

Legal and Ethical Issues and Answers

2018 NADCP Conference



National Drug Court Institute
Judge William G. Meyer (ret.)
Senior Judicial Fellow

Refresher/Crash Course

- Ethics
 - Ex Parte Communications
 - Judge Participant Contact Outside Courtroom
 - Defense Function
- Limited Constitutional Issues

Ethics in Drug Court

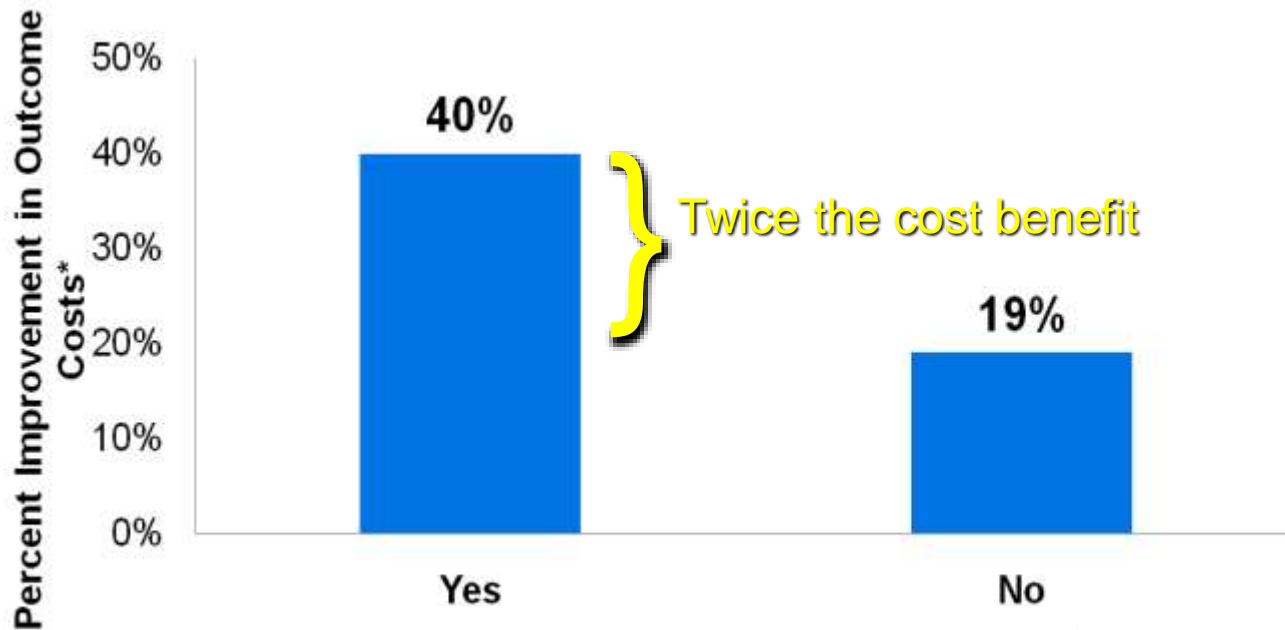
- Ex Parte Communications and Staffing
- Judicial Fraternization/Impartiality
- Role of the Defense Counsel

Ex Parte Communications

- Several States including Oklahoma, Minnesota, Montana, New York, Indiana, Idaho, Arkansas and Colorado have amended their Canons of Judicial Conduct to address the *ex parte* communication issue facing problem solving courts.
- A judge may initiate, permit, or consider *ex parte* communications expressly authorized by law or by consent of the parties, including when serving on therapeutic or problem-solving courts such as many mental health courts, drug courts, and truancy courts. In this capacity, judges may assume a more interactive role with the parties, treatment providers, probation officers, social workers, and others.
Comment Canon 2.9

Multidisciplinary Team

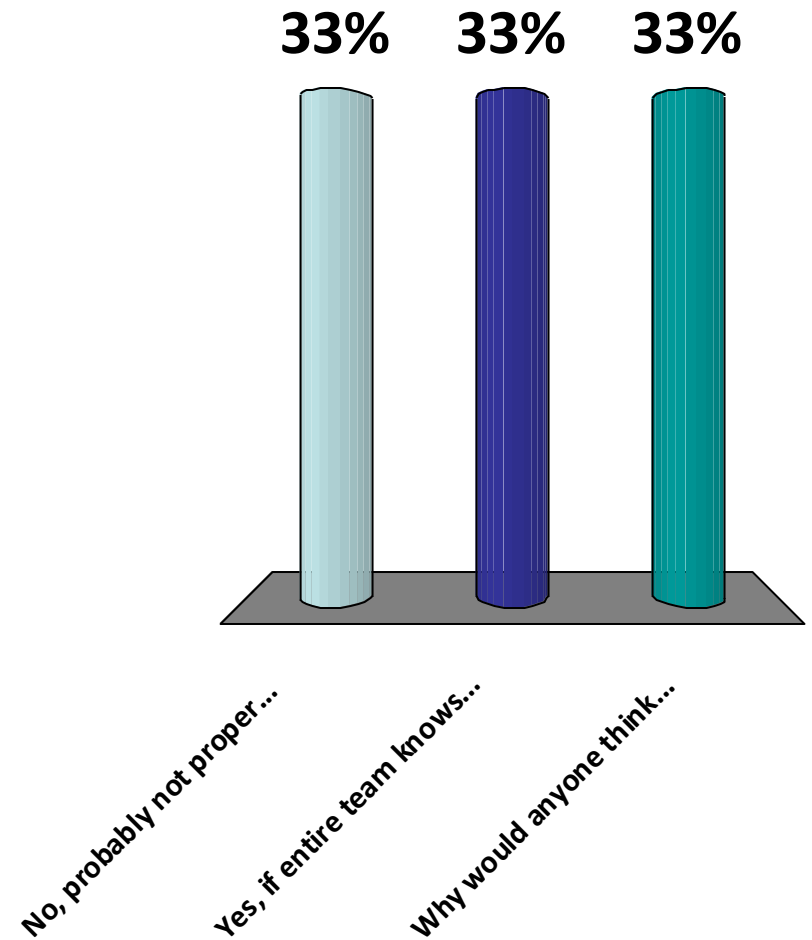
All Team Members Attend Pre-Court Team Meetings



Carey et al. (2012)

It is permissible for a judge to have lunch with a drug court participant as a reward or for the judge to visit the participant at their job?

