

# JUDICIAL ETHICS IN TREATMENT COURTS

*NADCP*

*July 15, 2019*

**Hon. Peggy Fulton Hora**

**Judge of the Superior Court of California (Ret.)**

# Central Principle of Being a Judge

- “The basic function of an independent, impartial and honorable judiciary is to maintain the utmost integrity in decision making.”

Hon. David Rothman (Ret.)

Los Angeles Superior Court

# Ethical Canons for Judges

“The wording of State codes of judicial ethics may appear to discourage or place little value on problem-solving and court and community collaboration.”

Rottman, David and Pam Casey, “Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts,”  
*National Institute of Justice Journal* (1999)

# Discussion Question

- What are the drug/DWI/vet court procedures and practices that most often raise ethical considerations for judges?

# Judicial Issues

- Remaining objective and impartial
- *Ex Parte* communications
- Ensuring confidentiality, privacy, & dignity
- Crafting appropriate incentives and sanctions
- Using evidence-based practices
- Demeanor

# Ethical Issues Arise From:

- Direct contact between the judge and participant
- The increased personal relationship of the judge to a drug court participant versus a “normal” criminal defendant
- The collaborative nature of drug courts (Key Component 6)
- The community advocacy role of the drug court judge (Key Component 10)

# *Ex parte* communication: Canon 2.9

# Canon 2

- Canon 2 of the American Bar Association (ABA) Model Code of Judicial Conduct requires a judge to “perform the duties of judicial office impartially, competently, and diligently.



# ABA Rule 2.9(5)

- **No *ex parte* communications except:**
- (5) A judge may initiate, permit, or consider any *ex parte* communication when expressly authorized by law to do so.

# Drug Court Exception

- Comment [4]

A judge may initiate, permit, or consider ex parte communications ...when serving on **therapeutic or problem-solving courts, mental health courts, or drug courts**. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.

# States with 2.9 Amendment

- AR
- AZ
- CO
- HI
- IA
- ID
- KS
- MD
- MI
- MO
- ND
- NE
- NV
- NH
- NM
- OH
- OK
- SD
- TN
- UT
- WA
- WI
- WY

# *Ex parte* staffing

- Permissible to have *ex parte* communications at staffing **with appropriate waivers** and outside of drug court
- Best practice to inform defense counsel of content and nature of communications
- NY has specific administrative orders permitting such communication

# Open staffing

- Issue: whether staffings should be open to the public/press
- *State v. Sykes* 182 Wn.2d 168; 339 P.3d 972; 2014 Wash. LEXIS 1146 (Dec. 14, 2014)
- Washington Supreme Court
- Staffings may be closed

# Open courtroom

- Courtroom can't be closed in Drug Court
- *Florida v. Noelle Bush*, Circuit Court (2002)

# Courtroom as classroom

- Additionally, and equally as important, drug court status hearings must be open to all participants so that all **participants can observe each other's successes and failures.**
- Every participant must be able to observe other participants' status hearings because the **hearings and the interaction with the drug court judge are an essential part of the treatment program.**
- The drug court participants who are observing, **gain encouragement by seeing that other participants** can become drug free and that the program works.
- The hearings also give the participants the **opportunity to see what sanctions may be imposed and thereby help them to avoid the same behavior. . . .**

# Participant is unsuccessful

Who should sentence? Hear the probation violation? Hear a new case?



# Ted withdrew from Drug Court

Should drug court judge be the one to sentence him?

- What to do with participant who dropped out? Hear case on regular docket? Recuse?
- Duty to hear all cases Canon 2.1
- Impartiality/bias or appearance Canon 2.2, 2.3
- Being engaged does not mean lack of impartiality

# Embroided?

- Do you know them too well?
- Are you working on their recover harder than they are?
- What information have you received *ex parte*?

