**

#### **I. Introduction:**

*Explain the purpose and goal of the committee and why this interview is being conducted.*

#### **Main points:**

- The committee was recently formed to address the widely varying record-keeping and confidentiality practices throughout WI drug and other specialty courts and to assure that procedures are being conducted within state and federal statutes.
- WI judges have been talking about confidentiality and record keeping issues relating to Treatment Courts for several years.
- Treatment courts and other specialty courts are growing in Wisconsin and these policy questions need to be addressed so treatment courts can continue to grow without running into problems.

Some fundamental questions the committee is tackling:

- ✓ Federal statutes are not a perfect fit for treatment courts – many gray areas.
- ✓ How to best fit the treatment court model with standard criminal court procedures & defining the judge's role.
- ✓ Are current procedures adequately supported by law?
- ✓ Will you be able to respond to open records requests, sustain rulings on appeal?
- This committee will discuss and hopes to draft some workable recommendations or best practices and discuss whether new statutory language is necessary.

#### **II. Referral and Sentencing:**

- a) How is an individual referred or selected to take part in the specialty court program?
- b) Is your specialty court pre-sentence, post adjudication or some other hybrid?
- c) What is your process for sentencing—both graduates of the program and those who have left or been expelled from the program?
- d) If someone is expelled or does not complete the program, what is the termination process?

#### **III. Treatment Court Staffing and Staffing meetings:**

- a) Do you have staffing meetings?
  - i) Who attends these meetings?
  - ii) What is the judge's role in these meetings?
  - iii) What decisions are made during these meetings?
  - iv) what information is provided at these meetings and who provides it?
- b) Do you have a "treatment court coordinator" or a position like this?
  - i) If so, who/what entity hires, supervises and supports this position?
  - ii) How is this position funded?

**IV. Information, Files and Recordkeeping:**

- a) Please describe your filing system for your court (i.e. do you have one or more separate files and what do they contain.)?
- b) What type of information is kept on Treatment Court participants?

**Examples to provide/ask about (Please list where and with whom each item kept):**

<b>Information Type</b>	<b>Who keeps it</b>	<b>Where its kept/housed</b>
Referral to court		
Weekly progress reports/updates, calendar and history (some have recommendations)		
Assessment information (AODA, risk/needs, psychological, AIM Report)		
Treatment provider information		
Police reports		
Judges notes and observations		
Probation/parole info		
Motion to expel		
Defense argument		
Defendant input and family input (letters, presentations)		
Letters from other judges		
Emails		
Other criminal complaints		
Documentation of medical conditions, prescriptions		
Team member input		
Psych evaluation/summary		
Drug test results		
Progress in treatment groups		
Past/present compliance with supervision		
PSI-sometimes		
Pre-trial services info		
Housing info		
Financial info		
Other family life info		
Other (please list)		

- c) Specifically, what type of information is contained in the “weekly reports/updates”?
- d) Who prepares this information?
- e) What information does the judge keep (see list) and where is it housed?
- f) What takes place on/off the record?
- g) Are minutes kept at any point in time and if so, who takes them and where are they kept?
- h) What goes onto CCAP?
- i) What happens to the files when an individual graduates or is expelled from the program?

- j) Is there a file destruction policy and if so, what is it?
- k) What information is open to the public and available if a public information request were to occur?
- l) Do you have a protocol that you follow or one that has been discussed if a public information request were made?
- m) Have you ever had an open records request?

**V. Conclusion:**

- a) Have you or your team ever discussed any of these issues/topics?
- b) Have you attended any training (national or local) on any of these topics specific to Drug/Specialty Courts?
- c) Is your Drug/Specialty Court modeled after the “ten key components” as defined by the National Drug Court Institute?
- d) Do you have other concerns you’d like us to discuss as part of this committee?

**b. Summary of results, Survey of Wisconsin Treatment Court Judges, May 2010**

	Type of court	Number of current participants	pre-adjudication	post-adjudication or hybrid	Formal termination process on record	Cases remain with same judge if terminated	Court hearings are open to the public	Program has specified coordinator	DA or rep attends staffing meetings	PD or rep attends staffing meetings	Staffing meetings attend staff meetings	formal records retention/file destruction policy	Formal public info request protocol	Formal open records request	
Ashland	Juv	7	Post	Yes	No	Yes	?	Yes	Yes	Yes	Yes	Off	Yes	No	No
Barron	Drug		Post	Some	No	?	?	Yes	Yes	Yes	Yes	Off	?	No	No
Brown	Drug	4	Post	No	Yes	No	Yes	Yes	Yes	Yes	Yes	Off	No	No	No
Burnett	Drug	10	Post	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Off	Yes	No	No
Chippewa	Drug	3	Post	No	No	No	Yes	No	Yes	Yes	Yes	Off	No	No	No
Dane	Drug		Pre	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Off	Yes	No	No
Douglas	Drug	2	Post	Yes	Yes	Yes	?	Yes	Yes	Yes	Yes	Off	No	No	No
Dunn			Hybrid	No	Yes	?	Yes	Yes	Yes	Yes	Yes	Off	Yes	No	No
Eau Claire	AIM	10	Post	?	Yes	No	Yes	Yes	Yes	Yes	Yes	?	No	No	No
Eau Claire	Drug	25	Post	No	Yes	No	Yes	Yes	Yes	Yes	Yes	Off	Yes	No	No
Eau Claire	MH	8	Post	Yes	Yes	No	?	Yes	No	Yes	Yes	?	Yes	Yes	No
La Crosse	Drug		Hybrid	Some	Yes	?	Yes	Yes	Yes	Yes	Yes	Off	No	No	Yes
La Crosse	OWI		Post	Some	Yes	No	Yes	Yes	Yes	Yes	Yes	Off	No	No	No
Milwaukee	Drug		Hybrid	Some	Yes	No	Yes	Yes	Yes	Yes	Yes	Off	No	No	No
Outagamie	Drug		Post	?	Yes	?	Yes	Yes	Yes	Yes	Yes	Off	No	No	No
Pierce			Post	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Off	No	No	No
Polk			Post	Yes	?	?	?	Yes	Yes	Yes	Yes	Off	No	No	No
Racine			Post	Some	Yes	No	?	Yes	Yes	Yes	Yes	Off	No	No	No
Rock			Pre	Yes	Yes	?	?	No	Yes	Yes	Yes	Off	No	No	No
Sawyer	Drug		Post	Some	Yes	?	Yes	Yes	Yes	Yes	Yes	Off	No	No	No
Trempealeau	Drug		Post	Some	Yes	?	?	No	Yes	Yes	Yes	Off	No	No	No
Waukesha	OWI		Post	Some	Yes	?	Yes	Yes	Yes	Yes	Yes	Off	No	Yes	No
Winnebago			Post	Some	Yes	?	?	Yes	Yes	Yes	Yes	Off	No	No	No
Wood			Hybrid	Some	Yes	No	?	Yes	Yes	Yes	Yes	Off	No	No	No