- A. No, probably not proper boundary
- B. Yes, if entire team knows about it
- C. Why would anyone think this is a reward



The Court and Drug Court Participant

- Judge attended group activities, softball games, bowling night, holiday party, spring picnic, Disneyland trip, with drug court participants.

Disciplined

- Matter of Blackman, 591 A.2d 1339 (N.J. 1991)
- Judge Blackman argued that his attendance was an innocent mistake; he had no improper motive and had been friends with the Defendant for many years. The court was unpersuaded and stated: “The lesson is that a judge who attends a public or social event will be perceived as endorsing or supporting not only the event itself but also persons associated with the event.”
- In re Jones, 581 N.W.2d 876 (Neb. 1998)
- Judge met individually with probationers. The judge justified a portion of his conduct on his sincere concern for the welfare of addicts and their progress. The Nebraska Supreme Court was unpersuaded and found that Jones’ conduct constituted a violation of Canon 1 (uphold integrity and Independence of Judiciary) and Canon 2 in that Jones failed to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

In re Day, 362 Or 547, ____ P. 3d ____ (2018)

- For all those reasons, we conclude that the commission has proved by clear and convincing evidence that, beginning in December, respondent acted willfully, as set out in Article VII (Amended), section 8(1)(e), when he violated Rules 2.1(A) and (C). Moreover, that same conduct toward BAS—a probationer in the VTC over which respondent presided—amounted to willful misconduct in a judicial office that bore a demonstrable relationship to respondent's effective performance of his duties as the VTC judge, in violation of Article VII (Amended), section 8(1)(b).
- Result: Judge suspended for 3 yrs for this and other conduct.

Respect the Role of the Defense

National Legal Aid and Defender Association:

Nothing in the problem solving court policies or procedures should compromise counsel's ethical responsibility to...challenge evidence or findings and the right to recommend alternative treatments or sanctions.

ABA Standards

The Defense Function

- The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation. ABA Model Rule 1.2; (“Defense Function Guidelines”)
- To competently represent client in DTC must familiarize self with treatment, procedures, bases for sanctions or termination, etc. (ABA Model Rule 1.1)

*Smith v. State, 840 So.2d
404, (Fla. 4th Cir. 2003)*

- It is essential that lawyers educate themselves as to the availability, requirements, and appropriateness of drug court programs. Only then can they effectively advise their clients. It is equally important for the institutions that educate future lawyers, as well as those that educate the other disciplines that play vital roles in the drug court process to incorporate drug courts into their curricula. For lawyers to do otherwise is for them to become legal dinosaurs. To ignore the need to learn about the drug court process is to ignore the evolution of the justice system. The sooner the Bar educates itself, the issue raised in this case will become extinct.

Best Practices-Ethics

1. Ensure that DA and Defense Counsel attend staffings and review hearings
2. Where CJC permit *ex parte*-insure disclosure to opponent
3. Judges avoid public activities (non-judicial) with participants, except for cameo appearance
4. Respect Ethical Obligations of Defense Counsel

Pre-Presentation Test Video Daily Double

- List every 4th, 5th and 6th Amendment issue
 - 4th Search and Seizure
 - 5th Right against Self-Incrimination
 - 6th Right to Counsel

Give me the Information

- bmeyer@jaginc.com

Adult Rights=Juvenile Rights

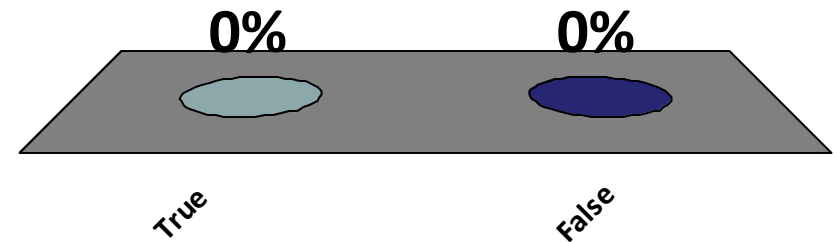
- *Juvenile proceedings must be in conformity with the essentials of due process and fair treatment as guaranteed by the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. In re Gault, [387 U.S. 1](#), 30, 87 S.Ct. 1428, 1445 (1967).*

LOPEZ-SANCHEZ v. STATE, 388 Md. 214 (2005)

Q #1: Because your State Constitution provides for an open courtroom, staffings must be open?

A. True

B. False



Confidentiality and Open Courtroom

- The provisions of 42 CFR 2.35 and the need for open courtrooms required denial of motion to close proceedings. Florida v. Noelle Bush, Florida Circuit Court (Oct. 2002)

Open Public Courtroom does not mean Open Staffing

- *State v. Sykes*, 339 P. 3d 972 (Wash. 12/18/14)
(Adult drug courts are philosophically, functionally, and intentionally different from ordinary criminal courts. Based on their unique characteristics, we hold that **adult drug court staff meetings are not subject to the open courts** provision of article I, section 10 of the Washington State Constitution. Whether adult drug court staff meetings are presumptively open or closed is left to the discretion of the individual drug courts.)

