Constitutional and Legal Issues in Treatment Courts

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NADCP
National Association of Drug Court Professionals

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JUSTICE FOR VETS

Constitutional vs. Recommended

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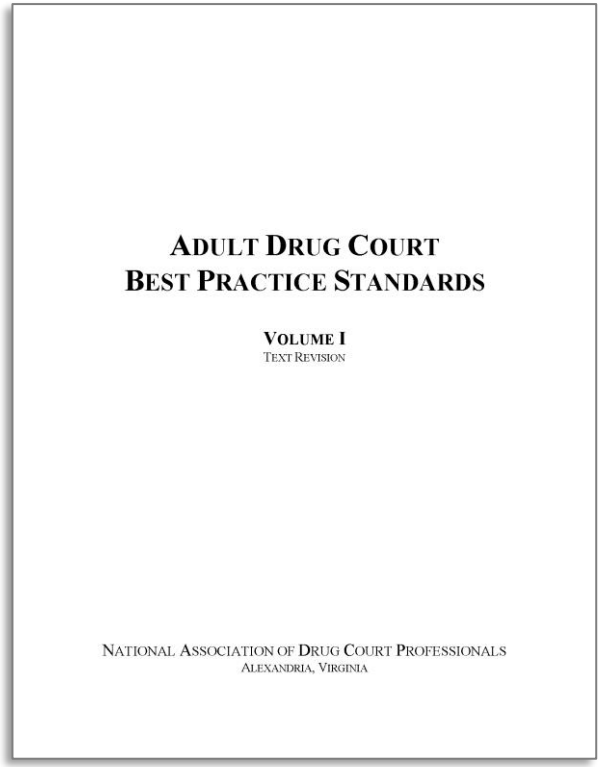
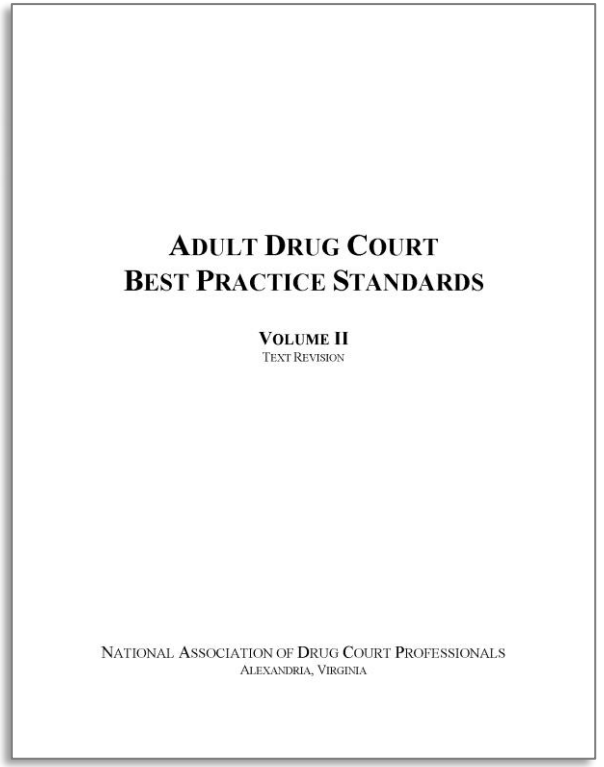
- 25+ years of research
- NADCP Adult Drug Court Best Practice Standards





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Eligibility

Eligibility Considerations

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Practical considerations

- Current charge and criminal history
- Criminogenic risk/need profile (usually high risk/high need)
- Availability of appropriate treatment services
- Treatment court's overall capacity

Constitutional and statutory considerations

- Equal protection
- Americans with Disabilities Act

Equal Protection

- 14th Amendment EP clause: Requires states to treat similarly situated persons in like manner

- Courts use three tests:
  1. Strict scrutiny: Used when there's a "fundamental right" or a "suspect class" at issue (race, religion, national origin, alienage)
  2. Intermediate scrutiny: Used when there is a "semi-suspect" class at issue (gender)
  3. **Rational basis: All other cases**

Eligibility and Equal Protection

Common equal protection challenges:

- “I want treatment court, but they won’t let me in!”
- “I want treatment court, but my jurisdiction doesn’t have one!”