# No Due Process violation

- Same DTC judge may preside over the case and hear probation violation hearing

Ford v. Kentucky, Ct. of Appeal, (April 30, 2010)

State (NH) v. Belyea (May 20, 2010)

Court of Appeals of Kentucky. Jerel Patrick HARPRING, Appellant v. COMMONWEALTH of Kentucky, Appellee. No. 2004-CA-000898-MR. Aug. 12, 2005

Ethics Committee of the Kentucky Judiciary Judicial Ethics Opinion JE-122 (Oct. 10, 2011)

- NV needn't recuse; must disclose

- **STATE v. BELYEA, 2009-038** (N.H. 5-20-2010) Defendant failed to show that a reasonable person would entertain significant concern about whether Judge Vaughan prejudged the facts or abandoned or compromised his impartiality in his judicial role on the drug court team. Also, **Court did not have extrajudicial facts.**
- **Mary E. FORD v. Kentucky, and William E. Flener, v. Kentucky (Ky. Appellate April 30, 2010)**

Having same judge preside over drug court and revocation hearing is not a denial of right to impartial hearing/due process

# But not in Tennessee

- Due process clause requires defendant's probation revocation to be adjudicated by a judge who has not previously reviewed the same or related subject matter as part of the drug court team.
- Decided on Constitutional grounds, not on ethical ones TN JUDICIAL ETHICS COMMITTEE ADVISORY OPINION NO. 11-01

Court of Criminal Appeals of Tennessee, at Jackson. State of Tennessee v. Brent R. Stewart. No.

- W2009-00980-CCA-R3-CD. August 18, 2010

# Or Oklahoma

- Termination application
- Participant objects to Drug Court Judge hearing the case
- May file a Motion to Recuse
- Motion should be granted

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



# Ethical violation?

- May a judge adjudicate a former drug court participant's new case?
- **MAYBE**

# Recusal

- Propriety of a judge who dealt with an offender in drug court later adjudicating the same defendant in non-drug court criminal proceeding
- Needn't recuse; must disclose

# What is the trend on recusal?

## Recusal Not Required

1. *State v. Bejeda*, 160 W.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)

## Recusal Required

1. *State v. Stewart*, W2009-00980-CCA-R3-CD (Tenn. Crim. App. 8-18-2010)(not selected for publication)

# Former DA Recusal

- Drug court judge was former DA
  - Must he recuse for all participants admitted while he was DA?
  - YES
  - But recusal may be waived
- 
- Supreme Court of Wisconsin Judicial Conduct Advisory Committee Op. 09-3 (Aug. 6, 2009)
  - Supreme Court of New Mexico Advisory Committee on Code of Judicial Conduct JAO 13-12 (Nov. 25, 2013)

# P gets a new case while in DTC

- Does judge have a duty to disclose a new arrest of a participant in drug court?
- What if the prosecutor was not present in staffing when you learned of it?
- Does defense counsel have a duty to disclose a new arrest?

# May P be prosecuted for disclosure?

- Participant tested positive
- Information disclosed to law enforcement outside the treatment team
- New charges brought against P
- Held: Participant may not be prosecuted for a new criminal offense based on his disclosure of activities to the team.
- MT v. Plouffe (2014)

# New criminal activity

- Is there a duty to report new criminal activity that may be disclosed during drug court?
- Not in Alaska, but in your state?
  - State of Alaska Comm'n on Judicial Conduct, Opinion No. 0-17 (February 12, 1993)
- Absent specific statute, there is no ethical obligation to report criminal activity

The Drug Court Judicial Benchbook Section 10.4

# Punish them for “failing”?

- Should the rule be maximum sentence if terminated from drug court?
- Should case be adjudicated on its own merits?
- Should the judge use extra judicial information to sentence?



# May increase sentence for “failure”

- San Bernardino County (CA) sentences to aggravated term if fail out of drug court
- Dismissal from drug court is an appropriate consideration to apply aggravated term
- People v. Loveless Ct.App. 3-9-09 and People v. Miller Ct. App. 3-24-09

# ADULT DRUG COURT BEST PRACTICE STANDARDS

- If terminated because adequate treatment is not available, participant should not receive augmented sentence or disposition (IV. K.)
- Participants are informed in advance of the circumstances under which they may receive an augmented sentence for failing to complete (IV.L.)

# Consequences of Termination

- Participants and legal counsel must be informed of the possibility of an augmented sentence for failure of drug court
- Waiver should be in writing
- Should spell out factors that will be considered in augmenting any sentence
- Don't punish someone for trying to get well

# May judge use *ex parte* communications to sentence?

- D pled possession of MJ with intent to distribute
- Judge terminated D from drug court
- No prior felonies
- Sentence: Life
- Judge used *ex parte* communication and inadmissible polygraph tests to determine sentence
- HELD?