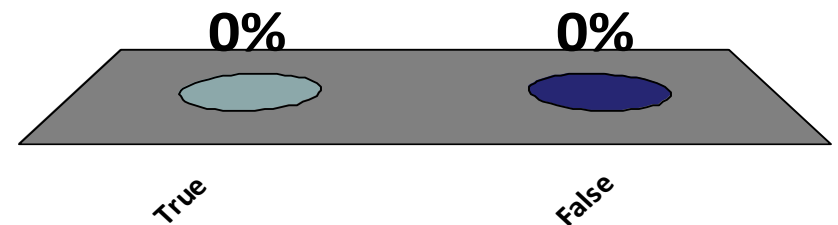
State v. LeClech, Washington Court of Appeals, NOT SELECTED (6/15/15)

- A defendant's right to be present at a proceeding is required "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." However, this right is not absolute.Just as closed staffings are critical to the success of drug court in the context of public trial rights, the presence of the defendant at staffings would frustrate the collaborative purpose of drug court.
- ***State v. Kelifa***, Not Selected for Publication (Wash. App. 7/13/ 2015) (Closed drug court staffing meetings preceding his termination did not violate constitutional rights to a public trial and to be present at all critical stages of a prosecution)

2. You can prohibit your drug court participant from going to the French Quarter?

A. True

B. False



First Amendment and Area Restrictions

- Who uses place and area restrictions?

Reasonable when narrowly drawn:

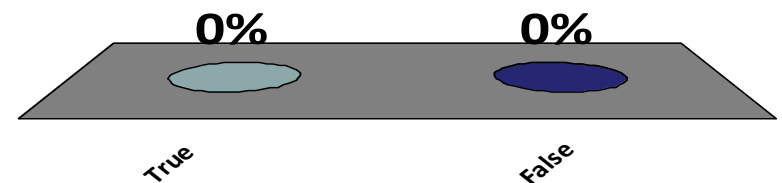
- 1) Whether the defendant has a compelling need to go through/to the area;
- 2) A mechanism for supervised entry into the area;
- 3) The geographic size of the area restricted, and
- 4) The relatedness between the restriction and the rehabilitation needs of the offender.

See *People v. Rizzo*, 362 Ill. App. 3d 444 (2005); *State v. Morgan*, 389 So. 2d 364, 364 (La. 1980) (prohibiting entrance into the French Quarter)

3. A Drug Court should refrain from ordering drug court participants from having association with a person with a prior conviction or arrest for a drug offense (association restriction) because: (1) it violates the First Amendment Freedom of Association Clause and (2) such an order is too vague, unless the defendant actually knows that the person has such a record.

A. True

B. False



Association Restrictions

Upheld when:

1. It is related to the crime for which the offender was convicted,
2. Is intended to prevent future criminal conduct, or
3. Bears a reasonable relationship to an offender's rehabilitation.

***Malone v. State*, 2012 Ark. App. 280, (2012) (Drug Court Case—revoking individual's probation for continual association with restricted individual);** *State v. Allen*, 370 S.C. 88, 634 S.E.2d 653 (2006); *Jones v. State*, 41 P.3d 1247 (Wyo. 2001) (persons of disreputable character); *State v. Hearn*, 128 P.3d 139 (Wash. App. 2006) (prohibition against associating with drug users or dealers constitutional); *Commonwealth v. LaPointe*, 759 N.E.2d 294 (Mass. 2001).

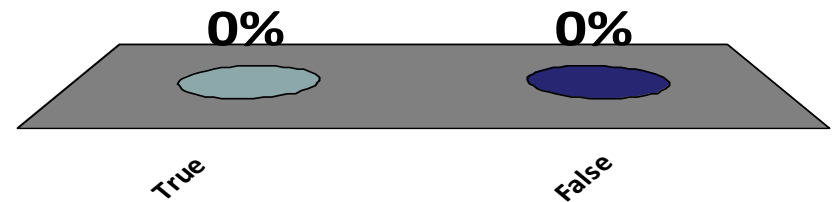
Association Restrictions

- Watch who you hang out with
- Not necessarily know that they are druggies or felons, look at what associates are doing and where they are
- *Jones v. State*, 41 P.3d 1247 (Wyo. 2001) (persons of disreputable character); *State v. Hearn*, ___ P.3d ___ (Wash. App. 2/6/06) (prohibition against associating with drug users or dealers constitutional); *Andrews v. State*, 623 S.E.2d 247, 247 (Ga. Ct. App. 2005) (restricting drug court participant from associating with drug users and dealers)

Q4: Your Court cannot
mandate AA/NA.

A. True

B. False



FIRST AMENDMENT

- Working the twelve steps requires:
 - **Confess to God “the nature of our wrongs” (Step 5);**
 - **Appeal to God to “remove our short comings” (Step 7);**
 - **By “prayer and meditation” to make “contact” with God to achieve the “knowledge of his will” (Step 11).**

FIRST AMENDMENT

- *Kerr v. Ferry*, 95 F.3d 472, 479-80 (7th Cir. 1996) (prison violated Establishment Clause by requiring attendance at Narcotics Anonymous meetings which used “God” in its treatment approach);
- *Griffin v. Coughlin*, 88 N.Y. 2d 674 (1996) cert. denied 519 U.S. 1054 (1997) (conditioning desirable privilege – family visitation – on prisoner’s participation in program that incorporated Alcoholics Anonymous doctrine was unconstitutional as violation of the Establishment Clause);
- *Inouye v. Kemna*, 504 F.3d 705 (9th Cir. 9-7-2007, amended on 10/3/07)(Parole officer lost qualified immunity by forcing AA on Buddhist)
- *Hanas v. Inter City Christian Outreach*, 542 F. Supp. 2d 683 (E.D. Mich. 2/29/08) (Drug Court program manager and drug court consultant held liable for actions related to referral to faith based program, where they knew of participant’s objections while in the program and when the program denied the participant the opportunity to practice his chosen faith –Catholicism)).

