

# New York State Adult Drug Treatment Courts



## RECOMMENDED PRACTICES

# Recommended Practices:

## New York State Adult Drug Treatment Courts

1. Recommended Practices Document
  - Appendix 1: Ten Science-Based Principles
  - Appendix 2: The New York Experience
  - Appendix 3: Additional Resources
  
2. Ethical Opinions, Administrative Orders, Statutes and Case Law
  
  
  
  
  
  
  
  
  
  
3. Standardized Forms

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## **ACKNOWLEDGMENTS**

In September 2004, Deputy Chief Administrative Judge for Court Operations and Planning, Judy Harris Kluger, created a multi-disciplinary advisory committee, chaired by Judge Stephen Herrick of Albany County, to produce a comprehensive guide for New York's drug treatment courts. She envisioned a resource document that would promote quality and consistency in drug treatment court operations by cataloguing the best of what the field knows about the drug court model and the substance-abusing offender population. The Recommended Practices for New York State Criminal Drug Treatment Courts is that resource.

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**RECOMMENDED PRACTICES FOR NEW YORK STATE**  
**ADULT DRUG TREATMENT COURTS**

<b>I.</b>	<b>INTRODUCTION .....</b>	<b>8</b>
<b>II.</b>	<b>ADMINISTRATION .....</b>	<b>10</b>
	<b>Court Structure and Operations .....</b>	<b>10</b>
<b>A.</b>	<b>Office of Court Drug Treatment Programs .....</b>	<b>10</b>
1.	Office of Court Administration - Coordination and Leadership .....	10
2.	Court Operations .....	10
3.	Human Resources .....	10
4.	Fiscal.....	10
5.	Technology .....	11
6.	Training .....	11
<b>B.</b>	<b>Judicial District Administrative Office .....</b>	<b>11</b>
1.	Drug Treatment Court District Liaison .....	11
2.	Court Operations .....	11
3.	Human Resources .....	12
4.	Fiscal.....	12
a.	Purchasing.....	12
b.	Contracts for goods and services.....	12
c.	Grants .....	12
d.	Annual budget process.....	12
e.	Budgets for new drug treatment courts .....	12
5.	Technology .....	12
<b>C.</b>	<b>Trial Courts .....</b>	<b>13</b>
1.	Judge .....	13
2.	Court Manager .....	13
3.	Coordinator .....	13
	<b>Division of Grants and Program Development .....</b>	<b>14</b>
<b>A.</b>	<b>Mission .....</b>	<b>14</b>
<b>B.</b>	<b>Role.....</b>	<b>14</b>
	<b>Center for Court Innovation .....</b>	<b>15</b>
<b>A.</b>	<b>Role.....</b>	<b>15</b>
<b>B.</b>	<b>Drug Treatment Courts.....</b>	<b>15</b>

<b>III.</b>	<b>ADMISSION PROCESS .....</b>	<b>15</b>
	<b>Eligibility Criteria.....</b>	<b>15</b>
1.	Targeted Charges .....	14
2.	Targeted Criminal History .....	17
3.	Drug Use .....	17
4.	Diagnosis .....	17
5.	Co-Occurring Population .....	18
6.	Age.....	19
7.	Pharmacological Interventions.....	19
8.	Non-English speaking participants .....	20
9.	Lesbian, Gay, Bisexual, and Transgender Populations.....	20
10.	Non-Citizens .....	21
11.	Confidential Informants .....	22
	<b>Screening Process .....</b>	<b>22</b>
1.	Legal Screening .....	22
a.	Timeliness .....	22
b.	Drug Court Team Review .....	23
c.	Linkage to Defense Counsel .....	23
2.	Clinical Assessment.....	23
a.	Clinical Screening.....	23
b.	Clinical Assessment .....	24
	<b>Becoming a Participant: Plea Structure and Contract/Participant Agreement .....</b>	<b>26</b>
1.	Courtroom Observation .....	26
2.	Pre-Plea or Post-Plea Model .....	26
3.	Drug Court Contracts and Participant Handbooks .....	27
<b>IV.</b>	<b>ACTIVE DRUG COURT PARTICIPANT PROTOCOLS .....</b>	<b>29</b>
<b>A.</b>	<b>Supervision Model .....</b>	<b>29</b>
<b>B.</b>	<b>Court Operations.....</b>	<b>31</b>
1.	Drug Court Team .....	31
2.	Staffings.....	32

<b>V.</b>	<b>DRUG COURT OPERATIONS.....</b>	<b>33</b>
<b>A.</b>	<b>Court Appearances .....</b>	<b>33</b>
1.	Judicial Style .....	33
2.	Courtroom Atmosphere .....	34
3.	Frequency of Court Appearances.....	35
<b>B.</b>	<b>Treatment Court Mandate.....</b>	<b>36</b>
1.	Treatment.....	36
2.	Special Considerations .....	37
a.	Heroin Users.....	37
b.	Homeless individuals.....	37
c.	Self-help Groups.....	37
d.	Site Visits to Treatment Providers .....	37
3.	Phases.....	38
4.	Troubleshooting with Treatment Providers .....	39
<b>C.</b>	<b>Drug Testing .....</b>	<b>39</b>
1.	Quality Assurance.....	39
2.	Drug Testing Specimens .....	40
3.	Drug Testing Protocols .....	40
4.	Drug Test Interpretation.....	41
5.	Drug Testing Frequency .....	42
<b>D.</b>	<b>Motivating the Participant .....</b>	<b>43</b>
1.	Clinical Perspective .....	43
2.	Jail Sanctions.....	44
3.	Essays .....	44
<b>E.</b>	<b>Leaving the Drug Court - Graduation.....</b>	<b>45</b>
1.	Graduation Requirements.....	45
2.	Graduation Decision .....	46
3.	Timing of Graduation .....	47
<b>F.</b>	<b>Leaving the Drug Court - Termination .....</b>	<b>47</b>
1.	Clinical vs. Law Enforcement Non-Compliance.....	47
2.	Clinical Non-Compliance .....	47
3.	Law Enforcement Non-Compliance.....	48
4.	Termination Process.....	49
5.	Post-Termination .....	49
<b>G.</b>	<b>Continuing Care Plan.....</b>	<b>49</b>

## I. INTRODUCTION

The Office of Court Drug Treatment Programs (OCDTP) is pleased to present Recommended Practices for New York Adult Drug Treatment Courts. This document is designed to serve as a resource for drug court practitioners in New York's adult drug treatment courts. To identify these practices, the OCDTP utilized a multi-disciplinary team approach that included the following components:

- a national drug court literature review of research findings that are associated with drug court policies, procedures and operations;
- structured site visits to eleven drug courts in New York that represent diverse geographical and political characteristics;
- consultant services from a clinician with extensive experience in drug court operations;
- an advisory committee comprised of all professional disciplines represented in the drug court model;
- a review of outcome data derived from the Universal Treatment Application and the New York Statewide Evaluation;
- results from a statewide survey of all drug treatment courts in New York;
- research and drug court program expertise from the Center for Court Innovation; and
- ongoing coordination and review by OCDTP staff.

The recommendations in this document are intended to guide New York's drug court professionals as they seek to improve program outcomes for the participants and the communities they serve. The growing body of rigorous drug court research, along with findings drawn from the field of behavior modification, support many of these recommendations. In areas where the research is wanting, the drafters of the document looked to New York drug court data, promising practices observed at the site visits, and the experience of the dedicated drug court professionals who served on the advisory committee. Finally, these recommendations generally follow the model outlined in the seminal document in the drug treatment court field, Defining Drug Courts: The Key Components (1997). Drug court practitioners should note two important aspects of these recommendations. First, they are recommendations, not mandated practices. Second, the authors understand that local resources may impact the ability of individual programs to implement particular recommendations.



In addition to the recommended practices, this document includes the following resources:

- a catalogue of forms and judicial Orders which are typically used in drug court operations;
- administrative Orders and Advisory Opinions related to drug court practices; and
- selected case law that addresses constitutional requirements in the drug court setting.

Finally, this document is intended to be a dynamic resource that will continue to incorporate new research and developments in drug court practice.

## **II. ADMINISTRATION**

### Court Structure and Operations

#### **A. Office of Court Drug Treatment Programs**

Under the direction of the Deputy Chief Administrative Judge for Court Operations and Planning, this office is responsible for the statewide implementation, expansion, and support of drug treatment courts. The Deputy Chief Administrative Judge and her staff work closely with the Administrative Judges in each of New York's twelve judicial districts.

1. Office of Court Administration - Coordination and Leadership
  - a. Implement goals of the Chief Judge
  - b. Establish and maintain relationships with national agencies and associations involved with drug treatment court programs
  - c. Participate in projects with other state agencies that advance the goals of the Office of Court Drug Treatment Programs (OCDTP)
  - d. Provide technical assistance on drug treatment court related issues as required by the Divisions of the Office of Court Administration
  - e. Coordinate and participate in drug treatment court research projects
2. Court Operations
  - a. Develop and implement statewide drug treatment court policies and procedures
  - b. Work with the administrative office in each judicial district to implement and support the operation of their drug treatment court programs
  - c. Provide guidance to the judicial districts on issues concerning the operation of their drug treatment courts
  - d. Work with the drug treatment courts in each district to identify and implement best practices and innovative procedures
  - e. Respond to requests for technical assistance from the judicial districts
3. Human Resources
  - a. Participate on interview panels for positions in the drug treatment courts
  - b. Make recommendations on Requests for Reclassification
  - c. Participate in the development of Title Standards
  - d. Make recommendations on appropriate work volume by title
4. Fiscal
  - a. Submit budget proposals to the Unified Court System (UCS) Budget Office to support statewide drug treatment court initiatives
  - b. Submit New Court Budget Requests to the UCS Budget Office on behalf of new drug treatment courts implemented outside of the UCS Budget cycle

- c. Make recommendations to the UCS Budget Office on requests for resources
  - d. Make recommendations to the UCS Budget Office on requests for new positions
- 5. Technology
  - a. Maintain the statewide management information system, the Universal Treatment Application (UTA), for the drug treatment programs and develop enhancements and modifications to meet state and local needs; respond to user feedback regarding modifications and functionality
  - b. Provide training for users of the Universal Treatment Application
  - c. Establish and maintain the OCDTP Intranet site
  - d. Provide support to the Problem-Solving Section of the UCS Internet site
  - e. Participate in the development of new computer programs and applications to support the drug treatment courts
- 6. Training
  - a. Develop and conduct statewide training sessions for new employees in the drug treatment courts and new members of drug treatment court teams
  - b. Develop and conduct training sessions for full drug treatment court teams
  - c. Develop and conduct training on special drug treatment court topics, as needed
  - d. Work with drug treatment courts to plan and implement training to meet the needs of the local community

#### B. Judicial District Administrative Office

Under the direction of the District Administrative Judge, each District Office is responsible for the operation and management of all trial courts and court agencies within its judicial district.

- 1. Drug Treatment Court District Liaison
  - a. Coordinate the receipt and distribution of drug treatment court-related information for the judicial district
  - b. Respond to requests for drug treatment court information from the District Administrative Judge and the OCDTP
  - c. Provide information to the OCDTP on changes in their drug treatment courts that should be reflected on the monthly Status Report
  - d. Promote participation in training opportunities for drug treatment court staff and related agencies
- 2. Court Operations
  - a. Review and assist with operational procedures for the trial courts district-wide
  - b. Review and assist with operational procedures for the drug treatment courts district-wide

- c. Make requests for obtaining any necessary Hub Court designations as a local Criminal Court Hub Court
  - d. Make requests for obtaining any necessary Superior Court for Drug Treatment designations
- 3. Human Resources
  - a. Review staffing levels throughout the judicial district
  - b. Review titles and work with the court to determine need for additional staff
  - c. Review and process reclassification requests
  - d. Post new positions and participate in the hiring process for new drug treatment court staff
- 4. Fiscal
  - a. Purchasing
    - i. Process requests for instant read drug tests and other drug testing supplies in accordance with the purchasing guidelines
    - ii. Implement and process procedures for laboratory confirmation tests
    - iii. Process requests for office supplies
  - b. Contracts for goods and services
    - i. Review and assist courts with bid process
    - ii. Establish district-wide acquisition protocols
  - c. Grants
    - i. Adhere to fiscal reporting requirements
    - ii. Assist and participate in the grant application process as needed
  - d. Annual budget process
    - i. Review and process requests for additional resources from all courts in the district
    - ii. Review and process, as appropriate, requests for funds to expand programs
  - e. Budgets for new drug treatment courts
    - i. Work with OCDTP when preparing budgets for new drug treatment courts
- 5. Technology
  - a. Provide general automation support for all court applications
  - b. Provide and support hardware/software for all court applications

### C. Trial Courts

Under the direction of the District Administrative Judge, the trial court is responsible for the day-to-day operations of the drug treatment court in collaboration with the local community. The trial court utilizes the District Administrative Office and ODTCP as needed for support.

#### 1. Judge

- a. Preside over court sessions for the drug treatment court
- b. May participate in and preside over the drug treatment court team staffing
- c. Work collaboratively with the local community and treatment court team to enhance the progress of the participants and the drug treatment court program
- d. Participate in statewide trainings as they relate to alcohol and substance abuse
- e. May participate in the interview process for new drug court staff
- f. Review and participate in policy and procedure recommendations for the drug treatment court

#### 2. Court Manager

- a. Monitor and review all operations of the drug treatment court, including data entry into the UTA
- b. Supervise drug treatment court staff, providing guidance and feedback
- c. Monitor and approve all requests for time and leave, including work related activity in the community
- d. Review and process all requests for travel and training in accordance with travel guidelines
- e. Review and submits all budget requests from the drug treatment court
- f. Participate in the interview process for new drug court staff
- g. Review and submit all requests for supplies from the drug treatment court
- h. Review and submit all grant-related reports
- i. Participate in statewide training programs as appropriate
- j. Act as court liaison with treatment community and social service agencies

#### 3. Coordinator

- a. Handle the day-to-day operations of the drug treatment court
- b. Supervise case managers, if applicable
- c. Work within the community and collaboratively with the team to promote the drug court concept
- d. Work directly with participants, performing case management as required
- e. Keep community partners informed of participants' progress
- f. Maintain the UTA with complete information about each participant
- g. Prepare calendars for court, schedule meetings and trainings for team members and stakeholders
- h. Comply with time and leave requirements
- i. Establish and implement procedures for random/monitored drug testing
- j. Assist Court Managers with budget, purchasing, and grant-related reports
- k. Participate in statewide trainings

## Division of Grants and Program Development

### A. Mission

The mission of the Division of Grants & Program Development is to support courts across the state in the design, development, funding and evaluation of innovative problem-solving initiatives. Those initiatives include the development of training programs and courts dedicated to serving communities, protecting victims and addressing the underlying causes of crime and family problems.

### B. Role

1. Coordinates with administrative judges, judicial districts, and local courts in the submission of all grant proposals and the implementation of all grant-funded programs.
2. Works with the Division of Financial Management, the Division of Administrative Services, local courts, and district offices to integrate grant-funded projects into the Unified Court System's (UCS) budgeting process.
3. Serves as the day-to-day link to the Center for Court Innovation, the UCS' research and development arm (<http://www.courtinnovation.org>), to help develop prototypes, conduct research, and obtain funding.
4. Assists in the development of training programs associated with problem-solving courts to be conducted in partnership with the Unified Court System's Judicial Institute.

## Center for Court Innovation

### A. Role

1. Founded as a public/private partnership between the New York Unified Court System and the Fund for the City of New York, the Center for Court Innovation is a non-profit think tank that helps courts and criminal justice agencies aid victims, reduce crime, and improve public trust in justice.
2. In New York, the Center functions as the court system's independent research and development arm. In that capacity, the Center works with the Unified Court System to develop and implement problem-solving courts, provide training and technical assistance, and produce documents that serve as resources for problem-solving professionals throughout the state.

### B. Drug Treatment Courts

1. Center staff works closely with the Office of Court Drug Treatment Programs to develop and conduct trainings for new and experienced drug court practitioners. These trainings include programs for new drug treatment court teams and new drug treatment court team members. Trainings are developed on an ongoing basis in the areas of adult and family treatment court practices, confidentiality laws, small group facilitation skills, and other topics of relevance to the drug treatment court programs.
2. The Center uses a multi-disciplinary approach to document effective and promising practices for New York's drug treatment courts.
3. The Center's research department evaluates both the process and impact of adult, family, and juvenile drug treatment courts in New York. It also writes monographs and white papers on various aspects of drug treatment court practice.

## **III. ADMISSION PROCESS**

## A. Eligibility Criteria

**Recommended Practice:** A drug court program should be as inclusive as resources and political support will allow, while remaining mindful that the program should not be available to those who would seek the program solely to avoid legal consequences. When setting eligibility criteria, the drug court team should ask the following questions:

- What charges should the drug court include?
- What criminal histories should the drug court target? exclude?
- What type of drug use is the court targeting?
- What diagnosis will the court require for admission?
- What is the community's treatment capacity?
- What is the court's time and staff capacity?
- What is the probation department's supervision capacity?
- What legal and ethical considerations may affect the eligibility of certain populations (e.g., non-legal residents, informants)?

**Rationale:** In order to measure program performance, a drug court should be very clear about the population it intends to admit to its program. Clarity in admission criteria will assist the Court in assessing whether it is reaching all appropriate offenders.

### 1. Targeted Charges

**Recommended Practice:** When deciding which charges to target, the drug court team should consider four factors:

- which offenses are typically committed by the substance-abusing population (e.g., drug offenses, non-drug offenses, specific charges);
- which offenses the prosecutor's office deems admissible from a public safety perspective;
- which offenses the defense bar deems serious enough to consider drug court as an alternative to traditional case processing; and
- which offenses carry longer alternative periods of incarceration.

**Rationale:** In order to capture the greatest number of eligible participants, the drug court team should identify the types of crimes being committed by the substance-abusing population. The team should consider reaching beyond drug possession charges (which will usually signal use or abuse) and examine charges that may be drug-driven, (e.g., petit larceny, criminal trespass, grand larceny, commercial burglary). At the same time, the prosecutor should be mindful of the types of charges that the community will tolerate in the drug court. For example, some drug courts will not admit any sale charges, while others will admit sale charges if the sale involves a relatively small amount of money and is committed to support personal use. Similarly, communities with a high incidence of charges under Section 1192 of the Vehicle and Traffic Laws may want to include these offenses in their program. In these jurisdictions, the drug court



team will want to formulate policies that are strict enough to address concerns about the risk factors associated with VTL Section 1192 offenders.

## 2. Targeted Criminal History

**Recommended Practice:** When deciding which criminal histories to target or exclude, the drug court team should consider the following three factors:

- which offenders are likely to face incarceration if processed in the traditional setting;
- of those offenders, which will the prosecutor deem eligible from a public safety perspective; and
- the effect of convictions for violent offenses on eligibility for the drug court program.

**Rationale:** As with targeted charges, the drug court team should seek to be as inclusive as possible within the constraints of public safety factors when identifying the types of criminal histories that will be accepted into the drug court program. The drug court should consider whether the offender would ordinarily face incarceration. Generally, offenders will be more inclined to participate in drug court if their alternative in traditional case processing would likely involve jail or prison time. In addition, research shows that longer alternative periods of incarceration (e.g., predicate felon facing 3-6 years versus a misdemeanor facing one year) produce higher drug court graduation rates.<sup>i</sup> While offenders with a history of violence are strictly prohibited in drug courts that receive federal funding, this population should be carefully examined where courts do not receive such funding. Offenders who have a history of violence but are otherwise eligible for drug court should be assessed on a case-by-case basis. Factors to consider will include the nature of the offense (isolated minor assault versus arson, robbery, etc.); severity of the offense; years at liberty since the offense occurred; number of previous violent offenses, etc. Note that treatment providers typically have their own admission criteria regarding clients with histories of violence.

## 3. Drug Use

**Recommended Practice:** The drug court should use available resources, such as Police and Probation, to keep current with drugs of choice in the offending population and changes in their patterns of use.

**Rationale:** When setting eligibility criteria, the drug court must determine whether sufficient resources are available to treat and monitor a participant. Different drugs may require different types of treatment. For example, if young adults in the drug court generally use marijuana only, then the drug court will require treatment providers who are skilled and experienced with testing and monitoring individuals who use that drug. If the jurisdiction is not equipped to address the needs of a particular type of drug user, then the drug court should probably not admit that type of drug user to the program.

## 4. Diagnosis

**Recommended Practice:** The drug court should decide whether eligible offenders should include individuals with substance abuse and substance dependence diagnoses, or only those with a substance dependence diagnosis.

**Rationale:** As with drugs of choice, the drug court team needs to know that participants will receive treatment appropriate for their clinical level of use. In addition, the number of treatment slots available to the drug court may dictate whether the program can include the larger population of those who abuse and those who are dependent.

## 5. Co-Occurring Population

**Recommended Practice:** *Treatment providers* - The drug court should ascertain whether the local provider community can offer appropriate treatment and other supportive services for individuals diagnosed with a co-occurring disorder. When assessing treatment capacity, the drug court should consider the “reasonable accommodation” standard set by the Americans with Disabilities Act.

**Rationale:** Research has shown that individuals diagnosed with co-occurring disorders are best served in treatment programs that can simultaneously provide mental health and addiction treatment using practitioners trained in both domains.<sup>ii</sup> “Integrated services” include medication management, cognitive-behavioral, and motivational enhancement therapies. Contingency management improves adherence to medication and links to community services.<sup>iii</sup> In considering whether individuals with co-occurring disorders have adequate access to services, practitioners should keep in mind that the Americans with Disabilities Act prohibits discrimination against persons with disabilities, including drug and alcohol abuse.<sup>iv</sup>

**Recommended Practice:** *Refining admission criteria* - The drug court should assess which types of mental illness it can accommodate. The drug court may wish to distinguish between those with Axis I Disorders (Clinical Disorders) and those with Axis II Disorders (Personality Disorders). Another approach is to formulate guidelines for admission according to functionality, rather than by diagnosis. In order to formulate an appropriate policy, the drug court should consult closely with clinical professionals who understand the challenges presented by the co-occurring population and are aware of available treatment resources in the community.

**Rationale:** Individuals with co-occurring disorders are frequently associated with a poor prognosis for involvement in treatment<sup>v</sup> and compliance with medication<sup>vi</sup>; greater rates of hospitalization<sup>vii</sup>; more frequent suicidal behavior<sup>viii</sup>; and difficulties in social functioning<sup>x</sup>. These challenges, along with the difficulty in accurately assessing co-occurring disorders, require careful planning and implementation.

**Recommended Practice:** *Modifications to drug court policies and procedures* - The drug court should expect that individuals with co-occurring disorders may not be able to adhere to all of the specific drug court requirements and may benefit from more individualized sanctions. The team should consider modifying both the requirements and sanctions scheme for this population.

**Rationale:** Many factors can affect the ability of individuals with co-occurring disorders to meet all program requirements. Medication can cause serious physiological side effects; the severity of the mental illness may impair one’s ability to maintain employment; and the level of functionality can vary widely among the mentally ill population. With respect to sanctions, treatment experts recommend that incarceration be used sparingly for individuals with co-occurring disorders.<sup>x</sup>

**Recommended Practice:** Once these decisions have been reached, all drug court programs should develop an effective screening tool to identify offenders with mental illness and make a proper diagnosis.

**Rationale:** An accurate screening tool will help the Court admit only those with eligible diagnoses. However, the assessment process is complicated by the fact that frequently, drug use masks mental illness. As a result, mental illness may surface some period after admission to the drug court. In these cases, the drug court may wish to allow a participant to opt out of the program if the drug court is unable or unwilling to address the mental health issues.\*

\*For detailed information on this topic, consult ROGER H. PETERS & FRED C. OSHER, CO-OCCURRING DISORDERS AND SPECIALTY COURTS, (2d ed., 2004), *available at* <http://gainscenter.samhsa.gov/pdfs/courts/CoOccurringSpecialty04.pdf>

## 6. Age

**Recommended Practice:** The drug court should determine whether community providers offer age-appropriate services, particularly for the young adult population (approximately 16-22 years old).

**Rationale:** This population typically requires very different treatment plans than the adult population, including educational, recreational, and family services. Frequently, young adults have not used drugs for long enough to be diagnosed with substance abuse dependence (or even abuse). Their drug of choice is typically marijuana, which presents testing challenges that are not insurmountable but require special attention to the issue of interpretation of positive results. Without services specifically targeted for this group, the drug court will likely retain them in treatment for shorter periods of time than the older participants. In addition, the drug court will need to structure a sanctions and incentives scheme that is specifically designed to motivate young adults. Finally, the drug court and treatment providers will need to address gang membership in communities where gangs are a factor. Gang membership will impact both the individual's readiness for engagement in treatment, as well as the treatment provider's capacity for effectively delivering services.

**Recommended Practice:** If the Court decides to admit this population, it may want to establish a separate track where young adults are grouped together, and apart from older drug court participants.

**Rationale:** Given the significantly different issues and needs of the "young adult" population, participants will be more likely to remain engaged if they can identify with others similarly situated.\*

\*For a detailed discussion of the young adult population, see the following monograph: BUREAU OF JUSTICE ASSISTANCE, JUVENILE DRUG COURTS: STRATEGIES IN PRACTICE (2003), *available at* <http://www.ncjrs.gov/pdffiles1/bja/197866.pdf>

## 7. Pharmacological Interventions

### Discussion

Methadone maintenance therapy can be a controversial topic when utilized in the criminal justice context. Most drug courts in New York City will only admit individuals on methadone if they are prepared to withdraw completely from methadone use and it is medically advisable to do so (i.e., they are at low enough dosages to withdraw in a reasonable period of time, they do not have compromised immune systems, etc.). Many other drug courts around the State will consider methadone maintenance as an appropriate treatment plan.

Treatment professionals and researchers who have studied the effects of methadone maintenance consistently urge methadone maintenance as an effective and proven medication for eliminating the craving for heroin. They also are equally emphatic that methadone maintenance must be accompanied by appropriate treatment. Finally, in 2006, the National Institute on Drug Abuse published its *Principles of Drug Abuse Treatment for Criminal Justice Populations*.<sup>xi</sup> Principal #12 states, “Medications are an important part of treatment for many drug abusing offenders,” and notes that both methadone and buprenorphine are helpful in normalizing brain function in those addicted to heroin. Criminal justice professionals tend to view methadone as another drug that is addictive and subject to misuse. In addition, many methadone clinics do not offer sufficient treatment services in conjunction with methadone administration which can result in continued use of illegal substances in addition to methadone maintenance. Finally, methadone clinics have become associated with illegal sale of methadone near the clinics, loitering, and other behavior that draws complaints from neighborhood residents.

**Note:** There are Methadone programs in the New York City area that provide comprehensive treatment services found in OASAS licensed 822 (non-Methadone) outpatient clinics. In addition, OASAS licensure now ensures that all 822 clinics must accept clients on Methadone for treatment. In these situations, the two programs must carefully coordinate services to the individual.<sup>xii</sup>

#### Naltrexone, Vivitrol, Buprenorphine, Subutex, and Suboxone

In recent years, the Food and Drug Administration has approved several medications for the treatment of opioid and alcohol dependence. Designed to treat opioid addiction, Naltrexone and Vivitrol have also been shown to be effective treatments for alcoholism. Buprenorphine, Subutex and Suboxone are used to treat opioid dependence.

**Recommended Practice:** Drug court programs should become thoroughly educated about the benefits, side effects, and philosophical issues associated with pharmacological interventions. Since drug courts uniformly adopt the disease model of addiction, effective and scientifically proven medications should be seriously considered where indicated. Drug court programs should make their decisions about medications in the same manner that they make other treatment-related decisions, in close consultation with the treatment professionals on their team.

#### 8. Non-English speaking participants

**Recommended Practice:** First, drug court programs should consider the availability of programs that can provide treatment services in the participant’s first language. Second, drug court staff should be particularly sensitive to the cultural proficiency of treatment providers who are serving individuals from diverse ethnic backgrounds.

#### 9. Lesbian, Gay, Bisexual, and Transgender Populations

**Recommended Practice:** Drug court programs should explore the availability of treatment providers that understand the challenges faced by individuals whose sexual orientation is different from that of the majority of the population.\*

\*For a thorough discussion of this topic, see CENTER FOR SUBSTANCE ABUSE TREATMENT, A PROVIDER'S INTRODUCTION TO SUBSTANCE ABUSE TREATMENT FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDER INDIVIDUALS (2001), available at <http://kap.samhsa.gov/products/manuals/pdfs/lgbt.pdf>

## 10. Non-Citizens

**Recommended Practice:** *Legal Permanent Residents* - If the drug court wants to include legal non-residents, it should consider adjusting its plea policy. The Court could either defer prosecution but require a written agreement that the participants will not object to the admission of any and all evidence by the prosecution, should the offender be terminated from drug court; or require a plea to a charge that does not serve as grounds for deportation.

**Rationale:** Legal non-citizens face very serious deportation consequences for admitting to drug use and/or sale. Even if the plea is later vacated, admission on the record of drug use and/or sale has been held sufficient grounds for deportation.<sup>xiii</sup> If the participant admits to certain non-drug offenses, there may also be serious deportation consequences.

**Recommended Practice:** *Illegal non-citizens* – The drug court should almost always exclude illegal non-citizens from participation.

**Rationale:** Admitting undocumented aliens raises obvious legal and ethical issues for the Court. For the illegal non-citizen, the risk of detection by the Immigration and Customs Enforcement (ICE) agency is heightened because of jail sanctions. In addition, illegal aliens are generally ineligible for benefits that pay for substance abuse treatment and typically unable to pay for them without government sponsored assistance.\*

\*For a detailed discussion of the collateral consequences of criminal convictions for non-citizens, visit: Immigrant Defense Project at <http://www.immigrantdefenseproject.org> or Collateral Consequences of Criminal Charges at <http://www2.law.columbia.edu/fourcs/>

**Recommended Practice:** All drug courts should designate one member of the team to serve as an expert advisor on immigration issues.

**Rationale:** Over the past several years, both statutory and case law have become increasingly strict with respect to legal non-residents who are convicted of a crime or even admit facts sufficient to support a finding of guilt. In order to avoid unintended consequences (including mandatory deportation), the drug court should ensure that at least one team member is thoroughly educated on collateral consequences for legal non-residents.

**Recommended Practice:** If there is any question regarding an individual's legal status, the drug court staff should require proof of citizenship.

**Rationale:** Given the potential of extremely serious consequences for the legal non-resident, program staff should be absolutely certain that each drug court participant is either a citizen or has been appropriately advised of the collateral consequences of participation.

#### 11. Confidential Informants

**Recommended Practice:** Drug courts should avoid admission of confidential informants into their program.

**Rationale:** Admission of confidential informants into the drug court program poses many challenges for the informant, the court, and the treatment program. If the prosecutor intends to continue using the informant in the investigation of criminal activity, the informant will have to frequent locations that will be counter-therapeutic. Other drug court participants will inevitably discover his/her status and tend to perceive that the person is receiving favorable treatment from the prosecutor and/or the court. Additionally, informants are generally held in extremely low regard and profoundly mistrusted by those who are likely to participate in the drug court. This status places them in potential danger within the court and treatment provider settings. Even if the prosecutor ceases to use the informant, many of the above concerns will still impact the drug court program.

### B. Screening Process

#### 1. Legal Screening

The first step in screening cases for drug court typically involves a paper review of the case to determine if preliminary criteria for eligibility are evident. Factors may include charge, criminal history, place of occurrence, self-reported addiction, and other factors. Ideally, all cases that meet the established criteria will then proceed to the drug court for review by the entire team.

##### a. Timeliness

**Recommended Practice:** Most drug courts should seek to develop a formal screening process designed to capture all eligible offenders as quickly as possible. Written eligibility criteria and review of cases close in time to the arrest or violation of probation will produce more expeditious entry into the drug court. Notwithstanding the desirability of early placement into treatment, judges, prosecutors and defense counsel must be afforded the time necessary to review each case, protect constitutional rights, and inform each defendant of all consequences of drug court participation.

**Rationale:** Research has found that the sooner an individual enters treatment after a crisis (in drug courts, the arrest represents the crisis), the longer the person will remain in treatment. In turn, length of time in treatment is directly related to long-term sobriety.<sup>xiv</sup> A formal screening process builds capacity and ensures that drug courts can assess all potentially eligible defendants in a timely manner. A formal process does not preclude a supplemental, informal “back-door” process to allow case-by-case decisions on offenders who do not fall squarely within the eligibility criteria.\*

\*For more information on recommended duration of treatment for the criminal justice population, see NATIONAL INSTITUTE OF DRUG ABUSE, PRINCIPLES OF DRUG ABUSE FOR CRIMINAL JUSTICE POPULATIONS (2006), available at [http://www.drugabuse.gov/PDF/PODAT\\_CJ/PODAT\\_CJ.pdf](http://www.drugabuse.gov/PDF/PODAT_CJ/PODAT_CJ.pdf)

b. Drug Court Team Review

**Recommended Practice:** Once a case has satisfied “paper eligibility” criteria, the drug court team should review the case to decide whether the individual should be clinically assessed for eligibility.

**Rationale:** Although the prosecutor typically will render the final decision on admission to the drug court, a team review of “paper eligible” cases will support a more in- depth consideration of eligibility.

**Recommended Practice:** The prosecutor assigned to the drug court should be empowered to make the final admission decision for his or her office in the majority of cases.

**Rationale:** Waiting for a supervisor’s decision on every case will further delay entry into drug court, thereby affecting placement into treatment as close as possible to time of crisis.

c. Linkage to Defense Counsel

**Recommended Practice:** Defense counsel should be involved as early as possible in the admission process to discuss the drug court program and its appropriateness with the client. Once “paper eligibility” criteria have been satisfied, defense counsel should have the opportunity to consult with the defendant before drug court personnel approach the defendant regarding participation in the drug court and/or drug or alcohol use.

**Rationale:** Early involvement by defense counsel serves three important purposes. First, it promotes consideration of constitutional and other legal issues affecting the case (e.g., 4<sup>th</sup> Amendment issues, consequences of a guilty plea, etc.). Second, providing the client with complete information about the program, including its requirements, intensified supervision, and potentially longer period in the system, will promote more informed decision-making about entering the program. Third, a thorough explanation of the drug court process will encourage honest and candid responses by the defendant to inquiries by the drug court staff.\*

\*For a thorough analysis of a defense attorney’s obligations in the drug court setting, see NATIONAL DRUG COURT INSTITUTE, CRITICAL ISSUES FOR DEFENSE ATTORNEYS IN DRUG COURT (Monograph Series 4 2003), available at <http://www.ndci.org/CriticalIssues.pdf>

2. Clinical Assessment

a. Clinical Screening

**Recommended Practice:** The drug court team should look at the offender’s clinical appropriateness for participation. Aspects of appropriateness include:

- DSM diagnosis (abuse, dependence);
- current use (type, frequency, intensity);
- substance abuse history and its relation to criminal justice history;
- psychological/behavioral functioning (including cognitive factors);
- current mental status;

- medical status (including intoxication or withdrawal potential);
- presence of Traumatic Brain Injury (TBI);
- participant motivation; and
- cultural/ethnic/religious orientation and the impact on participation.

Screening tools, such as the Addiction Severity Index (ASI), the Michigan Alcohol Screening Test (MAST), the Global Assessment of Individual Needs (GAIN), are useful in determining the client's appropriateness for admission. OASAS also recommends use of the HELPS (a brief screening for Traumatic Brain Injury) as well as a screen for Fetal Alcohol Spectrum Disorders, as both of these conditions will impact treatment and the individual's ability to comply with program requirements. Also, instruments such as the MAST, for example, can be given to the client in paper form to fill out prior to the interview.

**Recommended Practice:** In cases where a potential participant appears to be suffering from a co-occurring mental disorder, the drug court program should have provisions for psychiatric referral and evaluation prior to recommending admission to the drug court program. OASAS recommends use of the Modified Mini Screen (MMS) to identify potential participants with coexisting disorders. The MMS can be accessed at <http://www.oasas.state.ny.us/hps/research/documents/ MINIScreenUsersGuide.pdf>

**Recommended Practice:** Assess clinical eligibility before executing a participant contract.

**Rationale:** Legal and ethical questions can arise if an offender admits guilt and is subsequently deemed clinically ineligible.

**Recommended Practice:** If court-based treatment providers are responsible for conducting the initial assessment and placement, the drug court should establish protocols to avoid any appearance of conflict.

**Rationale:** Conflicts of interest (real or perceived) can occur when a treatment provider assesses the offender and then refers the individual to his or her own program.

#### b. Clinical Assessment

**Recommended Practice:** The clinical assessment should match participants to appropriate levels of care and modalities of available substance abuse services. Basic components of the assessment include:

- diagnosis (dependence, abuse, other);
- engagement of the participant in determining motivation and goals;
- meaningful, strength-oriented treatment planning; and
- level of care determinations with reference to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition Text Revision (DSM-IV-R) of the American Psychiatric Association (2000).

**Recommended Practice:** An effective clinical assessment should reflect the following components:

- an objective, strength-based clinical evaluation which clarifies the nature and extent of a substance abuse disorder in relation to a range of bio-psychosocial areas (e.g.,



- substance abuse history, treatment history, medical, psychological, familial, vocational, and other domains of functioning);
- identification of the client's needs, strengths, resources and problem areas along this continuum (Note that initial contact with the participant may not result in a full and accurate reporting of all aspects of the person's current and past functioning); and
- regular review and updating to ensure that a comprehensive picture of each client is reflected in the Universal Treatment Application(UTA) or client file (Note that the UTA is the customized computer application utilized by all drug courts in New York State).

**Recommended Practice:** Wherever feasible, the drug court professional who conducts the assessment should be a Certified Alcoholism and Substance Abuse Counselor (CASAC), who considers the following guidelines when interviewing the offender:

- potential client is drug and alcohol free during the interview;
- language of the interview is clearly worded and in the primary language of the client;
- environment for the interview is conducive to establishment of trust and rapport with 1-1.5 hours allocated for the Assessment;<sup>xv</sup>
- participation of family members or significant others is encouraged to gather additional information (with client's permission); and
- the interviewer is trained in interviewing techniques and the use of evidence-based assessment tools.\*

\*Recent studies indicate the efficacy of a Stages of Change/Motivational Interviewing approach that assists the client in recognizing his/her problem (in this case, the role and relationship of substance abuse to and with the criminal justice system) and elicits client motivation to make the changes necessary to successfully complete the drug court program.<sup>xvi</sup> The use of these techniques requires training and consultation with a clinical practitioner.

**NOTE:** In New York State, **Level of Care for Alcohol and Drug Treatment Referral (LOCADTR)** is a patient placement criteria system designed for use in making level of care decisions in New York State. Level of care determination is a clinical procedure provided by OASAS-certified alcoholism and substance abuse treatment services or by qualified health professionals as defined in OASAS chemical dependence regulation.\*

\* For a complete listing of New York State regulations governing chemical dependence outpatient services, see 14 N.Y. COMP CODES R. & REGS. tit. 14 § 822.1 – 822.13 (2008), *available at* <http://www.oasas.state.ny.us/regs/822.cfm>

The purpose of the level of care determination procedure is to assure that a client in need of chemical dependence services is placed in the least restrictive, but most clinically appropriate level of care available. It is the responsibility of the treatment provider to make an appropriate placement. Note that Certified Alcoholism and Substance Abuse Counselors are authorized to conduct assessments and make referrals to treatment, as is common practice in drug court programs. They can not, however, make the final decision on admission to a particular treatment program.

In addition, the **ASAM Placement Criteria** (American Society of Addiction Medicine) provides a similar mechanism for organizing an appropriate referral process. These manuals are available to professionals and can be adapted to the Screening and Assessment instruments used by drug court staff.

\*An excellent resource for many clinical screening, assessment and treatment issues is The Treatment Improvement Protocols (TIPs) Series, which presents best practice guidelines for the treatment of substance abuse. This series is produced by the Center for Substance Abuse Treatment, Office of Evaluation, Scientific Analysis, and Synthesis. For more information, visit: <http://www.csat.samhsa.gov/publications.aspx>

To request a print copy of a TIP publication, visit:  
<http://www.kap.samhsa.gov/products/manuals/tips/index.htm>

## C. Becoming a Participant – Plea Structure and Contract/Participant Agreement

### 1. Courtroom Observation

**Recommended Practice:** Drug courts should require eligible offenders to observe drug court for at least one session before reaching a final decision regarding admission to drug court. After observation, the drug court judge should discuss questions and concerns that the observer may have.

**Rationale:** Observation of drug court helps an offender make an informed decision about entering drug court. The experience can also provide motivation for those who believe they cannot abstain from drugs or are not ready to stop using.

### 2. Pre-Plea or Post-Plea Model

**Recommended Practice:** The drug court team should carefully consider whether to utilize a pre-plea diversion model or a post-plea structure. Both models offer advantages and disadvantages, depending on the severity of the charge and the legal and clinical profile of the participant. In cases that would not typically result in incarceration (e.g., misdemeanors with little or no criminal history), a pre-plea structure may be the only arrangement in which defense counsel will advise the client to participate in drug court.

**Rationale:** A post-plea structure promotes many important goals of the drug court. They include the following:

- simplifying options for the participant (stay in treatment or go to jail/prison);
- incorporating research findings that increased leverage (i.e., certainty of incarceration upon failure) promotes retention in the program;<sup>xvii</sup>
- relieving prosecutors of the burden of proving a case many months after an arrest; and
- achieving finality of a disposition for the court.

In courts where the probation department provides community-based supervision, participants may be sentenced to probation with drug court as a condition of their sentence. A pre-plea diversion model may be appropriate in certain misdemeanor cases where incarceration is unlikely in traditional case processing. The pre-plea model allows an individual to benefit from drug court without exposing him or her to permanent liability from a criminal conviction.

**Recommended Practice:** In a post-plea structure, the prosecutor should be encouraged to provide open file discovery, laboratory results, and information regarding the constitutional legality of any search and seizure.

**Rationale:** Drug courts generally utilize a modified adversarial approach that works most effectively when all parties have access to the same information. Withholding information undermines this approach and encourages gamesmanship which will ultimately discourage participation in the drug court.

### 3. Drug Court Contracts and Participant Handbooks

**Recommended Practice:** Drug courts should execute a written contract that includes all of the Court's expectations of the participant and specifically, what legal action the court promises to take if the participant complies with the drug court mandate or fails to meet the drug court's expectations. The contractual agreement should explain to participants:

- the "contingency" nature of the drug court structure, including the use of incentives and sanctions; and
- the drug court phases, including their relationship to treatment, recovery and graduation.

**Rationale:** Clear expectations of required behavior and consequences for non-compliance will help the participant to set goals and learn consequential thinking when the court sanctions negative behavior.

**Recommended Practice:** The court should carefully consider which legally established rights the participant is required to forfeit. For example, forfeiture of the right to appeal, 4<sup>th</sup> Amendment protections, and reasonable restrictions on association have been found acceptable by nearly all appellate courts. On the other hand, forfeiture of the right to scientifically valid drug testing or an evidentiary hearing of any kind at termination and sentencing may run afoul of due process requirements.

**Rationale:** Although appellate review of the drug court process is still minimal, the legal rights and protection afforded parolees and probationers can and will most likely be applied in the drug court setting. In the more established arena of parole and probation, courts have been given considerable latitude in imposing conditions on individuals being supervised. Courts have upheld geographical restrictions, so long as they are narrowly drawn. They generally uphold searches based on an executed waiver. Forfeiture of the right to appeal, with some limited exceptions, is permissible as a condition of a plea agreement. Conversely, due process probably requires scientifically accepted and reliable evidence of drug use if the participant is to be deprived of his/her liberty.<sup>xviii</sup> And in New York, a trial court must hold some kind of evidentiary hearing, formal or informal, where the factual basis for finding a breach of conditions of release and sentence to incarceration is established.<sup>xix</sup>

**Recommended Practice:** In cases where participants are under 18 years old, the drug court should have a parent or guardian present at the time of plea and/or admission to the drug court. Where appropriate, the court should encourage the parent or guardian to participate in the drug court process and, where appropriate, co-sign the drug court contract.

**Rationale:** Both legal and practical considerations support the inclusion of parents and guardians.

Frequently, the participant will be living at home and will depend on the parent or guardian for treatment insurance as well as coordination of school and treatment attendance.

**Recommended Practice:** The drug court should develop and distribute to each participant a Participant Handbook that outlines the requirements of the drug court program. The Handbook should be available in the client's preferred language. The Handbook should be made available to the offender prior to admission into the Drug Court.

**Rationale:** Clarity around expectations promotes informed decision-making about whether to enter the drug court program and enhances the perception of the Court's fairness by the participant.

**Recommended Practice:** The drug court should provide the participant with the greatest legal incentive possible, consistent with local sensibilities and the prosecutor's judgment, to encourage participants to complete the program. Outcomes can range from vacatur of the plea and dismissal of all charges to early discharge from probation to reduction of a felony to a misdemeanor.

**Rationale:** The "value" of the benefit of graduation will affect the motivation of the participant.<sup>xx</sup>

**Recommended Practice:** The participant should know the penalty upon termination from the drug court program before admission to drug court. The Court's discretion in sentencing can be maintained by framing the jail/incarceration period in the language, "up to a maximum of" a particular number of days or years.

**Rationale 1:** "Up to a maximum of" allows the court to consider the participant's behavior and length of time in drug court. The court may want to impose a greater sentence on a participant who absconds and never attends treatment than a participant who ultimately fails, but remained in treatment for an extended period of time and always appeared in court.

**Rationale 2:** In certain misdemeanor cases, the actual sentence may ultimately fall far short of one year, but "up to" language may carry more weight with the participant during drug court participation.

**NOTE:** Research suggests that the Court should set a specific incarceration alternative regardless of the nature of a participant's involvement with drug court. Vague jail/prison alternatives may undermine the drug court message that specified behaviors have certain consequences.<sup>xxi</sup>

#### **IV. ACTIVE DRUG COURT PARTICIPANT PROTOCOLS**

##### **A. Supervision Model**

In all drug treatment courts, judicial monitoring constitutes the ultimate supervision of the participant. In order to provide the most effective monitoring, judges rely on information provided by drug court team members who supervise the participant at treatment, in court, and in the community. The prosecutor and defense counsel may also convey information otherwise unknown by those who provide community-based supervision of the participant.

