

# WHOSE TEAM AM I ON ANYWAY? MUSINGS OF A PUBLIC DEFENDER ABOUT DRUG TREATMENT COURT PRACTICE

MAE C. QUINN\*

## I.

### INTRODUCTION

Over the last decade or so, players in the criminal justice system have begun to rethink the ways in which courts handle drug-related crime.<sup>1</sup> As a result, courts throughout the country have established treatment-based programs.<sup>2</sup> Perhaps the most popular of these developments have been specialized, drug treatment courts.<sup>3</sup>

Due to their purported promise and reported success, drug treatment court initiatives have received much attention, praise, and funding to encourage their development.<sup>4</sup> While the “movement”<sup>5</sup> towards the treatment court model has gained ever-increasing popularity, the legal

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\* Staff Attorney, The Bronx Defenders, 1999–present. LL.M., 2001, Georgetown University Law Center. J.D., 1995, The University of Texas at Austin School of Law. B.A., 1991, State University of New York at Albany. My thanks to John Copacino, Jenny Kronenfeld, B. Kele McComsey, Florian Meidel, William Montross, Nicole Mull, Ward Oliver, and Robin Steinberg for their comments and contributions. Many thanks also to the staff of the *N.Y.U. Review of Law & Social Change*, and in particular Alba R. Morales, for thoughtful and diligent editorial work on this paper.

1. See generally THE EARLY DRUG COURTS: CASE STUDIES IN JUDICIAL INNOVATION (W. Clinton Terry III ed., 1999) [hereinafter THE EARLY DRUG COURTS]; Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000); STEVEN BELENKO & TAMARA DUMANOVSKY, BUREAU OF JUSTICE ASSISTANCE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, SPECIAL DRUG COURTS: PROGRAM BRIEF (1993) [hereinafter SPECIAL DRUG COURTS], available at <http://www.ncjrs.org/txtfiles/spdc.txt>; DRUG COURTS PROGRAM OFFICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, LOOKING AT A DECADE OF DRUG COURTS (1998) [hereinafter DECADE OF DRUG COURTS], available at <http://ojp.usdoj.gov/dcpo/decade98.htm>.

2. See Stephen Belenko, *Research on Drug Courts: A Critical Review*, 1 NAT'L DRUG CT. INST. REV. 1 (1998) [hereinafter Belenko, *Critical Review*] (discussing various treatment-based programs that have been used within criminal courts over last twenty years, including Treatment Alternatives to Street Crime (TASC), diversionary programs, and drug-treatment as condition of pretrial release); see also Hon. Peggy Fulton Hora, Hon. William G. Schma & John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 452–54 (1999) (explaining that drug courts fall into one of two categories: those with the goal of efficiently disposing of drug cases and those which actually concentrate on treating drug addiction).

3. See Belenko, *Critical Review*, *supra* note 2, at 4 (indicating that by April 1998 specialized drug treatment courts had been implemented in 275 jurisdictions).

4. *Id.*; see also Press Release, Office of Justice Programs, U.S. Dep't of Justice, Attorney General Reno Announces Funds to Continue Successful Drug Court Program (June 3, 1999), available at <http://www.ojp.usdoj.gov/dcpo/dcpopr63.htm> (announcing that another \$14 million was awarded to 147 jurisdictions to “expand, enhance or plan drug courts to

community, including the criminal defense bar, has neglected to provide rigorous critique or analysis of it in legal literature.<sup>6</sup> This is somewhat surprising because the new model purportedly makes a fundamental change in the traditional litigation-based process by espousing a nonadversarial, “team work” approach among all of the court’s players—judge, prosecutor, and defense attorney—to move drug-addicted persons to sobriety.

This article seeks to contribute to drug treatment court discourse by analyzing drug treatment court practices from the perspective of a criminal defense attorney practicing within one such court. Part II briefly recounts the history of U.S. drug policies leading to the advent of drug treatment courts as an alternative to ordinary case processing by our courts. Part III describes the development of the initial drug treatment court in Miami, Florida, and the spread of drug courts throughout the country. It outlines the methods through which these programs modify the traditional litigation-based playing field, introducing closer judicial supervision of criminal defendants in less adversarial settings.

To demonstrate the need for drug court literature to adequately address the legal and ethical concerns that may affect defense attorneys working in treatment courts, Part IV focuses on a recent article by drug court proponents about these courts and their practices. I base my analysis upon

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treat nonviolent, substance-abusing offenders,” bringing total federal drug court grants since 1995 to over \$100 million). *But see* Eric Cohen, *The Drug Court Revolution*, WKLY. STANDARD, Dec. 27, 1999, available at [http://www.weeklystandard.com/magazine/mag\\_5\\_15\\_99/cohen\\_feat\\_5\\_15\\_99.html](http://www.weeklystandard.com/magazine/mag_5_15_99/cohen_feat_5_15_99.html) (questioning effectiveness of drug courts). *See generally* DECADE OF DRUG COURTS, *supra* note 1 (outlining accomplishments of drug treatment courts).

5. *See* John S. Goldkamp, *The Origin of the Treatment Drug Court in Miami*, in THE EARLY DRUG COURTS, *supra* note 1, at 19 [hereinafter Goldkamp, *Treatment Drug Court in Miami*] (“In 1999, there is a sizeable and increasingly accepted movement across the country to establish drug courts.”); Hora, Schma & Rosenthal, *supra* note 2, at 440.

6. Most of the evaluations of these developments to date have been conducted from a social work, psychology, therapy, and/or policy perspective and do not adequately address the legal issues presented. *See, e.g.*, Adele Harrell, Sharon Cavanagh & John Roma, *Evaluation of the D.C. Superior Court Drug Intervention Programs*, RES. IN BRIEF (Nat’l Inst. of Justice, U.S. Dept. of Justice, Washington, D.C.), Apr. 2000, at <http://www.ojp.usdoj.gov/nij/courdocs2000.htm> (reporting decrease in drug use and criminal activity among drug involved defendants who participated in comprehensive treatment program); *see also* Belenko, *Critical Review*, *supra* note 2, at 2 (finding that increased supervision and drug testing in drug court program resulted in decrease in drug use and criminal activity). The majority of the articles that significantly touch upon the legal and ethical implications of drug court programs are largely theoretical. *See infra* Part IV.A; *see, e.g.*, Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205 (1998) (surveying history of rehabilitative models and discussing theoretical tensions in related literature). In addition, few articles about drug treatment courts are written from a defense perspective or based upon the real experiences of practicing attorneys. *But see, e.g.*, Lisa Schreiberdorf, *The Pitfalls of Defenders as “Team Players,”* INDIGENT DEF., Nov./Dec. 1997, available at <http://www.nlada.org/indig/nd97/Pitfall.htm> (discussing erosion of adversarial stance when defense attorneys become team players and counselors to their clients in drug courts).

my observations and experiences as a staff attorney with The Bronx Defenders<sup>7</sup> representing clients in the Bronx Treatment Court.<sup>8</sup> In particular, Part IV considers an important issue largely unaddressed by other authors—the role of defense attorneys at drug treatment court status hearings in post-plea jurisdictions. It concludes that these phases of drug court proceedings must be regarded as critical stages of criminal prosecutions, wherein a defendant's constitutional rights to effective assistance of counsel and due process of law must be protected and maintained.

Based upon this discussion and analysis, Part V makes general suggestions for the future of drug treatment courts and drug treatment court practice. Ongoing evaluation of these popular new models should include and take into account the actual experiences of defense attorneys within the courts. Without rigorous and honest assessment, drug treatment courts cannot properly evolve and may have difficulty claiming legal legitimacy in the twenty-first century.

## II.

### A BRIEF HISTORY OF RESPONSES TO DRUG-RELATED CRIME IN THE UNITED STATES

The history of drug regulation and crime in the United States is relatively short.<sup>9</sup> For decades, many substances now illegal were readily and

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7. The Bronx Defenders is an alternative public defender office serving clients in Bronx County, New York. The opinions expressed in this article are my own and not necessarily those of The Bronx Defenders.

My initial interest in specialized courts and more specifically in drug treatment court practices began when I served as an E. Barrett Prettyman Fellow at Georgetown University's Criminal Justice Clinic. As a Fellow, I represented clients in Washington, D.C., Superior Court during the implementation of its specialized domestic violence and drug courts. Thereafter I clerked for the Honorable Jack B. Weinstein, United States District Court, Eastern District of New York. As Judge Weinstein's law clerk, I assisted the judge in his researching and writing about the U.S. "drug war" policies and their effect on the criminal justice system. Before joining The Bronx Defenders, I worked with the Center for Court Innovation on its Justice Project, which sought to explore the implications of "problem-solving" courts on the criminal justice system.

8. See discussion *infra* Part II. The Bronx Treatment Court was established in 1999 in Bronx County, New York. It is a post-plea, felony drug treatment court, which means that defendants are required to enter a guilty plea before they are allowed to take part in treatment programs through the drug court. In some pre-plea or pre-adjudication jurisdictions, prosecution is simply deferred while the defendant completes a drug treatment program. See Belenko, *Critical Review*, *supra* note 2, at 5; Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1462 n.2 (2000).

9. For an excellent and extended discussion of the history of drug crime and drug policy in the United States, see Special Issue, *The Drug Policy Debate*, 28 FORDHAM URB. L.J. 1 (2000) [hereinafter *The Drug Policy Debate*] (including discussions by David F. Musto, M.D., and others regarding past, present, and future U.S. drug policy). See also Hoffman, *supra* note 8 (concluding that there is little evidence that drug courts reduce recidivism but substantial evidence that they create profound operational and institutional problems); Jack B. Weinstein & Mae C. Quinn, *Some Reflections on the Federal Judicial Role During the War on Drugs*, in THE JUDICIAL ROLE IN CRIMINAL PROCEEDINGS (Sean Doran & John Jackson

legally available in the United States and contained in a number of commercial products.<sup>10</sup> Not until the late 1800s and early 1900s did many substances become “controlled” and criminalized by the government.<sup>11</sup> The Harrison Narcotics Act of 1914,<sup>12</sup> passed in the wake of increased focus on the relationship among crime, increased drug usage, and abuse,<sup>13</sup> marked the federal government’s entry into the world of drug control.<sup>14</sup> Prior to the passage of the act, drugs were considered a medical concern left largely to doctors, who could provide medications to patients as they saw fit.<sup>15</sup> The new law restricted distribution by requiring doctors to keep careful records of their disbursements of medication and imposing fines upon those who failed to comply.<sup>16</sup>

Through enforcement of the Harrison Act, the United States began to develop a narcotics policy more concerned with control and punishment of drug use than with public health.<sup>17</sup> In the years that followed, this prohibitionist, punitive approach took firm root. The first American “drug czar,” Harry Anslinger, was appointed to head the Federal Bureau of Narcotics (now the Drug Enforcement Administration),<sup>18</sup> and marijuana was added to the list of substances “controlled” by American laws.<sup>19</sup> Thus the nation’s law-enforcement model—premised on control and punishment—prevailed, readily incorporating each new wave of popular drugs, from the 1920s to the 1960s.<sup>20</sup>

During the tumultuous decade of the 1960s when issues of drug sale, use, and addiction commanded heightened national attention, the federal

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eds., 2000) (examining history and effect of war against drugs in United States and suggesting role that should be played by federal judges handling drug cases).

10. See *The Drug Policy Debate*, *supra* note 9, at 26–27 (discussing use of heroin in Bayer company medications and cocaine in Coca-Cola).

11. See *id.* at 25–35; see also LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 134–40 (1993) (discussing emergence of temperance movements and drug laws during mid- to late-nineteenth century); JAMES A. INCIARDI, DUANE McBRIDE & JAMES RIVERS, *DRUG CONTROL AND THE COURTS* 1–5 (1996) (discussing late-nineteenth-century criminalization of certain substances, particularly use and distribution of opium).