- Voluntary program= Mandate AA okay?
- Morrissey v. Brewer—condition due process (other constitutional rights) on privilege vs. right analysis rejected

Not all is lost

- *O'Conner v. California*, 855 F. Supp. 303, 308 (C. D. Calif.) (no Establishment Clause violation where DUI probationer had choice over program, including self-help programs that are not premised or monotheistic deity)
- *In Re Restraint of Garcia*, 24 P.3d 1091 (Wash. App. 2001) (same)
- *Americans United v. Prison Fellowship*, 509 F.3d 406 (8th Cir. 12/3/07) (state supported non-coercive, non-rewarding faith based program unconstitutional First Amend. establishment clause violation, where alternative not available)
- LifeRing Recovery <http://www.unhooked.com>
- Rational Recovery <http://www.rational.org>
- Secular Organizations for Sobriety (SOS) <http://www.secularhumanism.org/sos>

Q5: A Drug Court participant can be searched at any place and any time w/o probable cause or reasonable suspicion

A. True

B. False



Search Waiver
Samson v. California,
547 U.S. 843, 846; 126 S. Ct. 2193 (2006)

- In parole case, mandatory search waiver constitutional and totally suspicionless search is upheld.
- Like *Knights*, but goes further because does not make a finding of reasonableness, but notes cannot be harassment

Search waivers in non-convicted cases

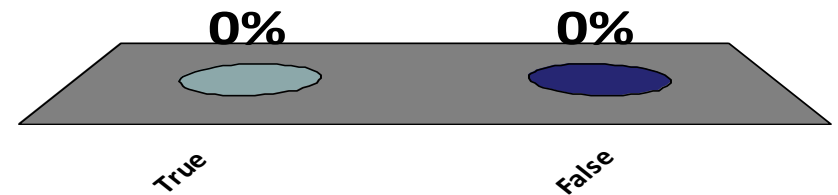
- Compare *State v. Ullring*, 741 A.2d 1065 (Me. 1999) (search waiver as condition of bond constitutional); and *In Re York*, 9 Cal. 4th 1133 (Calif. 1995) (same) **with**
- *Terry v. Superior Court*, 73 Cal. App. 4th 661 (Cal. App. 1999) (4th Amendment waiver improper condition in diversion case, without statutory authority) and *U.S. v. Scott*, 450 F.3d 863 (9th Cir. 2006) (search waiver probably improper when person on bond).

*State v. Olsen, 399 P. 3d
1141 (Wash. Supreme Court
2017)*

- Additionally, as noted by the **National Drug Court Institute**, "it is crucial that samples be collected in a random, unannounced manner," as random testing prevents individuals from planning ahead and avoiding detection. Requiring reasonable suspicion as a basis to test could make it prohibitively difficult for the probation officer to carry out his or her responsibilities of supervising the probationer and accurately assessing progress toward rehabilitation

Q6: Termination from Drug Court requires a hearing?

- A. True
- B. False



Due Process

- Procedural protections are due under the due process clause when the defendant will **potentially suffer** a loss to a **recognized liberty or property right** under the 14th Amendment.
- If due process applies, the question remains what process is due.

Fuentes v. Shevin, 407 U.S. 67 (1972).

Morrissey v. Brewer, 408 U.S. 471 (1972).

Due Process-Probation Revocation

- What is required?
- P/C determination
- Written Notice
- Right to Appear
- Cross-Exam and call witnesses
- Independent magistrate
- Written findings-reasons

Gagnon v. Scarpelli, 411 U.S. 778, 781-782
(1973). (probation)

Due Process

- What about right to counsel?

Due Process

- Revocation=Termination
- *People v. Anderson*, 833 N.E.2d 390 (Ill. App. 2005); *State v. Cassill-Skilton*, 122 Wash. App. 652 (Wash. App. 2004); *Hagar v. State*, 990 P.2d 894 (Ok. 1999). *In Re Miguel*, 63 P.3d 1065, 1074 (Ariz. App. 2003) (juvenile).

People v. Anderson, 833 N.E.2d 390 (Ill. App. 2005);

The drug-court program is a form of conditional liberty like supervision, probation, or parole. Each program requires the participant to comply with certain conditions or face the loss of the privilege. Revocation of that privilege may not be accomplished without inquiry.

Defendant should have (1) been informed of the nature of the alleged violation, (2) been informed of the nature of the evidence against him, and (3) had the right to appear and be heard before he was dismissed from the program. Likewise, the court should have taken the opportunity to determine (1) whether defendant in fact acted in violation of one or more conditions of the program and, if so, (2) whether defendant should be tried on the original offense or if some other step, in accordance with the program guidelines, should be taken to improve his chances of rehabilitation.

But see *STATE v. ROGERS*, 31264
(Idaho Ct. App. 8/22/2006)

Due process concerns are therefore sufficiently allayed through the contract-based means commonly used to remedy breaches of agreements between the State and a defendant. By this opinion we do not wish to dissuade a judge from following termination procedures in drug court akin to those employed in a probation revocation process. To the contrary, in order to eliminate uncertainty and the appearance of unfairness, we encourage courts to do so. What is recommended is not, however, the equivalent of what is required.

Rogers Reversed

State v. Rogers, 170 P. 3d 881 (Idaho 2007)

- **As of January 2006, Idaho had forty-four drug courts in operation spread out over approximately twenty-three counties and at differing levels of the judicial system within some counties. From the above discussion, it must be assumed that each drug court in Idaho operates uniquely and, therefore, the analysis in this case might not be applicable to any other particular drug court program in the state.**
- **Not even mention the contract analysis**
- **Key was diversionary program where guilty plea entered**

Trend

- **Harris v. Commonwealth, 689 S.E.2d 713 (Va. 2010)** Consequently, because Harris had no opportunity to participate in the termination decision, when deciding whether to revoke Harris' liberty and impose the terms of the plea agreement deprived Harris of the opportunity to be heard regarding the propriety of the revocation of his liberty interest.

Gosha v. State, 927 N.E.2d 942, 942 (Ind. Ct. App. 2010)

In termination from drug court, due process rights include:

written notice of the claimed violations, disclosure of the evidence against him, an opportunity to be heard and present evidence, the right to confront and cross-examine witnesses, and a neutral and detached hearing body

Trend

Bonn v. Commonwealth, No. 2009-CA-002304-MR. (Court of Appeals of Kentucky. May 6, 2011) UNPUBLISHED (Defendant not entitled to continuance of drug court termination hearing to obtain an expert who could testify that defendant's 3 positive drug tests were due to sexual contact with cocaine users and sweat from barbershop customers)

State v. Shambley, 281 Neb. 317 (2011) (Drug court program participants are entitled to the same due process protections as persons facing termination of parole or probation.)