**c. Detailed results, Survey of Wisconsin Treatment Court Judges, May 2010**

<b>Information Type</b>	<b>Who keeps it</b>	<b>Where its kept/housed</b>
Referral to court	Coordinator (13) Clerk of Court (3) Judge (3) Probation / Parole (2) Human Services (2) Treatment Court File Private Social Service Agency Oral	Human Services (7) Coordinator's File (5) Judge's Office (4) Clerk of Court (2) Private Social Service Agency(2) DOC Juvenile Court County Treatment Center
Weekly progress reports/updates, calendar and history (some have recommendations)	Coordinator (14) Judge (10) AODA/DHS Coordinator (6) Clerk of Court (2) Parole Officer (2) Case Manager Team Private Social Service Agency	Judge's Office (12) Human Services (10) Private Social Service Agency (3) Coordinator's File (3) Clerk of Court (2) DOC (2) Juvenile Court CCAP Docket County Treatment Center
Assessment information (AODA, risk/needs, psychological, AIM Report)	Coordinator (12) Human Services (7) Treatment Coordinator (4) Case Manager Judge (4) Parole Officer (2) AODA Coordinator Private Social Service Agency Clerk of Court	Human Services (11) Judge's Office (5) Coordinator's File (4) Private Social Service Agency(2) Treatment Provider's Office (2) DOC Juvenile Court LSS and/or Doctor County Treatment Center
Treatment provider information	Coordinator (10) Treatment Coordinator (7) Human Services (6) Judge (3) Case Manager Probation / Parole Oral Private Social Service Agency Judge	Human Services (8) Judge's File (5) Coordinator's File (5) Treatment Provider File (3) Private Social Service Agency(2) DOC County Treatment Center
Police reports	Coordinator (8) District Attorney (7) Probation / Parole (6) Judge (3) Case Manager Sheriff Clerk of Courts Human Services	DOC (6) District Attorney's File (6) Human Services (4) Judge's Office (3) Coordinator's File (3) Private Social Service Agency Sheriff's Office
Judges notes and observations	Judge (15) Destroyed / None Kept (4) Case Manager Coordinator	Judge's Office (12) Clerk of Courts (3) Human Services Destroyed Upon Graduation

Probation/parole information	Probation / Parole (15) Coordinator (3) Judge (2) All Oral Private Social Service Agency	DOC (15) Judge's Office (2) Coordinator's File (2) Human Services Private Social Service Agency
Motion to expel	Coordinator (8) All Oral (5) Judge (3) Clerk of Court (3) Private Social Service Agency Human Services	Clerk of Court (4) Judge's Office (3) Human Services (3) Coordinator (3) Private Social Service Agency(2)
Defense argument	On Record (9) Judge (3) Public Defender (3) Clerk of Court	Judge's Office (3) On record (3) Clerk of Court (3)
Defendant input and family input (letters, presentations)	Coordinator (10) Judge (7) Clerk of Court (4) All Oral (2) Probation/Parole (2) Private Social Service Agency Human Services Depends On Who Gets It	Judge's Office (7) Human Services (5) Coordinator's File (4) Clerk of Court (3) Private Social Service Agency(2) DOC Case Manager County Treatment Center
Letters from other judges	Coordinator (6) Judge (3) Clerk of Court (2) Human Services All Oral	Human Services (4) Judge's Office (2) Clerk of Court (2) Coordinator Private Social Service Agency
Emails	Coordinator (6) Judge (5) Each Person (2) Not retained (2) Case Manager MIS System	Judge's Office (5) Coordinator's File (3) Own Computer (2) Human Services (2) Private Social Service Agency(2) Case Manager
Other criminal complaints	Clerk of Court (7) Coordinator (3) District Attorney (2) Probation (2) Case Manager Treatment Court File Private Social Service Agency MIS System	Human Services (4) Clerk of Court (4) Private Social Service Agency(2) Judge's Office (2) DOC District Attorneys' File Coordinator's File
Documentation of medical conditions, prescriptions	Coordinator (8) Human Services (7) Case Manager (2) Judge (2) Probation (2) Treatment Coordinator Private Social Service Agency MIS and Coordinator	Human Services (10) Judge's Office (4) Coordinator's File (4) DOC (2) Private Social Service Agency(2) County Treatment Center