- Trial court's finding that judge committed "oppression in office" was not against the clear weight of the evidence nor contrary to law or established principles of equity
  - No judicial misconduct
  - Specific to Oklahoma
- 
- Court on the Judiciary of Oklahoma, Appellate Division. State of OK, ex rel. W.A. Drew Edmondson, Appellee v. Jerry L. Colclazier, District Judge Seminole Co., No. CJAD-01-2, June 14, 2002

# Incentives & Sanctions

Who pays for them? How are donations handled?

# Incentives/Rewards

- Graduations rates increased from 43% to 55% if the judge is the sole provider of rewards.

Carey, Shannon M., Ph.D., *et al.*, “Exploring the Key Components of Drug Courts: A Comparative Study of 18 Adult Drug Courts on Practices, Outcomes and Costs,” NPC Research (March 2008)

**BUT**

The “judge would be appearing to be lending the prestige of judicial office to advance the private interests of the commercial interests involved.”

NY Opinion 02-77: Sept. 12, 2002

# Staffing

- Due process and judicial ethics require judges to exercise independent discretion
- A Drug Court judge may not delegate these
- responsibilities to other members of the Drug Court team
- It is not permissible for a Drug Court team to vote on what consequences to impose on a participant unless the judge considers the results of the vote to be merely advisory.
- ADULT DRUG COURT BEST PRACTICE STANDARDS (H.)



# Language matters

- “The team has decided....”

VS.

- “I have considered the input from the entire team and I will impose....”

# “Team Method”

- "I have no thoughts or opinions on what you should do, should you decide that [the defendant] should come back with no sanctions whatsoever, or if he should be revoked and dismissed from the program or anything between, I do not care what your opinion is. I trust your judgment."
  - Neither the transcript of the hearing nor the order reflect that the trial judge engaged in its own deliberation of the proper disposition of the case.
- Tennessee v. Stewart, Ct. of Crim. Appeals at Nashville (10/6/08) 2008 Tenn. Crim. App. LEXIS 784

# Out-of-court contact with participants

DTC picnic

Bowling night

## Activities Outside Court

- Attend an open 12-Step meeting?
- Visit treatment facilities?
- Ride along on probation checks?

# Justice for Vets

- Veterans' Court judge paid participant to paint his house
- What could go wrong?

# Justice for Vets

- Judge took participant and his wife to dinner at a local restaurant to thank him for his service
- What's wrong with this picture?

# Justice for Vets

- Judge invited Veterans' Court participant to judge's family events
- Judge allowed him to handle a gun and he went target shooting with judge's son.
- The veteran was a felon and Oregon law made it a felony for him to possess a firearm.

- Oregon Commission on Judicial Fitness and Disability (2016)

- Receiving award by tx community?
- **No** (NY 2010-65)
  
- Write letter supporting drug court liaison application for pardon?
- **NO** (FL 2010-29)
  
- Testify for a drug treatment program?
- **No** (FL 2010-34)



- Serve on committee to eliminate teen drug use
- **YES** Arizona Supreme Court Judicial Ethics Advisory Committee OPINION 91-04  
(May 24, 1991);
- May Judge serving on juvenile drug court sit on board of directors of non-profit organization that counsels and treats juvenile drug offenders
- **NO** Maryland Judicial Ethics Committee Opinion Request Number: 2008-12 ( July 22, 2008)

- May judge attend and receive an award at a dinner sponsored by a local not-for-profit organization that is a member of the drug court team in which the judge presides?
- **NO** NY Opinion 01-33: April 18, 2002 Advisory Committee on Judicial Ethics. NY State Unified Court System; Contra, NY Opinion 10-65)
- May judge sit on the Board of treatment facility that serves drug court
- **NO** NY Opinion 98-10: March 12, 1998

- May judge sit on Board of non-profit that develops job skills?
- **YES** NY Opinion 88-121: Oct. 17, 1988
  
- May judge contribute a recipe to a fundraising cookbook for a counseling program?
- **YES** New York Opinion 10-141.

- May judge participate as an applicant for grant funding?