**Recommended Practice:** Supervision of the drug court participant should include:

- community-based supervision that allows for monitoring the participant outside of treatment and the court (where legally and clinically appropriate, practices may include announced and unannounced home visits, curfew checks, enforcement of location restrictions, and family engagement);
- case management services that seek to address the individual needs of each participant, including education, employment, health, dental, housing, parenting, and civil legal needs;
- scheduled and random drug testing; and
- ongoing assessment of progress in treatment as reported by the provider, timely recommendations by treatment regarding changes in level of care, and early intervention when participant is not compliant.

**NOTE:** In drug courts where probation is not utilized, community-based supervision may not be practical.

##### **Models of Supervision**

1. *Probation (generally, upstate model)*

Under the probation supervision, model, the participant is placed on probation and supervised by a probation officer who is a member of the drug court team. The probation officer frequently provides both community supervision and case management services.

*Strengths of this model:* a) capacity to provide community- based supervision, including home visits with drug testing; enforcement of curfews and location restrictions; b) ability to visit sites to confirm education and/or employment involvement; and c) law enforcement component which reassures prosecutors and may result in a greater number of individuals being admitted to the drug court.

*Weaknesses of this model:* a) the probation officer may be viewed by participants as “law enforcement,” which can inhibit candor about struggles with treatment compliance and other personal issues (e.g., dysfunctional family environment where drugs or other criminality may be present, spousal or partner abuse, etc.); b) the probation officer may not be sufficiently trained in substance abuse treatment, which can affect his or her ability to recognize behavior that signals a need for changes in level of care and/or clinical intervention; and c) conflict between a more traditional probation model that focuses on enforcement and the drug court model which should include a strength-based approach.

NOTE: Most of these issues can be addressed by training probation officers in substance abuse treatment and the disease model of addiction.

2. *Court-based case managers (generally, New York City model)*

Under this model, the participant enters a guilty plea, but sentencing is deferred pending participation in treatment. A court-based case manager with clinical training is assigned to monitor compliance and provide case management services.

*Strengths of this model:* a) the case manager may be viewed by participants as a “counselor,” which may encourage greater disclosure about problem areas in their lives; b) a clinical background makes it more likely that the case manager will recognize behavior that suggests a need for adjustment to the treatment plan; and c) the case manager is more likely to be familiar with a strength-based approach.

*Weaknesses of this model:* a) court-based case managers do not provide community-based supervision that allows home visits, randomized drug testing, enforcement of curfews and location restrictions, and visits to educational and/or employment sites to confirm participation; and b) court-based case managers may experience conflict between a “clinical” and “law enforcement” role.

3. *Treatment provider case management*

In a small number of drug courts, treatment providers are charged with performing the case management function as well as monitoring participant compliance. In these courts, the participant is not on probation, and there is no court-based case manager.

*Strengths of this model:* a) treatment providers are more likely to recognize clinical barriers and the need for change in level of care; and b) treatment professionals are more familiar with participant's progress in treatment.

*Weaknesses of this model:* a) treatment providers do not provide community-based supervision that allows for home visits, enforcement of curfews and location restrictions, and visits to educational and/or employment sites to confirm participation; and b) treatment providers can experience conflict between their treatment role and their duty to report non-compliance to the drug court.

**Recommended Practice:** Regardless of which supervision model is utilized, the drug court team members, especially the judge, should routinely inform clients about the contingencies of treatment participation and about how participation will be monitored by legal agents.

**Rationale:** Research has found that higher retention rates are “associated with proactively [informing offenders of] the contingencies of program participation, consistent messages among multiple criminal justice agents and treatment staff, the use of behavioral contracts and judicial orders, and swift returns to custody upon failure.”<sup>xxii</sup>

## B. Court Operations

### 1. Drug Court Team

**Recommended Practice:** The drug court team should include at a minimum:

- Judge
- Prosecutor
- Defense attorney
- Coordinator
- Treatment representative
- Probation (outside of New York City) or Case Manager (New York City)

Where appropriate and feasible, the team will benefit from the inclusion of:

- Department of Social Services representative
- Housing liaisons
- Law enforcement liaison (Police, Sheriff)
- Mental health professional
- Vocational/education counselors
- Chief Clerk or Deputy Chief Clerk

**Recommended Practice:** To the extent possible, drug court team members should include dedicated prosecutors, defense attorneys, and treatment representatives. When new members join the team, they should be trained in the fundamental components of the drug court model (e.g., the team approach, pharmacology of addiction, sanctions and incentives, and the recovery process).

**Rationale:** Staff consistency and training promote teamwork, trust, and a stable environment for participants. Constantly changing faces encourage participants, particularly in the early stages of recovery, to split/manipulate team members.

**Recommended Practice:** Where practical, the drug court should ask the local public defender's office to assign an attorney(s) to represent drug court participants. In jurisdictions where there is no public defender, the court should make an effort to ensure that drug court participants are represented by attorneys who are thoroughly familiar with the court's policies, procedures, and protocols. Similarly, the District Attorney's office should assign one prosecutor to the drug court.

**Rationale:** Consistency of attorneys promotes smooth operations, facilitates swift referral to treatment, solidifies the team dynamic, and ensures that the lawyers are familiar with the drug court process.

**Recommended Practice:** The prosecutor's office should develop a written statement of intent regarding use of information obtained in drug court in the prosecution of the instant, past, and future cases.

**Rationale:** Effective drug courts depend on honest disclosure by participants regarding their drug use. Fear of prosecution for admission of criminal behavior will undermine the atmosphere of trust required for disclosure.

**Recommended Practice:** The drug court team should set aside one day per year to review the court's policies and procedures, explore areas of concern, and set goals and objectives. If possible, this meeting should occur away from the court. In most jurisdictions, the team can identify a facility in the community that can be used at little or no cost.

**Rationale:** Drug courts are dynamic in nature. Drugs of choice change; participant characteristics, such as age, ethnicity, and gender may shift over time; new treatment approaches emerge; and new staff members join the team. The day-to-day demands on time and resources frequently leave no room for the review or reflection necessary to improve the program. Part of this annual review should include an examination of the program's compliance with federal confidentiality laws and laws affecting the confidentiality of HIV/AIDS information.<sup>xxiii</sup>

**Recommended Practice:** Drug court coordinators should attempt to convene regionally, on a quarterly basis, to examine trends in drug use, identify obstacles in drug court operations, and brainstorm solutions.

## 2. Staffings

**Recommended Practice:** Time permitting, the entire drug court team should meet prior to each drug court session to review each individual's progress in treatment since the last appearance. Topics may include treatment attendance; who should be drug tested; phase advancements; sanctions, incentives; terminations; and graduation candidates. Each team member should have an opportunity to be heard regarding the court's action at the upcoming court appearance. The team should strive to reach consensus, but final decision-making must be left to the judge. The judge's decision should not be litigated in open court except where failure to do so would impinge on the team member's ethical obligations (e.g., defense attorney is obligated to present his or her client's wishes regardless of whether they are consonant with the drug court's policies and procedures).



**NOTE:** Where treatment providers participate in staffings, their presence should be limited to discussion of participants in their program.

**Rationale:** The focus of the drug court session is the participant's progress in treatment, not the legal aspects of the case. From a treatment perspective, a united front achieves two important objectives. First, it diminishes the participant's ability to fragment the team when he or she perceives conflict or disagreement among its members. Second, a unified message clarifies expectations for the participant.

## **V. DRUG COURT OPERATIONS**

### **A. Court Appearances**

#### **1. Judicial Style**

Every judge possesses his or her own unique style. The drug court model accommodates a wide range of approaches which span from lenient to stern and informal to formal. Many styles will work, so long as the judge creates a safe space in the courtroom that is conducive to building self-esteem and teaching participant accountability.

**Recommended Practice:** Although there is no single recommended judicial style, the judge should be aware of his or her style and maintain consistency in the messages that are sent to the participants. Judicial responses may be individualized but the overall approach to participants should be constant. When judges customize their sanctions and incentives to the individual, care should be taken to explain the rationale for different responses to other participants in the courtroom.

**Rationale:** Behavioral research informs us that perceived certainty of response has a deterrent effect. Individuals who perceive the judicial response as predictable will have greater success at controlling their behavior. Conversely, unpredictable responses lead to "learned helplessness" on the part of the participant.<sup>xxiv\*</sup>

\*For additional information about effective judge-defendant interaction, see C. Petrucci, *The Judge-Defendant Interaction: Toward a Shared Respect Process*, in *JUDGING IN THE THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* (B.J. Winnick & D.B. Wexler, eds., 2002)

**Recommended Practice:** The judge should maintain a balance between his or her role as caring authority figure and role as judge. The judge needs to gain participant's trust through effective communication and understanding the challenge of recovery. At the same time, the judge must resist being perceived as the participant's friend. Accordingly, the court should generally discourage ongoing group activities that include the judge, drug court staff, and participants (e.g., softball teams, bowling nights, etc).

**Rationale:** For many participants, motivation towards compliance stems from the fact that an individual with great authority cares about their well-being. If the relationship moves too close to

perceived friendship, that motivation is diminished. Also, judges must remain mindful that they may one day have to sentence a participant to a lengthy period of incarceration.

## 2. Courtroom Atmosphere

Drug court professionals frequently speak of drug court as “theater,” with participants in the “audience” watching the drug court in action. The behavior and attitudes that the participants observe affect their overall perception of the drug court’s fairness.

**Recommended Practice:** Ensure that participants and other members of the drug court audience can clearly hear the proceedings, either by using a smaller courtroom or utilizing microphones. Avoid bench conferences and talking in legal jargon or shorthand whenever possible.

**Rationale:** Communication between the judge and participants should be designed to affect the audience as well as the participant before the court. Poor acoustics undermine this goal.

**Recommended Practice:** All drug court team members and court staff (e.g., clerks, stenographers, court officers, bailiffs) should recognize the importance of non-verbal communication. They should remain attentive and engaged during the drug court proceeding, avoiding side conversations and activities unrelated to the drug court process.

**Rationale:** Participants and their family and friends in the audience take their cues from the drug court team and court staff. If any of the team or court staff are reading the paper, not applauding, walking in and out of the courtroom, the audience is likely to become uninterested and non-supportive.

**Recommended Practice:** Drug court staff should follow the same rules they require of participants (e.g., show up on time, dress appropriately, pay attention during session, be mindful that drug court occurs in a formal courtroom setting, etc.).

**Rationale:** Again, participants will naturally follow drug court staff’s lead or feel resentful if the same rules do not apply to drug court staff.

**Recommended Practice:** Know the population. If most participants are required to be in school or employed, try to schedule court sessions accordingly.

**Recommended Practice:** Require most drug court participants to remain in the courtroom for the entire calendar. In larger drug courts where the calendar takes an entire day, require participants to remain for at least half of the day. The drug court may want to reward participants who are doing well by calling their cases early and permitting them to leave. This practice should probably be limited to those individuals who have maintained long periods of compliance. If participants are permitted to leave early, make all general announcements at the beginning of the session.

**Rationale:** Drug court participants benefit from observing other cases for at least three reasons:

- when participants observe others doing well, they are reminded that other similarly situated individuals have achieved success. This reassurance can provide motivation for their own recovery;

- when they observe the court imposes sanctions on non-compliant participants, they learn consequential thinking; and
- in a good drug court, observation of numerous cases should enhance participants' perception that the court is fair and treats all participants equally. Positive perceptions of fairness promote buy-in to the drug court process.

**Recommended Practice:** The drug court should attempt to use a strength-based approach when communicating with participants. Even when a participant is non-compliant, the court should include mention of what they have done well. Examples include:

- A participant tests positive after several months of abstinence – remind the participant that he remained clean for several months and ask what helped him do so well – what changes did he experience that led to use?
- A participant is testing negative, working a steady job but is starting to miss treatment appointments, claiming that work prevents regular attendance at treatment – commend the participant for her work record and abstinence – ask the counselor or case manager to sit with the participant and draft a schedule on paper that will facilitate attendance at treatment.

Conversely, drug court judges should avoid communication that can be construed as public shaming or revealing intensely personal facts about the participant's life.

**Rationale:** Research indicates that a strength-oriented approach promotes successful program completion. Using a strength-oriented approach, the drug court judge will point out examples of client's capabilities (skills, educational achievements), responsible behaviors (work or attempts at work, positive family interactions), and talents. The judge will then relate these strengths to the participant's potential for achieving success in recovery. In addition, counselor optimism regarding the participant's ability to change is associated with positive treatment engagement.<sup>xxv</sup>

**Recommended Practice:** Judges and other drug court staff (probation, counselors, case managers) should routinely and repeatedly inform participants about the contingencies of treatment participation (i.e., the consequences of non-compliance).

**Rationale:** Research reveals that, among offenders who are mandated to participate in substance-abuse treatment, higher retention rates are associated with proactively engaging offenders in understanding the contingencies of program participation, consistent messages among multiple criminal justice agents and treatment staff, and swift returns to custody upon failure.<sup>xxvi</sup>

**Recommended Practice:** At each court appearance, the court should ask the participant to set one new goal that he or she intends to accomplish before the next court appearance or by a certain date in the near future.

**Rationale:** Behavioral research suggests that small, manageable objectives are more easily achieved than grandiose goals. The satisfaction of completing a small task provides motivation for the next step.<sup>xxvii</sup>

### 3. Frequency of Court Appearances

**Recommended Practice:** Frequency of court appearances should usually be linked to phase status (see B3 below) and generally decrease in frequency as the participant moves through the phases of the drug court program. The court should require appearances at least once per week at the outset and gradually reduce frequency to once per month in the final phase. Regardless of frequency of judicial hearings, the court should ensure that the treatment provider informs the court immediately of significant non-compliance by the participant.

**Rationale:** Judicial status hearings, especially with a high risk population, tend to enhance compliance among drug court participants.<sup>xxviii</sup> More frequent appearances early in the program hold participants accountable and tend to promote a positive relationship with the judge. Decreasing frequency with phase advancement provides an incentive for the participant.

**NOTE:** Under certain circumstances and where feasible, drug courts may consider using videoconferencing technology in place of in court appearances. In cases where travel from the provider to court is onerous and/or court appearances might disrupt treatment (particularly early on in the process), the court may wish to explore this option. It should also be noted that treatment providers generally cannot be reimbursed for their time escorting participants to and from court.

## B. Treatment Court Mandate

The drug court should distinguish between the “court” mandate and the “treatment” mandate. The court may want to set requirements for time in the drug court, frequency of appearances, drug testing protocols, and other court related components. In reaching these requirements, the court may consider the severity of the instant criminal offense or the extent of the participant’s criminal history. However, regulations promulgated by the New York State Office of Alcoholism and Substance Abuse Services (OASAS) require licensed treatment professionals to make treatment decisions based on approved clinical assessment criteria. These criteria will include history of substance use, previous treatment episodes, modalities previously utilized, job status, housing situation, health history, etc.

### 1. Treatment

**Recommended Practice:** The drug court program should follow the recommendations of the treatment professionals regarding Level of Care Determination (LOCADTR).

**Rationale:** According to OASAS, “[t]he purpose of the level of care determination procedure is to assure that a client in need of chemical dependence services is placed in the least restrictive, but most clinically appropriate level of care available. It is the responsibility of the provider to make an appropriate placement.”<sup>xxix</sup>

**Levels of Care** refer to the following treatment services:

*Crisis Services* – Medically managed detoxification; in-patient/residential medically-supervised withdrawal; and out-patient medically-supervised withdrawal

*Outpatient Services* – Non-intensive outpatient; intensive outpatient; outpatient rehabilitation; and methadone maintenance

*Inpatient Rehabilitation Services* – Short-term residential treatment (14-30 days)

*Residential Services* – Intensive residential rehabilitation; community residential; and supportive living

\*For a review of LOCADTR guidelines, see NEW YORK STATE OFFICE OF ALCOHOLISM AND SUBSTANCE ABUSE SERVICES, GUIDELINES FOR LEVEL OF CARE DETERMINATION (LOCADTR 2.0 2001) available at:

<http://www.oasas.state.ny.us/treatment/health/locadtr/LOCADTR2-3&cover.pdf>

## 2. Special Considerations

### a. Heroin Users

**Recommended Practice:** Notwithstanding the recommendations above, long-term heroin users will frequently require medically-supervised detoxification and some period of residential treatment to achieve abstinence.<sup>xxx</sup>

### b. Homeless individuals

**Recommended Practice:** Homeless individuals or those with unstable housing should be considered for inpatient referrals.<sup>xxxi</sup>

### c. Self-help Groups

**Recommended Practice:** Participants should be encouraged to utilize self-help groups in conjunction with substance abuse treatment. Drug court staff should develop a directory of self-help groups, including, but not limited to, Alcoholics Anonymous and Narcotics Anonymous.

**Rationale:** The purpose of self-help groups is to re-establish social relationships with sober peers and gain abstinence time. A recent study that tracked individuals for 16 years concluded that people who become involved in both Alcoholics Anonymous and treatment fare better than those who obtain only treatment.<sup>xxxii</sup>

**NOTE:** While self-help groups can provide support for those in recovery, they are not treatment.<sup>xxxiii</sup> They should be promoted only as an adjunct to formal substance abuse treatment. Additionally, the law prohibits ordering an individual to participate specifically in Alcoholics or Narcotics Anonymous groups. Courts have held that these groups are inherently religious and therefore violate the Establishment Clause of the Constitution.<sup>xxxiv</sup>

### d. Site Visits to Treatment Providers

**Recommended Practice:** Drug court coordinators or other appropriate staff should periodically conduct site visits to their treatment providers.

**Rationale:** Site visits accomplish several objectives. First, they serve to educate the drug court team about the services offered by a particular provider. Second, they communicate to the provider that the drug court considers treatment a key stakeholder in the drug court process. Finally, site visits can help drug court staff to address complaints from participants about program actions or activities.

**NOTE:** In most cases, the drug court should give the provider notice that its staff wants to visit the facility and, when practical, request that all drug court participants assigned to that provider be convened to meet the court staff. Unannounced visits can create unintended defensiveness and impair effective communication between the Court and treatment.

### 3. Phases

**Recommended Practice:** Drug courts should organize their programs into a series of phases with specific and quantifiable goals and objectives for each phase. The length of phases and the number of “clean” days required may vary, but the objectives must be clearly announced to the participant.

**Rationale:** Phases give participants more manageable and achievable goals. Short-term goals that participants can accomplish and measure will motivate them to advanced to the next stage of goals and objectives.<sup>xxxv</sup>

#### Example

*Phase One:* The focus of this phase is to encourage the participant to choose a drug-free life and establish a foundation of abstinence by beginning to develop appropriate life skills. Specific objectives might include:

- Attend a drug court orientation session
- Begin treatment and attend all required sessions
- Report to probation officer or other community-based supervisor
- Complete detoxification and remain abstinent
- Submit to random drug screenings
- Attend all required drug court sessions
- Permit unannounced home visits by community-based supervision agency
- Comply with curfews
- Complete an educational/employment plan and literacy assessment
- Arrange for complete physical and dental examination
- Explore life skills, health, education, and employment programs

*Phase Two:* The focus of this phase is to stabilize the participant in treatment, offer strategies for living without alcohol and other drugs, and develop the individual's educational/employment goals. Specific objectives might include:

- Attend all required treatment sessions
- Report to probation officer or other community-based supervisor
- Remain abstinent
- Submit to random drug screenings
- Attend all required drug court sessions
- Permit unannounced home visits by community-based supervision agency
- Start educational program or job skills training
- Attend required life skills, parenting skills, health, employment, or education programs

*Phase Three:* The focus of this phase is to move the individual towards self-sufficiency while re-connecting with the community at large. Specific objectives might include:

- Attend all required treatment sessions
- Focus on relapse prevention
- Report to probation officer or other community-based supervisor
- Remain abstinent
- Submit to random drug screenings
- Attend all required drug court sessions
- Permit unannounced home visits by community-based supervision agency
- Actively participate in educational program or job skills training
- Develop continuing care plan and community re-integration strategy
- Attend graduate group and graduate review panel
- Plan and complete required community service projects
- Participate in victim/offender mediation, as appropriate

**Recommended Practice:** When a participant falters significantly (e.g., positive drug screens, multiple absences from treatment sessions), return the participant to the beginning of their current phase rather than to the beginning of Phase One (unless they are currently in Phase One).

**Rationale:** Relapse and other forms of non-compliance are a normal part of the recovery process. Sanctions should be designed to motivate, not discourage, participants. For example, sanctioning someone in Phase Three to start all over in Phase One erases the positive sense of accomplishment that motivated the participant to complete Phase One earlier in the process.

#### 4. Troubleshooting with Treatment Providers

**Recommended Practice:** If the Court is unable to resolve a concern with a treatment provider directly, it should contact the appropriate OASAS Field Office via a letter that defines the issue, with copies to Ken Perez at OASAS, 1450 Western Avenue, Albany, NY 12203 and Frank Jordan at the Unified Court System, 25 Beaver Street, 11<sup>th</sup> Floor, New York, NY 10003. OASAS and UCS staff will track the issue until it is resolved. For a directory of Field Offices, visit <http://www.oasas.state.ny.us/pio/regdir.cfm>

#### C. Drug Testing

The following recommended practices for drug testing are derived in large measure from formal training presentations by Paul Cary, Director of the Toxicology and Drug Monitoring Laboratory, University of Missouri Health Care System.

##### 1. Quality Assurance

**Recommended Practice:** Drug testing should be:

- Scientifically valid – employs proven methods and techniques and is accepted by the scientific community
- Therapeutically beneficial – provides an accurate profile of participant's drug use and offers rapid results for appropriate response

- Legally defensible – able to withstand challenge and has been scrutinized by legal/judicial review

**Recommended Practice:** Drug testing protocols should be in writing and staff should be trained to strictly follow each step of the process.

**Rationale:** The integrity of the drug testing regimen is critical to the fair and effective operation of the court. The judge must be able to rely on the accuracy of drug testing results. If participants observe an erratic or casual approach to the process, they may tend to either lose confidence in the drug court or become inclined to challenge unfavorable results.

## 2. Drug Testing Specimens

The following specimens can be utilized for detection of substance use:

- Urine
- Breath
- Hair
- Sweat-patch test
- Saliva – oral fluids
- Eye scanning devices

Urine remains the specimen of choice because it is readily available in large quantities, contains high concentrations of drugs, provides both recent and past usage, and is a good analytical specimen. Hair analysis is effective for detection of usage in the past 90 days but will not detect very recent use as the hair must have time to grow. The sweat patch is generally reliable but is subject to false positives due to environmental factors.

## 3. Drug Testing Protocols

**Recommended Practice:** Urine collections should be directly observed by a staff member of the same sex.

**Rationale:** Reliability and accuracy of urinalysis testing (no substitution or adulteration) can only be achieved by “witnessed” collection.

**Recommended Practice:** Both the collector and the participant should wash hands prior to collection. The sample should be reviewed for temperature (90-100 degrees Fahrenheit), color, odor, and the presence of solids or other particles.

**Rationale:** Clean hands will avoid contaminating the sample and analysis of temperature, color, odor and particles will help ensure a reliable sample.

**Recommended Practice:** Drug testing should follow a two-step approach. First, each sample should be screened to separate negative samples from “presumptively” positive samples. Second, if a screening reveals a positive result and the participant contests the screen, a confirmation test should be conducted to validate the result. Immunoassay testing is a common method for confirming the presence of a prohibited substance in drug courts. Gas chromatography-mass spectrometry (GC-MS) testing is the forensic method of testing for a



specific drug. In contested cases, a GC-MS confirmation test should always be ordered. A confirmation test can be eliminated in cases where the participant admits to use. The drug court, probation department, or treatment provider should assume responsibility for payment of the confirmation test.

**Rationale:** A participant is entitled to a scientifically reliable testing process, which can only be achieved with a confirmation test. In the few New York drug courts where immunoassay analyzers (EMIT) are utilized, a confirmation with a second EMIT test has been found sufficient by reviewing courts. However, in most New York drug courts, the initial screen is performed with non-instrumented test cups or dip sticks. Since the reliability of these tests continues to be debated, the court should order a GC-MS confirmation test when the participant contests a positive result. If the court is clear regarding the consequences for lying about drug use (e.g., increased sanctions), then the program should experience relatively few challenges to drug screen results. In cases where a confirmation test is ordered, equal access to justice principles place responsibility for payment of the test on parties other than the participant. The court may consider increasing the severity of the sanction where a contested result is confirmed as positive.

**Recommended Practice:** Drug courts should establish written protocols for participants who challenge the results of a drug test.

**Rationale:** A clearly articulated protocol for challenging a test result (e.g., who pays for it, severity of sanctions, laboratory used for testing, scientific reliability of GC-MS testing, etc.) will likely reduce specious challenges.

**Recommended Practice:** Where feasible, participants should always be tested for alcohol, regardless of whether it is their drug of choice.

**Rationale:** Substance abusers will frequently substitute with easily accessible alcohol, which cannot always be detected on breath or observed in a participant's behavior.

**Recommended Practice:** Drug courts should not use certain biomarkers, such as EtG, as stand-alone confirmation of relapse.

**Rationale:** Research has not yet established an acceptable standard to distinguish possible exposure to alcohol in various commercial products from consumption of alcoholic beverages.<sup>xxxvi</sup>

#### 4. Drug Test Interpretation

**Recommended Practice:** Utilize drug testing results as only one of many indicators of the participant's overall program compliance.

**Rationale:** Relying too heavily on drug test results to measure compliance can distort the court's assessment of the participant's progress. For example, if a participant is testing clean but missing sessions, appearing late for court, and has recently lost a job, the program staff should examine the possibility that the samples are unreliable or that other aspects of her recovery are in jeopardy. Conversely, if a participant is doing well in all other areas but tests positive once, the program may want to consider that the dirty urine is a minor lapse, meriting a response but not one that will disrupt otherwise positive progress.

**Recommended Practice:** Drug courts should interpret urinalysis test results qualitatively, not quantitatively. The program should interpret test results only as “Positive” or “Negative.”

**Rationale:** Urine drug concentrations are of little or no interpretative value. Utilizing urine drug test levels produces interpretations that are inappropriate, factually unsupportable, and without a scientific foundation. Many factors can affect drug levels (e.g., water loading, urine volume or output, age, exercise, and salt and protein intake). Moreover, drug tests are not linear and are not designed to accurately quantify drug concentrations.

**Recommended Practice:** Drug court programs should routinely measure creatinine levels of their collected samples. If abnormal creatinine levels are detected, the court should first explore any physiological reasons that the individual may have abnormal levels without intentionally diluting the sample. Second, the court may wish to increase the frequency of the individual’s drug testing for a period of time. Third, the Court should examine whether there are other indicators of drug use (e.g., missed appointments, lateness, etc.). After eliminating valid reasons for abnormal creatinine levels, the court should follow its policy for “substituted” samples.

**Rationale:** Normal human creatinine levels will vary during the day but healthy individuals will rarely produce creatinine levels of less than 20mg/dL. Levels lower than 20mg/dL suggest diluted urine (usually, from water loading) and may not accurately reflect an accurate picture of recent drug use. Levels less than 5mg/dL are considered “substituted” samples. Notwithstanding established “normal” levels of creatinine, the court should proceed cautiously if considering a sanction based solely on “abnormal” creatinine levels since there is a very small percentage of individuals who will test at low levels without water loading.

**Recommended Practice:** Establish a policy that participants are responsible for what they put in their bodies. The policy should also address the fact that certain prescribed and over-the-counter medicines may produce false urine test results. If a physician prescribes medication, the participant should be required to immediately notify the appropriate drug court team member (probation officer, case manager, or coordinator) and produce the written prescription. Before taking over-the-counter medicines, the participant should discuss with the appropriate drug court team member to learn if the medicine can affect drug test results.

### **Answers to Frequently Asked Questions**

Passive inhalation of marijuana smoke will not cause a “positive” result if standard cutoffs are used, (i.e., 20, 50, 100 mg/mL).

Advil will not cause “false-positive” results for marijuana.

Poppy seeds, in very small amounts, will cause a positive result for opiates.

Drinking vinegar or cranberry juice will not produce a “negative” urine drug test.

## **5. Drug Testing Frequency**

**Recommended Practice:** To the greatest extent possible, drug testing should be random and progressive. In Phase One, testing should be aggressive (2x/week minimum); in Phase Two, testing frequency should be reduced as an abstinence reward (1x/week); and in Phases Three (and Four), testing frequency should be reduced further (1x/2 weeks). Testing schedules should

always be subject to increased frequency when a positive test occurs or other relapse factors are observed.

**Rationale:** Unexpected, unannounced, and unanticipated testing will limit a participant's ability to "plan ahead." Random testing is also an effective tool for participants (especially younger individuals) when confronted with peer pressure to use. "I can't – I could be tested at any time!"

\*For detailed discussion of common drug testing issues in the drug court setting, see:

JEROME J. ROBINSON & JAMES W. JONES, DRUG TESTING IN A DRUG COURT ENVIRONMENT: COMMON ISSUES TO ADDRESS (Office of Justice Programs Drug Courts Program Office, Drug Court Clearinghouse and Technical Assistance Project, 2000), *available at* <http://www.ncjrs.gov/pdffiles1/ojp/181103.pdf>

Paul L. Cary, *The Use of Creatinine-Normalized Cannabinoid Results to Determine Continued Abstinence or to Differentiate Between New Marijuana Use and Continuing Drug Excretion From Previous Exposure*, DRUG COURT REVIEW, Summer 2002, at 83-103 (publication of the National Drug Court Institute)

Paul L. Cary, *Urine Drug Concentrations: The Scientific Rationale for Eliminating the Use of Drug Test Levels in Drug Court Proceedings*, DRUG COURT PRACTITIONER FACT SHEET, January 2004 (publication of the National Drug Court Institute)

Paul L. Cary, *The Marijuana Detection Window: Determining the Length of Time Cannabinoids Will Remain Detectable in Urine following Smoking: A Critical Review of Relevant Research and Cannabinoid Detection Guidance for Drug Courts*, DRUG COURT REVIEW, Spring 2006, at 23-58 (publication of the National Drug Court Institute)

#### D. Motivating the Participant

Drug courts utilize a scheme of graduated sanctions and rewards to change the behavior of participants. In recent years, drug court practitioners have looked to the world of behavioral research to identify the most promising approaches to achieve this goal. Based on a review of behavioral research literature, particularly in the criminal justice setting, William G. Meyer, Sr., Judicial Fellow at the National Drug Court Institute, catalogued "Ten Science-Based Principles of Changing Behavior Through the Use of Reinforcement and Punishment". These soon-to-be-published principles, printed in their entirety, are included in the Appendix at the end of this document. They should be of great assistance as the court seeks to respond to participant behavior in creative and effective ways. (Note that reproduction of these principles is subject to the approval of the National Drug Court Institute).

##### 1. Clinical Perspective

As Judge Meyer notes in his review, sanctions and incentives will have disparate impacts on different drug court participants. Accordingly, the underlying approach to using sanctions and incentives requires a philosophical shift from a simple learning model to a combination of ongoing clinical assessment, motivational strategies, cognitive-behavioral interventions, and the development of continuing care strategies.

**Recommended Practice:** Encourage "intentional behavior change" through motivational strategies so that participants' goals reflect their understanding of life-change "benefits" to

ceasing drug use and other antisocial behaviors, as opposed to perceiving “costs” in relation to attending treatment and becoming abstinent.<sup>xxxvii</sup>

**Recommended Practice:** The range and specific types of sanctions should be set forth in writing and given to all participants.

**Rationale:** The drug court wants to be able to customize its sanctions and incentives to the individual while, at the same time, notifying the participant of potential consequences to his or her behavior.

**Recommended Practice:** Resist a “blanket” policy that directs every client to a higher and more intensive level of care as the result of a relapse.

**Rationale:** Without proper re-assessment, this clinical decision may put a client at risk, if not for active use, then for treatment and drug court failure. Re-assessment after a relapse is particularly important with dual-diagnosis clients, adolescents, and elderly participants, who are more likely to be experiencing other psychiatric or physical disturbances that may be impacting their recovery.

**Recommended Practice:** Re-assess, at least every three months, each participant’s progress and problems to avoid potential lapses and treatment failures. Re-assessment should include not only the client’s urinalysis and attendance reports, but the existence of any life stress problems, such as difficulties in educational/vocational programs, family and/or domestic violence problems, emerging psychological or emotional problems, housing problems, lack of appropriate social support, etc.

**Rationale:** This approach helps a participant to assess the “intrinsic benefits of recovery.”

## 2. Jail Sanctions

**Recommended Practice:** Consider sanctions of incarceration in the following circumstances:

- the commission of a criminal act (non drug-related) as determined by the court and law enforcement personnel;
- consistent failure to attend the program, maintain appointments, and abide by contractual agreements with the Court; and
- “chronic” relapsing behavior after the first 3–6 months of treatment and after clinical re-assessment.

**Recommended Practice:** Refrain from using incarceration as an exclusive or predominant sanction. Instead, employ a range of sanctions that take into account the participant’s incarceration history, employment status, age, health, mental health issues, and other individual characteristics of the participant.

**Rationale:** Research has shown that incarceration is not necessarily the harshest punishment for many criminal offenders. Graduated sanctions allow the court to individualize its response to each participant and minimize the risk that the offender will become habituated to jail sanctions.<sup>xxxviii</sup>

## 3. Essays

**Recommended Practice:** Essays can be an appropriate sanction for non-compliance, but the court should consider whether reading them in open court will shame or embarrass the participant.

**Rationale:** Essays may reveal low literacy levels or highly personal issues. Reading in open court in front of peers may produce a perception, albeit unintended, that the judge seeks to humiliate the participant. This perception will offset the benefit of having written the essay.

**NOTE:** For ethical and financial reasons, the Office of Court Drug Treatment Programs has advised drug court staff to refrain from soliciting or distributing incentives with a monetary value. However, research has found that a “contingency management protocol,” in which vouchers or points are rewarded for abstinence and compliance in increasing amounts, has produced favorable outcomes. A contingency management protocol permits participants to exchange vouchers or points for items consistent with a drug-free lifestyle (movie tickets, sports tickets, gift certificates). Clients are able to choose which rewards they receive, based on their points-earned value. For those lapsing into drug use, the point values are lost and reset to the original level as a form of “sanction.” The drug court may wish to explore ways to utilize contingency management without involving the court directly in the solicitation of goods or services.<sup>xxxix</sup>

#### E. Leaving the Drug Court - Graduation

##### 1. Graduation Requirements

**Recommended Practice:** Establish specific and concrete requirements for graduation and communicate them clearly to participant upon entry into drug court. Include these requirements in the Participant Handbook and in the written drug court contract. If restitution is a factor, include the specific amount and payment schedule in the individual’s contract. The court should refrain from changing requirements during the course of participation. If the drug court alters its requirements as a policy matter, apply them only to new participants.

**Rationale:** Individuals in recovery, particularly the early stages, experience short-term memory loss, difficulty with abstract thinking, and other cognitive deficits associated with damage to the brain from substance abuse. Formulating goals in the most explicit manner will enhance the participant’s comprehension of the program’s requirements.

**Recommended Practice:** Graduation requirements should usually include, at a minimum:

- completion of the drug court’s program phases (typically, three-four);
- a specified period of clean time;
- treatment provider approval for graduation;
- progress toward vocational, educational, and employment goals; and
- a written graduation application.

Additional requirements may include:

- community service;
- suitable residence; and
- a sponsor.

**Rationale:** Including requirements that are not directly related to abstinence sends a message that recovery is a holistic process, not simply abstinence. Stable employment, in particular, has been related to decreased relapse among substance users following treatment.<sup>xi</sup>

## 2. Graduation Decision

**Recommended Practice:** Inform participants that the drug court team and the appropriate treatment provider will be involved in the decision to approve graduation applications. If a participant has met all obligations of the initial contract with the drug court, the graduation application should be approved.

**Rationale:** Failure to approve a graduation application without advising the client of any remaining, unfulfilled expectations at least three months in advance is clinically unsound and may engender non-compliance, a return to use, and other negative outcomes. Note that three months in advance of expected graduation coincides with the final re-assessment of client progress and provides an opportunity for the team to advise the client that he or she may not be leaving the drug court as anticipated.

**Recommended Practice:** The drug court should avoid linking completion of the drug court's requirements with completion of treatment.

**Rationale:** Although the treatment provider should be part of graduation decision-making, there may be cases where a participant should continue in treatment after he or she has fulfilled all drug court requirements. Individuals with co-occurring disorders will need ongoing treatment. In misdemeanor cases, the drug court might not have sufficient leverage to hold the participant in treatment for the clinically indicated period of time.

**Recommended Practice:** The drug court team should review continuing care plans with participants prior to graduation. Any suggestions or questions regarding the basis for the plan should be discussed and approved as part of the graduation process.

**Recommended Practice:** The drug court team should notify the treatment provider that it is considering graduation for a particular participant and invite their input on the decision.

**Rationale:** Notice allows the provider to address the individual needs of the participant. In appropriate cases, the treatment provider can offer a detailed continuing care plan or recommend that the individual remain in treatment notwithstanding the lifting of the court mandate.

**Recommended Practice:** Drug court staff should conduct an exit interview with all graduating participants to determine which components of the drug court worked best (and least well) from their perspective. Ideally, similar interviews should be conducted with those who are terminated, although such interviews may be difficult to obtain if the terminated participant is resistant.

**Rationale:** Too often, drug court programs overlook input from the actual participants in assessing the effectiveness of their programs. Drug court participants can provide valuable insight into what actually motivates them to succeed and what factors undermine progress.\*

\*For a discussion of participant perspectives, see DONALD J. FAROLE & AMANDA B. CISSNER, SEEING EYE TO EYE? PARTICIPANT AND STAFF PERSPECTIVES ON DRUG COURTS (Center for Court

Innovation 2005), available at:  
[http://www.communityjustice.org/uploads/documents/eye\\_to\\_eye.pdf](http://www.communityjustice.org/uploads/documents/eye_to_eye.pdf)

### 3. Timing of Graduation

**Recommended Practice:** When participants succeed in fulfilling their drug court requirements, the court should deliver any promised legal incentives as close in time to completion as possible.

**Rationale:** Regardless of the drug court's legal incentive (e.g., dismissal or charges, reduction of charges, termination from probation), the participant's perception of fairness is adversely affected if he or she must continue under the court's supervision after fulfilling all requirements. In addition, the court, the participant, and the defense attorney face the possibility that a participant could commit an infraction after technically completing the program. Some courts resolve this issue by executing the legal incentive either at the precise time that requirements are met or within one to two months of fulfillment of the contract. Participants are then invited back for a more formal graduation event conducted once every year.

#### F. Leaving the Drug Court - Termination

##### 1. Clinical vs. Law Enforcement Non-Compliance

**Recommended Practice:** Termination criteria should be individualized both to the jurisdiction and the participant. However, in all cases, distinctions should be made between termination for clinical reasons (e.g., repeated drug use) and termination for law enforcement violations (e.g., re-arrest, absconding).

**Rationale:** Perception of fairness is a critical component of the drug court program's credibility and effectiveness. A drug court that responds in the same fashion to drug use as it does to willful commission of a crime or absconding runs the risk of being perceived as unfair. Since most drug courts adhere to the disease model of addiction, the drug court should rigorously examine the treatment plan of those struggling to achieve abstinence. More intensive psychological examinations coupled with increased levels of care may help promote compliant behavior. Conversely, the drug court should consider jail sanctions, and ultimately termination, for law enforcement violations.

##### 2. Clinical Non-Compliance

**Recommended Practice:** Failure to comply with program standards should be assessed in terms of the client's intellectual, cognitive, and affective capacities. Clients who are developmentally or organically impaired, who are dealing with a chronic and/or fatal illness, or who are diagnosed with severe mental illness require referrals to appropriate services and an alternative legal mandate that does not punish them for their disabilities.

**Recommended Practice:** In cases of dual-diagnosis, incarceration has been demonstrated to further impair the condition of mental illness; additionally, residential programs have not been shown to retain such individuals in treatment. The best case scenario for termination of these participants is an alternative-to-incarceration sentence, with a referral to an integrated out-patient program that addresses both the individual's mental illness and substance abuse.<sup>xii</sup> These programs will often assist clients in finding housing and, if possible, vocational training.

**Recommended Practice:** In cases of chronic relapse, the drug court should consider termination when:

- the treatment resources in the jurisdiction have been exhausted;
- all appropriate levels of care have been utilized;
- the participant does not wish to continue in treatment; or
- the court concludes that further participation would undermine the effectiveness of the program.

**Rationale:** Recognizing that recovery is a process that can include multiple relapse episodes, the drug court will want to offer as many opportunities for success as local treatment resources permit. However, while recovery is a lifelong process, the court is not a lifelong monitoring body. At some point, the court must provide other offenders with the opportunity to participate in drug court and communicate to all participants that the tolerance of the court is not unlimited.

### 3. Law Enforcement Non-Compliance

**Recommended Practice:** Re-arrest during program participation should be assessed on a case-by-case basis. The following factors can be considered:

- Does the new arrest render the participant ineligible for the drug court (e.g. violent charge, felony charge in a misdemeanor court)? If so, termination is probably appropriate.
- Is the new arrest associated with relapse (e.g., petit larceny, trespass)? If so, the drug court may consider retaining the participant and upwardly adjusting the jail alternative.

**Rationale:** A case-by-case approach gives the court flexibility to weigh public safety considerations against the possibility that the new arrest is, in fact, a manifestation of relapse that merits a sanction rather than termination from the program.

**Recommended Practice:** In cases where the participant absconds, the drug court should consider the following factors:

- the participant's length of time in the program before absconding;
- the participant's length of time between absconding and returning to court;
- whether participant returned to court voluntarily or involuntarily; and
- any previous incidents of absconding.

**Rationale:** Voluntary returns suggest a desire to return to treatment and an expectation of being held accountable. Drug court teams may look more favorably on retaining participants under these circumstances. On the other hand, the drug court should consider terminating a participant who is returned to court involuntarily after a several months of absence.



#### 4. Termination Process

**Recommended Practice:** Drug courts should not only notify the treatment provider of intent to terminate but should allow the provider an opportunity to participate in the decision-making process.

**Rationale:** Effective communication between the court and the treatment provider is critical to the drug court process. The treatment provider frequently possesses the most reliable information regarding the participant's prognosis for successful recovery.

**Recommended Practice:** The drug court must consider legal due process requirements when terminating a participant.\*

\* It is recommended that drug courts review *Torres v. Barbary*, 340 F.3d 63 (2d Cir. 2003), for guidance in satisfying due process concerns at termination.

**Rationale:** In *Torres*, the court found that the “preponderance of the evidence” standard was not satisfied by a single report from the treatment provider that contained “multiple levels of hearsay and speculation.” The court concluded that due process requires “some kind of hearing” in cases where the participant contests the factual basis for termination. *Torres* does not necessarily mandate a formal, full-blown hearing, but it does require that, in contested cases, the court establish an evidentiary basis for finding a breach of conditions of release and sentencing the individual to a prison term.<sup>xlii</sup> *Torres* suggests that courts look to procedural standards used in probation and parole revocation proceedings.

**Recommended Practice:** In cases where the judge terminates a participant from the program, the participant and defense attorney should consent in writing to the drug court judge conducting the revocation proceeding and sentence. If no consent is provided, the drug court judge should consider referring the case to another judge for hearing and sentence.

**Rationale:** Due process requires that judges possess neither actual nor apparent bias in favor of or against a party.<sup>xliii</sup> In the course of a drug court case, the judge tends to learn a great deal about participants, their families, their drug use, and other undesirable behaviors. Further, the frequent appearances in the drug court and the interaction between the judge and participant can potentially interfere with the judge's ability to be impartial and neutral. While New York's appellate courts have not addressed this issue, one reviewing court has suggested that in contested cases, recusal from the revocation hearing and sentence is recommended.<sup>xliv</sup> At the very least, the court should consider this option when the circumstances of a case raise the issue.

#### 5. Post-Termination

**Recommended Practice:** When a participant is terminated, the drug court team should conduct a thorough examination of the reasons for failure and explore ways in which the drug court staff might have addressed the participant's failure to comply with program requirements.

**Rationale:** Individual case reviews may reveal areas of needed improvement in drug court practices. Case reviews can help the team identify common factors that lead to termination and facilitate the implementation of modifications in the program's policies and procedures.

#### G. Continuing Care Plan

**Recommended Practice:** The drug court team should develop a Continuing Care Plan (CCP) for participants who are favorably discharged from the drug court.

**Rationale:** A CCP promotes the maintenance of changes achieved in drug court after the participant has successfully completed the program. Research indicates that long-term support and continuing care “contribute significantly” to the ongoing effects of substance abuse treatment, whatever the treatment approach.<sup>xiv</sup> Such a plan should be formulated in steps, beginning upon the participant’s entry into the drug court and continuing to his or her completion. The CCP targets ongoing treatment, community resources, family, housing, employment, and social networks designed to help the client re-integrate into the social environment without resorting to former illegal and self-defeating patterns of behavior.

**Recommended Practice:** The drug court program should utilize tools designed to increase the participant’s acceptance of the Continuing Care Plan. Strategies include:

- Plan a “transition” group for clients who will be graduating from the drug court at the same time. At these group meetings, conduct an orientation to the concept and process of Continuing Care, and encourage participants to share concerns and ask questions.
- Prior to release from drug court, require participants to meet with one or two of the outside agencies that will form the Continuing Care network.
- Engage a spouse, significant other, or other family member in the Plan. Encourage the participant to enter into a “contract” to attend a certain number of sessions or meetings at the referral site. The family member can assist in supporting such attendance by ensuring that appointments are kept. Family therapy or collateral counseling may also be arranged.
- Plan an alumni group meeting as a follow-up to the continuing care process. This group can share its experiences with other upcoming drug court graduates as an introduction to the benefits of the CCP.

