

## LEGAL & TREATMENT ETHICS FOR TREATMENT COURT PROFESSIONALS

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#### **LEARNING OBJECTIVES**

#### Areas of focus:

- Effective treatment practices
- $\checkmark$  First Amendment and Alcoholics Anonymous  ${\mathbb R}$
- Medication assisted treatment laws
- Illegality of preventive detention
- Compliance with confidentiality laws
- Sharing information in staffing
- Trauma informed care and reducing stigma

- $\checkmark$  Obtain and maintain consent to release information
- ✓ Provide and/or coordinate clinical care with client
- ✓ Obtain clinical updates from other treating providers for the purpose of care coordination and staff disclosure
- ✓ Provide clinical updates to treatment court team at staffing
- ✓ Educate treatment court team on substance use disorders, client's trajectory of change and evidence-based practices/interventions
- $\checkmark$  Attend staffing and court sessions

## THE BIG PICTURE

- Participants receive substance-related treatment based on a standardized assessment of their treatment need.
- ✓ Treatment is not provided to reward, to punish, or to serve other nonclinical goals.
- Treatment providers are trained and supervised to deliver a continuum of evidence-based interventions that are documented in treatment manuals.

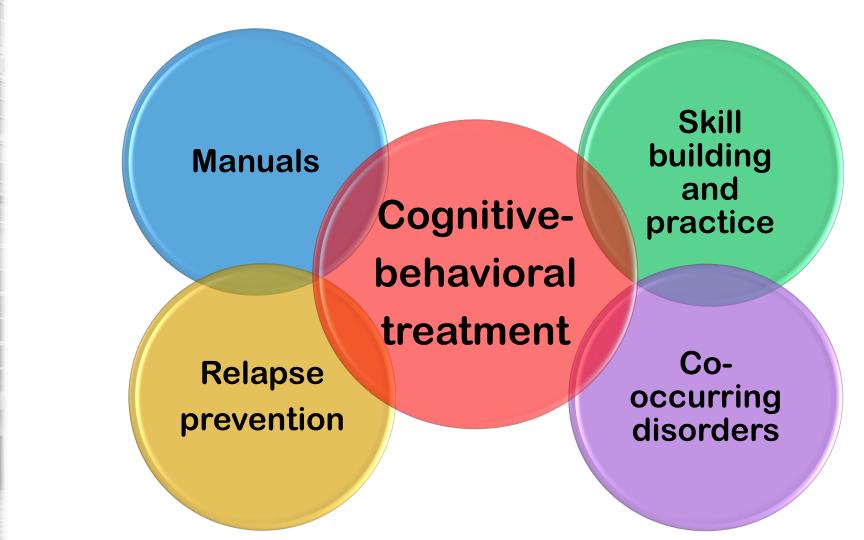


#### **EFFECTIVE TREATMENT PRACTICES**

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## **OUTCOMES IMPROVE WHEN...**

- Participants receive behavioral or cognitivebehavioral interventions.
- Interventions are carefully documented in treatment manuals.
- Providers are trained to deliver the intervention consistent with the manual.
- Fidelity to the treatment model is maintained through continual clinical oversight.



#### **USING RECOVERY SUPPORT GROUPS IN THERAPY**

### Offer choice (types, spiritual and secular)

# Try to match demographics, lifestyles, and level of substance involvement



Treatment courts can *refer* participants to deitybased programs such as Alcoholics Anonymous<sup>®</sup>, but courts cannot *require* participation in such programs without violating the First Amendment.



# Why does *requiring* attendance at deity-based programs violate the First Amendment?

The First Amendment Establishment Clause prohibits the government from establishing or requiring religious practices.

Deity-based programs like Alcoholics Anonymous<sup>®</sup> require:

- Confess to God "the nature of our wrongs" (Step 5)
- Appeal to God to "remove our shortcomings" (Step 7)
- By "prayer and meditation" make "contact" with God to achieve the "knowledge of the will" (Step 11)

#### **IT DOESN'T MATTER:**

- Treatment court is voluntary
- AA doesn't require belief in God, just a higher power
- It's just a reference to God
- Treatment providers require AA, not the treatment court

#### Courts have uniformly held that requiring attendance at AA/NA violates the First Amendment

#### **Recommendations:**

- Courts have held that if a secular alternative is available, there is no First Amendment violation by referring to AA/NA.
- Secular alternatives include, among others, LifeRing Secular Recovery<sup>®</sup>, Rational Recovery<sup>®</sup>, Smart Recovery<sup>®</sup>









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# MEDICATIONS



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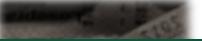
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#### **MAT – MEDICATIONS FOR ADDICTION TREATMENT**



- ✓ Medication- refers to any FDA-approved medication used to treat addiction
- ✓ASAM recommends MAT be understood as medications for addiction treatment



#### **MEDICATIONS**



- Medications for addiction treatment improves outcomes, and includes buprenorphine, methadone, and naltrexone (Vivitrol).
- Participants are prescribed psychotropic or substance use disorder medications based on medical necessity by a treating physician with related experience.
- Treatment courts discourage participants from obtaining mood-altering medication from general practitioners.