Team member input	All Oral (8) Coordinator (6) Judge (3) Team Members Keep Own Notes (2) Case Manager Private Social Service Agency	Judge's Office (4) Human Services (3) Private Social Service Agency(2) Case Manger County Treatment Center
Psych evaluation/summary	Coordinator (11) Judge (5) Human Services (4) Case Manager (3) Treatment Coordinator Probation Private Social Service Agency GAIN – DA/PD/Coordinator	Human Services (8) Judge's Office (5) Coordinator's File (4) Case Manager (2) Private Social Service Agency(2) DOC Not at Office County Treatment Center
Drug test results	Coordinator (10) Human Services (5) Treatment Coordinator (3) Probation / Parole (3) Judge (2) Case Manager Sherriff Oral Report Private Social Service Agency Jail	Human Services (9) DOC (5) Coordinator's File (4) Judge's Office (3) Private Social Service Agency(2) Sheriff's Office Treatment Coordinator File County Treatment Center
Progress in treatment groups	Coordinator (10) Human Services (8) Judge (4) Treatment Coordinator (4) Case Manager (2) Probation Oral Private Social Service Agency Written Summary to Team	Human Services (11) Judge's Office (5) Coordinator's File (4) Private Social Service Agency(2) Case Management DOC Clerk of Courts County Treatment Center
Past/present compliance with supervision	Probation / Parole (12) Coordinator (4) Human Services (2) Judge Oral Private Social Service Agency Case Manager	DOC (9) Human Services (5) Judge's Office (2) Private Social Service Agency(2) Coordinator's File (2) Clerk of Courts
PSI-sometimes	Probation / Parole (4) Clerk of Court (4) Judge (2) Case Manager	DOC (4) Clerk of Court (3) Case Manager Judge
Pre-trial services information	Coordinator (8) Court File (3) Parole Officer (2) Case Manager Private Social Service Agency MIS Chrono Report Human Services	Human Services (5) Coordinator's File (3) Court (2) DOC (2) Case Manager Private Social Service Agency County Treatment Center

Housing information	Coordinator (9) Probation / Parole (5) Human Services (5) Court / Judge (3) Case Manager (2) MIS Chrono Report Private Social Service Agency	Human Services (8) DOC (5) Judge's Office (5) Private Social Service Agency(2) Coordinator's File (2) County Treatment Center Case Manager
Financial information	Probation / Parole (23) Coordinator (9) Human Services (5) Judge (4) Case Manager (2) Treatment Provider Private Social Service Agency MIS Chrono Report	Human Services (9) Judge's Office (5) DOC (4) Coordinator's File (4) Private Social Service Agency(2) Case Manager County Treatment Center
Other family life information	Coordinator (10) Human Services (5) Probation / Parole (4) Judge (4) Case Manager Private Social Service Agency MIS Report	Human Services (9) Judge's Office (4) Coordinator's File (4) DOC (3) Private Social Service Agency(2) County Treatment Center
Other (please list)	Community service authorizations and releases  Community Service Notes  Authorization and Releases  Participant Letters, Papers, and Sponsors	Clerk of Court and Coordinator  Restorative Justice Program Files  Coordinator File  Coordinator File

## Appendix 2: Summary of state and federal law issues regarding treatment court records

Federal law issues	State law issues
<p><b>federal confidentiality for AODA treatment</b> <sup>i</sup></p> <ul style="list-style-type: none"> <li>• federal alcohol &amp; substance abuse treatment regulations are designed to help patients avoid the stigma of addiction by keeping treatment confidential</li> <li>• consent forms are required for disclosure of information &amp; redisclosure – otherwise providers can’t even acknowledge person is in the program</li> <li>• treatment courts must follow federal regulations to maintain funding</li> <li>• regulations say state law cannot authorize a disclosure prohibited by federal law</li> <li>• but the law was not designed for treatment courts &amp; is not a perfect fit <sup>ii</sup></li> </ul>	<p><b>Wisconsin public records law</b> <sup>iii</sup></p> <ul style="list-style-type: none"> <li>• One of strongest state open records laws</li> <li>• firmly supported by appellate case law</li> <li>• court records subject to absolute right to inspection except under limited circumstances <sup>iv</sup></li> <li>• court records may be closed as provided by statute</li> <li>• strong public interest in criminal cases, particularly in oversight of prosecutorial function, equal treatment of defendants <sup>v</sup></li> <li>• sealing of criminal records so far has little support in case law</li> <li>• local rules &amp; blanket orders may not run contrary to open records statutes <sup>vi</sup></li> </ul>
<p><b>HIPAA</b> <sup>vii</sup></p> <ul style="list-style-type: none"> <li>• designed to make health insurance more portable, coordinate electronic health care information, protect confidentiality of patient information</li> <li>• applies to “covered entities” (health care providers &amp; insurance companies) &amp; “business associates” (lawyers, accountants, etc. who handle health information on behalf of covered entities)</li> <li>• required numerous changes on the part of providers &amp; created considerable confusion</li> <li>• treatment courts are generally not covered by HIPAA <sup>viii</sup></li> </ul>	<p><b>criminal court records</b></p> <ul style="list-style-type: none"> <li>• criminal records have limited statutory exceptions: PSIs, psychological reports</li> <li>• AIM reluctantly concluded that detailed court reports weren’t PSIs &amp; so were open</li> <li>• treatment court model is not a good fit with current court procedures</li> <li>• no provision to hold any part of criminal proceedings off the record <sup>ix</sup></li> <li>• no provision to create a separate “treatment court file” or have another entity hold file <sup>x</sup></li> <li>• questions re ex parte communications &amp; independent fact-finding <sup>xi</sup></li> </ul>
<p><b>consent to share information</b> <sup>xii</sup></p> <ul style="list-style-type: none"> <li>• recommended by federal drug court programs for sharing treatment information with treatment team</li> <li>• federal guidance allows limited sharing; doesn’t address what information goes in court records; often assumes treatment court records will not be available to the public <sup>xiii</sup></li> <li>• but court may determine what “minimum necessary” information is shared in open court, with other treatment court participants <sup>xiv</sup></li> </ul>	<p><b>Wisconsin medical records</b></p> <ul style="list-style-type: none"> <li>• like HIPAA, aimed at providers</li> <li>• medical records introduced in court are treated as open unless protected by statute or court order to seal in an individual case</li> <li>• open question whether AODA treatment records are protected by §51.30 when introduced outside the ch. 51 context <sup>xv</sup></li> </ul>