**Rationale:** Participants’ expectations concerning their Continuing Care Plans play a major role in successful reintegration. If participants believe that they will benefit from engaging in such long-term care, they may be more likely to participate fully.\*

\*For further discussion of this approach, see Dennis M. Donovan, *Continuing Care: Promoting the Maintenance of Change*, in *TREATING ADDICTIVE BEHAVIORS* (W. Miller & N. Heather eds., 1998)

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- <sup>i</sup> See MICHAEL REMPEL ET AL., THE NEW YORK STATE ADULT DRUG COURT EVALUATION: POLICIES, PARTICIPANTS, AND IMPACTS (2003), available at [www.courts.state.ny.us/whatsnew/pdf/NYSAdultDrugCourtEvaluation.pdf](http://www.courts.state.ny.us/whatsnew/pdf/NYSAdultDrugCourtEvaluation.pdf)
- <sup>ii</sup> See K.T. MUESER ET AL., INTEGRATED TREATMENT FOR DUAL DISORDERS: A GUIDE TO EFFECTIVE PRACTICE (2003)
- <sup>iii</sup> See NATIONAL INSTITUTE OF DRUG ABUSE, PRINCIPLES OF DRUG ABUSE FOR CRIMINAL JUSTICE POPULATIONS (2006), available at [www.drugabuse.gov/PDF/PODAT\\_CJ/PODAT\\_CJ.pdf](http://www.drugabuse.gov/PDF/PODAT_CJ/PODAT_CJ.pdf)
- <sup>iv</sup> See Americans with Disabilities Act, 42 U.S.C. § 12111-12134 (2008); see also Ellen M. Weber, *Bridging the Barriers: Public Health Strategies for Expanding Drug Treatment in Communities*, 57 RUTGERS L. REV. 631 (2005).
- <sup>v</sup> A.T. McLellan, "Psychiatric Severity" as a Predictor of Outcome from Substance Abuse Treatment, in *PSYCHOPATHOLOGY AND ADDICTIVE DISORDERS* (R.E. Meyer, ed., 1986); R.D. Weiss, *The Role of Psychopathology in the Transition from Drug Use to Abuse and Dependence*, in *VULNERABILITY TO DRUG USE* (M. Glantz & R. Pickens, eds., 1986).
- <sup>vi</sup> R.E. Drake et. al, *Alcohol Use and Abuse in Schizophrenia: A Prospective Community Study*, JOURNAL OF NERVOUS AND MENTAL DISEASE, July 1989, at 408-414.
- <sup>vii</sup> D. Safer, *Substance Abuse by Young Adult Chronic Patients*, HOSPITAL AND COMMUNITY PSYCHIATRY, May 1987, at 511-514.
- <sup>viii</sup> C. Caton, *The New Chronic Patient and the System of Community Care*, HOSPITAL AND COMMUNITY PSYCHIATRY, July 1981, at 475-478.
- <sup>ix</sup> K. EVANS & J.M. SULLIVAN, DUAL DIAGNOSIS: COUNSELING THE MENTALLY ILL SUBSTANCE ABUSER (1990).
- <sup>x</sup> See ROGER H. PETERS & FRED C. OSHER, CO-OCCURRING DISORDERS AND SPECIALTY COURTS, (2d ed., 2004), available at <http://gainscenter.samhsa.gov/pdfs/courts/CoOccurringSpecialty04.pdf>
- <sup>xi</sup> See NATIONAL INSTITUTE OF DRUG ABUSE, PRINCIPLES OF DRUG ABUSE FOR CRIMINAL JUSTICE POPULATIONS (2006), available at [www.drugabuse.gov/PDF/PODAT\\_CJ/PODAT\\_CJ.pdf](http://www.drugabuse.gov/PDF/PODAT_CJ/PODAT_CJ.pdf)
- <sup>xii</sup> See 14 N.Y. Comp Codes R. & Regs. tit. 14 § 822.1 - 822.13 (2008) (OASAS regulations for 822 medically-supervised programs), available at [www.oasas.state.ny.us/regs/822.cfm](http://www.oasas.state.ny.us/regs/822.cfm)
- <sup>xiii</sup> See Matter of Roldan-Santoyo, 22 I. & N. Dec. 512 (BIA 1999).
- <sup>xiv</sup> REMPEL, *supra* note 1.
- <sup>xv</sup> (NIAAA/HHS, 2003)
- <sup>xvi</sup> See, e.g., R. MILLER & S. ROLLNICK, MOTIVATIONAL INTERVIEWING: PREPARING PEOPLE FOR CHANGE (2002); J.O. Prochaska & C.C. DiClemente, *Common Processes of Self-Change in Smoking, Weight Control, and Psychological Distress*, in *COPING AND SUBSTANCE ABUSE: A CONCEPTUAL FRAMEWORK* (S. Shiffman & T. Wills eds., 1985); CENTER FOR SUBSTANCE ABUSE TREATMENT, TIP 35: ENHANCING MOTIVATION FOR CHANGE IN SUBSTANCE ABUSE TREATMENT (Treatment Improvement Protocol (TIP) Series 2001).

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<sup>xvii</sup> REMPEL, *supra* note 1; Hung-En Sung, *Drug Treatment Alternative-to-Prison Ninth Annual Report* (Kings County District Attorney's Office, Brooklyn, NY) 1999.

<sup>xviii</sup> See *People v. Whalen*, 766 N.Y.S.2d 458, 460 (App. Div. 2003) (discussing requirement of scientific acceptance and reliability of evidence in probation violation context).

<sup>xix</sup> See *Torres v. Berbary*, 340 F.3d 63 (2d Cir. 2003).

<sup>xx</sup> See D. Young & S. Belenko, *Program Retention and Perceived Coercion in Three Models of Mandatory Drug Treatment*, JOURNAL OF DRUG ISSUES, Winter 2002, at 297-328; D. Gottfredson, et al., *Effectiveness of Drug Treatment Courts: Evidence from a Randomized Trial*, 2 CRIMINOLOGY AND PUBLIC POLICY 171, 196 (2003).

<sup>xxi</sup> See D. Young & S. Belenko, *Program Retention and Perceived Coercion in Three Models of Mandatory Drug Treatment*, JOURNAL OF DRUG ISSUES, Winter 2002, at 297-328.

<sup>xxii</sup> See *Id.*

<sup>xxiii</sup> See Health Insurance Portability and Accountability Act, 42 C.F.R., Part 2.

<sup>xxiv</sup> See A. Harrell & J. Roman, *Reducing Drug Use and Crime Among Offenders: The Impact of Graduated Sanctions*, JOURNAL OF DRUG ISSUES, Winter 2001, at 207-232; W.M. Burdon. et al., *Drug Courts and Contingency Management*, JOURNAL OF DRUG ISSUES, Winter 2001, at 73-90; MOTIVATING BEHAVIOR CHANGE AMONG ILLICIT-DRUG ABUSERS: RESEARCH ON CONTINGENCY MANAGEMENT INTERVENTIONS (S.T. Higgins & K. Silverman eds., 1999).

<sup>xxv</sup> See W.R. MILLER & S. ROLLNICK, *MOTIVATIONAL INTERVIEWING: PREPARING PEOPLE FOR CHANGE* (1991).

<sup>xxvi</sup> See Young & Belenko, *supra* note 16.

<sup>xxvii</sup> ROBERT S. HELGOE, *A COMMUNITY REINFORCEMENT APPROACH: TREATING COCAINE ADDICTION AND HIERARCHY OF RECOVERY*, National Institute on Drug Abuse (Hazelden Bookstore).

<sup>xxviii</sup> See D.B. Marlowe et al., *The Judge is a Key Component of Drug Court*, DRUG COURT REVIEW, 2004, at 1-34.

<sup>xxix</sup> NEW YORK STATE OFFICE OF ALCOHOLISM AND SUBSTANCE ABUSE SERVICES, *GUIDELINES FOR LEVEL OF CARE DETERMINATION (LOCADTR 2.0 2001)*, available at <http://www.oasas.state.ny.us/treatment/health/locadtr/LOCADTR2-3&cover.pdf>

<sup>xxx</sup> See REMPEL, *supra* note 1.

<sup>xxxi</sup> See REMPEL, *supra* note 1.

<sup>xxxii</sup> See Bernice S. Moos & Rudolf H. Moos, *Paths of Entry into Alcoholics Anonymous: Consequences for Participation and Remission*, ALCOHOLISM: CLINICAL & EXPERIMENTAL RESEARCH, October 2005.

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xxxiii See W.R. Miller, et al., *What works? A Methodological Analysis of the Alcohol Treatment Outcome Literature*, in HANDBOOK OF ALCOHOLISM TREATMENT APPROACHES: EFFECTIVE ALTERNATIVES (2d. ed., R. K. Hester & W. R. Miller eds., 1995).

xxxiv See *DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397 (2d Cir. 2001); *In re Griffin v. Coughlin*, 673 N.E.2d 98 (N.Y. 1996).

xxxv See *HELGOE*, *supra* note 27.

xxxvi SUBSTANCE ABUSE TREATMENT ADVISORY (Center for Substance Abuse Treatment, Substance Abuse and Mental Health Services Administration, Rockville, MD), Sept. 2006.

xxxvii R. Demmel et al., *Readiness to Change in a Clinical Sample of Problem Drinkers: Relation to Alcohol Use, Self-Efficacy, and Treatment Outcome*, EUROPEAN ADDICTION RESEARCH, 2004, at 133-138.

xxxviii A. Harrell & J. Roman, *Reducing Drug Use and Crime Among Offenders: The Impact of Graduated Sanctions*, JOURNAL OF DRUG ISSUES, Winter 2001, at 207-232; J. Roll et al., *An Experimental Comparison of Three Different Schedules of Reinforcement of Drug Abstinence Using Cigarette Smoking as an Exemplar*, JOURNAL OF APPLIED BEHAVIORAL ANALYSIS, Winter 1996, at 495-504.

xxxix Stephen T. Higgins et al., *Voucher-Based Incentives: A Substance Abuse Treatment Innovation*, ADDICTIVE BEHAVIORS, Nov.-Dec. 2002, at 887-910.

xl J.S. Atkinson, et al., *The Relationship Among Psychological Distress, Employment, and Drug Use Over Time in a Sample of Female Welfare Recipients*, JOURNAL OF COMMUNITY PSYCHOLOGY, May 2003, at 223-234.

xli K.T. Mueser et al., *INTEGRATED TREATMENT FOR DUAL DISORDERS: A GUIDE TO EFFECTIVE PRACTICE* (2003).

xlii *But see People v. Valencia*, 819 N.E.2d 990 (N.Y. 2004) (holding that no evidentiary hearing is required where defendant admitted the facts constituting violation of the drug treatment agreement).

xliii See *In re Murchison*, 349 U.S. 133, 136-139 (1955).

xliv See *Alexander v. State*, 48 P.3d 110 (Okla. Crim. App. 2002).

xlvi See Dennis M. Donovan, *Continuing Care: Promoting the Maintenance of Change*, in *TREATING ADDICTIVE BEHAVIORS* (W. Miller & N. Heather eds., 1998).

Ethical Opinions,  
Administrative Orders,  
Statutes and Case Law

**NEW YORK STATE RECOMMENDED PRACTICES  
FOR DRUG TREATMENT COURTS**

**ETHICAL OPINIONS, ADMINISTRATIVE ORDERS,  
STATUTES AND CASE LAW**

**A. ETHICAL OPINIONS**

**Drug Treatment Court Judges – Relationship with community and professional organizations**

1. *Opinion 88-121, October 27, 1988*  
Judge serving on board of directors of local civic group
2. *Opinion 97-83, September 11, 1997*  
Judge serving as officer of a not-for-profit organization dedicated to raising funds for a drug treatment court
3. *Opinion 98-10, March 12, 1998*  
Drug treatment court judge serving on Board of Directors for a treatment facility
4. *Opinion 02-33, April 18, 2002*  
Receipt of awards by drug treatment court judge
5. *Opinion 05-155, January 26, 2006*  
Judge serving as regional coordinator for professional association

**Rewards for drug treatment court participants**

6. *Opinion 02-77, September 12, 2002*  
Nature of rewards by drug treatment court judges to program participants
7. *Opinion 05-132, December 8, 2005*  
Use of excess campaign funds to purchase rewards for program participants

**Ex parte Communications**

8. *Opinion 04-88, March 10, 2005*  
Ex parte communications in a drug treatment court
9. *Joint Opinion 06-154 and 06-167, January 25, 2007*  
Drug treatment court judge's participation in meetings with government agencies that include discussion of substantive and procedural legal issues

**Drug Treatment Court Judges - Conflict of interest**

10. *Opinion 04-100, October 28, 2004*  
Recusal of drug treatment court judge due to conflict of interest
11. *Opinion 05-32, April 21, 2005*  
Conflict of interest for part-time drug treatment court judges

## B. ADMINISTRATIVE ORDERS AND MEMORANDA

12. *Prohibition on Mandating Individual participation in Alcoholics Anonymous, July 17, 2002, Issued by the new York State Office of Alcoholism and Substance Abuse Services*
13. *Subpoenas for Drug Court Case Records, August 8, 2002*
14. *Ex Parte Communications at Drug Court Staffings and Court Appearances [Rescission of Administrative Order 152/02], April 8, 2003*
15. *Privacy Regulations promulgated under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and their Impact on Drug Treatment Court Operations, July 25, 2003*
16. *HIPAA and Linkage Agreements with Treatment Providers, August 5, 2003*
17. *Drug Treatment Courts and Purchase of Rewards, December 23, 2003*
18. *Records Retention and Disposition Schedule, Division of Court Operations, Office of Records Management, January 2005*
19. *Part 43 of the Rules of the Chief Judge, October 18, 2005  
Establishment of Superior Court for Drug Treatment and Transfer of Drug Cases within a County*
20. *SAMHSA EtG Advisory, October 19, 2006  
Advisory regarding the use of an EtG test in determining abstinence*
21. *Ethical Guidance For Drug Treatment Court Employees Regarding 501(c)(3) Organizations that Raise Funds for the Drug Treatment Courts, February 2, 2007*

## C. STATUTES AND CASE LAW

22. *Removal of action from one local criminal court to another – CPL, Article 170, Section 170.15*
23. *Chemical Dependence Outpatient Services, Title 14, Chapter XXI, Part 822  
Level of Care Determination and Other Admission Criteria*
24. *Daniel Torres v. J. Barbary, 340 F.3d 63,  
Due process consideration for termination of participant from drug treatment court*
25. *People v. Joseph, N.Y. Sup., 2004, 5 Misc.3d 517  
Due process considerations in sentencing drug treatment court participant*



**Opinion: 88-121**

**October 27, 1988**

**Topic:** Judge serving on board of directors of civic group devoted to helping disadvantaged people develop skills necessary to secure employment.

**Digest:** A judge may serve as a member of the board of directors of a civic group devoted to helping disadvantaged people develop skills necessary to secure employment, provided the judge in no way allows his or her name to be used in connection with fundraising or grant applications.

**Rules:** 22 NYCRR 100.5 (b)(2); Code of Judicial Conduct, Canon 5B(2)

**Opinion:**

A judge asks whether it is proper to serve as a member of the board of directors of a civic group whose primary mission is to train disadvantaged people in the basic communication skills which are necessary and helpful to one seeking employment.

The Committee believes that such participation by a judge is proper and to be encouraged so long as the judge engages in no fundraising activities nor allows his or her name to be included on any grant applications. The judge must make sure that his or her name is excluded from any such efforts or applications. This prohibition would require that all stationery and written material used in connection with any fundraising, and grant applications, exclude any reference to the judge's membership on the board of directors.

This opinion is advisory only and does not bind either the Office of Court Administration or the Commission on Judicial Conduct.

**Opinion: 97-83**

**September 11, 1997**

**Digest:** A judge who serves as the presiding judge of a County Drug Treatment Court may not serve as an officer or director or assist in the formation of a not-for-profit corporation or foundation, the sole purpose of which would be to solicit funds and services for the benefit of the program for which the court was established.

**Rules:** Judiciary Law §212(1)(n);  
22 NYCRR 100.4(C)(3);  
100.4(C)(3)(b)(i), (iii), (iv);  
Opinions 95-88 (Vol. XIII),  
88-07 (Vol. I).

**Opinion:**

An acting County Court Judge requests an opinion on whether, as the presiding judge of the County Drug Treatment Court, the judge can be an officer or director of a proposed foundation, the sole purpose of which would be to solicit contribution/services as a form of ancillary assistance to the drug treatment program supervised by the Court. Examples of the ancillary assistance cited are: to make available certificates and mementoes to be given out upon graduation from the Court's Drug Program and also the possibility of establishing child care for those defendants in the program when they make court appearances.

Section 100.4(C)(3) of the Rules Governing Judicial Conduct states in part:

(3) A judge may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice. He or she may assist such an organization in raising funds and may participate in their management and investment, but shall not personally participate in public fund-raising activities. He or she may make recommendations to public and private fund-raising agencies on projects and programs concerning the law, the legal system and the administration of

justice.

There is no ethical constraint upon a judge passively accepting funds, goods or services for the court system which generally benefit the court and the public. See Judiciary Law §212(1)(n). However, the judge may not participate personally in the fund-raising. Opinion 95-88 (Vol. XIII).

While participation in community activities by judges is encouraged, there is always a prohibition against engaging in fund-raising activities or in any activity which would adversely affect his/her impartiality as a judge. Opinion 88-07 (Vol. I).

In this instance, the judge would be directly involved in forming the foundation, the sole purpose of which is to solicit funds/services which directly benefit the court in which the judge presides. This is distinguished from the community board or advisory committee for United Way or a foundation established by others for the benefit of the general public or the courthouse. See Opinion 95-88 (Vol. XIII). As the officer or director of this proposed foundation, it would be impossible to separate the presiding judge from the fund-raising activity which would benefit this judge's court directly.

The Committee therefore advises that the judge may not serve as an officer or director nor assist in the formation of the planned not-for-profit corporation/foundation.

**Opinion: 98-10**

**March 12, 1998**

**Digest:** A full-time judge who presides over a drug treatment court may not be a member of the Board of Directors of one of the drug treatment facilities that is assigned cases by the courts.

**Rules:** 22 NYCRR 100.1; 100.2.

Opinion 97-83

**Opinion:**

A full-time judge who presides over a drug treatment court has been invited to sit as an uncompensated member of the Board of Directors of one of the drug treatment facilities that is assigned cases from the courts. Defendants from the judge's court are assigned to a facility by the drug court administrator and a treatment team. The judge has no involvement in the assignment of defendants to a particular treatment facility.

Although the inquiring judge does not determine which facility any defendant attends, the judge does sit on the screening panel which initially determines whether a defendant qualifies for participation in the program. Thus, the judge's decision as a panel member may, albeit indirectly, increase the facilities' client pool.

This Committee has previously advised that a judge who serves as the presiding judge of a County Drug Treatment Court may not serve as an officer or director or otherwise assist in the formation of a not-for-profit organization, the sole purpose of which was to solicit funds and services for the drug treatment program supervised by the court. Opinion 97-83.

Given the possible perception of impropriety that might be occasioned by the relationship of the judge to a program involving the facility and the judge's role on the screening panel, it is the opinion of the Committee that the judge should not serve on the facility's board of directors. 22 NYCRR 100.1; 100.2.

## **Opinion 02-33**

**April 18, 2002**

**Digest:** A judge may attend and receive an award at an awards dinner sponsored by a local not-for-profit organization that is a member of a drug court team in the drug court over which the judge presides.

**Rules:** 22 NYCRR; 100.4(C)(3)(b)(i), (ii); Opinions 88-66 (Vol. II); 90-184 (Vol. V); 91-42 (Vol. VII); 93-128 (Vol. XI); 94-147 (Vol. XIII); 99-15 (Vol. XVII).

### **Opinion:**

A local organization that is a member of a drug court team in the judge's court wants to present an award during its annual dinner to the judge who presides in that court. The organization has assured the judge that dinner is not a fund-raising event. The judge asks whether it is ethically permissible to attend the dinner and accept the award.

This Committee has previously advised that a judge may attend and may be honored at non-fund-raising events sponsored a variety of not-for-profit community organizations such as the Boy Scouts [Opinion 88-66 (Vol. II)], an ethnic police association [Opinion 90-184 (Vol. V)], a charitable organization [Opinion 91-42 (Vol. VII)], civic groups [Opinion 93-128 (Vol. XI)], a local community service agency that provides services to the judge's court [Opinion 94-147 (Vol. XIII)] and a not-for-profit organization dedicated to supporting civilian participation in the New York military reserves and militia [Opinion 99-15 (Vol. XVII)].

In the present inquiry, because the judge has been assured that the annual dinner does not involve fund-raising, it is the Committee's view that the judge may attend the annual dinner and accept an award. Acceptance of an award, under these circumstances, does not violate sections 100.4(C)(3)(b)(i) and (ii) of the Rules Governing Judicial Conduct, which prohibit personal participation in fund-raising.

## Opinion 05-155

January 26, 2006

Digest: A full-time judge may serve in an uncompensated advisory position as regional coordinator of the National Association of Drug Court Professionals.

Rules: 22 NYCRR 100.4(B); 100.4 (C)(3); Opinions 90-25 [Vol. V]; 93-102 [Vol. XI].

### Opinion:

A full-time judge inquires whether it is permissible to serve on a committee of the National Association of Drug Court Professionals. The judge would serve as an uncompensated regional coordinator facilitating the dissemination of information, lecturing and providing training for drug court judges.

Section 100.4(B) of the Rules Governing Judicial Conduct provides that a judge may speak, write, lecture, teach and participate in extra-judicial activities subject to the requirements of Part 100. Section 100.4(C)(3) states that “[a] judge may be a member or serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice . . .”

The Committee has in prior opinions advised that judges may engage in similar activities devoted to the improvement of the law, the legal system or the administration of justice e.g., serving on the Advisory Board of a Neighborhood Crime Prevention Program (Opinion 90-25) (Vol. V); and in the planning and development of a Youth Court. Opinion 93-102 (Vol. XI).

Accordingly, it is the opinion of the Committee that the judge may serve in the capacity stated, provided that such service will not affect the performance of the inquirer’s judicial duties.

Opinion 02-77

September 12, 2002

Digest: A judge presiding in a Drug Court may consider certain ex parte communications as set forth in Administrative Order 152/02, but should not reward defendants with gifts from commercial enterprises.

Rule: 22 NYCRR 100.2(C); Administrative Order 152/02; Opinion 01-52.

Opinion:

A City Court judge who presides in a Drug Court inquires whether defendants must be accompanied by their attorneys at the weekly progress reports sessions. The judge further asks as to the propriety of providing defendants who are reported to be making progress, with incentives such as movie passes or coupons from a local fast food restaurant.

As to the communications made in the absence of defense counsel, we note that Administrative Order 152/02, of March 19, 2002, issued by the Chief Administrative Judge sets forth the procedure which permits consideration of such communications. See, Opinion 01-52.

As to providing rewards, the Committee regards it as inappropriate. In effect, the judge would be appearing to be lending the prestige of judicial office to advance the private interests of the commercial interests involved. Under section 100.2(C) of the Rules Governing Judicial Conduct, such conduct should be avoided.

## **Opinion 05-132**

December 8, 2005

**Digest:** A recently re-elected judge who presides over a drug treatment court may not use excess campaign funds to purchase congratulatory gifts, such as dinners or theater tickets, for graduates who have successfully completed the drug court treatment program.

**Rules:** Election Law Â§14-130; 22 NYCRR 100.5(A)(5); Opinions 04-06; 98-06 (Vol. XVI); 93-80 (Vol. XI); 93-19 (Vol. X); 90-4 (Vol. V); 89-152 (Vol. V); 87-16 (Vol. I); 87-02 (Vol. I).

### **Opinion:**

A recently re-elected City Court judge inquires as to the proper use of unexpended campaign funds. The judge has presided over the drug treatment court for the past three years, and asks whether a portion of the excess campaign funds may be used to buy dinners, theater tickets or other congratulatory items for those who successfully complete the drug court program. These items would be distributed at the drug court graduation ceremony.

Section 100.5(A)(5) of the Rules Governing Judicial Conduct states that “A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.” Section 14-130 of the Election Law further states, regarding campaign contributions, that “[s]uch funds shall not be converted by any person to a personal use which is unrelated to a political campaign.”

Applying these provisions, the Committee has generally prohibited the use of campaign funds for private, including charitable purposes. Opinion 98-06 (Vol. XVI); See also Opinions 93-80 (Vol. XI); 90-4 (Vol. V) and 87-02 (Vol. I). The Committee has extended this prohibition to include token gifts to campaign workers. Opinion 98-06 (Vol. XVI). While the Committee has stated that such funds may be used for a modest victory celebration during the six-month post-election period (Window Period), this allowance was made because these celebrations were determined to be a “traditional part of the total election process.” Opinion 87-16 (Vol. I); See also 93-19 (Vol. X); 89-152 (Vol. V).

Further, the Committee has stated that a judge, depending upon the circumstances, must either return expended campaign funds to contributors on a pro-rata basis, or may purchase chambers furniture, office equipment, or the like, which then becomes the



property of the New York State Unified Court system. Opinion 04-06. Thus, the proposed expenditures in this instance do not fall within a permitted category for the use of excess campaign funds. Accordingly, in our opinion the rules cited above prohibit the use of unexpended campaign funds for the distribution of gifts to graduates of drug treatment courts.

## Opinion 04-88

March 10, 2005

**Digest:** A judge presiding over a drug court (1) may engage in ex parte communications with court personnel pursuant to 22 NYCRR 100.3(B)(6)(c) concerning information obtained by such personnel, whether outside of or at drug court staffings or court appearances, but should give notice to and inform the defendant's attorney of the content and nature of those communications; (2) is authorized under 22 NYCRR 100.3(B)(6)(e) to consider ex parte communications at staffings and court appearances from drug court team members provided there has been consent as required under Administrative Order 142/03; (3) should consult with his/her administrative authority for the purpose of revising the current drug court participation agreement used in the judge's court so that it is in conformity with Administrative Order 142/03.

**Rule:** 22 NYCRR 100.3(B)(6)(c), (e); A/O 142/03; 152/02 (rescinded). Opinion 01-52.

### **Opinion:**

In Opinion 01-52 the Committee addressed the question of whether a judge presiding over a drug court treatment program may consider "ex parte communications which are likely to arise in the operation of the program as designed and intended to be implemented." Opinion 01-52. In concluding that under the circumstances a judge who presides over a drug treatment court may consider ex parte communications occurring at meetings of the drug court treatment team (referred to as "staffings"), we relied on the Chief Administrative Judge's Administrative Order 152/02 of March 19, 2002. That order directed that the participation agreement between a defendant and the court include a provision whereby the defendant agreed "that communications during these staffings may take place in the absence of myself or my attorney and that the judge may consider such communications," and further provided for a waiver of his or her attorney's participation at such meetings. In our view, the issuance of that order met the exception stated in section 100.3(B)(6)(e) of the Rules Governing Judicial Conduct which provides that "A judge may initiate or consider any ex parte communications when authorized by law to do so." 22 NYCRR 100.3(B)(6)(e).

Thereafter, concerns were expressed that the mandated provision was unduly burdensome in that it appeared to require defendants to waive their right to counsel at staffings as a prerequisite to participation in the program and, further, failed to

mention ex parte communications that may occur in open court immediately following the staffings. As a consequence, Administrative Order 152/02 was rescinded on April 8, 2003, and a new Administrative Order (A/O 142/03) was issued on that date. It reads as follows:

Pursuant to the authority vested in me, I hereby direct that a Judge presiding over a drug treatment court may at a drug court appearance or staffing session, initiate, permit or consider ex parte communications with treatment providers, probation officers, law enforcement officials and other members of the drug court team who are not court personnel, provided the absent party and his or her attorney have consented thereto.

Accompanying the issuance of the new directive was a detailed set of Guidelines intended to be applied at drug court staffings and court appearances concerning the handling of ex parte material. It is in light of these Guidelines, the new Administrative Order and sections 100.3(B)(6)(c) and (e) of the Rules Governing Judicial Conduct, which deal with ex parte communications, that the inquiring County Court judge who presides over a drug treatment court poses certain issues for consideration by the Committee.

In responding to those inquiries, we must first point out the special circumstances inherent in a drug court setting which are not necessarily present in an ordinary criminal proceeding in the context of a discussion about ex parte communications. A drug court proceeding is predicated upon an ongoing, interactive relationship between defendant, the drug court team and the court. That fact alone distinguishes it from the usual criminal proceeding structure of plea, trial, and sentence which often does not involve evaluation and consideration of a defendant's present activity between the proceedings' beginning and end. However, inherent in drug court relationship is the continuing exchange of information among the various participants virtually always including court personnel who are not drug court team members. It is only through such interchange that the salutary purposes of the program can be achieved. At the same time, achieving those goals can not be accomplished at the expense of the defendant's legal rights, which include the protections afforded vis a vis ex parte communications. As stated in the first sentence of section 100.3(B)(6) of the Rules Governing Judicial Conduct, "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." 22 NYCRR 100.3(B)(6). It is against this background, which includes the Rules Governing Judicial Conduct, the Administrative Orders referred to herein, and the Guidelines that we consider the questions posed by the inquirer.

Essentially, the questions raised by the judge assume various scenarios where information has been conveyed to members of the judge's staff (i.e. "court personnel") who are not members of the drug court team, and who then convey that information to the judge. The judge asks, for example, whether ex parte communications engaged in by the judge's staff who are employees of the court, outside of the drug court staffing may be reported to the judge "ex parte, in drug court staffing sessions and court appearances without consent of the absent party." Reference is made to section 100.3(B)(6)(c) of the Rules which provides that as an exception to the prohibition on judicial consideration of ex parte communications, "A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges." 22 NYCRR 100.3(B)(6)(c). That section appears to permit a judge to consider the communications referred to by the inquirer since they could be deemed to constitute a "consultation" with court personnel and therefore authorized under the Rules without first obtaining the consent of a party. That is, the fact that the information was obtained by the employees outside of a staffing session or court appearance does not mean that it cannot be communicated at such sessions or appearances to the judge, without the defendant's consent.

But, that still leaves open the question of whether the defendant is entitled to know about such communications. For, the fact that a judge may be authorized to engage in ex parte communications does not mean that such communications should be kept from the parties. Indeed, given the potential significance of such material dealing with conduct of the defendant during the pendency of the actions, and its possible consequences to the defendant's liberty, we are of the opinion that in this particular situation it is important that the defendant's attorney be given notice of and informed of the content and nature of the communications.

The judge also asks whether the judge's staff who are court employees may engage in ex parte communications in staffings or court appearances with drug court team members who are not court employees and then report the communications back to the judge ex parte, in the same drug court staffing session and/or court appearances if the party did not consent to ex parte communications. Here, it appears that the judge is asking about a possible scenario where the "court personnel" exception under the section 100.3(B)(6)(c) might come into play at the staffing or appearance itself thus obviating the need for obtaining consent in order for the judge to consider the ex parte information. Yet, since Administrative Order 142/03 is intended to cover communications from drug court team members at the staffings or appearances, we do not believe that the court personnel exception should be interpreted to avoid what is required under that order at such staffings or appearances, i.e., consent of the defendant. And, yet, the court personnel exception is provided for under the Rules. Under that set of circumstances, it again seems advisable that should court personnel be the conveyors to the judge of the

communications from drug court team members, the judge should provide notice to and inform the defendant's attorney of the content and nature of the communications where consent has not been given.

In short, the court personnel exception does permit the judge to be the recipient of the communications in the situations outlined above. But, the due process rights of the defendant can best be preserved by instituting practices and procedures which assure the defendant and his or her attorney prompt and meaningful access to that information which comes to the judge from court personnel who are not part of the drug court team. Having access to that information would thus enable the defendant to properly invoke his/her right to be heard as provided by 22 NYCRR 100.3(B)(6). How that can best be accomplished is, of course, the province of the appropriate administrative authorities.

In addition, what should not be ignored, given the special nature and purposes served by the drug court is the desirability of effectuating Administrative Order 142/03. It is that provision which permits a judge to be engaged in ex parte communications "at a drug court appearance or staffing session," with members of the drug court team who are not court personnel "provided the absent party and his or her attorney have consented thereto." A/O 142/03 (emphasis added). That is the order which furnishes the authority for the judge to be engaged in the ex parte communications with certain non-court personnel, in that its promulgation constitutes authorization by law to initiate or consider such communications, and is thus an exception to what would otherwise be prohibited. 22 NYCRR 100.3(B) (6)(e).

Such consent presumably will be forthcoming in the agreement between the defendant and the court, and should be implemented in accordance with the detailed provisions of the Guidelines. This, however, does not mean that the wording of certain paragraphs of the agreement currently used in the judge's court should continue to be used. The paragraphs quoted by the judge and about which he/she inquires are virtually identical to what was required under Administrative Order 152/02. But, as noted, that directive was rescinded on April 8, 2003 and replaced by Administrative Order 142/03, which although it does not specify the language pertaining to ex parte communications to be used in a participation agreement, must be read as providing the basis for such provisions in the agreement. Retaining the present language in view of the rescission is not tenable. Accordingly, we recommend that the inquiring judge consult with his or her administrative authority for the purpose of revising the current agreement so as to reflect what is provided for in Administrative Order 142/03, and not Administrative Order 152/02.

In sum, information obtained by court personnel whether outside of or in staffings or court appearances may be communicated to the judge ex parte at staffings or court appearances under section 100.3(B)(6)(c) of the Rules Governing

Judicial Conduct regardless of whether the defendant consented, but the defendant's attorney must be informed of the nature and content of such communications. Moreover, the judge's consideration of ex parte information conveyed at staffings or court appearances which was obtained at such staffings or appearances from court drug team members is permissible under section 100.3(B)(6)(e) of the Rules in view of the issuance of Administrative Order 142/03, which order requires the consent of "the absent party and his or her attorney. . . " A/O 142/03. Any agreement between the defendant and the court concerning what occurs at staffings or court appearances should reflect and not exceed what is permissible under that directive with respect to ex parte communications.

Further, and contrary to the judge's interpretation of Opinion 01-52, that opinion does not state that a waiver by a defendant in a drug court participation agreement may by itself enable a judge to engage in ex parte communications whether in or out of drug court staffings or court appearances. The Committee made clear that the validity of a waiver was dependent upon the exception provided for in subparagraph (e) of section 100.3(B)(6) which permits a judge to initiate or consider ex parte communication "when authorized by law to do so." 22 NYCRR 100.3(B)(6)(e). That is precisely what is accomplished, in our opinion, by Administrative Order 142/03 with respect to communications from drug court team members at staffings and court appearances where the defendant is absent.

Finally, in view of the fact that Opinion 01-52 was predicated in large measure on the issuance of Administrative Order 152/02 and that directive has been rescinded, that opinion should be deemed modified to reflect the particulars dealt with herein. We note, however, that its basic premise, that in the drug court situations an administrative order of the Chief Administrative Judge may constitute a sufficient basis for concluding that consideration of certain ex parte communications have been "authorized by law," and therefore are permitted under 22 NYCRR 100.3(B) (6)(e), remains in effect. This opinion adds the proviso that where court personnel who are not members of the drug court team, are the providers of information to the judge, notice should be given to the defendant's attorney of the nature and content of the communications.

## Joint Opinion 06-154 and 06-167

January 25, 2007

Digest: Judges should not participate in regularly-scheduled meetings with the representatives of a government agency, which represents the interests of children and families, where the meetings involve discussion of substantive and procedural legal issues and do not include other agencies and parties representing other interests which are present in Family Court matters.

Rules: 22 NYCRR 100.4(A)(1); Opinion 06-108; Joint Opinion 00-54 and 00-56 (Vol. XIX); Opinion 96-96 (Vol. XV).

Opinion:

Two Family Court judges inquire separately about whether it is proper for judges to participate in regularly scheduled meetings with the County Department of Children, Youth and Families (hereinafter “the Department”). The judges explain that these meetings will be held in alternating months, and will include the Department’s Commissioner and other key personnel, including the Department’s legal staff.

One judge describes these meetings as a “collaborative effort” with the Department, which remains integral to the efficient daily operation of the court and to the development of successful Family Court programs and initiatives. The other inquiring judge notes, however, that these meetings will not include other county agencies, such as the Public Defender’s Office, the Conflict Defender’s Office, and the Law Guardian Panel. Further, in his/her view, these meetings will “delve into the substantive and procedural aspects of Court operations in terms of how child abuse and neglect petitions are processed, scheduled, and resolved by the Court.”

The Committee has previously noted that “a pivotal issue in all such matters is whether a judge’s participation would cast doubt on the judge’s impartiality.” 22 NYCRR 100.4(A)(1); Opinion 06-108; see also Opinion 96-96 (Vol. XV). While the discussion of issues and exchange of ideas about the operation of the court is certainly desirable, here that input would arise exclusively from regularly-scheduled meetings with only one executive agency, which represents only one set of interests before the court. Absent input from those representing other interests, these meetings may reasonably create an appearance that the Court is failing to

consider other perspectives. While avoiding such appearances is important in all courts, it is especially so in courts like family court where emotions often run high and its judges decide not only the law, but the facts as well.

It is therefore this Committee's opinion that judges' participation in these meetings, in these circumstances, may well "cast reasonable doubt" on the judiciary's impartiality, particularly where only one set of interests involved in Family Court matters is represented, and where attendees will participate in discussions of substantive and procedural legal issues. 22 NYCRR 100.4(A)(1); Opinion 06-108; Joint Opinion 00-54 and 00-56 (Vol. XIX).

We thus advise that Family Court judges only attend such meetings during consideration of purely administrative matters.



## Opinion 04-100

October 28, 2004

Digest: A judge of the drug court may not preside over a defendant's participation in the drug treatment court program, where the judge's son represented defendant in the underlying criminal case, even if the son's involvement ended at the plea and sentencing stage.

Rule: 22 NYCRR 100.3(E)(1)(e), 100.3(F); Opinion 01-07 (Vol. XIX).

### Opinion:

A drug court judge asks whether recusal is necessary in the case of a - now self-represented - defendant's participation in the drug treatment court program, where the judge's son represented the defendant in the underlying criminal case, and whose involvement ended at the plea and sentencing of the defendant to the drug court program.

Section 100.3(E)(1) of the Rules Governing Judicial Conduct provides that a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. Such an instance is illustrated by subsection (e), in which "the judge knows that the judge or the judge's spouse, or a person known by the judge to be within the fourth degree of relationship to either of them, or the spouse of such person, is acting as a lawyer in the proceeding." Notwithstanding the fact that the judge's son is no longer acting as an attorney in the proceeding, the situation is such that the judge's impartiality may be questioned because of the familial relationship and, in our opinion, recusal should be exercised. Furthermore, we note that the defendant is now appearing *pro se*. Under such circumstances, it is our view that, even if the judge feels that he/she can be impartial, it would be inappropriate to impose upon a *pro se* defendant the burden of determining whether to consent to the judge's continued participation under the remittal procedures of section 100.3(F). Thus, remittal of disqualification pursuant section 100.3(F) should not be available in this situation. See Opinion 01-07 (Vol. XIX).

## Opinion 05-32

April 21, 2005

Digest: (1) A part-time judge who practices law, and is presiding in a drug treatment court must disclose, on the record, the prior legal representation of a person who appears before the judge as a participant in the drug court and may proceed, provided that the judge has taken into consideration all relevant circumstances that might bear on whether the judge's impartiality might reasonably be questioned; (2) a part-time judge who practices law and is representing a client in Family Court may preside in a drug treatment court where the participant is the pregnant girlfriend of the adversary party in the Family Court proceeding, provided that the judge believes he/she can be fair and impartial.

Rule: 22 NYCRR 100.3(E)(1). Opinions 97-85 (Vol. XVI); 95-05 (Vol. III); 92-14 (Vol. IX); 92-01 (Vol. IX).

### Opinion:

A part-time judge inquires whether former clients can participate in the drug treatment court where the judge presides. This Committee has previously opined that "a judge should disqualify him/herself where a party before the judge had been a former client within the preceding two years, subject to remittal of disqualification. If more than two years have elapsed, the judge may preside after full disclosure on the record and in the absence of a meritorious objection." Opinions 97-85 (Vol. XVI); 92-14 (Vol. IX), 92-01 (Vol. IX).

However, in the drug court context where the proceedings are intended to be non-adversarial, the Committee is of the opinion that when a former client of a judge appears before the judge as a participant in a drug treatment court, the judge need not immediately disqualify him/herself, unless the judge personally questions his/her ability to act fairly and impartially in the matter. In the absence of such doubt, the judge must consider all relevant factors to determine if disqualification is appropriate, including, but not limited to, the nature of the instant proceeding; the nature of the prior representation of the client; the length of time since the last representation; the amount of work done for the client; the amount of the fee; whether the judge acquired knowledge of facts concerning the defendant that would be of significance in a drug court proceeding; whether a social relationship exists between the judge and the former client; and whether there are any special circumstances that may create a likely appearance of impropriety. If, after considering all of the

circumstances, the judge personally does not conclude that disqualification is required, the judge should make full disclosure on the record and preside. However, the judge should not preside over any case in which the offense that brought the party before the judge was a matter that the judge personally handled as an attorney.

The inquiring judge also informs the Committee that he/she is representing a client in Family Court where the adversary party's girlfriend who is pregnant is a participant in the drug treatment court over which the judge presides. The judge asks whether "this would present any ethical problem." In our view the judge may preside, as the drug treatment court judge, in a matter in which the drug treatment court participant is in a personal relationship with the opposing party in a case involving a current client of the judge, provided that the judge believes that he/she can be fair and impartial. 22 NYCRR 100.3(E)(1).



NEW YORK STATE  
OFFICE OF ALCOHOLISM  
AND  
SUBSTANCE ABUSE SERVICES  
1450 Western Avenue  
Albany, New York 12203-3526

George E. Pataki  
Governor

Jean Somers Miller  
Commissioner

June 17, 2002

To: Parole, County Directors of Probation, ATI Programs, Drug Court Officials,  
Town/Village Justices, City, County and Family Court Judges, DCJS – Bureau for  
Municipal Police, County Social Service Commissioners, Municipal Housing  
Authorities, County Directors of Community Services

Dear Colleague:

Recently, the Second Circuit Court has issued a ruling which is directly and significantly impacting the relationship between funded Alcoholism and Substance Abuse treatment programs and self-help groups, specifically Alcoholics Anonymous. As a result of this ruling, governmental agencies and governmental funded agencies are clearly prohibited from mandating individual participation in Alcoholics Anonymous.

The enclosed OASAS document is being disseminated to all treatment programs in New York State. Those programs are being directed to comply with the procedures in the document. Because of the close referral relationships between your agency and OASAS certified treatment programs, this decision will likely impact on our shared clients. The full interpretation of what is and is not allowable is an ongoing process for the OASAS certified providers. Given that the basic premise of the decision is the maintenance of separation of church and state, this ruling may impact your agencies operations as well. **In any event, and as is the case with treatment providers, you are still permitted to encourage participation in and help link clients to this important support for recovery.**

OASAS is committed to providing assistance to both our treatment system and your agency in developing acceptable expectations for client involvement in self-help and mutual aid groups. We will not, however, provide any legal advice as it applies to any specific program or individual. If you have any questions, please feel free to contact Raymond Conte, OASAS Coordinator for Recovery Services, at 518-457-6378.

Sincerely,

Jean Somers Miller

Enclosure

# **LOCAL SERVICES BULLETIN NO. 2002-05: Impact of Recent Federal Court Decision Concerning Alcoholics Anonymous On Government Funded Providers**

**Contents:**

RECIPIENTS

## **RECIPIENTS**

- All Providers of OASAS Certified Services,
- Local Governmental Units (LGUs)

## **BACKGROUND**

The purpose of this bulletin is to inform OASAS certified treatment providers that the United States Court of Appeals for the Second Circuit in *DeStefano v Emergency Housing Group et al.* has determined that Alcoholics Anonymous ("A.A.") is a religious activity and accordingly OASAS funding of providers who mandate patient participation in A.A. and, by extension, other government funding of providers who mandate participation in A.A., is a violation of the principle of separation of church and state.

The *DeStefano* decision concluded that the promotion of religious beliefs by staff members of government funded providers through coerced, required or mandated participation in A.A. constitutes impermissible governmental indoctrination of religion in violation of the First Amendment to the United States Constitution. Consequently, an OASAS certified provider that requires or coerces a patient to participate in A.A. would not be eligible to receive government funding. While the *DeStefano* decision was specifically concerned only with A.A., the same constitutional concerns would apply to any approach, 12 step or otherwise, that has a sufficiently religious character. Government funded providers should be cautious not to risk violation of the constitutional principle of separation of church and state.

However, the *DeStefano* decision also concluded that it is permissible for a government funded provider to make A.A. programs available to patients, as long as the provider and its program staff make it clear that participation is on a voluntary basis without any coercion.

While this decision will likely require some government funded providers to alter their policies, nothing in the *DeStefano* decision alters the central role that A.A. plays in providing peer support, spiritual exploration and personal growth in support of recovery.

## **PROVIDER ACTIVITIES WHICH ARE IMPACTED BY THE DECISION**

Government funded providers should give careful consideration to activities provided as a planned component of a treatment plan which could be construed as coercion or otherwise mandated participation in a religious activity. For example, government funded providers:

- **must not** require that a patient attend A.A.
- **must not** provide staff supervision of any meetings of A.A.
- **must not** compel the reading, listening or viewing of written, audio or visual material developed by A.A.
- **may** suggest that individuals receiving services participate in A.A.
- **may** require that a patient attend recovery support groups in the community, as long as the patient has the option of choosing attendance of activities that are of a non-religious nature.
- **may** request a patient read, listen or view materials developed by A.A., as part of an introduction to available resources, as long as the materials are not limited to A.A.
- **may** make space available to A.A. for holding meetings, as long as the space is available to other groups as well.

Employees who are members of A.A. may participate in such meetings, as long as they are not acting as an employee of the provider.

