

Practicing Law in Problem-Solving Courts *...is no easy matter!*

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What issues do you see?

- Are they unique to these Courts?
- What solutions have you found?

Quick survey:

- Less than one year in drug court
 - One to three years
 - Over three
 - How long?
-
- When did you truly “get it”?

Why are you assigned to these courts?

- Volunteer?
- “sentenced” ? ;-)
- Training rotation ?
- Attorney du jour ?
- Trickle down? ;-)

These are national issues!

- Legally speaking, drug courts are fairly new
- The law is still emerging.
- The model has sometimes been misapplied! “program” not “court” - wrong!

What if you are a “trial lawyer”?

- Is this a career buster?
- How do trial lawyers get promoted?
- Does it enhance your career?
 - How
 - How not

The role of an attorney

- Protect due process
- Protect the Constitution(s)
- Practice law.
- Be part of a team, without blowing your ethical and legal mandates.

What's in it for the DA???

- Is it a career killer?
- Do you get promoted from a drug court assignment?
- Isn't this just another soft on crime "hug a thug" program?
- Is this why you became a prosecutor and litigator?

Prosecutors

- Due process protections remain paramount-drug tests too
- No additional penalty upon termination
- Confidentiality via 42 CFR and HIPAA
- Odd ball ethics stuff that is “only in drug court”.
- Cameo appearances at events

Defense Tough job!

- Ethics,
 - Attorney client privilege,
 - Advocacy, (in Court and in staffing)
 - Participant wants to lie to court
 - Participant DOES lie to court and you know it.
 - Participant lies to Court after you asked a clarifying question.
- Team resentments over things you cannot say

- High maintenance clients
- Counselor at law vs attorney at law
- Short term goals vs. long term goals
- Internal professional conflicts-
 - "not a real PD"
 - "sell-out"
 - Light caseload only continuances to manage

What's in it for the defense??

- What about the idea that you're selling your clients down the river?
- What about the idea that this is too tough?
- What about the idea that folks would do less time on a terminal sentence?
- What about the idea that you're not REALLY practicing law?

Sometimes we get relaxed or too casual in drug courts

- “Team” is great, BUT, the law remains.
 - Evidentiary rules apply (rest of team may not see the issue)
 - Due process applies (rest of team may not understand)
 - Ethical rules apply (and others don’t understand them)

Partial list of what comes up:

- Multiple hearsay in staffing or emails getting to the Court officer without filtering
- Ex Parte conversations, supra
- Drug testing without sufficient evidentiary basis of admissibility
- Waivers of rights on violations or terminations. No contract analysis!
- Others you have seen?

Monitoring the law

- Changes in technology-electronic privacy statutes and waivers
- Litigation over termination rights
- Concerns over judicial recusal, or not.
- Changes in complex sentencing statutes in some areas.

www.ndcrc.org

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Home Training & Technical Assistance Library FAQs Calendar Law Blog

Law

Practical Application Guide:
Moral Reconciliation Therapy
By: Kenneth Robinson, EdD

Publications

- Order Publications
- Painting the Courtroom
- Drug Court Resources
- Monograph Series
- Fact Sheets
- More Publications

National Drug Court Resource Center
Your virtual source for everything Drug Court

NDCI
NATIONAL DRUG COURT INSTITUTE
NDCI is a professional services branch of the NADCP

Home Training & Technical Assistance Library FAQs Calendar Law Blog

Constitutional and Other Legal Issues in Drug Court

Constitutional and Other Legal Issues in Drug Court:
a bibliography
Updated 12/5/15
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I. Cases holding that mandating individual to Alcoholics Anonymous/Narcotics Anonymous (AA/NA) is a violation of the First Amendment

Jackson v. Nixon, 747 F. 3d 537 (8th Cir. 2014) (Concluding that based on the allegations in the complaint, Randall Jackson has pled facts sufficient to state a claim that a parole stipulation requiring him to attend and complete a substance abuse program with religious content in order to be eligible for early parole violates the Establishment Clause of the First Amendment.)
https://scholar.google.com/scholar_case?case=4167135450736042917&q=747+F.+3d+537+&hl=en&as_sdt=4006

Hazle v. Crofoot, 727 F.3d 983 (9th Cir. 2013) (noting with approval the granting of summary judgment for plaintiff on his claim that forcing him into a 12 step religious based treatment program, when he was an atheist, was a violation of the First Amendment and granting a new trial on Plaintiffs' request for compensatory damages. Instead of a retrial, the matter was reportedly settled with the state paying \$1M and the treatment agency \$925K, see <http://www.sacbee.com/news/local/crime/article2768782.html>)

http://scholar.google.com/scholar_case?case=11927802176043308693&q=+Hazle+v.+Crofoot&hl=en&as_sdt=4006

Hazle v. Crofoot, 2:08-cv-02295-GEB-KJM (E. D. Calif. 4-6-2010) (granting summary judgment for plaintiff on his claim that forcing him into a 12 step religious based treatment program, when he was an atheist, was a violation of the First Amendment)
<http://lifering.org/2010/05/another-first-amendment-case-hazle-v-crofoot-2010/>