12. Pub. L. No. 223, 38 Stat. 785 (1914).

13. See INCIARDI, McBRIDE & RIVERS, *supra* note 11, at 2.

14. *Id.*; see *The Drug Policy Debate*, *supra* note 9, at 28.

15. See *The Drug Policy Debate*, *supra* note 9, at 26–28.

16. See *id.* at 28.

17. See INCIARDI, McBRIDE & RIVERS, *supra* note 11, at 5; *The Drug Policy Debate*, *supra* note 9, at 28.

18. FRIEDMAN, *supra* note 11, at 356; INCIARDI, McBRIDE & RIVERS, *supra* note 11, at 10.

19. Marijuana Tax Act, Pub. L. No. 238, 50 Stat. 551 (1937).

20. See NORMAN ABRAMS & SARA SUN BEALE, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 257 (1993); see also INCIARDI, McBRIDE & RIVERS, *supra* note 11, at 12 (“Among the difficulties reflected in the research from the 1920s through the 1960s is the static frame of reference in which addiction has been repeatedly perceived.”); *The Drug Policy Debate*, *supra* note 9, at 31 (quoting David F. Musto, M.D., stating, “when there was a modest resurgence of heroin use in the 1950s, the federal response was to enact more severe laws”).

government stepped up its drug control efforts.<sup>21</sup> Feeding fears related to widespread protest, rebellion, and drug use by U.S. youth,<sup>22</sup> President Richard Nixon declared a “war on crime,” promising to expand federal drug control laws.<sup>23</sup>

During the same time period, however, the federal government directed limited resources towards less punitive responses to drug use<sup>24</sup> and created a Special Action Office for Drug Abuse Prevention.<sup>25</sup> The federal government also experimented with rehabilitative approaches to drug crime, sponsoring programs that attempted to link the criminal justice system and the treatment model. One of these, the Treatment Alternatives to Street Crime (TASC) program, continues to exist today.<sup>26</sup> Additional local noncriminal alternatives for drug cases also sprang up throughout the country in the 1960s and 1970s, diverting first-time drug offenders from the criminal justice system into treatment programs.<sup>27</sup>

Despite the more liberal, rehabilitative undercurrent of the 1960s and 1970s, the punitive approach towards most drug offenders continued on many fronts.<sup>28</sup> For example, in 1973 in New York State, Governor Nelson Rockefeller signed new drug sentencing laws still known for their draconian treatment of drug offenders.<sup>29</sup> By the 1980s a renewed federal “war on drugs” was under way, with the creation of rigid sentencing guidelines

21. See INCIARDI, McBRIDE & RIVERS, *supra* note 11, at 36-38.

22. *See id.*

23. *See id.*; *see also* Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended at 21 U.S.C. §§ 801-971 (1994 & Supp. IV 1998)).

24. *See The Drug Policy Debate*, *supra* note 9, at 33 (noting that during 1960s, “[v]ery little national resources were put into anti-narcotic campaigns or treatment”).

25. *See* Thomas M. Quinn & Gerald T. McLaughlin, *The Evolution of Federal Drug Control Legislation*, 2 DRUG ABUSE L. REV. 144, 172-74 (1972-73).

26. INCIARDI, McBRIDE & RIVERS, *supra* note 11, at 36 (“Under TASC, community-based supervision is made available to drug-involved individuals who would otherwise burden the justice system with their persistent drug-associated criminality.”). For a more in-depth discussion of TASC and its history, *see id.* at 35-60.

27. *See, e.g., id.* at 38 (noting that TASC’s first diversion programs operated in Delaware and Pennsylvania); *see also* SENTENCING REFORM IN OVERCROWDED TIMES 3 (Michael Tonry & Kathleen Hatlestad eds., 1997) (noting that “American reformers in the 1970s called for creation of fairer, more principled policies”) [hereinafter SENTENCING REFORM]. *See generally* S. ANTHONY McCANN, NAT’L ASSOC. OF COUNTIES RESEARCH FOUND., LOCAL ALTERNATIVES TO ARREST, INCARCERATION, AND ADJUDICATION (1976) (copy on file with author) (describing alternatives to incarceration for drug offenders); Tom S. Allison, San Joaquin County—Outside Evaluator’s Report on the “Drug Client Offender Diversion Project” (1974) (unpublished report, on file with author) (discussing and evaluating diversion program for first time drug offenders in San Joaquin County, California).

28. *See* W. Clinton Terry III, *Judicial Change and Dedicated Treatment Courts: Case Studies in Innovation*, in THE EARLY DRUG COURTS, *supra* note 1, at 3 [hereinafter Terry, *Judicial Change*] (“In 1981, President Reagan abandoned the government’s reliance on treatment and prevention in favor of strengthening law enforcement efforts.”).

29. *See, e.g.,* INCIARDI, McBRIDE & RIVERS, *supra* note 11, at 67 (“[V]irtual emergency strategies . . . were necessary to deal with the massive number of arrests following enactment of the harsh so-called Rockefeller Drug Laws.”); David C. Leven, *Our Drug Laws Have Failed—So Where Is the Desperately Needed Meaningful Reform*, 28 FORDHAM URB.

and mandatory-minimum sentences for drug offenses on the national level.<sup>30</sup>

While Presidents Reagan and Bush spent billions of dollars on drug control efforts and narcotics enforcement both within our borders and outside of the country,<sup>31</sup> tremendous numbers of Americans, many of them addicts, still committed narcotics-related crimes and became entangled in the criminal justice system. "Drug war" tactics were widely criticized for failing to prevent the horrors caused by drug abuse.<sup>32</sup> On the local level, instead of solving the criminal justice system's problems, the tough tactics simply added to them. For instance, the various institutions engaged in dealing with drug offenders faltered under the heavy burden of dealing with the tremendous number of defendants passing through the courthouse doors. Criminal court dockets became overloaded, prisons became overcrowded, and attorneys on both sides of the equation faced growing caseloads.<sup>33</sup>

One localized response<sup>34</sup> to the enormous number of drug cases flooding the system was an attempt to move narcotics matters more quickly.<sup>35</sup> Another was to create specialized courts which handled only drug offenses.<sup>36</sup> However, neither expedited case processing efforts nor dedicated drug courts ameliorated the problem of overcrowding in prisons and jails.<sup>37</sup>

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L.J. 293, 293 (2000) ("[T]he Rockefeller drug laws . . . have filled our prisons with thousands of non-violent addicts who are unjustifiably denied drug treatment alternatives.").

30. See generally *The Drug Policy Debate*, *supra* note 9; Symposium, *The Sentencing Controversy: Punishment and Policy in the War on Drugs*, 40 VILL. L. REV. 301 (1995) (analyzing history and wisdom of sentencing guidelines).

31. See DRUG TRAFFICKING IN THE AMERICAS 2-3 (Bruce M. Bagley & William O. Walker III eds., 1996); HUMAN RIGHTS WATCH, THE "DRUG WAR" IN COLOMBIA: THE NEGLECTED TRAGEDY OF POLITICAL VIOLENCE 129-36 (1990); Ethan Nadelmann, *Common Sense Drug Policy*, 77 FOREIGN AFF. 111, 111 (1998).

32. See *The Drug Policy Debate*, *supra* note 9, at 56 (quoting Eric Sterling, President of the Criminal Justice Policy Foundation, stating that "[a] CBS News poll from October 1996 revealed that 78% of the public believed the war on drugs had failed"). Organizations such as Families Against Mandatory Minimums (FAMM) and the Lindesmith Center became vocal critics of rigid, drug war practices. Individuals working within the criminal justice system also fought hard to oppose draconian drug sentencing laws. Indeed, for a period of time U.S. District Court Judge Jack B. Weinstein of the Eastern District of New York refused to handle any drug cases given the harshness of the federal sentencing guidelines and mandatory-minimum sentences. See Hora, Schma & Rosenthal, *supra* note 2, at 457 n.84.

33. See SPECIAL DRUG COURTS, *supra* note 1, at 2; DECADE OF DRUG COURTS, *supra* note 1, at 2; Boldt, *supra* note 6, at 1207; Hora, Schma & Rosenthal, *supra* note 2, at 456-62.

34. The federal courts, still controlled by federal sentencing guidelines, have been largely uninvolved in the drug treatment court movement. This is interesting given that the Department of Justice supervises prosecuting attorneys in federal courts while simultaneously funding much of the drug court activity on the state level.

35. See CAROLINE COOPER, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, EXPEDITED DRUG CASE MANAGEMENT (1994), <http://www.ncjrs/txtfiles/exdc.txt>; see also SPECIAL DRUG COURTS, *supra* note 1 (describing differences between specialized drug treatment courts and courts that simply provide differentiated case management of drug cases).

36. Terry, *Judicial Change*, *supra* note 28, at 4.

37. Goldkamp, *Treatment Drug Court in Miami*, *supra* note 5, at 22.

Finally, one jurisdiction moved beyond attempts to simply process drug cases more efficiently, initiating a program to deal with the “root causes” of drug-related crime—drug abuse and addiction—by integrating drug treatment with traditional case processing.<sup>38</sup> Thus, a specialized drug treatment court in Miami, Florida—said to be the first of its kind<sup>39</sup>—was developed in 1989.<sup>40</sup>

### III.

#### DEVELOPMENT AND PROMOTION OF THE DRUG TREATMENT COURT MODEL

##### A. *Miami Drug Court: America's First Treatment Court*

The Miami Drug Court targeted only persons arrested for first-time, relatively low-level, felony drug offenses.<sup>41</sup> These individuals had their cases diverted from the traditional adjudication path if they agreed to participate in long-term, outpatient drug treatment.<sup>42</sup> Upon successful completion of treatment, defendants were rewarded with dismissal of their cases.<sup>43</sup>

This program was considered innovative because, unlike earlier rehabilitative efforts within the criminal justice system, the court did not rely on outside actors such as parole or probation officers to find programs and monitor defendants in treatment.<sup>44</sup> Rather, Miami Drug Court involved an active judge who was integrally involved with a defendant's treatment from beginning to end.<sup>45</sup>

38. *Id.* at 27–32; see also John S. Goldkamp, *Challenges for Research and Innovation: When Is a Drug Court Not a Drug Court?*, in *THE EARLY DRUG COURTS*, *supra* note 1, at 166–67 [hereinafter Goldkamp, *When Is a Drug Court Not a Drug Court?*] (describing creation of treatment drug court in Miami, Florida).

39. As already noted, some specialized drug courts did exist prior to the 1980s. See *supra* note 36 and accompanying text. During the 1970s New York City created specialized drug courts in response to the growing number of drug cases under the Rockefeller Drug Laws. See INCIARDI, McBRIDE & RIVERS, *supra* note 11, at 68; Belenko, *Critical Review*, *supra* note 2, at 4; SPECIAL DRUG COURTS, *supra* note 1, at 4.

40. See generally Goldkamp, *Treatment Drug Court in Miami*, *supra* note 5 (describing creation of drug treatment court in Miami that was premised on notion of reducing crime and criminal caseload by involving offenders in drug treatment).

41. See Bennett H. Brummer, *Independent, Professional Judgment: The Essence of Freedom*, 10 ST. THOMAS L. REV. 607, 611 n.18 (1998) (explaining how Miami's drug court differs from traditional courts).

42. The treatment program lasted approximately one year. See Goldkamp, *Treatment Drug Court in Miami*, *supra* note 5, at 26.

43. See SPECIAL DRUG COURTS, *supra* note 1, at 4.

44. INCIARDI, McBRIDE & RIVERS, *supra* note 11, at 67 (“Rather than relying on organizations such as TASC or probation to identify, assess, refer, and monitor drug-using offenders, drug court judges act as case managers.”); Terry, *Judicial Change*, *supra* note 28, at 7 (“[B]y bringing treatment into the courtroom, an effort is made to modify offenders' substance-abusing behavior.”).