## **THE ROLE OF A.A. IN RECOVERY**

OASAS recognizes that not all alcohol and drug involved persons require treatment and that many individuals find recovery outside of the system of certified treatment providers. The use of A.A. for individuals during and after treatment has been regularly suggested and encouraged by clinicians. A.A. offers the individual a readily accessible alternative that is supportive of and complementary to chemical dependence treatment. While A.A. is a valuable resource to many individuals, it is not the same as treatment. While treatment professionals can inform and encourage individual involvement with A.A., it should be recognized

that A.A. cannot replace OASAS certified chemical dependence treatment for all persons.

## CONCLUSION

As a result of the *DeStefano* decision, an OASAS certified treatment program that requires, or coerces, participation in A.A. would not be eligible to receive government funding. As each government funded provider must make its own planning decisions, OASAS recommends that each provider carefully review the *DeStefano* decision with its own attorney to ensure that they do not violate the constitutionally mandated separation of church and state.

## SOURCE(S) OF FURTHER INFORMATION

The decision of the U.S. Court of Appeals may be downloaded from the Internet <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=2nd&navby=case&no=999146>. If you have any questions concerning the issues detailed in this Bulletin, please contact Raymond Conte, OASAS' Coordinator for Recovery Services, at (518) 485-2123.

Copies of all active Local Services Bulletins are available on the OASAS Web Site at:

<http://providernet.oasas.state.ny.us/msu/lbhome.htm>

/s/ Paul S. Puccio  
Executive Deputy Commissioner



Date Issued: 05/20/2002

**From:** Frank Jordan  
**To:** District Executives; NYC Chief Clerks  
**Date:** 3/16/2007 1:22:05 PM  
**Subject:** Drug Treatment Court Subpoena Procedure

An operational procedure is in place to assist the drug treatment courts when they receive a subpoena for either testimony about a drug treatment court participant or to produce any drug treatment court records. In addition to local notification procedures, a copy of the subpoena should be sent to both John Amodeo in Counsel's Office [JAMODEO@courts.state.ny.us](mailto:JAMODEO@courts.state.ny.us) and to the appropriate Drug Treatment Court Project Manager-Karen Ambrozik, Linda M. Baldwin or Sky Davis.

For your information, I have attached a copy of the 2002 memo from Michael Colodner that first established this procedure for the subpoena of drug treatment court records. Mr. Colodner also provided important information on safeguarding our drug treatment court records and a helpful summary of the applicable laws.

Please share this information with all of your drug treatment courts as a reminder.

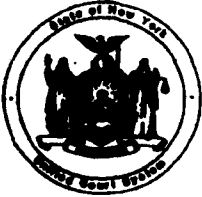
Thanks

Frank

Frank T. Jordan  
Executive Assistant to the Deputy Chief Administrative Judge  
Salina Place Building, Room 204  
205 South Salina Street  
Syracuse, NY 13202  
(315)466-7167  
(315)466-7168 fax  
[fjordan@courts.state.ny.us](mailto:fjordan@courts.state.ny.us)

**CC:** Administrative Assistants; Drug Court Liaisons NYC Criminal ; Drug Court Liaisons NYC Family; Drug Court Liaisons ONYC; Drug Court Management Team; Drug Court Project Managers; John Amodeo; Judy Harris Kluger





STATE OF NEW YORK  
UNIFIED COURT SYSTEM  
EMPIRE STATE PLAZA  
4 ESP, SUITE 2001  
ALBANY, NEW YORK 12223-1450  
(518) 474-7469

JONATHAN LIPPMAN  
Chief Administrative Judge

MICHAEL COLODNER  
Counsel

August 8, 2002

TO: Judges and Chief Clerks of All Drug Courts

FROM: Michael Colodner *MC*

SUBJECT: Subpoenas for Drug Court Case Records

A question has been raised as to how a Clerk of a Drug Court should respond to a subpoena *duces tecum* for records of a pending or completed Drug Court case in light of federal confidentiality protections that may apply to some of the subpoenaed case records. This issue was recently brought to our attention by a Drug Court Clerk who received a grand jury subpoena seeking "any and all" records of an identified case that had been disposed of in that Court.

We have concluded that, because of the complexity of the federal laws and regulations governing the confidentiality of certain "patient" records that are routinely received and accessed by Drug Courts throughout the State, the better practice would be for you to contact Counsel's Office immediately upon receipt of a subpoena seeking the production of any records of a pending or completed Drug Court case. This will allow us to evaluate the subpoena to determine whether the particular records sought are subject to the confidentiality provisions of the regulations, and whether an additional "disclosure order" may be required before the subpoena may be complied with.

Based on our review of these laws and regulations, we would also recommend that all Drug Court case records relating to the assessment, diagnosis, monitoring or treatment of a defendant's substance abuse problem be kept in a separate "confidential" case file, and that the file, when not in use, be stored in a locked file cabinet or other secure place.

We have attached for your consideration a brief legal analysis of the federal confidentiality provisions that form the basis of our recommendations. Any questions regarding this topic, and the providing of notice to Counsel's Office if a subpoena seeking Drug Court records is received, may be directed to John Amodeo at (518) 474-7469.

Attachment

STATE OF NEW YORK  
OFFICE OF  
COURT ADMINISTRATION

**Federal Confidentiality Laws and Regulations Affecting the  
Disclosure and Storage of Drug Court Case Records**

Federal law imposes strict limitations on the disclosure and use of certain patient records maintained in connection with the treatment of substance abuse. Pursuant to 42 U.S.C. section 290dd-2(a),

[r]ecords of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

42 U.S.C. section 290dd-2(a).

The implementing regulations for section 290dd-2 are set forth in 42 C.F.R. Part 2 ("the regulations"). Under the regulations, a "federally assisted" drug or alcohol abuse program is generally prohibited from disclosing, either directly or indirectly, "patient identifying information" (i.e., "the name, address, social security number, fingerprints, photograph, or similar information by which the identity of a patient can be determined with reasonable accuracy and speed either directly or by reference to other publically available information"). 42 C.F.R. section 2.11. It may be assumed, for purposes of this analysis, that the various substance abuse programs utilized by Drug Courts throughout the State are "federally assisted" as that term is defined in the regulations. *See*, 42 C.F.R. section 2.12(b).

Where, pursuant to a patient's written consent or one of the other enumerated exceptions to nondisclosure, a program reveals "patient identifying information," the disclosed information retains its confidential status in the hands of the recipient and may be redisclosed by him or her only with the patient's consent or as otherwise permitted by the regulations. *See*, 42 C.F.R. section 2.12(d)(2); *see also*, 42 C.F.R. section 2.12(e)(3) [noting that the restrictions on use and disclosure contained in the regulations "apply to recipients of information under

§2.12(d);" emphasis added].<sup>1</sup>

One of the enumerated exceptions to nondisclosure under the regulations is the "consent" disclosure authorized by 42 C.F.R. section 2.35. That section, which is particularly relevant to adult Drug Courts, permits a program to "disclose information about a patient to those persons<sup>2</sup> within the criminal justice system which have made participation in the program a condition of the disposition of any criminal proceedings against the patient or of the patient's parole or other release from custody," *provided* the disclosure is made with the patient's written consent *and* the information is disclosed "only to those individuals within the criminal justice system who have a need for the information in connection with their duty to monitor the patient's progress." 42 C.F.R. section 2.35(a); *emphasis added*. Subdivision (d) of section 2.35 provides that a person who receives patient information under that section "may redisclose and use it only to carry out that person's official duties with regard to the patient's conditional release or other action in connection with which the consent was given."<sup>3</sup>

In accordance with 42 C.F.R. sections 2.35 and 2.12(d)(2), when a Drug Court receives patient identifying information from a program, that information retains its confidential status and may be redisclosed only to the limited extent permitted by subdivision (d) of section 2.35 (pertaining, as noted, to adult Drug Courts) or as otherwise authorized by the regulations. *See, e.g.*, 42 C.F.R. sections 2.51 [authorizing a program or other holder of patient identifying information to disclose that information to medical personnel in certain medical emergencies]; 2.12(c)(3)[authorizing the communication of patient identifying information "between or among personnel having a need for the information in connection with their duties that arise out of the provision of diagnosis, treatment, or referral for treatment of alcohol or drug abuse if the communications are...[w]ithin a program or...[b]etween a program and an entity that has direct administrative control over the program"] and 2.12(c) (5)[authorizing a program to release certain patient-identifying to law enforcement officers where a patient commits or threatens to commit a crime on the premises or against program staff]. Moreover, any written records

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<sup>1</sup>Pursuant to 42 C.F.R. section 2.32, each disclosure made with the patient's written consent must be accompanied by a written statement advising the recipient, *inter alia*, that the disclosed information is protected by Federal confidentiality rules that prohibit any further disclosure absent the express written consent of the patient or unless otherwise permitted by the regulations.

<sup>2</sup>42 C.F.R. section 2.11 defines "person" as "an individual, partnership, corporation, Federal, State or local government agency, or any other legal entity."

<sup>3</sup>The provisions of section 2.35(d) authorizing the redisclosure of patient information in connection with the recipient's "official duties" apply only to *criminal* proceedings in Drug Courts, and are not applicable to Family Court proceedings in Family Treatment Courts. *See*, 42 C.F.R. section 2.35(a). In these latter Drug Courts, any such redisclosure would ordinarily require the patient's consent thereto or a court order issued in accordance with the applicable provisions of the regulations.

containing such information must be maintained by the Drug Court "in a secure room, locked file cabinet, safe or other similar container when not in use." 42 C.F.R. section 2.16(a).

Another exception to nondisclosure, set forth in Subpart E of the regulations, permits the release of otherwise confidential patient information where a court order has been issued specifically authorizing the disclosure. The regulations make clear that a subpoena, including a subpoena signed by a Judge, is *not* sufficient, by itself, to require or even permit the holder of the information to disclose it. The disclosure order is separate from the subpoena, and, in effect, is the authorization that permits the subpoena to issue in the first place. As stated in 42 C.F.R. section 2.61(a):

An order of a court of competent jurisdiction entered under this subpart is a unique kind of court order. Its only purpose is to authorize a disclosure or use of patient information which would otherwise be prohibited by...these regulations. Such an order does not compel disclosure. A subpoena or a similar legal mandate must be issued in order to compel disclosure. This mandate may be entered at the same time as and accompany an authorizing court order entered under these regulations.

42 C.F.R. section 2.61(a). Subdivision (b)(1) of section 2.61 sets forth the following example to illustrate the need for a separate disclosure order in addition to a subpoena: "A person holding records subject to these regulations receives a subpoena for those records: a response to the subpoena is *not* permitted under the regulations unless an authorizing court order is entered. The person may not disclose the records in response to the subpoena unless a court of competent jurisdiction enters an authorizing order under these regulations." 42 C.F.R. section 2.61(b)(1); emphasis added.

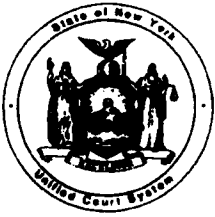
The circumstances under which a disclosure order may be entered by a court, and the specific findings that must be made prior to its issuance, vary greatly, depending on the purpose for which the order is sought.<sup>4</sup> The regulations provide, moreover, that, for certain of these orders, the person holding the records (e.g., the Clerk of a Drug Court) must be given

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<sup>4</sup> See, e.g., 42 C.F.R. sections 2.63 [authorizing the issuance of a court order permitting the disclosure of "confidential communications" made by a patient to a program]; 2.64 [authorizing the issuance of a court order permitting the disclosure of patient records for "noncriminal purposes"]; 2.65 [authorizing the issuance of a court order permitting the disclosure and use of patient records to "criminally investigate or prosecute a patient"] and 2.66 [authorizing the issuance of a court order permitting the disclosure and use of patient records to "criminally or administratively investigate or prosecute a program or the person holding the records (or employees or agents of that program or person)"].

notice of the application for the order as well as an opportunity to file a written response to, or be heard on, the application. See, e.g., 42 C.F.R. sections 2.64(b)[requiring notice of an application for a disclosure order, and an opportunity to file a written response, where the patient records are sought for "noncriminal purposes"] and 2.65(b)[requiring notice of and an opportunity to "appear and be heard" on an application for a court order permitting the disclosure and use of patient records to "criminally investigate or prosecute a patient"].

Dated: August 8, 2002



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**JONATHAN LIPPMAN**  
Chief Administrative Judge

**JOSEPH J. TRAFICANTI, JR.**  
Deputy Chief Administrative Judge  
  
Director  
Office of Court Drug Treatment Programs

April 8, 2003

TO: All Drug Court Judges

FROM: Joseph J. Traficanti, Jr. *JJT*

SUBJECT: Ex Parte Communications at Drug  
Court Staffings and Court Appearances  
[Rescission of Administrative Order 152/02]

Achieving the goal of a Drug Court participant's successful recovery from substance abuse and addiction requires the constant sharing of information among members of the Drug Court team. This collaborative approach to treatment and recovery calls for prosecutors, defense attorneys and other attorney-advocates in Drug Court to meet regularly with the Judge and other team members to review each participant's progress in treatment. These "staffing" sessions typically are followed by the participant's appearance in open court, where the Judge discusses the participant's progress, or lack thereof, directly with him or her. While proven effective in maximizing an addicted person's chances for long-term recovery, this "team" approach to adjudicating adult and Family Drug Court cases can present serious ethical issues for Drug Court Judges. This memorandum focuses on one of the most troublesome of these – the prohibition on ex parte communications – and provides some concrete guidelines for Judges to follow to avoid ex parte problems at Drug Court "staffing" sessions and court appearances.

Pursuant to section 100.3(B)(6) of the Chief Administrator's Rules Governing Judicial Conduct, "[a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding." 22 NYCRR 100.3(B)(6). Among the enumerated exceptions to this general prohibition against ex parte communications are subparagraphs (d) and (e) of section 100.3(B)(6), which provide, respectively, that "[a] judge, with the consent of the parties, may confer separately with the parties and their lawyers on agreed-upon matters," and "[a] judge may initiate or consider any ex parte communication when authorized by law to do so." 22 NYCRR 100.3(B)(6)(d) and (e).

This latter exception, permitting ex parte communications “when authorized by law,” formed the basis of an administrative order (“the order”) signed by Judge Lippman at my urging in March of last year (*see*, Administrative Order 152/02, attached). The order, which was intended to address the issue of ex parte communications at Drug Court staffings, required the inclusion in all Drug Court participation agreements of an acknowledgment by the participant that the non-appearance of his or her attorney at a scheduled staffing “shall be deemed a waiver of his or her participation for that particular staffing,” that communications during such staffings “may take place in the absence of...[the participant or his or her attorney],” and that such communications may be considered by the Drug Court Judge. Although the waiver language required by the order clearly satisfies the “authorized by law” exception to the general prohibition on ex parte communications, it has been criticized as being unduly burdensome to participants by requiring them, in effect, to waive their right to counsel at staffings as a prerequisite to participation in Drug Court. In addition, it has been noted that the order is too limited in scope in that it fails to address ex parte communications that may occur in open court immediately *following* the staffing.

In light of these concerns, and because, in my view, the issue of ex parte communications in the Drug Court context can effectively be addressed through the “consent” exception of subparagraph (d) of section 100.3(B)(6) and other relevant provisions of that section, I have asked Judge Lippman to rescind the order, effective immediately (*see*, Administrative Order 143/03, attached). This, of course, does not mean that Drug Court Judges are now free to engage in the kinds of ex parte communications covered by the order. To the contrary, this rescission will require each Drug Court Judge to be increasingly vigilant, and may call for the implementation of new practices and procedures tailored to the available resources and specific needs of each jurisdiction, to insure compliance with the rule against ex parte communications. To that end, and with the generous assistance of members of the recently formed New York State Drug Court Best Practices Committee, I have developed the following five guidelines to be applied at all Drug Court staffings and court appearances:

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- I. **For purposes of the rule against ex parte communications, Drug Court staffings should be treated no differently than any other criminal or Family Court proceeding.**

**Comment:** Although Drug Court staffing sessions are usually conducted in an informal and non-adversarial setting, these proceedings are part of the underlying criminal or Family Court case, and, unless one of the exceptions under section 100.3(B)(6) applies, no ex parte communications with the Judge are permitted at such staffings.

- II. At the first court appearance in Drug Court, or as early in the proceedings as possible, the Judge should: (A) ascertain whether the attorney for the participant will be representing the participant through completion of the case; and (B) make clear to the attorneys for the parties that they, or their duly designated representatives, are expected to be present at all future staffings and court appearances.**

**Comment:** Part (A) of this Guideline is particularly relevant to adult Drug Court cases where the participant's attorney is retained. Sometimes a participant, due to limited financial resources or other circumstances, will retain an attorney solely for the purpose of negotiating a plea bargain, executing the Drug Court participation agreement and entering a guilty plea. It is important that the Judge, as early in the proceedings as possible, be made aware of this kind of limited retainer agreement so that he or she can take appropriate action, such as formally relieving the retained attorney (at the conclusion of his or her representation) and inquiring as to the participant's eligibility for assigned counsel. Having accurate and up-to-date information about the status of each participant's legal representation will assist the Judge in avoiding ex parte problems and unnecessary delays at future staffing sessions and court appearances.

Unlike most criminal or Family Court proceedings, Drug Court cases typically involve frequent court appearances, as well as weekly, bi-weekly or monthly staffing sessions, conducted over an extended period of time. An attorney representing a party in Drug Court should be advised by the Judge at the earliest possible time that he or she is expected to be present at *all* future staffings and court appearances. Making this expectation clear to the attorneys at the inception of the case, as required by Part (B) of this Guideline, should reduce the need to deal with ex parte communications issues as the case progresses.

- III. Where an attorney for a party, or the attorney's designated representative, cannot be present at a staffing or court appearance, the Judge should, in accordance with section 100.3(B)(6)(d) and the relevant provisions of these Guidelines, obtain the consent of that attorney to proceed ex parte before going forward.<sup>1</sup> A record of any such consent should be retained in the Court's case file.**

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<sup>1</sup>Since staffing sessions, to be effective, are nearly always conducted without the participant present, the *participant's* consent to the Judge's proceeding in his or her own absence at all future staffing sessions is often included as one of the terms of the Drug Court participation agreement. Nothing in these Guidelines or in section 100.3(B)(6) would prohibit the continued inclusion of such a provision in the agreement. However, where the participant, at any stage of the proceedings and after appropriate cautionary instructions from the Judge, elects to proceed *pro se*, the Judge should, at the point of such election, advise the participant on the record of his or her right to be present at all future staffing discussions of the case.



**Comment:** Where an attorney for a party is unable to attend a staffing or court appearance, he or she may consent to the Judge's ex parte conversations at that proceeding with the other party's attorney (*see*, NYCRR 100.6(B)(6)(d)). Whenever possible, this consent should be obtained well in advance of the proceeding, so as not to delay the proceeding or necessitate an adjournment. The consent need not be a formal, written consent, and can be established through a simple phone conversation with the attorney, or by having the attorney fax a prepared form<sup>2</sup> confirming that the Judge is authorized to proceed in the attorney's absence. Regardless of whether the consent is written or verbal, a record thereof should be included in the Court's case file.

- IV. (A) Under the exception in subparagraph (c) of section 100.3(B)(6), the Judge may engage in ex parte communications at staffing sessions with members of the Drug Court team who are employees of the Drug Court, such as the Drug Court Coordinator and Case Manager; and (B) Under the exception in subparagraph (e) of section 100.3(B)(6), and in accordance with Administrative Order 142/03, the Judge may also, with the consent of the parties and their attorneys, engage in ex parte conversations at staffing sessions with members of the Drug Court team who are *not* employees of the Drug Court.**

**Comment:**

**Part (A):** Subparagraph (c) of section 100.3(B)(6) expressly permits ex parte communications between the Judge and "court personnel whose function is to aid the [J]udge in carrying out the [J]udge's adjudicative responsibilities." In the Drug Court context, such "court

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<sup>2</sup>To facilitate the use of this "faxed consent" procedure, Drug Courts may want to prepare and distribute to the attorneys for each party, at the inception of the case, a form to be completed, signed and faxed to the Court by the attorney when he or she is unable to attend a specific staffing or court appearance, expressly consenting to the Court's going forward in the attorney's absence. The form should contain a reference to the absent attorney's consenting to ex parte conversations at the proceeding with the attorney(s) for the other parties, and with the other (non-party) members of the Drug Court team. *See*, Guideline IV, *infra*. The form might also contain a clause acknowledging that: (1) where a significant sanction such as incarceration is likely to be imposed, the absent attorney will be contacted by the Drug Court Coordinator by telephone either prior to, during or immediately following the staffing or court appearance, so that appropriate arrangements can be made for the attorney to appear and be heard prior to the imposition of such sanction; and (2) in the rare instance where the *immediate* imposition of a significant sanction such as incarceration is deemed necessary by the Judge (*e.g.*, where the participant appears in court in an intoxicated condition or after being rearrested for a serious crime), and the attorney cannot be reached or, if reached, is unable to appear, the case will be adjourned, following imposition of the sanction, to the next business day or to a date requested by the attorney.

personnel” would include the Drug Court Coordinator and any other employees of the Drug Court who serve this function. *See*, 22 NYCRR 100.3(B)(6)(c).<sup>3</sup>

**Part (B):** Because the exception in subparagraph (c) of section 100.3(B)(6) applies only to ex parte conversations with “court personnel,” it presumably would not permit a Drug Court Judge to engage in ex parte conversations with members of the Drug Court team who are not directly employed by the Court. This would include, in many jurisdictions, treatment providers, probation officers and other non-Court employed professionals who regularly participate in Drug Court staffings. Nor would such ex parte conversations with non-Drug Court personnel be permitted under the “consent” exception of subparagraph (d) of section 100.3(B)(6). As previously noted, that provision allows the parties to a court proceeding to consent to the Judge’s “conferring separately *with the parties and their lawyers* on agreed-upon matters.” 22 NYCRR 100.3(B)(6)(d); *emphasis added*. Because, on its face, this consent provision is limited to ex parte communications with “the parties and their lawyers,” it arguably would not allow a party to consent to ex parte communications between the Judge and a *non-party*.

To deal with this problem, I have asked Judge Lippman to prepare a new Administrative Order (*see*, Administrative Order 142/03, attached) expressly authorizing a Drug Court Judge, with the consent of the non-present party and his or her attorney, to discuss the case at the staffing session with non-party members of the Drug Court team who are not “court personnel.” This Order is based on the exception set forth in subparagraph (e) of section 100.3(B)(6) which, as previously noted, permits a Judge “to initiate or consider any ex parte communications *when authorized by law* to do so.” 22 NYCRR 100.3(B)(6)(e); *emphasis added*.<sup>4</sup>

- V. To minimize the need to rely on attorney consent under Guidelines III and IV(B), the Judge is encouraged to explore with the local provider(s) of indigent defense services (e.g., the Public Defender’s Office or 18-B Administrator) the possibility of having these providers designate one or more attorneys to attend Drug Court staffings and court appearances when the originally assigned Public Defender or 18-B attorney is not available.**

**Comment:** In many jurisdictions around the State, representation of indigent participants at Drug Court staffings and court appearances is routinely provided by an attorney

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<sup>3</sup>Unlike the “consent” exception of subparagraph (d) of section 100.3(6)(B)(*see*, Guideline III, *supra*.), this “court personnel” exception to the prohibition on ex parte communications does *not* require the consent of the absent party or his or her attorney.

<sup>4</sup>In effect, the Administrative Order constitutes the “law” that allows the parties to consent to such ex parte communications, and the Judge to consider same, without violating the general prohibition of section 100.3(B)(6).

specifically designated by the County 18-B Administrator or Public Defender's Office to handle these proceedings. Not surprisingly, in jurisdictions where this procedure has been established, problems with ex parte communications at staffings and court appearances have been largely eliminated. In Drug Courts where the participants are currently represented by several different attorneys from the local 18-B Panel or Public Defender's Office, the Judge, in cooperation with the local District Attorney's Office, may want to reach out to the 18-B Administrator or Public Defender in that jurisdiction to see if this representation model, or some variation thereof, can be implemented in that jurisdiction.<sup>5</sup>

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I would emphasize that the above Guidelines are intended both to alert affected Judges to the very real problem of ex parte communications in the Drug Court setting, and to provide practical recommendations for addressing the issue in the context of Drug Court staffing sessions and court appearances. Any questions regarding the Guidelines may be addressed to John Amodeo in Counsel's Office at (518) 473-2129.

#### Attachments

c: Honorable Jonathan Lippman  
Honorable Ann T. Pfau  
Honorable Joan B. Carey  
Michael Colodner, Esq.  
Executive Assistants  
NYC Chief Clerks  
Greg Berman  
Mizzi Diamond  
Drug Court Project Managers  
Drug Court Liaisons

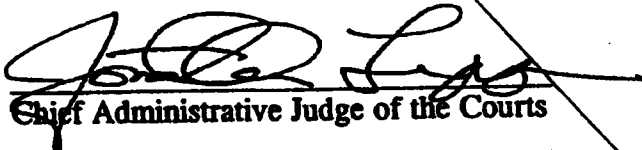
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<sup>5</sup>Implementation of this or a similar representation model is certainly not the only means by which a Drug Court Judge might address the ex parte problem at staffings and court appearances. With respect to the former, for example, Judges might consider allowing attorneys who would otherwise be unable to attend a particular staffing to "appear" by way of speaker phone or video conference, where these options are available at the Drug Court site.

RESCINDED 4/8/03  
**ADMINISTRATIVE ORDER OF THE  
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS**

Pursuant to the authority vested in me, I hereby direct that each drug treatment court should incorporate the following, in substantially similar language, into its agreement with a defendant to participate in the drug treatment court program:

I understand that the staff of the drug court, which may include the judge presiding over my case, will be meeting at regularly scheduled staffings to discuss my ongoing progress and participation in the drug court program, and that such meetings may include my substance abuse treatment provider. I understand that my attorney is invited to these staffings and may or may not attend them in his or her discretion. I agree that any non-appearance by my attorney at a staffing shall be deemed a waiver of his or her participation for that particular staffing. I further understand and agree that communications during these staffings may take place in the absence of myself or my attorney and that the judge may consider such communications.

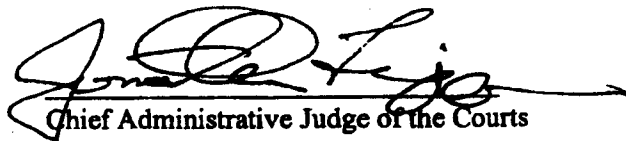
  
Chief Administrative Judge of the Courts

Dated: March 19, 2002

AO/ 152 /02

**ADMINISTRATIVE ORDER OF THE**  
**CHIEF ADMINISTRATIVE JUDGE OF THE COURTS**

Pursuant to the authority vested in me, I hereby direct that a Judge presiding over a drug treatment court may, at a drug court appearance or staffing session, initiate, permit or consider *ex parte* communications with treatment providers, probation officers, law enforcement officials and other members of the drug court team who are not court personnel, provided the absent party and his or her attorney have consented thereto.

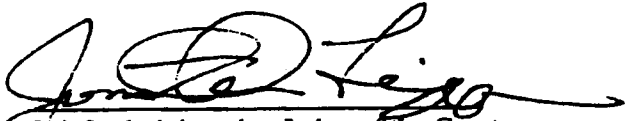
  
Chief Administrative Judge of the Courts

Dated: April 8 , 2003

AO/ 142 /03

**ADMINISTRATIVE ORDER OF THE**  
**CHIEF ADMINISTRATIVE JUDGE OF THE COURTS**

Pursuant to the authority vested in me, I hereby rescind, effective immediately,  
Administrative Order AO/152/02, requiring the inclusion in all drug treatment court participation  
agreements of certain provisions relating to staffing meetings.

  
Chief Administrative Judge of the Courts

Dated April 8, 2003

AO/ 143 /03

## MEMORANDUM

TO: Drug Court Judges  
Drug Court District Liaisons  
Drug Court Coordinators

FROM: Office of Court Drug Treatment Programs

DATE: July 25, 2003

SUBJECT: Privacy Regulations promulgated under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and their Impact on Drug Treatment Court Operations

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HIPAA's privacy regulations have established standards and requirements to protect the privacy and security of private health information.<sup>1</sup> Due to drug treatment courts' frequent and routine handling of private health information, the impact of these regulations on drug court operations has been debated among drug court professionals. The memorandum will summarize key aspects of HIPAA's privacy regulations and analyze their potential impact on the operations of drug treatment courts in New York State.

### **Do HIPAA's Privacy Regulations Apply to New York State's Drug Treatment Courts?**

HIPAA's privacy regulations govern the use or disclosure of *protected health information* by a *covered entity*.<sup>2</sup> Therefore, to determine if New York State's drug treatment courts are subject to the requirements of HIPAA's privacy regulations, we must first determine if the drug treatment courts are "covered entities" that use or disclose "protected health information."

*Protected health information* is defined in the regulations as information relating to the past, present or future health condition of an individual that identifies or can be used to identify the individual.<sup>3</sup> A *covered entity* is defined in the regulations as either (1) a health care provider that engages in certain electronic transactions (such as the electronic transmission of health care claims, health claims attachments, health care payment and remittance advice, and other administrative documents related to the payment of health care costs<sup>4</sup>); (2) a health plan; or (3) a health care clearinghouse.<sup>5</sup>

Although drug treatment courts certainly use or disclose protected health information regularly as part of their operations, New York State's drug treatment courts do not fall under the regulations' definition of a covered entity. First, drug treatment courts are neither health plans nor health care clearinghouses. Second, although some drug treatment courts may be considered health care providers under HIPAA<sup>6</sup>, New

York State's drug treatment courts do not, in any event, currently engage in those specific electronic transactions (see footnote 4) that would make them the type of health care providers that are covered entities under HIPAA. *Accordingly, New York State drug treatment courts are not covered entities under HIPAA.*

Because drug courts are not covered entities, they may collect protected health information from their participants (as they do when conducting assessments) and disclose/share such information with treatment providers, *without having to obtain consents from their participants or comply with the many administrative requirements established by the Privacy Rule.*

Even though New York State's drug treatment courts are not covered entities under HIPAA, however, drug treatment courts' operations will be affected *indirectly* by HIPAA's privacy regulations because the treatment and other health care providers that work with drug treatment courts will, in all likelihood, themselves be covered entities subject to the mandates of HIPAA. Accordingly, understanding the requirements of HIPAA's privacy regulations will help the drug treatment courts to work with these providers as they adapt their policies to be in compliance with HIPAA.

### **General Provisions of HIPAA's Privacy Regulations**

Pursuant to HIPAA's privacy regulations, a covered entity may only use or disclose protected health information in the following types of situations:

- to the individual who is the subject of the protected health information<sup>7</sup>;
- to carry out treatment, payment, or health care operations, if a valid consent has been obtained in accordance with Section 164.506 or, if a consent is not required, pursuant to Section 164.506(a)<sup>8</sup>;
- under an allowed exception (for example, for judicial and administrative proceedings, for law enforcement purposes, for research purposes, or pursuant to a valid subpoena)<sup>9</sup>;
- pursuant to a valid "authorization", if the disclosure is not to carry out treatment, payment, or health care operations<sup>10</sup>;
- where the protected health information has been "deidentified" in accordance with Section 164.514 (and is, therefore, no longer protected health information)<sup>11</sup>;
- to a "business associate," if the covered entity receives satisfactory assurances that the business associate will appropriately safeguard the information<sup>12</sup>.

When making a disclosure, a covered entity must make reasonable efforts to limit the use or disclosure of protected health information to the "minimum necessary" to accomplish the intended purpose, except when treating the individual or where authorization has been granted.<sup>13</sup>

Covered entities must provide individuals with a written notice informing them of their rights and the covered entity's legal duties with respect to protected health



information. Section 164.520 of the regulations provides detailed guidance on the information that must be contained in the notice.

The regulations also spell out certain "Administrative Requirements" that a covered entity must follow with respect to the safeguarding of health information, namely, (1) that it designate a "privacy official" to be the person responsible for the development and implementation of the policies and procedures of the entity; (2) that it designate a contact person or office to be the person to whom complaints or questions concerning the information contained in the privacy notices will be directed; and (3) that it put in place "appropriate administrative, technical and physical safeguards to protect the privacy of protected information."<sup>14</sup>

A covered entity must also keep records and submit compliance reports so that the Secretary of the Department of Health and Human Services can ascertain whether the covered entity is in compliance with HIPAA.<sup>15</sup> Covered entities are required to comply with the privacy standards by April 14, 2003, except for small health plans, which have been given until April 14, 2004.

### **How HIPAA May Affect New York Drug Courts**

In accordance with standard operations, drug treatment courts regularly receive protected health information from treatment providers in the form of treatment updates. The treatment updates are reports designed to inform the Court about the drug court participants' progress in treatment and the results of drug tests performed on them. These treatment providers are, in almost all circumstances, covered entities under HIPAA. (Treatment providers all fall under the HIPAA definition of "health care provider" and, if they engage in any of the electronic transactions defined in 45 C.F.R. 160.103, will also be considered covered entities under HIPAA. (See footnote 4.)) Accordingly, the providers' treatment updates are treated as disclosures of protected health information subject to the protections and limitations of HIPAA's privacy regulations for which an authorization/or consent should be obtained by the treatment providers from their participants prior to disclosure.

Under certain circumstances, however, treatment providers may be excepted from obtaining HIPAA consents or authorizations from drug court participants. For example, the privacy regulations provide that covered entities may disclose protected health information without a consent "in the course of any judicial or administrative proceeding . . . in response to an order of a court or administrative tribunal."<sup>16</sup> Thus, if a treatment provider were to receive an order from a drug treatment court requesting the disclosure of protected health information concerning a drug court participant, a treatment provider would be permitted to disclose the information requested without obtaining a HIPAA consent or authorization from this participant.<sup>17</sup>

The Office of Court Drug Treatment Programs has developed samples of two such "HIPAA orders" that may be used by drug treatment courts to obtain protected

health information regarding one or more drug court participants from a treatment or other health care provider when that provider has not yet obtained an appropriate HIPAA consent or authorization from its client(s). The first is a Standing HIPAA Order that, once executed by a particular drug treatment court, could be used to obtain protected health information from any treatment or other health care provider concerning any participant of that drug court. The second is a more limited HIPAA Order, to be used when a Standing HIPAA Order has not been issued and when a drug court requires protected health information concerning a particular participant from a particular treatment or other health care provider. Samples of the two types of orders are attached to this memorandum as Attachments A and B.

Accordingly, drug treatment courts can obtain protected health information from treatment and other health care providers in compliance with HIPAA in any one of the following three ways: (1) by requiring treatment and other health care providers to obtain HIPAA-compliant consents or authorizations from their clients; (2) by issuing a Standing HIPAA Order; or (3) by issuing individualized HIPAA Orders on a case-by-case basis.

### **Continued Applicability of State and Federal Confidentiality Law and Regulations**

HIPAA's privacy regulations will not require a change in the operations of drug treatment courts. *Drug treatment courts will continue to comply with current federal and state laws and regulations concerning the confidentiality of substance abuse patient records<sup>18</sup> and must continue to obtain waivers of confidentiality from their participants as current procedures dictate.*

State and federal confidentiality laws and regulations will also continue to govern disclosures made by the drug treatment courts to their evaluators for the research and analysis of their programs.<sup>19</sup>

If you have any questions concerning the contents of this memorandum or the impact of HIPAA's privacy regulations on drug treatment court operations, please call Linda M. Baldwin of the Office of Court Drug Treatment Programs at (914) 682-3221.

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1. 45 C.F.R. Parts 160 and 164; 65 F.R. 82462; 67 F.R. 53182

2. See 65 F.R. 82462, at 82618.

3. 45 C.F.R. § 160.103; 45 C.F.R. § 164.501.

4. The transactions that automatically turn a health care provider into a "covered entity" are listed in Section 1173(a) of HIPAA and include: health care claims or equivalent encounter information, health claims attachments, health plan enrollments and disenrollments, health plan eligibility, health care payment and remittance advice, health plan premium payments, first report of injury, health care claim

status, referral certification and authorization, coordination of benefits, and any other transaction that may be included by the Secretary of the Department of Health and Human Services. (Section 1173(a)(1) and (2) of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"); 45 C.F.R. 160.103.)

5. 45 C.F.R. § 160.103.

6. 45 C.F.R. 100.103 defines "health care provider" as "any . . . person or organization who furnishes, bills, or is paid for healthcare in the normal course of business." Some New York State drug treatment courts may be said to furnish healthcare, because 45 C.F.R. § 160.103 defines "health care" as including "assessment . . . with respect to the physical or mental condition, or functional status of an individual".

7. 45 C.F.R. 164.502(a).

8. 45 C.F.R. 164.502(a), 164.506.

9. 45 C.F.R. 164.510, 164.512, 164.514.

10. 45 C.F.R. 164.502(a).

11. 45 C.F.R. 164.502(d).

12. Certain third parties who transmit or receive protected health information to or from covered entities may fall under the definition of a "business associate". Business associates must sign agreements in which they agree to handle such information in compliance with HIPAA's regulations. 45 C.F.R. 164.502(e).

13. 45 C.F.R. 164.502(b)

14. 45 C.F.R. 164.530.

15. 45 C.F.R. 160.310.

16. 45 C.F.R. 164.512(e)(1).

17. Any disclosures made by the treatment provider must conform to the Privacy Rule's "minimally necessary" standard, however, and may contain only the protected health information expressly authorized by such order. 45 C.F.R. 164.512(e)(1)(i).

18. In addressing the exception created for disclosures made in response to an order of a court, DHHS specifically discussed the continued applicability of the federal law concerning the confidentiality of substance abuse patient records, 42 U.S.C. 290dd-2 and its implementing regulations, 42 C.F.R. Part 2, specifically noting that "these more stringent rules will remain in effect." (64 F.R. 59918, at 59959)

19. In responding to comments to the proposed privacy regulations regarding the concern for potential re-disclosure of protected health information by non-covered entities who have received such information pursuant to an exception in the privacy regulations (such as drug treatment courts do when they pass on protected health information to their evaluators), DHHS stated that "[u]nder HIPAA, we have the authority to restrict re-disclosure of protected health information only by covered entities" and that any other re-disclosures "are not within the purview of this rule." Accordingly, the HIPAA regulations will not require New York State drug treatment courts to change the manner in which they allow access to participant data by their evaluators for the purposes of research and evaluation of drug treatment court programs. (65 F.R. 82462, at 82672)

**[NAME OF COURT]  
STATE OF NEW YORK**

**ORDER TO DISCLOSE PROTECTED HEALTH INFORMATION**

WHEREAS one of the purposes of the \_\_\_\_\_  
[Name of Drug Treatment Court]  
(the "Drug Treatment Court") is to monitor closely the progress of defendants  
("Participants") appearing in the Drug Treatment Court in their substance abuse treatment; and

WHEREAS Participants' enrollment in a substance abuse treatment program is a condition  
of Participants' continued participation in the Drug Treatment Court; and

WHEREAS the Drug Treatment Court requires timely and accurate information concerning  
Participants' attendance and progress in treatment in order to adequately monitor the effectiveness  
and progress of Participants' participation in treatment; and

WHEREAS, from time to time, the Drug Treatment Court may direct a Participant to receive  
additional health-related services in connection with the Participant's involvement in the Drug  
Treatment Court, from which follow-up information concerning the diagnosis and prescribed  
treatment of the Participant must be received by the Drug Treatment Court staff in order for the  
Court to properly monitor and modify the Participant's treatment plan; and

WHEREAS this Court recognizes that the privacy regulations promulgated by the United  
States Department of Health and Human Services pursuant to the Health Insurance Portability and  
Accountability Act of 1996 ("HIPAA") have imposed restrictions on the ability of health care  
providers to disclose protected health information concerning a particular individual to third parties  
except under particular circumstances; and

**ATTACHMENT A**

**SAMPLE**

WHEREAS HIPAA's privacy regulations contain an exception permitting health care providers to disclose protected health information "in the course of any judicial or administrative proceeding . . . in response to an order of a court or administrative tribunal" (45 C.F.R. 164.512(e)(1);

THEREFORE, it is hereby ORDERED that all substance abuse treatment and other health care providers to whom a Participant is referred by the Drug Treatment Court disclose to the Drug Treatment Court and/or its staff, upon request, subject to the federal regulations governing the Confidentiality of Alcohol and Drug Abuse Patient Records (42 C.F.R. Part 2), information concerning, as applicable, the treatment recommendation, diagnosis, attendance, scope of treatment, treatment progress and quality of participation, dates and results of toxicology testing, and termination or completion of treatment concerning such Participant of the Drug Treatment Court.

DATED: \_\_\_\_\_

\_\_\_\_\_  
Judge/Justice

ATTACHMENT A

At Part \_\_\_\_ of the \_\_\_\_\_ Court County of \_\_\_\_\_  
at \_\_\_\_\_,  
New York, on the \_\_\_\_\_ day of \_\_\_\_\_, 2003

Present: Hon. \_\_\_\_\_

THE PEOPLE OF THE STATE OF NEW YORK

-against-

**ORDER TO DISCLOSE PROTECTED  
HEALTH INFORMATION**

Docket#/SCI#/IND# \_\_\_\_\_

\_\_\_\_\_  
Defendant

WHEREAS the above-referenced Defendant is currently a participant in the

\_\_\_\_\_ (the "Drug Treatment Court"); and  
[Name of Drug Treatment Court]

WHEREAS Defendant's participation in a substance abuse treatment program is a  
condition of Defendant's continued participation in the Drug Treatment Court; and

WHEREAS the Drug Treatment Court requires timely and accurate information  
concerning Defendant's attendance and progress in treatment in order to adequately monitor the  
effectiveness and progress of Defendant's participation in treatment;

ORDERED that \_\_\_\_\_ disclose to  
[Name of Treatment or Health Care Provider]  
the Drug Treatment Court and/or its staff, subject to the federal regulations governing the  
Confidentiality of Alcohol and Drug Abuse Patient Records (42 C.F.R. Part 2), information  
concerning, as applicable, the treatment recommendation, diagnosis, attendance, scope of treatment,  
treatment progress and quality of participation, dates and results of toxicology testing, and  
termination or completion of treatment concerning the above named Defendant.

DATED: \_\_\_\_\_

\_\_\_\_\_  
Judge/Justice

ATTACHMENT B



STATE OF NEW YORK  
**UNIFIED COURT SYSTEM**  
OFFICE OF COURT DRUG TREATMENT PROGRAMS  
4 ESP. SUITE 2001  
ALBANY, NEW YORK 12223-1450  
(518) 474-3828  
Fax (518) 473-5514  
E-mail: jtrafica@courts.state.ny.us

**JONATHAN LIPPMAN**  
Chief Administrative Judge

**MEMORANDUM**

**JOSEPH J. TRAFICANTI, JR.**  
Deputy Chief Administrative Judge

Director  
Office of Court Drug Treatment Programs

**TO:** Drug Treatment Court Judges  
Drug Treatment Court Coordinators

**FROM:** Office of Court Drug Treatment Programs

**DATE:** August 5, 2003

**SUBJECT:** HIPAA

---

To further clarify our position concerning the treatment providers' responsibility for obtaining HIPAA-compliant consents or authorizations from their clients, we recommend that in the future your courts' linkage agreements with their providers include the following language:

The Provider acknowledges that it is a "covered entity", as defined in the Health Insurance Portability and Accountability Act of 1996 (HIPAA). As such, the Provider understands that it may be required to obtain HIPAA-compliant authorizations or consents from its clients enrolled in the Court sufficient to permit its disclosure of protected health information concerning those clients upon request to the Court.

Notwithstanding this language, as discussed in our July 25, 2003 memorandum regarding the impact of HIPAA's privacy regulations on drug treatment court operations, a Court may nevertheless decide to issue a standing or individualized HIPAA Order exempting the provider from having to obtain the otherwise necessary authorization or consent from its drug-court referred client(s) prior to disclosing protected health information concerning such client(s) to the drug court.

To explain the effect of these HIPAA Orders to the providers, the Office of Court Drug Treatment Programs has developed a notice entitled Notice to Treatment and Other Health Care Providers Regarding Court Order To Disclose Protected Health Information. We recommend that a copy of the Notice, which is attached to this memorandum, be sent, along with the HIPAA Order, to the treatment or other health care provider to whom the HIPAA Order is being sent.

**NOTICE**  
**TO TREATMENT OR OTHER HEALTH CARE PROVIDERS REGARDING**  
**COURT ORDER TO DISCLOSE PROTECTED HEALTH INFORMATION**

In order to fulfill its mission, the \_\_\_\_\_ relies on up-  
[name of drug treatment court]

to-date information from you concerning the health of its participants (your clients), including their progress in substance abuse treatment. Although such information is considered to be "protected health information" (as defined under the privacy regulations promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA")), which requires you to obtain appropriate HIPAA-compliant consents or authorizations from your clients prior to disclosing the requested information to this drug treatment court, the attached HIPAA order will permit you to do so without obtaining such a consent or authorization.

45 C.F.R. 164.512(e)(1) of HIPAA's privacy regulations creates an exception to the general requirement that a HIPAA-compliant consent or authorization form be in place prior to the disclosure of any protected health information. The exception provides that no consent or authorization is needed if protected health information is disclosed "in the course of any judicial or administrative proceeding . . . in response to an order of a court or administrative tribunal." The attached order has been executed in order to place such disclosures by your treatment program or health care organization squarely within this exception.

*Please note that this order does not alter your current obligations regarding compliance with applicable federal confidentiality laws and regulations.*

If you have any questions concerning this notice or the attached Order please call Linda Baldwin of the Office of Court Drug Treatment Programs at (914) 682-3221.





STATE OF NEW YORK  
**UNIFIED COURT SYSTEM**  
OFFICE OF COURT DRUG TREATMENT PROGRAMS  
4 ESP, SUITE 2001  
ALBANY, NEW YORK 12223-1450  
(518) 474-3828  
FAX (518) 473-5514


**JONATHAN LIPPMAN**  
Chief Administrative Judge

**JOSEPH J. TRAFICANTI, JR.**  
Deputy Chief Administrative Judge

Director  
Office of Court Drug Treatment Programs

**FRANK T. JORDAN**  
Executive Assistant

## Memorandum

**To:** Administrative Judges  
**From:** Joseph J. Traficanti, Jr.   
**Date:** December 23, 2003  
**Subject:** Drug Treatment Courts

---

Now that drug treatment courts in most areas are in operation, or an advanced phase of planning, a portion of my efforts are focusing on the process of integrating these courts into the normal operational and administrative procedures for each judicial district. This will help facilitate the eventual transition of administrative control to each district.