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<sup>i</sup> 42 USC §290dd-2 provides that records of the identity or treatment of any patient in a substance abuse treatment or rehabilitation program shall be confidential, if the program is funded or regulated by the United States. 42 CFR §2.20 provides that no state law may either authorize or compel any disclosure prohibited by federal regulations. Guidance from the National Drug Court Institute assumes that all drug courts will operate in a confidential manner. See also note 12, below.

<sup>ii</sup> Carson Fox, National Drug Court Institute, Confidentiality & Drug Courts, presentation for WATCP conference, February 7-8, 2008. Similar slides are posted at [http://www.mncourts.gov/documents/0/Public/Problem\\_Solving\\_Courts/HIPAA\\_NADCP\\_Presentation.ppt](http://www.mncourts.gov/documents/0/Public/Problem_Solving_Courts/HIPAA_NADCP_Presentation.ppt).

<sup>iii</sup> Wis. Stats. §19.31 provides that it is “the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.... The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.” The criminal benchbook outlines how to analyze a public records request at CV 28-12 to 28-18. The Wisconsin Department of Justice publishes an extensive public records compliance outline at <http://www.doj.state.wi.us/site/ompr.asp>.

<sup>iv</sup> Wis. Stats. §59.20(3) authorizes inspection of “all papers required to be kept” by certain officers, including the clerk of courts and register in probate. *State ex rel. Journal Co. v. County Court*, 43 Wis.2d 297, 306-312 (1969). §59.20(3) is a legislative declaration granting those persons who properly come under its umbrella “an absolute right of inspection subject only to reasonable administrative regulations. . . .” *State ex rel. Bilder v. Delavan Tp.*, 112 Wis.2d 539, 555 (1983). Court records may be closed to public examination as provided by statute. *Bilder* at 554.

Apart from statutory, constitutional and common law exceptions, circuit court case records can be sealed only if the court determines that administration of justice requires limiting access to the records. To persuade the court to exercise its inherent authority in this respect, the part seeking to close court records must demonstrate that the administration of justice requires that the public interest in closing the records outweighs the public interest in leaving them open. *Bilder*, 112 Wis.2d at 557-558. Many state statutes require other recordkeepers to keep certain information confidential; these statutes may be the basis of a motion to seal when the record is filed in court. For a list of these statutes see State Bar, *Wisconsin Public Records and Open Meetings Handbook*, app. D (2008).

<sup>v</sup> It is of particular importance that criminal records be open, for the reasons described in *Newspapers, Inc. v. Breier*, 89 Wis.2d 417, 436-37 (1979): “The power to arrest is one of the most awesome weapons in the arsenal of the state. It is an awesome weapon for the protection of the people, but it is also a power that may be abused. In every case, the fact of an arrest and the charge upon which the arrest is made is a matter of legitimate public interest. The power of arrest may be abused by taking persons into custody on trivial charges when charges of greater magnitude would be appropriate. The power of arrest may be abused by overcharging for the purpose of harassing individuals and with the expectation and intent that the initial charge will be dismissed or substantially reduced. In any event, curbing abuse of the arrest power is only possible if the public can learn how that power is exercised.” See also *In re Billy Jo W.*, 182 Wis. 2d 616, 644-652 (1993).

<sup>vi</sup> Local rules governing practice in the circuit courts must be consistent with state statutes. *Hunter v. AES Consultants, Ltd.*, 2007 WI App 42 ¶7. An agency cannot promulgate an administrative rule that creates an exception to the open records law. *Chavala v. Bubolz*, 204 Wis.2d 82. In a 2002 informal opinion letter to the director of state courts regarding information-sharing among juvenile justice agencies, the Attorney General advised that a court may not issue a blanket order that directly contradicts the terms of a statute governing confidentiality. While a court may make a contrary ruling in an individual case, judicial discretion cannot be used to authorize a blanket order permitting disclosure of confidential records in all juvenile cases before the court. *Id.*

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<sup>vii</sup> The Health Insurance Portability & Accountability Act (HIPAA) privacy rules apply to health care information held by “covered entities,” defined as health care providers (such as hospitals, nursing homes, clinics, and most doctors, dentists, and other practitioners) and health plans (such as insurers and company sponsored plans). HIPAA regulations also apply indirectly to “business associates,” such as lawyers, accountants, and others who handle health information on behalf of covered entities. As a general rule, courts are neither covered entities nor business associates covered by the HIPAA privacy rules. According to *State v. Straehler*, 2008 WI App 14, 307 Wis.2d 360¶12, the HIPAA privacy rule “regulates the ability of health care clearinghouses, health plans, and covered health care providers to use and disclose health information. It does not regulate the behavior of law enforcement officials or the courts.”

<sup>viii</sup> The US Department of Health and Human Services, the agency that enforces HIPAA, believes that HIPAA allows the release of protected health information if required under a public records law. “The Privacy Rule permits a covered entity to use and disclose protected health information as required by other law, including state law. See 45 CFR 164.512(a). Thus, where a state public records law mandates that a covered entity disclose protected health information, the covered entity is permitted by the Privacy Rule to make the disclosure, provided the disclosure complies with and is limited to the relevant requirements of the public records law.” See <http://www.hhs.gov/hipaafaq/permitted/require/506.html>.

