



WORK AS A TEAM

MIND YOUR BOUNDARIES

KEEP YOUR ETHICS

Due Process & Legal Issues

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FIRST AND BEST ADVICE

- ▶ **READ** the Adult Best Practices and discuss each section with team, one at a time. **LEARN** about your team's strengths and challenges.
- ▶ **READ** the Judicial Benchbook. It isn't just for Judges.
- ▶ **KEEP** up to date by tracking NDCI, NADCP, and other vendors who specialize in this area.

Confidentiality Laws

THE FEDS, AND THE LOCALS

Confidentiality/Privacy

42 CFR Part 2 – The alcohol and substance abuse treatment confidentiality rule.

HIPAA – New(er) federal rules covering all health related information.

Confidentiality laws & HIPAA

- ▶ This is simply a bunch of laws that can be read, understood, and waived.
- ▶ There is no REAL clarity
- ▶ In some places it conflicts with the Constitution
- ▶ Nobody was contemplating Drug Courts
- ▶ Really not the real challenge for counsel in the “big picture”.

42 U.S. Code 290dd 42 CFR Part 2

- ▶ First issued 1975, revised 1987, 2018
- ▶ Designed to help deal with the stigma of addiction.
- ▶ Requires notification of confidentiality, consent forms, prohibition of redisclosure
- ▶ “I’m sorry I cannot acknowledge whether someone is or isn’t in our treatment program”.

What 42 CFR Covers:

- ▶ “Any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation or research which is directly or indirectly assisted by any department or agency of the United States.”

HIPAA

- ▶ Health Insurance Portability and Accountability Act of 1996
- ▶ 45 CFR Parts 160 and 164, Subparts A and E
- ▶ Designed to ensure maintenance of health insurance coverage when you change jobs.
- ▶ Administrative simplification – Healthcare processes becoming very complex – look to standardize information – make it easier.
- ▶ Protect confidentiality and security of patient information

Privacy Standards

- ▶ Places restrictions on the use and/or disclosure of “Protected Health Information” –PHI
- ▶ Effective 4/14/03
- ▶ Essentially applies “42 CFR p.2-like” requirements to all health care.

Protected Health Information (PHI)

- ▶ Any health information:
 - ▶ *Oral , paper, or electronic*
- ▶ Including identifying demographic information
- ▶ Relating to:
 - ▶ Physical or mental health (treatment) of individual,
 - ▶ Provision of health care to an individual (operations)
 - ▶ Payment for provision of health care to individual

Security Standards

- ▶ Security of information against non-approved access
- ▶ Electronic creation, transmission, and storage of information a significant concern – hackers
- ▶ Requirements for logging of access, automatic log offs, encryption of information sent by internet.
- ▶ Regulations took effect in 4/05

Minimum Necessary Standard

- ▶ When using/disclosing PHI, only the minimum necessary information should be shared.
- ▶ The disclosure should cover only the authorized information
- ▶ Individuals, family, visitors, etc. who do not have a need to know PHI should not have access to it.

HIPAA v. 42 CFR Part 2

- ▶ The laws cover a lot of the same material.
- ▶ Some points of difference – more specific or more recent rule usually applies.
- ▶ For the CD Treatment providers, in most cases the rules of 42 CFR Part 2 are more stringent
- ▶ In several cases HIPAA wins.



Do These Laws Apply to Problem-Solving Court Practitioners?

YES

HIPAA doesn't apply to courts

- ▶ Contrary to myth, HIPAA covered entities do not include the courts, court personnel, accrediting agencies like JCAHO and law enforcement personnel including police or probation officers.
- ▶ GAINS CENTER, "Dispelling the Myths..."
Feb. 2007

Persons who are protected as “Patients”

- ▶ A person is a “patient” if they have sought or received a treatment programs services.
- ▶ If someone fails to appear for an initial appointment, that information is protected because they have “sought” treatment.

Defining the Program

1. A unit or office of the problem-solving court itself provide diagnosis, treatment or makes referrals to CD treatment.
 - ▶ Is a “Program” under 42 CFR Part 2.
 - ▶ Is a “Covered Entity” if it transmits PHI electronically.
 - ▶ Requires a valid multi-party consent to disclose information to the problem-solving court team.

Defining the Program

2. The program is independent of the problem-solving court.
 - ▶ Requires valid multiparty consents for re-disclosure of information to the problem-solving court team.

General Rule of Disclosure

- ▶ “Treatment Programs may only release information or records that will directly or indirectly identify a problem-solving court participant as a substance abuser:
 - ▶ With a knowing and written consent from the participant, AND
 - ▶ limited exceptions



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; (MODIFIED AND STILL NOT CLEAR)
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 1st 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.

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

Option 1- Court Order & Irrevocable Consent

- ▶ Use of Court Order (court or administrative body) – Satisfies HIPAA
 - ▶ “Standing order”
 - ▶ “Limited HIPAA Order”
 - ▶ Irrevocable consent – 42 CFR Part 2

Option 2 – Revocable Consents

- ▶ “Unlikely” the individual will revoke consent if it means they will be in violation of terms of sentence.
- ▶ Saves Court work – no orders
- ▶ If revoked, programs will have to inform court that a 42 CFR Part 2 court order is needed.
- ▶ Consent needs to describe specifically how disclosed info will be used.