#### **MEDICATIONS**



# ✓ Methadone

✓ Buprenorphine

## ✓ Naltrexone

✓ Disulfiram

✓ Acamprosate

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## **MEDICAL MARIJUANA**

#### Follow medication policy of your program as you would for any other drug

✓ Letter signed by doctor acknowledging participant has advised that they are being treated for substance use/mental health issues and are in a treatment court program

 ✓ Appropriate release of information and communication is in place with provider and program

**NOTE:** The federal government regulates drugs through the Controlled Substances Act (CSA), which does not recognize the difference between medical and recreational use of cannabis. Therefore, programs who received federal funds need to be aware of the funding requirements.



## **CONSTITUTIONALITY** MEDICATION ASSISTED TREATMENT LEGAL CHALLENGES

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#### **MAT prohibitions are invalid under:**

Americans with Disabilities Act (ADA) Rehabilitation Act of 1973

Fourteenth Amendment due process guarantees Eighth Amendment cruel and unusual punishment

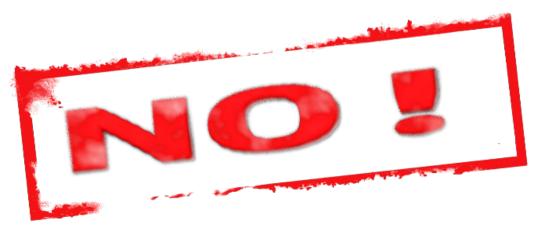
#### **INCARCERATION IS NOT A LEVEL OF CARE**

Participants *are not* incarcerated to achieve clinical or social service objectives such as obtaining access to detoxification services or sober living quarters.

#### It is lawful to place a participant with a substance use disorder in jail while you are waiting for a placement bed to become available?



#### "But, if I release her, she will OD..."



Preventive detention is **UNCONSTITUTIONAL!** 

Treatment courts <u>CANNOT</u> jail participants because they need inpatient treatment and a bed is not available without basic due process protections.

#### Why Is Preventive Detention Wrong?

- The Sixth Amendment guarantees the right to a speedy and public trial and arrested persons cannot be detained for extended period without a trial.
- The Eighth Amendment allows for reasonable bail and prohibits cruel and unusual punishment.
- Jail is not treatment.
- There is no evidence that preventive detention reduces crime, treats substance use disorders or instills fear.

#### Unlawful Preventive Detention Exposes Treatment Courts to CLASS ACTION LAWSUITS

Recently, the Seventh Circuit Court of Appeals made this observation about a treatment court in Indiana:

"Unfortunately, the drug treatment court in Clark County was not one of the success stories. Under the stewardship of Judge Jerome Jacobi, the court ran roughshod over the rights of participants who frequently languished in jail for weeks and even months without justification. The jail stays imposed as sanctions for noncompliance [and awaiting placement in treatment facilities] were arbitrary and issued without due process."

Source: Hoffman v. Knoebel, 894 F.3d 836 (7th Cir. 2018)

#### Recommendations

- Hold a hearing with testimony by a treatment provider concerning the participant's substance use or mental health needs.
- Document the efforts taken to secure a treatment bed placement.
- Make a probable cause determination.
- Set bail.
- Exhaust other less restrictive alternatives (e.g. house arrest, halfway house, GPS monitoring, etc.)
- Rely on other non-compliance issues to justify the sanction (e.g. missing appointments, curfew, etc.)

#### Recommendations

- Rely on treatment provider recommendations for alternatives.
- Allow consultation with an attorney.
- Set review dates, as well as an automatic release condition when a treatment bed is available.
- Explore a civil commitment proceeding.

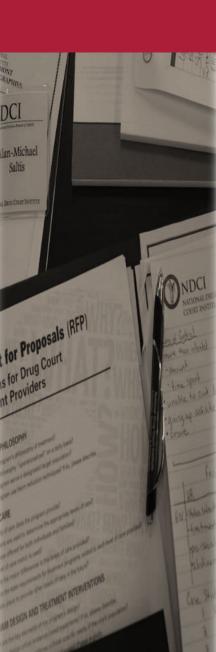
## HOW ARE WE DISCUSSING INFORMATION?