Eligibility and Equal Protection

- **No fundamental right** to participate in treatment court
  - Lomont v. State, 852 N.E.2d 1002 (Ind. Ct. App. 2006)
- Likewise, "individuals with drug offenses" is not a **suspect class**
- Therefore, courts use the **rational basis test** → A defendant can be excluded from treatment court for any legitimate reason

Eligibility and Equal Protection

- Bottom line: Most equal protection challenges related to treatment court eligibility/access will fail

- But be careful to avoid policies/practices that affect a suspect class (race, ethnicity, gender, religion, alienage); these are presumptively unconstitutional

Alienage

- "Alienage" refers to a person's status as a non-citizen
  - Alienage is a suspect class → strict scrutiny
  - Therefore, a ban on non-citizens entering treatment court would be impermissible

- But what about those who immigrate illegally?
  - NOT a suspect class → rational basis review

Alienage

- Can treatment courts exclude those who immigrate illegally?
- Yes, if there is a legitimate government purpose for excluding
- Likelihood of deportation
  - People v. Espinoza, 132 Cal. Rptr. 2d 670 (Cal. Ct. App. 2003) (upholding exclusion where the substantial likelihood of the defendant's deportation would prevent them from completing the program)

Indigence

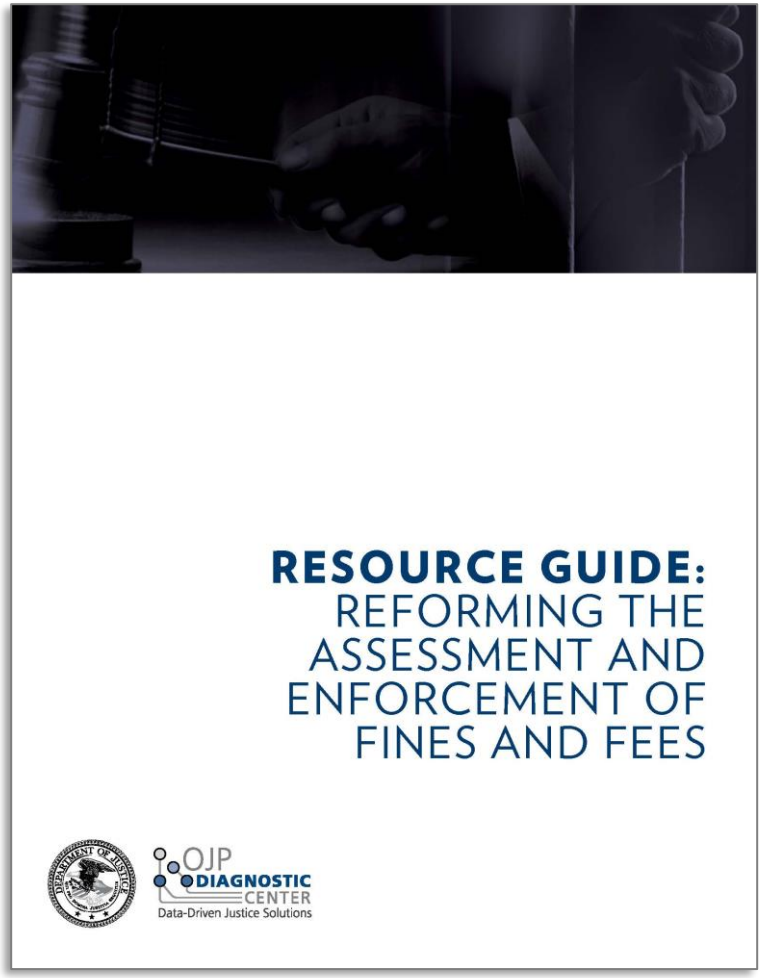
- Can a treatment court exclude a person because they can't afford fines or fees?

- No, violates equal protection
  - Mueller v. State, 837 N.E.2d 198 (Ind. Ct. App. 2005) (can't deny prosecutor diversion program for inability to pay)
  - State v. Shelton, 512 S.E.2d 568 (W. Va. 1998) (can't deny home detention for inability to pay for monitoring)

Indigence

- For more information about program fees and ability to pay:

  ojp.gov/sites/g/files/xyckuh241/files/media/document/finesfeesresguide.pdf



Health Conditions

- Can a treatment court exclude a person because of a physical or mental health condition?

- Generally, yes, if there is a legitimate government purpose
  - Evans v. State, 667 S.E.2d 183 (Ga. Ct. App. 2008) (finding no equal protection violation where exclusion was based on the program's lack of resources to handle "serious mental health issues" as well as the program's lack of access to HIV-related resources)

(But consider Americans with Disabilities Act, covered below)

Prescription Drugs

- Can a treatment court exclude a person because they take a prescribed medication (e.g., oxycodone for chronic pain)?

