

# **Legal Issues Across Disciplines Ethics, Confidentiality & Constitution**

Helen Harberts  
helenharberts@gmail.com  
Chico CA

# Learning Objectives:

- Understanding confidentiality laws, and how to deal with them
- Monitoring for legal trouble and protection of the Constitution
- Roles of team members, including counsel.
- Avoidance of the appearance of impropriety by judges
- Medication Assisted Treatment (MAT) laws and issues
- Avoiding practicing medicine without a license-use of prescription medications
- Failure to follow confidentiality laws
- Failure to honor boundaries and scope of practice
- Not watching legal issues
  - MAT, MOUD
  - Due Process
  - Prophylactic Incarceration

# **Federal Rules of Confidentiality**

# CONFIDENTIALITY

## What are Part 2 Regulations?

- Title 42, Part 2 of the Code of Federal Regulations addresses use of substance use disorder information in non-treatment settings
- Part 2 ensures a patient receiving substance use treatment does not face adverse consequences in criminal proceedings and civil proceedings such as those related to child custody, divorce, or employment.
- Separate regulations from HIPAA.

## Does it apply to treatment courts?

- Yes, if the treatment court, its state funding agency or any tax-exempt entity or a treatment provider receives federal funds. This is broadly interpreted. Assume it applies to your court.
- Yes, if it is patient identifying information

# CONFIDENTIALITY

## PART 2 REGULATIONS AND DISCLOSURE

### Treatment Courts Should Use Consent Forms

- Advise of rights
- Consent must include the patient name, entity, purpose, statement of revocation, expiration, signature and date, and how to report violations
- Ensure the consent form specifically references 42 C.F.R. Part 2

### Other means of disclosure are **VERY LIMITED**

- Civil subpoena – must show good cause-notice and hearing required
- Criminal subpoena – must show good cause and serious crime
- (BRADY issues) (Example)

# Basic Rule:

- Strictest rules control-so if the state has a higher standard-it controls
- No waiver(s) equal NO INFO
- Get a waiver, via consent or court order.

# HIPAA, Confidentiality, and COVID

- Telehealth and online activities are sharply expanded.
- Health and Human Services: Enforcement Discretion announced. 3/17/2020. Allows flexible use of electronic media for telehealth and treatment via communication technology.
- Includes Skype, FaceTime, etc.

# **How do You Obtain Written Consent from Your Participants?**



# Elements of a Consent

1. Name of person or organization that may make the disclosure;
2. Name or title of person (or organization) to whom disclosure may be made;
3. Participant's name;
4. Purpose of the disclosure;
5. How much and what kind of information may be disclosed;
6. Participant's signature;
7. Date on which the consent was signed;
8. Date, event, or condition upon which the consent will expire  
(Consent cannot be revoked unless in a civil or juvenile court setting)

# And under HIPAA

- Must be in plain language
- Can be signed by a personal representative (then, must contain a description of the representative's authority to act on patient's behalf)
- Patients must be given copy of written form
- Programs must keep copy of form for six years from expiration date
- Program must ensure that consent complies with applicable requirements of 45 CFR section 164.508

# Consents

- A proper consent can authorize all parties involved in the problem-solving court to share information necessary to monitor treatment progress and compliance.
- To be effective the consent form should be signed at the earliest possible time.
- Judge, coordinator, probation, etc., should get consent and fax it to treatment before 1<sup>st</sup> appointment.

# Requiring Consents

- HIPAA prohibits a program from conditioning treatment on a patient signing a consent, but
- The judge (problem-solving court) can condition participation in the court program on the defendant signing the consent form. (ditto other Court programs)

# Consent Guidelines

- Criminal Justice System (CJS) consents
  - Determine whether assessment and treatment participation is an official condition that the person must meet.
  - CJS consents have special rules under 42 CFR part 2 – irrevocable until expiration.
  - HIPAA requires all consent be revocable.

# Satisfying 42 CFR and HIPAA

- HIPAA requires all consents to be revocable, but
- HIPAA also allows for the use of an administrative order for information disclosure. Therefore,
- Programs that provide both substance abuse and mental health treatment services can pair their 42 CFR consent with a HIPAA administrative order and/or build HIPAA language into their consent

# Subpoenas v. Court Orders

- Part 2 allows information to be released by subpoena if patient has signed consent permitting release
- If no consent, then see 42 CFR Part 2, Subpart E for procedures the court must follow, findings, and limits
- HIPAA allows information release under subpoena with assurance patient has been given notice (or reasonable efforts made to give notice) with the opportunity to object

**When can we disclose  
information without  
consent?**



# Mandatory disclosure -no consent

- State child or elder abuse\* laws
- A valid court **order** (42 vs HIPAA)
- State laws relating to cause of death
- Duty to protect others, to warn of imminent, serious harm

## Permitted disclosures -no consent

- Medical emergency
- Crimes on the premises
- Crimes against staff
- Administration / qualified service programs working with treatment facility (must have business associate agreement under HIPAA—see 67 Federal Register 53264 for sample contract language—published by HHS office for Civil Rights)
- Outside auditors, central registries and researchers
- No re-disclosures unless permitted
- All disclosures must be documented

# Can a Judge share treatment information in open court?

- The Judge may decide that sharing information about progress/difficulty in treatment is a “legitimate part of the court’s official duties and responsibilities with respect to the criminal proceedings”.
- Remember the Minimum Necessary Information standard and rule of minimization.
- *“Because you can, doesn’t mean you should”.*

# SHARING INFORMATION

- HIPAA and 42 C.F.R. Part 2 do not prohibit treatment professionals from sharing information related to substance use and mental health treatment.
- These statutes control how and under what circumstances treatment professional (and other covered entities) may disclose such information
  - ✓ Voluntary, informed, and competent waiver of patient's confidentiality and privacy rights; or
  - ✓ Court order (in the absence of patient waiver)

# What should be shared by treatment after waivers are taken?

- In treatment courts, treatment professionals may share specified information with other team members pursuant to a valid waiver (or court order).
- Scope of disclosure must be limited to the minimum information necessary to appraise participant progress in treatment and complying with the conditions of the program.
- The following data elements are required by all treatment court team members and disclosure by treatment professionals is generally to include and be limited to these elements.