#### **SHARING INFORMATION**

HIPAA and 42 C.F.R. Part 2 do not prohibit treatment professionals or criminal justice 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)



## **Sharing Information**

- ✓ In treatment courts, treatment professionals (and others who are subject to HIPPA and 42 C.F.R. Part 2 stipulations) may share specified information with other team members pursuant to a valid waiver (or court order).
- ✓ Scope of disclosure must be limited to the <u>minimum</u> 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.

#### **SHARING INFORMATION**

Assessment results pertaining to a participant's eligibility for treatment court and treatment and supervision needs

Attendance at scheduled appointments/sessions

✓ Drug and alcohol test results conducted by the treatment center, including efforts to defraud or invalidate

Attainment of treatment plan goals

✓ Evidence of symptom resolution or exacerbation

Evidence of treatment-related attitudinal changes

Attainment of treatment program phase requirements

#### **SHARING INFORMATION**

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

## **STAFFING CONSIDERATIONS**

- Responses to behavior
- Changes in treatment
- Changes in supervision

## Who are they in terms of risk and need?

Where are they in the program (phase)?

Why did this happen (circumstances)?

Which behaviors are we responding to? proximal or distal?

What is the response choice/magnitude?

HOW do we deliver and explain response?

#### **STIGMA**

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"Stigma is a degrading and debasing attitude of the society that discredits a person or a group because of an attribute... Stigma destroys a person's dignity; marginalizes affected individuals; violates basic human rights; markedly diminishes the chances of a stigmatized person of achieving full potential; and seriously hampers pursuit of happiness and contentment."

2015 International Conference on Stigma, Howard University, Washington, DC

#### **COURTROOM ENVIRONMENT**

#### **Be Trauma Informed!**

- Acknowledge the prevalence and impact of trauma
- Create a sense of safety
- Many treatment court participants engage in behaviors that others may consider self-destructive
- Important to understand these behaviors are not character flaws but a strategy or behavioral adaptation developed to cope with the physical or emotional impact of past trauma

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#### **COURTROOM ENVIRONMENT**

#### **Communication Counts!**

- Words can be hurtful or healing
- For example:
  - Court: "Your drug screen is dirty."
  - Participant: "I'm dirty. Something is wrong with me"
  - Trauma informed: "Your UA shows the presence of drugs."
  - Court: "I'm sending you for a mental health evaluation."
  - Participant: "I must be crazy and something is wrong with me."
  - Trauma informed: "I'm referring you to a doctor who can help us better understand how to support you."

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#### **COURTROOM ENVIRONMENT**

#### **Communication Counts!**

Avoid these terms	Use these instead
Addict, user, drug abuser, junkie	Person with opioid use disorder or person with opioid addiction, patient
Addicted baby	Baby born with neonatal abstinence syndrome
Opioid abuse or opioid dependence	Opioid use disorder
Problem	Disease
Habit	Drug addiction
Clean or dirty urine test	Negative or positive urine drug test
Opioid substitution or replacement therapy	Opioid agonist treatment
Relapse	Return to use
Treatment failure	Treatment attempt
Being clean	Being in remission or recovery

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## **COURTROOM ENVIRONMENT**

#### **Words Matter!**

- 516 mental health professionals read one of two vignettes and were asked to complete a questionnaire
- The vignettes were identical except <u>substance</u> <u>abuser</u> vs <u>individual with a substance use disorder</u>
- <u>Substance abuser</u> were thought to be more culpable and deserving of punitive measures

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## **COURTROOM ENVIRONMENT**

#### **Words Matter!**

 314 lay persons completed a questionnaire about two individuals, a <u>substance abuser</u> and an <u>individual with a</u> substance use disorder

#### "Substance Abusers"

- Recommended for punishment
   benefit from a jail "wake up call"
- Perceived as a greater social threat
- ♦ Have a personality problem
- Should overcome problem without professional help

### "People with Substance Use Disorders"

- Recommended for treatment or psychiatrist
- Have a problem that is related to genetics or chemical imbalance

#### **COURTROOM ENVIRONMENT**

#### **Environment Matters!**

- Minimize perceived unfairness of sanctions
  - Equivalent does not mean identical
  - Based on phase and risk/need
  - Similar value, severity, magnitude or intensity
- Be aware of anxious participants
  - Prioritize
  - Address anxiety
  - Prepared remarks
- Be aware of courtroom set-up
  - Backs to doors, crowds (especially combat veterans)
  - Isolation
  - Anxiety