- Generally, yes, if there is a legitimate government purpose
  - People v. Webb, 2011 Cal. App. Unpub. LEXIS 1896 (2011) (upholding exclusion from treatment court, in part, because of defendant's inability to focus as a result of strong pain medications)

(But consider Americans with Disabilities Act, covered below)

Medical Marijuana

- Can a treatment court exclude a participant who uses medical marijuana (or require them to discontinue use)?
- The law continues to evolve on this issue.
- States fall into two major “camps”
  1. Permitted
  2. Case-by-case

Medical Marijuana

Camp #1: Medical marijuana use by probationers must be **PERMITTED**

- Arizona: Reed-Kaliher v. Hoggatt, 347 P.3d 136 (Ariz. 2015)
  - Sentencing court may *not* prohibit a probationer from using marijuana
  - State statute provides immunity against "penalty in any manner, or the denial of any right or privilege," for use pursuant to the statute
  - A probation condition prohibiting the use of MM denies a privilege conferred by statute, and revoking probation would constitute a punishment in violation of the statute

Medical Marijuana

Also in Camp #1 (medical marijuana use must be PERMITTED):

- Montana: State v. Nelson, 195 P.3d 826 (Mont. 2008)
- Pennsylvania: Gass v. 52nd Judicial Dist., 232 A. 3d 706 (Pa. 2020)
- Oregon: State v. Heaston, 482 P.3d 167 (Or. Ct. App. 2021)
- Michigan: People v. Thue, 969 N.W.2d 346 (Mich. Ct. App. 2021)

Medical Marijuana

Camp #2: Medical marijuana permitted CASE-BY-CASE

- California: People v Leal, 149 Cal. Rptr. 3d 9 (Cal. Ct. App. 2012) (prohibition is permissible if related to the crime or to prevent future crime)
- Colorado: Walton v. People, 451 P.3d 1212 (Colo. 2019) (blanket prohibition is invalid, but may be prohibited in a particular case by looking at the individual's circumstances and the statutory sentencing goals)
- New York: People v. Stanton, 60 Misc. 3d 1020 (Sullivan County Ct 2018) (must give "due consideration" to the crime, circumstances, and purpose of the penal sanction")

MAT and the Americans with Disabilities Act

The Americans with Disabilities Act (ADA) has three major requirements:

1. The person has a “disability”: physical or mental impairment that substantially limits a major life activity
2. The person is otherwise qualified for the program
3. The person is denied access to the program because of the disability

Medication for Addiction Treatment (MAT)

- The law is evolving before our eyes
- For years, the case law conflicted with science and best practice
  - Beisel v. Espinoza, 2017 U.S. Dist. LEXIS 73391 (D. Fla. 2017) (family drug court ordered mother off Suboxone; federal court upheld the order, finding no violation of 8th Amend., 14th Amend., or ADA)
  - Bazzle v. State, 434 P.3d 1090 (Wyo. 2019) (drug court participant required to stop Suboxone; court found the requirement valid and enforceable)

Medication for Addiction Treatment (MAT)

But…

…now the U.S. Department of Justice is stepping in and suing states under the **Americans with Disabilities Act**.

MAT and the Americans with Disabilities Act

Pennsylvania investigation and lawsuit (February 2022)

- DOJ findings: PA courts required drug court participants to discontinue MAT and excluded individuals who wanted to continue their medication
- Conclusion: PA courts discriminated against defendants on the basis of disability in violation of the ADA
- Demands: Adopt written policies explicitly stating that no court may discriminate against qualified individuals with an opioid use disorder; appropriately train all court staff on the ADA's requirements
- Status: PA did not respond; DOJ filed lawsuit in federal court

MAT and the Americans with Disabilities Act

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Massachusetts settlement agreement (December 2021)

- DOJ investigated the Massachusetts Parole Board under the ADA and found that it allowed prospective parolees with opioid use disorders to take Vivitrol only—not other medications allowed
- Parole Board agreed to a settlement, terms including:
  - Individualized assessment of prospective parolees
  - Board cannot mandate a specific medication
  - Training for all board members, parole officers, and other staff

MAT and the Americans with Disabilities Act

In addition, some recent federal court cases have opened the door to successful ADA claims:

Pesce v. Coppinger, 355 F. Supp. 3d 35 (D. Mass. 2018)

- Defendant in active recovery for two years with help of methadone
- Facing 60 days in prison on a probation violation
- Jail would require defendant to discontinue methadone
- Court granted preliminary injunction finding likely violation of ADA and 8th Amendment
- Required prison to allow defendant to continue prescribed methadone while in custody

MAT and the Americans with Disabilities Act

Smith v. Aroostook County, 376 F. Supp. 3d (D. Maine 2019)

- Defendant in active recovery from opioid use disorder for 10 years with the help of buprenorphine
- Previous attempts to taper her dosage had failed; doctor testified that continued MAT is needed
- Defendant charged with theft 1and sentenced to 60 days jail; jail would not allow her to continue MAT
- Court found that jail's denial of necessary medication was based on stigma around OUD/MAT and in violation of the ADA
- Jail ordered to provide defendant with buprenorphine

MAT and the Americans with Disabilities Act

- So, what's the bottom line?