Tornavacca v. State, 2012 Ark. 224 (2012) (Although the majority finds that defendant's due process rights were not violated during his drug court termination hearing, the dissent finds that status hearing where the initial decision was made to remove defendant from drug court violated his due process rights because he did not get to contest the allegations then, although he was represented by counsel and a termination hearing 4 months later did not cure the due process violation)

Mental Health Courts

- **TATE v. STATE**, 2013 OK CR 18, 313 P.3d 274 (2013)
(We find that this due process guarantee is also applicable to mental health court termination proceedings. Therefore, a mental health court participant must be sufficiently apprised as to the evidence and the grounds upon which his or her participation in the mental health court is terminated. See Hogar, 1999 OK CR 35, 990 P.2d at 899 (applying this same rule to drug court termination proceedings).

Waiver of Hearing

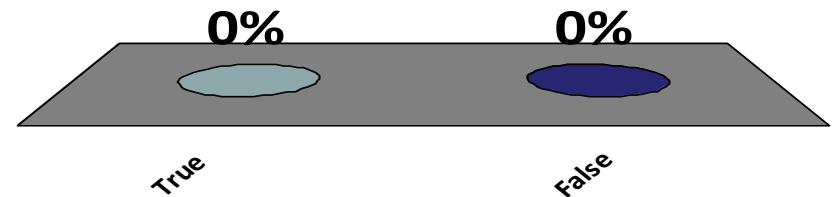
- ***State v. LaPlaca***, 27 A.3d 719 Supreme Court of New Hampshire, (N. H. 2011) (Even where program manual provided: “Any violation of the terms and conditions of the [Program] shall result in the imposition of sanctions, without hearing, by the court as deemed fair and appropriate, consistent with statutory authority and the descriptions as outlined in the [Program] policy manual. The defendant waives any right(s) to any and all hearings. Termination of participation in the [Program] shall result in the imposition of the suspended prison sentences and fines without hearing. The defendant shall affirmatively waive any and all rights to a hearing”, waiver pre-notice of allegations was not enforceable. Court relied upon *Staley v. State*, 851 So.2d 805 (Fla. Dist. Ct. App. 2003) Failure to provide the participant a pre termination hearing was a violation of due process in the context of removal from drug court and imposition of a suspended sentence.)
- ***Neal v. State***, 2016 Ark. 287 (Ark. Sup. Ct. 6/30/16) (Citing *Laplaca* and *Staley, infra* , Ark. Sup. Ct. holds: “[T]he right to minimum due process before a defendant can be expelled from a drug-court program is so fundamental that it cannot be waived by the defendant in advance of the allegations prompting the removal from the program.”)
- *People v. Dowd*, Cal: Court of Appeal, (4th Appellate Dist., 2nd Div. 2018) Not selected for publication (pre hearing waiver of probation revocation hearing upon entry into drug court did not violate due process if waiver was knowing, voluntary and intelligently given.)
- ***People v. Dowd***, (Calif. 4th Appellate Dist., 2nd Div. 2018) Not selected for publication (pre hearing waiver of probation revocation hearing upon entry into drug court did not violate due process if waiver was knowing, voluntary and intelligently given.)

Waiver of Right to Sue

- Hendrick v. KNOEBEL, (SD Indiana 5/10/2017)
("Though we need not rule on Defendants' argument concerning the waiver provision in the DTC Agreement, we note our serious doubts as to its enforceability under Indiana contract law, given the conspicuous lack of parity between the parties, the absence of specificity in the provision's language, the fact that it purports to absolve the DTC's employees of liability for intentionally tortious conduct, and the fact that the DTC Program is an entity of the local government performing a public service.

Q7: The Drug Court judge should not hear the termination hearing or probation revocation hearing.

- A. True
- B. False



Due Process & Judicial Impartiality

- Test:

U.S. v. Ayala, 289 F.3d 16, 27 (1st Cir. 2002) (would the facts, as asserted, lead an objective reasonable observer to question the judge's impartiality)

Recusal Issues

- Appearance of Partiality
- Personal Knowledge

- Canons Of Judicial Conduct
- Due Process

STATE v. DAILEY, 2006 ND 184, 721 N.W.2d 29 (August 24, 2006)

- In this case, the statements the district court judge made were facts the judge learned while presiding over the case. Dailey had four prior DUI convictions, he requested specific judges not preside over the case because of his past relationship with the judges, and he had failed drug court. It is in the nature of the judicial process for a judge to assess the defendant's conduct and form an opinion on the merits of the case. See *State v. Crescenzo*, [114 R.I. 242](#), [332 A.2d 421](#), [432](#) (1975).

Due Process & Judicial Impartiality

- a judge should recuse where the Court has personal knowledge of disputed facts.
- the basis of recusal is due to partiality or bias acquired outside the context of the proceedings – or from an “extrajudicial source”.
Liteky v. U.S., 510 U.S. 540, 555 (1994);
- Compare *U.S. v. Bailey*, 175 F.3d 966, 969 (11th Cir. 1999) (where judge received facts from judicial source, recusal not required) with *Edgar v. K.L.*, 93 F.3d 256, 259 (7th Cir. 1996) (judge who received off the record briefings had extra judicial personal knowledge of facts).

Code of Judicial Conduct

3. E. Remittal of Disqualification.

- A judge disqualified by the terms of Section 3D may disclose on the record the basis of the judge's disqualification, and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification **other than personal bias or prejudice concerning a party**, the parties and lawyers, Without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceedings. The agreement shall be incorporated in the record of the proceeding.

Ethics Opinions

Tennessee Advisory Opinion 11-01

- Question: Does the Code of Judicial Conduct permit a judge, who is a member of a drug court team, to preside over the revocation/sentencing hearing of a defendant who is in the drug court program?

Yes, unless the judge has personal knowledge of the facts giving rise to the revocation

Kentucky 10/10/11 JE_122

- Recusal issues where a Drug Court or Mental Health Court judge presides in a revocation hearing based on defendant's violation of terms of participation in drug or mental health program.

