

Chapter 5: The Judge and Wellness Court Staffing and Hearings

Overview

The sections of the Policies and Procedures Manual (P&PM) governing the role of the Judge, the purpose and process of the Healing to Wellness Court case review meetings (a.k.a. “staffings”), and the Wellness Court hearings are implicated by Key Component 7 - Judicial Interaction.

The success of a Wellness Court hinges upon the team’s ability to meet regularly and effectively. At the staffing, team members gather to report to each other and discuss the progress of each participant. Without a structured meeting format, even a small docket can consume an entire afternoon of endless discussion. It is the role of the Judge to lead these meetings effectively. However, in Wellness Court the Judge is no longer the sole arbiter, but a member of a non-adversarial team. The Judge thereby exudes good team membership.

At the hearings, the Judge represents the team’s consensus on how the participant is progressing, and whether an incentive or sanction is warranted. Judges have good relationships with the participants while holding participants accountable for their actions.

The P&PM outlines the structure of the hearings and the staffings, providing notice of expectations to all of the team members. It can additionally establish the expectations of the Judge in order to assist judicial turnover and unfamiliarity with Wellness Court philosophy.

Relevant Key Components

Key Component #7: Judicial Interaction

Ongoing involvement of a Tribal Healing to Wellness Court Judge with Tribal Wellness Court team and staffing, and ongoing Tribal Wellness Court Judge interaction with each participant are essential.

Findings from NIJ Tribal Wellness Court Study: Key Component

Problems Identified:

- (1) The original judge left and was replaced by a judge who did not practice Tribal Wellness Court principles or who was not a team player.

Lessons Learned:

- Choose a judge for Tribal Wellness Court who understands and practices Tribal Wellness Court philosophy. The judge makes or breaks the Tribal Wellness Court; not every judge can relinquish the traditional role of sole arbiter and be a team player.

Strengths & Weakness Reported in the First Four Tribal Wellness Courts⁵²

Key Component #7: Judicial Interaction

Strengths	Weakness
<ul style="list-style-type: none"> • First & second judges team players • First judge catalyst for WC • Judge's good relationship with participants 	<ul style="list-style-type: none"> • Judge not integral member of the team • Third judge not perceived as team player • Current judge perceived by some as too lenient

⁵¹ Gottlieb, "Lessons Learned in Implementing First Four Tribal Wellness Courts," 40.

⁵² "Process Outcome Evaluations of the Fort Peck Tribes Community Wellness Court" (December 30, 2005), "Process Outcome Evaluations of the Blackfeet Alternative Court" (December 30, 2005), "Process Outcome Evaluations of the Hualapai Wellness Court" (December 30, 2005), "Process Outcome Evaluations of the Poarch Band of Creek Indians Drug Court" (December 30, 2005).

Section A: Judicial Supervision

Purpose

The purpose of this section is to clearly describe the role, function, and what might be expected of the Healing to Wellness Court Judge in case reviews, Wellness Court hearings, decision making, and so forth

The National Drug Court Institute focuses on nine "core competencies" for Drug Court Judges. See Chapter 3, Section B: Team Roles and Responsibilities. Consistent with these core competencies, a Drug Court Judge is expected to possess or acquire skills as a leader, communicator, educator, community collaborator, and institution builder. For a detailed discussion of each of these roles, see Chapter 3, The Roles of the Drug Court Judge in the NDCI Drug Court Judicial Benchbook.⁵³ Below are excerpts of relevant segments on "Judge as Leader" and "Judge as Communicator."

Excerpts from NDCI's The Roles of the Drug Court Judge⁵⁴ Judge as Leader (citations omitted)

II. [§3.2] JUDGE AS LEADER

The author Ken Kesey observed: "You don't lead by pointing and telling people some place to go. You lead by going to that place and making a case." While putative leaders imagine that leadership can provide power, control, or perks, the actual role of a leader consists of empowering others, helping others fix problems, and serving others. At least three core competencies directly relate to the judge as leader. The cornerstone of the drug court is a team of professionals, which is led by the drug court judge. As a team member, the drug court judge is fully committed to the program mission and goals and works as a full partner to ensure program success.