**YES** 2002 OK Jud Eth2. Oklahoma Judicial Ethics Advisory Panel, Judicial Ethics Opinion No. 2002-2, Jan. 25, 2002; NC Opinion 2010-3

- ABA Ethics Opinion 08-452 agreed

- May judge lobby legislature to increase drug courts?

- Not in FL. Supreme Court adopted rule prohibiting individual judges from lobbying

- Hansen, Mark, "Fla. High Court Approves New Rule Prohibiting Judges from Lobbying Lawmakers," *ABA Journal* (April 13, 2012)

- May judge serve on the board of a live-in treatment program?
- NO Would be service in a government position not connected with improvement of the law.
- Kentucky Judicial Ethics Committee JE-126 (Aug. 13, 2014)

- May judge write a letter in support of a jobs program the judge uses in drug court?

- **YES** California Judges Association Judicial Ethics Update (March 2006)

- May judge contribute to a book on methamphetamine abuse if not getting paid?

**YES** State of Nevada Standing Committee on Judicial Ethics & Election Practices JE08-008 (Aug. 7, 2008)

- May judge help school develop a drug testing policy?

- **NO** State of Nevada Commission on Judicial Discipline JE-07-002 (Ap. 12, 2007)

- May judge serve on Alcoholism Advisory Council?

- **YES** Maryland Judicial Ethics Committee Opinion 1979-07 (Sept. 13, 1979)

- May judge sit on the board of a non-profit that counsels and treats juvenile drug offenders?

- **NO** Maryland Judicial Ethics Committee Opinion 2008-12 (July 22, 2008)

# Jogging with Juveniles

Jud.EthicsAdComm. FL 2010-37

- Community service project to jog with judge
- Non-participants may wonder if they will get worse treatment if they don't participate
- No, could affect impartiality



# Association with Felons

- Judge attended a convicted felon's party.
- He said it was an innocent mistake; he had no improper motive and had been friends with the felon 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."

# Further association

- Two NJ judges attended weekly dinners with a group of church friends that included an indicted sewage official.
  - One judge sat in the same criminal court where the official will be appearing.
  - Appearance of impropriety?
  - One justice asked, “...whether a bright-line rule should be adopted that requires a judge to ‘run the other way’ when encountering an indicted friend.”
- 
- Weiss, Debra Cassens, “Church-group dinners with indicted sewage official bring ethics trouble for two judges,” ABA Journal (9-24-14)

# Publicity and Education for DTC

- Judges may be educators (Canons 3.1 and 3.7)
  - May share success stories
  - May attend government hearings (Canons 3.2 and 3.7)
  - Always make clear the intent to follow the law
  - *i.e.*, may criticize mandatory minimum sentences so long as indicate you will follow them
- 
- The Drug Court Judicial Benchbook Section 10.15

# In-Court Conduct

A drug court is still a court and the judge is still a judge subject to all ethical requirements of the office.

# Judicial misconduct?

- Judge met with juvenile Tx Court participant who was having bereavement issues.
- Overdosed twice.
- Asked to speak to Judge alone.
- Judge and boy went for a walk alone in a park where he discussed the death of his mother and continued lack of sobriety.

# Public Reproval

- “Failed to maintain high standards of conduct so that the integrity and independence of the judiciary would be preserved...;”
- “Failed to avoid impropriety and the appearance of impropriety, in that he failed to respect and comply with the law...;”
- and initiated, permitted and considered an improper ***ex parte*** **communication...**

In re Tarantino, NY State Commission on Judicial Conduct, March 28, 2011

Judge made a promise to all drug treatment court participants:  
“If you do 90 meetings in 90 days, I will do cartwheels for you.”  
He did it twice. In the courtroom. In his robe.

CNN: “A Judge Flips for Sobriety”

# Individual meetings in chambers

- 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 Jones*, 581 N.W.2d 876 (Neb. 1998)



# Behavior toward court staff

- Drug Court Judge “bullied” drug court PD
- Called staff member who had hip surgery “Hop-a-Long”
- Grabbed staff by the ear and pulled her toward the court room exit, saying “come on, come on,” and referring to her as “my problem child,” causing her to be “embarrassed, humiliated and upset.”