45. See Goldkamp, *Treatment Drug Court in Miami*, *supra* note 5, at 24–25.

After pleading guilty and having their sentences deferred while they participated in the program, defendants were required to report to the presiding judge for frequent case updates.<sup>46</sup> At each update the treatment agency provided the court with information regarding the defendant's progress and participation.<sup>47</sup> The judge and defendant directly discussed the defendant's program status.<sup>48</sup> If a defendant was doing fairly well, the court encouraged her to continue to comply with the treatment regime. On the other hand, the court would sanction a defendant who was doing poorly in treatment or violating drug court rules.<sup>49</sup> Sanctions intensified with repeated violations, some involving periods of incarceration of up to fourteen days.<sup>50</sup>

The dramatic change in the judge's role from passive arbiter to hands-on treatment monitor drastically affected the courtroom dynamic for all players in the system. As Professor John Goldkamp wrote in a review of the Miami Drug Court:

The unusual role of the judge . . . is best understood in the context of the unorthodox, nonadversarial, and team-oriented roles played by the other criminal justice officials in the courtroom, roles designed to support the judge's role and contribute to the treatment progress of the drug-involved felony defendants coming through the court. . . . Most noticeable are the transformed roles of the prosecutor and defender.<sup>51</sup>

Indeed, the defense attorneys of the Miami Drug Court reportedly played a role that was "more therapeutic in nature than adversarial."<sup>52</sup>

### *B. Proliferation of Drug Treatment Courts: Federal Encouragement of the Treatment Model in the States*

After the creation of the Miami Drug Court, interest in drug treatment courts specifically,<sup>53</sup> and the integration of treatment into the traditional judicial process generally,<sup>54</sup> grew tremendously. Many people, including a

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46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 25.

51. *Id.*

52. *Id.*

53. See, e.g., Katherine E. Finkelstein, *New York to Offer Most Addicts Treatment Instead of Jail Terms*, N.Y. TIMES, June 23, 2000, at A1 (reporting New York State's plan for treatment programs for nonviolent drug addicts); see also Goldkamp, *When Is a Drug Court Not a Drug Court?*, *supra* note 38, at 168 (noting that "drug court movement spread quickly because [of] the Miami innovation," resulting in greater inclusion of treatment into traditional criminal process).

54. See, e.g., DRUG COURTS PROGRAM OFFICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, DRUG COURTS PROGRAM OFFICE FACT SHEET (June 1998) [hereinafter FACT SHEET], available at <http://www.ojp.usdoj.gov/dcpo/facts98.htm> (reporting that in



large number of defense attorneys, welcomed the possibility of providing court-sponsored treatment to drug offenders as opposed to more punitive alternatives.<sup>55</sup> Surprisingly, the federal government seemed to play a much larger role in spreading the word about drug treatment courts than the defense bar did.

To assist in the implementation and funding of the vast number of local drug treatment courts that were developing throughout the country, the U.S. Department of Justice (DOJ) established a Drug Courts Program Office in 1995.<sup>56</sup> As part of this federal initiative, the Drug Courts Program Office in cooperation with the National Association of Drug Court Professionals published in 1997 a well-known report entitled *Defining Drug Courts: The Key Components*.<sup>57</sup> The report outlined important features successful drug courts should have, based on the experiences of the drug court “pioneers.”<sup>58</sup> Requirements included integration of treatment services with traditional case processing, prompt placement of eligible defendants into treatment, and close monitoring of defendant drug use by the

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1998, at least forty-three juvenile and family drug courts operated in United States); Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469 (1998); Brummer, *supra* note 41, at 624 (1998) (discussing emergence of other specialized criminal courts, including treatment-based teen smoking courts).

55. See Nat’l Legal Aid and Defender Ass’n, *Defenders Largely Satisfied with Drug Court Experience*, INDIGENT DEF. (Nov./Dec. 1997), available at <http://www.nlada.org/indig/nd97/Dcexper.htm>. Certainly most defense attorneys would support a forum that allows for treatment rather than incarceration for addicted clients—a standard characterization of drug courts. See, e.g., John Feinblatt, Greg Berman & Aubrey Fox, *Institutionalizing Innovation: The New York Drug Court Story*, 28 FORDHAM URB. L.J. 277, 278 (2000) (describing New York’s drug treatment courts as “specialized courtrooms that take problem-solving approach to addiction, linking nonviolent defendants to long-term, judicially-supervised drug treatment instead of incarceration”). Interestingly, it seems that those who are approved for participation in drug court, at least in the Bronx, would not always have received a sentence of incarceration prior to the inception of the drug court. Indeed, as will be addressed further in this article, drug court clients in the Bronx are first-time felony offenders. See *infra* note 140. It is my understanding that prior to the creation of the drug court, such defendants often received plea offers that involved a sentence of probation, not incarceration.

56. FACT SHEET, *supra* note 54. For consideration of the federal government’s decision to involve itself in local drug policy and court administration when almost no federal drug courts exist, see Hoffman, *supra* note 8, at 1464 n.115.

57. DRUG COURTS PROGRAM OFFICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, *DEFINING DRUG COURTS: THE KEY COMPONENTS (1997)* [hereinafter *KEY COMPONENTS*], available at <http://www.ojp.usdoj.gov/dcpo/Define/dfdpdf.pdf>.

58. There are ten key components in all:

- (1) Drug courts integrate alcohol and other drug treatment services with justice system case processing.
- (2) Using a nonadversarial approach, prosecution and defense counsel promote public safety while protecting participants’ due process rights.
- (3) Eligible participants are identified early and promptly placed in the drug court program.
- (4) Drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services.
- (5) Abstinence is monitored by frequent alcohol and other drug testing.

judge.<sup>59</sup> Thereafter, the DOJ conditioned funding of new drug courts on their being designed “in accordance with the ten key components.”<sup>60</sup> As of 1999, under the auspices of the DOJ, nearly 400 drug courts<sup>61</sup> of varying shapes and sizes<sup>62</sup> operated across the country. One such institution, located in the jurisdiction where I practice, is the Bronx Treatment Court.

### C. Suggested Role for Defense Counsel in Drug Treatment Courts

Beyond merely providing basic parameters for drug treatment courts to observe, DOJ's *Key Components* also places particular requirements upon defense attorneys working within such institutions, carving out the role counsel should play. It indicates that all attorneys practicing in drug treatment courts should “shed their traditional adversarial courtroom relationship and work together as a team.”<sup>63</sup>

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- (6) A coordinated strategy governs drug court responses to participants' compliance.
  - (7) Ongoing judicial interaction with each drug court participant is essential.
  - (8) Monitoring and evaluation measure the achievement of program goals and gauge effectiveness.
  - (9) Continuing interdisciplinary education promotes effective drug court planning, implementation, and operation.
  - (10) Forging partnerships among drug courts, public agencies, and community-based organizations generates local support and enhances drug court effectiveness.

*Id.*

59. *See id.* at 12, 16, 22. An analysis of the drug treatment court judge as active monitor is beyond the scope of this paper. Indeed, this “new” role for judges may be viewed as analogous to the judge's role first developed under the public law litigation model, used by courts since the 1960s to remediate ongoing social problems by looking beyond the traditional trial-focused litigation. *See Dorf & Sabel, supra* note 1, at 835 n.7.

60. FACT SHEET, *supra* note 54. As of 1998, 270 jurisdictions had received a total of \$47 million in DOJ grants to plan, implement, or improve drug treatment courts. *Id.*

61. Office of Justice Programs, Drug Court Clearinghouse and Technical Assistance Project, *Drug Court Activity Update: Summary Information* (June 1999) at <http://www.american.edu/academic.depts/spa/justice/publications/decadein.htm> (also reporting that approximately 140,000 defendants had enrolled in such courts).

62. Some courts deal only with felony drug cases, others take on only misdemeanors, and a few deal with both. There are also variations in the types of dispositions required for treatment involvement. Some courts hold prosecution in abeyance until completion of treatment or failure, allowing “failing” defendants to proceed to trial thereafter. A number of other courts require defendants to enter guilty pleas prior to entering drug rehabilitation programs. In these jurisdictions, defendants are usually allowed to withdraw their guilty pleas altogether, or alternatively to plead guilty to reduced charges, upon their successful completion of treatment. Some commentators refer to this latter type of drug treatment court as a “postadjudication” model. *See, e.g.,* Hora, Schma & Rosenthal, *supra* note 2, at 515 (comparing “preadjudicative” and “postadjudicative” models). This is a bit of a misnomer, since formal judgment or adjudication is not possible until after a sentence is imposed. Therefore, to avoid confusion, this article will refer to such courts as post-plea models.

63. KEY COMPONENTS, *supra* note 57.

Some commentators, particularly members and former members of the judiciary, have been quick to praise and promote a nonadversarial approach in drug treatment courts.<sup>64</sup> For instance, a recent article by John T.A. Rosenthal and Judges Peggy Fulton Hora and William G. Schma, discussed at greater length below, explained that “the DTC [drug treatment court] defense attorney must also put aside her adversarial mindset and engage in the collaborative efforts of the treatment team . . . . With the consent of the defendant the goal becomes recovery from addiction and not the exercise of the full panoply of the defendant’s rights.”<sup>65</sup> In an interview with the National Legal Aid and Defender Association (NLADA), Judge Jeffrey S. Tauber, former presiding judge for the Oakland, California, drug treatment court,<sup>66</sup> explained:

Defenders need to look at this as a new approach that requires a level of team work and partnership that is not often seen. It requires defenders to take a step back, to not intervene actively between the judge and the participant, and allow that relationship to develop and do its work, and basically to understand the importance of working within a team concept.<sup>67</sup>

Even the State of New York’s Chief Judge Judith S. Kaye has promoted a “shift away from the adversary model towards a team-based, problem-solving approach” for treatment-based proceedings. Her support for such a shift has resulted in the creation of many treatment-based courts in New York, including the Bronx Treatment Court,<sup>68</sup> as well as a promise of more to come.<sup>69</sup>

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64. *But see Hoffman, supra* note 8, at 1477 (criticizing drug treatment court movement, in part, for “enabling our continued national schizophrenia about drugs”). Perhaps other judges favor the new model because the Department of Justice recommends that in such courts judges should be permitted to step beyond their “traditionally independent and objective arbiter roles” to become “the leader of the drug court team.” KEY COMPONENTS, *supra* note 57.

65. Hora, Schma & Rosenthal, *supra* note 2, at 479–80.

66. Judge Tauber became Director of the National Drug Court Institute (NDCI), an organization sponsored by the Office of National Drug Control Policy, Executive Office of the President, and the Drug Courts Program Office, Office of Justice Programs, U.S. Department of Justice. NDCI’s stated mission is “[p]romoting education, research and scholarship for drug court and other court-based intervention programs.” Nat’l Drug Court Inst., *About NDCI*, at <http://www.ndci.org/aboutndci.htm>.

67. Scott Wallace, *A Level of Teamwork Not Often Seen: An Interview with Judge Jeffrey S. Tauber*, INDIGENT DEF., Nov./Dec. 1997, available at <http://www.nlada.org/indigent97/Tauber.htm>.

68. Chief Judge Judith S. Kaye, *Lawyering for a New Age*, 67 *FORDHAM L. REV.* 1, 5 (1998) (“The lawyers also have new roles. The prosecution and defense are not sparring champions, they are members of a team with a common goal: getting the defendant off drugs.”).

69. *See* Feinblatt, Berman & Fox, *supra* note 55, at 292 (noting proposal to institute drug courts and their principles in every jurisdiction within New York State).