One procedural area that I have been asked to address is the practice of purchasing awards and incentives, such as plaques or gift certificates, for drug court participants. In reviewing the financial procedures for the Unified Court System I have found no authority to support this type of expenditure and the majority of our drug courts do not present such items. While there are many drug courts that currently provide such items to participants to commemorate phase advancement or successful graduation from the program, the items presented are often donated through a community based or non-profit agency rather than purchased. These types of donated awards are not prohibited, but neither the judge nor the court can be involved in the solicitation of such items.

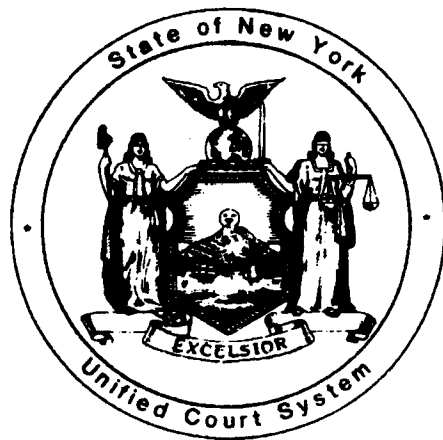
It would be appropriate for the drug treatment courts to present certificates of achievement signed by the judge at the time of phase advancement or graduation. These types of certificates can either be purchased or produced locally using office technology. It would also be appropriate to purchase the inexpensive tokens or pins that are commonly presented with the certificates.

I hope that you find this type of procedural guidance helpful in the successful operation of your drug treatment courts and I ask that you contact me with any questions that you may have. As always, I thank you, your judges and court staff for all of your hard work in establishing and supporting the drug treatment court program.

**Please distribute this memorandum to all appropriate drug treatment court judges and personnel.**

cc: Honorable Jonathan Lippman  
Honorable Ann T. Pfau  
Honorable Joan B. Carey  
David L. Sullivan  
Frank T. Jordan  
Executive Assistants

# **RECORDS RETENTION AND DISPOSITION SCHEDULE**



## **DRUG TREATMENT COURTS**

**DIVISION OF COURT OPERATIONS  
OFFICE OF RECORDS MANAGEMENT**

**JANUARY 2005**

## **TABLE OF CONTENTS**

<b>I.</b>	<b>CASE FILES</b>	
	Drug Treatment Court Program Case Files .....	<b>2</b>
<b>II.</b>	<b>SUPPLEMENTAL CASE RECORDS</b>	
	Defendant Criminal History Records ("Rap Sheets") .....	<b>3</b>
	Universal Treatment Application (UTA) Database Files .....	<b>4-5</b>
<b>III.</b>	<b>CASE MANAGEMENT RECORDS</b>	
	Statistical/Administrative Reports .....	<b>6</b>
<b>IV.</b>	<b>FISCAL RECORDS</b>	
	Grant Program Files .....	<b>7</b>
	Performance Base Contract (P.B.C.) Invoices .....	<b>8</b>
	<b>INDEX .....</b>	<b>9</b>

# **NEW YORK STATE UNIFIED COURT SYSTEM**

## **DRUG TREATMENT COURTS**

### **RECORDS RETENTION AND DISPOSITION SCHEDULE**

#### **DRUG TREATMENT COURT PROGRAM CASE FILES**

A case file contains all papers and documents relating to the proceedings of a treatment program participant, including any trial case papers forwarded from the originating Family and Criminal Courts. Documents include but are not limited to: participant's information intake and/or data sheet(s); participant's Plea Agreement or Contract; copies of Court Orders from Family or Criminal Court; Department of Social Services' Mental Health Report(s); Drug Treatment Court Program Update Biopsychosocial Report(s); Treatment Providers' Psychosocial Assessment(s); Drug Treatment Court Plans Monitoring Report(s); copies of participant's medical record(s) and/or report(s); Drug Treatment Court Progress Form(s); copies of Court Case Summaries of Proceedings; Drug Treatment Court's Weekly Progress Report(s); Drug Treatment Court Plan(s); Treatment Center Referral Form(s); participant's Consent and Authorization for Release and/or Disclosure of Confidential Information Form(s); copies of pharmaceutical prescriptions, representative counsel letters, alien and/or visa cards; Judge's Participant Progress Report(s); Treatment Facility Drug Testing Toxicology Report(s); copies of school records, correspondence and Certificates for Treatment Program Completion.

Note that some Courts currently store some of the documents listed above separately from the case file. These documents have been distinguished as a separate record series in this Schedule, but have the same retention requirements as the related case file.

## CASE FILES

RECORD SERIES TITLE	DESCRIPTION	RETENTION
<b>DRUG TREATMENT COURT PROGRAM CASE FILES</b>	<p>Records used for monitoring and/or assessing progress made by alcohol and substance abuse program participants of the Drug Treatment Court.</p> <p>a) <b>DRUG TREATMENT COURT PROGRAM RECORDS</b></p> <p>b) <b>TRIAL COURT RECORDS</b></p>	<p>a) Retain for six years after discharge or until completion of all requirements of participant's plea agreement/contract, whichever is longer, then destroy.</p> <p>b) Retain until all requirements of the Drug Treatment Court Program Records are completed, then destroy all duplicates immediately and return records to originating trial Court.</p>

## SUPPLEMENTAL CASE RECORDS

RECORD SERIES TITLE	DESCRIPTION	RETENTION
DEFENDANT CRIMINAL HISTORY RECORDS (also known as "RAP SHEETS")	Arrest and case disposition records of defendants.	Destroy immediately after superseded or after DRUG TREATMENT COURT PROGRAM CASE is completed, whichever occurs first, then destroy.

RECORD SERIES TITLE	DESCRIPTION	RETENTION
UNIVERSAL TREATMENT APPLICATION (UTA) DATABASE FILES	<p>Records used for managing and/or administering information obtained on Drug Treatment Court participants. Information includes but is not limited to: participant name(s) and identification number(s); docket number(s); release statuses: top charge(s); plea conviction charge(s); participant interview date(s); interested program(s); case disposition(s); date(s) of drug testing, plea agreement and drug treatment court hearings; referral treatment plan(s); participant address(es) and telephone number(s); whether participant(s) can speak, read and/or write English; birth date, age, country of citizenship of participant (s), date(s) of residency; social security number(s); country of birth; race(s)/ethnicity; marital statuses; sexual preference(s); assessment location(s); whether participant(s) owns an alien green card, valid driver's license and employee identification card; number(s) of treatment plans used; participant(s) employment status, primary means of financial support, veteran status, home and social environment; number of children; participant(s) physical and mental health, whether participant(s) were victim of a crime, used alcohol and/or drugs; past treatment history(s) and barrier(s) to hinder treatment(s); requested treatment(s); comments on participant(s) progress.</p>	



RECORD SERIES TITLE	DESCRIPTION	RETENTION
<b>UNIVERSAL TREATMENT APPLICATION (UTA) DATABASE FILES (continued)</b>	<p>a) <b>UTA TREATMENT PROGRAM CASE FILES</b></p> <p>b) <b>UTA TREATMENT PROGRAM ANALYSIS REPORTS</b></p> <p>c) <b>UTA DATABASE ENTRY FORMS</b></p>	<p>a) <b>Considered to be part of the DRUG TREATMENT COURT PROGRAM CASE FILE. Retain for same length of time as DRUG TREATMENT COURT PROGRAM CASE FILE.</b></p> <p>b) <b>Considered to be part of the DRUG TREATMENT COURT PROGRAM CASE FILE. Retain for same length of time as DRUG TREATMENT COURT PROGRAM CASE FILE.</b></p> <p>c) <b>Retain until information is entered into UTA DATABASE FILES and quality control is conducted, then destroy.</b></p>

## CASE MANAGEMENT RECORDS

RECORD SERIES TITLE	DESCRIPTION	RETENTION
STATISTICAL/ ADMINISTRATIVE REPORTS	Record created to document current status of incoming and/or outgoing Drug Treatment Court Program Cases. Information includes but is not limited to: Court and location; month(s) and year(s) being reported; status of new and old case(s); sex (male/female) of treatment participant(s), status of intake and eligible determination; number of arraignment charges; age of participant(s); number by race/ethnicity of participant(s); primary drug(s) of choice of participant(s); number of opened, warranted, graduated and failed case(s).	Retain until updated or until no longer needed, whichever is shorter, then destroy.

## FISCAL RECORDS

RECORD SERIES TITLE	DESCRIPTION	RETENTION
GRANT PROGRAM FILES	<p>Records created to document grant applications and/or programs for Federally sponsored Drug Treatment Courts of the Unified Court System. Includes but is not limited to: award letter(s)/notice(s), Categorical Assistance Progress Report(s) (C.A.P.R.), request for grant extension(s), Quarterly Financial Statement Report(s), approval for budget modification(s), process evaluation report(s), drug court agreement(s) or contract(s) for acquiring outside service(s), rejection grant letter(s), memorandums, correspondence and all supporting documentation.</p> <p>a) APPROVED GRANTS</p> <p>b) DENIED OR UNSUCCESSFUL GRANTS</p>	<p>a) Retain for six fiscal years after lapse of grant or final payment, whichever is later, then destroy.</p> <p>b) Retain for two fiscal years, then destroy.</p>

RECORD SERIES TITLE	DESCRIPTION	RETENTION
<b>PERFORMANCE BASED CONTRACT (P.B.C.) INVOICES</b>	<b>Documents used by Drug Treatment Courts of New York City to request payment from Federally awarded Grant funds managed by the Mayor's Office. Include but are not limited to: correspondence; memorandum(s); invoice(s); copies of contract(s); list of name(s) and identification number of participant(s); billing information.</b>	<b>Considered to be part of the GRANT PROGRAM FILE. File in GRANT PROGRAM FILE. If maintained separately, retain for same length of time as GRANT PROGRAM FILE.</b>

## INDEX

ADMINISTRATIVE REPORTS: SEE STATISTICAL/ADMINISTRATIVE REPORTS .	6
CASE FILES .....	2
CASE MANAGEMENT RECORDS .....	6
DEFENDANT CRIMINAL HISTORY RECORDS ("RAP SHEETS") .....	3
DRUG TREATMENT COURT PROGRAM CASE FILES .....	2
FISCAL RECORDS .....	7-8
GRANT PROGRAM FILES .....	7
PERFORMANCE BASE CONTRACT (P.B.C.) INVOICES .....	8
STATISTICAL/ADMINISTRATIVE REPORTS .....	6
SUPPLEMENTAL CASE RECORDS .....	3-4
UNIVERSAL TREATMENT APPLICATION (UTA) DATABASE ENTRY FORMS ...	5
UNIVERSAL TREATMENT APPLICATION (UTA) DATABASE FILES .....	5
UNIVERSAL TREATMENT APPLICATION (UTA) TREATMENT PROGRAM ANALYSIS REPORTS .....	5
UNIVERSAL TREATMENT APPLICATION (UTA) TREATMENT PROGRAM CASE FILES .....	5

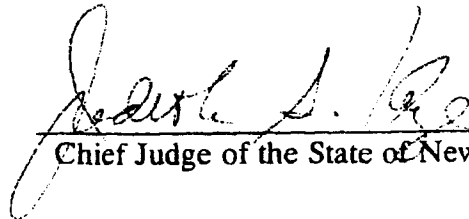
ADMINISTRATIVE ORDER OF THE  
CHIEF JUDGE OF THE STATE OF NEW YORK

Pursuant to Article VI, §28(c) of the State Constitution and section 211(1)(a) of the Judiciary Law, and upon consultation with the Administrative Board of the Courts and with the approval of the Court of Appeals of the State of New York, I hereby promulgate, effective immediately, new Part 43 of the Rules of the Chief Judge, relating to operation of Superior Courts for Drug Treatment, to read as follows:

**PART 43. SUPERIOR COURTS FOR DRUG TREATMENT**

§43.1. Superior Courts for Drug Treatment. (a) A Superior Court for Drug Treatment may be established in Supreme Court or County Court in any county by order of the Chief Administrator of the Courts following consultation with and agreement of the Presiding Justice of the Judicial Department in which such county is located. A Superior Court for Drug Treatment shall have as its purpose the hearing and determination of criminal cases in the courts of the county that are appropriate for disposition by a drug treatment court.

(b) The Chief Administrator, upon consultation with the Administrative Board of the Courts, shall promulgate such rules as are necessary to regulate operation of each Superior Court for Drug Treatment, and to permit transfer to the court, for disposition, of drug cases that are pending in another court in the same county.

  
\_\_\_\_\_  
Chief Judge of the State of New York

Attest: \_\_\_\_\_  
Clerk of the Court of Appeals

Date: October 18, 2005

AO/ 04 /05

From: Frank Jordan  
To: Drug Court Liaisons NYC Criminal ; Drug Court Liaisons NYC Family;  
Executive Assistants  
Date: 10/19/2006 5:12:36 PM  
Subject: **SAMHSA EtG Advisory**  
CC: Administrative Assistants; brada@uarc.org; Drug Court Liaisons ONYC; Drug  
Court Management Team; Drug Court Project Managers; FTC Judicial Advisory  
Committee; kenperez@oasas.state.ny.us; NYC Chief Clerks

Attached please find a recently released Advisory from the U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA) titled "The Role of Biomarkers in the Treatment of Alcohol Use Disorders."

In discussing the use of tests to detect Ethyl Glucuronide (EtG) the Advisory concludes that:

"Currently, the use of an EtG test in determining abstinence lacks sufficient proven specificity for use as primary or sole evidence that an individual prohibited from drinking, in a criminal justice or a regulatory compliance context, has truly been drinking. Legal or disciplinary action based solely on a positive EtG, or other test discussed in this Advisory, is inappropriate and scientifically unsupportable at this time.

These tests should currently be considered as potential valuable clinical tools, but their use in forensic settings is premature."

In light of the information in this Advisory I would advise against using an EtG test as a basis for any sanction in the drug treatment courts.

Please share this information with your drug treatment courts and feel free to call me with any questions.

Thanks

Frank




STATE OF NEW YORK  
**UNIFIED COURT SYSTEM**  
OFFICE OF COURT ADMINISTRATION  
25 BEAVER STREET, SUITE 1128  
NEW YORK, NEW YORK 10004  
(212) 428-2130  
FAX (212) 428-2192

**JONATHAN LIPPMAN**  
Chief Administrative Judge

**JUDY HARRIS KLUGER**  
Deputy Chief Administrative Judge  
Court Operations & Planning

**MEMORANDUM**

**To:** Administrative Judges

**From:** Honorable Judy Harris Kluger  
Deputy Chief Administrative Judge  
Court Operations and Planning 

**Date:** February 2, 2007

**Subject:** Ethical Guidance for Drug Treatment Court Employees Regarding  
501(c)(3) Organizations that Raise Funds for the Drug Treatment Courts

---

We have been presented several times with the question of whether Drug Treatment Court employees may be involved in the management, operations or fund-raising activities of 501(c)(3) organizations that raise funds for the Drug Treatment Courts. In consultation with the office of the Statewide Special Counsel for Ethics, I am writing to advise you that our employees should not have any involvement with such organizations.<sup>1</sup>

As you know, the Chief Judge's Rules prohibit court employees from participating in outside employment or business activities "that create an actual or appearance of conflict" with their official duties. 22 NYCRR 50.1(III)(A).

If a Drug Treatment Court employee solicits funds for the Drug Treatment Courts, there is a tremendous risk that the solicitation will be viewed as the "price of doing business" with the court system. Moreover, litigants and counsel dissatisfied with the outcome of litigation may claim that they were treated unfairly because they gave less than requested or less than their opponents did.

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<sup>1</sup> The Advisory Committee on Judicial Ethics has similarly held that a judge may not help form, or serve as an officer or director of, a not-for-profit entity whose purpose is to solicit funds and services for the benefit of the judge's Drug Treatment Court. Opinion 97-83; 22 NYCRR 100.4(C)(3) (barring judges from participating in fund-raising activities).



Even if Drug Treatment Court employees volunteer in a *non*-fund-raising role, their involvement still creates the perception that the courts are improperly involved in, or even control, fund raising entities.

Frank Jordan is available to discuss these matters further if you have any questions or concerns.

cc: Hon. Jonathan Lippman  
Hon. Ann Pfau  
Hon. Joan Carey  
District Executives  
Chiefs of Staff

§ 170.15 Removal of action from one local criminal court to another.

Under circumstances prescribed in this section, a criminal action based upon an information, a simplified information, a prosecutor's information or a misdemeanor complaint may be removed from one local criminal court to another:

1. When a defendant arrested by a police officer for an offense other than a felony, allegedly committed in a city or town, has, owing to special circumstances and pursuant to law, not been brought before the particular local criminal court which by reason of the situs of such offense has trial jurisdiction thereof, but, instead, before a local criminal court which does not have trial jurisdiction thereof, and therein stands charged with such offense by information, simplified information or misdemeanor complaint, such local criminal court must arraign him upon such accusatory instrument. If the defendant desires to enter a plea of guilty thereto immediately following such arraignment, such local criminal court must permit him to do so and must thereafter conduct the action to judgment. Otherwise, it must remit the action, together with all pertinent papers and documents, to the local criminal court which has trial jurisdiction of the action, and the latter court must then conduct such action to judgment or other final disposition.

2. When a defendant arrested by a police officer for an offense other than a felony has been brought before a superior court judge sitting as a local criminal court for arraignment upon an information, simplified information or misdemeanor complaint charging such offense, such judge must, as a local criminal court, arraign the defendant upon such accusatory instrument. Such judge must then remit the action, together with all pertinent papers and documents, to a local criminal court having trial jurisdiction thereof. The latter court must then conduct such action to judgment or other final disposition.

3. At any time within the period provided by section 255.20, where a defendant is arraigned upon an information, a simplified information, a prosecutor's information or a misdemeanor complaint pending in a city court, town court or a village court having trial jurisdiction thereof, a judge of the county court of the county in which such city court, town court or village court is located may, upon motion of the defendant or the people, order that the action be transferred for disposition from the court in which the matter is pending to another designated local criminal court of the county, upon the ground that disposition thereof within a reasonable time in the court from which removal is sought is unlikely owing to:

(a) Death, disability or other incapacity or disqualification of all of the judges of such court; or

(b) Inability of such court to form a jury in a case, in which the defendant is entitled to and has requested a jury trial.

4. Notwithstanding any provision of this section to the contrary, in any county outside a city having a population of one million or more, upon or after arraignment of a defendant on an information, a simplified information, a prosecutor's information or a misdemeanor complaint pending in a local criminal court, such court may, upon motion of the defendant and with the consent of the district attorney, order that the action be

removed from the court in which the matter is pending to another local criminal court in the same county which has been designated a drug court by the chief administrator of the courts, and such drug court may then conduct such action to judgement or other final disposition; provided, however, that an order of removal issued under this subdivision shall not take effect until five days after the date the order is issued unless, prior to such effective date, the drug court notifies the court that issued the order that:

- (a) it will not accept the action, in which event the order shall not take effect, or
- (b) it will accept the action on a date prior to such effective date, in which event the order shall take effect upon such prior date.

Upon providing notification pursuant to paragraph (a) or (b) of this subdivision, the drug court shall promptly give notice to the defendant, his or her counsel and the district attorney.

SUPPLEMENTARY PRACTICE COMMENTARIES

07 Electronic Update

by Peter Preiser

2000

Subdivision four, added in 1998 and amended in 1999 was again amended in 2000. The purpose of the latest amendment was to create "hub" central drug courts in the three counties formerly specified by name--i.e., Rockland, Suffolk and Tompkins--and thus facilitate administration of the drug court program, as described in my 1999 Practice commentary.

Accordingly, the sole statutory change was elimination of the names of the three counties and substitution of "any county outside of a city having a population of one million or more".

1999

Subdivision four of this section added in 1998 and amended in 1999 provides a procedural mechanism for transfer of jurisdiction over an action involving a charge less than felony grade to a specialized court with support services designed for diversion of nonviolent offenders with drug or alcohol addiction. The objective is to assist the offender to overcome the addiction with the expectation that this will be a key factor in turning the individual from criminal activity.

The specialized court program, funded in part by federal grants, presently is in operation in various parts of the state as well as in many other jurisdictions. Basically no legislation is required, as diversionary programs have been in operation in this state for many years without specific legislation. Certain economies of scale however require legislative authorization for transfer of cases due to peculiar geographic jurisdictional limitations of local criminal courts.

CPL § 100.55 sets forth specific geographic jurisdictional limits for filing of local criminal court accusatory instruments and the CPL as unamended does not provide authority for transfer of an action when the accusatory instrument has been filed in the statutorily designated court for commencement of the criminal action. In the case of courts serving smaller populations it may be uneconomical to provide the intensive counseling and other services necessary to the few offenders who would qualify. Accordingly, it makes sense for courts in the counties where that problem exists to pool their resources and provide the services in one or more central locations. The new procedure permits transfer of cases to another court within the same county that has been designated to operate a special "drug court" program. As enacted in 1998 it applied only to Rockland County. The 1999 amendment permitted expansion to Suffolk and Tompkins counties. It also added two administrative provisions: first, that the "drug court" be one designated by the Chief Administrator of the Courts; and second, a procedure for the "drug court" to reject the transfer.

Note that there is no provision as to how a "drug court" is to operate. The sole statutory requirement is a motion by defendant, consent of the district attorney and exercise of judicial discretion to transfer the action. Presumably the operation is a matter of local county option. This would include, such matters as: whether a plea of guilty is to be required prior to or post transfer; whether there is to be a specified sentence upon a guilty plea, if entered, that will be carried out if defendant does not perform acceptably in the program; or whether a guilty plea, if entered, may be withdrawn upon successful completion of a program.

From the standpoint of logical statutory organization, it would have made more sense to place the authority herein granted in CPL § 170.10, as the present section is focused upon situations where the case is commenced in a court other than the one that normally would have had initial preliminary jurisdiction. A parallel provision for felony charges is set forth in a new subdivision three added to CPL § 180.20.

ACTICE COMMENTARIES

93 Main Volume

by Peter Preiser

Subdivision one of this section establishes authority for a substitute local criminal court--one that lacks geographical trial jurisdiction over the offense--to conduct an arraignment. The circumstances under which an arrested person may be brought to such court for arraignment are set forth in CPL §§ 120.90(5) and 140.20(1). This, of course applies only when the charge is below felony grade. Where the accusatory

instrument charges a felony--i.e., is a felony complaint--the appropriate court for arraignment is ascertained pursuant to CPL § 100.55(6) and, in the case of Class E felonies CPL § 120.90(5).

Note that the substitute arraignment court also has authority to make immediate post-arraignment disposition of the charge by accepting a guilty plea and imposing sentence. But if a guilty plea is not entered immediately following arraignment, the action and all pertinent documents must be remitted to the court with trial jurisdiction for further processing.

Subdivision two deals with arraignments for offenses other than a felony conducted by a superior court justice or judge sitting as a local criminal court (see CPL § 10.10[3(f) and (g)] ). In this case, however, a plea of guilty cannot be accepted following arraignment. As a technical matter, where a supreme court justice acts, the legislature has no power to curtail jurisdiction, because the New York Constitution vests that court with "general original jurisdiction in law and equity" (art. 6, § 7). Thus a plea accepted-- or a trial conducted--by a supreme court justice could not be held to be a nullity by virtue of the limitation set forth in this subdivision. See *People v. Darling*, 50 A.D.2d 1038, 377 N.Y.S.2d 718 (3d Dept.1975). Nevertheless, this subdivision does express a legislative preference for utilizing the concurrent jurisdiction of the local criminal court judge to dispose of the case.

Subdivision three is the change of venue provision for cases that are processed to judgment in local criminal courts. The statutory authorization here appears narrower than the change of venue standard applicable to cases pending in superior courts. The latter provision (CPL § 239.20[2] ) authorizes a change of venue if a party demonstrates "that a fair and impartial trial cannot be had" in the jurisdiction served by the court. That clearly includes inability to select an impartial jury in the jurisdiction. Here, however, the only authorized ground is that disposition of the case within a reasonable time is unlikely, due to one of the two specified factors. It is possible though to construe this provision as applicable in a situation where the attempt to impanel an unbiased jury would negate the likelihood of disposition within a reasonable time. Moreover, it seems clear that if in fact an unbiased jury cannot be selected, due process would require construction of the provision to permit change of venue. See *People v. Roberts*, 95 Misc.2d 41, 406 N.Y.S.2d 432 (Tompkins Co.Ct.1978).

An application for a change of venue may be made by motion of either the defendant or the people. That motion must be made to a county court judge of the county where the action is pending and normally must be made within the forty-five day period following arraignment specified in CPL § 255.20.

## LEGISLATIVE HISTORIES

**L.1999, c. 565:** For Legislative, Executive or Judicial memorandum relating to this law, see McKinney's 1999 Session Laws of New York, p. 1953.

**L.2000, c. 67:** For Legislative, Executive or Judicial memorandum relating to this law, see McKinney's 2000 Session Laws of New York, pp. 1499, 2005.

**L.1998, c. 77:** For Legislative, Executive or Judicial memoranda relating to this law, see McKinney's 1998 Session Laws of New York, p. 1559.

## CROSS REFERENCES

Arraignments outside county, see NY City Crim. Ct. Act § 54.

Copy of accusatory instrument attached to warrant of arrest as constituting valid basis for arraignment under this section, see CPL 120.40.

### Definitions

City court, see CPL 10.10.

Police officer, see CPL 1.20.

Town court, see CPL 10.10.

Trial jurisdiction, see CPL 1.20.

Village court, see CPL 10.10.

Drawing of jurors in criminal cases, see UCCA § 2012; UDCA § 2012; UJCA § 2012.

Formation of trial juries generally, see CPL 360.10.

### Geographical jurisdiction of

Cities, towns and villages over offenses, see CPL 20.50.

Counties over offenses, see CPL 20.40.

Judge before whom defendant arraigned or tried, city court, see UCCA § 2009.

Pleas to informations, see CPL 340.20.

Removal of proceeding against juvenile offender to family court, see CPL 725.00 et seq.

Speedy trial, right to, see CPL 30.20; CPL 30.30; Civil Rights Law § 12.

Superior court indictments; pre-trial motion procedure, see CPL 255.20.

**From:** Frank Jordan  
**To:** Drug Court Liaisons NYC Criminal ; Drug Court Liaisons NYC Family; Executive Assistants; NYC Chief Clerks  
**Date:** 10/25/2006 11:18:26 AM  
**Subject:** Role of Drug Treatment Court Teams with the Drug Treatment Process

Attached please find sections from the New York State regulations governing the Department of Mental Health, Office of Alcoholism and Substance Abuse Services (OASAS). These sections address the role of OASAS licensed treatment providers in the initial determination of a need for substance abuse treatment, the level of care determination, the admission to treatment decision, the comprehensive evaluation and the development of individual treatment plans.

Our drug treatment court teams work closely with our treatment providers and regularly make referrals and recommendations to treatment providers in these areas. However, the drug treatment court teams should be aware that 14 NYCRR 822 places the responsibility for the final decision in these areas on the OASAS licensed treatment providers.

Please share this information with all of your drug treatment courts.  
Thank you for your continuing cooperation and please call me if you have any questions.  
Frank

Frank T. Jordan  
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**CC:** Administrative Assistants; David Sullivan; Drug Court Liaisons ONYC; Drug Court Management Team; Drug Court Project Managers; FTC Judicial Advisory Committee; Judy Harris Kluger; kenperez@oasas.state.ny.us; Maria Logus Esq.

## NEW YORK CODES RULES AND REGULATIONS

Title 14 Department of Mental Hygiene  
Chapter XXI Office of Alcoholism and Substance Abuse Services  
Part 822 Chemical Dependence Outpatient Services

### **Initial Determination**

#### **14 NYCRR 822.3. Admission procedures.**

- (a) An individual who appears at the outpatient service seeking or having been referred for treatment or evaluation shall have an initial determination made and documented in a written record by a qualified health professional, or other clinical staff under the supervision of a qualified health professional, which states the following:
- (1) that the individual appears to be in need of chemical dependence services;
  - (2) that the individual appears to be free of serious communicable disease that can be transmitted through ordinary contact; and
  - (3) that the individual appears to be not in need of acute hospital care, acute psychiatric care, or other intensive services which cannot be provided in conjunction with outpatient care or would prevent him/her from participating in a chemical dependence service.
- (b) The determinations made pursuant to the above shall be based upon service provider records, reports from other providers and/or through a face-to-face contact with the individual, all of which must be documented.

### **Level of Care Determination**

#### **14 NYCRR 822.3(c) Level of care determination.**

If an individual is determined to be appropriate for chemical dependence services, a level of care determination shall be made by a clinical staff member who shall be provided clinical oversight by a qualified health professional. The level of care determination shall be signed and dated by the clinical staff member. The level of care determination shall be made promptly and in no event not later than two visits to the service, or two weeks for minors.

- (d) The level of care determination process must be in accord with the governing authority's policy and procedures and incorporate the use of the OASAS Level of Care for Alcohol and Drug Treatment Referral Protocol (LOCADTRP) or another Office-approved protocol.
- (e) Prohibition against discrimination. No individual shall be denied admission to the outpatient service based solely on the individual's:
- (1) prior treatment history;
  - (2) referral source;
  - (3) maintenance on methadone or other medication prescribed and monitored by a physician, physician's assistant or nurse practitioner, however, if an outpatient service objects to an individual's continued use of such prescribed drugs or substances, the outpatient service shall document each of the following: (i) obtain a signed consent form in accordance with the requirements of 42 Code of Federal Regulations Part 2 which authorizes the release of patient identifying information to the physician, physician's assistant, or nurse practitioner who prescribed the drug or substance to the patient ("the prescribing professional"); (ii) consult with

the prescribing professional to ascertain their knowledge and awareness of the individual's history of chemical dependence, and if the prescribing professional is unaware of the individual's history of chemical dependence, inform the prescribing professional accordingly; and (iii) after the required consultation in (ii) above, if the prescribing professional believes that the individual should be permitted to continue to use the drug or substance, the individual must be permitted to continue to use the drug or substance.

- (4) pregnancy;
- (5) history of contact with the criminal justice system;
- (6) HIV and AIDS status;
- (7) physical or mental disability; or
- (8) lack of cooperation by significant others in the treatment process.

(f) Admission criteria. To be admitted for outpatient services, the individual must: (1) be determined to be able to achieve or maintain abstinence and recovery goals with the application of outpatient services; or (2) be a significant other who manifests psychological, behavioral and/or emotional effects arising from another individual's chemical abuse or dependence, as significant others may be treated as patients in their own right and admitted to the chemical dependence service, regardless of whether the addicted person is in treatment, or they may be treated as part of a family; or (3) meet the admission criteria identified in § 822.9 for outpatient rehabilitation services.

(g) If the individual is deemed inappropriate for outpatient services, unless the individual is already receiving chemical dependence services from another provider, a referral to a more appropriate service shall be made. The reasons for denial of any admission to the outpatient service must be provided to the individual and documented in a written record maintained by the outpatient service.

#### **Admission Decision**

**14 NYCRR 822.3 (h) If determined appropriate for the outpatient service, the individual shall be admitted.** The decision to admit an individual shall be made by a staff member who is a qualified health professional authorized by the policy of the governing authority to admit individuals. The name of the qualified health professional who made the admission decision, along with the date of admission, must be documented in the patient record.

(i) There must be a notation in the patient record that the patient received a copy of the outpatient service's rules and regulations, including patient rights and a summary of federal confidentiality requirements, and a statement that notes that such rules were discussed with the patient, and that the patient indicated that he/she understood them.

(j) All patients shall be informed that admission is on a voluntary basis and that a patient shall be free to discharge himself or herself from the service at any time. For patients under an external mandate, the potential consequences for premature discharge shall be explained, but this shall not alter the voluntary nature of admission and continued treatment. This provision shall not be construed to preclude or prohibit attempts to persuade a patient to remain in the service in his or her own best interest.



### **Comprehensive Evaluation**

#### **14 NYCRR 822.4 Post admission procedures.**

(a) Comprehensive evaluation.

- (1) The goal of the comprehensive evaluation shall be to obtain that information necessary to develop an individual treatment plan.
- (2) The comprehensive evaluation shall obtain that information necessary to determine whether a diagnosis of alcohol related or psychoactive substance related use disorder in accordance with the International Classification of Diseases, Ninth Revision or another Office-approved protocol is indicated.
- (3) Each comprehensive evaluation shall be coordinated by a qualified health professional and be based, in part, on clinical interviews with the patient, and may also include interviews with significant others, if possible and appropriate.

### **Individual Treatment Plan**

#### **14 NYCRR 822.4 (f) Individual treatment plan.**

Within thirty days of admission to an outpatient service, a written individual treatment plan ("the treatment plan") based on the comprehensive evaluation shall be developed and approved by the multidisciplinary team for each patient.

14 NYCRR 800.2. Definitions.

- (12) **Multi-disciplinary team** means a team of health professional staff including, at a minimum, one medical staff member (where applicable) as defined in this section, one credentialed alcoholism and substance abuse counselor (CASAC) and one other staff member who is a qualified health professional as defined in this section in a discipline other than alcoholism and substance abuse counseling.

### **Individual Treatment Plan**

#### **14 NYCRR 822.4 (l) The treatment plan shall:**

- (1) be developed in collaboration with the patient and reviewed by a multi-disciplinary team; (2) be based on the admitting evaluations specified above and any additional evaluation(s) determined to be required; (3) specify the treatment goals for each problem identified; (4) specify the objectives to be achieved while the patient is receiving services which shall be used to measure progress toward attainment of treatment goals; (5) prescribe an integrated program of therapies and activities to meet the objectives, with target dates for achievement; (6) include schedules for the provision of all services prescribed to the patient and their significant others as appropriate; (7) identify a single member of the clinical staff responsible for coordinating and managing the patient's treatment ("the responsible clinical staff member"); (8) include each diagnosis for which the patient is being treated; (9) include a description of the additional services, particularly the vocational, educational, or employment services needed by the patient and a plan for meeting those needs; and (10) be signed by the responsible clinical staff member and be approved, signed and dated by the medical director or other physician employed by the service within seven days of review and approval by the multidisciplinary team.

**DANIEL TORRES, Petitioner-Appellant, -v.- J. BERBARY, Superintendent, Respondent- Appellee.**

**Docket No. 02-2463**

**UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

**340 F.3d 63; 2003 U.S. App. LEXIS 16167**

**April 30, 2003, Argued  
August 7, 2003, Decided**

**PRIOR HISTORY:**   [\*\*1] Appeal from a judgment denying a petition for a writ of habeas corpus entered in the United States District Court for the Southern District of New York (Martin, J.), the District Court having determined that the state court sentencing challenged by petitioner was justified by a satisfactory evidentiary showing of a breach of the condition of the original sentence imposed.

*Torres v. Barbary*, 2002 U.S. Dist. LEXIS 10041 (S.D.N.Y., May 31, 2002)

**DISPOSITION:**   Vacated and remanded with instructions.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Petitioner inmate filed a petition for a writ of habeas corpus pursuant to 28 U.S.C.S. § 2254 and challenged his resentencing by a state court following an alleged breach of the condition of his original sentence, completion of a drug treatment program. The United States District Court for the Southern District of New York denied the inmate's petition. The inmate filed a timely notice of appeal.

**OVERVIEW:** The inmate entered a plea of guilty to the offense of criminal sale of a controlled substance in the third degree. The sentence provided for a conditional release to a drug treatment facility. The inmate was discharged from the program because of his alleged involvement in the distribution of contraband in the facility. Although the inmate asked for review by the program director, no review was provided to him. The inmate was sentenced to four and a half to nine years imprisonment. The Appellate Division, First Department affirmed. The appellate court found that the total reliance by the trial court on a hearsay report that itself contained only uncorroborated statements of unnamed informants, the failure of the trial court to conduct some kind of hearing, the lack of preponderating evidence of the inmate's wrongdoing, and the gross disparity between the sentence the inmate would have received if he completed the drug treatment program and the four-and-a-half-to-nine-year sentence to state prison that he received, mandated a

finding of denial of due process in the inmate's sentencing and compelled the issuance of a writ of habeas corpus pursuant to 28 U.S.C.S. § 2254.

**OUTCOME:** The district court's denial of the inmate's habeas petition was reversed and the court directed that a writ of habeas corpus be issued releasing the inmate from his present confinement unless the state provided him with a new sentencing hearing within 90 days.

**LexisNexis(R) Headnotes**

***Civil Procedure > Appeals > Standards of Review > De Novo Review***

***Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > General Overview***  
***Criminal Law & Procedure > Habeas Corpus > Appeals > Standards of Review > General Overview***

[HN1] An appellate court reviews de novo a district court's denial of a writ of habeas corpus to a person in custody pursuant to a state court judgment. The standard for review by a district court in the first instance has been established by an Act of Congress, the Antiterrorism and Effective Death Penalty Act of 1996, as codified in 28 U.S.C.S. § 2254(d).

***Criminal Law & Procedure > Habeas Corpus > Cognizable Issues > General Overview***  
[HN2] See 28 U.S.C.S. § 2254(d).

***Civil Procedure > Judgments > General Overview***  
***Civil Procedure > Appeals > Standards of Review > De Novo Review***

***Criminal Law & Procedure > Habeas Corpus > Appeals > Standards of Review > De Novo Review***

[HN3] The deferential review of state court judgments established by the statutory scheme of 28 U.S.C.S. § 2254(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) is dependent on the federal claim having been adjudicated on the merits by the state court. If there is no such adjudication, the deferential standard does not apply, and the courts apply the pre-AEDPA standards, and review de novo the state court disposition of the petitioner's federal constitutional claims. A peti-

tioner's federal constitutional claim is adjudicated on the merits in state court when the state court disposes of the claim on the merits and reduces its disposition to judgment. The issue of whether the claim has been disposed of on the merits by a state court includes an inquiry into: (1) what the state courts have done in similar cases; (2) whether the history of the case suggests that the state court was aware of any ground for not adjudicating the case on the merits; and (3) whether the state court's opinion suggests reliance upon procedural grounds rather than a determination on the merits.

***Criminal Law & Procedure > Habeas Corpus > Cognizable Issues > General Overview***

***Criminal Law & Procedure > Habeas Corpus > Review > Standards of Review > General Overview Governments > Courts > Judicial Precedents***

[HN4] With respect to the elements of deferential review under the Antiterrorism and Effective Death Penalty Act of 1996 set forth in 28 U.S.C.S. § 2254(d)(1), a state court's decision is "contrary to" clearly established United States Supreme Court precedent if the state court arrives at a conclusion opposite to that reached by the United States Supreme Court on a question of law or if the state court decides a case differently than the United States Supreme Court has on a set of materially indistinguishable facts. And an "unreasonable application" of clearly established United States Supreme Court precedent occurs when a state court identifies the correct governing legal principle from the United States Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. Although it is clear that the question is whether the state court's application of clearly established federal law was objectively unreasonable, the precise method for distinguishing objectively unreasonable decisions from merely erroneous ones is less clear. However, it is well-established in the Second Circuit that the objectively unreasonable standard of 28 U.S.C.S. § 2254(d)(1) means that petitioner must identify some increment of incorrectness beyond error in order to obtain habeas relief.

***Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview Criminal Law & Procedure > Sentencing > Appeals > General Overview***

***Criminal Law & Procedure > Sentencing > Imposition > General Overview***

[HN5] The United States Supreme Court has clearly spoken on the question of the standard of proof of facts in sentencing in relation to the constitutional requirement of due process, holding that the preponderance of evidence standard satisfies the requirement.

***Criminal Law & Procedure > Sentencing > Alternatives > Probation > Revocation > General Overview***

***Criminal Law & Procedure > Sentencing > Imposition > General Overview***

***Criminal Law & Procedure > Postconviction Proceedings > Parole***

[HN6] The United States Supreme Court has clearly spoken on the question of the process due one who is alleged to have failed to abide by the rules governing his parole. The determination to resentence for the breach of a condition of a sentence is analogous to the determination to revoke the parole of a parolee for failure to comply with the conditions of parole. It is also analogous to the determination to impose a sentence for violation of the terms of probation. All those determinations should be informed by the same considerations. For parole revocation, an opportunity for a hearing must be provided. According to the United States Supreme Court, that hearing must be the basis for more than determining probable cause, it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation. The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation.

***Administrative Law > Agency Adjudication > Hearings > Evidence > General Overview***

***Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination***

***Criminal Law & Procedure > Postconviction Proceedings > Parole***

[HN7] In order to justify the further punishment generated by parole revocation, the following minimum requirements of due process must be filled: (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses, unless the hearing officer specifically finds good cause for not allowing confrontation; (e) a neutral and detached hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. The inquiry is said to be a narrow one, and the process should be flexible enough to consider evidence, including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.

***Criminal Law & Procedure > Sentencing > Imposition > Evidence***

[HN8] The United States Court of Appeals for the Second Circuit has previously reviewed United States Supreme Court teaching to arrive at the conclusion that, although due process considerations are implicated in sentencing generally, not all the evidentiary limitations and procedural safeguards are required in the conduct of a sentencing proceeding. The United States Court of Appeals for the Second Circuit has gone so far as to hold that due process does not prevent use in sentencing of out-of-court declarations by an unidentified informant where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means.

***Criminal Law & Procedure > Sentencing > Imposition > Evidence***

***Evidence > Hearsay > Hearsay Within Hearsay***

[HN9] Due process in sentencing requires at least a showing by a preponderance of evidence to resolve disputed factual issues. While it is true that the use of material that would not be admissible in an adversary criminal trial is permitted, a single report replete with multiple levels of hearsay and speculation cannot be said to suffice to make a showing by a preponderance of the evidence, even under the "flexible" standard that is permitted.

***Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection***  
***Constitutional Law > Substantive Due Process > Scope of Protection***

[HN10] Due process has clearly been held to require some kind of hearing before a person is deprived of a liberty interest.

***Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Confrontation***  
***Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination***

***Criminal Law & Procedure > Sentencing > Imposition > Evidence***

[HN11] While it is true that the United States Supreme Court has held that it was not a denial of due process in sentencing to rely on information supplied by witnesses whom the accused could neither confront nor cross-examine, it is also true that the Court does not hold that all hearsay information must be considered. In the federal sentencing context, the United States Court of Appeals for the Second Circuit has held that admission of an unidentified informant's corroborated declarations in a sentencing proceeding where there is good cause for not disclosing his identity is not barred by the *Confrontation Clause*.

**COUNSEL:** DAVID E. LIEBMAN, ESQ., New York, NY, for Petitioner-Appellant.

NISHA M. DESAI, Assistant District Attorney for Bronx County, Bronx, NY, (Joseph N. Ferdenzi, Assistant District Attorney, Robert T. Johnson, District Attorney for Bronx County, Bronx, NY, on the brief), for Respondent-Appellee.

**JUDGES:** Before: MINER, McLAUGHLIN and POOLER, Circuit Judges.

**OPINION BY:** MINER

**OPINION**

[\*64] MINER, *Circuit Judge*: Petitioner Daniel Torres appeals from a judgment denying a writ of habeas corpus entered in the United States District Court for the Southern District of New York (Martin, J.). Torres filed his petition for the writ pursuant to 28 U.S.C. § 2254 as a person in state custody. By the petition, Torres challenged his resentencing [\*2] by a state court following an alleged breach of the condition of his original sentence. The District Court determined that the resentencing was justified by a satisfactory evidentiary showing of the breach in state court and concluded that the decision of the trial court was not contrary to the jurisprudence of the Supreme Court of the United States. *See Torres v. Barbary*, 2002 U.S. Dist. LEXIS 10041, No. 01 CIV 4512, 2002 WL 1218276 (S.D.N.Y. June 4, 2002). Because we conclude that the hearing afforded by the state court that resulted in the resentencing was inconsistent with due process, we vacate the judgment of the District Court and remand with directions to grant the writ conditionally.

**BACKGROUND**

On March 16, 1998, Torres entered a plea of guilty in New York Supreme Court, Bronx County, to the offense of Criminal Sale of a Controlled Substance in the Third Degree, *N.Y. Penal Law* § 220.39(1), a Class B Felony. The court accepted the plea following the customary allocution and proceeded to impose sentence in accordance with a plea bargain previously arrived at. The sentence provided for a conditional release to Phoenix House, a drug treatment facility and was encompassed in its [\*3] entirety in the following dialogue between the court and Torres, designated "THE DEFENDANT" in the transcript:

THE COURT: Okay. I am going to sentence you. I will release you on the 23rd to Phoenix House. If you work out, you will be allowed to come back, re-plead to

a misdemeanor, and I will sentence you [to] time served. If you don't work out, you will get at least four [\*65] and a half to nine years in jail. Do you understand?

THE DEFENDANT: Yes. THE COURT: Is that satisfactory to you?

THE DEFENDANT: Yes.

"If you work out" apparently was understood by all concerned to refer to the successful completion by Torres of the drug treatment program provided by Phoenix House. According to the sentence, successful completion would result in a return to court for repleading to a misdemeanor in place of the felony, and a resentencing to time served. Failure to complete would result in a sentence of imprisonment of four-and-a-half-to-nine years on the original felony charge.

Torres immediately entered the Phoenix House program. Less than a month later, Torres was discharged from the program. The "Client Discharge Form" dated April 10, 1998, provided to Torres [\*\*4] by Phoenix House, gave the following reasons for his discharge: "Your alledge [sic] involvement in the distribution of contraband in the facility. You are being directed to immediately surrender yourself to 1020 Grand Concourse Part 51 Bronx Supreme Court." The Form contained the following legend: "You have the right to have this decision reviewed by the Program Director. You may seek advice from outside sources in preparation for the program director/designee review of the discharge decision." Although Torres inserted a checkmark in the space provided in the Form following the words: "I wish a review" and signed the Form, no review was provided to him.