Use and Redisclosure

- ▶ 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.....

Mandatory disclosure -no consent

- ▶ State child or elder abuse laws
- ▶ A valid court order
- ▶ 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

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

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.

Slowly we get answers: open courts

- ▶ The provisions of 42 CFR 2.35 and the need for open courtrooms required denial of motion to close proceedings. Sec. 2.35:
 - a. need to disclose as a condition of participation in program
 - b. disclosure only to those in criminal justice system on a need to know basis
 - c. consent

Florida v. Noelle Bush,
Circuit Court (Oct. 2002)

Common errors:

- ▶ WHO is in the staffing? Are they covered by the waivers?
- ▶ How much HEARSAY is allowed in staffing?
- ▶ Failure to follow the rule of MINIMIZATION.
- ▶ Leaking information into other cases, or peers.

Objectives

- ▶ Highlight the importance and benefit of working cooperatively with drug court partners
- ▶ Identify strategies for developing team relationships
- ▶ Learn the pitfalls of boundary problems
- ▶ Ethics are NEVER changed.

Examples:

- ▶ 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
- ▶ As a defense attorney, I cannot:
 - ▶ Allow a perpetration of a fraud upon the Court
 - ▶ Reveal information subject to privilege.



- ▶ As a Judge, I cannot:

- ▶ Defer decisions to the team
- ▶ Conduct ex parte conversations or Court
- ▶ Discuss individual legal matters before me.

- ▶ As a treatment provider, I cannot:

- ▶ Reveal information subject to confidentiality laws that are not necessary
- ▶ Ignore safety of others

- 
- ▶ As a probation officer, I cannot:
 - ▶ Reveal LE activity coming up
 - ▶ Ignore public safety mandates incumbent on my profession.
 - ▶ Yield my authority to violate probation
 - ▶ As law enforcement, I cannot:
 - ▶ Reveal confidential LE activity.
 - ▶ Reveal what I learn in Treatment Court to others.



Maintaining Boundaries

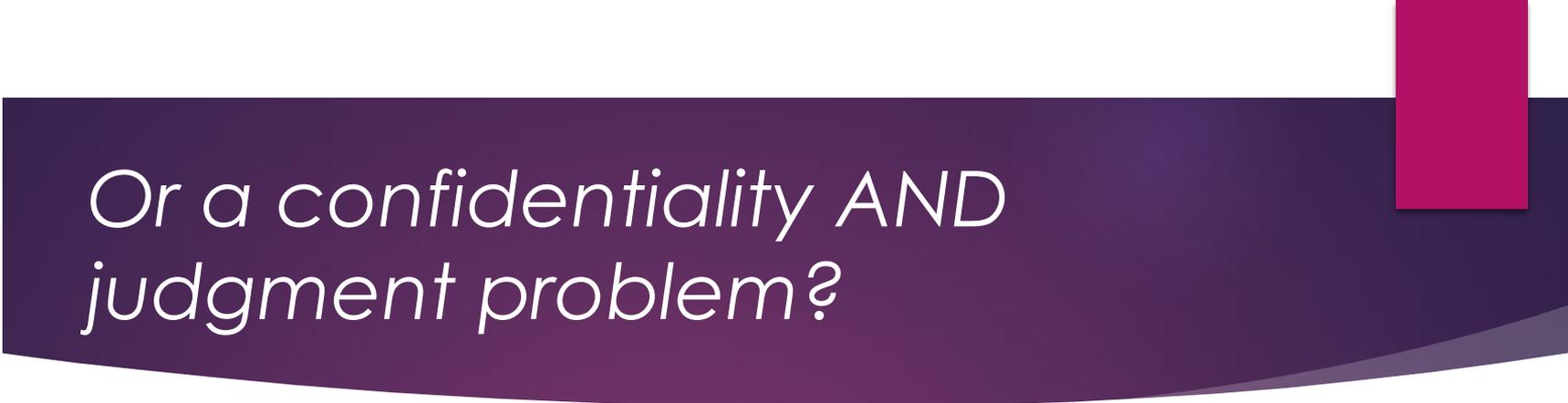
*DRUG COURT PROFESSIONALS
AND ETHICS*

Is there a problem with...

- ▶ Loaning a current participant money ??
- ▶ co-signing a loan on a car for a client?
- ▶ Co-signing a mortgage with a client?
- ▶ Sleeping with people under your care?
- ▶ Having them live with you?
- ▶ Hire them to baby sit for you?

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?



*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?

- 
- ▶ 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.



How about:

- ▶ Abuse of power?
- ▶ Criminal conduct?



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

Ex parte conversations?

- ▶ Between participants and judges?
- ▶ Between the DA and participants?

Codependent Courtrooms???

- ▶ Teams or judges who manipulate the system to benefit select clients for personal reasons.
- ▶ Teams or judges who “feed “ illness rather than address it.

Some folks in recovery want to be treatment professionals without training! Ditto lawyers. Ditto probation.

