BLURRED LINES:
THE POTENTIAL FOR PARTIAL JUDGES AND IMPARTIAL LAWYERS IN DRUG COURTS

Ryan Shymansky*

INTRODUCTION

In 1989, the nation's first drug court was established in Miami-Dade County, Florida.[1] Not even thirty years later, more than three thousand drug courts operate across all fifty states and twenty-seven U.S. District Courts.[2] This rapid growth can be at least partially attributed to effectiveness; drug courts are estimated to decrease the recidivism of nonviolent drug offenders by an average of eight to twenty-six percent,[3] with the most effective drug courts doing the same by as much as thirty-five or forty percent.[4] Coupled with the substantial cost savings associated with drug court programs—they produce a two hundred twenty-one percent return on investment for their respective jurisdictions, on average[5]—and drug courts seem an unmitigated success.

Yet, even among this flurry of warranted praise, drug court programs impose costs of their own. Participants in drug courts, whether presentence or post-incarceration, waive many of their basic Constitutional rights.[6] While a good deal of scholarly and judicial attention

---

* Georgetown University Law Center, J.D. expected 2019. Mr. Shymansky is a Featured Online Contributor for the *American Criminal Law Review*.

[1] Kevin S. Burke, *Just What Made Drug Courts Successful?*, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 39, 40 (2010).

[2] NAT'L INST. OF JUSTICE, DRUG COURTS (Jan. 10, 2017), https://www.nij.gov/topics/courts/drug-courts/Pages/welcome.aspx.

[3] Douglas B. Marlowe, *Research Update on Adult Drug Courts*, NAT'L ASS'N OF DRUG COURT PROF'LS 1 (December 2010), https://www.nadcp.org/sites/default/files/nadcp/Research%20Update%20on%20Adult%20Drug%20Courts%20-%20NADCP_1.pdf.

[4] *Id.* at 2.

[5] *Id.* at 3.

[6] Trent Oram & Kara Gleckler, *An Analysis of the Constitutional Issues Implicated in Drug Courts*, 42 IDAHO L. REV. 471, 492 (2006).

has been paid to the Establishment Clause,[7] Fourth Amendment,[8] and Due Process[9] concerns raised by these waivers, perhaps no concern is as fundamental as the transformation of the adversarial process itself. While a program's "team" structure allows it to function as a goal-oriented body aimed at recovery for individual participants,[10] it also means that (aside from occurring in a courthouse) drug court programs actually have very little in common with traditional courts.[11] This Note will seek to address two concerns that arise from this distinctive structure: first, that judges often struggle to remain impartial as part of drug court teams, and second, that defense attorneys have difficulty strike a balance between zealously representing their clients and working cooperatively with probation officers and prosecutors. A uniform act regulating drug courts can help mitigate both concerns by providing a clear set of ethical standards for judges and lawyers to abide by.

PART I: TODAY'S DRUG COURT LANDSCAPE

While drug court programs vary widely across the country, they are fundamentally "specially designed calendar[s] or dockets[s], the purposes of which are to achieve a reduction in recidivism and substance abuse among nonviolent substance-abusing offenders . . . through early, continuous, and intense judicially supervised treatment, mandatory period drug testing, and use of appropriate sanctions and other habilitation

---

[7] Drug courts often require participation in recovery programs such as Alcoholics Anonymous (AA) or Narcotics Anonymous (NA). That these programs are premised on recognizing the existence of a higher power has led courts to hold that mandatory attendance at AA and NA meetings violates the Establishment Clause. *See, e.g.,* Warner v. Orange County Dep't of Probation, 115 F.3d 1068, 1076 (2d Cir. 1996) (requiring AA as a condition of probation ran afoul of the Establishment Clause); Kerr v. Ferry, 95 F.3d 472, 479 (7th Cir. 1996) (conditioning parole eligibility on attendance at NA meetings violated the Establishment Clause).