#### D. Bronx Treatment Court

Established in March 1999, the Bronx Treatment Court was intended to provide an “innovative approach to the processing of drug abusing defendants charged for the first time with felony sale or possession of controlled substances.”<sup>70</sup> As “a joint effort of representatives from the court system, the Bronx District Attorney’s Office, the Bronx Legal Aid Society,”<sup>71</sup> and treatment providers, the Bronx Treatment Court’s stated goal is to provide “instead of jail . . . intensive long term treatment for drug and alcohol abusers under close court supervision.”<sup>72</sup>

Defendants who are nineteen years of age or older, with no prior felony or violent crime convictions, and no prior felony probation sentences, are potentially eligible for assessment by the Bronx Treatment Court.<sup>73</sup> In addition, to qualify for diversion to the court for screening, defendants must be charged with certain enumerated felony drug offenses—including most crimes relating to drug sale or possession with intent to distribute drugs.<sup>74</sup> Specifically, defendants charged with violating New York Penal Code sections 220.06 (criminal possession of a controlled substance in the fifth degree), 220.09 (criminal possession of a controlled substance in the fourth degree), 220.16 (criminal possession of a controlled substance in the third degree), 220.34 (criminal sale of a controlled substance in the fourth degree), 220.39 (criminal sale of a controlled substance in the third degree) or any felony level section 221 charge (offense involving marijuana) are potentially eligible for drug court placement.<sup>75</sup>

Defendants who fit this description have their cases routed early in the criminal process to the Bronx Treatment Court for further evaluation. Any attorney, including private counsel, the Legal Aid Society, or The Bronx Defenders, may represent defendants referred to the treatment court.

Once a case reaches the drug treatment court, often within a few days of the defendant’s arrest and arraignment, drug court staff interviews the defendant to determine her need for drug or alcohol treatment. If the staff decides that a defendant is an appropriate candidate for rehabilitation and

70. BRONX TREATMENT COURT, WELCOME TO THE BRONX TREATMENT COURT 5 (1999) (on file with author) [hereinafter WELCOME TO THE BRONX TREATMENT COURT].

71. *Id.*

72. *Id.* at 2. Thus the Bronx Treatment Court considers itself an “alternative to incarceration” program. BRONX TREATMENT COURT, YOUR GUIDE TO THE BRONX TREATMENT COURT 1 (1999) (on file with author) [hereinafter YOUR GUIDE TO THE BRONX TREATMENT COURT]. *But see supra* note 55.

73. Eligible defendants may have previously been sentenced to a term of felony probation if they were adjudicated youthful offenders for a felony offense. N.Y. PENAL LAW § 60.02 (McKinney 2001).

74. YOUR GUIDE TO THE BRONX TREATMENT COURT, *supra* note 72, at 1–2. Those charged with drug felonies related to alleged activity on or near a school ground, *see* N.Y. PENAL LAW § 220.44, or A-level felony drug crimes, *see, e.g., id.* § 220.18, are generally ineligible. *See* YOUR GUIDE TO THE BRONX TREATMENT COURT, *supra* note 72, at 1–2.

75. *See* YOUR GUIDE TO THE BRONX TREATMENT COURT, *supra* note 72, at 8–9.

drug court participation, she may avail herself of a drug court plea offer, assuming one is made by the Office of the District Attorney.

The plea offer generally provides that if a defendant pleads guilty to the most serious crime with which she is charged, she will be permitted to enter into long term treatment.<sup>76</sup> As part of the plea agreement, the defendant must comply with all drug court rules, allow the release of confidential information relating to treatment progress to the court, prosecutor, defense counsel, and drug court staff, and waive her right to appeal.<sup>77</sup>

Upon successful completion of the mandated program, a defendant may withdraw her felony guilty plea.<sup>78</sup> Thereafter, she pleads guilty to a misdemeanor, or in special cases, she may have her case dismissed entirely.<sup>79</sup> For those who do not successfully complete treatment, the court imposes the sentence promised under the plea agreement, usually two to six years of incarceration.<sup>80</sup> Failure to complete treatment occurs if the defendant is arrested and indicted for new felony drug charges, a violent offense, or is expelled from the program.<sup>81</sup>

The court generally offers treatment lasting for twelve to eighteen months, during which a defendant attends an outpatient program for approximately twenty hours per week.<sup>82</sup> Treatment providers supply the court with information about the participant on an ongoing basis through written progress reports and other communications.<sup>83</sup> A defendant, usually accompanied by a program representative, must appear before the court for frequent case updates or status hearings.<sup>84</sup>

At case updates, the court praises defendants who are doing well, congratulates them for their accomplishments, and encourages their continued success in the program. Indeed, positive updates are an uplifting experience, many punctuated with applause for the defendant by everyone present in the court. On the other hand, defendants who are not doing so well—such as those who have relapsed, failed to attend all program meetings, or broken other drug treatment court rules—can be sanctioned. Thus, the Bronx Treatment Court employs DOJ's *Key Components* by integrating treatment services with case processing, placing eligible defendants into treatment quickly, and closely monitoring their compliance.

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76. See BRONX TREATMENT COURT BROCHURE, BRONX TREATMENT COURT CLIENT INFORMATION GUIDE 2 (1999) (copy on file with author) [hereinafter BRONX TREATMENT COURT CLIENT INFORMATION GUIDE].

77. *Id.* at 3.

78. *Id.* at 2.

79. *Id.*

80. *Id.*

81. *Id.* at 5.

82. *Id.* at 2–3.

83. See YOUR GUIDE TO THE BRONX TREATMENT COURT, *supra* note 72, at 4.

84. See *id.*

## IV.

DOES THE DRUG TREATMENT COURT MODEL COMPORT  
WITH EXISTING LEGAL AND ETHICAL STANDARDS  
FOR DEFENSE ATTORNEYS?

While DOJ's *Key Components* for attorneys practicing in drug treatment courts suggests a new role for defense attorneys, it does not cite any accompanying modification of prevailing constitutional, legal, or other ethical guidelines by which defense counsel are bound. In fact, DOJ's report makes only passing mention of any legal standard relating to defendant representation, stating that by "[u]sing a nonadversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights."<sup>85</sup> In the absence of legal grounding, one is left to wonder how practitioners are supposed to square drug treatment court principles with already existing mandates of the U.S. Constitution, state statutes, and relevant codes of professional responsibility.

Defense attorneys have a duty to ask questions about suggested changes in practice that may affect their clients.<sup>86</sup> Common sense suggests, and professional responsibility dictates, that before the defense bar can be expected to take on a new role, open and meaningful examination of existing legal and ethical rules pertaining to the representation of criminal defendants must occur in light of the suggested new role.<sup>87</sup> Indeed, as part of its *Performance Guidelines for Criminal Defense Representation*, NLADA explained:

Stating that ethical and professional obligations apply to counsel engaged in criminal defense may appear to be a restatement of the obvious. However, increasing political, economic and social pressures on the criminal justice system have led to demands that defense attorneys act as "team players," i.e., to keep the system

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85. KEY COMPONENTS, *supra* note 57, at 14.

86. Attorneys as professionals are not simply relegated to making objections and presenting arguments in a courtroom. Indeed, the Model Rules of Professional Conduct note that "[a] lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." MODEL RULES OF PROF'L CONDUCT pmbl. (1983). It is every attorney's duty to "seek improvement of the law, the administration of justice and the quality of serviced rendered by the legal profession" and to utilize her specialized knowledge "in reform of the law." *Id.*

87. See NAT'L LEGAL AID & DEFENDER ASS'N (NLADA), PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION § 1.1 (1997) ("Attorneys . . . have an obligation to abide by ethical norms and act in accordance with the rules of the court."). The NLADA guidelines are not binding on defense attorneys but are intended "to provide guidance to criminal defense attorneys (by identifying potential options, actions and relevant considerations) for the purpose of ensuring that all defendants receive the zealous and quality representation that should be their right." *Id.* at Introduction.

functioning even at the expense of individual clients. While defense counsel may remain sensitive to system difficulties . . . counsel must not compromise the representation of counsel's own client when seeking to ameliorate such difficulties.<sup>88</sup>

While NLADA's comments do not seem to be aimed specifically at drug treatment court practice, they serve as a reminder that thoughtful evaluation should precede any accepted change in role for defense attorneys. The fact that drug courts already operate in counties across the country and continue to be replicated does not mitigate this necessity. Thus, since we currently find ourselves more than a decade into the drug court movement, critical analysis of the suggested "team work" approach must be undertaken both in light of proposals that have been made by proponents of such models, as well as the practices that have evolved in the courts.

#### A. *The Question of How to Respond to the Question*

The question of whether the drug treatment court model comports with existing legal and ethical mandates is, at best, difficult to answer.<sup>89</sup> For one thing, as discussed above, each individual drug court has developed separately and implemented its own version of the treatment-based model. While nearly all espouse the tenets set out in the DOJ's *Key Components*, almost every jurisdiction presents a slightly different variation on the same theme. Thus generalizations are difficult to make and may in fact lead to incorrect conclusions. It is important, therefore, that drug court critiques ask not only whether drug court principles in theory raise constitutional or other concerns, but also if they do in practice.

It should be further noted that some attempts to address the legal and ethical implications of drug treatment courts are underway.<sup>90</sup> To date,

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88. *Id.* § 1.1 cmt.

89. The legality of treatment court practices is an issue one might expect the judiciary to eventually reach via appellate review. It may take some time before a substantial number of cases testing drug treatment court policies percolate up through the appellate process, however, particularly in jurisdictions like the Bronx where defendants are required to waive their right to appeal in order to accept a drug court plea offer.

In addition, decisions relating to drug treatment court practices and procedures might more appropriately be made through the legislative process. Cf. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 401–02 (1998) (discussing how experimentalism in courts features judges involving social actors in remedial plans).

90. See, e.g., NAT'L DRUG COURT INST., FEDERAL CONFIDENTIALITY LAWS AND HOW THEY AFFECT DRUG COURT PRACTITIONERS, at Conclusion n.2 (1999) (hereinafter FEDERAL CONFIDENTIALITY LAWS) ("The National Drug Court Institute . . . is in the process of developing a comprehensive treatise on confidentiality and ethical issues confronting all practitioners in drug courts . . . NDCI plans to publish the comprehensive treatise in the fall of 2000, which will provide information to all disciplines."). The Center for Court Innovation, in partnership with the U.S. Department of Justice and the Open Society Institute, "has conducted a series of discussions about problem-solving courts, looking at how they

however, little written analysis based on actual experiences in the drug courts and in light of prevailing legal and ethical norms has been undertaken of the proposed shift in role for defense attorneys.<sup>91</sup> Most of the literature regarding drug treatment courts is relatively abstract<sup>92</sup> or fails to adequately explore the issue of whether the drug court model comports with legal and ethical standards for defense attorneys in day-to-day practice.<sup>93</sup> To demonstrate this point, and to provide a starting point for a broader discussion about the propriety of treatment court practice, I will analyze a recent article concerning drug treatment courts, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*,<sup>94</sup> in light of my experience in the Bronx Treatment Court.

### B. Response to the "Therapeutic Jurisprudential" Response

In *Drug Treatment Court Movement*, Judges Peggy Fulton Hora and William G. Schma along with John T.A. Rosenthal (hereinafter "the authors") have written one of the most in-depth articles about drug treatment courts to date. Unfortunately, although the article is an important contribution to treatment court discourse, it does little to adequately address the question of whether such institutions raise ethical or legal issues for defense practitioners.