<sup>ix</sup> As an elected official, the clerk of circuit court has record-keeping duties under statute and court rules. The clerk is required by Wis. Stats. §59.40(2)(b) and (c) to “record a history in brief of each action or proceeding from beginning to final disposition”, including the indictments and informations. Under SCR §72.01(15) to (20), the clerk must retain all papers filed, a history & index of criminal proceedings, and a minute record of in-court proceedings.

<sup>x</sup> Filings with the court shall be made by filing with the clerk of circuit court. §801.16. Under §59.40(2), the clerk must file and keep all papers properly deposited with him or her in every action or proceeding. *Bilder*, 112 Wis.2d at 553-554. A government agency cannot evade its recordkeeping responsibilities by shifting a record’s creation or custody to an agent. *Journal-Sentinel, Inc. v. Shorewood School Board*, 186 Wis.2d 443,445 (Ct. App. 1994); *Wiredata v. Village of Sussex*, 2008 WI 69 ¶89, 310 Wis.2d 397.

<sup>xi</sup> If the treatment court proceedings are not considered part of the criminal case, their relationship to the case raises questions about the judge’s role. Judges may not engage in ex parte communications concerning a pending case. SCR 60.04(g)(1). A judge must not seek evidence independently and then rely on such evidence to make a ruling. *State v. Vanmanivong*, 2003 WI 41, ¶34, 261 Wis.2d 202.

<sup>xii</sup> Under 42 CFR 2.35, treatment records may be disclosed “only to those individuals within the criminal justice system who have a need for the information in connection with their duty to monitor the patient’s progress (e.g., a prosecuting attorney who is withholding charges against the patient, a court granting pretrial or post-trial release, probation or parole officers responsible for supervision of the patient)”, and only if the patient has signed a written consent meeting the requirements of Sec. 2.31.

<sup>xiii</sup> See, for instance, USDOJ, “Practical Guide for Applying Federal Confidentiality Laws to Drug Court Operations”, <http://www1.spa.american.edu/justice/documents/1936.pdf>; Tauber, National Drug Court Institute, “Federal Confidentiality Laws & How They Affect Drug Court Practitioners”, <http://www.wvpds.org/Drug%20Court/Federal%20Confidentiality%20Section%207.pdf>.

<sup>xiv</sup> See Carson Fox presentation, note 2 above. While disclosure of treatment information to the treatment court is permissible, the extent of the court’s permissible redisclosure is unclear.

<sup>xv</sup> See *LaCrosse Tribune v. Circuit Court for LaCrosse County and Stanley*, 2010 AP 3120, certified to the supreme court on October 20, 2011.

### **Appendix 3: Model treatment court waiver re confidentiality and ex parte communication**

#### **XXX COUNTY DRUG COURT PROGRAM Waiver of Confidentiality and Agreement to Ex Parte Communication**

All treatment court participants, whether proposed or accepted into the program, are required to provide authorization to disclose confidential information as part of their application to and participation in the XXX County treatment court program. The purpose of this authorization is to give the treatment court team access to any and all necessary participant healthcare and non-healthcare information to evaluate and assess the participant's entry into the treatment court program, to determine an appropriate and individualized treatment plan, and to evaluate and monitor the participant's success under that plan.

1. I agree to execute a consent for disclosure of confidential health and medical and non health information. I understand that members of the treatment court team may require me to provide very personal information. This may include, but is not limited to, drug and alcohol use, my criminal record, education and work history, family history, medical information, physical and sexual abuse history, and psychiatric information. \_\_\_\_\_
  
2. I understand that information and documents received through any consent for disclosure of confidential health and medical and non health information may be copied and shared between members of the treatment court team, which consists of the treatment court judge, the treatment court coordinator, the public defender's office, the district attorney's office, law enforcement, the department of corrections, and the department of health and human services. I understand that the members of that team may change. \_\_\_\_\_
  
3. I understand that information and documents received through this waiver and information relevant to my progress and participation in treatment may be discussed in open court and may be disclosed to other participants in treatment court and observers of treatment court including, but not limited to, members of the public and/or media. No pictures or representations of me and no identifying information about me may be disclosed to the public other than in the treatment court courtroom without my express written consent. \_\_\_\_\_
  
4. I understand that occasionally people other than treatment court team members may observe a treatment court team meeting/staffing, with the understanding that the meetings are confidential. \_\_\_\_\_
  
5. I understand that some information relating to my treatment court participation will be publicly available in my criminal court file, which is kept by the clerk of circuit court. This information includes:
  - Any order referring the participant to treatment court;
  - Any notice admitting or rejecting the participant to the program;
  - Any order staying the criminal court proceedings;
  - Any waiver pertaining to court proceedings;

- Any proceedings or orders regarding sanctions;
  - Any order or notice of the participant's voluntary termination from the program;
  - Any proceedings or orders regarding involuntary termination from the program;
  - Any acknowledgement of successful completion of the program;
  - Any letters or information provided directly to the judge
- 

6. I understand that some information relating to my treatment court participation will be kept separate from the regular court file and kept confidential. Access to this information is limited to members of the treatment court team unless I consent to additional disclosure or unless otherwise ordered by the court. This information includes:

- Any application to participate in the treatment program;
  - Any information gathered to evaluate the application;
  - Any treatment court participation contract;
  - All medical information and history of substance abuse: diagnosis, drug and alcohol use, monitoring, medical and psychological reports, prescriptions, etc.;
  - All treatment team information: weekly progress reports, information provided by team members, team member recommendations;
  - Any agreement by team members that information in treatment file shall be used only for purposes of treatment court.
- 

7. I understand that there are exceptions to the confidentiality of the information referenced in #6. Those exceptions include:

- General information that does not identify me
  - Information pertaining to a medical emergency
  - Information that must be released via a court order
  - Information regarding a crime perpetrated during the course of the program, or while on program premises, or in Court or staffing, or against team personnel
  - Information pertaining to child abuse or child neglect
  - Information for the purpose of research or audits.
- 

8. I understand that the judge may initiate, permit, or consider ex parte communication with members of the treatment court team at team meetings/staffings, or by written documents provided to all members of the treatment court team. I understand that this means that even when I am not present, the judge may discuss me and learn or review any information about me that could affect my participation in treatment court.