By letter dated the same date as the Discharge Form, Ed Greaux of Phoenix House advised the Bronx Supreme Court of Torres' discharge. The letter, in its substantive entirety, reads as follows:

Your Honor, with reference to the above-named client, information has come to light that compels us to discharge this resident. New residents overheard conversations conducted in Spanish between this client and other residents claiming that they could make illicit drugs available for sale within this facility.

It is suspected [\*\*5] that the drugs may have been entering the facility through the use of church trips. Confederates may have met clients at church to pass drugs or money. Also, it is suspected that gang activity in the form of meetings

on the male floor and the use of gang hand signals have involved the above-named client.

Although we have been unable to obtain physical evidence, we have received information from residents that clearly implicates this individual in an organized attempt to sell drugs in this facility.

Following his discharge, Torres was returned to the court for further proceedings. At the outset of the proceedings, counsel for Torres addressed the court as follows:

[COUNSEL]: Judge, for the record, my client is, again, he had pled guilty and was given his plea wherein if he completed the Phoenix Drug House program, to which he was assigned, he would be allowed to complete that program and that if he completed it successfully, he would be allowed to withdraw his felony plea and receive a plea with a misdemeanor and time served.

I realize there has been a communication to the Court. I've seen a copy of it indicating that my client was discharged from Phoenix [\*\*6] House and making an accusation that he was involved with other people in trying to bring drugs into the facility. My client denies that. He's asked me to state that he never was a participant with anyone else in trying to bring drugs into the facilities, and he [\*66] has tested clear all times and he would like an opportunity to complete a drug program and complete all the conditions of the plea.

The court responded as follows:

THE COURT: The application is denied. The report has convinced me that he violated the conditions I set down, very seriously. You have an exception for the record.

Later, there was this exchange between counsel and the court:

[COUNSEL]: Judge, the Defendant is again giving me [a] copy of the notification, that he received a client discharge

form from Phoenix House, and that he says he requested a review which he was never given.

THE COURT: I'm still prepared to sentence him. Phoenix House has indicated they don't want him. Let's proceed, please.

After a further exchange during the proceedings, counsel again advised the court of Torres' adamant assertion that he did not bring drugs into Phoenix House, [\*\*7] and of Torres' request that he have "some sort of hearing, evidentiary hearing on this issue." The court responded to that request as follows:

THE COURT: I decline to do so. I received a communication, as you know, you were given it as soon as I received it, indicating that Phoenix House had had people overhear him plotting with other people to bring drugs into the facility. I'm not going to try that case because Phoenix House, in my opinion, generally gives me accurate reports, and most of the time, they want to keep a client, not let a client go. I'm prepared to sentence your client. I deny any further applications to be given.

Torres then personally requested the opportunity to speak, which the court granted. The following is a transcript of Torres' unsworn statement to the court:

THE DEFENDANT: Yeah. When I went, a lot of people, which is usually people that I know was upstate with me before, one of them, which I don't know, who supposedly got caught with drugs or gave drugs to somebody, now, it's the people I talk to almost every day when I have a cigarette break. When that happened, they took my unit twice and searched me and saying, that's [\*\*8] my people, that I screw around, but I say that I don't know what happened. They still threw me out due to the fact that I associate with them, that I say what's up to them, and I say hello to them, when we used to go down for a cigarette smoke. In other words, they also told me, I will have a review with the director, but they are stating that they just threw me out for associating with them. It was really, I don't know who or what really happened.

The court immediately proceeded with sentencing after Torres' statement as follows:

THE COURT: Okay. Based upon everything I know about the case, based upon the recent communication and writing that I received from Phoenix House, Defendant is sentenced to a minimum term, which I promised him if he did not successfully complete the program, four and a half to nine years, and I am imposing the statutory surcharge.

On appeal to the Appellate Division, First Department, Torres' judgment of conviction and sentence was affirmed. The Appellate Division reasoned as follows:

The court promised that it would impose a more lenient disposition in the event that [Torres] successfully completed a drug program. [\*\*9] [Torres] was expelled from the drug program. Before imposing [\*\*67] sentence, the court conducted an inquiry to determine whether or not there was any legitimate basis for defendant's exclusion from the drug program, and satisfied itself that the report of [Torres'] misconduct in the program was reliable and accurate. Hence, the court properly sentenced [Torres] on the felony.

*People v. Torres*, 277 A.D.2d 12, 12, 715 N.Y.S.2d 59 (1st Dep't 2000) (mem.) (citations omitted). Leave to appeal to the New York Court of Appeals was denied. See *People v. Torres*, 96 N.Y.2d 764, 725 N.Y.S.2d 290, 748 N.E.2d 1086 (2001).

In his petition for a writ of habeas corpus dated May 29, 2001, Torres alleged that his due process rights were violated because he was denied an evidentiary hearing in connection with his discharge from Phoenix House. He asserted that he was "ejected from the treatment program on the basis of uncorroborated and unsubstantiated double-hearsay allegations from unnamed sources" and that "the ejection was conducted without an internal review hearing and in violation of the treatment program's internal policies." His due process challenge [\*\*10] was grounded in his claim that "no evidentiary hearing of any kind was conducted by the sentencing court to evaluate the allegation, even though I requested and was not given a hearing at the treatment center, and I was not permitted to challenge the evidence or cross-examine any witness."

In an unpublished, eleven-page opinion and order dated May 31, 2002, the District Court denied Torres'

petition for relief under the provisions of 28 U.S.C. § 2254. The District Court concluded that the state court's decision was "not contrary to 'clearly established Federal law, as determined by the Supreme Court of the United States.'" *Torres*, 2002 U.S. Dist. LEXIS 10041, 2002 WL 1218276, at \*4. In support of that conclusion, the District Court reasoned as follows:

The sentencing judge had a report from a reliable institution to which the courts regularly send defendants for treatment, that Petitioner had been involved in bringing drugs into the institution. While the institution's conclusion was based on information from unnamed, recently admitted residents, there was no reason to believe that the institution did not have an adequate basis to believe their statements. [\*\*11] Had the court ordered a hearing, the institution would no doubt have resisted disclosing the identities of those who provided information in confidence. Thus, it is likely that the record at the close of the hearing would have been no different than it was at the time of sentencing, with the petitioner denying the charge, and Phoenix House staff persuaded that the charges were true and stating that they would not re-admit the Petitioner.

*Id.* A certificate of appealability was issued by the District Court, and Torres filed a timely notice of appeal.

## DISCUSSION

### I. Standards for Habeas Corpus Review of State Convictions: The Statutory Scheme Examined.

[HN1] We review *de novo* a district court's denial of a writ of habeas corpus to a person in custody pursuant to a state court judgment. *Loliscio v. Goord*, 263 F.3d 178, 184 (2d Cir. 2001). The standard for review by a district court in the first instance has been established by an Act of Congress, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), as codified in 28 U.S.C. § 2254(d). The statute provides as follows:

[HN2]

An application for a writ [\*\*12] of habeas corpus on behalf of a person in custody pursuant to the judgment of a State [\*\*68] court shall not be granted with respect to any claim that was adjudi-

cated on the merits in State court proceedings unless the adjudication of the claim --

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

[HN3] The deferential review of state court judgments established by the statutory scheme is dependent on the federal claim having been "adjudicated on the merits" by the state court. If there is no such adjudication, the deferential standard does not apply, and "we apply the pre-AEDPA standards, and review *de novo* the state court disposition of the petitioner's federal constitutional claims." *Aparicio v. Artuz*, 269 F.3d 78, 93 (2d Cir. 2001). A petitioner's federal constitutional claim is adjudicated on the merits in state court [\*\*13] when the state court disposes of the claim on the merits and reduces its disposition to judgment. See *Norde v. Keane*, 294 F.3d 401, 410 (2d Cir. 2002). The issue of whether the claim has been disposed of on the merits by a state court includes an inquiry into: "(1) what the state courts have done in similar cases; (2) whether the history of the case suggests that the state court was aware of any ground for not adjudicating the case on the merits; and (3) whether the state court's opinion suggests reliance upon procedural grounds rather than a determination on the merits." *Sellan v. Kuhlman*, 261 F.3d 303, 314 (2d Cir. 2001) (internal quotation marks omitted).

### II. The Appropriate Standard of Review in this Case: The Unreasonable Application Rule Described.

There is no question that the issue before us was "adjudicated on the merits" in the state courts. The Appellate Division concluded that the inquiry conducted by the state trial court revealed an adequate basis for the expulsion of Torres from the drug program, specifically determining that the trial court had properly satisfied itself that the report of Torres' conduct at Phoenix House "was [\*\*14] reliable and accurate." *Torres*, 277 A.D.2d at 12. The Appellate Division effectively decided that there was no violation of Torres' right to constitutional due process and sentencing when it held that the trial court "properly sentenced [Torres] on the felony." *Id.* Accordingly, we are constrained to conduct our review under the deferential standard established by the AEDPA.

[HN4] With respect to the elements of AEDPA deferential review set forth in § 2254(d)(1), a state court's decision is "contrary to" clearly established Supreme Court precedent if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000); see also *Eze v. Senkowski*, 321 F.3d 110, 123 (2d Cir. 2003). And an "unreasonable application" of "clearly established" Supreme Court precedent occurs when a state court "identifies the correct governing legal principle from [the Supreme] Court's decisions but [\*15] unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413. "Although it is clear that the question is [\*69] 'whether the state court's application of clearly established federal law was objectively unreasonable,' the precise method for distinguishing 'objectively unreasonable' decisions from merely erroneous ones is less clear." *Cotto v. Herbert*, 331 F.3d 217, 248 (2d Cir. 2003) (citation omitted). "However, it is well-established in [this C]ircuit that the 'objectively unreasonable' standard of § 2254(d)(1) means that petitioner must identify some increment of incorrectness beyond error in order to obtain habeas relief." *Id.* (internal quotation marks omitted).

### III. Due Process in the Sentencing Context: Supreme Court Precedent Identified.

[HN5] The Supreme Court has clearly spoken on the question of the standard of proof of facts in sentencing in relation to the constitutional requirement of due process, holding that the preponderance of evidence standard satisfies the requirement. See *McMillan v. Pennsylvania*, 477 U.S. 79, 91, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986) ("Like the [state] [\*16] court below, we have little difficulty concluding that in this case the preponderance standard satisfies due process."); see also *United States v. Watts*, 519 U.S. 148, 156, 136 L. Ed. 2d 554, 117 S. Ct. 633 (1997) (noting, in connection with the approval of standard under Federal

Sentencing Guidelines, that the Court has "held that application of the preponderance standard at sentencing generally satisfies due process"). [HN6] The Supreme Court also has clearly spoken on the question of the process due one who is alleged to have "failed to abide by the rules" governing his parole. See *Morrissey v. Brewer*, 408 U.S. 471, 479, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972). The determination to resentence for the breach of a condition of a sentence is analogous to the determination to revoke the parole of a parolee for failure to comply with the conditions of parole. It is also analogous to the determination to impose a sentence for violation of the terms of probation. All these determinations

should be informed by the same considerations. For parole revocation, an opportunity for a hearing must be provided. According to the Supreme Court,

this hearing [\*17] must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation. The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation.

*Id.* at 488.

[HN7] In order to justify the further punishment generated by parole revocation, the following "minimum requirements of due process" must be filled:

(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [\*18] parole.

*Id.* at 489. The inquiry is said to be a "narrow" one, and "the process should be flexible enough to consider evidence, including letters, affidavits, and [\*70] other material that would not be admissible in an adversary criminal trial." *Id.*

[HN8] We have previously reviewed Supreme Court teaching to arrive at the conclusion that, although due process considerations are implicated in sentencing generally, not all the evidentiary limitations and procedural



safeguards are required in the conduct of a sentencing proceeding. See *United States v. Fatico*, 579 F.2d 707, 711 (2d Cir. 1978). We have gone so far as to hold "that Due Process does not prevent use in sentencing of out-of-court declarations by an unidentified informant where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means." *Id.* at 713 (footnote omitted).

#### IV. *Torres' Second Sentence: The Process Analyzed and Evaluated.*

Torres actually was sentenced a second time under the peculiar procedure followed by the state trial court. Originally, his plea to a felony drug count was accepted by the court, and [\*\*19] he was remanded to a drug rehabilitation program. Successful completion of the program, he was told, would result in his return to the court for a plea to a misdemeanor, apparently in replacement of the felony conviction, and a sentence to "time served" in the rehabilitation program. When Torres was returned to the trial court for further proceedings, however, it was not for a misdemeanor plea, but for a sentence of four-and-a-half-to-nine years. The felony sentence imposed was the sentence promised if Torres did not "work out" in the Phoenix House program. In imposing the sentence, the trial court relied only on its review of the letter from Phoenix House, and, after he had requested and received permission to be heard, on Torres' brief unsworn statement to the court that he was innocent of the alleged wrongdoing. Due process standards clearly established by the Supreme Court were thereby ignored.

In rejecting Torres' unsworn statement and relying on the report from Phoenix House, the trial court noted that it was convinced by the report that Torres had "violated the conditions" the court had set down "very seriously." An examination of the report that formed the entire basis for [\*\*20] the court's determination reveals that double and triple hearsay informed the decision of Phoenix House to discharge Torres from the program for attempting to sell drugs at the facility. According to the report, certain residents of the facility overheard conversations in Spanish between Torres and others "claiming that they *could* make illicit drugs available for sale" within the facility. (emphasis supplied) The report recites that "it is *suspected* that drugs *may* have been entering the facility through the use of church trips," and that "confederates *may* have met clients at church to pass drugs or money." (emphasis supplied) These speculative statements obviously do not implicate Torres in any way.

There is one statement in the report that does implicate Torres: "It is *suspected* that gang activity in the form of meetings on the male floor and the use of gang hand signals have involved [Torres]." (emphasis supplied) This statement does not even implicate Torres directly in

drug dealing at the facility. It is only the concluding sentence of the Report that mentions Torres in connection with drug dealing at the facility. According to the concluding sentence, [\*\*21] information received from (unnamed) residents "clearly implicates" Torres "in an organized attempt to sell drugs in this facility." That statement is qualified by the statement: "We have been unable to obtain physical evidence."

[\*71] In affirming Torres' felony sentence, the Appellate Division recognized the due process implications of the procedure in the trial court, finding that the trial court properly relied on a report of misconduct that was "reliable and accurate." 277 A.D.2d at 12. The Appellate Division therefore recognized the Supreme Court's due process jurisprudence relating to sentencing but applied it to the facts of this case in an objectively unreasonable manner. See *Wiggins v. Smith*, 156 L. Ed. 2d 471, 123 S. Ct. 2527, 2538-39 (2003); see also *Woodford v. Visciotti*, 537 U.S. 19, 24-25, 154 L. Ed. 2d 279, 123 S. Ct. 357 (2002) (per curiam).

In the first place, it cannot be said that the required preponderance of the evidence standard in sentencing can be met with only a report of the type furnished by Phoenix House. As has been demonstrated, [HN9] due process in sentencing requires at least a showing by a preponderance of evidence [\*\*22] to resolve disputed factual issues. While it is true, as the learned district judge noted, that *Morrissey v. Brewer* permitted the use of "material that would not be admissible in an adversary criminal trial," 408 U.S. at 489, a single report replete with multiple levels of hearsay and speculation cannot be said to suffice to make a showing by a preponderance of the evidence, even under the "flexible" standard that is permitted. And, while *Morrissey* involves standards for parole revocation, it is not a great extension to apply its principles to the breach-of-condition-of-sentence case before us. See *Kennaugh v. Miller*, 289 F.3d 36, 44-45 (2d Cir.), cert. denied, 537 U.S. 909, 154 L. Ed. 2d 187, 123 S. Ct. 251 (2002).

[HN10] Due process has clearly been held to require "some kind of hearing" before a person is deprived of a liberty interest. See *Wolff v. McDonnell*, 418 U.S. 539, 558, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974) (In the context of deprivation of good time prison credits for serious misconduct, "the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process [\*\*23] appropriate for the circumstances must be observed."). The teachings of the Supreme Court have been effectively ignored in the case of Torres. He was not afforded the opportunity to testify under oath, and no witness from Phoenix House testified as to the reliability of those who furnished the information of Torres' wrongdoing. The district judge opined that the institution "no doubt" would have resisted

disclosure of the names of those who furnished the information. We cannot say that this is so, and we certainly cannot say that a witness familiar with the administration of Phoenix House could not or would not have furnished some basis for determination of the informants' reliability. A Phoenix House representative could have testified in this regard.

The District Court also opined that "there was no reason to believe" that Phoenix House did "not have an adequate basis to believe" the informants' statements. The problem with that analysis is that there was no explanation of the basis for the beliefs of Phoenix House other than vague references to information furnished by informants. Had the informants furnished reliable information in the past? Did they have any axes to grind? Were [\*\*24] they promised any rewards for informing? Torres said he was discharged from the program merely for associating with certain other inmates during "cigarette breaks." His "hearing" did not even include his own sworn testimony in the trial court and he therefore was not available for cross examination regarding his contentions. As a matter of fact, he was not even given a review by Phoenix House prior to his discharge despite the fact that he requested a review by the Program [\*\*72] Director by checking the space provided for such a request on his Client Discharge Form.

[HN11] While it is true that the Supreme Court in *Williams v. New York*, 337 U.S. 241, 252 n.18, 93 L. Ed. 1337, 69 S. Ct. 1079 (1949), "held that it was not a denial of due process in sentencing to rely on information supplied by witnesses whom the accused could neither confront nor cross-examine," *Fatico*, 579 F.2d at 711, it is also true that "*Williams* does not hold that all hearsay information must be considered," *id.* at 712. In the federal sentencing context, we have held "that admission of an unidentified informant's *corroborated* declarations in a sentencing proceeding [\*\*25] where there is *good cause for not disclosing* his identity is not barred by the *Confrontation Clause*." *Id.* at 714 (emphasis supplied). In the case at bar, there was no corroboration of informant declarations and no showing of good cause for failure to disclose the identity of any informant who may have furnished information to Phoenix House regarding Torres.

We think that well-settled and clearly established Supreme Court due process jurisprudence or, at the very least, a reasonable extension of it, mandates a finding of denial of due process in Torres' sentencing. The following elements, unique to this case, compel the issuance of a writ of habeas corpus: total reliance by the trial court on a hearsay report that itself contains only uncorroborated statements of unnamed informants; omission of any finding by the trial court as to the reliability of the informants or as to reasons for the non-disclosure of their

identities; failure of the trial court to conduct some kind of hearing, including provision for the examination of Torres under oath; lack of preponderating evidence of Torres' wrongdoing; and the gross disparity between a sentence that would release [\*\*26] Torres to society on a plea to a misdemeanor charge after completion of the Phoenix House program and the four-and-a-half-to-nine-year felony sentence to state prison that he received for violating the original sentence condition.

## CONCLUSION

We direct that a writ of habeas corpus be issued releasing Torres from his present confinement unless the State provides him with a new sentencing hearing within ninety days.

**C**

People v. Joseph  
N.Y. Sup., 2004.

Supreme Court, Kings County, New York.  
PEOPLE of the State of New York

v.

Pierre JOSEPH, Defendant.  
Sept. 22, 2004.

**Background:** Hearing was brought to impose enhanced sentence against defendant for violating residential drug treatment condition in plea agreement after defendant was discharged from residential treatment program.

**Holding:** The Supreme Court, Kings County, Joseph E. Gubbay, J., held that due process was satisfied in resentencing based on defendant's expulsion from drug treatment facility.

Ordered accordingly.

West Headnotes

**[1] Constitutional Law 92 4725**

92 Constitutional Law

92XXVII Due Process

92XXVII(H) Criminal Law

92XXVII(H)6 Judgment and Sentence

92k4724 Resentencing

92k4725 k. In General. Most Cited

Cases

(Formerly 92k270(1))

**Sentencing and Punishment 350H 2094**

350H Sentencing and Punishment

350HX Alternative Dispositions

350HX(E) Termination

350Hk2094 k. Effect of Termination. Most

Cited Cases

Due process was satisfied in resentencing of burglary defendant based on his expulsion from drug treatment facility for assault on co-resident; four written reports and one oral report were offered outlining facility's investigation of assault which included victims names and nature of injuries, defendant was given opportunity to provide sworn testimony at hearing,

defendant and his counsel were provided opportunity to dispute evidence, and preponderance of evidence supported charge that defendant assaulted co-resident. U.S.C.A. Const. Amend. 14.

**[2] Constitutional Law 92 4705**

92 Constitutional Law

92XXVII Due Process

92XXVII(H) Criminal Law

92XXVII(H)6 Judgment and Sentence

92k4704 Matters Considered in

Sentencing

92k4705 k. In General. Most Cited

Cases

(Formerly 92k270(2))

As a matter of due process, an offender may not be sentenced on the basis of materially untrue assumptions or misinformation; rather, to comply with due process the sentencing Court must assure itself that the information upon which it bases the sentence is reliable and accurate. U.S.C.A. Const. Amend. 14.

**\*\*292 \*517** Spencer Leeds, for defendant.

Charles J. Hynes, District Attorney (Jonathan Laskin of counsel), for plaintiff.

**JOSEPH E. GUBBAY, J.**

[1] **\*518** Defendant entered into a conditional plea of guilty whereby he agreed to comply with a period of residential drug treatment. If the defendant complied with treatment, the defendant would receive a sentence of probation. In the alternative, if he failed, he would be sentenced to six years state prison. Defendant was discharged from residential treatment for allegedly assaulting a co-resident in connection with a gang-related initiation rite. This case requires the court to consider the level of due process the defendant is entitled to in determining whether the defendant has failed to comply with the conditions of his plea. The court's opinion is guided by the United States Court of Appeals, Second Circuit decision Torres v. Barbary, 340 F.3d 63 (2003), which sets forth the federal due process parameters in this context. The impact of Torres can **\*\*293** not be minimized given the existence of nine drug treatment courts in New York City alone, and the fact that each of these courts routinely confronts the issue at the heart of Torres: what *quantum* and *character* of evidence must a court consider to determine whether

a defendant was justifiably discharged by a treatment provider.<sup>FN1</sup>

FN1. In Kings County there are three drug treatment courts, Brooklyn Treatment Court, The Screening Treatment and Enhancement Part (STEP), and Misdemeanor Brooklyn Treatment Court; in Manhattan there are two such courts, Manhattan Treatment Court and Manhattan Misdemeanor Treatment Court; in Queens there are two drug treatment courts, the Queens Treatment Court and the Queens Misdemeanor Treatment Court; the Bronx and Staten Island each have a treatment court, the Bronx Treatment Court and the Staten Island Treatment Court, respectively.

Defendant asserts that he is entitled to the broadest hearing, that due process requires the calling of witnesses and the right to cross examine. The People oppose, arguing that there is sufficient evidence before the court for it to find that the defendant was justifiably discharged from the treatment program based on the alleged conduct.

Based on the reasoning below, the court concludes that any defendant who disputes the factual basis of termination from a residential treatment program, and where continued treatment is no longer offered by either the court or the People, if imposition of the jail alternative is based solely on this discharge and the underlying facts which led to the discharge, such defendant is entitled to a hearing, if requested, before the jail alternative may be imposed.<sup>FN2</sup> The court, however, is not bound to convene a hearing of the breadth sought by the defendant in the instant case, so long as there is a preponderance of trustworthy, reliable,\*519 and accurate evidence for the court to resolve the disputed facts.

FN2. The court's holding does not contemplate the case of a defendant who is discharged based on conduct which resulted in an arrest. In that event, the New York Court of Appeals decision in *People v. Outley*, 80 N.Y.2d 702, 594 N.Y.S.2d 683, 610 N.E.2d 356 (1993), would control.

#### *Factual Background*

On February 3, 2003, the defendant pled guilty to one count of burglary in the second degree [P.L.

140.25(2) ], a C felony, and one count of petit larceny [P.L. 155.25], an A misdemeanor, in satisfaction of the pending indictment.<sup>FN3</sup> Defendant admitted that he entered a private dwelling without permission or authority and stole money. Defendant's plea was predicated on the following conditions: that if he complied with residential drug treatment, his felony plea would be vacated and dismissed and he would be sentenced to a period of three years probation on the misdemeanor conviction. Defendant was advised that his plea was conditioned on his "cooperating with [the] residential program" where he would be placed. Defendant was further advised that if he did not complete the program he would be sentenced to a state prison alternative of six years. The defendant indicated that he understood and accepted the terms of the plea (T. pgs. 5-7). On March 19, 2003, defendant was released from custody and placed in a residential treatment facility, Phoenix House. He remained overall compliant with the treatment mandate until February 15, 2004.

FN3. The indictment charged the defendant and his co-defendant with nine counts, including 3 separate counts of burglary in the second degree. Defendant pled guilty to one of these counts.

On February 17, 2004, the court was notified by the court appointed monitor, Treatment Alternatives to Street Crime ("TASC"), that the defendant was discharged\*\*294 from Phoenix House. In a letter provided to the court dated February 17, 2004, addressed to TASC, the Managing Director of the Phoenix House facility where the defendant was placed reported,

"On February 15, 2004, Mr. Joseph was identified as being part of a group who took part in a gang initiation ritual. The initiation rite involved physical violence which is grounds for discharge. It was reported that Mr. Joseph is alleged to be a member of the, "Crypts" [sic ] and one of the individual's who carried out the initiation. Consequently, he was discharged from Phoenix Academy."

On February 18, 2004, the defendant, with counsel present, appeared in court and was remanded. The case was calendared \*520 for the following day for the People to provide the court with more facts.

On February 19, 2004, the defendant was present and represented by counsel. The People, based on discussions with TASC and staff from the facility

where the incident occurred, related that on the date of the incident the defendant was in the program's auditorium rehearsing for a cultural event. The auditorium is located on the first floor of the facility. The assault took place on the floor below the auditorium. Defendant was seen in the auditorium between the hours of 7:00 p.m. and 11:00 p.m. by a staff member whose name was provided in open court. The incident occurred between the hours of 8:00 p.m. and 9:00 p.m. The People described the rehearsal as a "fluid situation" where skits were rehearsed and "people would come and go." The People added that the victims of the assault were also members of the identified gang, but not members of the "local chapter." The defendant was known to the victim by his street name identified in court. He lived in the same unit in the facility as the victim. The two victims were beaten one at a time. The People had spoken with the named individual who conducted the investigation (the program's Deputy Director for Adolescents), who had interviewed both victims. The victims named the defendant as one of the initiators and named him by his street name. A corporeal identification proceeding ensued and the defendant was identified. (T. pgs. 2-6.)

The defendant was given an opportunity to make a sworn statement to the court. He denied his participation in the gang initiation and stated that during the assault he was participating in another activity at the facility and that this could be verified by the same staff member identified by the People. (T. pgs. 7-10.) The defendant never denied his gang affiliation or the street name by which he was known.

In response to the defendant's statement, the People cited a second letter, submitted to the court and dated February 19, 2004, addressed to TASC, written by the Managing Director of the facility, "This letter serves as a follow up to our review of Mr. Joseph's reported involvement in the gang initiation ritual that took place here on February 15, 2004. Mr. Joseph insisted that, at the time of the beating, he was participating in a community activity. He adds that the activity was overseen by a facility staff member. When asked to corroborate Mr. \*521 Joseph's alibi, the staff member stated that Mr. Joseph was seen at the activity but she could not account for his presence for the full period. Nevertheless, Mr. Joseph was identified as one of the gang initiators by the two victims."

In a letter dated March 16, 2004, written to TASC, the Vice President and Deputy Regional Director for

the program advocated for the defendant's reinstatement to the program given the defendant's repeated petitions to return, and the director's\*\*295 belief in the defendant's commitment to treatment. This endorsement was based on the defendant's compliance with a call-in schedule set by the director, and because in the director's own words, "He also seems genuine in renouncing gang affiliation and helping the Phoenix community deal with the gang issue."

On May 13, 2004, after meeting with the People and counsel for defendant, the court corresponded with the facility's Managing Director seeking more specific facts concerning the incident, including the identities of the victims and any witnesses, as well as the details of their personal observations.<sup>FN4</sup> A response was received dated June 7, 2004. It states in relevant part,

FN4. The instant court was assigned to the case April, 2004.

"As you requested, I conducted a thorough review of Mr. Pierre Joseph's discharge from the Phoenix Academy. The discharge was based on reports from two residents one of whom identifies Mr. Joseph as his attacker in what was later described as an [sic] gang initiation ritual. The reporting resident stated that he had no desire to be gang initiated. Adding, he proceeded to the area where the incident took place believing that a legitimate facility function was happening. At the time of this incident, both of the residents were relatively new to the program and believed they were following the directions of responsible peers."

The letter continues to describe the same alibi offered by the defendant and concludes, "Mr. Joseph was observed by a staff member participating in the rehearsal but, could not account for his presence during the entire activity."

\*522 Despite the court's request for *in camera* review, the identities of the witnesses were not revealed.<sup>FN5</sup>

FN5. To comply with federal regulations, the program would not disclose the full names of the victims. See, 42 U.S.C. 290dd-2, 42 C.F.R. Part 2.

In so far as the program's reply was not fully responsive, a follow-up request for further

information, dated June 21, 2004, was made on the court's behalf by the Citywide Drug Treatment Court Coordinator to the Phoenix House Assistant General Counsel. A response dated June 30, 2004, was received from the Director of Clinical Services. The response identified, by full name, the two staff members who investigated the incident. Further, the two victims were named by first name and last initial. Unredacted copies were provided to the People and the defendant. The letter states in pertinent part, "The victims [first name last initial of both victims in original], were interviewed separately by [names of both investigators in original] respectively on the day of the incident.

On the day of the incident, [victim No. 2] first identified Mr. Pierre Joseph from a list of suspects and then identified him in person. [Victim # 2] stated the he was a former Crips and wanted to disaffiliate himself. He adds that for several weeks he was being pressured to renew his participation. He proposed the reason for his attack was based on his position not to be gang affiliated.

Both victims sustained injuries but, neither required medical attention. Both interviewing counselors observed the following injuries: [victim # 1] had scratches on his neck and upper body, and [victim # 2] had facial and neck bruises and was given an ice pack for the facial swelling. No photographs were taken of the victims. Neither victim wished to press charges so a police report was not filed.

**\*\*296** The incident was reported to the appropriate criminal justice agencies on the day of the incident. Upon conclusion of the staff's investigation, two days after the incident occurred, it was decided that all clients identified as attackers were to be discharged."

*Torres v. Barbary*

In *Torres v. Barbary*, 340 F.3d 63 (2nd Cir.2003), defendant sought *habeas* relief in the United States Court of Appeals for **\*523** the Second Circuit. The *Torres* court held that the trial court erred in relying on a single written report, which the Court of Appeals found to be fundamentally untrustworthy, in determining that the defendant had violated the plea agreement and was subject to the prison alternative. The *Torres* court ruled that federal due process in sentencing "requires at least a showing by a preponderance of evidence to resolve disputed factual issues," a standard not afforded by the trial court (*id.* at 71).

[2] Due process is implicated in sentencing because a

defendant's right to enforce his plea agreement is a fourteenth amendment liberty interest [U.S.C.A. Const.Amend. 14]. See *People v. Outley*, 80 N.Y.2d 702, 712, 594 N.Y.S.2d 683, 610 N.E.2d 356 (1993) and *Lopez v. Sanders*, 302 F.Supp.2d 241, 246 (S.D.N.Y.2004). "[A]s a matter of due process, an offender may not be sentenced on the basis of 'materially untrue' assumptions or 'misinformation' (*People v. Naranjo*, 89 N.Y.2d 1047, 1049, 659 N.Y.S.2d 826, 681 N.E.2d 1272, citing *United States v. Pugliese*, 805 F.2d 1117, 1123 [2nd Cir.1986], quoting *Townsend v. Burke*, 334 U.S. 736, 741, 68 S.Ct. 1252, 92 L.Ed. 1690 [1948] ). "Rather, 'to comply with due process ... the sentencing Court must assure itself that the information upon which it bases the sentence is reliable and accurate' " (*People v. Naranjo, id.*, at 1049, 659 N.Y.S.2d 826, 681 N.E.2d 1272 quoting *People v. Outley*, 80 N.Y.2d 702, 712, 594 N.Y.S.2d 683, 610 N.E.2d 356 [1993] ).

*Torres* involved a defendant who was allowed to enter drug treatment after pleading guilty to criminal sale of a controlled substance in the third degree, a B Felony. Less than a month after his placement, the defendant was discharged from the program for his involvement in a plan to sell drugs at the treatment facility and his participation in gang meetings. In determining that the defendant's discharge was justified, the trial court relied exclusively upon a single report from the program. The report contained references to overheard conversations in Spanish between the defendant and other residents. There was no physical evidence connecting the defendant to the alleged drug sales, and the only evidence directly implicating him were allegations that he had engaged in the use of gang-related hand signals. The sources of the information were unnamed informants. There was no evidence of corroboration within the body of the report, nor was any subsequently provided. On the basis of this report, and despite the defendant's request for "some sort of hearing, evidentiary hearing on this issue," the trial court determined that defendant breached a condition of his plea and sentenced him to four-and-a-half-to-nine years (*Torres*, 340 F.3d at 66).

In overturning the sentence, the Court of Appeals examined the report upon which the trial court based its determination. It **\*524** noted that double and triple hearsay informed the decision of the treatment provider to discharge Torres from the program (*emphasis supplied* ). The Court of Appeals was specifically concerned about the speculative nature of the accusations leveled at Torres, which did not

specifically implicate him in any way with respect to \*\*297 the drug sales (*Torres*, 340 F.3d at 70). The *Torres* court observed,

"In the first place, it cannot be said that the required preponderance of the evidence standard in sentencing can be met with only a report of the type furnished by Phoenix House. As has been demonstrated, due process in sentencing requires at least a showing by a preponderance of evidence to resolve disputed factual issues. While it is true, as the learned district judge noted, that *Morrissey v. Brewer* permitted the use of 'material that would not be admissible in an adversary criminal trial,' 408 U.S. at 489, 92 S.Ct. 2593 [33 L.Ed.2d 484], a single report replete with multiple levels of hearsay and speculation cannot be said to suffice to make a showing by a preponderance of the evidence, even under the 'flexible' standard that is permitted." *Torres*, *id.* at 71.<sup>FN6</sup>

FN6. The "flexible" standard cited by the court refers to the United States Supreme Court decision in *Morrissey v. Brewer*, which set forth the due process requirements in the context of a parole revocation proceeding, "the process should be flexible enough to consider evidence, including letters, affidavits, and other material that would not be admissible in an adversary criminal trial" (*Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484).

In *Torres*, the court stated that the standard of proof to resolve disputed facts in sentencing is a preponderance of the evidence. It did not, however, hold that this standard can only be met by holding an evidentiary hearing which includes the calling of witnesses subject to cross examination. Rather, so long as the court is provided with sufficient information which it determines is reliable and trustworthy, and that evidence reaches the threshold of a preponderance to resolve the disputed facts, then due process has been satisfied. A defendant's compliance with the condition that he successfully complete a drug treatment program "can be readily established based upon factual information provided to the court ... provided that the court has assured itself that the factual information justifying its departure from the negotiated sentence is reliable and accurate" (*People v. Parker*, 271 A.D.2d 63, 711 N.Y.S.2d 656 [4th Dept.2000]).

The *Torres* court set forth 5 elements, "unique" to the case, which compelled it to grant the writ of *habeas*

*corpus*:

\*525 "[1] total reliance by the trial court on a hearsay report that itself contains only uncorroborated statements of unnamed informants; [2] omission of any finding by the trial court as to the reliability of the informants or as to reasons for the non-disclosure of their identities, [3] failure of the trial court to conduct some kind of hearing, including provision for the examination of Torres under oath, [4] lack of preponderating evidence of Torres' wrongdoing; and [5] the gross disparity between a sentence that would release Torres to society on a plea to a misdemeanor charge after completion of the Phoenix House program and the four-and-a-half-to-nine-year felony sentence to state prison that he received for violating the original sentence condition" (*Torres*, 340 F.3d at 72).

#### *Findings of Fact and Law*

In the instant case the initial information received from the treatment provider regarding defendant's discharge was conclusory and uncorroborated. This court, guided by *Torres*, insisted that the treatment provider provide it with as many facts as possible, including the identities of the witnesses and investigators, the nature of the injuries and the defendant's role in inflicting those injuries, as well as any evidence which could corroborate the allegations.\*\*298 The evidence ultimately presented to the court, taken in its entirety, satisfies the due process requirements set forth in *Torres*.

It is a sad and unfortunate reality that many defendants in residential treatment are unable to comply with the strict mandates required of living in a therapeutic community. It is not an uncommon occurrence for such defendants to be discharged by the facility. After an evaluation of the circumstances of discharge, in many cases, defendants are given a second chance either at the original program or in a new placement. It is a probability that the defendant's initial discharge is considered prejudicial, and that should he be given a second chance, it is in all likelihood his last chance.

To require a full blown evidentiary hearing each time a defendant is discharged from a residential treatment program would place an undue and onerous burden on the court. If such a hearing was convened, how broad should the inquiry reach? Would residents be required to testify? If so, the court would have to take precautions to protect their identities in

compliance with federal confidentiality requirements, and in certain circumstances,\*526 it may have to provide them with counsel.<sup>FN7</sup> Will treatment counselors have to testify, disrupting the provision of services to others in need, in order to travel, frequently from outlying jurisdictions? Further, the amount of the court's time that would be consumed by such litigation would have a debilitating effect on its ability to adequately and efficiently hear all the cases on its already congested docket.

FN7. 42 U.S.C.A. 290dd-2.

Each of the five elements outlined by the *Torres* court, as set forth above, is satisfied in the instant case.

#### *1) Reliance on Hearsay Reports*

Rather than relying on a single report which contains uncorroborated statements of unnamed informants, this court has considered the oral report of the People based on their interview of one of the investigating Phoenix House staff members as well as four separate written reports, the last of which, dated June 30, 2004, provided the names of the staff members who investigated the incident and described how the incident was brought to their attention. Further, it identified the names of the victims who were involved in the incident, the nature of the injuries they sustained, and the fact that these injuries were observed and thus corroborated by staff members. It also indicated that on the day of the incident one of the victims identified the defendant from a list of suspects and then identified him in person as one of the perpetrators of the attack.

Significantly, the *Torres* court had serious concerns whether there was a reliable basis for the treatment provider to have discharged Torres in that his discharge was based on double and triple hearsay. *See, Torres*, 340 F.3d at 70. In the instant case, a much more thorough internal investigation was conducted by Phoenix House. Each victim was interviewed separately on the date of the incident, and on that same date the defendant was identified as the perpetrator. The victims' visible injuries were treated and the defendant was confronted. The alibi which the defendant offered was investigated and found to be unconvincing. Based on the information of eyewitnesses, Phoenix House determined that discharge was appropriate.

#### *2) The Reliability of the Informants and the Disclosure of Their Identities*

Given the specificity of the details provided about the gang initiation, the injuries \*\*299 sustained by the victims which were verified\*527 by Phoenix House staff, and the victims' candid statements against penal interest as to their one time gang affiliation, the court finds that the informants are reliable. With respect to the identity of the informants, defendant was provided the names of the Phoenix House staff investigators and the defendant was identified as the perpetrator by the one of the victims in a face-to-face encounter and thus is aware of his accuser's identity.

#### *3) Defendant Was Given a Hearing of Sufficient Breadth*

As stated above, the court finds that when a defendant is discharged from a residential program and replacement in treatment is no longer being offered by either the People or the court, if imposition of the jail alternative is based solely on this discharge and the underlying facts which led to the discharge, then before the jail alternative may be imposed, if requested, a defendant is entitled to a hearing.<sup>FN8</sup> Such hearing does not necessarily require the calling of witnesses or an opportunity for the defendant to cross-examine. Rather, so long as the criteria of *Torres* and *Outley* are complied with, that there is sufficient reliable, trustworthy, and accurate evidence for the court to determine whether discharge was justified, based upon a preponderance of the evidence, due process is satisfied.

FN8. The court's holding incorporates the qualification set forth in footnote 2 above.

The court carefully reviewed the record in its entirety and the defendant was given an opportunity to provide sworn testimony. The court's review and detailed summary of the record in open court, the opportunity given to the defendant to provide sworn testimony, and the opportunity given for the defendant and his counsel to dispute the People's representations as well as the court's analysis of the record, constitutes a hearing of sufficient breadth to satisfy the due process requirements of *Torres* and is consistent with the New York State Court of Appeals holding in *Outley*.



5 Misc.3d 517  
 5 Misc.3d 517, 785 N.Y.S.2d 292, 2004 N.Y. Slip Op. 24354  
 (Cite as: 5 Misc.3d 517)

4) *Defendant Engaged In Alleged Wrongdoing Based on a Preponderance of the Evidence*

"The burden of showing something by a 'preponderance of the evidence' simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence ...' (Concrete Pipe and Products, Inc., 508 U.S. 602, 622, 113 S.Ct. 2264, 124 L.Ed.2d 539 [1993] quoting, In re Winship, 397 U.S. 358, 371-372, 90 S.Ct. 1068, 25 L.Ed.2d 368 [1970] ). The court finds that the information provided by Phoenix House, including\*528 the reports of the investigators and victims and the narrative of facts recited by the People, is reliable, trustworthy and accurate. The defendant's sworn testimony was considered and found not to be persuasive. A preponderance of the evidence plainly supports the charge that the defendant assaulted two co-residents in furtherance of a gang initiation rite.

5) *Disparity In Sentence*

When the defendant pled guilty to a violent felony, burglary in the second degree, he accepted a weighty bargain: comply with treatment and be sentenced to three years probation or fail and be sentenced to six years state prison. Typically this is the model followed in most felony drug treatment courts, liberty if one succeeds and extended state prison if one fails. The theory underlying the model is that a lengthy jail alternative has a coercive effect to ensure compliance with drug treatment. While it is true Phoenix House has offered to re-admit the defendant, the \*\*300 People are not willing to re-offer treatment based upon the circumstances of his discharge. Their position is that an individual who furthers gang activity, activity which has a lethal hold on some of Brooklyn's poorest and most vulnerable communities, is not deserving of a second chance at treatment. The court agrees. Insofar as the defendant has been afforded a hearing consistent with due process, sentencing may proceed.

N.Y.Sup.,2004.  
 People v. Joseph  
 5 Misc.3d 517, 785 N.Y.S.2d 292, 2004 N.Y. Slip Op. 24354

END OF DOCUMENT

NEW YORK STATE RECOMMENDED PRACTICES  
FOR DRUG TREATMENT COURTS  
STANDARDIZED FORMS

The following documents represent forms and judicial Orders typically used by New York State drug treatment court programs. Most of the recommended forms include a form template followed by a description of the purpose and suggested elements of each document.

**Assessment**

1. Universal Treatment Application Psychosocial Assessment FORM
2. Psychosocial Assessment
3. Short Assessment Tool FORM
4. Short Assessment Tool

**Treatment Referral**

5. HRA/DSS Referral Letter FORM
6. HRA/DSS Referral Letter
7. Social Security Number Verification FORM
8. Social Security Number Verification
9. Treatment Program Referral FORM
10. Medicaid Order FORM
11. Medicaid Order
12. Linkage Agreement and Memorandum of Understanding FORM
13. Linkage Agreement/Memorandum of Understanding – Information Exchange Requirements

**Drug Treatment Court Contract**

14. Drug Court Contract FORM
15. General Post Adjudication Contract FORM
16. General Post Adjudication Contract
17. Diversion Contract FORM
18. Contract – Diversion
19. Participant Handbook FORM
20. Participant Handbook Elements

**Participant Supervision**

21. Drug Court Treatment Progress FORM
22. Treatment Progress
23. Self Help Verification Journal FORM
24. Self Help Verification Journal
25. Declaration of Delinquency/Warrant Request FORM
26. Declaration of Delinquency/Warrant Request
27. Declaration of Delinquency and Bench Warrant Order FORM
28. Declaration of Delinquency and Bench Warrant Order

**Department of Correction**

29. Request for Documentation of Medical Care "Aftercare Letter" FORM
30. Request for Documentation of Medical Care "Aftercare Letter"
31. Request for Release of Inmate Property FORM
32. Request for Release of Inmate Property

**Date** \_\_\_\_\_ **Interview for** \_\_\_\_\_

---

**Demographics**

---

Last Name

First Name

Middle Initial

Gender ☐ male ☐ Female

Maiden Name

Is client known by a different name ?

AKA Last Name

AKA First Name

AKA Middle Initial

Referral Source

Does client speak another language?

Does the client require an interpreter? ☐ yes ☐ no

Interpreter Language

Ability to read English is:

Ability to write English is:

Date of Birth

Age

US citizen

US resident

Date of residency

Where were you born?

Social Security Number

Race/Ethnicity

Hispanic group

Marital Status

Sexual Preference

Where did assessment take place

---

**Identifications Reported**

---

Birth Certificate	yes	no
Do you have it with you?	<input type="checkbox"/>	
Social Security Card	yes	no
Do you have it with you?	<input type="checkbox"/>	
PA Card	yes	no
Do you have it with you?	<input type="checkbox"/>	
Medicaid Card	yes	no
Do you have it with you?	<input type="checkbox"/>	
Number	<input type="text"/>	
Benefits Card (Medicaid Card)	yes	no
Do you have it with you?	<input type="checkbox"/>	
Client ID number	<input type="text"/>	
Sequence Number	<input type="text"/>	
Insurance Company Number	<input type="text"/>	
Policy Number	<input type="text"/>	
Passport	yes	no
Do you have it with you?	<input type="checkbox"/>	
Passport Number	<input type="text"/>	
Country	<input type="text"/>	
Green Card	yes	no
Do you have it with you?	<input type="checkbox"/>	
Green card number	<input type="text"/>	
dd214	yes	no
Do you have it with you?	<input type="checkbox"/>	
Driver's License		
Do you have it with you?	<input type="checkbox"/>	
Number	<input type="text"/>	
State	<input type="text"/>	

Employment ID	yes	no
Do you have it with you?	<input type="checkbox"/>	
Employer		<input type="text"/>
HA Card	yes	no
Do you have it with you?	<input type="checkbox"/>	
Number		<input type="text"/>
Other	<input type="checkbox"/>	
Number		<input type="text"/>

---

**Living Arrangements**

---

Have you ever been homeless?	yes	no
Are you currently homeless?	yes	no
How long?		<input type="text"/>
Do you currently live in a shelter?		<input type="text"/>
Have you ever lived in a shelter?		<input type="text"/>

---

**Present Address**

---

Do you have a current address?	yes	no
Street Address		<input type="text"/>
Apartment number		<input type="text"/>
City		<input type="text"/>
State		<input type="text"/>
Zip		<input type="text"/>
Type of Residence		<input type="text"/>
Length of time at residence?		<input type="text"/>
Do you have a telephone	<input type="checkbox"/>	
Telephone number		<input type="text"/>
Cellular or Beeper Number		<input type="text"/>

---

**Contact at Present Address**

---

Last Name

First Name

Relationship

---

**Mailing Address**

---

Is there another mailing address?      yes      no

Street Address

Apartment

City

State

Zip

---

**Second Contact**

---

Do you have a second contact?      yes      no

First Name

Last Name

Street Address

Apartment

City

State

Zip

Does this contact have a phone?      yes      no

Telephone number

Relationship to client

---

**Education**

---

What is your current education status?