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

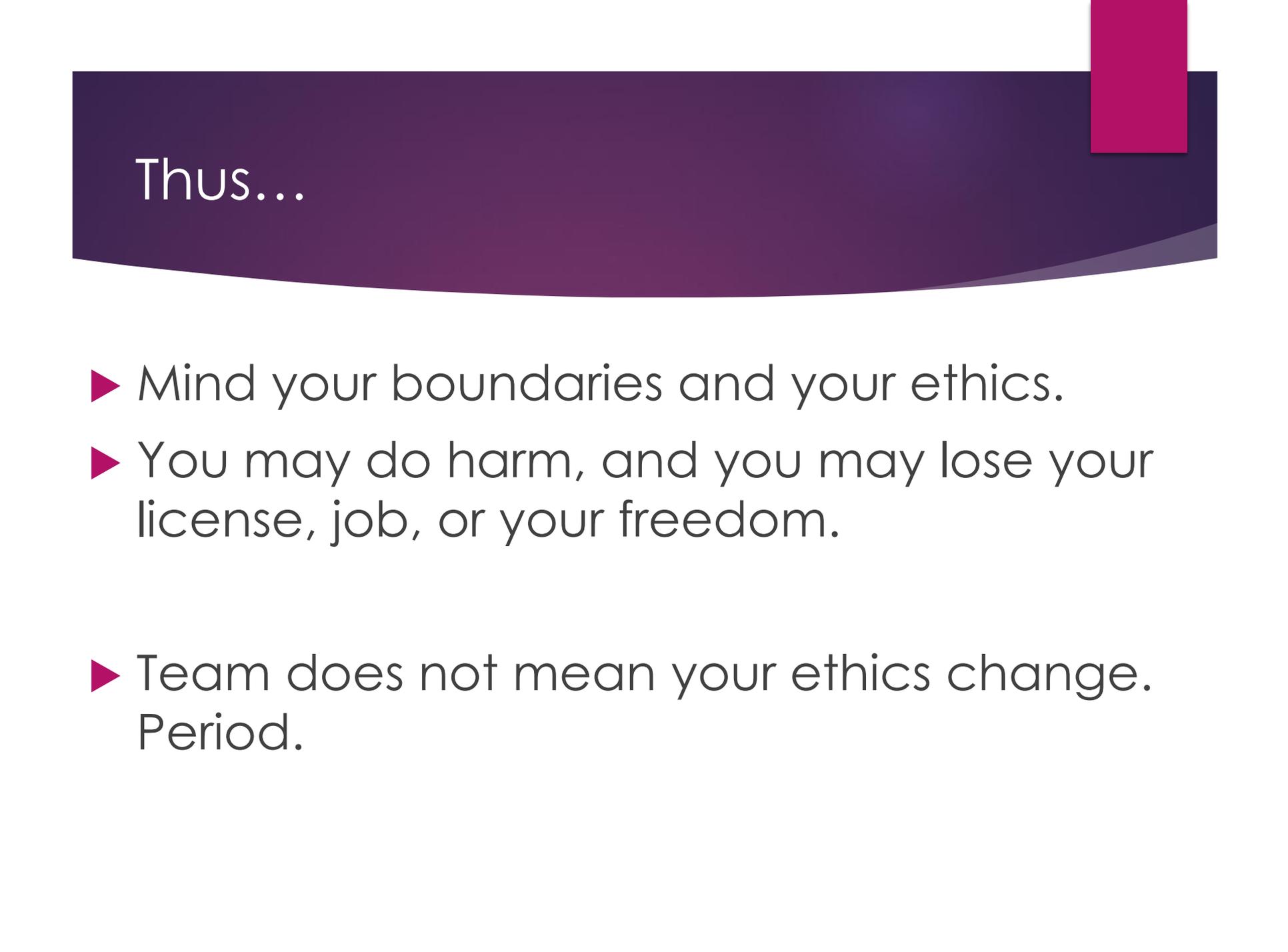
"Ethics for Addiction Professionals". Second edition, 1994. LeClair Bissell, M.D., C.A.C.; James E. Royce, S.J., Ph.D.

Dual relationships

- ▶ Drug Court clients present significant challenges to the issue of professional and ethical boundaries.

Why?

- ▶ They are with us longer
- ▶ We have a comprehensive look at their entire life
- ▶ Part of motivating change is developing a more intense relationship
- ▶ We admire their courage and work



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 change. 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

Drug Court Roles (Team concept)

- ▶ Judge- delegates authority to the team. Monitors participant progress
- ▶ Prosecutor- expands advocacy to include treatment. Recognizes the team. Protects due process & public safety.
- ▶ Defense- advocates for successful participation. Participates in and contributes to team efforts to hold participant accountable. Protects due process.



▶ Probation

- ▶ provides monitoring, supervision and case management services
- ▶ provides case related information to all members of the team for purposes other than a revocation
- ▶ in the case management role becomes the bridge to all other team members

▶ Treatment-both SA and MH

- ▶ Equal place at the table
- ▶ Critical information for team
- ▶ MAT

Best Practices

- ▶ Include law enforcement on the team
- ▶ Train and cross train constantly
- ▶ Follow the research, and follow the Adult Best Practices Volume 1 & 2, as well as the 10 Key Components.
- ▶ Read and follow the Judicial Benchbook.