# Each treatment court appearance:

(Adult Drug Court Best Practice Standards, Multidisciplinary Teams)

1. Assessment results pertaining to a participant's eligibility for treatment court and treatment and supervision needs
2. Attendance at scheduled appointments/sessions
3. Drug and alcohol test results conducted by the treatment center, including efforts to defraud or invalidate
4. Attainment of treatment plan goals
5. Evidence of symptom resolution or exacerbation
6. Evidence of treatment-related attitudinal changes
7. Attainment of treatment program phase requirements

8. Compliance with supervision requirements that treatment professional may be aware of (e.g., electronic monitoring, home curfews, travel limitations, stay aways, etc.)
9. Adherence to legally prescribed and authorized use of medicines—if relevant to team decisions
10. Procurement of unauthorized prescriptions or addictive or intoxicating medications
11. Commission of or arrests for new offenses that treatment professionals may be aware of
12. Menacing, threatening, or disruptive behavior

# Note that the “minimum necessary” standard may change based on the circumstances!

- The decision is held by the treatment professional if there is a pre-existing standard waiver.
- Even then, absent a Tarasoff warning, the disclosures should be limited and generalized as much as possible. The team must honor this highly sensitive disclosure.



# What about confidentiality rules and Courts?

- Open Courtroom? Absolutely ( Florida v. Noelle Bush) (rule of minimization)
- Closed staffing? Yes. (State v. Sykes, 339 P.3d 972, Washington State, 2014)
- In your policy and procedures manual :confidential staffing policy, standing order which closes staffing, and team members signing acknowledgement of rules. Visitors also should sign when they observe staffing.
- Be aware of extraneous counsel or treatment providers of other participants who may be in the room but not covered by waiver.

## No matter what:

- Always follow the rule of minimization in open court!
- What you hear in staffing about highly personal matters should not be discussed in the courtroom without very careful discussion and planning.
- You may inadvertently retraumatize a person and do harm.
- Remember: Your courtroom is a classroom. Everyone follows your lead.



What's the rule?



# What about Confidentiality rules and team members?

- It is a violation of Federal Rules of Confidentiality and the law, to use information learned in staffing (with waivers) for any purpose.
  - No search warrants, no grand jury proceedings, etc. Example: State v. Plouffe, 329 P.3d 1255 (Montana 2014) Prosecutor charged a participant with a new crime based on staffing information.
- Under 42 CFR § 2.35, information from a CJS release may be redisclosed and used only in connection to their official duties with respect to the **particular criminal** proceeding.
- The information may not be used in other proceedings, for other purposes or with respect to other individuals. (42 CFR § 2.12(d)(1))

**WHAT HAPPENS IN VEGAS.....**

# Confidentiality laws

Are NO joke.

# Common staffing errors:

- Look up! Is everyone in the room covered by the waivers signed by the specific person?
  - Are there extraneous counsel, treatment agencies, or others in the room?
- Lawyers! How many levels of hearsay in staffing?
  - Informal doesn't mean illegal!
  - Not having lawyers in staffing? Not good!

# Pay attention to who can see your files!

- Or your data?
  - Lawyers...are your files secure?
- Medical information in there?
- Treatment information in there?
- Who can see it, and what is public access? (Courts)

# What about confidentiality outside the team?

- Your family? **NOPE**
- The participant's family or friends? **NOPE**
- Other members of your office? **NOPE**
- Your first thought should always be “**NOPE**”. Unless there is a new waiver (clear with counsel) or the legal exceptions exist on the facts presented.

**If you do this, you might be committing malpractice and violating the law !**



# Pay attention!

- This stuff matters!
- Be diligent about those waivers!
- No redisclosure unless within the law!
- Information goes INTO the Court but doesn't come out, except for narrow reasons.
- REVISIT THIS AT LEAST ANNUALLY and with new staff!

**Confidentiality exception:  
BRADY Issues !**



# **Ethics and Boundaries**

On the team

With the participants

# Strange fact: treatment courts and programs develop role and boundary problems!

- Some are traditional problems in a new context
  - Ex parte contacts with members of the team.
  - Emails containing “too much information”.
  - Direct communications between judge and participants without filtering through counsel.
- Some are caused by the team blending “too much” and require strong judicial leadership to monitor.
- The role of the judge becomes very special to participants and easy to overstep.

# Obvious examples:

- **Violations of 42 CFR and HIPAA-** those are federal laws, and violations are both civil and criminal.
  - They can take your license to practice law, some violations are criminal in nature
  - Get waivers, and follow them scrupulously, retrain on this annually. CHECK your paperwork.
- **Ex parte communications:**
  - Judicial
  - Counsel
  - Others [including participants]
- **Ex parte activities:** Court and prosecution- cameo only!  
Have witnesses!

# WHAT is your business?

- Law?
  - Judge?
  - Counsel?
- Treatment Professional?
- Probation Officer?
- Assessor?
- Case Manager?
- Coordinator?

# Whatever your business is: **stay there!**

- Mind your ethics
- Mind your boundaries
- Mind your liability profile!

# Rule #1

- Your professional ethics are not reduced based on a program design.
- The ethics that control your profession remain intact *or **are increased.***
- ***Support the professional ethics of your team members. There are things they cannot do!***



Boundaries with participants

# Professional list of things not to do in treatment courts or in government programs:

- Loan money
- Co-sign loans for cars or homes
- Date *or worse*
- Visit homes (Judge)
- Attend searches (Judge)
- Take participants to support groups
- Have participants to your home for video games
- Show off Nazi memorabilia in chambers/courtroom (or really anywhere)
- Collect urine from participants
- Privately journal or communicate
- Have them into chambers alone
- Take participants out to lunch or dinner as an incentive.
- Have them work on your house, do your garden or be a handyperson
- Trips to Disneyland

If you do this, you might be committing malpractice!

# And don't handle guns with felons.

- *Or fraternize with participants: In re Day*, 413 P.3d 907, 362 Or. 547 (Or. 2018)
- **Judge** was suspended from office, others lacked boundaries as well.

**TEAM BLURRING OF LINES**

# Respect Boundaries

- You are a member of your profession, not another.
- Mind your ethics and stay out of theirs.
- Respect each other-LISTEN
- It is the strength of the team and the blending of professions that works.

# Professional confusion...

- Treatment professionals trying to be probation officers
- Probation officers trying to be treatment, when they are not licensed?
- A bench officer who acts as the DA?
- A bench officer who acts as the defense?

**If you do this, you are undoubtedly committing malpractice!**

## Or a confidentiality AND judgment problem?

- How about a district attorney who discounts treatment advice because his wife is a nurse and tells him different?