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9. I understand that statements I make in court or to treatment providers about personal drug and alcohol use are not for any other purpose including use in any other criminal proceeding or investigation in which I am either a potential witness or suspect.

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10. For the purposes of treatment court review hearings, I agree to waive my right to have my attorney of record present. I understand that my case may be discussed without my attorney or the prosecutor present. It is my responsibility to contact my attorney if I have a legal

question or a legal issue arises that I am unclear about and for which I need legal clarification.

11. I understand that failure to sign this waiver will be grounds for exclusion from treatment court.

**Participant's Information and Understanding**

I am \_\_\_\_\_ years old. I have completed \_\_\_\_\_ years of schooling.

I  do  do not have a high school diploma, GED, or HSED.

I  do  do not understand the English language.

I  am not  am currently receiving treatment for a mental illness or disorder.

I  have not  have had any alcohol, medications, or drugs within the last 24 hours.

I have read this waiver or had it read to me. I understand this entire document and any attachments. I have had an opportunity to discuss and ask questions and I have answered all questions truthfully. By signing this waiver I confirm that it accurately reflects my wishes regarding disclosing confidential information and ex parte communication.

\_\_\_\_\_  
Signature of Participant

\_\_\_\_\_  
Date

\_\_\_\_\_ Check here if participant refuses to sign waiver.

Witnessed by Treatment Court Coordinator

\_\_\_\_\_  
Signature of Coordinator

\_\_\_\_\_  
Date

**Milwaukee County Drug Treatment Court  
Deferred Prosecution Agreement and Participant Contract**

**Participant's Name:** \_\_\_\_\_

**Address:** \_\_\_\_\_

**Date of Birth:** \_\_\_\_\_

**Phone: Home** \_\_\_\_\_  
**Work** \_\_\_\_\_  
**Cell** \_\_\_\_\_

**In Case of Emergency Contact:** \_\_\_\_\_

**Phone #:** \_\_\_\_\_

**Address:** \_\_\_\_\_

**Case Number(s) and Charge(s):**

**Deferred Prosecution Agreement**

1. The Drug Court Participant will plead guilty to the charge of \_\_\_\_\_ in Milwaukee County Circuit Court Case Number \_\_\_\_\_, contrary to Wisconsin Stats. Section \_\_\_\_\_, as charged in the information.
2. The parties ask that the court find that the Drug Court Participant's pleas are knowing, intelligent, and voluntary, find a factual basis for the pleas, suspend the proceeding pursuant to Wisconsin Stats. Section 971.37(3)(1m)(b), and defer entry of the judgment of conviction for an initial period of 12 months and no longer than 18 months (deferral period). The deferral period may be tolled upon entry into drug treatment court if the defendant is in custody awaiting residential placement.
3. If, at the end of the deferral period, the Drug Court Participant has complied with the conditions of this agreement, the State will move the Court to dismiss case \_\_\_\_\_.
4. If, at any time during the deferral period, the defendant has not complied with the conditions of this agreement, the State may at its discretion revoke this Agreement, and, upon notice to the defendant, move the court to enter the judgment of conviction and the parties shall proceed to sentencing. Under these circumstances, the State and Defense will recommend that the defendant be sentenced to \_\_\_ months in the Wisconsin State Prison System: \_\_\_ months WSP Initial Confinement and \_\_\_ months WSP Extended Supervision with the conditions of Extended Supervision left up to the Court.
5. The State and Defense reserves the right to move the Court for a stipulated extension of the deferral period, as conditions require.
6. During the deferral period, the defendant agrees to have no contact with \_\_\_\_\_.

The defendant shall make a good faith effort to pay restitution, in the amount of \_\_\_\_\_ to \_\_\_\_\_, with said payment provided to Attorney for the Defense who will forward on to the victim via certified mail and comply with the provisions set forth below. If the defendant has made a good faith effort to pay restitution but has been unable to pay the full amount, any unpaid balance shall be converted to a civil judgment and shall be referred to the Wisconsin Department of Revenue Tax Intercept Program and shall be subject to administrative fees.

7. If, at any time during the deferral period, it is discovered that the defendant has a criminal record *anywhere* beyond that included in the discovery materials or previously disclosed by defendant to the State, or that the defendant has other pending matters that the defendant knew or should have known about, that ultimately result in criminal charges, the State reserves the right to renegotiate its sentencing recommendation, up to and including the maximum provided by law.