[8] Drug court programs often require that defendants consent to physical and property searches at any time. William G. Meyer, *Constitutional and Other Legal Issues in Drug Court*, NAT'L ASS'N OF DRUG COURT PROF'LS 7 (May 9, 2007), http://legisweb.state.wy.us/2007/interim/drugcourt/legalissues.pdf. These waivers are generally upheld as valid. *See, e.g.*, Wilkinson v. State, 641 S.E.2d 189 (Ga. Ct. App. 2006); State v. Jones, Nos. 23459–2–III, 23460–6–III, 2006 WL 182938 (Wash. Ct. App. Jan. 26, 2006).

[9] The application of sanctions, termination from a program, and waivers of due process challenges all implicate due process. *See* Fern L. Kletter, Annotation, *Due Process Afforded in Drug Court Proceedings*, 78 A.L.R.6th 1 (2012).

[10] Karen Freeman-Wilson et al., *Critical Issues for Defense Attorneys in Drug Court,* NAT'L DRUG COURT INST. 3 (April 2003), https://www.ndci.org/wp-content/uploads/Mono4.CriticalIssues.pdf.

[11] Some courts have explicitly held that drug courts are not courts. *See, e.g.,* Dunson v. Commonwealth, 57 S.W.3d 847, 850 (Ky. Ct. App. 2001) ("[T]he 'Drug Court' is not a 'court' in the jurisprudence sense; it is a drug treatment program administered by the court system."); State v. Jakubowski, 822 A.2d 1193, 1194 (Me. 2003) ("Drug court is not a separate court, but a program within the Superior and District Courts.").

services."[12] Though their roots lie in state court systems, drug courts have seen significant growth across U.S. District Courts as well.[13] Unlike typical adversarial proceedings, drug courts rely on a "team" structure that asks a participant's attorney to work alongside judges and prosecutors to ensure successful completion of a jurisdiction's program.[14]

Drug courts can be broadly categorized as either presentence or reentry programs. Presentence drug courts are alternatives to incarceration that give non-violent drug offenders the choice to participate in an intensive drug rehabilitation program, often spanning a period of months or years and requiring a guilty plea, court visits, therapy, and stable employment.[15] As the alternative-to-incarceration label suggests, offenders who successfully complete presentence drug court programs generally receive substantially reduced or suspended sentences.[16] Reentry programs, on the other hand, are problem-solving courts meant to give newly-released nonviolent offenders access to the treatment and structure necessary for rehabilitation.[17] These post-incarceration programs involve many of the same types of court appointments as their presentence counterparts.[18]

Both types of drug courts rely on a heavy degree of oversight and involvement in the day-to-day lives of their participants.[19] Beyond a participant's regularly-scheduled meetings with the judge and other enforcement personnel in her case,[20] she may also be required to submit to regular drug testing and attendance at a twelve step program.[21] In response to violations of drug court conditions, judges may levy sanctions on a participant including home confinement, community service, and even incarceration.[22] Sufficiently severe or regular violations can result in termination from a program altogether.[23]

---

[12] BUREAU OF JUSTICE ASSISTANCE, DEP'T OF JUSTICE, BJA DRUG COURT DISCRETIONARY GRANT PROGRAM: FY 2011 REQUIREMENTS RESOURCE GUIDE 5 (2011), https://www.bja.gov/Funding/11DCResource.pdf.

[13] NAT'L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, DRUG COURTS (Jan. 10, 2017), https://www.nij.gov/topics/courts/drug-courts/Pages/welcome.aspx.

[14] Meyer, *supra* note 8, at 19.

[15] Mosi Secret, *Outside Box, Federal Judges Offer Addicts a Free Path*, N.Y. TIMES, March 1, 2013, at A1.

[16] *Id.*

[17] Matthew G. Roland, *Assessing the Case for Formal Recognition and Expansion of Federal Problem-Solving Courts*, 80 FED. PROBATION 3, 7 (2016).

[18] *Id.*

[19] United States v. Leitch, Nos. 11-CR-00609 (JF), 11-CR-00457 (JG), 11-CR-00039 (JG), 2013 WL 753445, at *7 (E.D.N.Y. Feb. 28, 2013) ("Drug courts have demonstrated that judicial involvement in the rehabilitative process can greatly influence a defendant's success in treatment.").