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.

We operate 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.

Understand the other roles

- ▶ Lawyers are there for legal reasons. Protect the record. Protect the Constitution. Motivate positively.
- ▶ DA's are there to assert public safety concerns (with probation, Court and LE)
- ▶ The people who are doing direct services are the ones who know what is going on. **Their recommendations are paramount.**

The Bench

- ▶ Cannot delegate decisions
- ▶ Should be the predominant voice in the room in Court.
- ▶ Should spend three minutes with each person...good or bad.
- ▶ Should focus on teachable moments.
- ▶ Clear patient focus and engagement.
- ▶ Should engage and instill hope.

Supervision

- ▶ Is responsible for knowing what is happening outside the court and treatment arenas.
- ▶ Home visits are paramount.
- ▶ Assessments, and sequential case management based on the assessments.
- ▶ Testing results, and working with treatment.
- ▶ Delivering MRT.
- ▶ Intensive case management, sequenced correctly.
- ▶ Constant communication with treatment.

Treatment

- ▶ Must assess, and should provide the team with a diagnosis. And, update.
- ▶ Should assess at regular intervals at least every 120 days to measure progress.
- ▶ Should provide clinical services in the beginning to assess ability to manage group.
- ▶ Should conduct group using manualized treatment with fidelity to the model.
- ▶ Should provide information regarding what the participant is working on, and how they are doing.
- ▶ Must follow confidentiality standards, but provide sufficient information to help with the message.

Defense Counsel

- ▶ Technically probably the hardest job on the team.
- ▶ Must negotiate difficult ethical issues
- ▶ Has a duty to the client that is different than all others.
- ▶ When the defense is silent, you know you need to pay attention.

Each profession MUST

- ▶ Stay within their ethical mandates.
- ▶ There are things that each profession cannot do, team or not.
- ▶ Learn that, respect that.
- ▶ Help each other out and honor boundaries.

**Protect your clients, protect your court,
protect yourself and your profession.**

The magic

Is the team following the research, working together and keeping our eye on the ball.

The ball= the success of our clients.

Ethics in Drug Court: *Thorny issues*

1. *Ex Parte* Communications and Staffing
2. Judicial Fraternalization/Impartiality
3. Role of the Defense Counsel

Ex parte Communication

- Ex parte communication must be specifically waived or asserted (Model Code Judicial Conduct, Canon 3B(7))
- Who is present at staffing?
- Is it ok to attend team meetings w/out client?
- How many levels of hearsay in staffing?
- Are 42 CFR waivers executed for everyone present?

- ▶ Brown v. State, MD Ct of Appeal 5-18-09

Ex parte staffing

- ▶ Permissible to have *ex parte* communications at staffing with appropriate waivers and outside of drug court
- ▶ Best practice to inform defense counsel of content and nature of communications
- ▶ Many states have specific administrative orders permitting such communication
- ▶ Rules of Professional Conduct for Counsel-UNCHANGED

ABA Rule 2.9(5)

- ▶ No ex parte communications except:

(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.

ABA Rule 2.9

- ▶ Comment [4]

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

ate judicial ethics amendments

- ▶ Idaho, Maryland, Montana, Minnesota, New York, Indiana and Arkansas
- ▶ Amended their Codes to specifically address and permit *ex parte* communications in problem-solving courts including staffings
- ▶ Perhaps a better approach would be amending the Rules of Prof. Resp. for counsel requiring them to be present at staffing and progress reports
- ▶ **JUDICIAL ETHICS CHANGES DO NOT CHANGE COUNSEL ETHICAL MANDATES**

Out-of-court contact with participants



DTC picnic



Bowling night

The Judge and Drug Court Participants

Judge attends group activities, softball games, bowling night, holiday party, spring picnic, Disneyland trip, with drug court participants.

**Don't do anything more than
a cameo appearance!**

Judicial discipline

- ▶ *Matter of Blackman*, 591 A.2d 1339 (N.J. 1991)
“[J]udges who attend a public or social event will be perceived as endorsing or supporting not only the event itself but also persons associated with the event.”
- ▶ *In re Jones*, 581 N.W.2d 876 (Neb. 1998)
Canon 1 and Canon 2 violation to meet individually with probationers.

