

# **Ethical Considerations for Judges and Attorneys in Drug Court**

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## Ethical Considerations for Judges and Attorneys in Drug Court

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## INTRODUCTION

Drug courts reshape the professional roles of judges and lawyers working in them. Judges, used to working in relative solitude, become part of a collaborative decision-making team that includes treatment providers, court personnel, and attorneys. Prosecutors and defense counsel learn to coordinate their efforts to achieve a participant's recovery from alcohol or drug addiction, muting their traditional adversarial relationship. In the courtroom, the typical lawyer-dominated hearing gives way to conversations between judge and defendant. These and other changes in the professional roles of lawyers and judges are crucial to the drug court model but raise serious ethical questions. Can one be a good lawyer or judge in the drug court context? This publication seeks to answer that question through a commentary on selected provisions of three American Bar Association (ABA) ethical codes – the Model Code of Judicial Conduct, the Model Rules of Professional Conduct, and the ABA Standards for Criminal Justice. This study concludes that practitioners in drug court need heightened ethical sensitivity in both the design of particular drug court programs and in daily practice, but the proper exercise of the roles of judge or lawyer in drug court need not conflict with the professionals' ethical obligations. Indeed, drug court practice has the potential to fulfill the highest aspirations of judicial and legal ethics.

### JUDGES

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**Overview**

**Socrates observed:**

**Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly and to decide impartially.<sup>1</sup>**

In all judicial proceedings, the judge bears the ultimate responsibility for ensuring that the parties receive a fair hearing in a dignified forum. Although certain aspects of his or her role may change, the drug court judge's ultimate responsibility is no different. Given the unique nature of drug court practice – and the political visibility of many drug courts – this responsibility may be even greater for the drug court judge. Focusing on selected provisions of the American Bar Association's (ABA) Model Code of Judicial Conduct, this section highlights potential ethical problems for drug court judges, and offers suggested resolutions. Because some jurisdictions have not adopted the Model Code, or have deviated in

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<sup>1</sup> Quoted in Wright, *Courtroom Decorum and the Trial Process*, 51 JUDICATURE 378, 382 (1968).

If the drug court judge is a candidate for judicial election and the judge's opponent in the election has made criticisms, the judge may respond to the criticisms as provided under Section 5A(3)(d) & (e). The most difficult question in this respect is balancing the judge's appropriate defense of his or her past record with the prohibition under Section 5A(3)(d)(ii) on statements that commit, or appear to commit, the judge to future decisions. At minimum, the judge may both explain and defend the drug court model in general terms.<sup>39</sup> The judge may not state an intention to decide future cases in a particular manner (e.g., "I will enroll all first-time drug offenders in treatment") unless the statement simply reflects an intention to follow established law. In states where the judge is permitted to discuss past cases, the drug court judge should take particular care to ensure that confidential information about drug court participants is not disclosed. In no case should a judge comment on a case pending before him or her.

## LAWYERS

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### Overview

From the perspective of an ordinary courtroom observer, legal practice in drug court differs dramatically from ordinary criminal representation. Instead of taking center stage, prosecutors and defense counsel watch from the wings, spectators to the conversation between participants and the drug court judge. The proceedings have an air of relative informality, both in the conversation between judge and participant and in the relationships among lawyers and other professional staff. The drug court literature celebrates this shift in lawyers' roles and attitudes, proclaiming a "nonadversarial approach" to the proceeding as a "key component" of drug courts. "To facilitate an individual's progress in treatment, the prosecutor and defense counsel must shed their traditional adversarial courtroom relationship and work together as a team. Once a defendant is accepted into the drug court program, the team's focus is on the participant's recovery and law-abiding behavior – not on the merits of the pending case."<sup>40</sup> The authors' review of ethical considerations for lawyers who practice in drug court asks whether this shift in lawyers' roles conflicts with the fundamental requirements of legal ethics, as reflected in the American Bar Association's Model Rules of Professional Conduct and further explicated in the ABA Standards for Criminal Justice.