[20] *Id.* ("These group meetings address each participant's progress or problems during the preceding months and goals for the upcoming month.").

[21] Meyer, *supra* note 8, at 7.

[22] *Leitch*, 2013 WL 753445, at *12.

[23] Meyer, *supra* note 8, at 10.

PART II: JUDGES AND THE RISK OF PARTIALITY

The first clear implication of drug courts' non-adversarial structure is that no participant in the process is meant to be impartial, insofar as every involved party pursues a shared goal—"the defendant's recovery from drug addiction."[24] This means that, at least to some extent, a judge is no longer a neutral party in drug court proceedings. Whether angry at a violation of program rules or pleased with a long period of success, a judge is meant to take an active role in the recovery process in every drug court.[25] Indeed, "[j]udges become endorsers of the drug court program and strive to convince defendants to enter the program."[26]

Judges work as members of a participant's treatment team, taking part in conversations about treatment decisions, appropriate sanctions, and program terminations.[27] These conversations primarily occur in pre-conference meetings, where a judge and other team members have a chance to discuss a participant's progress (or lack thereof) before engaging with a participant directly.[28] These meetings, while administratively prudent, give rise to the danger that a judge will form conclusions about a participant's conduct before even speaking with her.[29]

This role can converge with Due Process, which requires "an absence of actual bias on the part of a judge."[30] In determining whether such bias exists, courts ask whether "the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias."[31] Given a judge's hands-on role in drug court proceedings, concluding that the potential for bias exists seems inescapable. Judges have access to a variety of sources of information from drug court team members, ranging from a participant's attorney to a participant's counselor.[32] This information can be confidential in nature,[33] including information about a participant's treatment, personal life, and possible relapses.[34] That this knowledge has

---

[24] Freeman, *supra* note 10, at 3.

[25] BUREAU OF JUSTICE ASSISTANCE, DEP'T OF JUSTICE, BJA DRUG COURT DISCRETIONARY GRANT PROGRAM: FY 2011 REQUIREMENTS RESOURCE GUIDE 4 (2011), https://www.bja.gov/Funding/11DCResource.pdf ("Ongoing judicial interaction with each drug court participant is essential.").

[26] Oram & Gleckler, *supra* note 6, at 512–13.

[27] *Leitch*, 2013 WL 753445, at *12.

[28] *See* Burke, *supra* note 1, at 54.

[29] *Id.* ("[Early hypothesis generation] may be more likely where there is an over commitment to the idea that the adversarial system is inappropriate.").

[30] In re Murchison, 349 U.S. 133, 136 (1955) ("[A] fair tribunal is a basic requirement of due process.").

[31] Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 881 (2009).

[32] Meyer, *supra* note 8, at 19 ("Judges sitting in drug court often have substantial information about drug court participants – some of which was gained through on the record colloquies and pleadings and other information from informal staffings with defense counsel, the prosecutor, treatment provider and probation, etc.").

[33] Oram & Gleckler, *supra* note 6, at 533.

[34] *See* Alexander v. State, 48 P.3d 110, 113 (Okla. Crim. App. 2002).

the potential to lead to bias in sanctioning decisions, probation revocation hearings, and program termination hearings is evident, and may adversely affect drug court participants. A review of sentencing decisions in Manhattan is instructive: while a normal sentence for possession of crack cocaine yields a 10- to 20-day jail sentence, defendants who enter but do not complete drug court programs may be sentenced to six months in jail.[35] This is a striking difference, and may demonstrate judicial bias even in formal proceedings like termination hearings.

The challenges that drug courts pose to judicial impartiality has not gone unnoticed. In response to the termination of a defendant's involvement in a drug court program, the Oklahoma Court of Criminal Appeals found that "[r]equiring the District Court to act as Drug Court team member, evaluator, monitor and final adjudicator in a termination proceeding could compromise the impartiality of a district court judge assigned the responsibility of administering a Drug Court participant's program," and held that future termination hearings should be conducted by judges not part of a defendant's drug court team.[36] In a concurring opinion in the same case, the problem was presented more bluntly as a violation of "the separation of powers doctrine by placing a judge in the role of performing executive and judicial functions simultaneously, *i.e.*, serving as judge and parole officer at the same time."[37] Other courts have reached much the same conclusion, holding that "an objective observer could reasonably conclude that the presiding drug court judge could not . . . maintain an open mind while making the requisite findings at [a] probation revocation hearing."[38]