Norton v. Kootenai County, CV09-58-N-EJL (D. Idaho 9-11-2009) (where claimant originally asked to go to facility that used AA, and never notified his probation officer of his religious objection to going to AA meetings, no First Amendment violation) http://scholar.google.com/scholar_case?case=18349691828430296020&q=norton+v.+Kootenai&hl=en&as_sdt=2,6

Thorne v. Hale, No. 1:08cv601 (JCC), 2009 WL 980136 (E.D. Va. 2009)
http://scholar.google.com/scholar_case?case=9882479498204455501&q=Thorne+v.+Hale&hl=en&as_sdt=2,6 (holding that a valid § 1983 civil rights claim was presented in the complaint, where the complaint stated that Hale and Killian were to some extent responsible for implementing the treatment regimen which included mandatory participation in AA/NA); Compl. at 15, Thorne v. Hale, No. 1:08cv601 (JCC), 2009 WL 980136 (E.D. Va. Mar. 26, 2009) (claiming that Killian "was responsible for all recommendations to Drug Court for treatment and clinical matters," including "substance abuse issues."); *id.* at 76 (claiming that Thorne was "subjected to the State religions of AA and NA by . . . [the] directors" of the Drug Court and the RACSB); *id.* at 89 (alleging due process deprivations by the "Directors" of the RACSB and the Drug Court). Members of the drug court ultimately prevailed in the *Thorne v. Hale* litigation, when the trial court granted summary judgment on the basis of absolute judicial immunity and dismissed the case. *Id.* The Fourth Circuit affirmed the granting of the summary

Other resources:

- American University
- NDCI Judicial Bench Book
- Publications specific to Defense work in drug courts via NDCI.
- Your peers across the USA via NDCI

The rules seem simple:

- But often they change preconceived notions of what we should be doing
 - To protect the public.
 - To advocate for clients.
 - Does that mean we don't fight and disagree?
HECK NO! *But it does mean that we fight in a different place and time.*

So what is the role of counsel in a problem solving court?

- Advocate...for what?
- Protect due process?
- Focus on outcomes that benefit the community and improve the program?

In each case, consider:

- What can attorneys do to implement or improve the performance of the drug court
 - As a DA?
 - As a defense counsel?

Why would we do something different than we always have?

- Do you think what traditional responses to addiction based offenses work as well as you hoped they would?
- Do you think the public is pleased with the standard criminal justice outcomes?
- Are you pleased with outcomes?
 - What could be better?

We start with a group exercise:

- I'm going to show you an email
- Take 5 minutes
 - Tell me what is “wrong” with this email from your discipline view.
 - Tell me what is right with this email from your discipline view.

- **From:** , **Public Defender**
- **Sent:** Tue 9/4/2007 9:13 AM
- **To:** Olson, Sheila; Grubbs, Jamie; Harberts, Helen; Nelson, Cyla
- **Cc:** Benson, Steve
- **Subject:** Mr. Client who is a gang involved meth addict

- He just called me crying.... He used meth last night. He is asking for help. He wants/needs residential treatment.
- I told him to call Shiela and Jamie.
- This 22 year old young man has had a horrible life filled with abuse and prison. If we can't respond to his request for help now the chances are pretty good the rest of his life will be spent in and out of state prison.
- He has already been to one of the tougher prisons in the state.... For him to call me, crying, and asking for help is rather remarkable.
- I hope BH can and will get him into a residential program immediately.
- He is set for review on 9/5.

What issues do you see?

- Defense?
- Prosecution?

FYI: Same young man...

- Also called me and left a similar message on my phone a month later.
- (Ethics alert!)

Comments?

- Does that reflect your experience?
- Prosecutors: what happens after you get the conviction? Do you care? Should you care?
- Defense: what happens after you win a VOP, etc.? How can you support accountability and good outcomes?

“Only in Drug Court” stuff...

- Major ethical challenges...
- Major reversal of roles
- Clients crying because....

This requires...understanding:

- the law
- the HOLES in the law
- the model
- the disease.
- What works
- How to help treatment
- what can undo good work
- sanctions and incentives to shape behavior
- How to help supervision

What is the goal?

- What are the proximal goals?
- What are the distal goals?
- What is the big goal?
- What do you have to know/understand to get there?

How do you balance science and the law?

- Incentives work better than sanctions-but sanctions make the incentives work...huh?
 - How does the DA help with this concept?
 - How does the Defense help?
 - What can goof it up? Excessive lawyering?
- Immediacy and reliable detection are critical?
 - How can lawyers goof this up?

PUNISHMENT!!!

- Actually, no-it is not the *severity* but the *certainty* of getting caught, and sanctioned that is most important for behavior modification.
- 24-48 hours is often more significant than a longer sentence. Why?

What about the simple facts of addiction?

- Addiction is a disease of the brain
- Memory problems
- Depression, poor decision making
- Collateral illness
- Slower recovery times for some drugs
- Poor life skills and associates
- The length of time for treatment to work.

So, when folks are just beginning..

- What are the proximal goals? What is reasonable to expect?
- What are the distal goals? When is it reasonable to expect behavior that is heading toward distal goals?
- How can lawyers help with these things?

