

*Tribal Healing to Wellness Court
Enhancement Training*

September 2013

Ethics: Are they for or against us? The Great Debate

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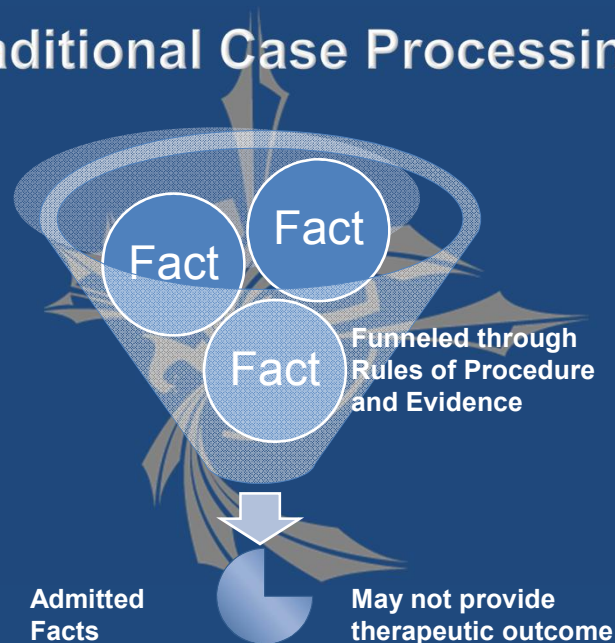
Stepping Outside our Professional Comfort Zone

- ▣ HWC require us to step outside our normal professional boundaries
 - Multi-disciplinary approach
 - Communication and information sharing critical to effectiveness
- ▣ Information sharing is inconsistent with ‘traditional’ information sharing restrictions
 - Laws
 - Regulations
 - Ethical Rules
 - Privileges
- ▣ To make your docket work – you will have to deal with these issues

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Traditional Case Processing



Healing to Wellness Court



Wellness Court Require Us to "Get Along"



Ethical “Falsehoods”

Common Comments

Common Comments - Judges

- ❑ Staffings undermine judicial independence and impartiality
- ❑ Allowing a ‘team’ to decide is relinquishing my judicial responsibilities
- ❑ Wellness Court is an *ex parte* communication

Staffings Undermine Judicial Independence and Impartiality

- ▣ ABA Model Code
 - Avoid External Influences
 - Judges Maintain Responsibility to Decide Case
 - No *Ex Parte* Communication
 - Avoid Conflicts of Interest
- ▣ Codes of Conduct Vary Among Jurisdictions

Response

- ▣ Judges can work in a Team environment
 - Maintains role as independent arbiter and guardian of legal rights
 - All discussions occur in context of team meetings/hearings
- ▣ Judges and Community Based Organizations
 - Exchange of General information
 - Educating about HWC about resources & ethical concerns minimized

Response

- ▣ Judges & Participants
 - Relations with participants does not require disengagement but impartiality
 - Personal engagement with participant is a keystone of HWC
- ▣ Relinquishment of Judicial Making Responsibility
 - Judge always maintains final decision making authority

Response

- ▣ *Ex Parte* Communication (ABA Model Code)
 - Rule 2.9(A)(5): “A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.”
 - Comment (4): “A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as 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.”
- ▣ Several jurisdictions and model codes contain same or similar language

More on *Ex Parte* Communications

- ▣ Representatives invited to attend
- ▣ Prompt notice of communication if they do not attend
- ▣ Judge's receipt of information from team member is not the ***Judge's personal knowledge*** – no observation
- ▣ Judge should recuse him/herself from adjudications involving events they ***witnessed***
- ▣ Parties should be given opportunity to respond before any final decision is made

Common Comments - Attorneys

- ▣ Allowing my client to participate in HWC is not 'zealous representation'
- ▣ Information shared with me is 'attorney-client privileged'
- ▣ HWC circumvents the Rules of Evidence
- ▣ HWC is inconsistent with my duties as the prosecutor to serve justice and protect public safety

Response

- ▣ ABA Model Code Rule 3.5
 - A lawyer shall not:
 - (b) communicate *ex parte* with such a person during the proceeding, ***unless authorized to do so by law or court order***
- ▣ Consent, consent, consent
 - Client is the holder of the consent and may waive
- ▣ Awareness of the procedures that will be followed