Defense counsel



Defense's duty

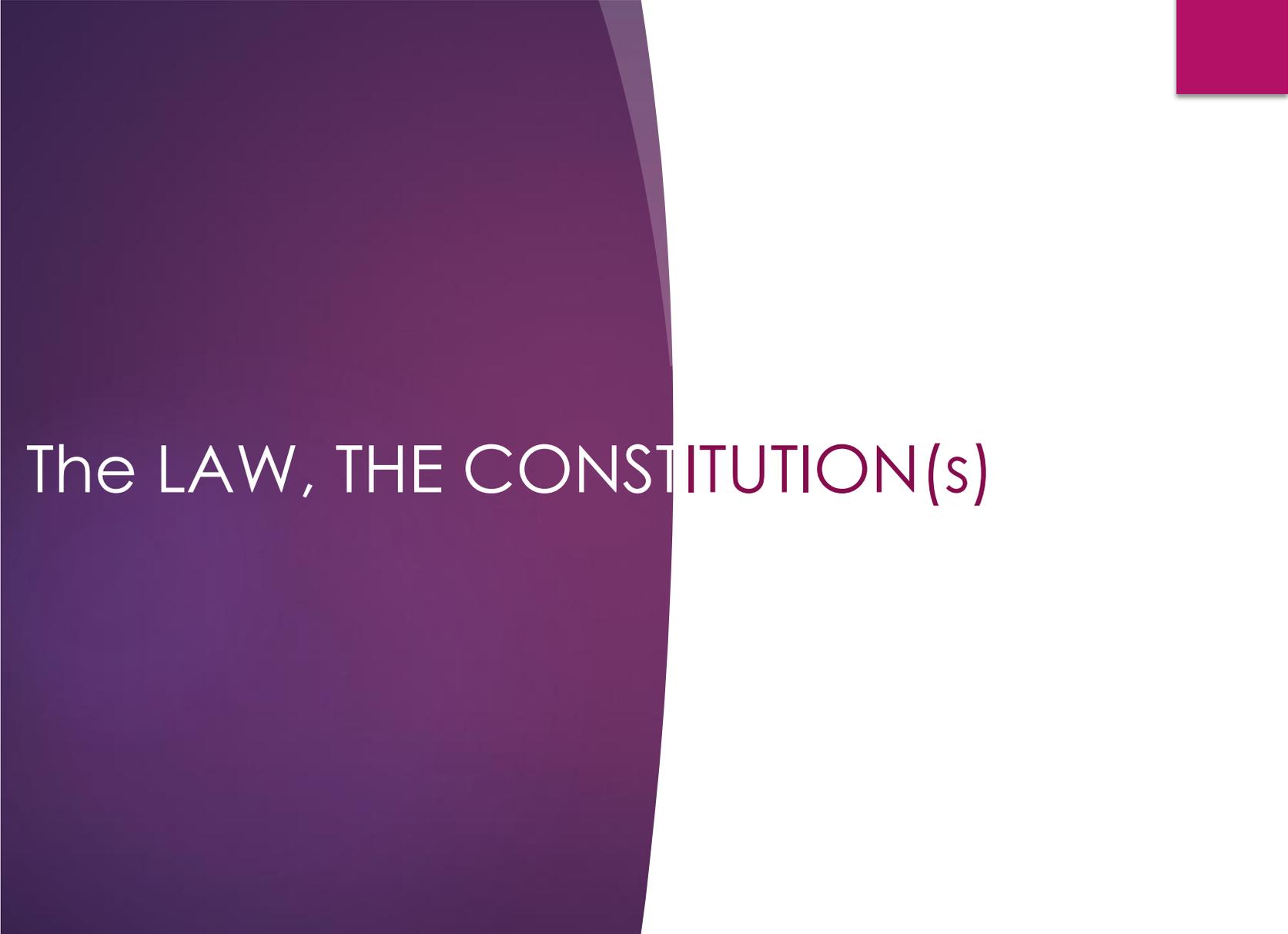
- ▶ “Duty of representation” of client
- ▶ *C.f.*, reasonable diligence and competence in ABA Model Rule 1.3; “devotion and courage” in advocacy in ABA (“Defense Function Guidelines”)
- ▶ To competently represent client in DTC must familiarize self with tx, procedures, bases for sanctions or termination, etc. (ABA Model Rule 1.1)

Respect Role of Defense

- ▶ National Legal Aid and Defender Association:
Nothing in the problem solving court policies or procedures should compromise counsel's ethical responsibility to...challenge evidence or findings and the right to recommend alternative treatments or sanctions.

Best Practices

- ▶ Ensure that DA and Defense Counsel attend staffings and review hearings
- ▶ Advocate change in Canons
- ▶ Judges: avoid public activities (non-judicial) with participants, except for cameo appearance
- ▶ Respect ethical obligations of defense counsel



The LAW, THE CONSTITUTION(s)

Due Process

- ▶ Procedural protections are due under the 5th and 14th Amendments when the defendant will potentially suffer a loss to a recognized liberty or property right.
- ▶ If due process applies, the question remains what process is due.

Fuentes v. Shevin, 407 U.S. 67 (1972).

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

First Amendment:

▶ 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, 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. “*
- ▶ *REALITY*: this is very few people and they get over it quickly. Recognize the law, make the new order, enforce the order.

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.”

Search

- ▶ Post conviction: 4th 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.

Massachusetts Variant

- ▶ Your Supreme Court has ruled otherwise. Thus, you follow the law, or make individualized rules for drug court participants, and articulate why you need to do so.

Electronic devices

- ▶ May require special orders, and waivers to examine them.

Other bans:

- ▶ Alcohol- OK: People v. Beal (CA 1997)
- ▶ Articulate why “medical” marijuana cannot be used on record, and place as a term of probation. (interferes with cognition)
(Interferes with motivation) (Except: Arizona)
- ▶ Articulate why folks cannot consume any item “not for human consumption”, poppy seeds, or other items that will mess up drug testing.