- Recent federal cases + DOJ enforcement actions = strong indication that denying MAT is a violation of the Americans with Disabilities Act

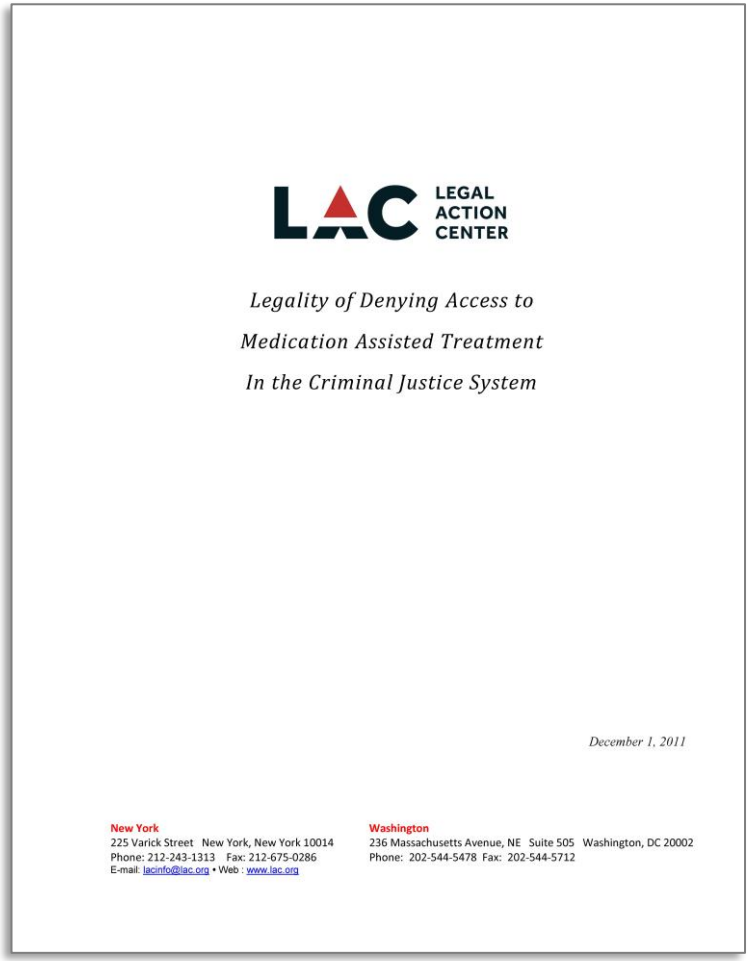
****NEVER DENY MAT****

when properly prescribed

MAT and the Americans with Disabilities Act

- For more information about MAT and the ADA:

  lac.org/assets/files/MAT_Report_FINAL_12-1-2011.pdf


LAC LEGAL ACTION CENTER

Legality of Denying Access to Medication Assisted Treatment In the Criminal Justice System

December 1, 2011

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Admission

Waiver of Rights

Defendants traditionally must waive several constitutional rights when pleading guilty:

- Right to trial
- Right to confront witnesses
- Right against self-incrimination
- Right to appeal

Waiver of Rights

- But there are special considerations for treatment courts
- Waiver of appeal may be limited
  - People v. Kitchens, 46 A.D.3d 577 (N.Y. App. Div. 2007) (general waiver of appeal does not foreclose appellate review of due process claim that sentencing court failed to hold a hearing regarding the circumstances surrounding defendant's failure to complete drug treatment program)

Waiver of Rights

- Can a treatment court participant be required to waive the right to a termination hearing?

- No
  - State v. Laplaca, 27 A.3d 719 (N.H. 2011) (rejecting hearing waiver: "defendant could not have knowingly and intelligently waived his right to a hearing to contest the allegations of misconduct against him without full knowledge of what those allegations were")

Search Waivers

- Can treatments courts require participants to submit to warrantless searches? To random searches?

- Yes, in post-plea treatment courts
  - People v. Ramos, 101 P.3d 478 (Cal. 2004) (by accepting probation, defendant waives Fourth Amendment rights and has no reasonable expectation of traditional Fourth Amendment protection)

Search Waivers

- But in pre-plea treatment courts, maybe not
  - U.S. v. Scott, 450 F.3d 863 (9th Cir. 2006) (pretrial releasee's liberty interests are "far greater" than a probationer's, holding invalid Nevada's the pretrial release condition requiring defendant to consent to warrantless search)
- Recommended approach: Make case-specific finding as to why a search waiver is needed
  - State v. Ullring, 741 A.2d 1065 (Maine 1999)
  - In re York, 892 P.2d 804 (Cal. 1995)
  - U.S. v. Laurent, 861 F. Supp. 2d 71 (E.D.N.Y. 2011) (in dicta)

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Participation

12-Step Programs

- Can treatment courts mandate participation in programs such as Alcoholics Anonymous (AA) or Narcotics Anonymous (NA)?