**If you do this, you are committing malpractice and violating the law!**

- Agreeing to be a probation officer for clients when probation team members will not serve them.

(District attorney)

- Defense counsel acting as a probation officer-but lacks the authority of the Court.

**If you do this, you ARE committing malpractice!**



## Ex parte conversations?

- Between participants and judges?
- Between the DA and participants?
- Between one attorney and the Judge?

**Some folks want to be treatment professionals without training! Sometimes they are lawyers or judges. Sometimes they are probation. Or, persons in recovery without training.**  
**NOT YOUR JOB!**

- "Just because you've had your appendix out doesn't qualify you to take out mine."

"Ethics for Addiction Professionals". Second edition, 1994. LeClair Bissell, M.D., C.A.C.; James E. Royce, S.J., Ph.D.

## Yes, we work as a team!

- But we work as a team from different professions
- We see things differently, and often what others may not see.
- We know things that others may not (or cannot) know about.
- BUT we don't practice the profession of the other team members!

# Examples:

- Any lawyers in the room?

- Do you like it when someone tells you how to practice law?
- Do you sometimes tell probation or treatment how to do their work?  
Unless it is legal advice, you MAY be committing malpractice!

- Judges?

- Same questions!
- Do you choose treatment levels of care? Or do you order them? If you overrule treatment, you MAY be outside your scope of practice! And that is malpractice!

# Examples: ethics don't disappear because I'm on a team!

- As a prosecutor, I cannot:
  - Allow a defendant to suffer a due process violation.
  - Reveal the existence of a search warrant
  - Allow a Brady violation
  - Ignore a law I don't like or agree with.
- As a defense attorney, I cannot:
  - Allow a perpetration of a fraud upon the Court
  - Reveal information subject to privilege.

- As a treatment professional, I cannot exceed the scope of my license or practice or breach a code of ethics.
- As a medical professional, I cannot exceed the scope of my license or practice or, breach a code of ethics.
- As a social worker, I cannot exceed the scope of my license or practice or, breach a code of ethics.
- As a law enforcement officer, I cannot exceed the scope of my job, ethics, or training.
- AS A JUDGE OR ATTORNEY, I cannot exceed the scope of my license or practice or breach a code of ethics or Judicial Canons.
- *However, it is possible for folks to have **additional** ethical requirements placed on them which exceed traditional ethics when they work on a treatment team.*

- As a Judge, I cannot:
  - Defer decisions to the team
  - Conduct ex parte conversations or Court
  - Discuss individual legal matters before me.
  - Ignore the law or Constitution.

## Thus...

- Mind your boundaries and your ethics.
- You may do harm, and you may lose your license, job, or your freedom.
- “Team” does not mean your ethics are reduced **EVER**.  
Period.



In a drug court model, rather than abandoning their roles, the involved disciplines expand them. The disciplines collaborate on a single mission to create a more effective and efficient system

## The role of counsel:

- NOT to be treatment professionals, probation officers, or other roles, i.e. stay in your own lane.
- To remember the role within the team construct as well as ethical context.
- The role of the defense counsel is particularly difficult and may require patience from the bench on occasion.
- RECALL: while the ex parte rules have changed for judges, they have not changed for counsel.

CRIMINAL CONDUCT BY TREATMENT COURT FOLKS

# This seems bad.....

- A former Lawrence County Treatment Court program supervisor is in the county jail for alleged misconduct during her involvement with running the county drug court operations. The Lawrence County District Attorney's office has filed charges against Jennifer Lynn Leasha, 39, of 125 Hillcrest Acres in North Beaver Township for allegedly sexually soliciting drug court offenders, and for allegedly trying to get one of them to commit a burglary and kill her estranged husband.
- [www.ncnewsonline.com/news/former-drug-court-official-charged/article\\_046da970-b21d-11e9-b5b7-cb4409e47458.html](http://www.ncnewsonline.com/news/former-drug-court-official-charged/article_046da970-b21d-11e9-b5b7-cb4409e47458.html)

## Gross abuse of power by LE

- <http://www.wsmv.com/story/34654368/woman-admits-relationship-with-deputy-while-inmate> sheriff deputy and drug court participant
- <http://www.wftv.com/news/local/2-volusia-county-deputies-off-job-over-drug-court-sex-scandal/625727529> sheriff deputies and drug court participant

## Two victims: Oklahoma case

- Appellant befriended drug court participant, J.M. On February 7, 2006, Appellant repeatedly telephoned J.M. and requested that she travel from Custer County to his hotel room in Oklahoma City. J.M. acquiesced when Appellant demanded that she meet him or he would vote for her termination from drug court. When she arrived at the hotel, Appellant provided J.M. with alcohol, engaged in sexual intercourse with her, and performed oral sodomy on her person. Thereafter, Appellant engaged in sexual intercourse with J.M. at her home, at the home of a friend of the Appellant's, at a motel, and at Appellant's home while his wife was on vacation. At Appellant's home, Appellant gave J.M. alcohol, engaged in several instances of intercourse, and performed oral sodomy upon J.M. Appellant and J.M. travelled to Oklahoma City for Drug Court Day at the State Capitol. Appellant repeatedly demanded and engaged in instances of sexual intercourse with J.M. in his hotel room.

- During this time frame, Appellant intervened in J.M.'s urinalysis testing at the Custer County Jail. Appellant instructed his employees to permit J.M. to test in the courthouse bathroom which was nicer than the jail restroom. On at least two separate occasions, Appellant intervened and stopped the jail employees from reporting J.M. for a positive test, took J.M. for a mouth swab test, and had the jail employees discard the positive urinalysis test.
- On January 3, 2007, Appellant assisted the drug court compliance officer with an investigation into drug court participant, B.B. Appellant discovered that B.B. was in violation of the Drug Court's rules. He contacted the Drug Court Judge and pursuant to her order took B.B. into custody. The compliance officer assisted and investigated other drug court participants while Appellant drove B.B. to the jail. Through repeated comments on her future, Appellant painted the grim picture of jail, termination from Drug Court, and imprisonment for B.B. Appellant told B.B. that he could save her from prison and make her stay in the jail more comfortable. He pulled off the road near two barns and told B.B. that he would help her if she would help him. Appellant directed B.B. to perform oral sodomy on his person and engaged in sexual intercourse with B.B. The records within the sheriff's department reflected that it took Appellant approximately 44 minutes to transport B.B. the 5 mile distance from her home to the jail.