The image of drug court lawyers as members of a team attracts supporters and incites critics of drug court, who see in this image a marked departure from

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<sup>39</sup> See Ala Judicial Inquiry Comm'n, Advisory Op. 80-86; Shaman, Lubet & Alfini, § 11.09 (discussing statements related to a judge's conduct in office).

<sup>40</sup> *The Key Components*, Key Component #2.

traditional principles of ethical representation.<sup>41</sup> The team member idea is interpreted as a kind of shared practice (critics often mistakenly interpret them as interchangeable roles) in which defense counsel regularly endorse sanctions and prosecutors reach out to participants as therapists. This image contrasts with an equally caricatured vision of traditional “zealous” adversarial practice as total war, in which nothing is spared to achieve victory for the client. These caricatures distort both normal understandings of ethical lawyering and normal legal practice in drug court. First, zealous advocacy does not require hostility or antagonism. As the Restatement provides: “The term [zealous representation] . . . should not be misunderstood to suggest that lawyers are legally required to function with a certain emotion or style of litigating, negotiating, or counseling. For legal purposes, the term encompasses the duties of competence and diligence.”<sup>42</sup>

Second, the “team player” image does not reflect interchangeable roles, though it does represent an important change in perspective for both prosecutors and defense counsel. Instead of starting with an assumption of conflict, prosecutors and defense counsel within drug court begin their work by expecting cooperation in achieving a shared goal: reducing or preventing the defendant’s further engagement with the criminal justice system by addressing the defendant’s addiction to alcohol or other drugs (AOD). This shared goal gives rise to the team concept, but prosecutors and defense counsel maintain distinct roles within the team. The prosecuting attorney “protect[s] the public’s safety by ensuring that each candidate is eligible and appropriate for the program and complies with all drug court requirements.”<sup>43</sup> Within the drug court team, the prosecutor has primary responsibility for representing the community’s concerns. These concerns certainly focus on public safety and shared obedience to law but also extend to the defendant’s recovery and successful reintegration into the community. The defense counsel “protect[s] the participant’s due process rights while encouraging full participation.”<sup>44</sup> Defense counsel’s two duties reflect the normal, bi-directional nature of legal representation. With a participant in drug court, defense counsel explains the court’s processes, prepares the participant for appearances, and helps the participant to conform his or her behavior to the obligations undertaken on entering drug court. Within the drug court team, defense counsel ensures that the client’s perspective is heard and respected, the client’s rights are protected, and the court’s procedures are followed. The distinctive roles of

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<sup>41</sup> See, e.g., Richard C. Boldt, *Rehabilitative Punishment and the Drug Court Movement*, 76 Wash. U. Law Qrtly 1205 (1998) (criticizing ethics of drug court practice).

<sup>42</sup> Restatement (Third) The Law Governing Lawyers § 16 comment d.

<sup>43</sup> *The Key Components*, Key Component #2.

<sup>44</sup> *Id.*

prosecutor and defense counsel respect traditional principles of ethical representation, even as their justified expectation of a shared goal in drug court allows both sides to consider themselves part of the drug court team.

This text highlights provisions of the ABA's Model Rules of Professional Conduct and Standards for Criminal Justice that have special relevance for lawyers practicing in drug court. Although most provisions of the Model Rules have been widely adopted, practitioners should consult the applicable rules of ethics in their own jurisdiction, and opinions of their jurisdiction's bar, for further guidance. In the commentary following each rule, the authors identify ethical issues that may arise in the drug court context and offer suggestions on how those issues should be resolved. The approach follows that recommended in the Preamble to the Model Rules: "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself."<sup>45</sup>

### **Rule 1.1: Competence**

**A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.**

*Relevant provisions from the ABA Standards for Criminal Justice*

#### Prosecutors

##### Standard 3-2.3: Assuring High Standards of Professional Skills

(a) The function of public prosecution requires highly developed professional skills. This objective can best be achieved by promoting continuity of service and broad experience in all phases of the prosecution function.

##### Standard 3-2.5: Prosecutor's Handbook; Policy Guidelines and Procedures

(a) Each prosecutor's office should develop a statement of (i) general policies to guide the exercise of prosecutorial discretion and (ii) procedures of the office. The objectives of these policies as to discretion and procedures should be to achieve a fair, efficient, and effective enforcement of the criminal law.

