

# Role of Defense Counsel in Healing to Wellness Courts

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# Questions to Consider

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- Do you represent the individual participants or the program?
- How do you effectively advocate for individuals within a non-adversarial team?
- How do you navigate ethical, legal, and practical conundrums?
- How do you protect a client's interests when those interests diverge from the rest of the Wellness team?
- What theoretical frameworks can inform, explain, and guide your work?

# Criminal Court vs. Wellness Court

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# Purpose of Proceeding

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## CRIMINAL COURT

- Deter/prevent crime
- Adjudicate
- Determine guilt
- Protect rights of defendant
- Punish

## WELLNESS COURT

- Recover from drug/alcohol addiction

# The Court Process

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## CRIMINAL COURT

- Adversarial
- Judge: resolves parties' disputes – has final say
- Prosecutor: investigate, litigate, dispose of criminal charges
- Defense: advocate for defendant & their rights
- Formal process
- Limited access to defense information

## WELLNESS COURT

- Team: judge, prosecution, and defense with shared goal
- Judge: directs, controls, and supervises rehabilitation – has final say
- Informal conversations with parties, tx providers, law enforcement
- Increased access to information

# Ultimate Outcomes

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## CRIMINAL COURT

- Charges dismissed/not guilty
- Conviction
- Incarceration
- Restitution
- Supervision

## WELLNESS COURT

- Recovery from drug/alcohol addiction
- Charges dismissed
- Return to criminal court

# Process vs. the Outcome

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- Does increased process justify extreme outcomes?
- What types of systems encourage accuracy?
- What types of systems prioritize individual and community interests?
- Does the outcome accomplish the goal?
- What is the value of a perfectly functioning system that produces undesirable outcomes?

# Defense Counsel Obligations

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## CRIMINAL COURT

- Zealous, partisan advocate
- Protect client's rights
- Protect confidential, privileged information
- Avoid actions that might conflict with client's interests

## WELLNESS COURT

- Zealous, partisan advocate
- Protect client's rights
- Protect confidential, privileged information
- Avoid actions that might conflict with client's interests



# Defense Counsel in Action

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## CRIMINAL COURT

- Inform client of risks and benefits of legal courses of action
- Litigation
- Argument before the judge
- Negotiation with prosecution
- Fulfill purpose of protecting client's rights & advocating for client's interests

## WELLNESS COURT

- Inform client of risks and benefits of wellness court participation
- Participate in staffings
- Attend court sessions
- Fulfill purpose of recovery from drug/alcohol addiction

# Wellness Court Defense Counsel Best Practices

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- The role of defense counsel is heavily modified but not relinquished
- Team member and client counsel
- Wellness court defense counsel:
  - informs participants about the rigors of Wellness Court
  - preserves all legal rights of the client
  - participates in team meetings
  - draws and maintains boundaries with the team
  - protects client from ineffective services
  - attends non-adversarial court proceedings
  - maintains commitment to program mission

# Inform Client of the Rigors of Wellness Court

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- Inform client of potential benefits and risks/costs
- Benefits: leniency, support to overcome addiction, criminal case dismissal, jail time suspended/deferred, confidentiality and immunity within court
- Risks: limited ability to influence decisions, waiver of confidentiality re healthcare, waiver of legal defenses and rights, risk of punitive sanctions and incarceration

\*Competence: provide competent representation

\*Communication: explain matter sufficiently to allow client to make informed decision

# Participate in Wellness Court Staffings as Full Team Member

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- Commitment to program goals and success of client
- As counsel, shields client from ineffective care; as team member, protects integrity for Wellness court program by monitoring effectiveness of all components of client care and supervision
- As counsel, serves as “voice of client” in pointing out deficiencies of Wellness court program; as team member, seeks productive means of addressing deficiencies
- Listen for undue encroachment upon client liberties or disparate treatment of participants

\*Scope of representation

# Participate in Wellness Court Staffings as Full Team Member

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- Advocate for prompt sanctions and incentives in response to client behavior
- Advocate for client's general well-being and productive recovery without mitigating or defending client's behavior
- Never breach attorney-client privilege

\*Scope of representation

\*Diligence

# Step Back in the Courtroom

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- Participate in staffings
- Allow client to speak directly to judge
- Encourage client to be forthcoming and honest regarding their recovery process
- Reach consensus with team regarding effective means of addressing client behavior
- Promote sense of unified team presence

# Draw and Maintain Boundaries with Your Wellness Team

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- Client needs to trust that someone is firmly on their “side”
- Consult local ethics rules
- May share conversations with clients
- May share perceptions of clients
- May not share information against client’s stated wishes
- May not actively assist client to deceive the Court

