

Reference Guide

FOR TREATMENT COURT
DEFENSE ATTORNEYS



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How to Use This Guide

This quick reference tool is meant for use by defense attorneys to support effective representation of treatment court participants in various scenarios. Each section highlights current best practices and legal requirements while offering questions and recommendations designed to prompt arguments or mitigation in the most common areas of contention. We recognize that some laws and court practices will differ among jurisdictions, and this guide is designed to navigate those differences accordingly.

Each section of the guide is followed by references that provide more in-depth information on that topic. At the end is a master list of these references, including how to access them.

Communication



Communication

How to talk to your client

Explain the treatment court to your client and facilitate their participation while ensuring that their perspective is heard and their rights are protected within the team. Advise your client about your role on the treatment team and how you will fulfill your duties to the client.

- Is enrollment a knowing, intelligent, and voluntary waiver of rights?
- Why is your client considering the program?
- Does your client understand the benefits and consequences of enrollment?
- Does your client understand the requirements for graduating from the program?
- What barriers will your client need to overcome?
- How can you help the client build recovery capital?
- What types of incentives will be impactful for your client?
- What types of sanctions will be impactful for your client?
- What prosocial activities are they interested in?

Representation

Once your client enters treatment court, the goals of defense representation remain the same but also include guiding your client through completion of the program.

Relationships

Establish a relationship with your client balanced by your role on the team with prompt, frequent, and continuing communication. Use communication skills like motivational interviewing.

More information

- *Adult Treatment Court Best Practice Standards*, 2nd ed., "Defense Counsel," pp. 188–190.
- *Critical Issues for Defense Attorneys in Drug Courts*, "Collaboration: Communication Is the Foundation," pp. 10–12, "Communication," pp. 23–25, and "Practice Guidance: Ethical Issues," pp. 33–35.
- *ABA Model Rules of Professional Conduct*, Communication (1.4) and Diligence (1.3).
- *A Practitioner's Guide to Constitutional and Legal Issues in Adult Drug Courts*, Chapter 2, "Admission," pp. 12–19.

How to talk to the team

Use staffings or team meetings rather than court time for discussion and debate about issues relevant to your client's program completion.

- Does your client understand what you will share and what will be kept confidential?
- Does the team understand what information you cannot share with them?
- Does the team understand what information you will share with your client?
- Are you receiving prestaffing reports with sufficient lead time to review and prepare for the staffing?
- How do you plan to participate in the team discussion?
- Do you understand team recommendations, and are they supported by the Best Practice Standards?
- Is your communication with the team assisting your client to achieve their goals?
- Are all team members present and staying in their lane?
- Is the team following its policies and procedures?

Your role on the team

Take an active role, be ready to collaborate and problem solve, and come prepared, having reviewed reports. Encourage your client to participate, but do not be the conduit of confidential information to the rest of the team.

Confidentiality

Confidentiality supersedes collaboration. Treatment court waivers and procedures should clearly state what information is confidential. This information must not be requested of defense counsel or used against the treatment court participant.

More information

- *Adult Treatment Court Best Practice Standards*, 2nd ed., "Sharing Information," pp. 199–201.
- *Critical Issues for Defense Attorneys in Drug Courts*, "The Defense Attorney's Relationship with the Team and the Court," pp. 7–9, "Collaboration Requires Teamwork," pp. 12–13, and "Confidentiality (Rule 1.6)," p. 35.
- *ABA Model Rules of Professional Conduct*, Confidentiality of Information (1.6).
- *A Practitioner's Guide to Constitutional and Legal Issues in Adult Drug Courts*, Chapter 3, "Participation," pp. 20–40, and "Staffing Meetings," pp. 41–43.

How to talk to the court

Discuss any information with your client and determine a defense plan and position before going on the record with the court. If your client has difficulty communicating to the court because of a language barrier, nervousness, cognitive limitation, or other factor, you or another team member may choose to assist your client in providing information or explanation to the court.