##### Standard 3-2.6: Training Programs

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<sup>45</sup> American Bar Association's Model Rules of Professional Conduct, 2000 Edition, Preamble.

Training programs should be established within the prosecutor's office for new personnel and for continuing education of the staff. Continuing education programs should be substantially expanded and public funds should be provided to enable prosecutors to attend such programs.

#### Standard 3-2.7: Relations With Police

(a) The prosecutor should provide legal advice to the police concerning police functions and duties in criminal matters.

(b) The prosecutor should cooperate with police in providing the services of the prosecutor's staff to aid in training police in the performance of their function in accordance with law.

#### Standard 3-3.8: Discretion as to Noncriminal Disposition

(b) Prosecutors should be familiar with the resources of social agencies which can assist in the evaluation of cases for diversion from the criminal process.

### Defense counsel

#### Standard 4-6.1: Duty to Explore Disposition Without Trial

(a) Whenever the law, nature, and circumstances of the case permit, defense counsel should explore the possibility of an early diversion of the case from the criminal process through the use of other community agencies.

#### Standard 4-8.1: Sentencing

(a) Defense counsel should, at the earliest possible time, be or become familiar with all of the sentencing alternatives available to the court and with community and other facilities which may be of assistance in a plan for meeting the accused's needs. Defense counsel's preparation should also include familiarization with the court's practices in exercising sentencing discretion, the practical consequences of different sentences, and the normal pattern of sentences for the offense involved, including any guidelines applicable at either the sentencing or parole stages. The consequences of the various dispositions available should be explained fully by defense counsel to the accused.

### *Commentary*

#### Drug court model and practice

In addition to the competence demanded of any attorney who would practice in criminal, juvenile or family court, attorneys who serve in drug courts

need to have a thorough understanding of both the drug court model in general and the particular practices of the court in which he or she serves. This is especially important for those who represent participants in drug court, because the attorney will be expected to counsel prospective participants on the risks and benefits of enrollment in drug court.

### Substance abuse and treatments

Effective legal practice in drug court requires interdisciplinary training. Lawyers should understand the nature of substance abuse and the available treatment options.<sup>46</sup> Education in substance abuse and its treatment not only offers lawyers technical competence to facilitate their interaction with treatment providers, but it also proves indispensable for the core roles lawyers serve in drug court. Defense counsel must understand substance abuse in order to appreciate the psychological pressures facing their clients, both in the decision to enter treatment and during the course of treatment.<sup>47</sup> Prosecutors, too, need adequate education in substance abuse and its treatment in order to make reasonable decisions about participants' continued enrollment in the program after relapse. Because drug courts remain open to innovations in treatment strategies, lawyers' competence requires continuing education.

Defense counsel should be familiar not only with the drug court procedures and general therapeutic strategies but also with the particular treatment providers and programs (when more than a single source provider is) available for drug court participants. By understanding differences between these programs, defense counsel can better help the court to monitor a treatment regime that is appropriate to each client.

### Institutional obligations

Beyond education of individual lawyers in drug court practices and substance abuse treatments, achieving competent representation in drug court depends on the engagement of prosecutors and defense counsel at an institutional level. First, the offices of the prosecutor and public defender (along with the private defense bar, where possible) should be involved in the formulation of the drug court. Active involvement at the developmental stage will make it more likely that legitimate concerns of prosecutors and defense counsel can be addressed in the drug court's basic design. Second, whenever possible, the offices of the

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<sup>46</sup> *The Key Components*, Key Component #9.

<sup>47</sup> Winick, *Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, 5 Psych. Pub. Pol and L. 1034, 1038-41 (1999).

prosecutor and public defender should help to insure competent representation by assigning experienced practitioners to drug court on a full-time basis. Significant prior criminal justice experience is important for both prosecuting and defense attorneys in drug court, who face the sensitive and sometimes complicated task of reconciling the participant's interests and the goal of achieving the participant's recovery. A full-time commitment is important because of the special training required for drug court practitioners and also because such commitment helps the attorneys to build effective relationships with other members of the drug court team.