Due Process Concerns

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

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

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

What is happening?

- ▶ Sanction in program?
- ▶ Termination from program?

- ▶ Different rules may apply depending on the model!
 - ▶ DEJ
 - ▶ POST CONVICTION

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. Best practice: follow the VOP procedure.
- ▶ Clear majority now moving toward due process.

Question:

- ▶ 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.

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.")
- ▶ Brutal, as is Hoffman v. Knoebel same district

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

- ▶ 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?

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?

Equal Protection issues:

- ▶ 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)
- ▶ Monitor disparate impacts in admission and program.
- ▶ DA may be gatekeeper for admission, and unless constitutional violation, no right to hearing to challenge rejection.



[HTTPS://WWW.NDCI.ORG/RESOUR
CES/LAW/](https://www.ndci.org/resources/law/)

Updated
every 6
months

Best Practice:

- ▶ Keep your lawyers involved
- ▶ This is how we protect the program, protect the clients, and protect the Constitution.
- ▶ It turns out that lawyers also improve outcomes!!!

Prosecutors

- ▶ Attend staffing? Cost savings up 171%
- ▶ Attend Court? Recidivism drops 35%

If your prosecutor is interested in public safety, they should show up

Defense Counsel

- ▶ Defense attends staffing:
Cost savings up 93%
- ▶ Defense attorney attends
court: Recidivism down 35%

Defense counsel: necessary

Other due process issues:

- ▶ Drug testing: must meet legal standards for adjudications. Not all tests are up to legal standards.
- ▶ Get confirmation via GC/MS if there is a question or challenge.
- ▶ If they pass you pay, if they flunk they pay...and they get sanctioned for lying.



Termination & Sentencing

- ▶ Split of authority ,majority now that the original judge may terminate and sentence.
- ▶ Judges already know how to recuse if they need to.
- ▶ Best practice, if they object, get another Judge.

Other stuff

- ▶ Open Courtroom?
Absolutely (Noelle Bush) (rule of minimization)
- ▶ Closed staffing? Yes. (State v. Sykes, 182 Wn2d 168)

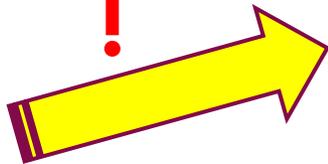
The legal
stuff...

**CONTINUES TO
EMERGE AND
PERSONAL
LIABILITY
BECOMES
REAL.**

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?

Much of the litigation involves criminal cases not family treatment courts

- ▶ But there are lessons to be learned and things to watch out for!
- ▶ 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, RA, 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

Can we mandate cessation as a condition of Drug Court graduation?

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.

The Bottom Line

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.

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 (7th 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 14th Amendment
 - ▶ 1983 Civil Rights violations....
- ▶ 8th Amendment-cruel and unusual punishment.

“This drug court isn’t a program under the ADA and RA”

Wrong.

- ▶ Pennsylvania Dep’t of Corrections v. Yesky, 524 U.S. 206, 210 (1999) (ADA applies to correctional programs)
- ▶ People v. Brathwaite, 11 Misc. 3d 918, 816 N.Y.S. 2nd 331 (Crim. Ct., Kings County 2006) (Brooklyn’s alternative sentencing program falls under Title II’s definition of “state service or program.”)
- ▶ Evans v. State, 667 S.E. 2d 183, 186 (Ga. App. 2008) (A drug court is a “public entity” under the ADA).

But they aren't disabled simply because they need MAT!

Addiction is a disability.

MX Group, Inc. v. City of Covington, 293 F.3d 326, 336 (6th Circuit 2002)

*It is well established that drug addiction constitutes and “impairment” under the ADA and that drug addiction necessarily substantially limits major life activities of “employability, **parenting**, and functioning in everyday life”. (emphasis added)*

US v. City of Baltimore, 845 F. Supp. 2nd 640 (D. Maryland 2012) Residents of substance abuse facility were individuals with a disability.

Eligible Participants disqualified due to blanket MAT policy but would be otherwise qualified?

- ▶ Thompson v. Davis, 295 F.3d 890, 896 (9th Circuit, 2002) Incarcerated individuals who were illegally denied parole because of their disability (drug addiction) sufficiently alleged that there were otherwise qualified for parole.

MAT users are not a significant risk to health or safety

- ▶ New Directions Treatment Services v. City of Reading, 490 F.3d 293, 305 (3rd Cir. 2007) (NIMBY case) General statements about heroin users does not establish substantial risk to community. Must establish nature, severity and duration of risk, based on current medical knowledge and best evidence.
- ▶ Start, Inc. v Baltimore County, Md. Et alia, 295 F. Supp.2d 569, 577-78 (D.Md. 2003) Risks of diversion and concerns can be mitigated by protocols and administration.
- ▶ There are several cases in this area.

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

- ▶ Disparate treatment
 - ▶ *Thompson v. Davis*, 295 F.3d 890 (9th 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.

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.

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).

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.