- No

- Why? Because of the First Amendment's Establishment Clause
  - Kerr v. Farrey, 95 F.3d 472 (7th Cir. 1996) (holding that a prison violates the Establishment Clause by requiring attendance at NA meetings which used "God" in its treatment approach)

12-Step Programs

- Also can't condition other benefits on participation in programs like AA/NA
  - Griffin v. Coughlin, 673 N.E.2d 98 (N.Y. 1996) (finding a violation of the Establishment Clause where privileges such as family visitation were conditioned on participation in a program that incorporated AA)

Secular Alternatives

- SMART Recovery (smartrecovery.org)
- LifeRing Recovery (lifering.org)
- Secular Organizations for Sobriety (sossobriety.org)

Geographic Restrictions

- Can a treatment court prohibit a person from going to certain locations?

- Yes, if the restriction is reasonably related to the participant's rehabilitation needs and narrowly drawn. Consider:
  - Geographic size of the area
  - Whether there is a compelling need to enter the area
  - Whether supervised entry is feasible

Geographic Restrictions

- Examples:
  - State v. Morgan, 389 So. 2d 364 (La. 1980) (prohibiting entrance into the French Quarter, noting that it is a small geographic area and is known for prostitution, the defendant's charged offense)
  - State v. Wright, 739 N.E.2d 1172 (Ohio Ct. App. 2000) (invalidating a probation term that prohibited entry to any place where alcohol is served or consumed; ambiguous condition; could subject them to punishment for innocent conduct such as going to the grocery store or gas station)

Association Restrictions

- Can a treatment court prohibit a person from associating with specific individuals?
- Yes, if the restriction is reasonably related to the participant's rehabilitation needs and narrowly drawn
- Must be specific

Association Restrictions

- Examples:
  - U.S. v. Soltero, 510 F. 3d 858 (9th Cir. 2007) (condition prohibiting defendant from associating with "any known member of any criminal street gang" is permissible; but condition prohibiting defendant from associating with any known member of "any disruptive group" was overbroad)
  - U.S. v Showalter, 933 F. 2d 573 (7th Cir. 1991) (upholding condition of probation barring defendant from association with neo-Nazis and skinheads)

Association Restrictions

- Incidental contact with prohibited associates is not enough to revoke probation
  - Arciniega v. Freeman, 404 U.S. 4 (1971) (reversing defendant's parole revocation, which was based on their association with formerly incarcerated individuals who worked at same restaurant)
  - U.S. v. Green, 618 F. 3d 120 (2nd Cir. 2010) (finding that condition only applied to association with gang members known to defendant)

Dress Restrictions

- Can a treatment court impose restrictions on a participant's clothing?
- Yes, dress restrictions are permitted if reasonably related to the offense and preventing future criminality
- Must give the participant adequate notice of what kinds of dress are permitted vs. prohibited
  - U.S. v Brown, 223 Fed. Appx. 722 (9th Cir. 2007) (restriction on clothing "which may connote affiliation or membership in" specific gangs was overly vague, failed to give adequate notice of precisely what apparel is prohibited)

Employment Requirements

- Can a treatment court require a participant to get a job?
- Yes (sort of): They can require good-faith efforts
- Examples:
  - U.S. v. Melton, 666 F.3d 513 (8th Cir. 2012) (defendant's lack of good-faith effort to seek employment is a valid ground for revoking supervised release)
  - Garrett v. State, 680 N.E.2d 1 (Ind. Ct. App. 1997) (vacating defendant's probation revocation because insufficient evidence that failure to secure employment was due to lack of effort)

Employment Restrictions

- Can a treatment court prohibit a participant from getting certain types of jobs?

- Yes, when the restriction is reasonably related to the defendant's crime and the goals of probation
  - Thomas v. State, 710 P.2d 1017 (Alaska Ct. App. 1985) (upholding a condition of probation prohibiting the defendant from working in commercial fishing after conviction for theft related to their work in that industry)

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Monitoring and Sanctions

Staffing Meetings

- Staffing meetings are typically:
  - Held outside regular court sessions
  - Informal, off-the-record meetings
  - For the team to share information about clients
  - To prepare for formal status hearings
  - **Not** for making formal findings or decisions

Staffing Meetings

- When conducted properly, normal due process rights do not apply to staffing meetings
- Defendant is not entitled to be present
- Need not be open to the public or on the record

Staffing Meetings

- Cases finding reduced due process requirements in staffing meetings
  - In re Interest of Tyler T., 781 N.W.2d 922 (Neb. 2010) (therapeutic goals of treatment court make it unnecessary for every action to be a matter of record, but a hearing must be on the record "when a liberty interest is implicated")
  - State v. Sykes, 339 P.3d 972 (Wash. 2014) (treatment courts are different from ordinary courts; because of their unique characteristics, staffing meetings need not be open to the public)

Ex Parte Communications

- Normally, *ex parte* communications are strictly forbidden
- But the American Bar Association and many states have made an exception for judges in treatment courts

Ex Parte Communications

Arizona Rules of Judicial Conduct, Rule 2.9(A)(6):
A judge may engage in ex parte communications when serving on problem-solving courts, if such communications are authorized by protocols known and consented to by the parties or by local rules.