For instance, with regard to the transition a defense attorney must undergo to practice in the drug court, the authors state: "In stark contrast to the traditional role of a defense counsel to minimize a client's exposure to

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depart from standard case processing in the state courts and how they have affected the roles of judges and attorneys." CENTER FOR COURT INNOVATION, <http://www.courtinnovation.org/reflection.html>. See also *What Is a Traditional Judge Anyway: Problem Solving in the State Courts*, 84 JUDICATURE 78 (2000) (consisting of transcript of discussion among judges, attorneys, policy makers, and scholars convened by Center for Court Innovation to talk about "problem-solving" courts, including drug treatment courts). Thus the existing "movement" to evaluate the drug treatment courts is largely being led by those who create and/or sustain such institutions.

91. See, e.g., *Alternatives to Incarceration for Drug-Abusing Offenders*, 111 HARV. L. REV. 1898, 1918 (1998) (noting that "drug courts create potentially serious conflicts of interest for defense attorneys"); Boldt, *supra* note 6 (concluding that minimum requirements for responsible defense practice in drug treatment courts are unlikely to be met on consistent basis); Robert Burke, *Reconciling Drug Court Participation with Defender Ethical Standards*, INDIGENT DEF., Nov./Dec. 1997 (suggesting ways in which defenders can utilize and play effective role in drug courts without diminishing independence or ability to provide representation). See generally Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437 (2000) (illustrating problems resulting from drug treatment courts, based on experiences and perspectives of judge).

92. See, e.g., Dorf & Sabel, *supra* note 1, at 837 (arguing that drug treatment courts, as "experimentalist" institutions involving complex ensemble of actors, are one way of moving beyond traditional legal paradigm).

93. See *supra* note 6 and accompanying text.

94. Hora, Schma & Rosenthal, *supra* note 2.



criminal sanctions, the DTC defense attorney tries to ensure that the addicted defendant stays in the treatment program until graduation.”<sup>95</sup> They go on to explain:

Actions by defense counsel may include, after full disclosure to the client, foregoing legal defense tactics such as motions to suppress evidence, which might delay the process or prevent the defendant from accepting responsibility for drug use. These actions might also include counseling a defendant to disclose continued drug use (relapse) in order to foster honesty and reduce the barriers to effective drug treatment.<sup>96</sup>

This advice is provided without meaningful analysis of the proposed courses of action in light of constitutional and ethical standards.

Instead, the authors urge attorneys to examine drug courts through the lens of therapeutic jurisprudence,<sup>97</sup> which is interested in the “‘sociopsychological ways’ in which laws and legal processes affect individuals involved in our legal system.”<sup>98</sup> They suggest that using such a filter, attorneys will conclude drug treatment court practices are just and proper regardless of any proposed changes in roles or procedures. They claim that treatment courts, unlike traditional criminal courts, work to further the “best interest” of defendants, which is sobriety. Thus, the authors imply ignorance or naiveté on the part of defense attorneys<sup>99</sup> who question the legality of drug court practices.<sup>100</sup>

This is not to say that the authors completely ignore the dilemmas created by the drug court model. Indeed, they admit that treatment courts

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95. *Id.* at 479.

96. *Id.*

97. The question of what constitutes therapeutic jurisprudence, by itself, presents somewhat of a quandary. See *id.* at 444 (stating that “[t]herapeutic jurisprudence is the study of the role of law as therapeutic agent . . . [and] suggests that society should utilize the theories, philosophies, and findings of various disciplines and fields of study to help shape the development of the law”) (internal quotations and citations omitted).

98. *Id.*

99. Most defense attorneys grapple on a daily basis with the notion of seeking “therapeutic” outcomes for our clients. See, e.g., Keri A. Gould, *A Therapeutic Jurisprudence Analysis of Competency Evaluation Requests: The Defense Attorney’s Dilemma*, 18 INT’L J.L. & PSYCHIATRY 83 (1995) (discussing conflicts between ethical, strategic, and therapeutic considerations in decision to request competency examination of criminal defendant); David E. Rovella, *The Best Defense*, NAT’L L.J., Jan. 31, 2000, at A1 (discussing concept of holistic advocacy on behalf of clients).

100. Regardless of the “lens” of therapeutic jurisprudence, the drug treatment court model still must be evaluated in light of prevailing constitutional, statutory, and ethical requirements. Therapeutic jurisprudence is merely a construct within the law, and not any kind of independent legal precept that must be followed. Accordingly, it cannot be used as a method to evade requirements under the law. Moreover, is it not a defense attorney’s “therapeutic jurisprudential” obligation to inquire whether certain drug court practices are perceived by clients as confusing or too invasive, which in turn may affect our ethical obligations towards such clients? See generally Boldt, *supra* note 6 (arguing that responsible advocacy in drug courts requires resistance to therapeutic approaches where such approaches conflict with client interests).

present certain issues,<sup>101</sup> particularly for defense attorneys moving from the role of traditional advocate to that of “team-player.” Nevertheless, the authors reject rather quickly the potential legal and ethical concerns raised by this transition, implying that anyone who continues to have serious questions about the long-term implications of drug treatment court practice is simply missing the point.<sup>102</sup>

To demonstrate that greater discussion should occur around these important questions, I address five “role of the defense” issues that Hora, Schma, and Rosenthal outlined and dismissed in their article.<sup>103</sup>

### 1. *Waiving the Rights of the Defendant*

First, the authors suggest defense attorneys may be troubled by having to waive certain rights on behalf of their clients in order for them to participate in a drug treatment program.<sup>104</sup> They give at least two answers for this quandary. On the one hand, they assert treatment court participation is fully voluntary and therefore any defendant wishing to explore his full range of rights simply need not participate.<sup>105</sup> On the other hand they claim the waiver of rights required in drug treatment courts is “no more onerous, and may actually be less imposing, than those required of other criminal defendants,” in, for example, the plea bargaining context.<sup>106</sup>

The authors are correct that defendants often waive important rights in order to obtain some other benefit.<sup>107</sup> In practice, examples of such waivers abound.<sup>108</sup> Generally, however, a waiver of rights by a defendant

101. See Hora, Schma & Rosenthal, *supra* note 2, at 506 (“Several key questions must be answered for a DTC to operate efficiently while promoting and safeguarding the community values it is entrusted to enforce.”). The authors list ten sets of issues raised by such courts: (1) program eligibility, (2) the structure of the program, (3) sources of funding, (4) whether to create a pre- or post-adjudicative model, (5) the role of the prosecutor, (6) the role of the defense attorney, (7) the role of the judge, (8) concerns on the part of treatment providers regarding forced treatment, (9) how to properly quantify success rate, and (10) cost effectiveness. *Id.* at 506–21.

102. Criticism targeted defense attorneys and prosecutors alike. See, e.g., Hora, Schma & Rosenthal, *supra* note 2, at 520 (“[M]ost prosecutors have viewed DTC’s through the lenses of inappropriate jurisprudential theories.”).

103. See also Robert Burke, *Reconciling Drug Court Participation with Defender Ethical Standards*, INDIGENT DEF., Nov./Dec. 1997, <http://www.nlada.org/indig/nd97/Reconc.htm> (discussing ways defense attorneys can comply with basic obligations to provide zealous effective advocacy within drug court system).

104. Hora, Schma & Rosenthal, *supra* note 2, at 521.

105. *Id.*

106. *Id.*

107. Providing an example, the authors note a defendant who wishes to be sentenced to probation. Probationers are generally subject to warrantless searches by probation officers. Thus, to gain the bargain of probation, they must give up their right to privacy to some degree. See *id.* at 521 n.453.

108. Defendants who accept reduced plea offers usually give up a hefty list of rights, including the rights to file suppression motions, to have a jury hear their case, to confront the government’s witnesses against them, to present witnesses on their own behalf, and to

must be made knowingly, voluntarily, and intelligently to be legally cognizable.<sup>109</sup> This presents a unique set of issues for attorneys in the drug treatment court setting, a relatively new territory lacking formal procedures.

One such issue is the problem of knowing what, exactly, the client receives in return for waiving her rights when she enters the drug court plea.<sup>110</sup> For a client who pleads guilty in treatment court, the defense attorney may not be able to provide the same definitive answers she would for the client accepting a plea offer in a traditional courtroom.<sup>111</sup> This is particularly true in jurisdictions that do not provide explicit contracts to clients setting forth the parameters of the treatment agreement by way of a sanctions schedule.<sup>112</sup> A simple explanation that a judge will oversee treatment and impose sanctions for failure to comply, potentially including short periods of incarceration, will satisfy the basic concerns of many clients, many of whom are anxious to receive treatment. Nevertheless, this knowledge alone may not be sufficient for a truly knowing, voluntary, and intelligent choice among options when the range of unknowns is potentially broad.<sup>113</sup> Without knowing with certainty all that a treatment modality and regime of sanctioning entails, the attorney may not be able to assist meaningfully a drug court client considering a guilty plea.<sup>114</sup>

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testify. *Cf.* *Boyd v. United States*, 586 A.2d 670, 674 (D.C. 1991) (holding that right to testify is “fundamental and personal right which can only be waived by the defendant”).

109. *Gardner v. Broderick*, 392 U.S. 273 (1968); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Boyd*, 586 A.2d at 675.

110. Those who agree to participate in drug court treatment programs prior to trial or guilty plea may face other legal and ethical issues, which are beyond the scope of this paper. *See* Hora, Schma & Rosenthal, *supra* note 2, at 513–16.

111. The authors write that prior to the time a defendant enters a treatment court plea, the defense attorney should make sure that “the defendant understands the nature of his or her legal rights, the requirements of the program, and the possible legal consequences should the defendant fail to complete the program.” *Id.* at 479.

112. The Bronx Treatment Court makes available to attorneys a rather elaborate “Sanctions Chart,” which sets forth a “framework” for the imposition of sanctions, as part of a brochure explaining the features of the treatment program. *See* YOUR GUIDE TO THE BRONX TREATMENT COURT, *supra* note 72, at 9. However, the chart is not intended to provide an absolute formula for sanctions since “[t]he Judge maintains complete discretion in the imposition of all sanctions.” *Id.* On the other hand, some jurisdictions provide defendants with detailed sanction schedules in long and confusing drug court contracts. Thus, even clients signing such agreements may not fully realize what they have agreed to or given up by agreeing to participate in treatment court.

113. *See* Burke, *supra* note 103 (“Once a drug court program has been adopted, defender programs should establish their own procedures to ensure that the clients’ interests are protected and that any waiver of rights is made knowingly and voluntarily (e.g. waiver forms), and that defender employees are trained to utilize the program effectively.”); *cf. In re Richard M.*, 993 P.2d 1048 (Ariz. Ct. App. 1999) (discussing due process requirements for revoking juvenile’s probation, including requirement that juvenile be informed of all terms of probation in writing); DAVID LYONS, ETHICS AND THE RULE OF LAW 75 (1984) (“It is generally considered unjust to penalize a person for failing to follow a law it is impossible to follow. Fairness requires that a person have fair warning—the opportunity to know what is expected of her and to decide what to do in light of that knowledge.”).

114. *See, e.g., People v. Parker*, 711 N.Y.S.2d 656, 661 (App. Div. 2000) (explaining that when sentencing conditions imposed by court are so vague or unclear that compliance with

Even when a drug treatment court provides the defendant with relatively clear, written boundaries and guidelines in advance of her plea, the manner in which this takes place may impair the attorney's ability to ensure that her client's plea is fully knowledgeable. Of particular concern are programs where court personnel interview clients and review with them the contract and various waiver forms outside the presence of counsel. Without witnessing this conversation, the attorney cannot know the specifics of what the client believes she has been promised. This, too, undermines an attorney's ability to provide effective assistance to her client,<sup>115</sup> regardless of whether she believes she is part of a team working to maintain the client's sobriety.

The ostensibly voluntary nature of treatment court participation<sup>116</sup> does not allay all defense concerns, nor does it absolve drug treatment courts from their obligation to operate in an appropriate and impartial manner. The mere fact that a program is optional should not preclude an evaluation of how far the program can go in requiring the abandonment of a long list of constitutional or other rights.