Response

- ▣ “To facilitate an individual’s progress in treatment, the prosecutor and defense counsel must shed their traditional adversarial courtroom relationship and work together as a team. Once a defendant is accepted into the drug court program, the team’s focus is on the participant’s recovery and law-abiding behavior – not the merits of the pending case.” (*The Key Components*, Key Component #2)

Response

- ▣ “The term [zealous representation] . . . should not be misunderstood to suggest that lawyers are legally required to function with a certain emotion or style of litigating, negotiating, or counseling. For legal purposes, the term encompasses the duties of competence and diligence.” (Restatement (Third) The Law Governing Lawyers § 16 comment d.)

Response

- ▣ Attorneys continue to maintain their roles, but share a goal – reducing or preventing the participant’s recidivism by addressing his/her substance abuse
- ▣ Prosecutors: Serve justice and protect public safety
 - Candidate eligibility
 - Candidate appropriateness
 - Candidate compliance
- ▣ Defense Counsel: Protect due process rights while encouraging full participation

But What About Confidentiality?



Defense Attorneys & Confidentiality

- ▣ Duty of confidentiality provides moral and practical foundation for attorney-client relationship
- ▣ Participation on Team does not weaken this duty
- ▣ Attorney is not the conduit of information, unless the client consents
- ▣ Encourage clients to be truthful
- ▣ Awareness of federal confidentiality laws
 - Team following
 - Advocate for narrowest of possible waivers consistent with effective functioning of HWC

Defense Attorneys & Confidentiality

- ▣ Two limitations under ABA Rules
 - Attorneys required to rectify a clients fraud on the court even if it involves disclosure
 - Must disclose client's intent to commit a criminal act that is likely to result in imminent death or substantial bodily harm
- ▣ Rule differs among jurisdictions
- ▣ Best Practices – Defense attorney on the Team should not represent any of the participants

Prosecutors & Confidentiality

- ▣ Duties of confidentiality under federal and tribal law
- ▣ Confidentiality may conflict with victim's rights
- ▣ Open records laws

Common Comments - Treatment

- ❑ Confidentiality rules and regulations prevent me from sharing information
 - 42 USC § 290dd-2 – Confidentiality of Records
 - Health Insurance Portability and Accountability Act (HIPAA) Ethical rules prohibit disclosure
 - 42 CFR Part 2
- ❑ Ethics (AMHCA Code)
 - Advise client of purpose/nature of evaluation – client has freedom of participation
 - Safeguard information – only disclose what is necessary, relevant & verifiable

Response

- ❑ Permitted disclosures
 - Medical emergency
 - Crime on premises or program staff
 - Others
- ❑ Mandatory disclosures
 - Suspected abuse or neglect of a child
 - Valid court order
 - Information relating to causes of death
 - Duty to protect 3rd parties
- ❑ Consent - Client is the holder of the privilege and consent to release of information

Consent



42 USC § 290dd-2 & 42 CFR Part 2 Valid Consent

- ▣ Written
- ▣ Describes information to be disclosed
- ▣ Specifies the purpose for disclosure
- ▣ Who is authorized to make disclosure
- ▣ Who is authorized to receive disclosures
- ▣ Identify participant
- ▣ Signature
- ▣ Date of signing
- ▣ Date/event when consent expires
- ▣ Participant's right to revoke consent
 - Criminal justice – no revocation
 - Juvenile & Family – may revoke

HIPAA Disclosures

- ▣ Basic Rule: Information may be disclosed
 - Permitted by Privacy Rule
 - Written consent
- ▣ Required Disclosure – Information **MUST** be disclosed
 - Individual requests protected health information
 - HHS compliance investigation
- ▣ Limitations:
 - Consents must be revocable
 - ▣ No valid until received
 - ▣ Reliance on valid consent – no issue

Confidentiality Consent Forms

- ▣ Be clear about the public nature of the Court review hearings

Ethical Responsibilities of Team Members

- ▣ Confidentiality
 - Disclosures
 - Re-disclosures
- ▣ Allegiance to the Wellness Court
- ▣ Protect program integrity
 - Internally
 - Externally
- ▣ Cooperation and collaboration
- ▣ Commitment
- ▣ On-going training
- ▣ Team building activities
- ▣ Team sustaining activities
- ▣ Full participation and discussion
- ▣ Safe environment to present opinions/ideas
- ▣ Unified front