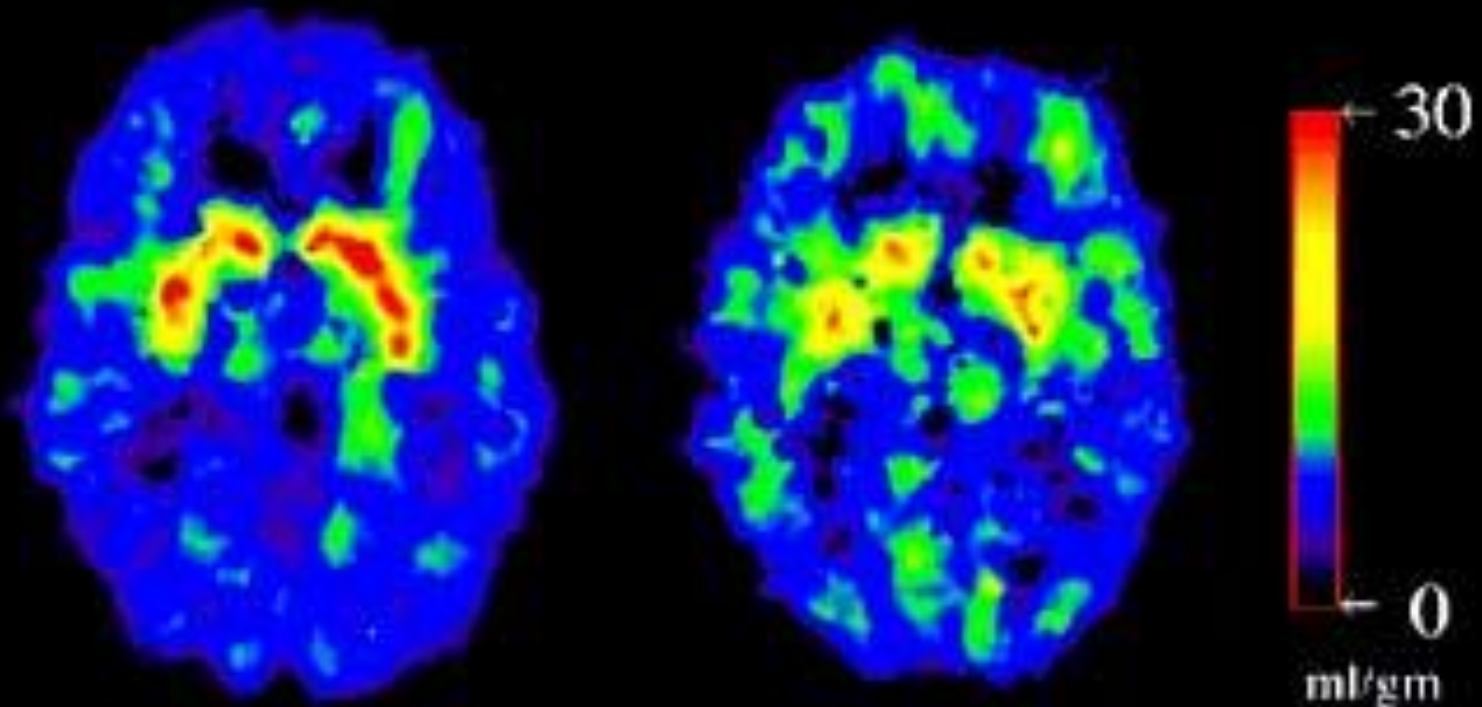
What can attorneys do?

- Lots!
 - We can improve outcomes , or kill them

How?

- Placebo
- Motivational interviewing
- Engagement
- Smoothing out legal delays
- Expediting responses to behavior
- Presenting a unified front against the disease.
- Or, do lawyering excessively and kill it.

- Understanding addiction and the psychopharmacology of drugs. Addiction is truly a disease of the brain. It is treatable.



Control Subject

METH Abuser

So how much sense does “three strikes” make?

- What does the research show us about the brain and recovery?
- How can we motivate the necessary change, and maximize outcomes while protecting the public safety?
- Do not discharge folks too quickly. Be patient. Think “stroke patient”.

Reality Check

- Counsel can be a great boon to drug courts
- Counsel can be a great impediment
- Our role is NOT limited to the strict application of due process. Our role is to protect the Constitution and maximize outcomes.
- A Pyrrhic Victory is no victory.
- Applying this model to lightweights is no benefit to the public.

Attorney roles:

1. Protect the constitution
 2. Maximize outcomes
- Facilitate the treatment team and the plan when it meets #1 and #2
 - Only counsel can find the legal way to get treatment and probation's goals implemented.

Fundamental Question remains the same.....

- Why do you have a problem solving court?
- What problems can you solve to make it more effective?
- What are your barriers?

As counsel in the Court, you have tremendous power. Use it wisely and maximize outcomes.

Who wins when we fight?

The disease

ABA Model Rules: 3.3: Candor toward the Tribunal

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

ABA Model Rules: 3.3: Candor toward the Tribunal

- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.