To be sure, this is not intended as a condemnation of judges' actual ability to remain impartial; nevertheless, the fact that their impartiality is called into question through their participation in drug courts at all has negative implications for the due process afforded to criminal defendants. Requiring judicial recusal in formal hearings upon a defendant's request seems an administrable and effective way to allay most fears of

---

[35] NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AMERICA'S PROBLEM-SOLVING COURTS: THE COSTS OF TREATMENT AND THE CASE FOR REFORM 29 (2009), https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20217.

[36] *Alexander*, 48 P.3d at 115.

[37] *Id.* at 155 (Lumpkin, J., concurring).

[38] State v. Cleary, 882 N.W.2d. 899, 906 (Minn. Ct. App. 2016). *See also* State v. Stewart, No. W2009–00980–CCA–R3–CD, 2010 WL 3293920, at *4 (Tenn. Crim. App. Aug. 18, 2010) (reasoning that a judge who was a member of a defendant's drug court team could not later conduct a probation revocation hearing for that defendant without violating due process). *But see* State v. Belyea, 160 N.H. 298, 303 (2010) (holding that a defendant had "failed to establish that an objective, disinterested observer who is fully informed of the operation of the [drug court program] . . . would entertain significant doubt about [a judge's] ability to fairly and impartially judge the issues presented at the defendant's termination hearing.").

impartiality.[39] Such rules, if implemented nationally, would impose clear standards for judges to follow while guaranteeing a fresh set of eyes to preside over formal hearings and termination proceedings. Such national standards have the added benefit of providing a degree of consistency between courts that would allow judges to reference cases in other jurisdictions to determine any lingering questions of recusal in their own courts. By taking much of the guesswork and ambiguity out of judges' hands, national rules—like in other areas of law—lend an imprimatur of formality and due process to judges in drug court programs.

PART III: DEFENSE COUNSEL AND THE RISK OF IMPARTIALITY

Unlike judges, defense attorneys face the opposite ethical and constitutional concern—namely, whether or not impartiality may actually cloud their responsibility toward their client. Rather than being expected to advocate *against* the prosecution in adversarial proceedings, a defendant's attorney is expected to work *with* the prosecution, the court, and other team members in drug court proceedings.[40] Obvious decisions in a traditional courtroom—whether or not to share confidential information about a relapse, for example[41]—may be significantly murkier in a back-room drug court team meeting.[42] Defense attorneys generally participate in pre-conference meetings with other drug court team members,[43] and while "the defense lawyer's protective function is not diminished, [the] primary exercise of this function will shift" towards these meetings rather than open court.[44] Defense attorneys are thus left on their own to determine where their commitment to the drug court treatment process ends and their commitment to their client begins. Where an attorney believes that drug court may provide an effective treatment for her client, she may be tempted to recommend participation in a program (and thus a guilty plea) even in cases lacking a key element that could lead

---

[39] Oram & Gleckler, *supra* note 6, at 542.

[40] Meyer, *supra* note 8, at 3 ("Drug courts reject the adversary model – where an impartial judge resolves conflicts between the parties' chosen, state interests after hearing presentations from the parties' lawyers – in favor of a system where the universally shared goal, the defendant's recovery from drug addiction and increased public safety, is expressed at the outset and shared by the parties and the court alike.").

[41] *See* Jeffrey Tauber et al., *Federal Confidentiality Laws and How They Affect Drug Court Practitioners,* NAT'L DRUG COURT INST. at 18 (April 1999), https://www.ndci.org/wp-content/uploads/federalconfidentiality.pdf.

[42] *Id.* at 7 ("Although some ethical rules and precepts designed primarily for the adversary context (e.g., the duties of zealous, partisan advocacy) may be adapted to the legitimate goals of the drug court process, requiring a lawyer to disclose confidences and secrets against the client's stated wishes should raise red flags for any defense lawyer.").