- In May, 2007, J.M. informed Appellant that she could not do it anymore. Appellant informed her: "Well, you know what that means." (Tr. V, 1210, 1453-54). Subsequently, J.M. tested positive on her urinalysis test at the Custer County Jail. She tried to get Appellant to intervene both before and after the test, however, he ignored her requests. J.M. was placed in the Custer County Jail and sanctioned to one year inpatient treatment by the Drug Court. As she left the courtroom, she screamed: "I've effed [sic] the sheriff all this time, you can't do this to me." (Tr. V, 1211, 1490-92).
- J.M.'s cousin, C.T., contacted Appellant and informed him that J.M. had DNA evidence proving their sexual relationship. Appellant offered to help C.T.'s brother get out of prison if she would obtain the evidence from J.M. and bring it to him.
- <https://law.justia.com/cases/oklahoma/court-of-appeals-criminal/2010/461458.html>



JUSTICE NEWS  
Department of Justice  
Office of Public Affairs  
FOR IMMEDIATE RELEASE  
Friday, December 14, 2012

Former Lincoln County, Missouri, Sheriff's Office Detective  
Sentenced on Sexual Abuse Charges-"Tracker"

2018 UPDATE: multi million dollar judgment, interesting  
turn on who was the responsible party: court, or Sheriff?  
Respondeat Superior?

- MORRISTOWN - A Drug Court participant who admittedly was tipped off to surprise drug screenings and given drug testing kits by a Sussex County Sheriff's officer in exchange for having a sexual relationship with him was given a second chance Wednesday to stay in the program and avoid a prison sentence.

## Drug testing labs....

- Two Arrested for Falsifying Drug Tests in Exchange for Sexual Favors (2017-Texas)

# Judges

- **Former Judge Casey Moreland arrested by FBI on obstruction of justice charges**
- Ex-judge Casey Moreland accused of taking money from drug court program he started 3/1/18
- Coordinator also snared.

# LEGAL ISSUES:

MAT

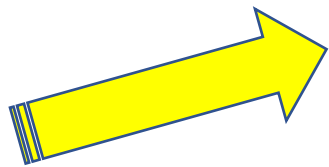
Prophylactic Incarceration

Failure to follow due process

Prospective waivers of rights

# MAT: Legal issues abound!

**My  
advice!**



**Always start from here:**

- 1. Are you a medical doctor?**
2. Do you have a license to practice medicine?
3. Do you specialize in addiction medicine?

**If any answer is NO, stay out of the discussion!  
You are committing malpractice, and a crime!**

# The Bottom Line from the Feds

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.

## Net Message:

- Beware of blanket MAT issues:
- Make a record of denials, or policies
- **Be aware that your “beliefs” are not medicine.**
- Failure to recruit/obtain accessible MAT is a growing area of liability.
- It violates the law, and Best Practice Standards.



Can we mandate cessation as a condition of Drug Court or government program completion? Or, admission?

**NO-** 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.

## Litigation in this Area is **HOT!**

- Pennsylvania [https://www.ada.gov/ujs\\_comp.pdf](https://www.ada.gov/ujs_comp.pdf)
- Massachusetts
- Colorado
- Rhode Island
- Indiana

**Violations of the ADA are being prosecuted by DOJ**

# Can I choose which medications can be used in our court?

- **NO**

- Are you a physician?
- Are you an addiction treatment physician?
- You are trying to practice medicine without a license!

# Challenging Blanket MAT prohibitions:

- The 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.
  - See: *Discovery House, Inc. v. Consol. City of Indianapolis*, 319 F.3d 277, 279 (7<sup>th</sup> Circuit. 2003) (“the ADA and The RA...fun along the same path, and can be treated in the same way”).
- Due Process protections of the 14<sup>th</sup> Amendment
  - 1983 Civil Rights violations....
- 8<sup>th</sup> Amendment-cruel and unusual punishment.

# Be careful

- Beisel v. Espinosa, Florida, 2017, United States District Court Tampa Division, case No.8:17-cv-51-T-33TBM, pro per misfires, but has instructive language. **[Adult Drug Court allows MAT but local FDC does not-equal protection and discrimination]**
- ADA, Rehabilitation Act of 1973, and some of 42 USC Section 1983 applies to FTC. Some tort claims may also lie.
- Monitor the Legal Action Center, NY NY for updates

# Blanket Denial of MAT access is discrimination because of a disability.

- Disparate treatment
  - Thompson v. Davis, 295 F.3d 890 (9<sup>th</sup> Circuit 2002) denial of parole because of addiction is subject to disparate treatment analysis of ADA.
- Reasonable Accommodation
  - ADA requires reasonable accommodation to avoid discrimination.
- Disparate Impact
  - Title II ADA prohibits eligibility requirements that screen out or tend to screen out individuals with a disability, unless the criteria are essential to the provision of services.

## **Watson v. Kentucky, E.D Kentucky, 7/7/15 (F. Supp.2d)**

- Watson requires the state court take her off the conditional release terms or remove the “blanket prohibition on her taking suboxone, methadone or any other drugs that she needs to treat her addiction. The state attorney clarified that there was not a Blanket prohibition on MAT, but agreed that “it’s generally the Court’s practice to allow MAT if the doctor will show medical need.”
- Relief denied. Her challenge on federal grounds was denied stating the claim could be handled on the state level.

# Due Process and Blanket prohibitions of MAT

***Constitutional due process requires reasonableness or a rational basis for conditions of treatment and supervision of persons on probation or in drug court.***

- Probation terms and conditions should be reasonably related to the crime and the rehabilitative needs of the individual and protection of the community People v. Beaty, 181 Cal.App.4th 644, 105 Cal.Rptr.3d 76 (2010)
- Judge must impose individualized conditions to meet community and individual needs. Commonwealth v. Wilson, 11 A.3d 519 (Pa. Super. 2010).



# Summary:

- Drug Court blanket prohibitions of MAT offend the ADA and RA.
  - Drug Court is a program covered by the statutes
  - Drug Court eligible persons have a disability. (DUI Court too)
  - Drug Court eligible persons do not as a class, constitute a substantial risk
  - Blanket denial of MAT is discrimination because of a disability.

## GENERAL RULE:

- blanket prohibitions of MAT are a due process violation because they are not rationally (scientifically based).
- They are not reasonable because they are not consistent with individualized sentencing and treatment
- They do not give parties a fair opportunity to present their case, since one alternative is foreclosed.