- Did you talk to your client about what will happen in court?
- Did you tell your client about the discussion during the staffing meeting with the team?
- Does your client know where they are in the program?
- Will your client talk directly to the court during the hearing?
- How can you or the team help your client be heard?
- Will your client be truthful to the court?

Candor toward the tribunal

You may develop a stronger bond with a client in a treatment court than you would with other clients, but you should never cross the line into dishonesty on your client's behalf.

Confidentiality

Confidences with your client will supersede candor to the tribunal, if it is something that happened in the past. You should insist that your client be truthful in statements to the court, but this rule does not require full disclosure of information.

More information

- *Critical Issues for Defense Attorneys in Drug Courts*, "Candor Toward the Tribunal (Rule 3.3)," p. 34.
- *ABA Model Rules of Professional Conduct*, Candor Toward the Tribunal (3.3).
- *A Practitioner's Guide to Constitutional and Legal Issues in Adult Drug Courts*, Chapter 3, "Participation," pp. 20–40, and "Status Hearings and Sanctions," pp. 41–45.

Legal Considerations



Legal Considerations

Due Process

Arguments challenging due process

To protect a client's due process rights, defense counsel should be present at every critical stage of the proceedings. Here, the role of defense counsel shifts from collaborating to litigating.

Procedural fairness

Due process requires written notice and an opportunity to be heard. Any loss of liberty will trigger procedural due process under the 14th Amendment: probation revocation hearings, termination proceedings, or sanction proceedings where jail is a potential sanction.

- Is your client's liberty interest at stake?
- Do you plan to contest the underlying basis for the violation?
- What is the procedure for a contested hearing?
- Did your client receive understandable advance notice about requirements, responses, and team processes?
- Did your client receive evidence of the violation?
- Has your client been provided the opportunity to respond to factual controversies and the appropriateness of the sanction?

- Should your client remain silent or address the court?
- Did your client receive a clear rationale for the judge's decision?
- Was the sanction delivered without expressing frustration or dislike?

More information

- *Adult Treatment Court Best Practice Standards*, 2nd ed., Standard VIII, "Multidisciplinary Team," pp. 180–203.
- *Critical Issues for Defense Attorneys in Drug Courts*, "Legal Issues in Drug Courts" and "Practice Guidance: Legal Issues," pp. 35–46.
- *The Drug Court Judicial Benchbook*, Chapter 8, "Constitutional and Legal Issues in Drug Courts," pp. 161–182.
- *A Practitioner's Guide to Constitutional and Legal Issues in Adult Drug Courts*, Chapter 4, "Monitoring and Sanctions," pp. 41–50.

Violations

Arguments challenging a violation hearing

The treatment court team classifies participants' goals according to their difficulty level before considering what responses to deliver for achievements or infractions of these goals. Sanctions

should be delivered to enhance compliance with proximal goals, whereas service adjustments are delivered to help participants achieve distal goals. Determine the goal, then frame an argument to address the response.

Standard of review

A violation should be proven by a preponderance of the evidence.

- **Proximal goals:** Goals that participants can achieve in the short term and sustain for a reasonable period of time.
- **Managed goals:** Goals that have been achieved and sustained for a reasonable time.
- **Distal goals:** Goals that are too difficult for the participant to accomplish currently.

Violation of a proximal goal

- What type of sanction is being recommended? Low, moderate, or high magnitude?
- Is the sanction for concrete and observable behaviors (e.g., not for subjective attitudinal traits)?
- Did your client receive clear advance notice of the behaviors that are expected of them and those that are prohibited?

- If the sanction is high magnitude, have verbal warnings and other low- and moderate-magnitude sanctions been unsuccessful in deterring repeated infractions?
- Does the sanction involve loss of previously earned incentives, such as program privileges, points, or fishbowl drawings, or does it involve other practices that demoralize participants and lower their motivation to continue trying to earn these incentives?

Violation of a managed goal

- Is the team meeting collaboratively with your client to understand what happened?
- Is the recommendation to implement service adjustments or other appropriate responses intended to help the person get back on course quickly?
- Is your client being returned to an earlier phase or to the beginning of the program, or is the sanction another practice that demoralizes participants and lowers their motivation to continue striving for phase advancement?