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Cabiguy (ipr. ivinnib), Friedr. Rarl von, Jurin, geb. 21. febr. 1779 au Franfpert a M., be 109 1796 die Universität Marburg. Radbom er auf röm ber Umverstatt Marburg. Naddemi er J auf borükrachenb Götingen, Lerpig und halle e reurs (Ana Beinde und eringe Reine gemach batte, bagun er 1800 in Marburg jurit, Borleitungen, erti als Rivattocent, feit 1892 als auferert. Re-feren Auf mörjabrann Reiten burg, Dautichland und Stautoich webweiten Reiten burg, Dautichland und Grantreich mitmete er fich ber Muffuchung un befannter Quellen bes rom, Rechts und ber Rechts-Stander einer vor ihn, breite and ver neuten gefächte. 1868 wurde er Professor ber Rechte in Landbäut und 1810 bei Errichtung ber Untversität in Betin einer der erfen Lebrer an berjelben, 1817 Ridglieb des Staatsrats, 1819 Rat bes für die Bitglieb des Staatsrats, 1819 Rat bes für die tehen Brownen errichteten Revisionsbojs und enblich 1842 preuß, Minister für die Revision der efengebung. Er trat im Marg 1848 ins Brivatieben bereggerung, er trat in Beng toto in Bertin, G. geberte weit be a ben Sabrern ber fog. hittorifden Edule ber ichtögelehrten, obwohl man ibn, ohne Sugo und aufogeterten nurvet man ten, tene gunge und denjer Unrede zu thun, nicht ben Stitter ber etben nemen fann. Janerbalb bleier Michtung trat G. jur Beit ber Betringsbrage ben Buber ein naterlandigke, von ber Berrichati ber fremben under Michtung feine beiterrichte ist wied Tau bes te befreites Gefen befürwerteten, in ber viel dem Sol amptien Schrift som Beruf unferer Beit fun febgebung und Rachtemiftenichaft » (Detbelb freib, i. Br. 1892) entgegen, Die ntherend, grete, i. Br. 1882) enlargen. Die pribatigteit G.s war inderjen biftor. Unter-angen zugetwendet, benen man feine e Geichichte rom. Rechts im Mittelalters (6 Bbe. Seihelb

#### Changing the Language of Addiction

Michael P. Botticelli, MEd White House Office of National Drug Control Policy, Washington, DC.

VIEWPOINT

#### Howard K. Koh, MD, MPH

Harvard T.H. Chan School of Public Health, Boston, Massachusetts; and Harvard Kennedy School, Cambridge, Massachusetts. Words matter. In the scientific arena, the routine vocabulary of health care professionals and researchers frames illness<sup>1</sup> and shapes medical judgments. When these terms then enter the public arena, they convey social norms and attitudes. As part of their professional duty, clinicians strive to use language that accurately reflects science, promotes evidence-based treatment, and demonstrates respect for patients.

However, history has also demonstrated how language can cloud understanding and perpetuate societal bias. For example, in the past, people with mental illness were derided as "lunatics" and segregated to "insane asylums." In the early days of human immunodeficiency virus, patients were labeled as having "gayrelated immune deficiency," with public discourse dominated by moral judgments. Other examples

Stigma isolates people, discourages people from coming forward for treatment, and leads some clinicians, knowingly or unknowingly, to resist delivering evidence-based treatment services. The 2014 National Survey on Drug Use and Health<sup>4</sup> estimates that of the 22.5 million people (aged  $\geq$ 12 years) who need specialty treatment for a problem with alcohol or illicit drug use, only an estimated 2.6 million received treatment in the past year; of the 7.9 million specifically needing specialty treatment for illicit drug use, only 1.6 million received treatment. The survey noted that reasons for not seeking treatment included fears that receiving it would adversely affect the individual's job or the opinion of neighbors or other community members. Lack of insurance coverage, cost concerns, and

not porceiving a pood for treatment also contributed



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#### **LEGAL ISSUES**

#### **Resources for Treatment Courts**

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	professionals to remain informed about the latest statutes, case authority and how e webliography of the relevant case law pertaining to treatment court operations to help g legal landscape.
Constitutional and Other Legal Issues in Drug Court: Hon. William G. Meyer (ret.) Senior Judicial Fellow National Drug Court Institute	
Updated: June 7, 2018 Click on each section to see relevant cases.	
<ul> <li>I. Cases holding that mandating individual to Alcoholics</li> </ul>	s Anonymous/Narcotics Anonymous (AA/NA) is a violation of the First Amendment
<ul> <li>II. Cases discussing providing a secular alternative as a of treatment</li> </ul>	an option will validate a referral to religious based programs like AA/NA as a component
<ul> <li>III. Cases holding that attendance at AA/NA does not e privilege</li> </ul>	establish a cleric-congregant relationship subject to protection by an evidentiary

#### https://www.ndci.org/resources/law/

# ANY QUESTIONS?