# Bd. Membership in 510(c)(3)

- May serve on a board of a state drug court association

Illinois Opinion No. 01-10 , New Mexico Judicial Advisory Opinion No. 10-04

- May serve on a NADCP Committee NY Opinions 90-25

- May be reimbursed for travel expenses

- Mass. CJE Opinion No. 2007-9

- **May attend and present at a drug court regional conference**
  - Massachusetts CJE Opinion 2014-2 (May 15, 2014)
- **May attend and present at a drug court state conference**
  - New Mexico Op. 10-04 (Ap. 14, 2010)
- **May present at NADCP annual conference**
  - New York Op. 05-155

- Referred to a senior probation officer as his “little pet” at a staff meeting
- “Shushing” an employee trying to ask judge a question and later ordering the woman out of a court reception
- NJ Advisory Committee on Judicial found violation of rules against “discourteous and undignified behavior” and “failure to preserve the judiciary’s integrity and the public perception of that integrity.”

# Using PD as an example for women

- While giving an introductory speech to drug court participants when he saw a female public defender enter the courtroom.
- Judge allegedly told the PD to come into the courtroom while grabbing her by the arm, and then asked people in the courtroom to notice her appearance.
- “He asked them to notice how well-dressed she is, how attractive she is, and what a good size she is,” the letter claimed. He then allegedly asked another person in the courtroom to stand, and said he wanted others in the courtroom to see how unhealthy the woman looked and how her size was different from that of the PD.

Weiss, Deborah Cassens, “Judge steps aside amid allegations of groping, using PD as example of appropriate looks,” ABA Journal (July 3, 2018)

# TV in the Courtroom

- Judge allowed filming of her drug court
- Groundwork for a network TV show
- Stipulated to never serve again as a judge in Arkansas

- In re Gunn (2011)

## ADULT DRUG COURT BEST PRACTICE STANDARDS (IV. J.)

- ✓ Use jail judiciously and sparingly.
- ✓ Use only after less severe consequences have been ineffective.
- ✓ Jail sanctions are definite in duration and no more than 3-5 days.
- ✓ Right to counsel and hearing before imposed.

# Misuse of custody

- “This American Life” Ira Glass (PBS)
  - Holding participants in custody without counsel or hearing
  - Indefinite sentence
  - Loss of privileges like visits and phone calls
  - In custody 73 days before release
  - Judge signed consent order promising never to sit as a judge again
- 
- In re Williams, Consent Order 12-19-11 (GA)



# Failure to supervise personnel

- Failed to train and supervise court personnel re: placement after serving jail sanction
- Didn't advise participants re: right to attorney
- Allowed unlawful detention of participants by drug court personnel
- Slow to provide hearing after rules violations
- Court suspended by Indiana Supreme Court
- Judge signed consent order promising never to sit as a judge again

- Stipulation Jerry F. Jacobi (March 4, 2015)

# Judge removed from office

- Judge kept DC participants past the two year limit
- Jailed for unspecified violations

“Court won’t rehear case for Lee Co. judge,” AP (Aug. 7, 2015)

Fundraising

# ABA Opinion

- Judges in P-S court find themselves being urged to engage in efforts to raise private funding
- No specific prohibition against fundraising for the court
- BUT Canons 3.7 and 1.2
- Judge is “well-advised” to take both the size and importance of the contribution in deciding recusal
- ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 08-452 (Oct. 17, 2008)

# Soliciting Rewards

- May the judge ask local businesses for gift cards to give out in court?
  - What if it is a pizza coupon that is given to Little League teams?
  - What if the judge knows the franchise owner?
  - Can you ask your family?
- 
- May not solicit incentive gifts from lawyers

# Soliciting rewards, con't.

- May a judge serve on a non-profit that solicits funds for incentives?
- YES, with qualifications
  - Maryland Judicial Ethics Committee Op. 2005-11 (Sept. 23, 2005)
- May not solicit or receive incentive gifts
  - Florida Op. 07-18
- May not solicit businesses for incentive gifts
  - Florida Op. 07-18
- BUT may accept a donation or contribution
  - State of Nevada Standing Committee on Judicial Ethics JE 12-0009 (Aug. 20, 2012)

- May judge be an officer or director or help in any way the foundation used to solicit funds for the drug court?
- **NO** NY Opinion 97-83: Sept. 11, 1997

# Activities for the Court

- Rubber chicken dinner (Attend? Speak?)
- Wine auction (Auctioneer?)
- Grant application (governmental or private?)
- Appear before local board of supervisors, state legislature, Congress in support of funding?
- Write letter in support of legislation?
- Write a recipe for the Drug Court Cook Book?
- Honoree at the Friends of the Overshoe County Drug Treatment Court at \$150/plate?