Violation of a distal goal

- Is a service adjustment being recommended?

- Are mental health or substance use symptoms interfering with your client's ability to meet certain goals?
- Does your client have a compulsive substance use disorder?
- Is your client still experiencing clinical symptoms of withdrawal such as persistent substance cravings, anhedonia, cognitive impairment, or acute mental health symptoms like depression or anxiety?
- Is your client receiving service adjustments for substance use until they are in early remission (at least 90 days without clinical symptoms that may interfere with their ability to attend sessions, benefit from the interventions, and avoid substance use)?

More information

- *Adult Treatment Court Best Practice Standards*, 2nd ed., Standard IV, "Incentives, Sanctions, and Service Adjustments," pp. 67–104.
- *Critical Issues for Defense Attorneys in Drug Courts*, "Legal Issues in Drug Courts" and "Practice Guidance: Legal Issues," pp. 35–46.
- *The Drug Court Judicial Benchbook*, Chapter 7, "Applying Incentives and Sanctions," pp. 141–159.

Jail

Arguments challenging a jail sanction

A treatment court cannot confine a person without a lawful reason or violation of a condition.

- Is jail being used for a violation of a distal goal?
- Is jail being used only to prevent an overdose?
- Is the jail sanction more than five days?
- How long is your client spending in jail while waiting to enroll?

When to use jail sanctions

Jail sanctions should be "imposed judiciously and sparingly." Unless a participant poses an immediate risk to public safety, jail sanctions are administered after less severe consequences have been ineffective at deterring infractions.

Length of a jail sanction

A jail sanction should be definite in duration and should typically last no more than three to six days. Participants are given access to counsel and a fair hearing if a jail sanction might be imposed, because a significant liberty interest is at stake.

Negative side effects from jail

- Interruption of treatment and support (e.g., medication for substance use disorder, medication for opioid use disorder, and/or medications prescribed for mental health reasons).
- Interactions with high-risk peers.
- Consequences of stress and reactions to stress.
- Habituation to highest-magnitude sanctions.
- Ceiling effects short of discharge.

Best practices for recommendations of jail sanctions

- They should not be used in the first 30 to 60 days of enrollment.
- They should be used only for proximal infractions after low- and moderate-magnitude sanctions have been unsuccessful.
- They should not be used for violations of distal goals.
- They should not be used to deter overdose.
- They should not be used for preventive detention unless no less restrictive option is available.

More information

- *Adult Treatment Court Best Practice Standards*, 2nd ed., Standards IV, "Incentives, Sanctions, and Service Adjustments," and V, "Substance Use, Mental Health, and Trauma Treatment and Recovery Management," pp. 67–142.
- *Critical Issues for Defense Attorneys in Drug Courts*, "Drug Court Litigation—Due Process," pp. 42–45.
- *Guidelines for Managing Substance Withdrawal in Jails*.
- *A Practitioner's Guide to Constitutional and Legal Issues in Adult Drug Courts*, "Custody Credits," pp. 47–49, and "Jail Sanctions," pp. 57–58.

Preventive detention

Arguments challenging preventive detention

It is not lawful to place a participant with a substance use disorder in jail solely because they are awaiting placement for a treatment bed.

- Is jail being used as a sanction or as a preventive measure?
- Is jail being used according to the Best Practice Standards?
- Is jail being used as a holding place while awaiting treatment or detox?

- Is jail being used to protect the health and safety of your client?

Standard of review

Jail should not be used to prevent overdoses or self-harm without first conducting an adversarial hearing. A judge should determine by clear and convincing evidence that jail is necessary to protect the client from imminent and serious harm, and that the client's safety cannot be ensured through less restrictive means.

Alternatives to jail

- Increasing frequency of sessions, level of care, or modality of treatment or delivering specialized services.
- Initiating medication for substance use disorder if recommended by a qualified medical practitioner.
- Implementing harm reduction strategies.
- Initiating daily reporting or other increased supervision tools.
- Developing a specialized counseling group for those at high risk of overdose.
- Identifying a safe and responsible family member to stay with the client.