To review:

Can the Court compel the use of MAT? OR compel the termination of MAT?

- **Question one: are you a physician who is an expert in MAT?**
- That should answer your question.
- The answer is **NO**.
- Sell v United States 539 U.S. 166 (2003)
  - There are some recent changes for psychotropic meds, but not these.

# CUSTODY TO SAVE A LIFE

**If you do this, you might be committing malpractice!**

# Protective or Prophylactic Incarceration

- What law or legal theory allows this?
- What about the 8<sup>th</sup> Amendment?
- Violations of probation: watch your record and the length of the hold.
- Pursue civil proceedings if necessary.
- IF you do this, make it rare and LAY A GOOD RECORD with testimony regarding the issues, the efforts to address the issues in alternative less restrictive manners, and testimony from a health or treatment professional regarding severity of the threat. Set frequent reviews and look to reduce harm or release if stable.

# 42 USC 1983

## Civil rights proceedings.

- 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))
- Mandatory damages.

# Violations of due process rights

- Civil liability-limited liability does not extend as far as it used to.
- Removal from Bench (Mississippi Commission on Judicial Performance v. Thompson (5/2015) 169 So3rd 857

**If you do this, you might be committing malpractice!**

## Avoid problems:

- Know the law and follow the law. These are Courts of Law.
- *Stay in your professional lane*
- Respect your team and their professions.
- Follow best practices as a team
- Train, train, train.
- **AVOID MALPRACTICE**



# Drug Court Roles (Team concept)

- Judge- delegates some authority to the team. Monitors participant progress. Motivates and engages participants in Court. Makes all decisions or incorporates decisions into orders (treatment)
- Prosecutor- expands advocacy to include treatment. Recognizes the team. Protects due process & public safety. Practices law.
- Defense- advocates for successful participation. Participates in and contributes to team efforts to hold participant accountable. Protects client. Raises due process as needed. Practices law.

# The role of counsel:

- NOT to be treatment professionals, probation officers, or other roles, [i.e. stay in your own lane.](#)
- To remember the role within the team construct as well as ethical context.
- The role of the defense counsel is particularly difficult and may require patience from the bench on occasion.
- RECALL: while the ex parte rules have changed for judges, they have not changed for counsel.

# Respect Boundaries

- You are a member of your profession, not another.
- Mind your ethics and stay out of theirs.
- Respect each other-LISTEN
- It is the strength of the team and the blending of professions that works.

# Best Practices

- Ensure that DA and Defense Counsel attend staffings and review hearings
- Judges/Prosecutors: avoid public activities (non-judicial) with participants, except for cameo appearance
- Respect ethical obligations of Defense Counsel
- **LISTEN** to treatment and probation.
- Stay in your lane and follow the law.

# Each team member operates in three distinct spheres

- Court
  - Staffing
  - Case management, problem solving, and client relations.
- 
- Each function has a separate set of skills
  - Each function still works within the Key Components.

# Remember your record!

- You need to document not just the sanctions but the good reviews and incentives in some manner for potential review.
- If someone questions what happened in a couple of years, how will they know *why* you did what you did?

# Cameo appearances only.... Judge and DA

- When there is a pro-social activity such as a dinner, ball game, or picnic, go with others, and leave in a timely fashion.
- Neither the prosecution or the judge is relieved of ethical responsibilities in order to “support” participants.
- The judge must not only be impartial, but also appear impartial to the public. Protection of public confidence in the judiciary is crucial.

# The legal stuff...

Continues to emerge and personal liability becomes real.



# Due Process, equal protection, constitutional issues.

So many issues!

BASIC Con. Law stuff

# First Amendment:



This includes  
most  
treatment!

## Religion

*Ex: **NO** mandatory AA/NA without alternatives being offered as well.*

- This is settled law.
- It does not matter that this is a voluntary program
- This is settled law. Adapt.
- Civil liability may attach for intentional violation. (Sacramento CA, again 8/13)
- So many options – Smart Recovery, White Buffalo, etc.
- Protect yourself- safe to order “support group” meetings. Make sure your treatment provider is also following these rules.

# So, what to do?

- The law says you cannot force them if they object. You must provide an alternative as well. There are plenty.
- Change your order! *“You must attend AA, NA or other community-based self-help program, as approved by your probation officer.” “Attend peer support as approved by your social worker” Etc. Get away from any reference to 12 step directly.*
- *REALITY:* this is very few people and they get over it quickly. Recognize the law, make the new order, enforce the order.
- *COVER YOUR RECORD.*

# Another First Amendment issue:

- **Area and place restrictions:**

*Ex: Do not enter any establishment where ....*

- Valid if narrowly drawn and related to rehabilitation needs of the offender.
- Must have allowances for compelling needs of probationer such as child visitation.
- Should be reasonable in size and duration.

# First Amendment

- **Freedom of association**

*Ex: Do not associate with any person on probation or parole, or any person who uses drugs, except in the context of treatment*

- Valid if narrowly drawn and related to rehabilitation needs of the offender.

# Fourth Amendment

“You are subject to a search of your person, place of residence, vehicle, or any item under your dominion and control any time, day or night, with or without probable cause, or your then and there presence, by any peace or probation officer.”

“You are subject to testing for the presence of banned items and controlled substances for the duration of your participation in the program.”

Get a waiver of electronics and password disclosures.

# Search depends on model of the Court

- Post conviction: 4<sup>th</sup> Amendment waivers are valid under Federal law-reduced expectation of privacy Sampson (2006).
- Pre conviction and non-conviction cases, must be individualized findings to apply search on a case by case basis (also true on some local state cases post conviction)
- **Make it a program rule.**



# Electronic devices: sample

You provide specific consent within the meaning of P.C. §1546 to any law enforcement agency seeking information provided by the California Electronic Communication Protection Act. This includes consent to seize and examine call logs, texts and voicemail messages, photographs and emails, contained on any device or cloud or internet connected storage owned, operated, or controlled by you, including but not limited to cell phones, computers, computer hard drives, laptops, gaming consoles, mobile devices, tablets, storage media devices, thumb drives, Micro SD cards, external hard drives, or any other electronic storage devices, by whatever law enforcement agency is seeking the information. You shall also disclose any and all passwords, passcodes, password patterns, fingerprints, or other information required to gain access into any of the aforementioned devices.