Yes, a judge may handle the revocation, unless the judge has personal knowledge of the facts giving rise to the revocation

• Canons of Judicial Conduct

3C and 3E—Recusal for Appearance of Partiality & Remittal of Recusal

Alexander v. State, 48 P. 3d 110 (Okla. 2002)

- Requiring the District Court to act as Drug Court team member, evaluator, monitor and final adjudicator in a termination proceeding could compromise the impartiality of a district court judge assigned the responsibility of administering a Drug Court participant's program.
- Therefore, in the future, if an application to terminate a Drug Court participant is filed, and the defendant objects to the Drug Court team judge hearing the matter by filing a Motion to Recuse, the defendant's application for recusal should be granted

New Issue

- Minnesota v. Cleary, 882 N.W.2d 899 (Court of Appeals of Minnesota July 5, 2016.) (When the sole basis for revoking probation is a probationer's termination from drug court and the drug court judge participated in the drug court team's decision to terminate the probationer from drug court, a probationer is entitled to have a judge other than the drug court judge preside over the probation revocation hearing, because of the appearance of lack of impartiality)

What is the trend on recusal?

Recusal Not Required

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

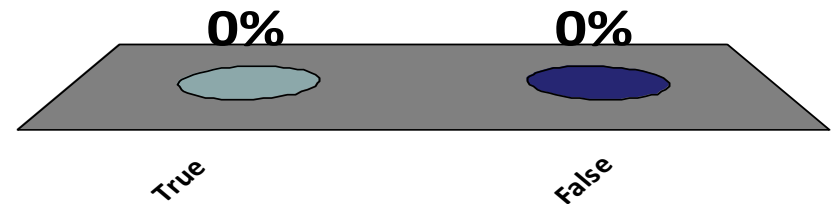
Recusal Required

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

Q 8: Infractions involving jail as a potential sanction require a hearing, when factual basis denied.

A. True

B. False



Key Component #2

- Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights.

THORNE v. HALE

(E.D. Va. 3-26-2009)

- Thorne claims that, during the "sanctions" hearings that followed his failure to adhere to the drug court's rules, the allegations against him, the testimony of witnesses, and the presentation of evidence violated his Sixth Amendment rights. *Id.* at ¶ 57. Testimony, he asserts, was "made in secrete [sic] between the Drug Court and RACSB administrators, {Defendants Kelly Hale, Judith Alston and Sharon Gillian}," the RACSB, the Commonwealth's Attorney, and the state court judge, "to include whispered testimony to the presiding Judge at the bench, so as to exclude Plaintiff . . . from all measures of defense and redress commensurate with Due and Compulsory Process of Law."

NICELY v. COMMONWEALTH, 2007-

CA-002109-MR (Ky. App. 4-24-2009)

- **Under these circumstances, if a *sentencing court chooses to find a defendant in contempt for violating conditions of probation as opposed to revoking or modifying the conditions of probation, the defendant must be afforded certain due process rights, including a hearing.* Pace, supra at 395.** There is no evidence from the record presented to us that any hearings were held or that the trial court made a finding of contempt at any time during the course of Nicely's probation. To the contrary, each time Nicely was incarcerated, the court order clearly recited violations of the terms and conditions of the Drug Court Program. If the record were silent, we would remand this matter back to the trial court for an appropriate evidentiary hearing consistent with the holding in *Cooke, supra*. But, since the court previously found that Nicely violated the conditions of Drug Court, we believe the trial court abused its discretion when, *nunc pro tunc*, it found him in contempt as well.

STATE v. STEWART, (Tenn. Crim. App. 8-18-2010) (NSOP)

- Leaving aside (as we must) the obvious due process concerns attendant to any additional deprivation of the defendant's liberty that has been imposed through a collaborative, non-adversarial, and at times *ex parte* process rather than through a traditional adversarial evidentiary hearing, there is considerable tension between this outcome and the general guidelines under which drug courts should operate. The drug court program explicitly recognizes that alcohol and drug addiction "is a chronic, relapsing condition," that "many participants [will] exhibit a pattern of positive urine tests," and expressly contemplates that many participants will experience periods of relapse "[e]ven after a period of sustained abstinence."

Mississippi Commission on Judicial Performance v.
Thompson, _____Miss. ____, (Miss Supreme Court
5/21/2015)

(Judge Thompson's conduct of depriving participants in drug court of their due-process rights when he signed orders of contempt without the persons being properly notified of the charge of contempt or a right to a hearing, and by conducting "hearings" immediately after "staffing meetings" without adequate time for the persons to have proper counsel or evidence presented, violated Canons 1, 2A, 3B(1), 3B(2), 3B(4), 3B(8), and constitutes willful misconduct in office and conduct prejudicial to the administration of justice. Result: Judge removed from office)

Brookman v. State, 158 A.3d 1099 (2017) cert.
provisionally granted 168 A.3d 69 (2017)

Sanctions and Hearings

Brookman—dilute

creatinine was 18.9

Carnes-Missed Test

truck broke down- call-not posted

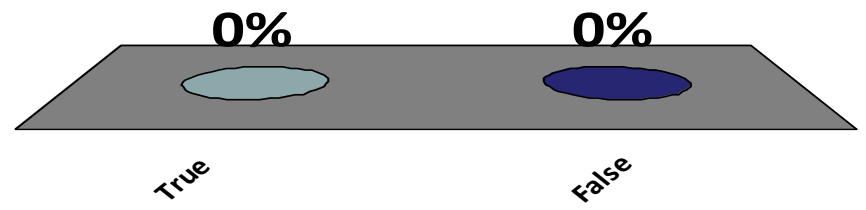
tested 1:30 am upon learning

9 pm---blood and urine

9. Our Court sometimes places a drug court participant in jail awaiting a bed, because we are afraid if left on the street (s)he will overdose?

A.True

B.False



What about incarcerating participants
while awaiting a treatment bed?

County of Riverside v. McLaughlin, 500 U.S. 44, 52, 111 S. Ct. 1661, 114 L.Ed.2d 49 (1991).

- In [Gerstein v. Pugh, 420 U. S. 103 \(1975\)](#), this Court held that the Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest.
- Taking into account the competing interests articulated in *Gerstein*, we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*.