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The role of the judge at staffings and in the courtroom is being the first among equals. Core Competency 2 requires that the judge be at the forefront in identifying appropriate sanctions during the planning stage and in selecting and delivering motivational consequences during the operational stage. At the planning stage the judge should:

- Discuss with the team when staffings will convene;
- Participate in client staffings;
- Preside over court sessions;

⁵³ THE DRUG COURT JUDICIAL BENCHBOOK (February, 2011), pp. 45-61, National Drug Court Institute.

⁵⁴ *Id.* at 47-53.

- Learn science-based principles regarding the development and use of incentives and sanctions;
- Explore, along with the team, community resources available for the imposition of incentives (e.g., gift certificates for local businesses) and sanctions (e.g., community service at local animal shelter);
- Participate in the development of incentives and sanctions to be used in the drug court program.

Once the court becomes operational, the judge should:

- Participate in scheduled staffings to review progress of participants;
- Preside over court sessions;
- Solicit information regarding the participant's progress from every team member in attendance;
- Remain abreast of research regarding behavior modification techniques and the imposition of incentives and sanctions;
- Impose incentives and sanctions that are consistent while considering the individual needs of each drug court participant;
- Establish separate meetings to ensure that policy and staffing issues are discussed;
- Deliver coordinated response to participants in the courtroom.

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Drug court judges simply do not give up their discretion or independence. Ultimately, when a consequence has to be imposed due to a drug court participant's noncompliant behavior, it is the judge's decision, after giving due consideration to the merits of the other team members' input.

Excerpts from NDCI's *The Roles of the Drug Court Judge*⁵⁵ **Judge as Communicator** (citations omitted)



III. [§3.3] JUDGE AS COMMUNICATOR

Several of the core competencies touch on the needed communication skills of the judge, including Competency 2: the judge as sanction and incentive advocate, and Competency 6: the judge as program promoter. Deserving of singular attention is the relationship between the judge and the drug court participant. Some have described it as therapeutic. Detractors complain that drug court judges are acting as amateur psychiatrists. What separates drug court judges from traditional judges is training in addiction, understanding how to motivate behavior change, and simple empathy.

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It is not only the type and magnitude of the consequence for (non)compliance that shapes

⁵⁵ *Id.* at 47-53.

a drug court participant's behavior in the future. The court's interaction with the participant and the delivery of the response also impact a participant's subsequent performance. People interacting with the judiciary believe they will be treated fairly because such treatment will produce an equitable result. The touchstone of the court's interface with the drug court participant should be procedural fairness. Individuals who receive a negative outcome in court are much more likely to accept the result if they perceive they were treated fairly by the court. The keys to procedural fairness are fourfold:

Voice. The ability to participate in the case by expressing their viewpoint.

Neutrality. Consistently applied legal principles, unbiased decision makers, and a "transparency" about how decisions are made.

Respectful Treatment. Individuals are treated with dignity and their rights are plainly protected.

Trustworthy Authorities. Authorities are benevolent, caring, and sincerely trying to help the litigants. This trust is garnered by listening to individuals and by explaining or justifying decisions that address each litigant's needs.

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Additionally, the judge must be cognizant of the audience of drug court participants. Drug courts frequently use court progress hearings to illustrate lessons to audience participants who are waiting to have their case called. Perceived unfairness impacts not only the recipient but also those who observed the alleged injustice. To avoid an appearance of unfairness, it is critical that the drug court judge explain the basis for the decision. Initially, the judge should discuss various factors during the staffings when selecting a particular sanction or incentive, such as the severity of the participant's addiction, mental illness, criminal background, response to treatment and program compliance or noncompliance. Advanced trainings by NDCI on sanctions and incentives recommend that when the judge delivers a consequence, the court should review with the offender the severity of their substance abuse problem; the behavior being responded to; how that particular behavior is temporally important in their recovery; and why the particular sanction and magnitude were selected.