[43] *See* Burke, *supra* note 1, at 54.

[44] Karen Freeman-Wilson et al., *Ethical Considerations for Judges and Attorneys in Drug Court* at 28, NAT'L DRUG COURT INST. 18 (May 2001), https://www.ndci.org/wp-content/uploads/ethicalconsiderations.pdf.

to outright dismissal.[45] This is no meager risk; defense attorneys are asked to encourage an offender's participation in drug court, and such encouragement does not necessarily involve speaking with a client about what she wants.[46]

Moreover, some defense lawyers oppose current drug court regimes on other principles. A number of public defenders argue that the lack of additional hearings before a court imposes sanctions on a drug court participant represents a lack of due process.[47] Others point to the lack of clarity in explaining the drug court process to their clients. A defense attorney may even refuse to "recommend drug courts to clients very often anymore, since the risks and burdens are so high."[48] There remains a fundamental lack of clarity surrounding the proper role of a defense attorney in drug courts, particularly if the interests of one's client "eventually diverge from those of the judge and the treatment team, especially if and when the judge resorts to the variety of punitive sanctions available in a drug court program."[49]

The solution to this lack of clarity is more top-down guidance about the role of defense attorneys in drug courts. In particular, drug courts "should specifically outline permissible procedures at all stages of drug court proceedings—including status hearings."[50] These should include mandatory preliminary hearings to ensure that sufficient facts exist to sustain a guilty plea,[51] as well as more detailed and concrete explanations about what rights a defendant will give up as she enters a drug court program.[52] Procedures like these carry the dual benefits of being easily administrable and effective. The goal in requiring preliminary hearings before drug court entry and more procedure around status hearings is not to create more work for courts, but to ensure that there is no question of a defendant's understanding of what she is taking on with entry into a drug court program. While requirements for further formal hearings certainly add to the time commitments of judges and lawyers, their consistent national application will render them an administrable part of drug court fabric.

---

[45] Mae C. Quinn, *Whose Team Am I On Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 58 (2000-2001).
[46] *See* Burke, *supra* note 1, at 46.
[47] Henri E. Cauvin, *Public Defender Calls Md. Drug Courts Unconstitutional*, WASH. POST, Apr. 3, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/04/02/AR2009040203732.html.
[48] Mike Riggs, *Want to Go to Drug Court? Say Goodbye to Your Rights*, REASON, Aug. 17, 2012, http://reason.com/archives/2012/08/17/want-to-go-to-drug-court-say-goodbye-to/.
[49] Meyer, *supra* note 8, at 3.
[50] Quinn, *supra* note 45, at 74.
[51] Oram & Gleckler, *supra* note 6, at 511.
[52] *Id.* at 539.

Indeed, importance of establishing truly national standards should not be overlooked when discussing further guidance for drug court programs. It is apparent enough that some modification of a defense attorney's traditional adversarial role is necessary for the functioning of drug courts; nevertheless, the present lack of any national guidance explaining a defense attorney's proper role in drug court proceedings allows for inconsistencies across jurisdictions that make exploring best practices extremely difficult.[53] Drugs courts, at their heart, are meant to be collaborative programs geared towards recovery for their participants. It runs counter to this notion of collaboration to have different courts in different jurisdictions requiring more or less from their defense attorneys. National standards rectify this problem, as would a set of procedural boundaries within which drug courts would be required to operate.

CONCLUSION

The present lack of clear standards for defense attorneys and judges should not be read as a condemnation of drug court programs as a whole. Nearly thirty years after the creation of the nation's first drug court, the evidence supports their efficacy and positive societal impact.[54] Yet, the lack of national rules setting out expectations for drug court team members creates ambiguity regarding Due Process and the role of judges and attorneys. Standardized rules for all drug court stakeholders is necessary to ensure that drug court participants are protected from overly partial judges and excessively impartial attorneys, while still giving them access to programs that save money, decrease recidivism, and increase success in treatment.[55]

---

[53] *Id.*
[54] Marlowe, *supra* note 3, at 2-3.
[55] Oram & Gleckler, *supra* note 6, at 472.