- Requiring daily attendance at a peer support group if recommended by a treatment professional and acceptable to the client.
- Using a peer support specialist.
- Implementing frequent home visits by community supervision officers, social workers, or peer specialists.
- Increasing the frequency of community supervision and monitoring.

More information

- *Adult Treatment Court Best Practice Standards*, 2nd ed., "Jail Sanctions," pp. 70 and 94–97, and Standard V, "Substance Use, Mental Health, and Trauma Treatment and Recovery Management," pp. 113–142.
- *Critical Issues for Defense Attorneys in Drug Courts*, "Preventive Detention," p. 44.
- *A Practitioner's Guide to Constitutional and Legal Issues in Adult Drug Courts*, "Incarceration While Awaiting Treatment," pp. 49–50.

Scientific challenges

Arguments based on the science of substance use

If your client denies use after a positive result, understand the science and then explain the full consequences of contesting the result.

- Will substance use be addressed therapeutically or punitively?
- Is abstinence a distal goal or a managed goal?
- Is the court monitoring substance use according to best practices?
- Is this monitoring discussed in the policies and procedures manual?
- Does a challenge to a substance use violation hurt your client's goals?
- Should you request a confirmed test, and will your client be charged?

Violation hearings for substance use

Defense should receive a copy of the report on the lab test before the hearing; a report on the chain of custody of each sample, including the date of collection, the name of the person(s) collecting and labeling the sample, and a description of the label; and a copy of an affidavit by a responsible laboratory employee attesting both to laboratory procedures,

including chain-of-custody routines, and to whether all required procedures were followed regarding the questioned sample.

More information

- *Critical Issues for Defense Attorneys in Drug Courts*, "Practice Guidance for Legal Challenges to Drug Testing," pp. 47–48.
- *The Drug Court Judicial Benchbook*, Chapter 6, "The Fundamentals of Drug Testing," pp. 115–140.
- *A Practitioner's Guide to Constitutional and Legal Issues in Adult Drug Courts*, Chapter 4, "Monitoring and Sanctions," pp. 41–50.

Termination

Arguments challenging a termination hearing

The hearing should be a fair process in open court, providing due process protections and the agreed-upon policy and procedures.

- Did your client receive written notice of the reasons for termination?
- Is the notice specific enough to allow you to defend against the allegations?
- What is the written procedure for your court regarding termination?

- Will there be a contested hearing?
- What is the evidence?
- Is the judge able to be fair and impartial?

Termination standard

Your client may be terminated from treatment court if they repeatedly fail to comply with treatment and supervision, or if it is no longer safe for them to be managed in the community. Your client cannot be terminated from treatment court for continued substance use if they are still amenable to treatment and are in compliance with current treatment and the probation conditions. Your client should not receive sanctions or a harsher sentence for noncompletion if they do not respond sufficiently to services that are inadequate to meet their needs. Treatment courts should exhaust all reasonable rehabilitative efforts before letting participants give up on themselves.

Recusal of the judge

Your client may be concerned about prior interactions or information that the treatment court judge received previously that could result in bias during a termination hearing. Your client may want to request recusal of the judge for this hearing.

More information

- *Critical Issues for Defense Attorneys in Drug Courts*, "Fair Procedure for Termination" and "Termination Hearing Standards," pp. 45–46.
- *The Drug Court Judicial Benchbook*, Chapter 8, "Constitutional and Legal Issues," pp. 161–182.
- *A Practitioner's Guide to Constitutional and Legal Issues in Adult Drug Courts*, "Right to a Sanction Hearing or Termination Hearing" and "Waiver of Right to Request Judicial Recusal," pp. 16–17, and Chapter 5, "Termination and Sentencing," pp. 51–54.

Restrictions on freedom

Arguments addressing restrictions on freedom

Treatment court participation will often implicate other constitutional rights. Review the policies and procedures manual and participant handbook to determine what rights are waived.