## 2. *Collaborating with Other Drug Court Players*

The authors believe that defense counsel may have difficulty adapting to the collaborative nature of treatment courts. However, they argue that such collaboration can inure to the benefit of defendants. Specifically, they state that defense attorneys generally work with prosecutors in developing drug treatment courts and can thus ensure the protection of defendants' interests. The authors also argue that once the drug court is established,

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them would be open to "subjective interpretation," they may violate due process by failing to provide defendant with adequate notice); *see also* NAT'L LEGAL AID & DEFENDER ASS'N, *supra* note 87, § 6.3(a) ("Counsel should inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement, and the advantages and disadvantages and the potential consequences of the agreement."). A judge's duty in this situation presents a special question. For instance, does the law require a special colloquy before permitting a drug treatment court plea? *Cf.* *Boyd v. United States*, 586 A.2d 670, 679-80 (D.C. 1991) (holding that "colloquy procedure [before allowing a defendant to waive the right to testify] would best serve all of the interests of the parties in the administration of justice").

115. *See Cullen v. United States*, 194 F.3d 401, 404 (2d Cir. 1999) (noting that defense counsel, as part of legal advice to client, must communicate all terms of proposed guilty plea); *Risher v. United States*, 992 F.2d 982 (9th Cir. 1993) (holding that defense counsel's failure to inform client adequately about sentence prior to entering guilty plea may constitute ineffective assistance of counsel).

116. Obviously, a long discussion can be had surrounding the question of whether choosing to participate in drug court is really voluntary. Indeed, as discussed below, many defendants entering treatment are simply accepting the shortest route to liberty. *See infra* text accompanying notes 128-31. Under these circumstances, is it fair to say that the defendant is freely making a decision among options? In addition, some might question the voluntariness of any decision made by a drug user in the throes of addiction.

defenders may protect clients' interests by identifying cases that should be dismissed "for lack of probable cause or other problems."<sup>117</sup>

However, for the individual client who finds herself within an already established treatment court, this may amount to very little. That the defense attorney<sup>118</sup> may have taken part in the court's design certainly does not relieve her responsibility to provide the individual client with effective assistance of counsel and zealous representation within that court. As discussed below, the same holds true if sanctions were part of the court's original plan and therefore anticipated or agreed upon by the defense lawyer.

Moreover, the authors may have overestimated the extent of "team" development of drug treatment courts.<sup>119</sup> Like other diversionary programs, most drug treatment courts operate at the whim of the prosecution.<sup>120</sup> In New York, drug courts cannot make promises to defendants without the approval of the Office of the District Attorney. Indeed, at the conclusion of every case in Bronx Treatment Court, defense attorneys must write a letter, not to the court, but to the head of the narcotics division of the Office of the District Attorney, requesting that the client be permitted to graduate and have the felony plea vacated, and urging a full dismissal of the charges. Thus, it seems unlikely that defense attorneys across the country had the same voice or power as prosecutors did during the planning stages of treatment courts.<sup>121</sup>

Indeed, while any particular prosecutor's office may have the ability to withdraw from treatment court participation,<sup>122</sup> the same does not necessarily hold true for a particular defense attorney or institutional defender. A

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117. Hora, Schma & Rosenthal, *supra* note 2, at 522 (internal quotations omitted).

118. In many if not most instances, the particular attorney before the court did not participate in the planning. It may instead have been management from the attorney's office or some other representative of the defense bar in the area.

119. See, e.g., W. Clinton Terry, III, *Broward County's Dedicated Drug Treatment Court: From Postadjudication to Diversion*, in *THE EARLY DRUG COURTS*, *supra* note 1, at 81–87 (discussing major agencies involved in drug court's development); Goldkamp, *Treatment Drug Court in Miami*, *supra* note 5, at 22–23 (explaining Miami drug court developed with strong support and leadership of prosecutor's office and only later gained support of public defender).

120. See *Irby v. United States*, 464 A.2d 136, 141 (D.C. 1983) (noting diversion program "owes its existence and operation solely to prosecutorial discretion"); see also *Woodward v. Morrissey*, 1999 OK CR 43, 991 P.2d 1042 (Okla. Crim. App. 1999) (holding that district attorney's broad power to veto defendant application to drug court does not violate Constitution).

121. Some commentators now warn that future drug court planners should "take pains to include both defenders and prosecutors in the planning stages of any drug court." Feinblatt, Berman & Fox, *supra* note 55, at 288. But again, inclusion can be interpreted in many ways. And inclusion alone does not change the balance of power—i.e., who actually has the final say in a particular decision-making process.

122. See, e.g., Joyce Purnick, *Drug Plan Is Clear-Cut*, in *Theory*, N.Y. TIMES, June 26, 2000, at B1 (indicating that while Chief Judge Judith Kaye has authority to create drug treatment courts in the State of New York, she cannot force prosecutors to use them). This dynamic may be different in states that have created drug treatment courts through legislation.

public defender's office would probably not have the power to boycott a treatment court it thought to be unfair, or if it believed its office did not play a large enough role in its development. Moreover, individual defense attorneys would be hard-pressed to refuse to practice in treatment court as institutions, particularly when an individual client could benefit from such an institution or wants to enter into a treatment program.

In addition, individual defense attorneys wield no more power in drug courts than they do in an ordinary courtroom setting.<sup>123</sup> As mentioned above, prosecutorial discretion is at the root of nearly every decision in a criminal case in the Bronx, regardless of whether a case is routed to a traditional or treatment court. Drug treatment courts, in and of themselves, do not give defense attorneys any greater ability to convince a prosecutor to dismiss a case. Indeed, the drug court's overriding goal of helping clients defeat their addictions may sometimes hamper attorney efforts to dismiss cases when, for instance, lack of probable cause exists.

The authors correctly state that defense counsel's collaboration with the prosecution may not be harmful to clients in all instances.<sup>124</sup> In the traditional adversarial setting there are many instances of collaboration between the prosecution and defense. For instance, prosecutors and defense attorneys may work together to convince a reluctant judge that a particular disposition for a case is appropriate, or to stipulate to certain evidence in the course of a hearing or trial. However, in some instances forced non-adversarialism can place defense attorneys in conflict with clients as well as interfere with the provision of competent and zealous representation as required by law.<sup>125</sup>

### 3. *Case Dumping*

An additional problem cited by the authors is the potential for prosecutors to use treatment court as a place to "dump" weak cases.<sup>126</sup> To check such behavior, the article suggests the treatment team simply "must ensure that such actions do not take place."<sup>127</sup>

To claim that "case dumping" will not occur merely because the treatment team will make sure it does not is dubious at best. As discussed above, the notion that all members of the team are on a level playing field seems to be a myth, at least in my experience in a non-legislatively created post-plea model drug court.

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123. The authors seem to believe that in all treatment courts, "[d]uring the screening process, the DTC defense counsel reviews the defendant's criminal history with the prosecutor and evaluates whether or not individuals meet treatment program requirements." Hora, Schma & Rosenthal, *supra* note 2, at 479. I have never taken part in any formalized meetings of this kind.

124. *See id.* at 479–80.

125. *See infra* text accompanying notes 220–24.

126. Hora, Schma & Rosenthal, *supra* note 2, at 522.

127. *Id.*

Indeed, if there were overwhelming evidence of case dumping occurring on a large scale, what could the individual defense attorney or institutional defender do? Perhaps a meeting might be called to address the issue, and the drug court judge might pressure the prosecution to refrain from the practice. Or institutional or political pressures might come to bear on an office that was routing a large number of cases involving innocent or minimally-culpable defendants to a treatment court. However, without some kind of objective monitor on such behavior, as well as enforceable procedures in place to act as a safeguard, defense attorneys can do little in such a situation except, where appropriate, advise individual clients not to enter a plea of guilty and not to accept the treatment option.

In practice, however, advising a particular client against accepting a guilty plea in treatment court may be of little utility in battling problems caused by case dumping. Clients generally hold the ultimate power to decide whether to plead guilty,<sup>128</sup> and the institutional pressure to plead guilty is quite strong. A good number of drug treatment court defendants are arrested and held on bail for several days before the treatment court judge sees them. Once in treatment court, they may be told that they will be released that day to an out-patient drug treatment program if they plead guilty.<sup>129</sup> They are certainly entitled to reject the treatment-based plea offer and fight their case, but, unless they have the means to post bail, they will have to assert their innocence from behind bars.<sup>130</sup>

Thus, damage from case dumping may be done as soon as a single weak case is deemed treatment court eligible, tracked to the treatment court part, and an offer of treatment made. It is difficult to imagine that many incarcerated clients in the Bronx, even those with potentially “winnable” cases, would opt to exercise the right to go forward to trial when the “freedom” of treatment is knocking at their door.<sup>131</sup>

While it is impossible without any formal data collection to know if cases are being “dumped” on a large scale, it appears that in a number of individual cases, prosecutions for felony drug sale might not have been as aggressively pursued if the defendants had not been sent to drug treatment court. In these scenarios, even membership in the treatment court “team” would do little to help convince the prosecution otherwise.

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128. See *Boria v. Keane*, 99 F.3d 492, 496–97 (2d Cir. 1996).

129. See YOUR GUIDE TO THE BRONX TREATMENT COURT, *supra* note 72, at 3 (“[U]pon defendant’s consent, treatment providers conduct assessments to determine the presence and severity of addiction, medical concerns, general mental health, family ties, etc. Offices in the courthouse are utilized for assessing defendants who are not incarcerated. Incarcerated defendants are assessed in holding areas.”).

130. This assumes that the defendant has not been made and accepted an alternative offer of probation. See *infra* note 140

131. Cf. Finkelstein, *supra* note 53 (indicating some experts believe drug treatment court initiatives “might tempt some people who wanted treatment to plead guilty even if they had not committed the crime”).

#### 4. *Proving the Need for Treatment*

Hora, Schma, and Rosenthal maintain that defense attorneys worry that the defense bears the burden of proving that a defendant actually deserves treatment.<sup>132</sup> The authors counter this concern by analogizing the purported burden shifting to that which occurs when a defendant asserts an affirmative defense, such as insanity.<sup>133</sup> They further contend that the burden is tempered by the fact that defendants undergo objective assessment, including drug testing by drug court staff, to determine if they are drug court eligible.<sup>134</sup>

However, in the Bronx, drug court eligibility is initially determined on the basis of the charges in the case and the defendant's criminal record, not a defendant's drug use or abuse history.<sup>135</sup> Thus a matter is first targeted for drug court well before the drug court's staff meets with the client. In the end, it appears that few of the defendants routed to the Bronx Treatment Court are rejected because they do not need help with drug or alcohol abuse. Therefore, at least in the Bronx Treatment Court, the contention that defense counsel worry about having the burden to prove a defendant is in need of help does not generally apply.

To the contrary, I have encountered a different set of problems relating to client eligibility. The biggest fear of rejection exists not for clients who may not be able to prove their need for treatment, but for those who, in some way, seem to need too much help. For instance, the Bronx Treatment Court deals with only a limited number of treatment providers. Each of these programs targets different populations and meets the needs of different kind of clients. Many programs are generally not equipped, for example, to assist clients whose addictions are complicated by other problems and demonstrate a reluctance to accept clients who present serious mental health issues.<sup>136</sup> In addition, a client who appears to be homeless or have an unstable housing situation may be deemed ineligible for the standard outpatient drug treatment program by the Office of the District Attorney. For such a client, the only option through the drug court may be to enter a more onerous, long-term, residential treatment program.