What type of school?

Highest grade completed

Have you received a high school diploma?      yes      no

Have you received a GED?      yes      no

Ever attended special education classes?      yes      no

Nature of the special education?

---

**Vocational Education**

---

Ever Attended vocational/technical courses?      yes      no

What courses?

Did you complete the courses?      yes      no

---

**Employment**

---

What is your current employment status?

How long unemployed?

Most recent employment?

When did that job end?

Employer's name

Employer's street address

Employer's city

Employer's state

Employer's zip

Employer's telephone number

Supervisor's name

Working hours

How long employed here?

Employment verified?      yes      no

Other professional trade or skill?

Have you ever been employed?      yes      no

Longest period employed at any job

Last earnings before taxes

---

**Financial Support**

---

What is your primary financial support?

Currently receiving government assistance?      yes      no

- ☐ Division of AIDS Services (DAS)
- ☐ Food stamps
- ☐ Home Relief
- ☐ Medicaid
- ☐ SSI/SSD
- ☐ Unemployment compensation
- ☐ Welfare, including AFDC, ADC, WEP
- ☐ WIC

How much assistance in the past year?

---

**Veteran Status**

---

Are you a veteran?

yes      no

What type of discharge?

Are you eligible for veteran's benefits?

yes      no

Currently receiving veterans benefits?

yes      no

Currently receiving veteran's services?

yes      no

Ever received veteran's services?

yes      no

---

**Home Environment**

---

With whom are you currently living?

How many adults live in this residence?

How long have you lived in this arrangement?

Has your spouse/partner or any of the people with whom you are living ever been incarcerated for 30 days or longer?

yes      no



yes      no

Spouse/partner ☐

Has your spouse/partner or any of the people with whom you are living ever been treated for a drug or alcohol problem?    yes    no

treated for a drug or alcohol problem?    yes    no

Spouse/partner ☐

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Have any of your friends or other family members (not living with you) ever been incarcerated for 30 days or longer?      yes      no

incarcerated for 30 days or longer?      yes      no

Children ☐

Father ☐

Foster parent ☐

Friends ☐

Grandparent ☐

Mother ☐

Other ☐

Other relatives ☐

Sibling ☐

Spouse/partner ☐

Is there anyone in you life who provides you with emotional support?      yes      no

Children ☐

Clergy ☐

Father ☐

Foster parent ☐

Friends ☐

Grandparent ☐

Mother ☐

Other ☐

Other relatives ☐

Sibling ☐

Spouse/partner ☐

## Children

How many biological or adopted children do you have under the age of 18?

How many non-biological children under the age of 18 live in your home?

Bio/Non	First Name	Last Name	Gender	DOB	Relationship

---

**Children**

---

Have you ever had an ACS/CPS worker?                      yes      no

Do you currently have an ACS/CPS worker?                      yes      no

First Name                     

Last Name                     

Telephone Number                     

What borough/county?                     

When was the case opened?                     

Have you ever had a case in Family Court?                      yes      no

How many cases do you currently have in Family Court?

Were you ever mandated to complete treatment?

Did you complete treatment?

Have your parental rights ever been terminated?

---

**Physical Health**

---

Seen a medical doctor within the past 2 years?                      yes      no

Type of medical insurance:

Name of HMO/Insurer:

Contact name:

Contact phone:

Have you ever been pregnant?                      yes      no

How many times have you been pregnant?

How many miscarriages have you had?

How many were born addicted to drugs/alcohol?

Are you currently pregnant?                      yes      no

What is your due date?

What are your intentions?

Have you been hospitalized for reasons other  
than pregnancy in the last five years?                      yes      no

Number of times:

Most recent hospital:

Most recent admission date:

Have you ever had a TB test? yes    no

Last TB test:

Was your last TB test positive? yes    no

Did you have a chest X-ray? ☐

Currently taking meds for physical condition? yes    no

Drug 1:

Dosage:

What for:

Drug 2:

Dosage:

What for:

Drug 3:

Dosage:

What for:

Drug 4:

Dosage:

What for:

---

### **Mental Health**

---

Ever felt or been told you were out of control at  
any time while NOT under the influence? yes    no

Number of times?

Have you ever set a fire? yes    no

Number of times

Have you ever considered harming yourself? yes    no

Number of times:

Most recent date:

Currently taking any meds for mental health reasons?      yes      no

Drug 1:

Dosage:

What for:

Drug 2:

Dosage:

What for:

Drug 3:

Dosage:

What for:

Drug 4:

Dosage:

What for:

---

**Suicide Risk - In the past month did you:**

---

- |  |     |    |
|--|-----|----|
| 1. Think you would be better off dead or wish you were dead? | yes | no |
| 2. Want to harm yourself?                                    | yes | no |
| 3. Think about suicide?                                      | yes | no |
| 4. Have a suicide plan?                                      | yes | no |
| 5. Attempt suicide?  | yes | no |
- 

**Suicide Risk - In your lifetime, did you ever:**

---

- |                     |     |    |
|---------------------|-----|----|
| 1. Attempt suicide? | yes | no |
|---------------------|-----|----|
- 

**Referral Decision Scale (RDS)**

---

1. Have you ever believed that people were watching  
or following you or spying on you?      yes      no
2. Have you ever believed that you were being poisoned  
or plotted against by others?      yes      no
3. Have you ever believed that someone could control your

mind by putting thoughts into your head or taking thoughts  
or taking thoughts out of your head?                      yes      no

4. Have you ever felt that other people knew your thoughts  
or could read your mind?                      yes      no

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**Major Depression**

---

1. Have you ever been consistently depressed or down, most  
of the day, nearly everyday for the past two weeks?      yes      no
2. In the past two weeks, have you been less interested in  
most things or less able to enjoy things you used  
to enjoy most of the time?                      yes      no

---

**Dysthymia**

---

1. Have you felt sad, low or depressed most of the time  
for the last two years?                      yes      no
2. Was this period interrupted by your feeling OK?                      yes      no

---

**Referrals**

---

Referral for MH Evaluation                      yes      no

---

**Manic Episode (Do not consider times when you were intoxicated)**

---

1. Have you ever had a period of time when you were feeling  
extremely happy or so full of energy or full of yourself  
that you got into trouble or that other people thought you  
were not your usual self?                      yes      no
2. Are you currently feeling extremely happy or full of energy?      yes      no
3. Have you ever been persistently irritable, for several days,  
so that you had arguments or verbal or physical fights,  
or shouted at people outside your family?                      yes      no
4. Have you or others noticed that you have been more irritable,

or over-reacted, compared to other people, even in  
situations that you felt were justified?

yes no

---

**Panic Disorder (Do not consider times when you were intoxicated)**

---

1. Have you, on more than one occasion, had spells or  
attacks when you suddenly felt anxious, frightened,  
uncomfortable or uneasy, even in situations where  
most people would not feel that way?

yes no

---

**Generalized Anxiety Disorder**

---

1. Have you ever worried excessively or felt uncomfortable  
for reasons you cannot explain over the past 6 months?
2. Are these worries present for most days?
3. Do you find it difficult to control the worries or do they  
interfere with your ability to focus on what you are doing?

yes no

yes no

yes no

---

**Posttraumatic Stress Disorder**

---

1. Have you ever experienced or witnessed or had to deal  
with an extremely traumatic event that included actual  
or threatened death or serious injury to you or  
someone else?
2. Have you ever been a victim of a violent crime?
3. Have you ever been threatened or wounded by a gun  
or a knife?
4. Has anyone ever coerced you or forced you to  
engage in a sexual act?
5. Have you ever re-experienced the event in a  
distressing way (such as dreams, intense recollections,  
flashbacks or physical reactions)?

yes no

yes no

yes no

yes no

yes no

---

**Referrals**

---

Referral for MH Evaluation

---

---

**Mental Health Treatment History**

---

Have you ever received counseling or treatment

for mental health problems?

yes no

Are you currently receiving counseling or treatment

for any other mental health problems?

yes no

If you are receiving mental health or psychiatric care,  
who is your current provider?

Agency:

Address:

Physician/Counselor:

Phone:

Have you ever been hospitalized for mental health reasons? yes no

If yes, how many times?

What was the most recent hospital you were admitted to?

What was the month and year of the admission?

Why were you admitted?

---

**Mental Health Diagnosis**

---

---

**Emotional Abuse**

---

Have you ever been emotionally abused?

yes no

If yes, how old were you when it began happening?

yes no

Are you currently being emotionally abused?

yes no

Are you currently living in the same house as the abuser?

yes no



---

**Physical Abuse**

---

Have you ever been physically abused?	yes	no
If yes, how old were you when it began happening?	yes	no
Are you currently being physically abused?	yes	no
Are you currently living in the same house as the abuser?	yes	no

---

---

**Sexual Abuse**

---

Have you ever been sexually abused?	yes	no
If yes, how old were you when it began happening?	yes	no
Are you currently being sexually abused?	yes	no
Are you currently living in the same house as the abuser?	yes	no

---

---

**Fear**

---

Have anyone made you feel afraid, intimidated or threatened  
you?

yes no

Has anyone hit slapped, shoved, punched or kicked you?

yes no

Do you feel that you are currently in danger of being hurt  
by someone you love?

yes no

If so, who are you in fear of and why?

What is their relationship to you?

---

**Order of Protection**

---

Are you named in any current orders of protection?

yes no

County/Borough Issued:

Date Issued:

Who named you?

Verified through Domestic Violence Registry?

yes no

Does anyone have an Order of Protection against you?

yes no

## Alcohol

Have you ever used alcohol?

yes      no

How old were you when you first used alcohol?

Figure 1. A schematic diagram of the experimental setup. The subject is seated in a chair, viewing a screen displaying a target (a red dot) and a starting point (a green dot). The subject's hand is positioned at the starting point, and the target is located at a distance of 10 cm from the starting point. The subject is instructed to move their hand from the starting point to the target. The screen is divided into two regions: a starting region (green) and a target region (red). The subject's hand is positioned at the starting point, and the target is located at a distance of 10 cm from the starting point. The subject is instructed to move their hand from the starting point to the target.

Have you ever felt the need to cut  
down on your drinking?

yes      no

Do you feel annoyed by people

## Complaining about your drinking?

yes      no

Do you ever feel guilty about drinking?

yes      no

Do you ever drink an eye-opener?

yes      no

## Drugs

Have you ever used drugs?

yes      no

What was the first drug you ever used?

\_\_\_\_\_

How old were you when you first used  
this drug?

Figure 4. The effect of the concentration of the inhibitor on the rate of polymerization of the monomer.

What is your primary drug of choice?

\_\_\_\_\_

Do you frequently use 2 substances together?

yes      no

Drug 1

---

Drug 2

\_\_\_\_\_

Are you currently in withdrawal?

yes      no

Have you ever shared a needle, cooker, etc.  
to get high?

yes      no

Ever sold belongings to buy drugs?

yes      no

Ever traded sex for drugs?

yes      no

Do you abstain from using drugs while pregnant?

yes      no

Do you smoke cigarettes?

yes      no

---

**Treatment History**

---

Have you ever been in treatment?

yes      no

How many times have you entered drug treatment  
including NA or AA?

How many times have you not completed  
treatment?

What was the longest, uninterrupted duration of  
time you spent in treatment?

Are you currently in a treatment program?

yes      no

What type of program?

If you are taking methadone, what is the  
dosage?

Name of the program you are currently  
attending:

How long have you been at this program:

Most recent treatment:

What type of program?

If you were taking Methadone, what was the  
dosage?

What was the name of the last treatment  
program you were in?

How long were you in this program?

Have you ever completed detox?

yes      no

How many times have you been through detox?

What was the date of your last detox?

What was the last drug you entered detox for?

Longest period of voluntary abstinence from drugs  
and alcohol:

---

**Treatment Barriers**

---

Are there any current barriers to treatment? yes      no

- ☐ child care
- ☐ conflict with school
- ☐ cost
- ☐ didn't know where to go for help
- ☐ family/friend resistance
- ☐ lost interest
- ☐ none
- ☐ other
- ☐ physical health
- ☐ religious beliefs
- ☐ transportation
- ☐ work schedule

---

**Service Needs**

---

Are there any current service needs? yes      no

- ☐ dental
- ☐ domestic violence
- ☐ educational
- ☐ employment
- ☐ entitlements
- ☐ family related
- ☐ health-related for children
- ☐ housing
- ☐ legal
- ☐ medical care
- ☐ mental health
- ☐ other services

- ☐ pre-natal
- ☐ sexual/emotional/physical abuse
- ☐ vocational

---

**Treatment Desired**

---

What type of treatment does the client desire?

---

**Motivation:**

---

I think drugs are a serious problem in my life

☐ Agree      ☐ 2      ☐ 3      ☐ 4      ☐ Disagree

My family will support me in treatment

☐ Agree      ☐ 2      ☐ 3      ☐ 4      ☐ Disagree

I am tired of using drugs and want to change, but can't do it on my own

☐ Agree      ☐ 2      ☐ 3      ☐ 4      ☐ Disagree

I am here because I was arrested, I don't need treatment

☐ Agree      ☐ 2      ☐ 3      ☐ 4      ☐ Disagree

I have too many responsibilities to enter treatment

☐ Agree      ☐ 2      ☐ 3      ☐ 4      ☐ Disagree

I am willing to enter treatment as soon as possible

☐ Agree      ☐ 2      ☐ 3      ☐ 4      ☐ Disagree

I am worried about who will care for my children

☐ Agree      ☐ 2      ☐ 3      ☐ 4      ☐ Disagree

I believe I can stop using drugs on my own

☐ Agree      ☐ 2      ☐ 3      ☐ 4      ☐ Disagree

If I can't get help here I will try another treatment program

☐ Agree      ☐ 2      ☐ 3      ☐ 4      ☐ Disagree

---

**Impression/Assessment**

---

General Comments:

In your opinion, the client's understanding of the

questions was

Was the client cooperative during the interview?      yes      no

In your opinion, client's primary drug of choice is ?

---

**Alcohol Use**

---

Does the client admit to alcohol use or a problem  
with alcohol?

yes      no

Professional assessment of alcohol use:

---

**Alcohol Use Indicators**

---

- ☐ Criminal History
- ☐ Environmental Instability
- ☐ Physical Appearance
- ☐ Positive Drug Test
- ☐ Relationship/Family Problems
- ☐ School/Employment Disruption
- ☐ Verification

---

**Drug Use**

---

Does the client admit to drug use or a problem with drugs?

yes      no

Professional assessment of drug use:

---

**Drug Use Indicators**

---

- ☐ Criminal History
- ☐ Environmental Instability
- ☐ Physical Appearance
- ☐ Positive Drug Test
- ☐ Relationship/Family Problems
- ☐ School/Employment Disruption
- ☐ Verification

---

**Mental Health**

---

Professional assessment of mental health:

---

**Mental Health Indicators:**

---

- ☐ Disorientation
- ☐ Disturbances of Mood/Affect
- ☐ Environmental Instability
- ☐ Evidence of thought disorder or disturbance
- ☐ Mental Health Treatment History
- ☐ Physical Appearance/Presentation
- ☐ Verification

---

**Treatment**

---

Is client motivated to attend treatment?

---

**Treatment Defining Factors:**

---

- ☐ childcare
- ☐ homeless
- ☐ Medical Insurance
- ☐ Medical issues
- ☐ MICA
- ☐ None
- ☐ Physical disability

---

**Professional treatment recommendation:**

---

- ☐ AA/NA
- ☐ Aftercare
- ☐ Ambulatory detox
- ☐ Day treatment

- ☐ Halfway House
- ☐ Inpatient (long-term)
- ☐ Inpatient (short-term)
- ☐ Intensive outpatient
- ☐ Methadone
- ☐ None
- ☐ OMH Supportive Living
- ☐ Outpatient
- ☐ Residential detox
- ☐ Social service (non-tx)
- ☐ TRP

---

**Current Medical Condition**

---

Indicate all current medical conditions:

- ☐ AIDS
- ☐ Asthma
- ☐ Blind
- ☐ Cancer
- ☐ Dental
- ☐ Developmentally disabled
- ☐ Diabetes
- ☐ Eye Glasses
- ☐ Hearing impaired
- ☐ Heart condition
- ☐ Hepatitis
- ☐ High blood pressure
- ☐ HIV
- ☐ Other
- ☐ Physically Disabled
- ☐ Seizure disorder



- ☐ STD
- ☐ TB
- ☐ Ulcers
- ☐ Wheelchair bound

---

**HIV Information**

---

Has client signed an HIV consent form or volunteered

HIV information?

yes no

Have you ever been tested for HIV

yes no

Are you HIV positive?

yes no

Have you ever received treatment for HIV?

yes no

Are you currently receiving treatment for HIV?

yes no

What is your CD4/T-cell count?

[illegible]

---

**Drug Use Detailed Information**

---

**Biological**

<b>First Name</b>		
<b>Last Name</b>		
<b>Gender</b>	<b>DOB</b>	<b>Relationship</b>
Present Live		
Agency Name		
Foster Last Name		
Foster First Name		
Other Parent Name		
Provide Finance		
Guardian		
Lost Reason		
Custody		
Importance Custody		
Ever Lost Custody		
Regain Custody		

---

**Biological**

<b>First Name</b>		
<b>Last Name</b>		
<b>Gender</b>	<b>DOB</b>	<b>Relationship</b>
Present Live		
Agency Name		
Foster Last Name		
Foster First Name		
Other Parent Name		
Provide Finance		
Guardian		
Lost Reason		
Custody		
Importance Custody		
Ever Lost Custody		
Regain Custody		

---

**Family Case Detailed Information**

---

Case Type

County/Borough

Next Court Date

Open/Close

Interview Comments for:

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

Interviewer Signature: \_\_\_\_\_

Interview Date: \_\_\_\_\_

## Psychosocial Assessment

### **Purpose**

To aid clinical staff in determining eligibility and level of care appropriate for drug court candidates.

### **Form and Required Elements**

Psychosocial assessment should exactly mirror questions and format in the Assessment section of the Universal Treatment Application.



## New York State Drug Court Short Assessment Tool

Participant's Name: \_\_\_\_\_ Date: \_\_\_\_\_

NYSID: \_\_\_\_\_ DKT/SCI/IND Number: \_\_\_\_\_

1. Sex: \_\_\_\_ Male \_\_\_\_ Female
2. Age: \_\_\_\_\_
3. Are you currently homeless? \_\_\_\_\_
4. Have you **ever** used any of the following drugs?

	Yes	No	30 days	Frequency	Route
Marijuana					
Crack					
Heroin					
Cocaine					
Alcohol					
Other:					
Other:					

5. What is your **primary** drug?  
\_\_\_\_\_
6. Have you ever been admitted to a substance abuse treatment program and/or Detox program?  
\_\_\_\_\_  
\_\_\_\_\_  
If yes, how many times? \_\_\_\_\_
7. Does anyone in your immediate family or anyone you live with, use drugs and/or alcohol?  
(If response is yes, indicate which family member.)  
\_\_\_\_\_  
\_\_\_\_\_

## Short Assessment Tool

### **Purpose**

To aid clinical personnel in quickly determining whether a drug court candidate should participate in a lengthy full psycho social assessment. Short Assessment Tool is not a substitute for standard UTA psychosocial assessment. It is meant exclude individuals who do not show any signs of or admit to drug abuse for further consideration for drug court participation. If the candidate admits to or shows signs of drug abuse (past or present) clinical staff should conduct a standard UTA psychosocial assessment

### **Form**

As the title makes clear, the assessment tool should prompt clinical staff to ask just a few key questions.

### **Required Elements**

#### ***Defendant Identifying Information***

Form should include the date the interview was conducted, candidates name, identifying numbers such as a NYSID number and/or docket/indictment/SCI or index number.

#### ***Defendant Pedigree Information***

This tool should include basic pedigree information such as gender and age. Form can also include residence information.

#### ***Drug Use***

Form should ask candidate about drug use history, whether the candidate has used drugs recently, how often the candidate uses drugs and method of drug delivery for each drug used. Interviewer should ask the primary drug(s) of choice and candidate should be asked about all drugs available in the area surrounding drug court.

#### ***Treatment History***

Tool should include a brief history of candidates attempts at substance abuse treatment.

#### ***Family Drug Abuse History***

Tool should indicate whether candidates family members or other persons living with candidate use drugs.





## New York State Drug Court

### HRA/DSS Referral Letter

Drug Court Participant \_\_\_\_\_  
S.S.# \_\_\_\_\_  
Date of Birth \_\_\_\_\_  
Drug Court \_\_\_\_\_  
Drug Court Judge \_\_\_\_\_  
Coordinator/Case Manager \_\_\_\_\_  
Drug Court Phone # \_\_\_\_\_  
Date: \_\_\_\_\_

To HRA/DSS personnel:

As a condition of a plea agreement, the aforementioned drug court participant has been ordered to participate in court-monitored substance abuse treatment by the court and judge listed above. The participant's progress will be monitored by the aforementioned court, judge and coordinator/case manager and should the participant fail to complete the mandated treatment, s/he will face incarceration.

The following are the terms of the mandate as set by the Court:

Duration of Mandated Treatment: \_\_\_\_\_  
OASAS Licensed Program Name: \_\_\_\_\_  
Program Address: \_\_\_\_\_  
Program Phone: \_\_\_\_\_  
Start Date: \_\_\_\_\_

Please contact the listed coordinator/case manager, should you have any questions or concerns.

Sincerely,

Coordinator/Case Manager \_\_\_\_\_

## HRA/DSS Referral Letter

### **Purpose**

To inform social service agency personnel that a drug court has mandated that a drug court participant enter into and complete substance-abuse treatment, so that the agency personnel can assist the participant in obtaining necessary health insurance and other benefits.

### **Form of Letter**

The letter should be addressed to HRA or DSS personnel from the drug court coordinator/case manager. Coordinator/case manager should inform HRA/DSS personnel of the details of the drug court mandate, including the name of the program participant will be attending, the length of the court mandate and consequences for non-compliance with the drug court mandate.

### **Required Elements**

#### ***Defendant Identifying Information***

Form should include defendant's name, social security number and date of birth.

#### ***Drug Court Information***

Form should include the name of the drug court, appropriate contact person at drug court, drug court address and/or phone number.

#### ***Mandate Information***

Form should include the length of time defendant is expected to participate in substance abuse treatment.

#### ***Treatment Program Information***

Form Should include the name of the substance treatment program defendant will be attending, program address, program telephone number and the expected date of participant's admission into the program



## New York State Drug Court

## Social Security Number Verification

Social Security Administration

Address:

Address: \_\_\_\_\_

Phone: \_\_\_\_\_

Fax: \_\_\_\_\_

To Social Security Administration Personnel:

I am requesting verification and I am hereby submitting the following information to execute this application:

Name: \_\_\_\_\_

Social Security Number: \_\_\_\_\_

Date of Birth:

Mother's Maiden Name: \_\_\_\_\_

Father's Name: \_\_\_\_\_

Town/Borough/State Born In: \_\_\_\_\_

I authorize the Social Security Administration to release my social security number to the following New York State Drug Court:

Name of Drug Court: \_\_\_\_\_

Name of Coordinator/Case Manager: \_\_\_\_\_

Coordinator/Case Manager Phone: \_\_\_\_\_

Participant's Signature \_\_\_\_\_

Date \_\_\_\_\_

**For Social Security Administration Personnel Use Only**

Is this Information verified by the Social Security Administration:

Yes

No

Authorized SSA Personnel:

Name

Signature or Initials

## Social Security Number Verification

### **Purpose**

To request verification of Social Security Number from the Social Security Administration so that the defendant may obtain healthcare insurance and/or public assistance benefits.

### **Form of Letter**

The letter should be from the defendant and directed to Social Security Administration personnel, seeking verification of his/her social security number. Defendant should explicitly authorize the Social Security Administration to release his/her social security number to the drug court and it should include the defendant's signature.

Verification Letter should have space for use by Social Security Administration Personnel indicating whether social security number was verified.

### **Required Elements**

#### ***Recipient Information***

Form should addressed to local Social Security Administration office. Information should include address and phone and fax number.

#### ***Defendant Identifying Information***

Form should include defendant's name, social security number, date of birth, mother's maiden name, father's name and location of birth.

#### ***Drug Court Information***

Form should include the name of the drug court, appropriate contact person at drug court, drug court address and/or phone number.

#### ***Participant's Signature***

Participant must sign the document.

#### ***Social Security Administration Verification***

Form should include a section where Social Security Administration personnel can simply indicate whether the participant's social security number was verified or not verified.



## New York State Drug Court

### Treatment Program Referral

#### Court Information

Date: \_\_\_\_\_  
Drug Court: \_\_\_\_\_  
Coord'r/Case Mgr: \_\_\_\_\_  
Phone: \_\_\_\_\_  
FAX: \_\_\_\_\_

#### Participant/Case Information

Name: \_\_\_\_\_  
Dkt/SCI/Case #: \_\_\_\_\_  
Plea Type: ☐ Felony ☐ Misdemeanor  
Next Court Appearance: \_\_\_\_\_  
Next Case Mgmt Visit: \_\_\_\_\_

#### Program Information

Program Name: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Program Contact: \_\_\_\_\_  
Contact Phone: \_\_\_\_\_

#### Court-Mandated Treatment Conditions

Duration of Drug Court Participation: \_\_\_\_\_  
Drug Court Phase of Treatment: \_\_\_\_\_  
Treatment Modality: \_\_\_\_\_  
Number of Toxicology Tests per Week: \_\_\_\_\_  
Number of Court Case Mgmt Visits per Month: \_\_\_\_\_  
Frequency of Court Appearances: \_\_\_\_\_

#### Additional Services Mandated/Instructions

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_ COURT OF THE \_\_\_\_ OF \_\_\_\_  
COUNTY OF \_\_\_\_: \_\_\_\_\_ PART \_\_\_\_\_  
-----X  
THE PEOPLE OF THE STATE OF NEW YORK  
: Order  
- against- : Date:  
\_\_\_\_\_, : SCI No.:  
Defendant  
-----X  
\_\_\_\_\_, J.

Chapter 649 of the Laws of 1996 amended Section 364-j of the New York State Social Services Law to include the following provision relevant to court-ordered care:

*"A managed care provider, comprehensive HIV special needs plan and mental health special needs plan shall provide services to participants pursuant to an order of a court of competent jurisdiction provided, however, that such services shall be within such provider's or plan's benefit package and are reimbursable under Title XIX of the federal social security act."* (SSL § 364-j(4)(r))

The following individual, (DEFENDANT), has been ordered by this Court to receive mental health, alcohol or substance abuse treatment or other medical care at (NAME AND ADDRESS OF TX PROVIDER) for the following duration: (PERIOD OF TREATMENT).

If this individual is enrolled in a managed care plan, and the treatment or care to be provided is included under such person's managed care basic benefit package and is a Medicaid-eligible service, the law requires that the managed care plan reimburse the provider for the provision of the treatment or care. Reimbursement is required whether or not such provider is a member of the managed care plan's provider network.

This constitutes the order of the Court.

\_\_\_\_\_  
(JUDGE'S NAME)  
(TYPE OF JUDGE)

Dated:  
(CITY NAME), NY

## Medicaid Order

### **Purpose**

Order pursuant to Section 364 of the New York State Social Services Law directing Medicaid managed care plan to reimburse drug participant's treatment program for care regardless of whether the program is a member of the managed care plan's provider network.

### **Form**

This document should be created in the format of a judicial order with all the required elements including the case caption, judge's name and signature, docket, indictment, SCI or index number and name of court issuing the order.

### **Required Elements**

#### ***Statute Excerpt***

Order should include the relevant portions of Section 364-j of the new York State Social Services Law. It follows:

*"A managed care provider, comprehensive HIV special needs plan and mental health special needs plan shall provide services to participants pursuant to an order of a court of competent jurisdiction provided, however, that such services shall be within such provider's or plan's benefit package and are reimbursable under Title XIX of the federal social security act."*

#### ***Defendant Identifying Information***

Order should include the name of the defendant and a statement that the defendant will be receiving substance abuse treatment.

#### ***Provider Information***

Order should include the name and address of the treatment provider.

#### ***Mandate Information***

Order should include the approximate length of time that defendant will be participating in court-ordered substance abuse treatment.

#### ***Order***

Order should explicitly state that defendant's managed care plan should reimburse the treatment provider for the provision of care, regardless of network participation.



## New York State Drug Court Linkage Agreement and Memorandum of Understanding

The following is a referral/linkage agreement between the **(NAME OF DRUG COURT)** (hereinafter referred to as "Court") located at **(ADDRESS OF DRUG COURT)** and **(NAME OF TREATMENT PROGRAM)** (hereinafter referred to as "Provider") located at **(ADDRESS OF TREATMENT PROGRAM)**.

This agreement shall be effective beginning **(EFFECTIVE DATE)** and establishes a reciprocal relationship which will facilitate professional, appropriate, effective and confidential services to persons referred by the Court (hereinafter referred to as "Participants").

Provisions of this agreement are herein set forth:

1. Prior to the signing this agreement, the Provider shall provide to the Court written copies of 1) the Provider's established policy regarding acceptance potential participants, 2) any regulations regarding confidentiality as well as 3) all regulations impacting treatment and participant expectations.
2. At the time of referral to the Provider, the Court will provide the Provider with a referral package including assessment information and all information regarding Court-mandated terms of treatment for that specific participant.
3. The Court will provide written Consent to Release Information Forms by fax to the agency upon referral of a participant. The Provider shall make all final determinations regarding the suitability of potential participants consistent with established program criteria and this agreement and will immediately (within 24 hours) notify the Court of all final decisions regarding admissibility for every referred participant.
4. If a participant is found unsuitable for admission, the Provider, after contacting the Court, may make subsequent referrals within the same modality to Court approved Providers.
5. If subsequent referrals for an unsuitable participant cannot be made by the Provider, the Provider must immediately (within 24 hours) notify the Court and immediately instruct the participant to return to the Court for further referrals by Court staff.
6. The confidentiality and exchange of participant information between the Court and the Provider shall be governed by regulations specified in the Court's Consent Forms and applicable Provider regulations.



7. For every participant of the Court, the Provider will identify a liaison as well as a "back up" with whom to exchange information and ensure consistent communication with the Court.
8. To the extent possible, the Provider will adhere to treatment terms and requirements as set forth in the Court-mandated terms of treatment but will make all other determinations regarding content and scope of treatment consistent with Court-mandated terms of treatment and will notify the Court in writing of all such determinations.
9. Provider acknowledges receipt the document entitled ***"Information Exchange Requirements Between Drug Court and Community-Based Treatment Provider"*** and agrees to the reporting requirements set forth therein.
10. Providers accepting Court clients must provide regular consistent and observed toxicology testing as per Court-mandated terms of treatment and provide those results to the Court as per information exchange agreements.
11. If, after admission, the Provider can no longer provide services consistent with the Court's mandate, the Provider will notify the Court immediately (within 24 hours) to discuss alternative plans and referrals.
12. If a participant fails to appear for admission, leaves against or without permission of the Court and/or Provider or fails to return to a program at a specified time, the Provider will immediately (within 24 hours) notify the Court.
13. The Provider will submit all written reports and accounts as set forth in the Information Exchange Requirements provided by the Court and will provide information including but not limited to attendance, scope of treatment, quality of participation, all urine test dates and results, problems, achievements and treatment accomplishments.
14. To the extent possible, the Court will endeavor to establish and maintain a **partnership with the Provider** where treatment decisions for specific participants are mutually acceptable and information is easily accessible.
15. In some situations, the Provider may be asked to participate and/or testify in a court proceeding.
16. To ensure a collaboration, the Provider is encouraged to initiate communication with the Court regarding a participant's treatment or any related issues as often as necessary. To the extent possible, the Provider may seek to use the Court as a motivator for treatment compliance.

## TERMINATION

This agreement may be terminated by either party upon written notification and shall be effective thirty (30)

days from the receipt of such notification. Termination of the agreement shall not require the termination of existing participants. Said participants shall continue to be serviced in accordance with the terms set forth in this agreement until such time the participant is no longer under the supervision of the Court. The undersigned agree to implement this agreement within their respective agencies.

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Print Name & Title (Court)

---

Print Name & Title (Provider)

---

Signed

---

Date

---

Signed

---

Date

## Linkage Agreement/Memorandum of Understanding Information Exchange Requirements

### **Purpose**

A memorandum of understanding between drug court and treatment provider detailing their working relationship and requirements for partnership. The memorandum may reference other documents that list in detail reporting requirements for all providers or for different types of providers.

### **Form**

This document should be created in the form of a memorandum of understanding. The memorandum should detail requirements for information exchange between the parties or refer to separate documents detailing the same information. This document should also provide details on required elements of treatment for drug court participants.

### **Required Elements**

#### ***Introduction***

Memorandum should have an introduction that identifies the parties to and purpose of the agreement.

#### ***Party Identifying Information***

Agreement should identify the name of the drug court or the court of which it is a part and its address. The agreement should also identify the treatment provider and its address.

#### ***Effective Date and Termination***

The agreement should set forth the date the partnership begins and it should also detail when the agreement ends or how either party can terminate the partnership.

#### ***Initial Partnership Requirements***

Memorandum should state the requirements that must be met by both parties before the agreement takes effect.

#### ***Information Exchange Requirements***

Linkage Agreement should detail minimum requirements for communication between provider and drug court. Areas that should be covered are method and frequency of regular reports, notification of participant termination, discharge and rule breaking. Other areas that might be detailed are method and frequency of toxicology screens. Attached are detailed Information Exchange Requirements.



## New York State Drug Court

### Information Exchange Requirements Between Drug Court and Community-Based Treatment Provider

As part of the Court's efforts to truly work in partnership with treatment providers, it is essential that the Court receive ongoing progress and compliance information about clients while in treatment. The following are reporting requirements for treatment providers:

#### **For Both Residential and Outpatient Settings**

- Immediate notification\* of termination, discharge or "split" (written and verbal)
- Immediate notification\* of "Cardinal Rule" breaks (written and/or verbal)
- Immediate notification\* of hospitalization or significant disruption of treatment process (written and/or verbal)
- Consistent telephone contact regarding treatment progress of participant
- Notification of all: (written and/or verbal)
  - ▶ Contracts / learning experiences
  - ▶ Phase / stage advancements
  - ▶ Rule breaking
  - ▶ Privilege revocation
  - ▶ Achievements /accomplishments
- Monthly Standardized Reports\*\* for participant faxed to Drug Court (written - submitted on NY State Uniform Progress Report Form)
- Letters or documentation regarding special issues or circumstances, upon request

#### **For Outpatient Settings Only**

- Notification immediately after three consecutive missed appointments or treatment days (written and verbal)
- Twice a week urine testing or other toxicology screening with detailed written report of each drug screen sent to resource coordinator at least once a month (written)

\* ***Immediate Notification: If the incident occurs on a weekend or legal holiday, the Treatment Provider is required to leave a voice mail message for Court personnel and a follow-up telephone call on the next business day.***

\*\* ***While monthly Standardized Reports are required. Verbal and/or written information exchange must occur regularly with Court personnel.***

\_\_\_\_ COURT OF THE \_\_\_\_ OF \_\_\_\_  
COUNTY OF \_\_\_\_: \_\_\_\_\_ PART \_\_\_\_\_

-----X  
THE PEOPLE OF THE STATE OF NEW YORK

- against- : Drug Court Contract

: Date:

\_\_\_\_\_, : SCI No.:  
Defendant

-----X

The New York State Drug Court, the Local District Attorney and the above-named defendant, agree that the defendant shall plead guilty to the following charge(s) in the New York State Drug Court pursuant to the provisions of this Contract.

<u>CHARGE(S)</u>	<u>PLEA OF GUILTY TO:</u>	<u>AGREED SENTENCE:</u>
1. _____	_____	_____
2. _____	_____	_____
3. _____	_____	_____
4. _____	_____	_____
5. _____	_____	_____
6. _____	_____	_____
7. _____	_____	_____

1. Defendant hereby voluntarily agrees to enter New York State Drug Court Program as an alternative to being sentenced under the pleas of guilty listed above and under conditions summarized below and in the Treatment Plan which will be developed upon completion of defendant's evaluation.
2. Defendant agrees to meet or report to treatment provider(s) as required and to follow their recommendations.
3. Defendant agrees to random testing for drug or alcohol use and understands that failure to provide a urine sample or Breathalyzer test may be considered by the Court to be the equivalent of a positive test result.

4. Defendant agrees to return to New York State Drug Court periodically as requested by the Court and understands that the Court may require periodic reports to the Court for a minimum of twelve (12) months depending on progress.
5. Defendant understands that missed court dates may result in the issuance of a bench warrant and termination from the program with the case reinstated for sentencing.
6. Defendant understands any violation of terms of parole or probation will also be deemed a violation of this contract and subject defendant to sanctions and/or possible termination from the program by the Court.
7. Defendant understands that he/she must inform the court and treatment provider(s) immediately of any change in address and phone number and reside in an approved halfway house or inpatient facility whenever required.
8. Defendant understands that any new arrest while in this program must be reported to the Court and may be grounds for immediate termination from the program. Failure to report a new arrest within 10 days may also be grounds for immediate termination from the program.
9. Defendant understands that the Court will require defendant to discuss drug use with treatment providers and the Court and that any statement defendant makes regarding drug use in the treatment program and/or for the purpose of treatment will not be used against defendant as evidence in any current or future criminal prosecution. It will, however, be admissible in the event of a termination proceeding.
10. Defendant understands that the Drug Court is an open court and that my case will be discussed in front of other defendants and members of the public.
11. Defendant understands that violation of any terms of this Contract and/or failure to work diligently towards the goals of this program, may result defendant's case returned for sentencing to the County Court or before the local Criminal Court and defendant agrees that there is no right to appeal to any other court from a conviction or sentence of the local Criminal Court or County Court.
12. Defendant agrees to sign reasonable authorizations for the release of information required by the Court. It is understood that any information regarding defendant's treatment and progress in treatment identifying defendant will not be redisclosed to persons not working for the Court and/or treatment providers without further authorization from defendant.

authorization from defendant.

13. Defendant agrees to keep all required appointments and to participate in programs that may include:
  - a. Substance abuse treatment programs
  - b. Counseling programs
  - c. Education programs or school
  - d. Vocational programs
  - e. Day reporting programs
  - f. Other reasonable rehabilitation requirements
14. Defendant agrees that upon failure to keep any program appointments (in the absence of an explanation satisfactory to the Court), failure to comply with any reasonable request or requirement, failure to comply with the rules of the treatment provider(s), positive toxicology tests for any non-prescribed drug including alcohol, or any drug not permitted by Court (with the exception of emergency situations, in which case the use of such drugs shall be disclosed on the next business day), or failure to comply with any other provisions set forth in this contract, the Court may immediately make necessary adjustments in requirements and may impose sanctions including jail time and/or termination from the Drug Court program. A sanction or termination is solely at the discretion of the New York State Drug Court judge.
15. Defendant agrees that in the event a termination hearing is held
  - a. Hearsay evidence is admissible for the purpose of establishing a violation of the contract;
  - b. The standard of proof shall be a preponderance of the evidence; and
  - c. Rules applicable to violation of probation hearings pursuant to CPL § 410.70(3) and/or suppression hearings pursuant to CPL § 710.60 are applicable.

\_\_\_\_\_  
Defendant's Initials

\_\_\_\_\_  
Defense Attorney's Initials

16. The parties to this contract agree that if defendant complies with the provisions of this contract and the Drug Court treatment plan, including modifications approved by the Court, the convictions herein listed will be disposed of as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

CERTIFICATION OF ATTORNEY

I, \_\_\_\_\_, hereby certify that I am attorney of record (or authorized to appear on behalf of the attorney of record) for the above-named defendant and that I have explained to defendant his/her rights and that defendant has freely and knowingly entered in this Contract.

\_\_\_\_\_  
Attorney

\_\_\_\_\_  
Date

\_\_\_\_\_  
District Attorney

\_\_\_\_\_  
Date

\_\_\_\_\_  
New York State Drug Court Judge

\_\_\_\_\_  
Date

\_\_\_\_\_  
County Court Judge

\_\_\_\_\_  
Date

\_\_\_\_\_  
Local Criminal Court Judge

\_\_\_\_\_  
Date



## **I. Non-Compliance**

The following are some examples of non-compliance that may result in court ordered sanctions of termination from the program:

1. Failure of defendant to keep mandated treatment appointment dates with service provider;
2. Failure of defendant to keep all scheduled court appearances;
3. Failure of defendant to consistently remain drug free as evidenced by repeated positive lab results demonstrating drug usage;
4. Failure of defendant to lead a law abiding life as a result of re-arrest and/or conviction;
5. Failure of defendant to follow instructions of the judge and/or treatment provider.

## **II. Sanctions**

The following is a list of some court-ordered sanctions that the Court may impose as a result of defendant's non-compliance:

1. In-Court verbal admonishment;
2. Essays;
3. Increased toxicology frequency;
4. Increased Court reporting schedule;
5. Extension of defendant's court-mandated drug court program;
6. Weekend work program;
7. Financial penalties;
8. Community service;
9. Period of incarceration.

## **III. Termination**

Termination from the New York State Drug Court Program is subject to the discretion of the Drug Court judge.

I have read, understood and received a copy of conditions of non-compliance and resulting sanctions.

\_\_\_\_\_  
Defendant

\_\_\_\_\_  
Date

\_\_\_\_\_  
Judge

\_\_\_\_\_  
Date



**New York State Drug Court  
General Post Adjudication Contract**

**People v. SCI#/ IND#/Docket#** \_\_\_\_\_

**Date:** \_\_\_\_\_

**Defendant:** By entering this plea of guilty and agreeing to enter a drug treatment program, I understand and agree to the following:

1. I acknowledge that I have a substance abuse problem and recognize that I need help to treat this disease.
2. I have reviewed the New York State Drug Court participant manual and will follow the rules and procedures set forth therein.
3. I will enter and remain in a drug treatment program and lead a law abiding life until the successful completion of my New York State Drug Court Mandate.
4. I understand that failure to comply with the rules of the Court and my treatment program may result in sanctions by the Court which may include incarceration and a change in my treatment plan.
5. I understand that the Drug Court is an open court proceeding and that my case will be discussed in front of other defendants and members of the public.
6. I understand that if I fail to complete my Court Mandate I will receive a jail/prison sentence of up to \_\_\_\_\_.
6. I understand that any new arrest may result in immediate termination from my treatment program and the New York State Drug Court and the imposition of a jail/prison sentence of up to \_\_\_\_\_.

---

New York State Drug Court Participant

**Judge:** By accepting your plea of guilty and promise to enter a drug treatment program, the New York State Drug Court agrees to the following:

1. The New York State Drug Court will assist you to overcome your addiction.
2. The clinical staff will assess your treatment needs, refer you to an appropriate provider and meet with you regularly to discuss your recovery.
3. The clinical staff will refer you to necessary mental and physical health services.
4. The New York State Drug Court will hold you accountable for your actions. Sanctions, including jail time, will be imposed for failure to comply with the Court's rules and directions as outlined in the participant manual. Achievements in recovery will be rewarded and acknowledged through the different phases.
5. The Court will impose the agreed upon jail/prison sentence if you fail to complete the Mandate.
6. The New York State Drug Court will dismiss/reduce these charges upon your successful completion of the Court's Mandate.

---

Judge, New York State Drug Court

## Contract - Post-Adjudication

### **Purpose**

To memorialize the agreement defendant makes with the Court to participate in a drug court program that requires a guilty plea before defendant is allowed to participate.

### **Form**

While there is no prescribed format, two types of post-adjudication contracts are currently in use in New York State.

### ***Detailed Contract***

The first type of contract is more detailed and closely follows the allocution defendant makes when pleading guilty and includes all of the rights the defendant is giving up, all of the conditions with which defendant must comply during drug court participation, what will occur upon successful completion, what will occur upon failure to comply with the courts mandate (including maximum sentence that the Court may impose), consent to *ex parte* communications, and *Parker* warnings. This first type of contract may or may not also include space for the judge, district attorney and/or defense counsel to sign agreeing to defendant's participation.

### **Suggested Elements**

#### ***Case Caption***

This document should be created in the format of an official court document with all the required elements including the case caption, judge's name and part, docket, indictment, SCI or index number.

#### ***Statement of Participation***

Defendant should state that he/she is agreeing to participate in the drug court program.

#### ***Terms of Guilty Plea***

This includes:

- crime to which defendant is pleading guilty;
- type and class of crime;
- maximum penalty that crime carries;
- sentence that the Court will impose if defendant fails to complete program;
- outcome of case if defendant successfully completes mandate; and
- potential consequences of arrest, indictment or conviction of a new offense.