## **Participant Agreement**

### **I UNDERSTAND:**

Before I can be accepted into the Milwaukee County Drug Treatment Court Program (MCDTC) I must give up certain statutory and/or constitutional rights. I voluntarily agree and consent to give up the following statutory and/or constitutional rights upon my acceptance into the MCDTC Program as stated below:

1. **WAIVER OF RIGHTS:** I understand that by signing this agreement, I waive the right to a jury trial, the right to a speedy trial, the right to confront the State's witnesses, the right to remain silent, and the right to have the charge proven beyond a reasonable doubt at trial. I also agree that this agreement tolls any applicable civil and/or criminal statutes of limitations. Finally, I agree to fully and HONESTLY participate in all Drug Court meetings. ( )
2. **FREE, VOLUNTARY, KNOWING AGREEMENT:** My participation in the Program requires that I waive very important rights. I have fully discussed my statutory and/or constitutional rights with my lawyer before agreeing to enter the MCDTC. I am satisfied that I understand how the MCDTC will affect my rights. At the time of signing this document, my thinking is clear and I am not under the influence of any substance. The decision to waive my rights and enter the MCDTC is mine alone and made of my own free will. I agree to accept all the terms and conditions of the MCDTC. ( )
3. **STATUS OF PROGRAM:** I have no legal right to participate in the MCDTC. At any time, the MCDTC may be ended or reduced, or I may be terminated from it. If, at any time after entering into this agreement and in any phase of the MCDTC, it is discovered that I am ineligible to participate in the program, I may be immediately terminated from the program and I will be sentenced by the judge. I will not be able to withdraw my plea of guilty at any time during the MCDTC, including after my termination from the MCDTC. ( )

4. **RIGHT TO COUNSEL:** I can request a lawyer and talk to my lawyer at any time. If I am indigent, an attorney will be appointed through the Public Defender's Office. While my attorney may be a member of the MCDTC team, she/he will continue to work as my advocate at staffings, court appearances and sentencing hearings. If it is determined that I am not indigent, I may have to hire my own attorney. A defense attorney will be present at all MCDTC staffings and court appearances. ( )
5. **GENERAL REQUIREMENTS:** I must attend all MCDTC sessions and treatment sessions, make all community supervision meetings, pass repeated drug screens, and resolve or remove problems contributing to my addiction. I must reduce risk factors which may include improving my family situation, bettering my employment status, increasing my educational level, moving from known drug distribution areas, etc. I may be required to pay restitution. I must make suitable progress towards controlling my addiction, and the MCDTC will set individual requirements that I must meet. I agree to abide by the rules and regulations imposed by the MCDTC team and I understand that if I do not abide by the rules and regulations, I may be sanctioned or terminated from the MCDTC. ( )
6. **INDIVIDUALIZED TREATMENT PLANS:** My individualized treatment plan will be reviewed by the MCDTC team. Ultimately, the MCDTC team will decide if specific requirements must be met or modified and whether I have made acceptable progress. The final decisions about my progress and my continued participation are in the Judge's sole discretion. I have no right to appeal the Judge's decisions while I am participating in the MCDTC. ( )
7. **WAIVER OF PRIVACY:** MCDTC officials may require me to provide very personal information. This may include, but will not be limited to: drug and alcohol use, my criminal record, education and work history, family history, medical information, physical and sexual abuse history, and psychiatric information. While MCDTC officials will try to avoid unnecessary embarrassment to me, and will not discuss these matters in open court, I understand and agree that these things may be discussed in MCDTC team meetings, in treatment sessions, or in other settings related to participation in the MCDTC. Information divulged in open court will pertain to compliance and progress in the MCDTC. ( )
8. **STAFFINGS:** I understand that every time I come to court, my progress in MCDTC will be discussed by the MCDTC team. The purpose of the staffing is to review my progression in the program and support my successful completion. I will not be present at the staffing. My attorney will represent me during the staffing. Everyone who attends the staffing and is not a member of the MCDTC team will sign a confidentiality agreement.
9. **PROGRAM LENGTH:** The MCDTC is expected to last at least 12 months and no longer than 18 months. ( )
10. **RELEASE OF INFORMATION:** I agree to complete evaluations, screenings, and assessments for the development of my drug treatment program as ordered by the Court. I authorize the release of all treatment information by the providers, to the Court and the MCDTC team. I understand that I may be asked to sign additional releases of

information and related waivers. Any such information may be used by the Court in deciding whether I remain in the MCDTC. ( )

11. **DRUG SCREENS:** I agree to be tested for the presence of drugs and alcohol in my system on a random basis according to procedures established by the MCDTC team. I understand that I may be drug tested at any time by a treatment provider, probation officer or MCDTC team member. In the event that I am given a location and time to report for my drug test, I understand that it is my responsibility to report to the assigned location at the time given for the test. I understand that if I miss a test or if my specimen comes back “diluted” it will be considered “dirty” and I may be sanctioned by the Drug Court. ( )
12. **MEDICATIONS:** I agree to notify any medical practitioner seen for medical treatment, including emergency room care, that I am subject to the terms of this Agreement and have an open criminal case in Milwaukee County and that this information should be considered by the practitioner in making any medical determinations on the participant’s behalf in connection with prescribed substances. I understand that I am responsible for informing and providing documentation of all prescription medications I am taking. (See attached Milwaukee County Drug Court Physician Disclosure Policy). I am responsible for notifying staff if there are any changes to my prescriptions. In addition, I understand I am required to inform MCDTC team and/or my treatment provider of any over-the-counter medications that I may be using and that they are non-addictive and do not contain any alcohol. I understand that I cannot take any prescription medications belonging to someone else. Failure to comply with this Policy may result in termination of the Agreement. ( )
- 
13. **NO ALCOHOL:** I understand that I cannot drink, or otherwise ingest anything containing alcohol, while I am a participant in the MCDTC. ( )
14. **DUTY TO BE TRUTHFUL:** In order for the Program to succeed, I must be truthful about my alcohol and/or drug usage. In an effort to promote truthfulness, some **limited** protection is given to me **AS TO ALCOHOL AND DRUG OFFENSES ONLY**. This limited protection includes: what I say about my own alcohol and drug use in open Drug Court sessions or otherwise in the MCDTC. This information will not be used against me in the prosecution of the charge(s) I pled guilty to in the MCDTC. **HOWEVER:** (a) statements I make outside the MCDTC are not protected, (b) statements about the activities of other persons are not protected; and (c) statements about my participation in crimes other than alcohol and drug use are not protected. ( )
15. **PRIOR RECORD:** The MCDTC will not accept persons who have a conviction for any sex, dangerous weapons, or firearms offense(s) on their criminal record. Moreover, federal requirements may exclude persons from entering the MCDTC who have any prior *arrests* for any type of violent offense. To the best of my knowledge I have disclosed to the MCDTC officials all my previous arrests and all my convictions. ( )
16. **NO WEAPONS:** I understand that I must not possess any dangerous weapons while I am in the MCDTC. I will dispose of any and all weapons in my possession, and inform