- Will the court limit how your client interacts with others?
- Will the court limit your client's travel?
- Does the policies and procedures manual explain the limitations?

- Will your client's person or property be subject to search?
- What is the status of your client?
- Is your client on probation?

Restrictions on freedom: A treatment court may impose area or rights of association restrictions, but they must be narrowly drawn and reasonably related to the rehabilitation needs of your client.

Unreasonable search and seizure

A participant can be searched when they are in a treatment court program because there is a lesser expectation of privacy. The validity of search conditions may depend on the status of the participant—on probation, in preadjudication, or on bond. Your client may have to consent to these searches as a condition of participation.

More information

- *Critical Issues for Defense Attorneys in Drug Courts*, "Restrictions on Freedom" and "Search and Seizure," p. 41.
- *The Drug Court Judicial Benchbook*, Chapter 8, "Constitutional and Legal Issues," pp. 161–182.
- *A Practitioner's Guide to Constitutional and Legal Issues in Adult Drug Courts*, Chapter 3, "Participation," pp. 20–40.

Treatment



Treatment

Arguments addressing treatment recommendations

Defense counsel should remind the court that treatment plans and recommendations must come from a treatment professional. Treatment should not be based on religion, unless voluntary, and medication to assist in treatment should be allowed. Treatment adjustments and conditions are predicated on valid clinical assessments and recommendations from qualified treatment professionals. The client should be given the opportunity to collaborate with the treatment plan, including choice of treatment, choice of provider, and treatment goals.

- Does the court allow medication for substance use disorder?
- What type of sober supports are required?
- Is your client appropriately matched to treatment resources?
- Are the recommendations coming from a treatment provider?
- Who is making the treatment recommendation?

Prescribed medication or treatment

It may be unconstitutional for the court to deny your client prescribed medication or treatment. Denying medication for

substance use disorder or medication for opioid use disorder can be considered cruel and unusual punishment. Treatment courts should not refuse admission, impose sanctions, or discharge participants unsuccessfully for the prescribed use of prescription medication, including medication for substance use disorder, psychiatric medication, and medications for other medical conditions such as pain or insomnia.

Sober support requirements

Freedom of religion under the U.S. Constitution prevents a treatment court from requiring a deity-based sober support program.

More information

- *Adult Treatment Court Best Practice Standards*, 2nd ed., "Medication for Addiction Treatment," p. 115.
- *Critical Issues for Defense Attorneys in Drug Courts*, "Treatment Recommendations," p. 40, and "Treatment," pp. 48–56.
- *The Drug Court Judicial Benchbook*, Chapter 4, "Addiction and Treatment Services," pp. 63–98.
- *A Practitioner's Guide to Constitutional and Legal Issues in Adult Drug Courts*, Chapter 3, "Participation," pp. 20–40.

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**Treatment
Court Institute**
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**Impaired
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**Justice
for Vets**
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**Center for
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All Rise is the leading training, membership, and advocacy organization for advancing justice system responses to individuals with substance use and mental health disorders. All Rise impacts every stage of the justice system, from first contact with law enforcement to corrections and reentry, and works with public health leaders to improve treatment outcomes for justice-involved individuals. Through its four divisions—the **Treatment Court Institute**, **Impaired Driving Solutions**, **Justice for Vets**, and the **Center for Advancing Justice**—All Rise provides training and technical assistance at the local and national level, advocates for federal and state funding, and collaborates with public and private entities. All Rise works in every U.S. state and territory and in countries throughout the world.

Founded as the National Association of Drug Court Professionals (NADCP) in 1994, All Rise has been at the forefront of justice system transformation for nearly three decades. As the leader of the treatment court movement, All Rise helps prove that a combination of evidence-based treatment and accountability is the most effective justice system response to individuals with substance use and mental health disorders. All Rise has trained over 800,000 public health and public safety professionals, and the number of treatment courts in the United States has grown to more than 4,000, helping more than 1.5 million people access treatment.

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