- ▶ The matter is settled (Presumption) in most instances if: (1) the physician has legal authority to write the prescription, (2) the medication is indicated to treat the patient's illness, (3) the prescription was not obtained fraudulently, and (4) the patient agrees to take the medication as prescribed. If prescribed: Presumption in favor of MAT **Burden of proof is on the objector to show it is inappropriate by preponderance.**

No federal funding:

- ▶ (1) the physician has legal authority to write the prescription, (2) the medication is indicated to treat the patient's illness, (3) the prescription was not obtained fraudulently, and (4) the patient agrees to take the medication as prescribed.
- ▶ But the burden is different. The moving party makes a prima facie case, then opposition may introduce evidence of prior abuse of MAT, or MAT deception in treatment.

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.

8th 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)

Can the Court compel the use 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.

What if the prosecution or a party objects?

- ▶ Set a hearing, follow guidelines supra.

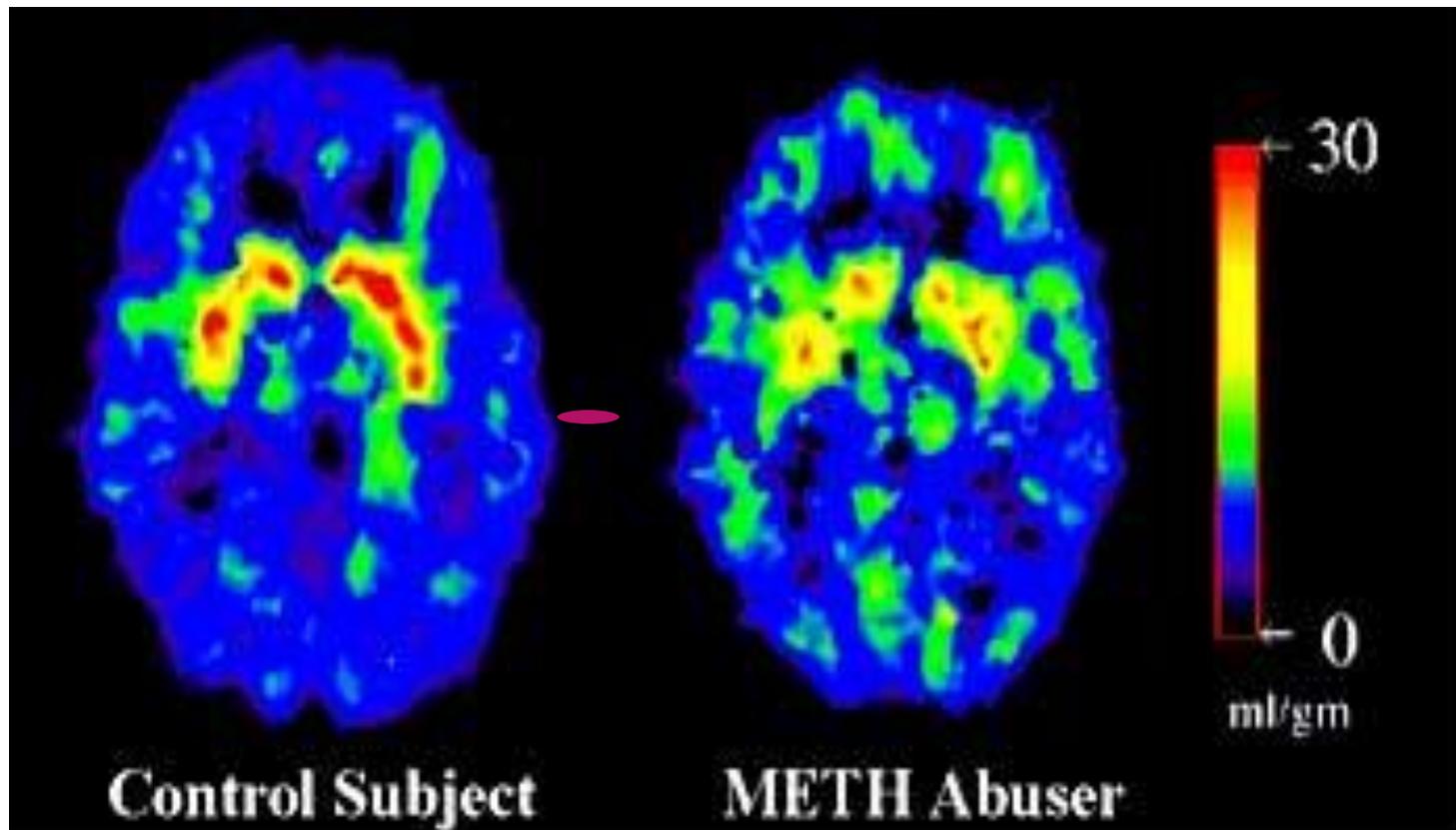
We are rural and have no MAT

- ▶ Federal resources will help
- ▶ Do local outreach.
- ▶ If you have drugs and alcohol, you need MAT.