Due Process Responsibilities

Termination

- ▣ Generally requires notice, a hearing and fair procedure
- ▣ Full constitutional rights do not apply at a termination hearing
 - ▣ Miranda
 - ▣ 5th Amendment
 - ▣ 4th Amendment
 - ▣ Rules of Evidence
 - ▣ Standard of proof: Preponderance of the evidence unless there is an allegation of a new crime and if defendant has not been convicted the standard is beyond a reasonable doubt

Judicial Impartiality

- ▣ No due process violation for Judge to hear drug court termination and probation revocation (Az)
- ▣ Due process violation for drug court judge to hear probation violation (Tenn)
- ▣ Recusal not required where judge received facts from a 'judicial source" (11th Cir, 1999)
- ▣ Judge receiving 'off the record' briefings had extra judicial knowledge of facts (7th Cir, 1996)
- ▣ No due process violation to have dependency/neglect trial court judge also preside over drug court, where respondent is in both courts

Drug Testing

- ▣ Results must be sufficiently reliable to meet due process standards
- ▣ Chain of custody requirements
- ▣ Mandatory drug testing proper when related to defendant's rehabilitation, protection of the public and assuring defendant's appearance in court

Right to Treatment

- ▣ Recognizing the need to treat a participant who is engaged but relapsing different than one who refuses to be engaged (Tenn 2012)
- ▣ Failure to properly identify, address or offer services directed as the recognized cause of participant's substance abuse (mental health issue) is a violation of due process (Ok 2012)
- ▣ Defendant not denied due process or other constitutional rights when he was denied drug court because he was taking strong narcotic medicine which would interfere with participation (Ca, 2011)

Medical Marijuana

- ❑ Constitutional authorization to use medical marijuana does not override statutory condition of probation prohibiting the commission of crime, including federal crime, which includes use of marijuana (Colo, 2012)
- ❑ Defendant is not entitled to use prescribed medical marijuana. The right to use marijuana is not a fundamental right. The United States has a fundamental right to prohibit the use of marijuana. (9th Cir, 2007)

Sanctions

- ❑ Where a liberty interest is implicated, an individual's right to due process must be respected (Neb, 2010)
- ❑ A defendant who voluntarily agreed to participate in drug court cannot 'opt out' to avoid jail-based treatment (Fla, 2010)
- ❑ Jail can be used as a sanction for defendants who chose to participate in voluntary program (Fla, 2005)
- ❑ Jail cannot be used as a sanction in a pre-plea contractual drug court program because jail is not authorized by statute (Fla, 2004)

Equal Protection

- ❑ Allowing the prosecutor to make initial determination of eligibility is not an unconstitutional delegation of judicial authority (Wash, 2013)
- ❑ When defendant met all criteria for entry, the prosecutor's objection could not prevent entry (NY, 2011)
- ❑ Defendant is not entitled to a hearing before rejection from drug court (NY, 2010)
- ❑ Participation in drug court is not a fundamental right (Ind, 2006)

Double Jeopardy

- ❑ Sanctions for drinking and driving in DUI court does not bar subsequent prosecution for DUI offense on double jeopardy (Md., 2011)
- ❑ Sanctions do not bar prosecution and conviction for identical conduct upon which the sanctions were based (ND, 2009)
- ❑ Adding drug court as an additional probation term, without a violation of probation violates double jeopardy (Fla, 2003)

Social Media

- ▣ A probationer was forbidden to use social networking sites. Probation revocation filed because Defendant was accessing Facebook. The conviction was upheld. *State v. Hall* (Ariz. App., 2012)
- ▣ Defendant on probation with a condition that she not possess firearms. She posted a photo on Facebook of her posing with a firearm. The photo was used as proof that she violated her probation. The Court of Appeals upheld the trial courts finding of probation violation. *State v. Cisz* (Ariz. App., 2011)

More on Social Media

- ▣ Minor was on probation. A term of his probation was a prohibition against using social media or internet chat rooms. On appeal the minor argued the condition interfered in his First Amendment rights. The Appeals court found that the minor did not use social media to contact his victims so the prohibition was overbroad. The condition was remanded for modification. *People v. Andre B. (In re Andre B.)* (Cal. App., 2012)

Questions