Comment 4:
When serving on problem-solving courts, such as mental health courts or drug courts, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others. See Application, Part A, Comment 3.

Ex Parte Communications

- Harder question: can attorneys engage in *ex parte* communications in a treatment court context?
- In other words, what if the prosecutor is present for staffing but the defense attorney isn't? Or vice versa?
- It's a problem; safer approach is to have both parties represented at all times

Sanctions and Due Process

- What kinds of due process protections are required when a treatment court imposes sanctions on a participant?
- There is a split of authority on this question

Sanctions and Due Process

- Some cases say sanctions can be imposed without a formal hearing or full due process
  - State v. Rogers, 170 P.3d 881 (Idaho 2007) (intermediate sanctions do not implicate the same due process concerns as termination and therefore informal hearings are permitted)
  - Commonwealth v. Nicely, 326 S.W.3d 441 (Ky. 2010) (the elements of due process required for probation revocation hearing are not required for a treatment court sanction because treatment court participants waive those rights)

Sanctions and Due Process

- But others disagree
  - State v. Brookman, 190 A.3d 282 (Md. 2018)
  - In re Miguel R., 63 P.3d 1065 (Ariz. Ct. App. 2003) (juvenile case; applicability to adult treatment courts unclear)

- Recommended approach:

  When a participant challenges allegations of noncompliance, "the court should give the participant a hearing with notice of allegations, the right to be represented by counsel, the right to testify, the right to cross-examine witnesses, and the right to call his or her own witnesses."

  --The Drug Court Judicial Benchbook

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Termination

Termination and Due Process

- Due process protections are required whenever a defendant faces the possible loss of a recognized “liberty interest”
- Freedom from jail is certainly a liberty interest
- So due process is required for treatment court termination

Termination and Due Process

- What process is due?
  - Written notice of the alleged violations
  - Disclosure of evidence
  - Right to appear
  - Right to present witnesses and confront adverse witnesses
  - Neutral and detached magistrate
  - Written findings with reasons

--Morrissey v. Brewer, 408 U.S. 471 (1972)

Termination and Due Process

- What if the defendant waived a termination hearing as a condition of entering treatment court?

- Remember, waiver of termination hearing is not valid
  - State v. Laplaca, 27 A.3d 719 (N.H. 2011) (rejecting waiver of the right to a hearing because it was impossible for the defendant to have knowledge of the allegations brought against them when the facts giving rise to those allegations had yet to occur)
  - State v. Staley, 851 So.2d 805 (Fla. Dist. Ct. App. 2003)

Termination and Evidence Needed

- Preponderance of the evidence standard
  - State v. Varnell, 155 P.3d 971 (Wash. Ct. App. 2007) (“burden is on the State to prove noncompliance with the agreement by a preponderance of the evidence”)

Termination and Evidence Needed

- Hearsay evidence permitted
  - State v. Rogers, 170 P.3d 881 (Idaho 2007) (revocation process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial)
  - State v. Shambley, 795 N.W.2d 884 (Neb. 2011) (hearsay evidence is admissible, but the court may not rely solely on hearsay)

Termination and Judicial Recusal

- Can the treatment court judge preside over the termination/ sentencing hearing?
- Every defendant facing termination/sentencing is entitled to a “neutral and detached magistrate.”
- There is a split of authority on this issue.

Termination and Judicial Recusal

- Most jurisdictions have taken a case-by-case approach to recusal
- The usual standard is whether the judge's impartiality might reasonably be questioned by person of ordinary prudence with full knowledge of the facts and circumstances
- The "mere fact" that the judge presiding over the termination was also the drug court judge is not enough, by itself, to require recusal
  - Conner v. State, 248 A.3d 318 (Md. Ct. App. 2021)
  - State v. Wells, 162 N.E.2d 835 (Ohio 2020)
  - State v. Belyea, 999 A.2d 1080(N.H. 2010)