Sample Tribal Wellness Court Wording

Little Traverse Bay Band of Odawa

"Waabshki-Miigwan Court Manual" (January 2011)

Team Member Roles

The Waabshki-Miigwan Judge supervises and re-enforces treatment by reviewing the reports from the Waabshki-Miigwan team members and input from each participant

and will assign various sanctions and incentives to encourage compliance with the Waabshki-Miigwan Program. The Judge will establish a rehabilitative relationship with the participant through intensive interaction during court appearances. The Judge assumes the role of not only judge, but also mentor and encourager.

The Judge responds quickly to any relapse or other violations with immediate sanctions that address the problem and encourages more dedication to the treatment process. The Court will utilize graduated sanctions to become more restrictive as the severity and frequency of the behavior increases. The court can utilize all the sanctions and incentives spelled out in the Waabshki-Miigwan Policy Manual and any other deemed proper by the Court.

The Drug Court will actively supervise and re-enforce the treatment received by the client. It is a goal of the Drug Court to be an optimistic outlook for each participant in encouraging that client to complete the Drug Court Program as they and the community will both benefit immensely.

Fort McDowell Yavapai Nation

"Fort McDowell Adult Wellness Court Policies and Procedures Manual" (March 2015)

The Adult Wellness Court Judge

The judge is the key leader for the Adult Wellness Court Program. The judge not only oversees the program participant's performance and progress but must also bring together all of the "parts" of the program, those within the criminal justice system as well as those associated with community, educational, public health, mental health, and other resources needed to support the participant's progress. The Court will convene weekly to review the status of all participants involved in the program. The judge shall supervise and re-enforce treatment by reviewing the reports from the treatment providers and input from each participant and will use various incentives, both positive and negative, to encourage compliance with the treatment program. The Court will forward all court-ordered release conditions to the Wellness Court Coordinator. The Program Coordinator will delegate court orders to appropriate individuals for monitoring purposes, i.e., curfew requirements to police, job or school attendance and performance to Career Development or education, intake/treatment program requirements to Wassaja Family Services, drug/alcohol testing to probation, etc.

Yavapai-Apache

"Yavapai-Apache Family Health Court - Policies and Procedures" (October 2011)

2.0 YAFHC Team, Roles and Responsibilities**2.11**

The Judge for the YAFHC shall:

- a. Preside over the YAFHC.*
- b. Participate in YAFHC pre-court staffing.*
- c. Provide instructions to, grant incentives to, and impose sanctions on YAFHC clients based upon recommendations by the YAFHC team.*
- d. Provide information to the Defendant on the YAFHC as a sentencing option upon a plea of guilty or nolo contendere or upon the finding of guilt by the Court of jury.*
- e. Preside over any hearing to terminate a participant from the YAFHC.*
- f. Preside over periodic review hearings in accordance with the participant's treatment plan.*

Section B: Wellness Court Hearings

Purpose

The purpose of this section is to clearly describe the purpose of the Healing to Wellness Court hearing, how it proceeds, how often it is held, and what is expected of the participant.

Excerpts from NDCP's Schedule of Status Hearings⁵⁶

(citations omitted)

IV. [§7.4] SCHEDULE OF STATUS HEARINGS

Most drug courts apply incentives and sanctions during court hearings, after the team has had an opportunity to review the case in a staffing and agree upon a suitable consequence. The ultimate decision about what consequence to impose is determined by the judge, but is based upon a consideration of the relevant evidence and expertise contributed by the various team members. The longer the time interval between staffings and between status hearings, the longer the delay will be between participants' accomplishments and the imposition of rewards, and between their infractions and the imposition of sanctions.