## ***Waivers of Rights***

Upon plea of guilty, defendant states that he is voluntarily giving up his/her rights, including:

- presentation of the case to a Grand Jury;
- speedy trial;
- pre-trial motions;
- appellate review; and
- pre-sentence investigation

## ***Conditions of Participation***

Defendant acknowledges the conditions of his/her participation which typically include:

- abstinence from drugs and alcohol;
- execution of Consents to Release Confidential Information;
- participation in substance abuse treatment;
- participation in self-help groups;
- school or vocational training attendance;
- attendance at other ancillary services as deemed necessary by drug court personnel;
- toxicology testing;
- regular visits with drug court personnel or probation officer;
- requirements for program graduation or successful termination;
- attendance at regular court appearances; and
- ability of court to impose interim sanctions.

## ***General Contract***

The second type of contract is a less detailed agreement between defendant and the drug court judge outlining the general parameters of defendant's court mandate. This less detailed contract typically refers to other documents that spell out the exact nature of the drug court program (such as a Participant Handbook) and maps out the general relationship into which defendant and Court are entering. Reference should be made to what will happen upon successful completion of, or termination from, the program. Typically both defendant and judge sign this agreement. Prosecutor and defense counsel do not sign. Drug courts that utilize this "general" contract allow the record of the plea allocution to act as the detailed contract between drug court and defendant. Note: This is not a recommended practice as the details of allocutions may vary and judges filling in for drug court judges will not always be as familiar with all the conditions of drug court.

## ***Suggested Elements***

### ***Case Identifying Information***

Header should include the name of defendant, a case identifying number (Docket, Superior Court Information, Indictment or Index number) and the date contract was executed.

### ***Statement of Participation***

Defendant should state willingness to participate in the program and why the program is necessary.

### ***Terms of Guilty Plea***

A simple statement of what will happen if defendant completes, or fails to complete, the drug court program.

At a minimum it should include:

- sentence that the Court will impose if defendant fails to complete program;
- outcome of case if defendant successfully completes mandate; and
- what may happen upon arrest, indictment or conviction of a new offense.

### ***Conditions of Participation***

Defendant should acknowledge drug court rules, typically making reference to another document such as a Participant Handbook.

### ***Statement By Judge***

Judge indicates how drug court will assist defendant and what will occur upon successful completion and what will occur if defendant fails to successfully complete.

\_\_\_\_ COURT OF THE \_\_\_\_ OF NEW YORK  
COUNTY OF \_\_\_\_\_

-----X  
THE PEOPLE OF THE STATE OF NEW YORK :

-against-

:

**DIVERSION CONTRACT**

\_\_\_\_\_, : Dkt# \_\_\_\_\_  
Defendant

-----X Date \_\_\_\_\_

**Defendant:** By signing this contract and agreeing to enter a drug treatment program, I understand and agree to the following:

1. I acknowledge that I have a substance abuse problem and recognize that I need help to treat this disease.
2. I have reviewed the Drug Court Participant Handbook and will follow the rules and procedures set forth therein.
3. I will enter and remain in a drug treatment program and lead a law abiding life until the successful completion of my Treatment Court Mandate.
4. I knowingly, intelligently and voluntarily waive my constitutional and statutory rights to speedy trial while I am involved in the Drug Court Diversion Program. I have been informed by my attorney that I have a right to a speedy trial and the effect of my waiver on those rights.
5. I agree that in the event that I commit any infraction(s) or violation(s) of Drug Court rules that would result in a sanction, as outlined in the Drug Court Participant Manual, the court may immediately make necessary changes in my treatment plan and may impose sanctions that will result in revocation of my bail or release status and result in my incarceration. I also understand that any intermediate jail sanction or series of jail sanctions may not exceed the maximum penalty for the crimes with which I was originally charged. I also knowingly and voluntarily waive my rights under CPL §§170.70 and 30.30(2) should the court revoke my bail or release status as part of a sanction for infractions to program rules. This waiver of my statutory rights will remain in effect for as long as I continue to participate in the Drug Court Diversion Program.
6. I understand that if I violate the terms of this contract and/or fail to work diligently towards the goals of this program, that my case may be returned for prosecution outside Drug Court and I agree that there is no right to appeal to any other court a judicial determination of dismissal from the Drug Court Diversion Program.
7. I understand that if I abscond from my treatment program, the Court issues a warrant for my arrest and I am brought back to Court involuntarily by law enforcement personnel, this may result in my immediate termination from Drug Court Diversion Program.
8. I understand that any new arrest may result in immediate termination from my treatment program and the Drug Court Diversion Program.
9. I understand that my right to file written pre-trial motions will be reserved. If I am terminated from this program, I will have at least 45 days from the termination date to make such motions.

10. I understand that if I successfully complete my Court Mandate and the charges against me are dismissed, the Court may stay, for a period of ten (10) years, the sealing of the record of my case for the limited purpose of allowing the Court to keep a record of my participation in the program, to which the prosecutor and my attorney will have access.

---

Drug Court Participant/Defendant

**Attorney:** By signing this contract, I hereby certify that I am the attorney of record (or authorized to appear on behalf of the attorney of record) for the above-named defendant and that I have explained the defendant's statutory and constitutional rights affected by this contract to the defendant and that the defendant has freely and knowingly executed the waivers contained in this contract.

---

Attorney for the Defendant

**Judge:** By accepting your plea of guilty and promise to enter a drug treatment program, the Drug Court agrees to the following:

1. Drug Court will assist you to overcome your addiction.
2. The clinical staff will assess your treatment needs, refer you to an appropriate provider and meet with you regularly to discuss your recovery.
3. The clinical staff will refer you to necessary mental and physical health services.
4. The Drug Court will hold you accountable for your actions. Sanctions, including jail time, will be imposed for failure to comply with the Court's rules and directions as outlined by the Drug Court Handbook. Achievements in recovery will be rewarded and acknowledged through the different phases.
5. The Court will terminate your participation in the Drug Court Diversion Program, if you fail to complete the Mandate.
6. Drug Court will dismiss these charges upon your successful completion of the Court's Mandate.

---

Judge, Treatment Court  
\_\_\_\_\_ Court of the \_\_\_\_\_ of New York

## Contract - Diversion

### **Purpose**

To memorialize the agreement defendant makes with the Court to participate in a drug court program that does not require a guilty plea before defendant is allowed to participate.

### **Form**

Contract closely follows colloquy defendant makes when agreeing to participate in drug court program and includes all of the rights the defendant is giving up (including waiver of right to be timely indictment or prosecution by information, waiver of right to speedy trial, right to bail or release upon recognizance in the event that the Court imposes an interim jail sanction), conditions with which defendant must comply during drug court participation or reference to another document (such as a Participant Handbook) which details such conditions, what will occur upon successful completion and what will occur upon failure to comply with the courts mandate (prosecution of the original charges). Typically, defendant, defense counsel and judge sign this agreement. Prosecutor may or may not sign the document. This contract should not take the place of a detailed colloquy between the Court and defendant.

### **Suggested Elements**

#### ***Case Caption***

This document should be created in the format of an official court document with all the required elements including the case caption, judge's name and part, docket, indictment, SCI or index number.

#### ***Statement of Participation***

Defendant should state that he/she is agreeing to participate in the drug court program.

#### ***Terms of Participation***

This includes:

- possibility of revocation of bail or recognizance upon program infraction and court imposed sanction;
- outcome of case if defendant fails to complete program;
- outcome of case if defendant successfully completes mandate; and
- what may happen upon arrest, indictment or conviction of a new offense.

#### ***Conditions of Participation***

Defendant should acknowledge drug court rules, typically making reference to another



document such as a Participant Handbook.

***Statement By Judge***

Judge indicates how drug court will assist defendant and what will occur upon successful completion and what will occur if defendant fails to successfully complete the drug court mandate.

# **I** mportant Names and Numbers:

## **New York State Treatment Court**

100 Main Street

Anywhere, NY 10000

Main Number (646) 555-5555

## **Important names and numbers to know:**

### **My Attorney:**

Name \_\_\_\_\_  
Phone # \_\_\_\_\_

### **My Case Manager:**

Name \_\_\_\_\_  
Phone # \_\_\_\_\_

### **My Treatment Program:**

Name \_\_\_\_\_  
Phone # \_\_\_\_\_

### **Self-Help Meetings**

You can obtain information, schedules and locations for local self-help groups from NYSTC, your Case Manager and/or your treatment provider.

**NEW YORK STATE**

**T R E A T M E N T**

**C O U R T**



# **Handbook**

**Guidelines and Program Information  
for Participants**

# Contents

Welcome to NYS Treatment Court	3
What is NYS Treatment Court?	4
What's in it for me?	5
NYS Treatment Court Rules	6-8
NYS Treatment Court Phase	
Description and Sanction Schedule	9-14
Graduation	15
NYS Treatment Court Expectations	16-18
NYS Treatment Court Support	19-22
Services	
NYS Treatment Court Team	23
Important Numbers	24

For more information or to provide comments contact:

New York State Treatment Court  
100 Main Street  
Anywhere, NY 10000  
(646) 555-5555

Revision Date: 12/30/05

# NYSTC Team

The New York State Treatment Court Team understands that addiction is a treatable disease and is dedicated to supporting the recovery of every NYSTC participant.

The NYSTC Team includes:

- Judge;
- Your lawyer and other members of the defense bar;
- The District Attorneys Office; and
- Your case manager and other members of the NYSTC treatment staff

The Team meets before every Treatment Court session to assess and monitor the progress of each case that the Judge will hear that day.

At these meetings, the Team members discuss the each participant scheduled for court appearance that day and the Judge decides the appropriate actions to take, including rewards and sanctions.



# Employment

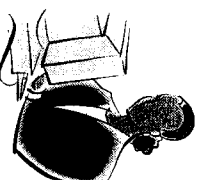
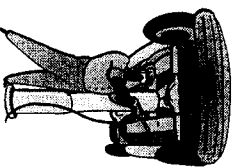
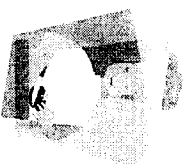
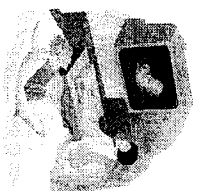
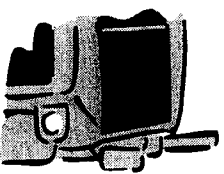
Finding and keeping a job that you like is an important part of building lasting success in recovery.

Employment referral services include:

- Job readiness training
- Resume writing
- Interviewing skills
- Job referrals

You will also get information on how to:

- Get proper clothing for the workplace
- Arrange for childcare if required
- Arrange for transportation if required



# Welcome to NYSTC

This handbook is designed to:

- ? Let you know what NYSTC is all about
- ? Answer your questions
- ? Address your concerns

As a New York State Treatment Court (NYSTC) participant, you must follow the instructions given in court by the Judge and the rules and treatment plan given to you by your Case Manager and Primary Treatment Provider. This handbook will explain what is expected of you. It will also provide general information about the NYSTC program.

**Ask your Case Manager or Defense Attorney to explain to you anything in this handbook that you do not understand!**

# What is NYSTC?

NYSTC is a special courtroom in the New York Criminal Court. It is a program for first time felony offenders arrested in New York, who face felony drug charges and who also abuse drugs. Instead of jail or probation, NYSTC will help you enter and stay in a drug or alcohol treatment program. The NYSTC program includes regular court appearances and supervision by the NYSTC judge.

After your arrest you were given the choice of joining NYSTC or having your case go through the regular court process. If you abuse drugs and are eligible for the NYSTC program, your Case Manager will work with you to build a treatment plan. While you are in treatment, the Judge will closely watch your progress.

## What do I have to do?

If you agree to participate, you sign an agreement. This agreement is a contract between you and the Judge. It explains what is expected of you and what will happen if you do not follow the rules. Before you sign your agreement, you should speak with your Defense Attorney and have your questions answered. While you are in a treatment program, the Judge, prosecutor, your lawyer and your case manager will monitor your progress in treatment. Your case manager will be in constant contact with your treatment program staff. Your urine will be tested regularly. **You must stop using drugs and alcohol.**

## How long will I be involved in NYSTC?

The amount of time you spend in NYSTC will depend on the crime you were originally charged with, your criminal history, your plea and your individual progress in treatment. Most people will spend anywhere from one to two years in the NYSTC program.





If you have any questions, speak to your Defense Attorney.

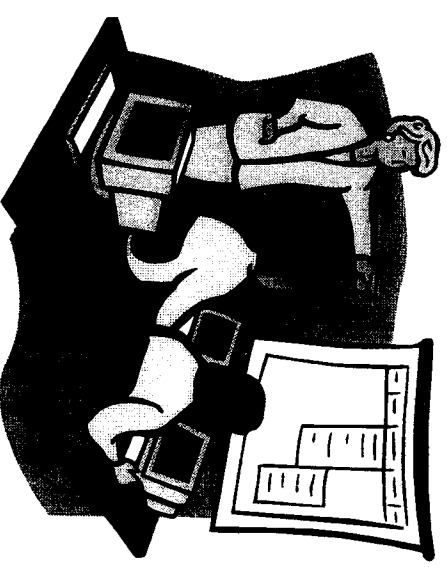
**If the Judge says you can no longer participate or you ask to stop participating, the Judge will sentence you to the jail time you and your lawyer agreed to when you pled guilty.**

## Education

NYSTC will help you meet your educational, vocational and employment goals.

NYSTC can help you get the following educational programs:

-  **High School:** if you need help with a particular subject or area, NYSTC will help you find a tutor.
-  **GED:** work toward your high school equivalency diploma.
-  **Vocational:** NYSTC can help you find training in many fields, from food service and haircutting to computer technology and auto mechanics.
-  **College:** if you are ready to take this step, NYSTC can help you with decisions about when and where to go and how to afford it.



# Health



Developing healthy living habits and knowing how to handle physical and emotional problems are essential for your success in avoiding drugs and succeeding in the NYSTC program.

NYSTC can help you get the following health services:

- Doctor and dentist
- TB (Tuberculosis) screening
- Testing for STD's (sexually transmitted diseases), Hepatitis and HIV
- Pregnancy testing
- Health and nutritional counseling
- Psychological testing and treatment

You must follow through on all treatment recommendations. You may also be asked to provide proof to the court of medical conditions or appointments. Any prescribed drugs must be reported to your Case Manager.

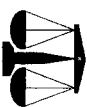


# What's in it for me?

## Rewards

NYSTC acknowledges progress in the following ways:

- ✓ Recognition by the Judge and your peers
- ✓ Monthly certificates of achievement
- ✓ Less frequent appearances in court
- ✓ Less frequent visits to your program



## Dismissal of your charges

If you successfully complete NYSTC, the Judge will dismiss, but not seal, your felony charge.\* †

## To successfully complete NYSTC you must:

- ✓ Attend your program regularly
- ✓ Follow all program rules
- ✓ Participate in all required activities
- ✓ Give negative urine tests for at least one year



NYSTC offers you the chance to move forward in your life.

## A New Beginning

In the rest of this Handbook, you will find information on what you need to do and where you can turn for help. Remember - there are many people who make up the NYSTC Team, and they all want to see you succeed. If you take the help that is offered, you will discover many ways to make a better life for yourself.

\*On rare occasions the terms of the plea agreement may require the Court to sentence you to time served or probation.

† If you are participating in NYSTC because of a Violation of Probation (VOP), upon successful completion of the program, the Judge will restore or terminate your probation.

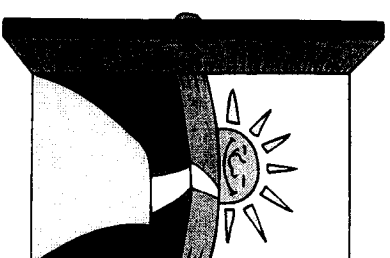
# R

ules:

## What are the rules of NYSTC?

To remain in NYSTC you must follow these rules:

1. Appear in Court as scheduled:  
Arrive on time for all court appearances. If you are not here on time, you may wait all day for your case to be called
2. Arrive on time for all other appointments
3. Stop using and carrying drugs, alcohol and drug paraphernalia
4. Never threaten, harass or use violence against anyone
5. Never leave the treatment program, the Court or the NYSTC office without permission
6. Respect the property of the treatment program, the Court and the NYSTC office and always clean up after yourself
7. Dress appropriately for court and case management visits (no hats, doo rags, tank tops, shorts or pants that hang below your hips)
8. In court, address the Judge as Your Honor or Judge (not Miss or Mister)
9. Be Honest at all times
10. Live a law-abiding life



## Support Services

NYSTC Support Services are available to you and your family. These services will help you to overcome stress, problems and conflicts that may block your recovery process.

The NYSTC team recognizes that recovery is not easy, but we praise your effort and courage to change.

Together, we can make it work.

## Comply with Drug and Alcohol Screening:

One of the primary goals of NYSTC is to help you remain drug and alcohol free. A positive drug test or your admission of drug or alcohol use may result in a sanction or change in treatment. Repeated drug or alcohol use may result in termination from NYSTC. Drug and alcohol tests will be done at your treatment program and at the NYSTC Treatment Center. You will be tested throughout all 3 phases of NYSTC.

**If you are in an outpatient treatment program, you must complete at least 1 drug test each week. If your program does not give you a drug test and you do not report to NYSTC for a drug test, the Judge will hold you responsible and will impose a sanction.\***

## Stop Drinking Alcohol:

Drinking any kind of alcohol is not allowed while you are part of the NYSTC program. Use of alcohol can be just as harmful as illegal drugs for someone who struggles with addiction. You will be tested for alcohol use and a positive alcohol test can result in a sanction.

## Be Law Abiding:

You must not break the law again. Any more criminal acts may result in being terminated from NYSTC.

**You must immediately report any new arrest to your case manager.**

## Communicate with Your Case Manager:

- Keep in regular contact with your case manager
- Talk about issues involving your treatment
- Get permission to travel outside of the state

\*A week without a drug test is considered a positive test for that week.

## Appear in Court as Scheduled

You will have to appear in front of the Judge regularly. The Judge will be given reports on how you are doing on your drug and alcohol tests and attendance and progress in your treatment program. The Judge will ask you about your progress and discuss any problems you may be having.

Depending on your situation, you may have to come to court several times a month. As you make progress, you will come to Court less often.

There may be times when your lawyer cannot appear with you in court, because your case is advanced after the NYSTC staff received information or your lawyer has a conflict with other matters. Your lawyer will be notified of all scheduled appearances.

**On the day of your Court Appearance, you must arrive at the NYSTC office at 8:30am and stay until the Judge says that you may go.**

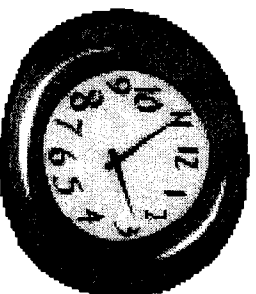
## Follow your Treatment Plan

After you first meet, your Case Manager will develop a Treatment Plan. Your Treatment Plan will explain the following things:

- ✓ Attendance at a substance abuse treatment program
- ✓ Regular drug and alcohol testing
- ✓ Medical screening
- ✓ Attendance at an educational/vocational program
- ✓ Participation in self-help groups

Your Case Manager will also help you with other areas of your life according to your individual needs.

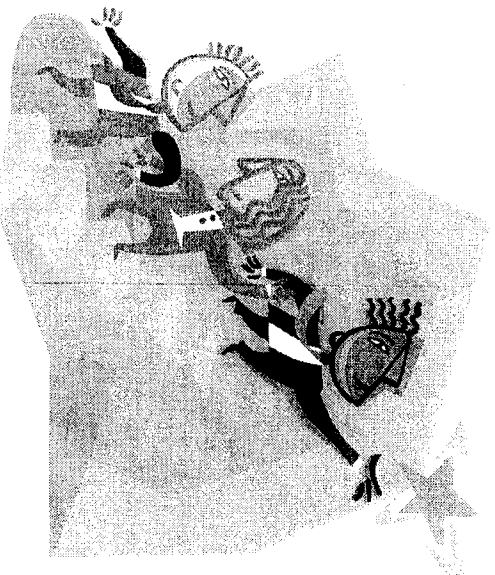
Your Treatment Plan will vary according to your progress. It is your responsibility to keep all scheduled appointments and to arrive on time. You must go over your Treatment Plan with your Case Manager and follow it carefully.





## Complete NYSTC Phases

NYSTC Phases are explained in the following pages. They are your steps to success.



**Remember that moving to the next Phase will be based on your own progress and your ability to stay focused on what you must do to meet all NYSTC rules and expectations.**

## Treat others with respect:

You should respect the opinions and feelings of other people in NYSTC. Verbal or physical threats to anyone will not be tolerated. Any inappropriate behavior will immediately be reported to the Judge and may result in a severe sanction or your termination from the program.

You must dress appropriately for your court appearances and treatment appointments. Clothes having a drug, alcohol, criminal or violent theme, advertising alcohol or drug use or showing any gang affiliation are not allowed. Sunglasses are not to be worn in court unless approved by a doctor.

**Note:** You will not be asked to be an informant in this program. You will not be asked to discuss any information concerning anyone's behavior or progress except your own.

## Cease all drug related activity:

You may not possess, sell, or use alcohol, marijuana and all other illegal drugs. You also may not possess or use any drug paraphernalia.

Any relapse by you involving drugs and/or alcohol must be reported to your Treatment Program immediately.

Any drugs that a doctor prescribes for you must be reported to your program immediately. You will be required to bring the prescribed medication in its original container.

# NYSTC

## Expectations

**What else is expected of me?**

**The expectations of NYSTC are:**

- Obey the Law
- Stop all drug-related activity
- Stop drinking alcohol
- Communicate with your case manager
- Treat others with respect
- Comply with drug screening

These expectations are explained in detail in the next pages.

**The goals you set up with your Case Manager may also include:**

- Healthcare
- Education
- Employment

These goals are explained in detail on page 20.

## Steps to Success!

### NYSTC Phases

Using information from your initial interview and the results of your drug test, your case manager will recommend a course of treatment for you known as your Treatment Plan.

Like everyone else who participates in the NYSTC program, you must move through 3 Phases of Treatment. In each phase you must have 4 drug-free months in-a-row before you can move to the next phase.

The 3 Phases of Advancement will differ in length for everyone as they move through the NYSTC program. You must complete each requirement before you can move to the next Phase.

**Remember: If you miss appointments, use drugs or alcohol, or ignore other requirements, you could be sanctioned and your time in NYSTC will be longer.**

In all phases you must:

- Meet with your Case Manager as directed
- Attend Court as instructed
- Give drug and alcohol test samples as directed
- Follow your Treatment Plan

**The NYSTC staff and your program will recommend to the Judge when you are ready to move to the next phase**

## PHASE I Alternative

All NYSTC participants enter in Phase I. Phase I begins after you sign your NYSTC agreement.

### Goals:

- Choose the ALTERNATIVE of treatment rather than drug use
- Build a foundation of abstinence and work towards a drug-free lifestyle.

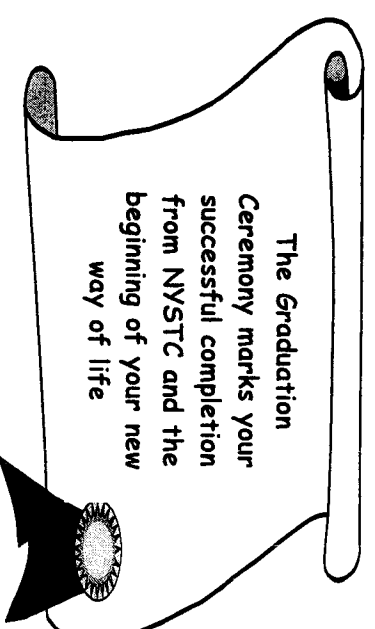
**How to Do It:** You become a participant in the Treatment Court program. NYSTC will diagnose your addiction and determine a treatment plan based on your needs and the severity of your drug abuse. NYSTC will place you in a treatment program and you will stop using drugs and alcohol.

To move to Phase II, you must meet the Phase I requirement, which is:

- 4 months in a row clean time without sanctions in treatment.

**Remember that moving to the next phase will only happen when you recognize you have an Alternative to the lifestyle you have been living.**

## Graduation: A time to celebrate your accomplishments



You will be able to invite your family and friends to join you at your NYSTC Graduation Ceremony.

### Requirements for Graduation:

- Complete all NYSTC Phases (at least 12 months without a sanction)
- Participation in 8 hours of community service
- Full time employment or SSI/SSD benefits, if disabled
- High school diploma or GED, if required by your plea agreement
- Submit a written Graduation Application

## Court Responses to New Arrests and Infractions

### Methadone to Abstinence Phases:

If you want to join NYSTC and you are already in a methadone program, you must agree to move from methadone to abstinence in order to participate.

#### All methadone clients must:

- Give their NYSTC Case Manager the name and telephone number of their methadone program, physician and counselor
- Follow your “pick-up” schedules and testing set by your methadone program
- Give weekly urine tests and attend additional treatment as directed by the Court

#### Phase I- Alternative

In addition to all other Phase I requirements, methadone participants must:

- Remain “clean” from all other drugs and alcohol
- Reduce their methadone dosage in half
- Have 4 months in a row sanctionless time

#### Phase II- Action

In addition to all other Phase II requirements, methadone participants must:

- Completely detox from methadone and continue to remain “clean” from all other drugs and alcohol
- After completely detoxing from methadone, have 4 months in a row sanctionless time before advancing to Phase III

#### Phase III- Achievements

Phase III requirements are the same for methadone participants as they are for drug- free clients. All requirements for graduation are the same.

Court Responses to New Arrests and Infractions		
Type of Arrest	Court Imposed Response	Action
New Violent Arrest	No Sanction Available	Imposition of Jail Alternative
New Non-Violent Arrest	Termination from Court Mandate Jail: Number of Days at Judge's Discretion	•Imposition of Jail Alternative •Loss of Current Phase •Full Level Review

Infraction	Court Imposed Sanction	Possible Consequence
The following infractions will immediately result in a Court Imposed Sanction:	<b>1st Sanction:</b> <ul style="list-style-type: none"> <li>• 1-14 Days Jail</li> </ul> <b>2nd Sanction:</b> <ul style="list-style-type: none"> <li>• Change in Program/Modality</li> </ul> <b>3rd Occurrence:</b> <ul style="list-style-type: none"> <li>• 15-28 Days Jail</li> </ul> <b>Failure:</b> Jail Sentence	<b>At every Sanction:</b> <ul style="list-style-type: none"> <li>• Full Treatment Level Review</li> <li>• Return to Earliest Phase of Treatment</li> <li>• Increase in Jail Alternative</li> <li>• Termination from NYSTC</li> </ul>
<ul style="list-style-type: none"> <li>• Abscond or Termination from Program with Involuntary Return to Court</li> </ul>	<b>1st Sanction:</b> <ul style="list-style-type: none"> <li>• Lunch Remand</li> <li>• 2 Days Penalty Box</li> <li>• Essay/Letter Writing</li> <li>• Detox/Rehab</li> </ul> <b>Phase Change</b>	<ul style="list-style-type: none"> <li>• Return to Beginning of Current or Earlier Treatment Phase</li> </ul>
<ul style="list-style-type: none"> <li>• Substituted or Tampered Urine</li> <li>• Submitting Fraudulent Documentation to the Court</li> </ul>	<b>2nd Sanction:</b> <ul style="list-style-type: none"> <li>• 1-7 Days Jail</li> </ul> <b>3rd Sanction:</b> <ul style="list-style-type: none"> <li>• Program/Modality Change</li> </ul> <b>4th Sanction:</b> <ul style="list-style-type: none"> <li>• 8-14 Days Jail</li> </ul> <b>Program/Modality Change</b>	<ul style="list-style-type: none"> <li>• Treatment Modality Change</li> <li>• Termination from NYSTC</li> </ul>
<ul style="list-style-type: none"> <li>• Abscond or Termination from Program with Voluntary Return to Court</li> </ul>	<b>1st Sanction:</b> <ul style="list-style-type: none"> <li>• 15-28 Days Jail</li> </ul> <b>5th Occurrence:</b> <ul style="list-style-type: none"> <li>• Failure: Jail Sentence</li> </ul>	
The following infractions will immediately result in a Court Imposed Sanction: <ul style="list-style-type: none"> <li>• Positive or Missed Urine</li> <li>• Missed Appointment</li> <li>• Rule Breaking at Program</li> <li>• Two Late Arrivals at NYSTC</li> </ul>	<b>1st Sanction:</b> <ul style="list-style-type: none"> <li>• 1 Day Bench</li> <li>• Essay/Letter Writing</li> <li>• Detox/Rehab</li> </ul> <b>Phase Change</b>	<ul style="list-style-type: none"> <li>• Increased Case Management Visits and Urine Tests</li> <li>• Detox/Rehab</li> <li>• Journal Writing</li> <li>• Loss of Program Privileges</li> <li>• Loss of Compliance Time</li> <li>• The Amount Depending on Current Phase Level</li> </ul>
<b>The Judge Retains Discretion to Depart from the Sanction Guidelines</b>	<b>2nd Sanction:</b> <ul style="list-style-type: none"> <li>• Lunch Remand</li> <li>• Detox/Rehab</li> </ul> <b>Phase Change</b>	
	<b>3rd Sanction:</b> <ul style="list-style-type: none"> <li>• 1-7 Days Jail</li> <li>• Detox/Rehab/Modality Change</li> </ul> <b>4th Sanction:</b> <ul style="list-style-type: none"> <li>• 8-14 Days Jail</li> </ul> <b>Program/Modality Change</b>	
	<b>5th Sanction:</b> <ul style="list-style-type: none"> <li>• 15-28 Days Jail</li> </ul> <b>6th Occurrence:</b> <ul style="list-style-type: none"> <li>• Failure: Jail Sentence</li> </ul>	

## PHASE II

### Action

#### Goals:

- Get yourself stable in treatment
- Take **ACTION** by looking at the reasons why you have abused drugs
- Rise to the challenge of recovery as a way of life

**How to Do It:** You will stabilize yourself in treatment and set goals for your education, employment, vocational training and reconnecting with family

To move to Phase III you must meet all Phase II requirements. They are:

8 total months without sanction (4 more months in-a-row after you move to Phase 2)

If you test positive for drugs, you will lose 30 days of clean time.

Remember that moving to the next phase is based on the Actions you take to work towards your Recovery.

## PHASE III

### Achievements

#### Goals:

- Using your recovery skills
- Vocational skills and educational **ACHIEVEMENTS**
- Getting a job
- Continuing to reconnect with your family
- A new start into your community

**How to Do It:** You are now in the final phase of treatment. Having remained clean for a long period of time, you will work on rehabilitation. You will work on reconnecting with your family and educational, vocational and career development.

Once you have done everything you need to do for Phase III, you will be eligible to have your case dismissed and to graduate from NYSTC.

Specific Requirements are:

At least 12 months of participation without a sanction (4 more months in-a-row after you move to Phase 3)

At least 3 months in-a-row must be without a sanction.

If you test positive for drugs, you will lose 3 months of clean time.

Now that you have chosen an **ALTERNATIVE**, worked on **ACTIONS** and succeeded in your **ACHIEVEMENTS**, you are ready for Graduation.

## Participant Handbook

### **Purpose**

To inform participants of drug court rules, their obligations, available services, sanctions and incentives.

### **Form**

While there is no prescribed format for conveying this information to participants, any handbook given to participants should give fair notice of all information that the participant is expected to know and should be written in an easy to understand, accessible format.

### **Suggested Elements**

#### ***Contact Information***

Telephone and address of clinical staff and lawyer

#### ***Drug Court Program Information***

Simple explanation of the drug court program

#### ***Drug Court Rules***

Handbook should list all pertinent rules with which participant will be expected to comply.

#### ***Description of Milestones/Phases***

Handbook should describe milestones and phase or level structure that drug court uses to advance participants through the program. Handbook should notify the participant of all requirements participant must complete.

#### ***Description of Sanctions and Incentives***

Handbook should inform participant of the drug court's sanction schedule or structure, putting the participant on notice regarding consequences for violations of the conditions of release and rules of the drug court and programs. Handbook should also describe incentives available to participants for compliance.



# New York State Unified Court System Drug Court Treatment Progress Form

DATE OF REPORT: \_\_\_\_\_  
REPORT PERIOD COVERING:  
\_\_\_\_\_ to \_\_\_\_\_

## PATIENT INFORMATION

Name:	Drug of Choice:	Date of Admission: ____/____/____	Est Date of Completion: ____/____/____	Dkt#/SCI# (Court Use Only)
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## COURT INFORMATION

Court:	Case Manager:	Telephone:	FAX:
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## TREATMENT AGENCY

Treatment Agency Name:	Type/Modality:	Preparer's Signature:
Program Counselor:	Program Contact:	Contact Telephone:

## RECOMMENDATION

- ☐ Maintain Current Treatment Status
- ☐ Referral for Additional Services
- ☐ Consider for Completion
- ☐ Revise Treatment Plan
- ☐ Being Considered for Discharge

## TREATMENT SCHEDULE

Month	days/wk (circle) M T W Th F Sa
# sessions/wk	#hrs/wk

## TREATMENT ATTENDANCE P=Present/E= Excused/A=Absent/L=Late (Attendance not required for residential)

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	

## TREATMENT AREAS

(N/A=not applicable, E=excellent, G=good, I=improved, NI=needs improvement)

Treatment Area	N/A	E	G	I	NI
Attitude towards Treatment	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Stability of med/psych health	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Status of Entitlements	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Family system status	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Participates in all aspects of program	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Develop social support network	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Educational/Vocational/Employment	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

## TOXICOLOGY (P=Positive, N=Negative, L=Lab/Pending)

Date	THC	Her	Coc	Bez	Amp	PCP	Alc	Meth	Barb	PM	Notes

Key: THC=THC; Her=Heroin; Coc=Cocaine; Bez=Benzodiazepine; Amp=Amphetamine;  
PCP=PCP; Alc=Alcohol; Meth=Methadone; Barb=Barbituates; PM=Prescription Medication

## TREATMENT SUMMARY/COMMENTS

(Please be specific and include recommendations, aftercare information, other relevant progress. Include program's response to identified problems, changes in treatment plan, achievements, and issues with which the court may be able to assist )


## ANCILLARY SERVICES (Indicate all services participant is attending)

Type of Service	days/wk (circle)	# absences	# attended
<input type="checkbox"/> Comm. Service	M T W Th F Sa		
<input type="checkbox"/> Educ./Voc. Ed.	M T W Th F Sa		
<input type="checkbox"/> Med./Psych.	M T W Th F Sa		
<input type="checkbox"/> Parenting	M T W Th F Sa		
<input type="checkbox"/> Probation	M T W Th F Sa		
<input type="checkbox"/> Support Grp	M T W Th F Sa		
<input type="checkbox"/> Other	M T W Th F Sa		

Treatment Summary/Comments:

\*Include Page 2 for all Family Court Reports and Additional Comments (Page 2 is not required for Non-Family Court cases)

**UPDATE ON CHILDREN (Mandatory for Family Treatment Court)**

Comments, concerns and issues regarding children where the court may be able to assist: (Please include names of children and date of occurrence if known) (e.g., child visitation and child service issues, parent/child interaction, etc.)

CLIENT SELF-REPORTED: \_\_\_\_\_

TREATMENT PROVIDER OBSERVED: \_\_\_\_\_

FAMILY SERVICES: \_\_\_\_\_

*\*\* Any information reported on this form does not release treatment provider from any responsibility to immediately notify the appropriate child service agency (e.g., ACS) and/or the court of any outstanding issues or concerns*

**ADDITIONAL COMMENTS (Not Required)**

Please use this space for any additional comments or to continue answers from previous sections



## Treatment Progress Form

### **Purpose**

To allow treatment providers to inform drug court judges and clinical staff of participants' progress.

### **Form**

The Drug Treatment Court Progress Form is a form approved by the Director, Office of the Court Drug Treatment Programs and all drug courts have been directed to supply community-based treatment providers with the form and require their use.

### **Required Elements**

This document is a standardized form drafted with extensive input from both treatment providers and drug court judges and personnel. The standard form is designed to alleviate the burden treatment providers face using different reporting tools for different drug courts. The progress report form is designed for use by both adult criminal drug courts and family court drug courts. All treatment providers are required to fill out the first page of this two page document, while those treatment providers reporting on a family court drug court participant must fill out the second page. Treatment providers reporting on an adult criminal drug court participant are not required to use the second page but may do so if they require more space. The Progress Report form also comes with an instruction sheet explaining how treatment providers should utilize each section. The Uniform Progress Report includes space for treatment providers to report on the following areas:

#### First Page

- Client Information
- Court Information
- Treatment Agency
- Treatment Schedule
- Treatment Attendance
- Treatment Areas
- Toxicology
- Treatment Summary/Comments
- Ancillary Services

#### Second Page

- Update on Children (Mandatory for Family Treatment Court)
- Additional Comments

NYS Drug Court  
Self Help Verification Log  
Defendant's Name: \_\_\_\_\_

Entry One

DAY/DATE: \_\_\_\_\_ TIME: \_\_\_\_\_ LOCATION: \_\_\_\_\_

SPEAKER'S INITIALS \_\_\_\_\_ What was the general topic of the discussion?

Did you share? \_\_\_\_\_ What was your feeling or impression of the meeting?

Entry Two

DAY/DATE: \_\_\_\_\_ TIME: \_\_\_\_\_ LOCATION: \_\_\_\_\_

SPEAKER'S INITIALS \_\_\_\_\_ What was the general topic of the discussion?

Did you share? \_\_\_\_\_ What was your feeling or impression of the meeting?

Entry Three

DAY/DATE: \_\_\_\_\_ TIME: \_\_\_\_\_ LOCATION: \_\_\_\_\_

SPEAKER'S INITIALS \_\_\_\_\_ What was the general topic of the discussion?

Did you share? \_\_\_\_\_ What was your feeling or impression of the meeting?

## Self Help Verification Journal

### **Purpose**

A log completed by drug court participant whose purpose is to help clinical staff verify required attendance at self help meetings.

### **Form**

This document should contain space for multiple entries that give information on the individual self help meetings that a drug court participant has attended pursuant to instructions from the judge or clinical staff.

### **Required Elements**

#### ***Day/Date, Time and Location***

Date, time and location of self help meeting.

#### ***Group Leader Verification***

Many self-help groups have a speaker or leader that organizes or directs a particular meeting. Many self-help groups also prohibit identifying members of the group, including the leader. The leader or speaker, however, will often initial the verification log.

#### ***Self-Reported Information about Particular Meeting***

Since the drug court personnel cannot typically communicate with a liaison for a self-help group to verify that a participant has in fact attended a particular meeting, the participant should be required to supply specific information about each meeting that only someone who attended would be able to give. Such information includes:

- Topic of Discussion;
- Whether participant spoke at the meeting or “shared;” and
- Participant’s impression of the meeting.



## New York State Drug Court Declaration of Delinquency/Warrant Request

Date: \_\_\_\_\_

Case Manager: \_\_\_\_\_

Reviewed By: \_\_\_\_\_

Participant Name	SCI/Dkt#	Court Date	Program Name & Address	Details & Dates of Delinquency

## Declaration of Delinquency/Warrant Request

### **Purpose**

Used in drug courts where one person is responsible for writing and submitting declarations of delinquency, this request is used to give that person the facts necessary to make an accurate request for a bench warrant.

### **Form**

This document should provide space for the writer to put all information necessary for another person to accurately write a declaration of delinquency request to the drug court judge. The form may have space for the requestor to write multiple entries for multiple defendants.

### **Required Elements**

The information given in the warrant request form should closely track those necessary to complete a declaration of delinquency. Typical required elements include:

- name of defendant
- case Identifying Information (Docket, Indictment, Superior Court Information or Index Number)
- date of next court appearance
- name and address of participant's program
- dates and details of participant's violation of conditions of release

\_\_\_\_ Court of the \_\_\_\_ of \_\_\_\_  
County of \_\_\_\_ : Part \_\_\_\_

Next Court Date \_\_\_\_\_

-----X  
THE PEOPLE OF THE STATE OF NEW YORK :

SCI/IND/DKT# \_\_\_\_\_

-Against-

:  
: Declaration of Delinquency and  
: Bench Warrant Order

,Defendant. :  
-----X

### VIOLATIONS OF CONDITIONS OF RELEASE

1. I am the coordinator for the New York State Drug Court located at \_\_\_\_\_.
2. As a condition of release pending sentence, the Court ordered the above-named defendant to attend and participate in substance abuse treatment, specifically \_\_\_\_\_.
3. The defendant, after evaluation by the drug court clinical staff was referred to the above-mentioned program(s). Based on information from \_\_\_\_\_ the defendant has left the program prior to completion, in violation of the court's order. Specifically, the defendant \_\_\_\_\_.
4. Therefore, as a result of defendant's failure to comply with court ordered condition of release, it is hereby requested that the court issue a bench warrant. Upon defendant's return to court, we ask the presiding judge to review the prior order releasing the defendant on his/her own recognizance.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Coordinator

On the basis of the above information, there is a reasonable cause to believe that the defendant has violated a condition of his/her release pending sentence. Accordingly, subject to final review, it is hereby declared that the defendant is in violation of his/her conditions of release. Therefore, a warrant shall issue directing the defendant to be taken into custody and brought before the court pursuant to C.P.L. §§ 530.60(1), 410.60.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Judge/Justice, Drug Court

## Declaration of Delinquency and Bench Warrant Order

### **Purpose**

A declaration by drug court clinical staff notifying drug court judge that a drug court participant has left the program to which he/she was referred and has not returned to court, in violation of the terms and conditions of release. Often the declaration of delinquency contains an order by the court directing the issuance of a bench warrant.

### **Form**

This document should be created in the format of statement of violation of conditions of release. If the declaration of delinquency also contains a bench warrant order, the document should take the form of a court order complete with case caption, case identifying number and court of record.

### **Required Elements**

#### ***Statement of Violation of Conditions of Release***

The document should state who is notifying the court that participant has violated the conditions of release. It should also specifically state in what way the participant has violated the conditions of release.

#### ***Request for Bench Warrant***

The declaration of delinquency should formally ask the judge to issue a bench warrant for the arrest of the participant.

#### ***Signature of Requesting Party***

Document must be signed by the individual requesting issuance of bench warrant.

### **Order**

If an order by the drug court judge is included in the declaration of delinquency, the document should include a finding by the court that there is reasonable cause to believe that defendant has violated a condition of release and that he/she should be taken into custody pursuant to C.P.L. §§ 530.60 and 410.60.

#### ***Signature of Judge***

An order by the Court must include the judge's signature.



## New York State Drug Court

### Request for Documentation of Medical Care "Aftercare Letter"

SAMPLE

To the Drug Court Participant: Take this letter to the Department of Correction Medical Clinic and wait for an "Aftercare Letter" from clinic personnel.

.....

Correctional Health Services

Defendant \_\_\_\_\_

Book & Case # \_\_\_\_\_

Drug Court \_\_\_\_\_

Date of Court Appearance \_\_\_\_\_

To Correctional Health Services:

Please accept this letter on behalf of the aforementioned drug court participant as a request for an "Aftercare Letter" for the following information: PPD results, any chest x-ray results, any medical treatment, medication, and/or necessary medical follow-up. Please include information on methadone detoxification, if applicable.

This drug court participant is being referred to a residential treatment program and this information is needed to help facilitate this process. The participant has been asked to have this information in writing for the court appearance listed above.

Thank you for your assistance.

Coordinator/Case Manager \_\_\_\_\_

Phone # \_\_\_\_\_



## Request for Documentation of Medical Care “Aftercare Letter”

### **Purpose**

To request medical information from jail medical personnel for incarcerated defendants that is required by community-based treatment providers for admission into their facility.

### **Required Elements**

#### ***Instructions to Defendant***

This form should include instructions to the defendant as to where and to whom the form should be delivered.

#### ***Recipient Information***

Form should be addressed to the agency from which the medical documentation is being requested.

#### ***Defendant Identifying Information***

Form should include not only defendant's name but an identifying number recognized by jail officials such as a Book and Case Number, NYSID Number or social security number.

#### ***Drug Court Information***

Form should include the name of the drug court, appropriate contact person at drug court, drug court address and/or phone number and the date of defendant's next court appearance.

#### ***Requested Information***

The form should include a brief explanation of why the medical information is needed. Information required should include the following:

- PPD results
- any chest x-ray results
- any medical treatment received in the jail setting, including methadone or other detoxification
- any medication dispensed in the jail setting
- follow-up medical care required



**New York State Drug Court**  
**Request for Release of Inmate Property**

To: Department of Correction Supervisor

From: \_\_\_\_\_

Date: \_\_\_\_\_

Re: **Request for Release of Inmate Property**

Defendant \_\_\_\_\_

Book & Case # \_\_\_\_\_

Drug Court \_\_\_\_\_

Drug Court Judge \_\_\_\_\_

Date of Court Release \_\_\_\_\_

This letter is written on behalf of the aforementioned defendant. Please be advised that on the date of court release, defendant is scheduled to appear in the aforementioned Court and Judge. The Judge will release defendant on that date for placement in a residential drug treatment program under Court order.

The undersigned will be transporting defendant directly from the Court to a residential treatment facility, where defendant will receive drug treatment. It is respectfully requested that this inmate be allowed to bring all of his/her personal belongings and medications to the Court on that date. Any help you provide in this matter is greatly appreciated.

Please feel free to contact me for further information.

Sincerely,

\_\_\_\_\_  
Coordinator/Case Manager

\_\_\_\_\_  
Telephone

## Request for Release of Inmate Property

### **Purpose**

To inform Corrections personnel that the drug court judge intends to release participant from custody into a substance abuse treatment program on his/her next court appearance and that corrections personnel allow the participant to bring his personal belongings and medications to court

### **Form of Letter**

The letter should be addressed to Department of Corrections or local jail supervisor and from the drug court coordinator or case manager. Letter should inform Corrections/jail supervisor of the judge's intent on the participant's next court appearance and ask that the participant be allowed to bring personal belongings and medication to court.

### **Required Elements**

#### ***Recipient Information***

Form should be addressed to local jail or Department of Corrections supervisor.

#### ***Defendant Identifying Information***

Form should include defendant's name and identifying number such as a book and case number, NYSID number or Social Security number.

#### ***Drug Court Information***

Form should include the name of the drug court, drug court judge, appropriate contact person at drug court, drug court address and/or phone number and the date of court release.