## Other bans:

- Alcohol- OK: People v. Beal (CA 1997)
- Articulate why “medical” or recreational marijuana cannot be used on record, and place as a term of probation or condition of participation in treatment. (interferes with cognition) (Interferes with motivation)(some states have legal exceptions due to poor legislative drafting)
- Recommendation: authorize FDA approved MAT only.
- Articulate why folks cannot consume any item “not for human consumption”, CBD\* consumer based, poppy seeds, or other items that will mess up drug testing.
- \* CBD is now available by prescription, follow prescription rules

# Failure to follow due process= Lawsuit you will lose

## Due Process violations

- You cannot waive your rights to a hearing in advance-it is not a knowing and intelligent waiver
  - **You must provide due process if “the defendant will potentially suffer a loss to a recognized liberty or property interest” (Gagnon v. Scarpelli)**
  - **Termination: yes**
  - **Sanctions: Courts are split-trend is toward yes.**
  - The level of due process is consistent with that of a violation of probation.
  - Make sure you have a written record of the rights and waivers.
- 
- Vary by model and legal status, but there are due process mandates to follow in each case.

# Due Process Concerns

- Juveniles have the same rights as adults regarding due process, except for jury.

*changes in the law:*

- Program violation: probation-full panoply of rights apply. (PC, counsel, notice, appear, cross exam and witnesses, magistrate, findings)

# Watch out! As the target population changes, so may the rules!!

- Is a sanction a potential loss of a *recognized liberty or property right?*
- Does it invoke the same level of due process as a VOP?
- Certainly if you are a post adjudication probation model. Probably if you are not. Best practice: do it. Adds about 45 seconds to the colloquy.

# ***What process is due* when defendants potentially suffer a loss to a recognized liberty or property right?**

## ***Q: What is happening?***

- Sanction in program?
- Termination from program?
  
- Different rules may apply depending on the model!
  - DEJ
  - POST CONVICTION

# The question remains: what process is due?

## Termination vs. Sanctions

- 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.”)

- **Gross v. State of Maine, Superior Court case # CR-11-4805 (2/26/13)**(drug court procedures relating to **termination** violative of due process and, therefore, unconstitutional. Drug Court participant entitled to: notice of the termination allegations and the evidence against him, right to call and x-examine witnesses, a hearing at which he is present, a neutral magistrate, written factual findings and the right to counsel. Here, the drug court team discussed the termination decision during the termination hearing, without defendant's presence or that of his counsel. That procedure coupled by the fact the Superior Court felt that the drug court judge should have recused, resulted in a finding of constitutional infirmity. Moreover, the appellate court ruled the defendant did not, arguably could not prospectively waive his rights, citing LaPlaca and Staley.



# SANCTIONS ?

- Brookman v. State, Md: Court of Special Appeals 2017 (Sanctions imposed reversed and remanded for a hearing. Defendants wanted to contest sanctions imposed without a hearing for low creatinine results and failure to appear for a drug test. Court held it was a due process violation to not accord an adversarial hearing, including the right to counsel, the ability to call witnesses and a continuance, if necessary for preparation.)

# Due Process concerns

- Termination is LIKE a VOP hearing in most cases
- Watch your record! Incentives and Sanctions should be noted. Contract analysis does not settle the issue
- States are divided on hearings for non-probation programs. (Maine is not) Best practice: follow the VOP procedure.
- Clear majority now moving toward due process.
- *PROSPECTIVE WAIVERS OF RIGHTS IN THIS AREA ARE INVALID!*

# He waived his rights! NOPE!

- 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. See generally *LaFrenz v. Lake Cty. Fair Bd.*, 360 N.E.2d 605, 608 (Ind. Ct. App. 1977). Moreover, because the provision implicates federal common law by purporting to waive federal statutory and constitutional rights, the likelihood of its enforceability is increasingly remote. Federal courts are rightly skeptical, albeit not uniformly dismissive, of claims that a plaintiff has waived his constitutional rights or has released a defendant from liability for violating them. We "indulge every reasonable presumption against waiver of fundamental constitutional rights," *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Bayo v. Napolitano*, 593 F.3d 495, 503 (7th Cir. 2010), and we acquiesce in a waiver only if it has been "knowing, intelligent, and voluntary." *Schriro v. Landrigan*, 550 U.S. 465, 484 (2007). The lack of specific language in the agreement before us, in conjunction with its prospectivity, not only falls short of eliciting "an intentional relinquishment or abandonment of a known right or privilege," *Patterson v. Illinois*, 487 U.S. 285, 292-93 (1988), but also encourages DTC staffers to violate the DTC participants' constitutional rights, knowing they are acting with impunity. Enforcing such an agreement is inconsistent with the public interest given its potential for abuse and cancellation of the participants' primary means of vindication.”)

## “ I’m immune!” Ouch

Mississippi Commission on Judicial Performance v Thompson 169 So.3d 857  
(5/2015)

**(Drug Court Judge removed from office** for, inter alia, sanctioning individuals to jail without according due process of hearing. 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.)

# Consider this when considering hearings, sanctions, and terminations

- Is really about the factual basis or about the factors in mitigation and sanctions?
- What would you prefer if it was you in the client's shoes? Full due process?
- THINK of what the overall design and message of your program is. If you want folks to become engaged citizens, act like it.

# Remember your record!

- You need to document not just the sanctions but the good reviews and incentives in some manner for potential review.
- If someone questions what happened in a couple of years, how will they know *why* you did, what you did?

# Other due process issues to remember:

- A drug test is a search.
- Some drug tests do not meet Daubert/Kelly/ Frye standards.
- Be sure that the testing meets legal standards for admission in a court of law.
- No information should go to a Judge without notice to counsel. THAT creates the legal nightmare.
  - What if it must be challenged?
  - What if it is not competent evidence?
- Then you buy trouble! Attorneys are there to prevent trouble and facilitate the needs of the treatment team! They protect due process.
- Again, this is a court, not just a program.

# Equal protection

- Poverty-you cannot deny access to indigents. Admission based on ability to pay is a denial of equal protection.
- Discretionary admission criteria must not violate due process (suspect class, semi-suspect class)
- DA may be gatekeeper for admission, and unless constitutional violation, no right to hearing to challenge rejection. (changing)
- Watch your data! Your court should match your jail pop. There is a profound inequity in treatment courts around historically disadvantaged populations. Gender, ethnicity, race, etc.