Thus, the quandary for defense attorneys is the extent to which certain potential drug treatment court clients should be "specially" prepared for the interview with the treatment court staff. For instance, is it appropriate

132. See Hora, Schma & Rosenthal, *supra* note 2, at 522.

133. *Id.*

134. *Id.*

135. YOUR GUIDE TO THE BRONX TREATMENT COURT, *supra* note 72, at 2 (stating "the District Attorney's Office reviews the charges and criminal records of all defendants to determine whether they meet eligibility criteria," and "[t]his decision is not based on the strength of the case or any assessment of a defendant's addiction status").

136. See, e.g., WELCOME TO THE BRONX TREATMENT COURT, *supra* note 70, at 2 ("Most defendants are referred to out-patient programs . . . including programs for clients with mental health issues.").



to caution a client to avoid discussing the extent of her mental illness with drug court staff in order to assist that client in avoiding a felony conviction? And what advice should attorneys provide to clients who do not wish to enter an in-patient drug treatment program but lack long-term housing?

Similar ethical dilemmas can present themselves in non-drug court settings.<sup>137</sup> However, because drug court proponents advocate nearly limitless disclosure on the part of defendants,<sup>138</sup> the tension seems particularly acute in the treatment court arena. Moreover, if defense attorneys are truly considered “team” players in drug treatment courts, they should have an equal voice in establishing and adjusting the workings of these institutions. This would include a greater role in determining which cases were accepted to drug treatment court as well as choosing the treatment providers.<sup>139</sup>

### 5. *Treatment Too Onerous*

Finally, the authors note that defense attorneys and their clients may be troubled by the fact that treatment court-imposed regimes may be “more onerous than the equivalent traditional court sanctions for the same offense.”<sup>140</sup> Again, however, the authors ascribe such concerns to ignorance on the part of defense attorneys: “Much of this unfounded apprehension comes from lack of understanding about DTCs and the concept of therapeutic jurisprudence.”<sup>141</sup>

In the end, the authors admonish that “[t]he DTC process need not be viewed negatively by defense attorneys,” at least not those who adopt a “therapeutic jurisprudence perspective . . . to more completely represent their clients.”<sup>142</sup> They urge defense counsel to “view the DTC process as

137. One analogous situation might be non-drug court clients who are offered a drug treatment program versus incarceration if they plead guilty through a program such as TASC.

138. See Hora, Schma & Rosenthal, *supra* note 2, at 479 (urging defense counsel to encourage honesty from drug court defendants).

139. Indeed, some public defender offices are especially well equipped to assist in such an endeavor—perhaps even more so than the court or prosecution—because of the extent to which such offices have assisted defendants in finding appropriate treatment programs in the past and have consequently developed relationships with such organizations.

140. See Hora, Schma & Rosenthal, *supra* note 2, at 522–23. In the Bronx, the inception of the drug court may be viewed as having changed the “going rate” for first-time felony drug crimes. See *supra* note 55 and accompanying text. Most first-time felony drug offenders in the Bronx are technically eligible for probation. That is, a defendant charged with a B-level felony that carries a mandatory-minimum sentence of one to three years of incarceration can be offered probation instead, if the prosecution agrees to allow her to plead guilty to a lesser charge, such as a C-level felony. Indeed, at least one attorney has told me that nearly every person charged with first-time felony drug crimes was offered probation prior to the inception of the drug treatment court in the Bronx. In my experience, however, those clients who decline drug treatment court as an option are not always offered probation. Thus, to call the Bronx Treatment Court an alternative to incarceration for first-time felony drug offenders may be somewhat off the mark.

141. *Id.* at 523.

142. *Id.*

the best method for ending the cycle of drugs and crime [which] is in the best interest of the client" and will result in a "total improvement" in the life of the client.<sup>143</sup>

The level of participation required by the treatment court regime is worrisome.<sup>144</sup> However, this concern does not, as the authors suggest, simply grow out of a comparison between the rigors of treatment and non-treatment court sentences. Instead, a more complex ethical dilemma relates to the sentence faced by defendants who fail to complete treatment. In the Bronx Treatment Court, defendants must agree to a harsher sentence if they fail to successfully complete treatment than they would have likely received if they had simply pleaded guilty to the "top count" of the charges against them. To participate in drug treatment court, most defendants must agree to a promised sentence of two to six years of incarceration even though the statutory minimum for the charge to which they are pleading is a term of one to three years.<sup>145</sup>

Even though a client enters a plea in treatment court with a promise from the court and prosecutor that if she completes the program, her felony plea will be withdrawn and no jail sentence will be imposed,<sup>146</sup> the situation is still unsettling. Armed with very little knowledge about the client, an attorney must discuss with her the pros and cons of agreeing to potentially be sentenced to a greater term of incarceration than she would have ordinarily faced under the circumstances.<sup>147</sup> In such a situation, it is hard to know whether the client presents a good "risk" for treatment<sup>148</sup> and to provide her with meaningful advice about whether to accept the plea offer. In effect, the attorney may be gambling with a client's future without sufficient information. The fact that, like all clients, drug treatment court clients should be treated as autonomous individuals<sup>149</sup> who are

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143. *Id.* (internal quotations and citations omitted).

144. In the Bronx, most clients participating in the drug treatment court attend an intensive out-patient drug treatment program for at least twenty hours per week, over a period of twelve to eighteen months. See BRONX TREATMENT COURT CLIENT INFORMATION GUIDE, *supra* note 76, at 3.

145. As noted above, this two to six year indeterminate sentence is far greater than most first-time drug sale defendants could receive outside of the treatment court by plea-bargain. Drug court defendants are generally charged with B-level drug sale cases. The prosecutor, for purposes of plea bargaining, could reduce the charge to a C- or D-level felony, which would make the defendant eligible for probation or a prison sentence of less than one to three years. Moreover, even if she pleaded guilty to the "top count," few judges would impose more than the minimum one to three year indeterminate sentence.

146. As indicated earlier, successful participants typically receive a misdemeanor on their record. In exceptional cases, the charges are dismissed altogether. See *supra* text accompanying note 79.

147. Guilty pleas in the Bronx Treatment Court, like any other pre-indictment guilty plea in the Bronx, are often entered within a few days of a defendant's arraignment.

148. For obvious reasons, one can never tell with certainty who will succeed in treatment.

149. Cf. Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987) (discussing difficulty of respecting client autonomy while working to protect client interests).

ultimately responsible for deciding whether to plead guilty or proceed to trial,<sup>150</sup> does little to allay both the moral<sup>151</sup> and legal<sup>152</sup> concerns such a situation presents for the practitioner.

*C. More Questions to Answer the Question:  
Post-Plea Status Hearings, Right to Counsel,  
and Role of Counsel*

The authors of *Drug Treatment Court Movement* and other commentators fail to address another important set of issues for defense attorneys: post-plea status hearings, including the right to and role of counsel at such proceedings.<sup>153</sup> As outlined above, defendants at the Bronx Treatment Court who have pleaded guilty are required to frequently provide the judge with information about their progress in treatment.<sup>154</sup> Specifically, “[d]efendants appear in court either biweekly or monthly on the day their program is on site to speak to the judge about their progress or any setbacks they may be experiencing.”<sup>155</sup>

In the Bronx Treatment Court, the treatment provider sends a written progress report for each defendant to the court prior to such court appearances.<sup>156</sup> The report notes absences, urinalysis results, and other information relating to the defendant’s participation in treatment.<sup>157</sup> However, neither the defendant nor defense counsel are generally provided with

150. See *Boria v. Keane*, 99 F.3d 492, 497 (2d Cir. 1996) (citing ANTHONY G. AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES 339 (Nat’l Legal Aid & Defender Ass’n ed., 1988)).

151. Cf. Ellmann, *supra* note 149, at 764–73 (addressing attorney paternalism in shaping client decision-making).

152. See *Boria*, 99 F.3d at 497 (“A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable.”) (citing MODEL CODE OF PROF’L RESPONSIBILITY, EC 7-7 (1992)). Indeed, under ordinary circumstances in the Bronx, if a first-time felony drug offender were advised by her attorney to accept a plea offer involving a sentence of two to six years, most attorneys would agree that such advice was incompetent. The drug treatment court in this same jurisdiction requires that the client attend a drug program each day for over a year, be closely monitored by the court, and give up privacy rights simply to avoid that two to six year sentence. How should an attorney advise the drug court client in such a court? See *Boria*, 99 F.3d at 497 (“Effective assistance of counsel includes counsel’s informed opinion as to what pleas should be entered.”) (citations omitted).

153. These proceedings have no formal legal designation under New York’s criminal procedure law. This article will refer to them as status hearings or case updates.

154. See *supra* text accompanying notes 84–85.

155. WELCOME TO THE BRONX TREATMENT COURT, *supra* note 70, at 3. The court’s literature further provides that “[t]he judge, the district attorney, the defense attorney and the treatment provider meet daily to review the defendants’ progress.” *Id.* This, however, has not been my experience. While I may discuss a defendant’s situation with the court or its staff on an informal, sporadic basis, the Office of the District Attorney has never met with me to discuss the progress of any of my clients.

156. In practice the reports are usually sent to the Bronx Treatment Court by facsimile either the day before the status hearing or the morning of such an appearance.

157. See YOUR GUIDE TO THE BRONX TREATMENT COURT, *supra* note 72, at 4 (“The treatment programs provide on-going information to the court, prosecution and defense

treatment provider update reports in advance of the scheduled court appearance.<sup>158</sup> As a result, the defendant and defense attorney may receive notice of an alleged drug court infraction at the moment they step before the judge.<sup>159</sup>

Aside from failing to provide defendants and attorneys with notice of alleged infractions prior to scheduled status hearings, the Bronx Treatment Court also conducts unscheduled status hearings by sua sponte advancing the cases of some defendants.<sup>160</sup> The court may call for such an unscheduled hearing if, for example, a defendant is re-arrested for possessing a quantity of drugs consistent with personal use or is returned on a warrant after failing to appear for a scheduled Bronx Treatment Court appearance.<sup>161</sup> When the court advances a case, it does not always notify defense counsel. Thus defendants may be seen by the judge, questioned, and sanctioned, all without an attorney present.

Indeed, within the treatment court a culture of informality has developed whereby most players in the court view the presence of a defense attorney at status hearings as nonessential, even for scheduled hearings. A number of factors may contribute to this pattern. For instance, institutional defender offices such as The Bronx Defenders have not received additional funding to provide drug treatment court representation. Since drug court matters tend to last longer than other cases and involve many more court appearances, limited resources present a challenge to defenders practicing in drug court.<sup>162</sup> Defense attorneys have also developed trust in the presiding treatment court judge. They believe that the judge hearing their cases has a history of fairness with clients and will not treat clients unjustly. Thus attorneys busy with other court matters and who cannot wait for the drug court to reach their cases simply “check in” with clients to verify that they are doing well in treatment, but allow clients who appear to be in compliance to appear at status hearings by themselves.

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attorneys about defendants’ progress, and discuss phase advancements, incentives and sanctions for defendants with the judge and the treatment team.”).

158. In my experience, if defense counsel wish to see reports for their clients prior to their status hearings, they must come to the Bronx Treatment Court at the courthouse to review them the evening before or the morning of the scheduled court appearance.

159. YOUR GUIDE TO THE BRONX TREATMENT COURT, *supra* note 72, at 4.

160. WELCOME TO THE BRONX TREATMENT COURT, *supra* note 70, at 4 (“[T]he close partnership between the court and treatment providers ensures immediate intervention, even when a defendant is not regularly scheduled for a court appearance.”).

161. YOUR GUIDE TO THE BRONX TREATMENT COURT, *supra* note 72, at 4 (“The treatment programs provide on-going information to the court, prosecution and defense attorneys about defendants’ progress, and discuss phase advancements, incentives and sanctions for defendants with the judge and the treatment team.”). Notably, the literature also does not define the term “treatment team.” It is unclear whether defense counsel are intended to be part of such teams.