For prosecutors whose offices participate in drug court programs, the office handbook should address the following subjects:

- 1) drug court eligibility requirements;
- 2) the schedule of sanctions and incentives, and the circumstances for their application;
- 3) requirements for graduation;
- 4) circumstances leading to termination from the drug court;
- 5) confidentiality; and
- 6) restrictions on the use by prosecutors of information obtained in drug court.

With regard to each of these topics, the handbook should delineate the drug court's rules, any memorandum of understanding the prosecutor's office has signed, and the office's internal policies. By including drug court policies and practices in the handbook, the prosecutor's office guides the exercise of discretion of those who serve in drug court and also helps to educate all prosecutors about drug court.

### Training of police

The potential for success of a drug court can be substantially enhanced with support from local law enforcement. In some jurisdictions, the police perform critical tasks including enforcement of drug court rules (such as area restrictions, under which participants are barred from drug trafficking venues); verifying addresses; and ensuring that participants are in drug-free environments. To obtain the necessary support, the drug court prosecutor should serve as a liaison between the court and the police department, help structure the activities of the police in support of the drug court, and participate in officer training. As liaison, the prosecutor's chief role is to help police understand and embrace the drug court model, in particular the less-adversarial nature of relations with drug court participants. The prosecutor can also help by recommending structural changes that will enable the police to better support drug court, such as giving priority to warrants relating to drug court participants.

Prosecutors make their greatest contribution to police/drug court relations by training the police for their drug court operations. In particular, prosecutors should instruct officers working with drug courts about confidentiality laws and any court rules governing the dissemination of information, to prevent unlawful disclosures. Prosecutors should instruct the police that they should not use drug court participants as informants for other investigations. (On this point, it may be useful for the drug court to issue an order barring the use of participants as informants; officers who violate this order would be subject to contempt sanctions.)

### **Rule 1.2: Scope of Representation**

**(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.**

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**(c) A lawyer may limit the objectives of the representation if the client consents after consultation.**

**(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.**

**(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.**

*Relevant provisions from the ABA Standards for Criminal Justice*

#### Defense counsel

##### Standard 4-3.1: Establishment of Relationship

(a) Defense counsel should seek to establish a relationship of trust and confidence with the accused and should discuss the objectives of the representation. . . .

##### Standard 4-3.7: Advice and Service on Anticipated Unlawful Conduct

(a) It is defense counsel's duty to advise a client to comply with the law, but counsel may advise concerning the meaning, scope, and validity of a law.

(b) Defense counsel should not counsel a client in or knowingly assist a client to engage in conduct which defense counsel knows to be illegal or fraudulent but defense counsel may discuss the legal consequences of any proposed course of conduct with a client.

#### Standard 4-5.2: Control and Direction of the Case

(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:

- (i) what pleas to enter;
- (ii) whether to accept a plea agreement;
- (iii) whether to waive jury trial;
- (iv) whether to testify in his or her own behalf; and
- (v) whether to appeal.

#### *Commentary*

##### Decision to enter drug court

In most drug court jurisdictions, defendants have the option of entering drug court or remaining in a typical criminal justice track;<sup>48</sup> defense counsel should ensure that the option of entering drug court is extended to all eligible defendants. Because of the demands placed on participants in drug court, defense counsel have a special obligation to provide eligible clients with an adequate basis for exercising their option of entering drug court. This obligation has two facets: first, as developed in the commentary to Rule 1.3, the lawyer must have a sufficient understanding of the factual basis of the charge to advise the defendant on entry into drug court; second, as developed in the commentary to Rule 1.4, the lawyer must enable the client to make a competent and informed choice about entering drug court.

Counsel should be acutely aware of the pressures bearing on a client's decision to enter drug court. The first is timing: the drug court model sees arrest as a moment of crisis that can spur the defendant into therapy and emphasizes quick entry of eligible defendants into the drug court program. However, this urgency

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<sup>48</sup> Some jurisdictions, however, have mandatory drug court treatment tracks. (See, e.g., the Denver (Colorado) Drug Court in which all drug-using offenders receive some type of drug treatment through a drug court system. For more information, contact the Denver Drug Court at 720-913-8274).