Termination and Judicial Recusal

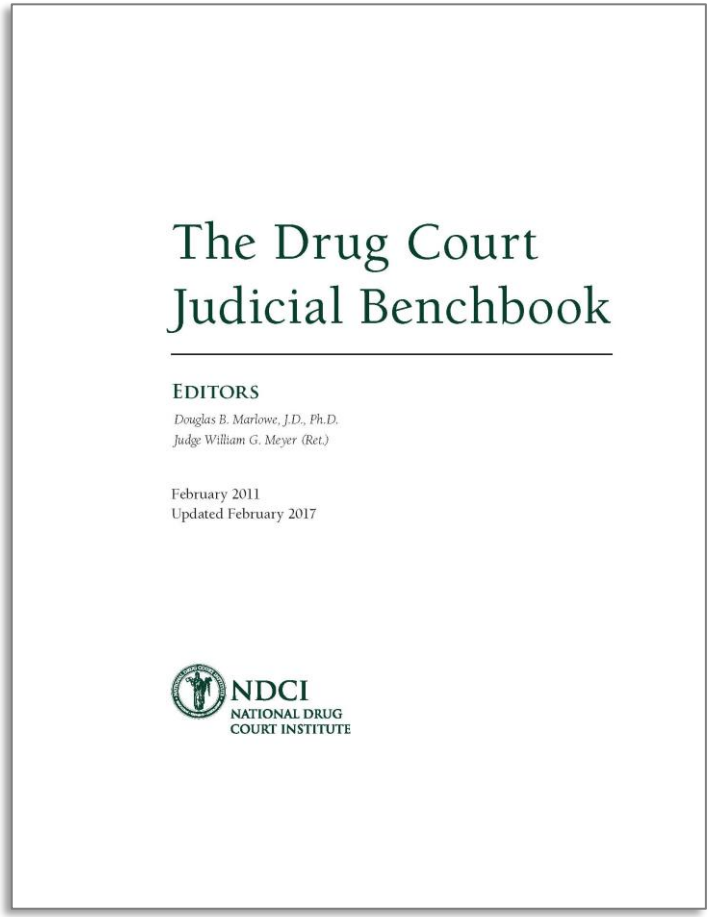
- However, several jurisdictions have adopted a blanket rule requiring recusal when the defendant asks for recusal
  - State v. Marcotte, 943 N.W.2d 911 (Wis. Ct. App. 2020)
  - State v. Cleary, 882 N.W.2d 899 (Minn. Ct. App. 2016)
  - Alexander v. State, 48 P. 3d 110 (Okla. Crim. App. 2002)

Termination and Judicial Recusal

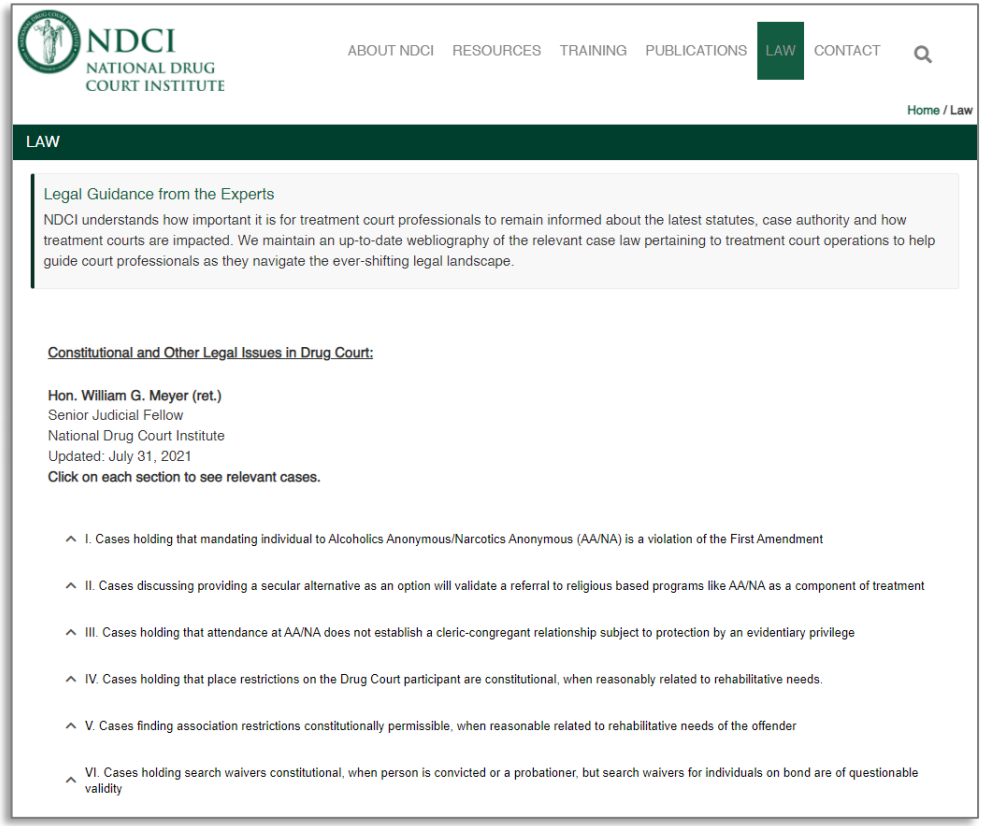
NADCP's recommended approach reflects that set forth in Alexander v. State, 48 P. 3d 110 (Okla. Crim. App. 2002):