\*Diligence

\*Scope of Representation



# Develop Relationship with Client that Promotes Client's Long-Term Best Interests

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- Monitor client progress to support full participation and ensure provision of treatment and other rehabilitative services
- Encourage client throughout the Wellness Court process
- Question client regarding effectiveness of treatment and ancillary services
- Conduct quality assurance of treatment
- Advocate for client to have every opportunity for recovery before involuntary dismissal from the program

# Continue to Educate Yourself

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- Access materials and opportunities to learn about your clients and their communities
- Research effective treatment modalities
- Conduct regular quality assurance to ensure appropriate treatment

# Variability in Wellness Court Models

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- Continuum of adversarial to team
- Pre plea, post-plea/pre-adjudication, or post-plea/post-adjudication
- Confidentiality/immunity from statements
- Staffings and team meetings
- Assigned wellness defense counsel and public defender

# Ethical Considerations in Wellness Court

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# Ethical Considerations in Wellness Court

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- Competence
- Communication
- Disposition
- Scope of representation
- Confidentiality
- Candor
- Conflict of interest
- Ability to make adequately considered decisions

# Competence

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- Be familiar with the Wellness Court program
- Know:
  - eligibility requirements
  - nature of various treatment programs
  - sanctions and incentives and the circumstances of their imposition
  - circumstances leading to termination
  - confidentiality waivers
  - restrictions on the tribe's use of information obtained in Wellness Court

Rule 1.1

# Communication

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- Advise the client with complete candor; do not understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the client's decision re change of plea
- Give the client sufficient information and in a manner to ensure that the client has a genuine choice; voluntary choice is the first step in the therapeutic process
- Duty to communicate is continuing; consult, advise, explain, and counsel the client in a manner consistent with helping the client to obtain their objectives

Rule 1.4

# Disposition

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- Wellness Court should intervene while the participant is still in the midst of “crisis”
- Conduct an immediate investigation and attempt to gain early access to discovery in order to competently inform the client of the viability of all options

Standard 4-6.1



# Scope of Representation

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- Abide by client's informed decision to enter Wellness Court
- Client still defines the objectives of representation: sobriety and recovery or avoidance of conviction
- Counsel “shall abide” by the client's decisions absent agreement to the contrary

Rule 1.2, 1.3

# Confidentiality & Candor

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- Duty of candor prohibits counsel from deceiving the Court or “assisting” a client or witness in doing so
- Duty of candor does not require full disclosure by the lawyer of all information about the client, even if the information would be material to the proceeding
- If defense counsel is not “assisting a fraudulent or criminal act by the client” then the duty of confidentiality appears to control, requiring counsel to maintain their confidence

Rule 1.6, 3.3

# Conflict of Interest

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- Co-defendant or witness participants in Wellness Court
- Defense counsel has access to confidential information and cannot provide conflict-free advice
- Defense counsel must withdraw from representation in criminal court

Rule 1.7

# Ability to Make Adequately Considered Decisions

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- Intoxication or withdrawal may affect client's ability to make adequately considered decisions
- Become familiar with the signs of intoxication and withdrawal and be prepared to seek additional time to allow a client to recover from the immediate effects of intoxication or withdrawal before deciding on a specific course of action
- When seeking additional time, be mindful of the tactical and ethical considerations involved in revealing information about the client's current mental or physical state
- Do not substitute your own judgment of the client's best interests for an informed choice by the client

Rule 1.14

# Treatment Issues

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Defense counsel must be able to:

- Recognize a client's need for treatment and be willing to support treatment as a viable case disposition, while also recognizing that not every client with problems is a Wellness Court candidate
- Understand that substance abuse rarely occurs in a vacuum and that the problems relating to health, physical and mental well-being, culture, family, and circumstances such as housing and employment must be addressed if long-term recovery is to be achieved
- Understand the spectrum of treatment and maintain an ongoing awareness of all available treatment options both in and out of Wellness court
- Ensure that clients are offered the least restrictive treatment options and that the treatment provided is not more onerous than required or agreed upon at admission

# Common Questions & Challenges

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# Client Discloses a Relapse

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- Duty of candor to the Court → share information with the team?
- Duty of confidentiality to the client → keep information private?

# Client Receives New Criminal Charges

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- Let the new case run its course?
- Terminate client from Wellness Court?
- Does it depend on the jurisdiction?
- Does it depend on the nature of the charges?



# Defense Counsel as Social Worker

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- What is your obligation to connect client with services?
- What does zealous advocacy look like when the client's most pressing needs are therapeutic?

# What if I disagree with some of the policies or practices of the Wellness Court?

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- Participate in wellness court planning and design
- Engage in open and candid conversations with team members
- Encourage ongoing training

# Questions or Comments?

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# Resources

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ABA Standards of Practice for Defense Counsel

[https://www.americanbar.org/groups/criminal\\_justice/standards/DefenseFunctionFourthEdition/](https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/)

ABA Model Rules of Professional Conduct

[https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/)