everyone in my household that I have a duty to disclose to the MCDTC team the presence of any weapons that I am aware are present in my household. Failure to disclose and/or disclose of any weapons may result in termination from the MCDTC and possible prosecution for any illegal possession of any weapon. ( )

17. **DUTY TO NOTIFY:** I **MUST** notify my treatment providers and the MCDTC team within 48 hours of any change in my residence or mailing address, any change or disconnection of my phone number, and any change in employment. If no notification is given or if timely notification is not given, a sanction may be imposed. ( )
18. **CONTACTS WITH LAW ENFORCEMENT:** I must inform any law enforcement officer I have contact with that I am a participant in the MCDTC. In addition, I agree that I must not work as a confidential informant with any law enforcement agency while I am in the MCDTC. I further understand that I must report any contact with law enforcement within 48 hours to my community case manager and my lawyer. ( )
19. **CONSENT TO SEARCH:** As a condition of participation in the MCDTC, I agree to the search and seizure of my person, property, place of residence, vehicle or personal effects by a law enforcement officer at any place and time with reasonable suspicion or probable cause, or when authorized by the MCDTC team. ( )
20. **ARRESTS:** I must obey all laws and notify the MCDTC team of any new criminal charges that are filed against me, including any driving violations or minor offenses including tickets. My arrest or conviction on new criminal or municipal charges and/or *my failure to report new charges* may result in termination from the MCDTC. The District Attorney's office has the absolute power to terminate me from the MCDTC if I am arrested on any new criminal and/or municipal charges. ( )
21. **SANCTIONS:** If I do not fully comply with the MCDTC, the Judge may impose sanctions. Before deciding on a sanction, the Judge will listen to members of the MCDTC team, including my attorney or my attorney's representative. I must complete the sanctions to continue in the MCDTC. The sanctions could include community service, a return to jail involving a modification of my bail, additional drug treatment or programming, or anything else deemed appropriate by the court, including termination from the MCDTC. ( )
22. **SELF-TERMINATION:** I can quit the MCDTC at any time, but the Judge may insist that I discuss this decision with the Judge, and the Judge may delay my withdrawal from the MCDTC for up to one week to make sure my decision is firm. If I quit the MCDTC, I will be sentenced immediately in Drug Court on the case(s) I pled guilty to and not be allowed to withdraw my guilty plea. ( )
23. **FEES:** I understand that I may be required to pay for some of the cost of my participation in the MCDTC and will complete a financial disclosure form if required. ( )
24. **BAIL:** I understand that the conditions of any bond in effect on the plea date shall continue for the entire length of this agreement and that any violation of my bond may

result in termination from the MCDTC and bail jumping charges pursuant to Wisconsin Statutes Section 946.49. ( )

25. **SENTENCING:** I understand that the MCDTC judge will participate in regularly scheduled staffings for me. The purpose of the staffing is to review my status in the program and support my successful completion. I will not be present at the staffing, but I will be represented by counsel. If my contract is revoked, I will be sentenced by the Drug Treatment Court Judge. I knowingly, freely, and voluntarily waive any objection to the Drug Treatment Court Judge doing the sentencing, even though the judge participated in the staffings without my presence. I have discussed this fully with my attorney, and I understand that this is my personal right and the decision is mine, not the decision of my attorney.

26. **SUCCESSFUL COMPLETION:** If I successfully complete the MCDTC the charge(s) filed against me will be reduced and/or dismissed. ( )

**I HAVE READ THE ABOVE CONTRACT AND I UNDERSTAND WHAT I HAVE READ. I AM WILLING TO ENTER INTO THIS CONTRACT.**

\_\_\_\_\_  
**DRUG COURT PARTICIPANT** **Date**

\_\_\_\_\_  
**ASSISTANT DISTRICT ATTORNEY** **Date**

\_\_\_\_\_  
**DRUG COURT JUDGE** **Date**

\_\_\_\_\_  
**DRUG COURT OFFICIAL** **Date**

\_\_\_\_\_  
**ATTORNEY FOR DRUG COURT** **Date**

**PARTICIPANT**

**State Bar Number** \_\_\_\_\_

**Attorney Address:** \_\_\_\_\_

\_\_\_\_\_  
**Attorney Fax #:** \_\_\_\_\_

**Attorney Phone #:** \_\_\_\_\_

**Attorney Email :** \_\_\_\_\_

**Appendix 4: Model agreement for treatment team members regarding use of information**

**XXX COUNTY TREATMENT COURT PROGRAM**

**Treatment Court Team Member Memorandum of Understanding**

I understand and agree that any statement about personal drug or alcohol use made by a treatment court participant as part of participation in the treatment court program, or any report made by treatment court staff, shall not be admissible as evidence against the participant in any criminal, juvenile, or civil proceeding in which the participant is either a potential witness or a suspect.

\_\_\_\_\_  
Signature of Treatment Court Team Member

\_\_\_\_\_  
Date

DRAFT