> *"[I]f an application to terminate a Drug Court participant is filed, and the defendant objects to the Drug Court judge hearing the matter by filing a motion to recuse, the defendant's application for recusal should be granted and the motion to remove the defendant from the Drug Court program should be assigned to another judge for resolution."*

NADCP Resources

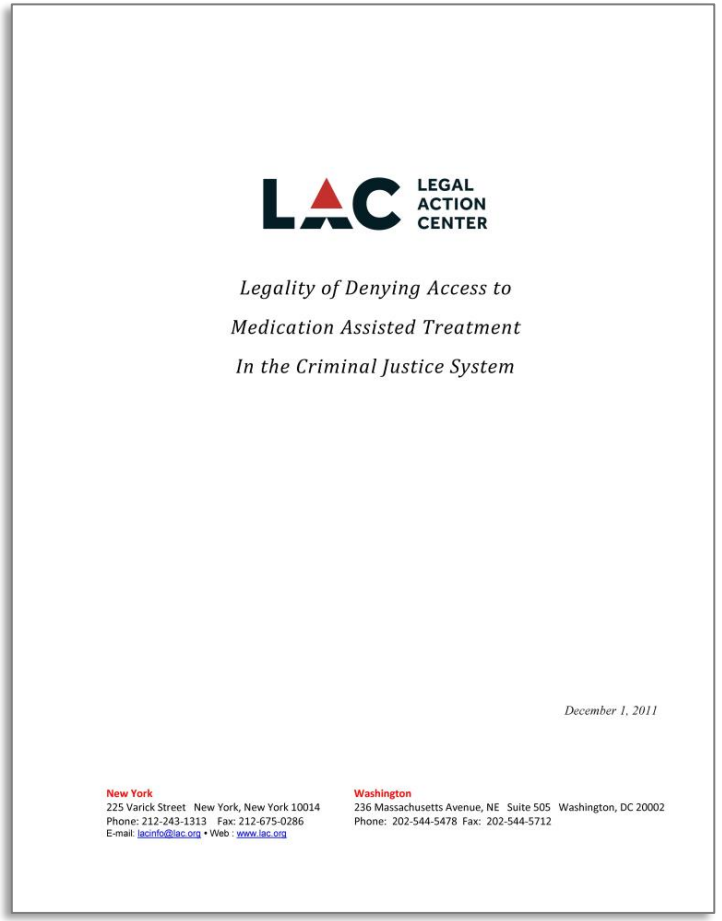


[NDCI Drug Court Judicial Benchbook]

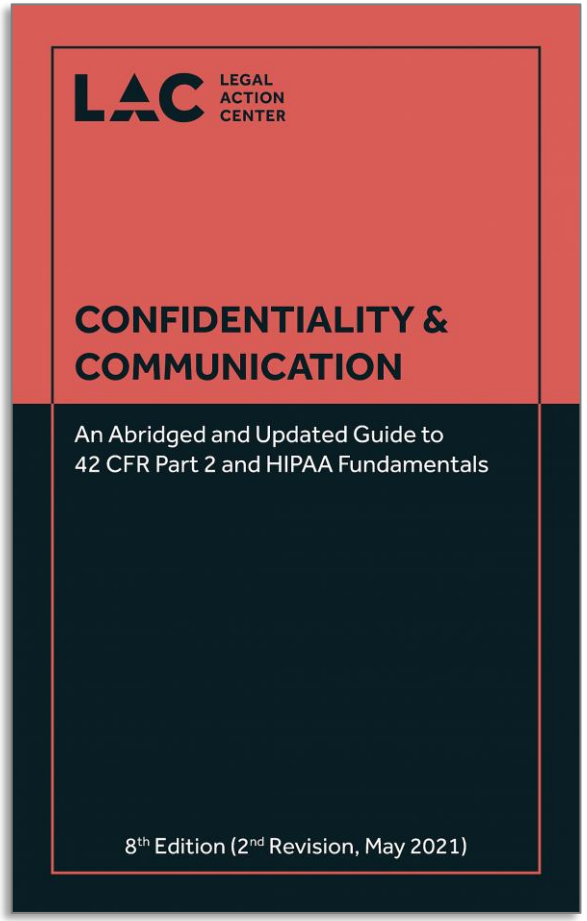


[NDCI webpage: Constitutional and Other Legal Issues in Drug Court]

Legal Action Center Resources



[Legality of Denying Access to MAT in the Criminal Justice System]



[Confidentiality & Communication]

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