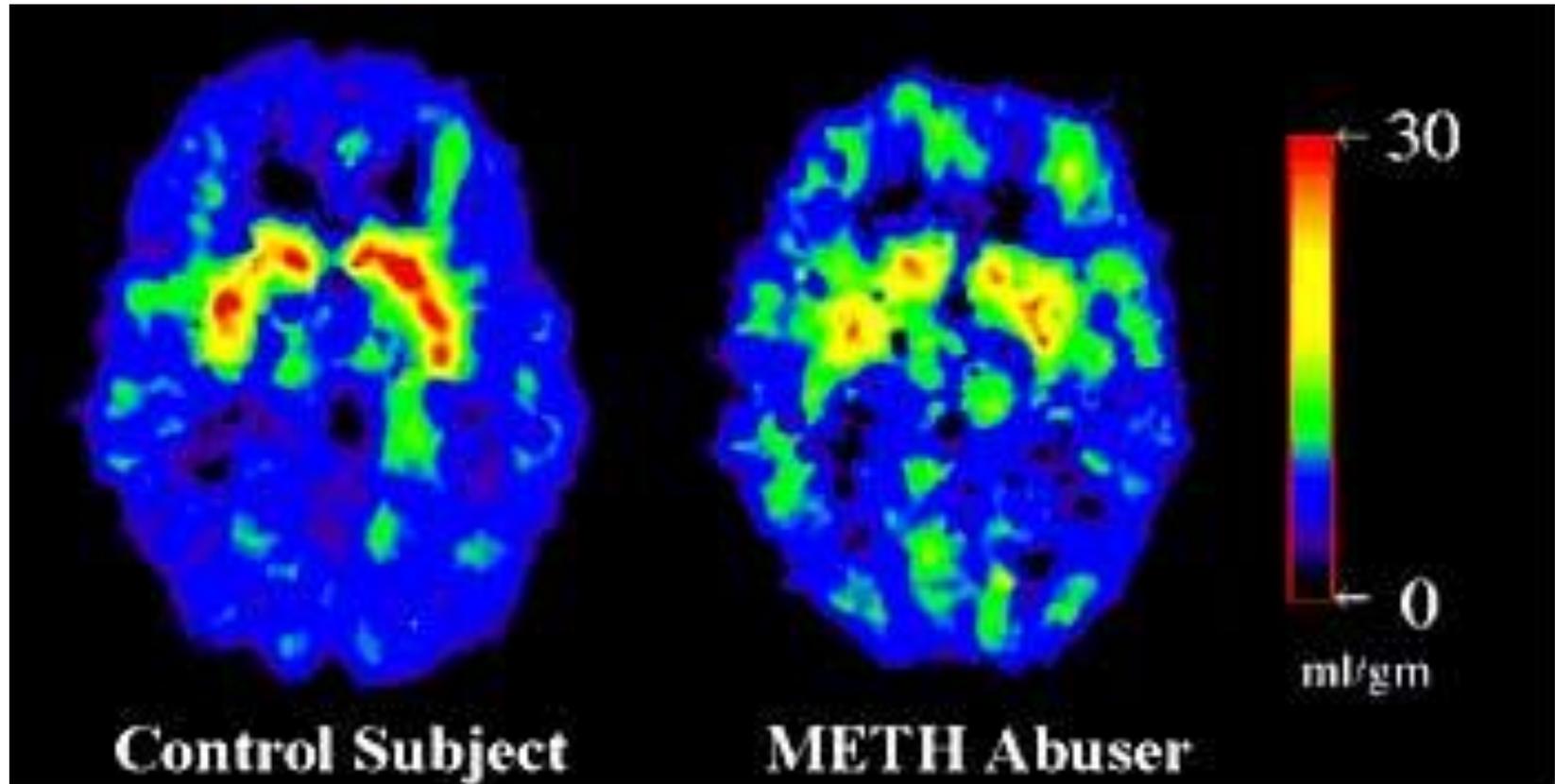
Net Message:

- ▶ Beware of blanket MAT issues:
- ▶ Make a record of denials, or policies
- ▶ Be aware that your “beliefs” are not medicine.

This is what it looks like when you do it following the research.



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



Best Practices

- ▶ Speed matters! Getting participants into the program within 20 days of arrest = twice the savings
- ▶ Single coordinating treatment agency = 10 times the fiscal savings.
- ▶ Treatment that has a phase focused on relapse prevention=3 times the savings

Important details....

- ▶ Better outcomes if folks are tested 2 or more times per week.
- ▶ Better outcomes if test results are back within 48 hours of test.
- ▶ Better outcomes if at least 90 days of documented abstinence before completion have larger savings.

Judicial impact matters:

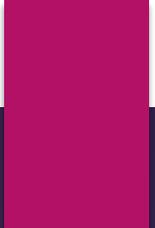


- ▶ Status hearings every 2 weeks in phase one have more cost savings
- ▶ The Judge should spend three minutes per person
- ▶ The longer the Judge is assigned to drug court, the better the client outcomes.
- ▶ Judges do even better second time around, and they should stay longer than 2 years for greater cost savings.

Client information matters:

- ▶ Courts that have written rules and guidelines for team responses have 3 times the savings.
- ▶ Courts that use electronic data storage save money.
- ▶ Courts that evaluate and follow the recommendations have 4 times the savings.
- ▶ Courts who have community partners save twice as much.





Who wins when the team is
not focused on best
practices?

THE DISEASE