

## **ETHICAL CONSIDERATIONS FOR DEFENSE COUNSEL IN DRUG COURT**

“Since the inception of the drug court movement in America, arguably no player on the drug court team – be it judge, prosecuting attorney, probation officer or treatment provider – has struggled more with his or her own identity and often conflicted role than the defense attorney. The desires of the treatment team and the drug court client are, at times, conflicting and can seemingly put the defense attorney in a box with no way out.” (The following information comes from *Critical Issues for Defense Attorneys in Drug Court, Monograph Series 4, NDCI, November 2002 and Adult Drug Court Best Practice Standards, Volume II, NADCP, Revision 2018*).

### **Competence**

ABA Rule 1.1: Competence – A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation.

Competence to represent a client who may be eligible for drug court program requires knowledge of:

- 1) Eligibility requirements, 42 Pa.C.S.A. Sec. 9802

“**Eligible offender.**” Subject to section 9721(a.1) (relating to sentencing generally), a person convicted of an offense who would otherwise be sentenced to a county correctional facility, who does not demonstrate a present or past pattern of violent behavior and who would otherwise be sentenced to partial confinement pursuant to section 9724 (relating to partial confinement) or total confinement pursuant to section 9725 (relating to total confinement). The term does not include an offender who has been convicted or adjudicated delinquent of a crime requiring registration under Subchapter H of Chapter 97 (relating to registration of sexual offenders) or an offender with a current conviction or a prior conviction within the past ten years for any of the following offenses:

[18 Pa.C.S. § 2502](#) (relating to murder).

[18 Pa.C.S. § 2503](#) (relating to voluntary manslaughter).

[18 Pa.C.S. § 2702](#) (relating to aggravated assault).

[18 Pa.C.S. § 2703](#) (relating to assault by prisoner).

[18 Pa.C.S. § 2704](#) (relating to assault by life prisoner).

[18 Pa.C.S. § 2901\(a\)](#) (relating to kidnapping).

[18 Pa.C.S. § 3122.1\(a\)\(1\)](#) (relating to statutory sexual assault).

[18 Pa.C.S. § 3301](#) (relating to arson and related offenses).

[18 Pa.C.S. § 3502](#) (relating to burglary) when graded as a felony of the first degree.

[18 Pa.C.S. § 3701](#) (relating to robbery).

[18 Pa.C.S. § 3923](#) (relating to theft by extortion).

[18 Pa.C.S. § 4302\(a\)](#) (relating to incest).

[18 Pa.C.S. § 5121](#) (relating to escape).

- 2) Nature of various treatment programs
- 3) Sanctions and incentives that can be imposed and the circumstances of their imposition
- 4) Circumstances leading to termination from the drug court

- 5) Confidentiality waivers and restrictions on the Government's use of information obtained in drug court.

## **Communication**

ABA Rule 1.4: Communication – (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

An attorney's method for imparting information in order to ensure that a client has a genuine choice will vary from client to client. At a minimum, however:

- 1) Non-English speaking clients must be afforded a bilingual translator or attorney.
- 2) Forms (e.g., agreement) should be read to clients.
- 3) Explanations should be clear and should contain specific examples (e.g., prohibited behavior, how the client will be tested for drugs, available sanctions, the maximum penalty for a conviction on the underlying offense, and trial rights).

## **Scope of Representation**

ABA Rule 1.2: Scope of Representation – (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. . . . In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

ABA Rule 1.3: Diligence – A lawyer shall act with reasonable diligence and promptness in representing a client.

Once a client has received competent advice and has rendered a decision about whether to enter into a drug court program, the defense attorney shall abide by the client's decision. Upon selecting the drug court option, the client still defines the objectives of the representation. Whether the client's objective is sobriety and recovery or simple avoidance of a criminal conviction, the lawyer "shall abide" by the client's decisions concerning the objectives of the representation.

## **Confidentiality, Candor**

ABA Rule 1.6: Confidentiality of Information – (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

ABA Rule 3.3: Candor toward the Tribunal – (a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

Rules 1.6 and 3.3 produce ongoing tension for the defense attorney in both the traditional adversarial system and a drug court program. The opportunity for expression of this tension in the drug court setting is enhanced by the informality of the proceedings and the frequency of contact between the client and the judge. Rule 3.3 prohibits a lawyer from deceiving the court or “assisting” a client or witness to do so. It does not, however, require full disclosure by the lawyer of all information about the client, even if the information would be material to the proceeding.

QUESTIONS: If a client informs the lawyer that the client has suffered a relapse and used either drugs or alcohol but the client’s use has not been detected, is the lawyer obligated to disclose this fact to the treatment court team?

If a client is under oath and provides false information, must the lawyer rectify the falsehood and inform the court of the correct information?

### **Conflict of Interest**

ABA Rule 1.7: Conflict of Interest: General Rule – (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

The most likely conflict that defense counsel might encounter in drug court is that between clients whose adversity originates in the underlying criminal case. The most obvious example is a pair of co-defendants who both choose to enter the drug court program.

QUESTION: Is there a conflict when both co-defendants wish to enter treatment court and the goal is to achieve recovery and sobriety?

There also may be adversity when one client is a witness to another client's relapse or to other behavior that violates the rules governing participation in drug court.

QUESTION: In this situation, which client should the attorney continue to represent; the violator or the witness?

Resources:

National Association of Drug Court Professionals: [nadcp.org](http://nadcp.org)

National Drug Court Institute: [ndci.org](http://ndci.org)

Pennsylvania Association of Treatment Court Professionals: [patcp.org](http://patcp.org)

Council on Chemical Abuse: [cocaberks.org](http://cocaberks.org)