Arrest on Original Charge vs Probation Revocation

- Although strict 48 hr. rule in Riverside may not apply to arrest for probation violation, due process and state statute/rule generally require **prompt** probable cause determination to continue to detain the individual. Gagnon v. Scarpelli, 411 U.S. 778, (1973); Morrissey v. Brewer, 408 U.S. 471 (1972) See also: Warner, C. “The Waiting Game: How States Deny Probationers Their Constitutional Right to a Preliminary Hearing”, 8 Crim. Law Brief 13 (2012-2013); Fowler v. Cross, 635 F. 2d 476, (5th Circuit 1981) (denying qualified immunity and finding civil liability for denial of prompt preliminary hearing in probation revocation)

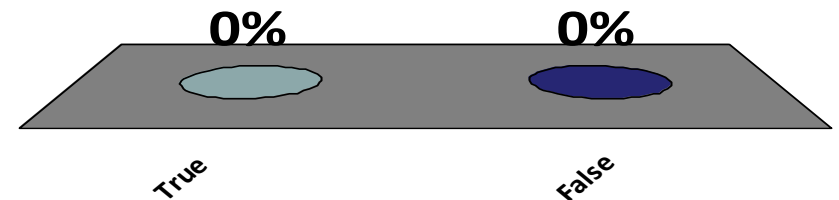
Timeliness of Termination/Sanction Hearing

- Hoffman v. Jacobi (S.D. Ind., 9/29/2015)

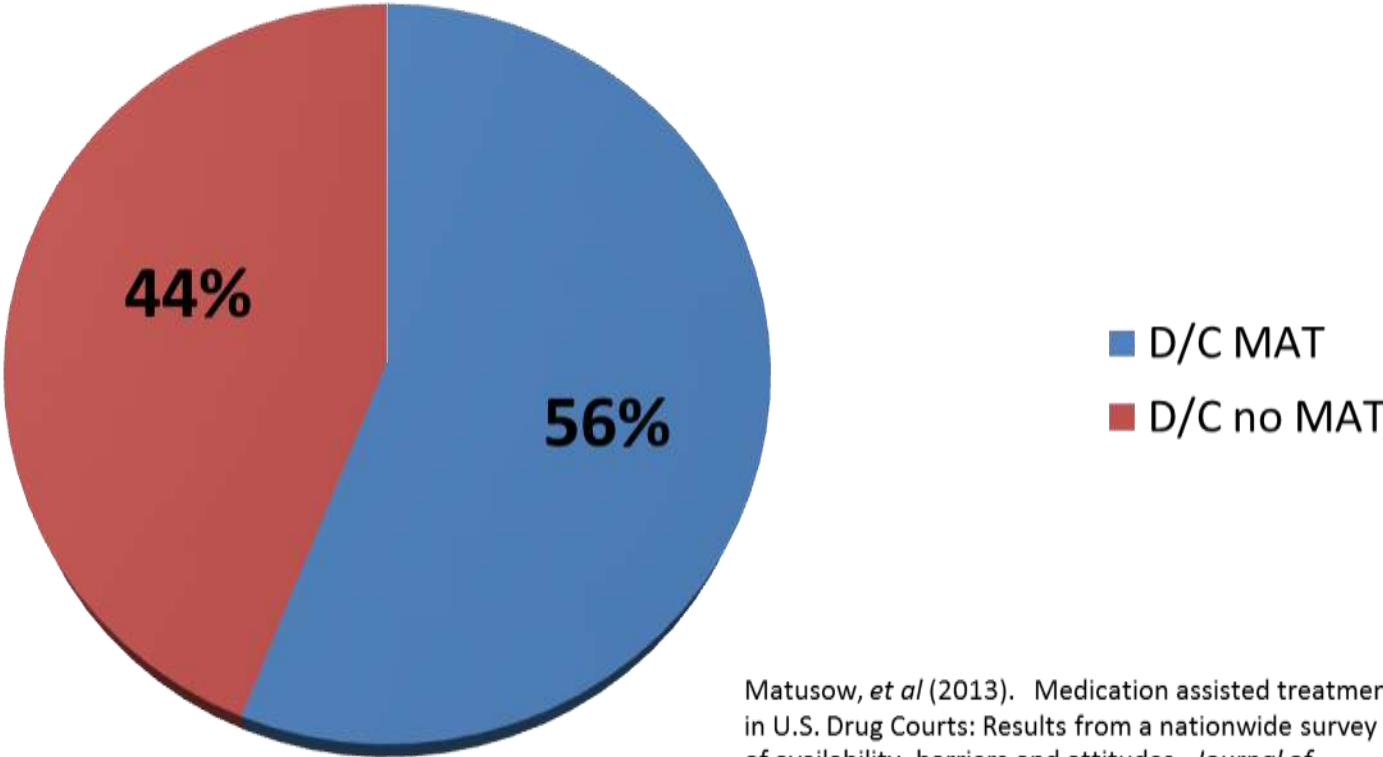
(Magistrate Judge recommends class certification on 42 USC §1983 damages and injunctive relief suit against Drug Court Judge and team for incarcerating participants for lengthy periods of time, while awaiting placement in drug treatment facilities. Plaintiffs allege that the decision to hold them in jail pending placement was made without counsel, hearing, consideration of bond, or other rights of due process)

Q 10: A problem solving court can prohibit MAT, such as methadone, because it substitutes one addiction for another?

