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Critical Issues for Defenders in the Design and Operation of a Drug Court

By Michael P. Judge

Drug-dependent clients need two things from a drug court: effective defense representation to address legal issues, and treatment and recovery opportunities to address long term personal needs. Active defender participation in all phases of the drug court, from design to operation, makes it more likely that the program will be client-oriented. The key is to maintain the defender presence.

The defense role in drug courts

The defense function in the traditional adversarial system is to resist the government's charges, to avoid or minimize loss of liberty or other sanctions. "Alternatives" offered to address antisocial behavior might be viewed warily, since careful monitoring of clients' behavior can be used to justify imposition of additional punitive measures.

The defense role in drug courts stems from a holistic view of the client's involvement in the criminal justice system. A key goal is to figure out why the client came into the criminal justice system, and to provide opportunities to prevent the client from coming back. Equal emphasis is placed on legal advocacy and development of sentencing or diversionary plans (see *NLADA's Performance Guidelines for Criminal Defense Representation*, section 8, sentencing). Social service and probation agencies work to solve the problems related to addiction, and to empower the client to become functional in society. The drug court brings these agencies together to promote a therapeutic approach, while maintaining discretion to order graduated sanctions for infractions, toward the goal of helping the individual overcome the addiction. Loss of liberty is just one component of a graduated sanctions plan that allows the court to pursue a total treatment

regimen.

The defender works as a member of a team with the court, prosecution, treatment provider, and corrections officials, to address the root causes of the addiction, and to provide social services such as housing, job training, education and employment, to make the client a functioning member of society. But it is essential that the policies and procedures of drug court programs be compatible with legal and ethical standards for defense representation. It is critical that the defender's role is not to make decisions about the client's participation or treatment, but to provide thorough advice about the drug court and let the client decide.

Initial defender involvement

If the establishment of a drug court is being considered, defenders should be at the table to provide input on all the policy and procedure issues distinct to that jurisdiction. If a drug court is being designed without the participation of the defender office, the office must insert itself into the process. Defender participation can make the difference between a client-centered drug court and a court meant only to speed drug case processing, where incarceration rather than treatment is dominant.

Participating agencies need to appreciate the unique knowledge the defender community can provide on the needs and perspectives of the client community. The goal of assisting clients who want to end addiction, or leave a drug-involved lifestyle, cannot be reached if the program has unrealistic expectations about what constitutes successful participation. A negative experience by clients will lead to their reluctance to participate, the unwillingness of defenders to promote the program, and ultimately the underuse or even demise of the drug court.

Initial planning and design issues should be addressed by an exploratory committee comprising executive level representatives from each agency to be involved in the drug court. Defenders should insist that all major policy issues of importance to the defense be resolved prior to making a commitment to

the drug court program, since it is much harder to add elements of a client-centered program after funding is secured and the program is set in motion. There is much to be gained for the client by having a well designed and properly implemented drug court program, but much to be lost if defender support is withdrawn due to misunderstandings that could have been avoided. It is important that the program be statutorily based, or be mandated in a court order, so that changes occur only with the consent of all agencies involved.

Operational elements

The operational and procedural guidelines provide the foundation for the drug court program. Defender input can make an important difference in shaping various key elements of a drug court program.

Early intervention. The goal of expedited disposition must be balanced against the importance of allowing defendants an opportunity to consult with an attorney before deciding whether to participate. Assessing legal issues particular to the case, including search and seizure issues, sufficiency of the charges, and timely filing of the complaint must be seen as central to the defense function. Also, effective treatment mandates that the probation office or treatment provider conduct interviews and file necessary reports before the first court appearance.

Eligibility. A client-centered drug program should allow participation not only by clients charged with low-level drug offenses such as simple possession or personal use, with limited criminal histories, but clients who are charged with more substantial offenses or offenses not drug-related on their face, such as drug distribution, burglary, domestic violence or assault, and who have more significant criminal histories, such as felony convictions, or convictions for drug sales, property offenses or violence. Where there is resistance to such broader eligibility, the

defender may be able to negotiate discretionary eligibility if other factors are present, such as no recent convictions, no other pending cases, or past success on probation, parole or in a treatment program.

Pre-adjudication v. post judgment. It may be advantageous to have both types of programs. A pre-adjudication program is typically available to clients with no significant criminal history, but clients with more significant histories or aggravated charges can be barred from participation. Designing a post judgment program may provide the compromise necessary to allow these clients the opportunity offered by the drug court.