# 42 USC 1983

## Civil rights proceedings.

- 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))
- Mandatory damages.

# 8<sup>th</sup> Amendment issues

# 8<sup>th</sup> Amendment-cruel and unusual punishment-growing area

- Correctional officials and health care providers may not act with deliberate indifference to an inmate's **serious medical needs**. Estelle v. Gamble, 429 U.S. 97, 104 (1976); .
- **Deliberate indifference** has both an objective and a subjective element: the inmate must have an objectively serious medical condition, and the defendant must be subjectively aware of and consciously disregard the inmate's medical need. Farmer v. Brennan, 511 U.S. 825, 837 (1994)

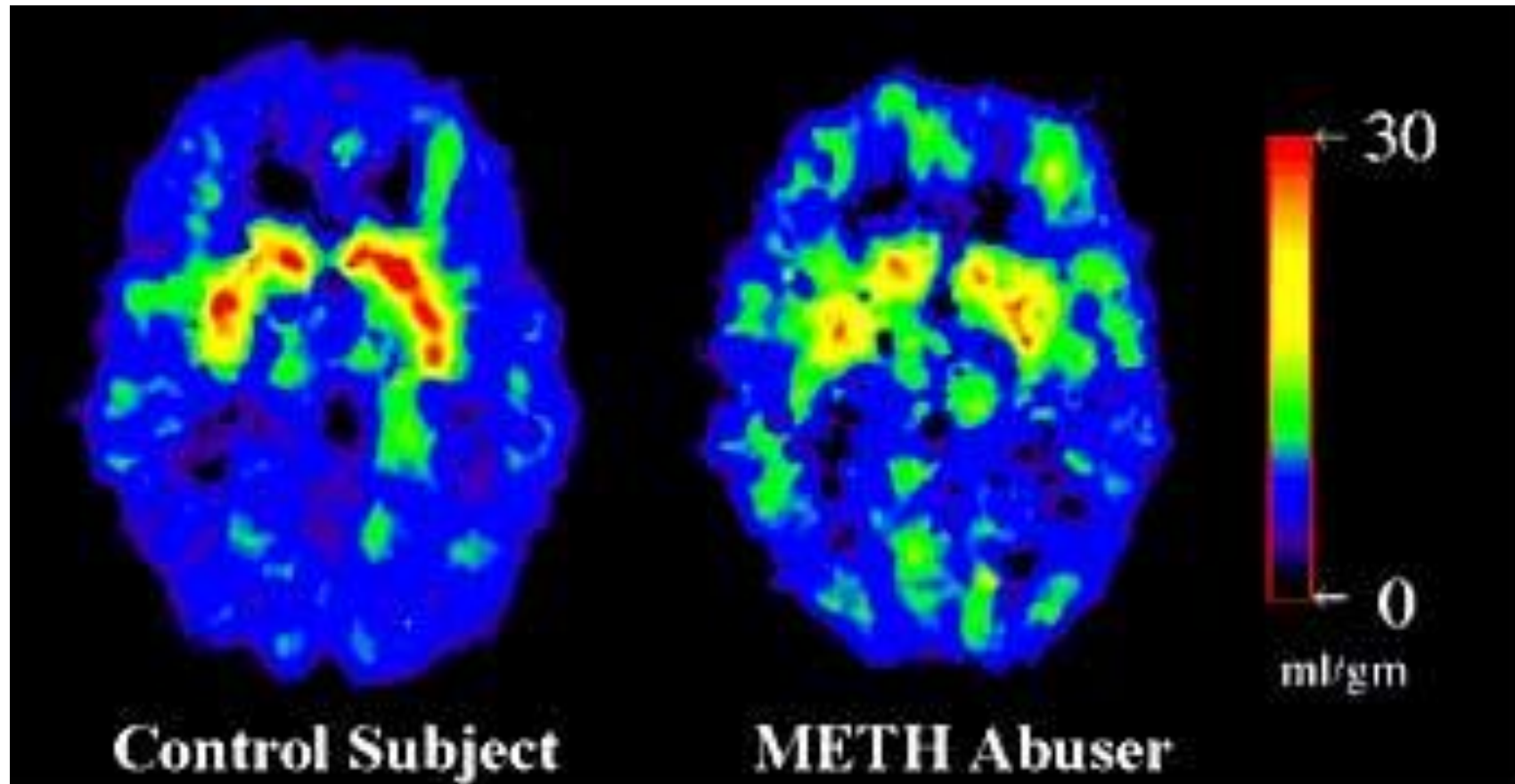
# What is a serious medical need?

- Withdrawal symptoms can qualify as a serious medical need. See, e.g., Boren v. Northwestern
- Regional Jail Authority, No. 5:13cv013, 2013 WL 5429421, at \*9 (W.D. Va. Sept. 30, 2013) (alcohol withdrawal states serious medical need); Mayo v.
- County of Albany, 357 F. App'x 339, 341-42 (2d Cir. 2009) (heroin and alcohol withdrawal); Sylvester v. City of Newark, 120 F. App'x 419, 423 (3d Cir.2005) (acute drug withdrawal); Foelker v.
- Outagamie County, 394 F.3d 510, 513 (7th Cir. 2005) (methadone withdrawal).

# What is deliberate indifference?

- The failure to provide methadone to an inmate exhibiting symptoms of withdrawal may constitute deliberate indifference to a serious medical need by intentionally ignoring the effects of withdrawal. Foelker v. Outagamie Cnty., 394 F.3d 510, 513 (7th Cir.2005);
- Alvarado v. Westchester County, 22 F. Supp. 3d 208 (SD New York 2014)
- Messina v. Mazzeo, 854 F. Supp. 116, 140 (E.D.N.Y. 1994) (pretrial detainee, whose participation in methadone program was interrupted by arrest, stated deliberate indifference claim against prison doctor who refused to continue methadone treatment).
- See also Mellender v. Dane County, \_\_\_ F. Supp. \_\_\_ (W. D. Wisc. 2006); Norris v. Frame, 585 F.2d 1183, 1188 (3d Cir. 1978)

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



Courts that use jail greater than 6 days have **worse** (higher) recidivism

Percent decrease in recidivism between courts that use differing amounts of jail sanction time



**That is lots of information!**

- Questions?