Fortunately, research provides clear indications about when to schedule status hearings. Outcomes in drug courts appear to be optimized when participants appear in court no less frequently than every two weeks, at least during the first three to six months of the program. Requiring participants to appear in court at least every two weeks permits the team to respond to their accomplishments and infractions in a reasonably short interval of time, which is necessary to modify their behavior effectively.

This is not to suggest that holding status hearings on a weekly basis is harmful or undesirable. Rather, there is no clear indication from the research that the additional expense and inconvenience of weekly hearings (for both the participants and staff) is warranted based upon the relative differences in outcomes. It also remains unclear whether this finding applies equally to populations other than adult drug offenders, such as mentally ill offenders or juvenile delinquents. More research is needed to determine how frequently status hearings should be scheduled for other populations. The best advice that can be offered at this juncture is that biweekly status hearings appear to be a reasonable and evidence-based schedule to follow in a drug court program.

There is no clear indication yet from the research evidence about when it is appropriate to ratchet down the frequency of status hearings. Most drug courts reduce the schedule of court hearings as participants move through the various phases of the program. If

⁵⁶ *Id.* at pp. 144-45.

advancement through the phases is based upon objective evidence of progress in treatment (which it should always be), and if participants continue to be reliably tested for substance abuse and other relevant behaviors, then it appears suitable to gradually reduce the frequency of court hearings over time. More research is needed to determine how quickly those adjustments can and should be made.

Sample Tribal Wellness Court Wording

Sisseton-Wahpeton Sioux Tribe

" Sisseton-Wahpeton Sioux Tribal Treatment Court Policies and Procedures" (no date)

III. Procedure in Treatment Court

Treatment court shall be conducted in an informal manner with an emphasis on rewarding positive behavior and applying immediate sanctions for violent behavior. Initially, the treatment court will be in two sessions, one session for adults and one for juveniles. Each session will be limited to a maximum of ten participants, none of whom can be previously convicted of violent behavior. Treatment court sessions are mandatory and will be on a weekly basis for approximately one hour each. Those in attendance will be the Tribal Judge, the tribal prosecutor, probation officer, and a representative of Dakota Pride.

The probation officer will compile a compliance list for each person in Treatment Court containing a list of objectives identified by Dakota Pride, the probation officer and School, where applicable, and a time period for meeting those objectives. The compliance list shall, at a minimum, cover the person's treatment program (in-patient or out-patient treatment, AA meeting attendance) and record of compliance; the person's compliance with paying for the cost of Treatment Court sessions and other costs for counseling and other requirements; a record of compliance with unannounced and announced PBT's and other tests for drugs or foreign substances; a spiritual aspect permitting the person to utilize his spiritual and religious beliefs to assist him in compliance (this will be optional and not imposed upon a person); employment or educational record; and a self-inventory to be completed each week by the individual revealing how he has worked on his Treatment Court program that week.

The Judge shall review each of the files before Court with the prosecutor and probation officer, who will highlight any violations and provide a summary of how that person is doing. The Judge will then review with each participant his/her file and discuss compliance and any issues that the participant wishes to discuss in court, including any problems that the individual is having working with the various individuals in the court and the treatment program. If a violation is admitted in court the Judge shall immediately impose the appropriate sanction as indicated hereinafter. The Judge shall

also promote and demote participants at the time of Treatment Court. Treatment Court will not be a court of record.

Navajo Nation

"D.A.N.A. Program Procedures Manual" (August 2000)

VII. DANA Drug Court Operations

After the appropriate documents are completed and signed by the defendant/offender and/or parent(s) or legal guardian. The defendant/offender will appear in Drug Court at designated time for progress review by the Judge. Parents or legal guardian(s) are required to appear at each Drug Court Hearing. Defendant/offender must maintain communication with Drug Court Officer for subsequent Drug Court Hearing.

B. Court Appearance

- 1. A client will appear before the Judge for case review per the phase that they are in.*
- 2. The treatment provider and/or a spiritual advisor will be allowed to attend.*