# ABA Model Code of Judicial Conduct

- ▶ 3.7 Permits solicitation for govt. entities and nonprofits concerned with admin of justice, etc. but only from family and other bench officers over whom you have no supervisory position
- ▶ 1.2 “Act in a manner that promotes public confidence in impartiality and integrity...”

# Friends of the Overshoe Drug Court

- DISCUSS:
- Do you have a duty to recuse if lawyer at the rubber chicken dinner appears before you?
- She bought a table of 10 and her firm was a “Golden Sponsor.”
- Opposing counsel bought one \$150 ticket

# DV Courts

Award by DV community?

1. DV Courts are still adversarial
2. Ct goal: to enhance victim safety and increase offender accountability
3. D perceives judge more closely aligned with victim
4. Appearance of impropriety?

# DV Courts, cont.

- May not accept award for work in DV from non-profit “aligned only with one side of domestic violence issues....”
- May cast doubt on judge’s impartiality
- May not be a member of non-profit to establish a Family Justice Center for victims if no participation by defense counsel
- Victim advocacy by judge
- *Judicial Ethics Update*, California Judges Association (Ap. 2014)

# Consequences

Do you like your house?

# Disciplinary action

- Private reproof
- Public reproof
- Removal from office
- At least 3 drug court judges have been removed from office

# Judicial immunity but not whole team

- Drug courts just like other courts. Judicial immunity applies

Ray, Phil, "State Office: Man Can't Sue Drug Court Judge," *Altoona Mirror* (Ap. 7, 2009)

- Staff may have "quasi-judicial immunity"
- Court upholds \$74,000 judgment against probation officials who disclosed drug use

Rizzo, Tony, "Court upholds judgment against probation officials over disclosure of drug use," *Kansas City.com* (Feb. 15, 2011)

# Drug Court Applications

- HANAS v. INNER CITY CHRISTIAN OUTREACH, INC. 542 F. Supp.2d 683 (E.D. Mich. 2008)  
(drug court mandating individual to religious based program which denied him the right to practice Catholicism—no absolute immunity for post placement activities)  
Violation of clearly established constitutional right
- PEEL v. SMITH (Fed Dist . N.D. Okla. 2-8-2008) (1983 suit against “drug court team” is dismissed—not a person under act and 11<sup>th</sup> Amend. immunity)
- BUSCH v. FORBES (Fed. Dist. N.M. 9-25-2007) (judge is entitled to absolute immunity in 1983 suit when raising issues with DA on another judges’ referral of plaintiff to drug court)



# Personal Liability

- Quasi-immunity for 1983 action extinguished if violates an established constitutional right
- Notice is assumed that requiring AA is a violation of the First Amendment
- Drug court case manager not immune (*Hanas v. Inner City Christian Outreach, Inc.* 542 F.Supp.2d 683, 701 (E.D. Mich. 2008))

# 1983 Damages are mandatory

- Atheist sent to Salvation Army, the only program available
  - Condition of parole
  - When wouldn't participate, revoked
  - Spent 100 days in custody
  - In Civil Rights action, if violation found, damages are mandatory
  - Case settled for **\$1,925,000** in Oct. 2014
- 
- Hazle v. Crofoot (9<sup>th</sup> Cir., 8-23-13)



# Judicial Demeanor/Procedural Fairness

Judge Lisa Tremewan, Auckland Alcohol and Other Drug Treatment Court

# What does an effective judge know?

- What separates drug court judges from traditional judges is training in addiction, understanding how to motivate behavior change, and simple empathy.

- William G. Meyer & A. William Ritter, Drug Courts Work, 14 FED. SENT'G REP. 179, 183-184 (2002).

# Judge is most important factor

- 80% of participants say they wouldn't have stayed in drug court if they did not appear before a judge

Drug Court Clearinghouse, American U.