# Dealing with Cannabis

# Fun Facts:

- Drugs are approved by the FDA for specific uses (only).
- Prescriptions are written by physicians and the capability to write a prescription is authorized by the DEA. (only)
- You cannot prescribe raw cannabis legally under Federal law.
  - There is a VERY limited amount of cannabinoids approved under the FDA
- (prescribe is a legal term of art) (FDA approval is a legal term of art)
- Recommendations are not prescriptions, dispensaries are not pharmacies, and HIPAA/42 CFR do not apply here.

## Brief reminder:

- Don't practice medicine without a license, ask questions, inform, and adopt the doctor's orders as part of the case plan and Court orders.
- IF there is a question about use of any mind- or mood-altering substance, request a second opinion and one primary reviewing physician for ALL medications being used.
- Identical procedures as a Court would use for persons who are misusing prescription medications or having challenges due to the impact of medication use.
- Team attorneys should be familiar with the procedures used for MAT laws, including procedure for challenging MAT for prior diversion or sales of MAT externally.

# Always distinguish between the requested use(s)

- Recreational?
- Medical?
- Both? OTC combined with medical?

# What are we talking about?

- **Recreational use?** Get a waiver for use during treatment court period.
  - Lay a good record for appeal, if no waiver of appeal.
  - Have a uniform pleading with relevant science and citations, providing a broad and accurate factual basis for the parties' position and adequate factual grounds for the lower Court's decision.
  - Be certain to tie a ruling to reasonable relationship of facts of the case, challenges raised by assessment(s), and success on probation.
- **Medical?** Tread carefully, and watch your record.
  - Follow the law as it relates to any other substance used by participants.
  - Follow the law as it relates to legally prescribed FDA approved substances
  - Follow the law as it relates to legally prescribed MAT.
    - Each MAY be different.

# Medical may consider conditional approval or use

- You may consider monitoring treatment personal capabilities. If persons can engage, can remember lessons, and are not disengaged or distracting others in group, revisit approval at regular intervals.
- Generally, over time, as other withdrawal and treatment issues clarify, the impact of cannabinoids may require adjustments, and some motivational interviewing may assist with considering voluntary termination.
- Re-consult a physician, or a specialist via Telehealth.

# What is requested or currently being used?

- **Cannabinoids?**

- **CBD?**

- Over the counter?
    - Route of ingestion?
    - Type(s) being used?
    - Dosage and frequency?
  - FDA approved via prescription? Use standard protocol for meds.
  - “Recommendation” with OTC access.

# FDA approved cannabinoids:

- If prescribed pursuant to FDA approval, by a physician, I suggest the legal procedure is exactly the same as Courts should be using for any prescription medication.
  - 42 USC waiver, and HIPAA waiver execution and communication with physician to be certain the medical professional is aware of the SUD diagnosis.
  - Communication between team and provider about changes, observations, etc.
  - Continued consultation between the team and the physician, as needed, examination of medical records. (rare)



# Non-FDA approved uses

- “Wild Wild West” meets the law.
- Challenges with overlapping formulas, inconsistent concentrations, consumer fraud, and cumulative uses on a brain and body suffering from distressed neurotransmitters and moderate to severe substance use disorders.

# Over the counter items are pervasive and disrupt drug testing

CBD maple nitro coffee



Energy drink with super creatine



# Things to consider:

- Legal waiver and agreement of non-use during treatment as a condition of plea bargain in all non-medical cases.
- Courts commonly ban legal items which interfere with
  - Drug testing (poppy seeds, kratom, over the counter energy products, decongestants, any products containing CBD or creatine sold over the Counter, etc.
  - Treatment: alcohol, including ETOH based cooking materials and kombucha.
- ***In consultation with physicians***, Courts currently limit access to benzodiazepines, opioid and synthetic opioid substances, etc.

# Legal issues abound!

**My  
advice!**



Always start from here:

- 1. Are you a medical doctor?**
2. Do you have a license to practice medicine?
3. Do you specialize in addiction medicine?

# If not, hold a hearing when medical cannabis is the issue.

- Follow due process
- Hold a hearing with expert testimony
- Preserve the transcript for frequent use.
  
- NDCI legal updates at the “law” section of their website.

# Blanket denial of MAT is a due process violation-what about objections?

- All Judges should:
  - Consider relevant information before making a factual decision.
  - Hear arguments from all sides of the controversy and receive evidence from scientific experts, if the subject matter is beyond that of lay person knowledge.

There is a **federal presumption** tied to funding.

# “Medical”

- The law calls cannabis “medical”, science does not.
- Science calls cannabinoids medicine.
- We are stuck with the **law** in the justice system. Science is running a different track and timeline. i.e.: Sativex
- It would be nice if science could steer the discussion rather than emotion and politics.

## As to treatment courts...2 issues

- Treatment for cannabis abuse, alone, within drug court.
- Use of cannabis while in a drug court or other court requiring behavior modification or cognitive behavioral therapy.



# Does cannabis abuse qualify for drug court at all?

- Heck...it's legal! (of course, so is alcohol.)
- Should cannabis abuse (alone) be a target population, given the treatment data, and the legal conundrums that follow?
- What about due process issues from state to state?
- What ASAM criteria are we talking about here?

# Cannabis in the context of the drug court

- Cannabis is a mood-altering substance, *medical or not*
- Cannabis is a drug that is addictive.
- Cannabis impacts cognition.
- Cannabis impacts motivation.

# Therein lies the conflict.....

- Treatment modalities used in drug court are based on MET (motivational enhancement
- Treatment and criminal thinking modules are CBT (cognitive behavioral programs)

*Use of cannabis, recommended or not, undercuts treatment of substance abuse.*

# Practical experience...

- Participants still believe the old myths...
  - Not addictive
  - 30 days to clean out-so no need to quit using
  - “it’s from nature !!!”
- And the new myths...
  - It is my medicine!
  - I need it!
  - I can do drug court and take my medicine !
- A-motivational syndrome.

# Practical Experience continued:

- Participants have a great deal of trouble stopping marijuana use, and report missing that drug more than others. It is as if they have lost a personal friend. While this is common with most cessation of drug use, it appears to be more acute with marijuana.
- Cannabis appears to be a uniquely personal drug to most users.

# The issues are complex

- Carefully monitor the law AND the science.
- Follow the research on BOGUS CBD research, etc.
- Follow the research on cannabinoids vs cannabis
- Conduct a hearing and lay a truly good record with up-to-date testimony.
- Adopt findings and adapt to a rule of these unique treatment courts.
- This drug is unique, and it requires multiple, unique approaches.