- A. True
- B. False

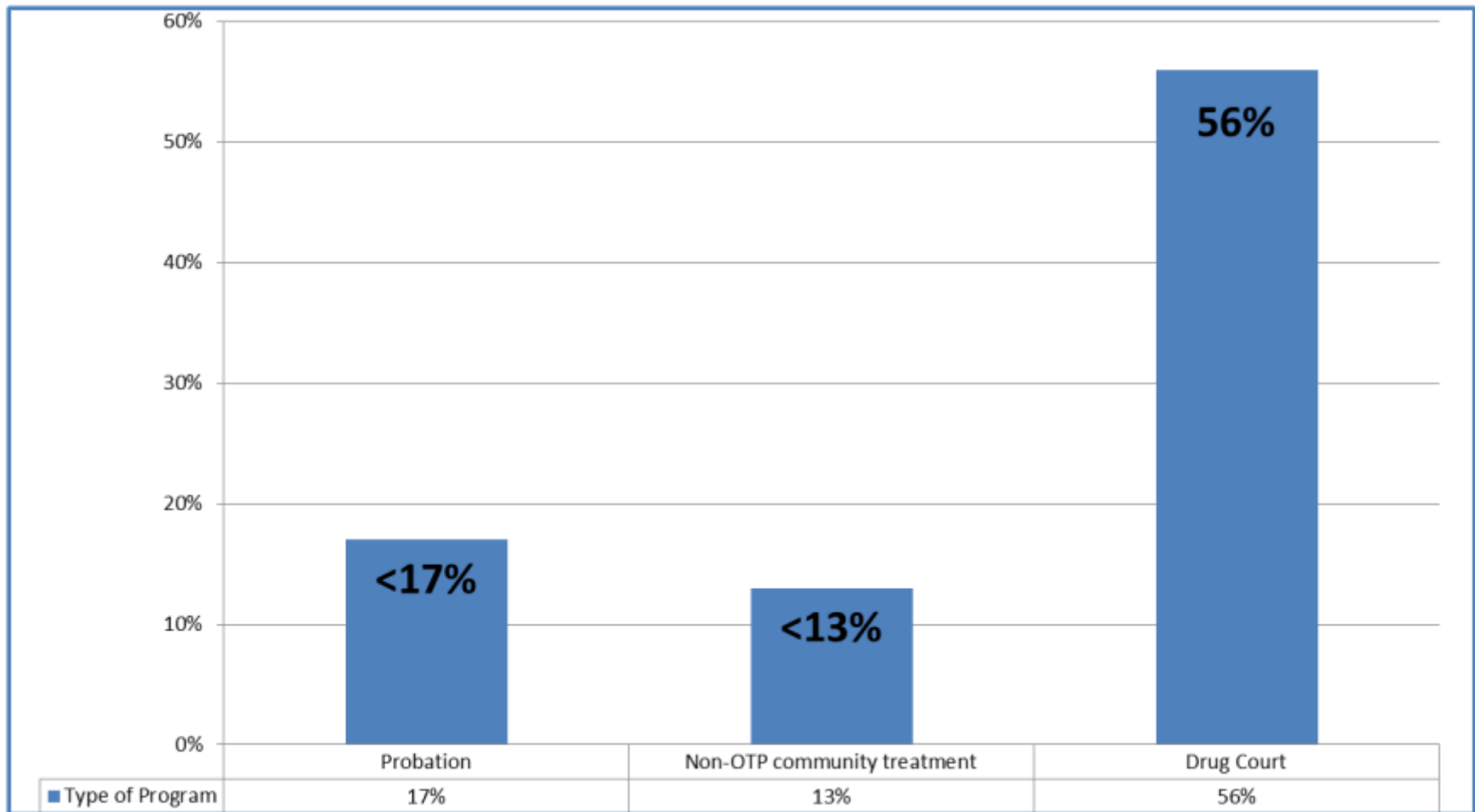


Prevalence of MAT Use in Drug Courts



Matusow, *et al* (2013). Medication assisted treatment in U.S. Drug Courts: Results from a nationwide survey of availability, barriers and attitudes. *Journal of Substance Abuse Treatment*, 44, 473-480.

Drug Court Use of MAT Compared with Other Criminal Justice Interventions



The Bottom Line

- **Under no circumstances** may a drug court judge, other judicial official, correctional supervision officer, or any other staff connected to the identified drug court deny the use of these medications when made available to the client under the care of a properly authorized physician and pursuant to regulations within an Opioid Treatment Program or through a valid prescription.

What about mandating cessation as a condition of Drug Court graduation?

- **In all cases**, MAT must be permitted to be continued for as long as the prescriber determines that the medication is clinically beneficial. Grantees must assure that a drug court client will not be compelled to no longer use MAT as part of the conditions of the drug court, if such a mandate is inconsistent with a licensed prescriber's recommendation or valid prescription.

Challenging Blanket MAT Prohibitions

- Americans with Disabilities Act (ADA)
Prohibits discrimination by state and local governments
- Rehabilitation Act of 1973 (RA)
Prohibits discrimination by federally operated or assisted programs
Discovery House, Inc. v. Consol. City of Indianapolis, 319 F.3d 277, 279 (7th Cir. 2003) ("the ADA and the [Rehabilitation Act] . . . run along the same path and can be treated in the same way").
- Due Process protections of 14th Amendment
Categorical sentencing
Rational Basis vs Fundamental Right/Strict Scrutiny
- 8th Amendment-cruel and unusual punishment

Best Practices

- Provide a secular alternative to AA and written consent
- Place and Area restrictions rationally related to rehabilitation
- Written, knowing 4th Amend. waiver
- Provide DP protections at termination hearing
- If participant denies factual basis and jail possible sanction, provide DP protections at Sanctions hearing,
- Provide equal access to drug court participation to all
- Consider whether Defendant can recuse Judge for revocation, or written waiver
- Insure participant knows what (s)he getting into (Boykin advisement)—no access to staffing
- Do not use preventive detention
- Use MAT, when clinically indicated and appropriately prescribed

Resources

- **Chapters in Judicial Manual (2011) on Ethics, Confidentiality & Legal Issues**
- **LEGAL ACTION CENTER, “Confidentiality and Communication”, (LAC 2012)**
- **NDCI, “Ethical Considerations for Judges and Attorneys in Drug Court” (May 2001)**
- **NDCI, “Federal Confidentiality Laws and How They Affect Drug Court Practitioners” (2001)**
- **NDCI, “Critical Issues for Defense Attorneys in Drug Court” (2003)**
- **GAINS CENTER, “Dispelling the Myths...” Feb. 2007**
- **NDCI**

<http://www.ndci.org/law>

- The end