Voluntary v. involuntary participation. Though the natural defender preference is for voluntary program participation, there may be a call for coerced participation as well. [Editorial note: numerous studies indicate that offenders coerced into treatment by the criminal justice system do as well as those who enter voluntarily. The studies are discussed in *Preventing Crime: What Works, What Doesn't, What's Promising*, a Report to the U.S. Congress prepared for the National Institute of Justice, by the Department of Criminology and Criminal Justice at the University of Maryland; the report can be found at www.ncjrs.org/works/]. Careful review of such proposals should be made by the defense community, aided by independent analyses of what is needed in the community, and success of other such programs.

Protocols for admissibility of evidence, statements, and waiver of rights. For eligibility, placement and treatment purposes the client may be encouraged to make statements, or provide evidence, such as urinalysis, that would be protected in an adversarial proceeding. Defenders will

want to ensure that such evidence is used for the limited purpose of treatment, and cannot be used against the client should litigation be re-instituted. Also, waiver of such rights as speedy trial to participate in the drug court program should be fully restored if prosecution proceeds.

Legal consequences of successful completion. Dismissal of the pending charges is typically the outcome for successful completion, but there should also be the opportunity for complete expungement so that future employment, housing or other opportunities are not threatened by having to disclose the arrest or participation in the drug court.

Legal consequences of failure to complete. The client must know at the outset the consequences of failing to complete the program, e.g., a lengthier period of incarceration, awarding of credit for time served (especially for a residential program), loss of bail or release on own recognizance.

Fees. Clients must know what is expected of them in terms of fees to the treatment provider, the court, public defender or probation offices. If fees are to be assessed, payment should not be required until successful completion of the program and a determination that the client has the resources to make the payments.

Procedures for complaints. In the event of complaints against drug court personnel, procedures should be established for reviewing conduct and actions in a professional setting.

Design of the treatment program

The committee designing the treatment program may be different from the policy and operational committees. The defender component of the treatment committee should include defender

representatives versed in addiction, treatment strategies, and programs available in the community, such as sentencing advocates or social workers with specialized training in substance abuse. If a client fails in the program, it should be due to the client, not the design of the program.

The treatment philosophy will determine many of the operational issues. Defenders should urge a realistic program philosophy, which recognizes, for example, that: 1) addicts are more amenable to successful intervention when they are in the crisis of initial arrest and incarceration; 2) relapse must be expected as part of the recovery process; and 3) addiction to drugs or involvement in a drug life style may be long-standing, so that treatment must be long-term and comprehensive.

One treatment program will not fit the needs of all clients; it is important to enlist the assistance of governmental and community agencies providing related social services.

The following factors should be considered in designing the treatment program:

- 1) Strong front-end resources to meet immediate needs;
- 2) First court appearance within two days of arrest;
- 3) Discretion to extend the treatment period to allow for relapse, e.g., to complete a one-year program in 18 months;
- 4) Access to day treatment and residential care facilities;
- 5) Transportation access and financial assistance;
- 6) Concomitant personal issues, e.g., pregnancy, HIV-AIDS, mental or physical disabilities;
- 7) Language, cultural and ethnic variables;
- 8) Qualifications and individual support of representatives of agencies, including the judge, prosecutor, probation officer, and treatment liaison

or provider;

9) Risk assessment design, including drug history, personal skills or deficiencies;

10) Graduated sanctions, at the discretion of the court; and

11) Social services for employment, job training and placement, literacy, education, housing, child care, and medical and mental health treatment.

Court appearances

In a drug court, court appearances play an integral role in the therapy of the client. In the early stages, court appearances should be frequent to reinforce positive behavior, and to check on poor progress before it becomes intractable. Defenders must stress to clients the reality of consequences for consistently noncompliant behavior, and must be careful not to substitute their views for those of the client when making representations to the court or treatment providers.

Staying involved

Once the drug court is under way, defender representatives should attend meetings of treatment providers to discuss the progress of clients, so that clients presenting greater challenges are not terminated from the program. Discussion should include the regular monitoring of urinalysis, and the need for more intensive treatment for specified clients. Site visits should also be part of the defender oversight to determine the level of services being provided, and convey an understanding that high quality service is expected. A useful tool to develop is a "customer service survey" to gather candid assessment from clients, whether they are successful, have had consistent relapse, or left the program.

The need to assess policy and design issues is an ongoing process. A committee comprised of the personnel who operate the drug court should meet regularly to resolve problems, evaluate progress, revise procedures, and incorporate new treatment providers and methods. The proactive presence of the

defender on this committee will help ensure that the program evolves to best serve the needs of the clients.

Revised from materials prepared by Michael P. Judge, Public Defender, Los Angeles, California, for the 1995 National Symposium on the Implementation and Operation of Drug Courts

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