- Interaction and delivery of response has most impact on participant performance

New Zealand Supreme Court

It's how you say it

It's not what you say...

# Judges' manner counts

- Judges who are respectful, fair, attentive, enthusiastic, consistent and caring in their interactions with participants had greater reductions in crime and substance use (MADCE 2012)
- Judges perceived as arbitrary, jumping to conclusions or not giving participants an opportunity to explain produced poorer results
- Stigmatizing, hostility or shaming reduced effectiveness
- Adult Drug Court Best Practices Standards



# Procedural Fairness/Justice

- Posits that the **manner** in which justice is done is just as important and the outcome
- “...bridges the gap that exists between familiarity and unfamiliarity and the differences between each person....”
- [www.Proceduralfairness.org](http://www.Proceduralfairness.org)
- Burke, Kevin and Steve Leban, “Procedural Fairness: A Key Ingredient in Public Satisfaction,” *Court Review* American Judges Association (2007)

# Procedural Fairness

- **Voice:** the ability to participate in the case by expressing their viewpoint;
- **Neutrality:** consistently applied legal principles, unbiased decision makers, and a “transparency” about how decisions are made;

# Procedural Fairness, cont.

- **Respectful treatment:** individuals are treated with dignity and their rights are obviously protected;
- **Trustworthy authorities:** authorities are benevolent, caring, and sincerely trying to help the litigants—this trust is garnered by listening to individuals and by explaining or justifying decisions that address the litigants' needs.

# Fairness is Key

- People will accept an unfavorable ruling if they feel the process is fair.
- People who win but who do not feel they were treated fairly are unhappy with the procedure

# R-E-S-P-E-C-T

- Proactive trouble shooting
- Judge directly address progress
- Open courtroom
- All observed consequences
- Genuine, caring, consistent, and firm

Carrie J. Petrucci, "Respect as a Component in the Judge-Defendant Interaction in a Specialized Domestic Violence Court that Utilizes Therapeutic Jurisprudence." CRIMINAL LAW BULLETIN

38:2 (2002)

- Active listening
- Rogerian approach  
(warmth, empathy, and  
genuineness)
- Shared respect

- The dispositive issue is not the outcome of the judge's decision, but rather how the decision was reached and how the participant was treated during the interaction.

- Adult Drug Court Best Practice Standards

- “People may not remember what you say but they will always remember how you made them feel.”

Maya Angelou



# Judges are not a social workers

- “Even in Treatment Court, a judge is not a social worker or therapist, but must maintain the role of a neutral and detached arbiter....”
- *In Re Tarantino* (NY Comm’n on Judicial Conduct 3-28-11)

Jane Addams, founder Hull House; winner Nobel Peace Prize

# The Team Approach

- With whom does the final decision rest?
- What is the reporting mechanism?
- Individual agency responsibilities
- Jurisdiction of the court

# Independent Judicial Decision-Making

- Due process and ethical consideration require the judge exercise independent discretion when resolving factual controversies, administering sanctions or incentives that affect a participant's fundamental liberty interests, or ordering the conditions of supervision.
- Adult Drug Court Best Practices Standards

# Team Approach

- Violation of Due Process to allow team to deliberate/recommend disposition when statute vested authority in trial court?
- “Majority rules”?
- Judge delegated decision-making authority to the team

# Decision by majority rule?

- Unethical unless judge considers the results merely advisory
  - Required to consider probative evidence or relevant information
  - Expert input from treatment professionals needed for judge to make treatment-related decisions
- 
- Adult Drug Court Best Practice Standards
  - Tennessee v. Stewart, Ct. of Crim. App at Nashville, 2008 Tenn. Crim. App. LEXIS 784

Who's driving the BUS?



# Avoiding Problems

- Review your state's Canons and Codes
- Check for any opinions specific to drug courts
- Ask for ethics opinions on issues of concern
- No court has ever found collaborative approach to be illegal when approached properly
- Examine your own prejudices
- Preconceived notions, biases, and stereotypes about people with AOD abuse and/or mental disorders can prevent fairness and impartiality toward those who have them

# When in doubt...

- Contact me at:
- [judgehora@](mailto:judgehora@justicespeakersinstitute.com)

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