162. Obviously, increased funding to public defender organizations in jurisdictions with treatment courts would help to alleviate this burden.

The treatment court's articulated goals may also contribute to this atmosphere. For instance, since the court's main concern is each client's progress in treatment, it seems to consider the presence of a program representative or a written update much more essential than the presence of defense counsel. Courthouse staff, interested in moving the court calendar along as quickly as possible, may view expediting cases as more important than ensuring the presence of counsel at routine updates. Thus, whether intentionally or not, attorney representation is not always provided at status hearings.<sup>163</sup>

Obviously, a defendant in a post-plea drug court like the Bronx Treatment Court has already made an admission of guilt, and the court has promised a specific jail sentence if the defendant fails to complete treatment. However, because no actual sentence has been imposed, final judgment or adjudication has not been rendered. Thus status hearings are a procedural anomaly in need of greater legal clarification. The question of whether defense counsel must be afforded at these "special" proceedings,<sup>164</sup> and if so, what her role should be, is addressed below.

### 1. *Should Counsel Be Present at Status Hearings?*

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."<sup>165</sup> This right, which "attaches" once the adversarial process has begun and the defendant is charged with a crime,<sup>166</sup> applies to more than just the trial phase of criminal proceedings.<sup>167</sup>

When entering a plea to charges against her, a defendant is entitled to assistance of counsel<sup>168</sup> regardless of whether the plea takes place at arraignment<sup>169</sup> or at a preliminary hearing.<sup>170</sup> And a defendant's right to counsel obviously extends beyond those instances in a criminal proceeding

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163. Given the large number of cases they have in the court, the Legal Aid Society, the primary public defender in the jurisdiction, has been able to assign one attorney to the treatment court on a full-time basis. The Legal Aid Society's attorney does not cover non-Legal Aid cases, however. For a discussion of the coverage of non-Legal Aid cases, see Schreibersdorf, *supra* note 6.

164. For instance, New York's Code of Criminal Procedure does not contemplate such a proceeding. *See, e.g.*, N.Y. CRIM. PROC. LAW § 380.30(1) (McKinney 2001) (providing that "[s]entence must be pronounced without unreasonable delay").

165. U.S. CONST. amend. VI.

166. *See Moran v. Berdine*, 475 U.S. 412, 428 (1986).

167. *See, e.g., Johnson v. Zerbst*, 304 U.S. 458, 469 (1945) (reversing conviction of defendant tried without assistance of counsel); *see also United States v. Ash*, 413 U.S. 300, 309–10 (1973) ("Later developments have led this Court to recognize that 'Assistance' would be less than meaningful if it were limited to the formal trial itself.").

168. *See Tomkins v. Missouri*, 323 U.S. 485, 489 (1945) (reversing conviction of defendant who pleaded guilty to charge of murder in first degree without being permitted to consult with counsel).

169. *See Hamilton v. Alabama*, 368 U.S. 52 (1961).

170. *See White v. Maryland*, 373 U.S. 59, 60 (1963) (finding that preliminary hearing in Maryland is "critical stage" of criminal proceeding).

where the question is that of guilt or innocence. The controlling principle, as set forth in *Hamilton v. Alabama*, is whether the event in question can be viewed as a "critical stage" of the criminal proceeding warranting the "guiding hand of counsel."<sup>171</sup>

Using this standard, the Supreme Court has extended the right to counsel under the Sixth Amendment to postindictment line-up identification procedures<sup>172</sup> and interrogations.<sup>173</sup> In such situations, even though the defendant is not necessarily facing an adversary in a courtroom, defense attorneys may be called upon to serve "as a spokesman for, or advisor to, the accused."<sup>174</sup>

In 1948 the Supreme Court faced the issue of whether a defendant was entitled to representation by counsel following a determination of guilt.<sup>175</sup> In determining that the defendant's rights had been violated by the failure to provide defendant with counsel at sentencing, the Supreme Court stated:

[I]t is evident that this uncounseled defendant was either overreached by the prosecution's submission of misinformation to the court or was prejudiced by the court's own misreading of the record. Counsel, had any been present, would have been under a duty to prevent the court from proceeding on false assumptions and perhaps under a duty to seek remedy elsewhere if they persisted . . . . In this case, counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner.<sup>176</sup>

Even when a defendant is placed on probation she has the right to be represented at any subsequent probation revocation hearing.<sup>177</sup> In *Mempa v. Rhay* the Court reiterated that "appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected."<sup>178</sup> It further rejected the notion that the "imposition of sentence following probation is . . . a mere formality" even though the defendants in *Mempa* were already informed of their

171. See *Hamilton*, 368 U.S. at 54.

172. See *United States v. Wade*, 388 U.S. 218 (1967).

173. See *Massiah v. United States*, 377 U.S. 201 (1964). A defendant's Fifth Amendment right to counsel is beyond the scope of this article. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966).

174. See *United States v. Ash*, 413 U.S. 300, 312 (1973).

175. In *Townsend v. Burke*, 334 U.S. 736 (1948), the defendant was unrepresented by counsel at his sentencing hearing. The facts showed that the court made its sentencing determination based in part upon an erroneous understanding of the defendant's prior criminal record. *Id.* at 740. That is, the court assumed certain prior theft charges resulted in convictions, when in fact they had been dismissed.

176. *Id.* at 740-41.

177. See *Mempa v. Rhay*, 389 U.S. 128 (1967).

178. *Id.* at 134.

promised sentence “at the time they were originally placed on probation.”<sup>179</sup> The Court concluded “a lawyer must be afforded at this proceeding whether it be labeled a revocation of probation or a deferred sentencing.”<sup>180</sup>

In applying the above analysis to post-plea drug treatment court status hearings, it would seem that a defendant must be afforded legal counsel. If a defendant is alleged to have violated a drug court rule, a right of the defendant might be affected—namely, her right to liberty—by way of a court sanction. And regardless of whether the defendant agreed to accept such a sanction at the time of her guilty plea, she must be given the opportunity to have counsel defend her—even if that simply means presenting mitigating evidence on the client’s behalf.

However, a recent New York Court of Appeals case dealing with guilty pleas involving treatment through Treatment Alternatives to Street Crime (TASC) suggests that the Constitution does not provide a right to counsel at certain treatment-related status hearings.<sup>181</sup> In *People v. Garcia*, the defendant had pleaded guilty and been promised a sentence of four and one-half to nine years of incarceration if he failed to complete an eighteen-month in-patient drug treatment program through TASC.<sup>182</sup> After participating in the program for several months, the defendant was allegedly ejected for violating its rules.<sup>183</sup> The defendant was purportedly at large for several months before he was returned to court on a bench warrant.<sup>184</sup> Once before the court, the defendant explained that he was turned away from the drug treatment program because he attended a banquet for other members of the treatment program without permission.<sup>185</sup>

The court remanded the defendant and TASC considered placing the defendant into another program.<sup>186</sup> The court adjourned the matter for three additional dates for TASC to attempt to find an alternative placement for defendant.<sup>187</sup> Counsel was not present at any of the three adjournment dates.<sup>188</sup> On the last of the three dates, having been unable to find a treatment placement for the defendant, the TASC representative told the presiding judge he could proceed to sentencing if he wanted.<sup>189</sup> At the next court appearance, defense counsel was present and was told that

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179. *Id.* at 135.

180. *Id.* at 137.

181. *People v. Garcia*, 708 N.E.2d 992 (N.Y. 1999).

182. *Id.* at 992–93.

183. *Id.* at 993.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

the court wished to impose the promised sentence.<sup>190</sup> Over defense counsel's request that the defendant be given another opportunity to complete treatment, the court sentenced the defendant to a term of incarceration of four and one-half to nine years.<sup>191</sup> Because he was not represented at the proceeding in which TASC informed the court it had no objection to the court's imposing sentence, the defendant appealed the court's decision, claiming a violation of the Sixth Amendment right to counsel. The Court of Appeals, deciding against defendant, held that the court appearance was not a "critical stage" of the criminal prosecution as contemplated by the Constitution "where counsels' absence might prejudice due process rights."<sup>192</sup> The proceeding, the court stated, did not depend "upon an arbiter's determination as to the truth of assertions of misconduct."<sup>193</sup> Rather, "[t]he only issues addressed at the . . . proceeding were administrative concerns that the court sought to have answered by the TASC representative . . . and the defendant's views were not relevant to TASC's decision to readmit him or its ability . . . to find a new program for him."<sup>194</sup>

The *Garcia* decision reads too great a limit into the concept of right to counsel under the Sixth Amendment. Indeed, as already discussed, there are many stages of the criminal prosecution that are "critical" even when a defendant is not called upon to answer allegations.<sup>195</sup> Moreover, drug court status hearings, even where the defendant is not in violation, involve the direct interrogation of the defendant by an arm of the government—the treatment court judge—in the presence of the prosecution. As such, the right to counsel would seem to apply absent an express waiver.<sup>196</sup> This is so even though the court's inquiry does not relate to guilt or innocence but to other issues potentially relevant to the final disposition of the case.<sup>197</sup>

Nevertheless, even if the presence of counsel were not constitutionally mandated at such status hearings, counsel should be present with the defendant for other reasons. If a defense attorney is supposed to be part of a

190. *Id.*

191. *Id.*

192. *Id.* at 993–94.

193. *Id.* at 994.

194. *Id.*

195. *See, e.g.,* *United States v. Wade*, 388 U.S. 218 (1967) (holding that post-indictment lineup was critical stage of prosecution, activating defendant's Sixth Amendment right to counsel).

196. *See Michigan v. Jackson*, 475 U.S. 625, 636 (1986).

197. *See Powell v. Texas*, 492 U.S. 680, 686 (1989) (per curiam) (holding that state violated Sixth Amendment by failing to provide notice to defense attorney before forcing defendant to undergo psychiatric evaluation to determine his future danger to society); *Satterwhite v. Texas*, 486 U.S. 249, 255–56 (1988) (same); *see also* CAROLINE S. COOPER, NAT'L DRUG COURT INST., ISSUES RAISED FOR DEFENSE COUNSEL IN DRUG COURT REPRESENTATION RELEVANT TO THE ABA CANONS OF ETHICS: CANONS 2–4 (Draft) (1999), available at [http://www.american.edu/academic.depts/spa/justice/ndci\\_ethics.htm](http://www.american.edu/academic.depts/spa/justice/ndci_ethics.htm) (outlining proposed best practices in light of canons of ethics).



“team” working towards a defendant’s sobriety, it seems more “therapeutic” for defense counsel to be present for all proceedings when the defendant is doing well, so as to convey congratulations and positive reinforcement. In addition, by having counsel present at all times, courts might be able to avoid challenges like the one seen in *Garcia*.<sup>198</sup> Finally, regardless of the parameters of the Sixth Amendment, counsel must fulfill ethical obligations to their clients, even after conviction and up through sentencing.<sup>199</sup> Thus, as status hearings might be viewed as incremental components of the sentencing hearing, courts should ensure that cases are not handled without defense counsel present to provide the client with advice and counsel.<sup>200</sup>

## 2. *What Is the Role of Counsel at Status Hearings?*

With regard to the role of defense attorneys generally, the Supreme Court’s Sixth Amendment jurisprudence has clearly established a standard of “effective assistance” of counsel.<sup>201</sup> Obviously, most of the case law dealing with the issue of effective assistance of counsel involves post-conviction claims of ineffectiveness.<sup>202</sup> In deciding whether counsel has provided ineffective assistance in a particular case, a court will determine whether the attorney’s performance fell below some objective standard of reasonable behavior, and, if so, whether such performance actually prejudiced the defendant.<sup>203</sup> However, this test is largely informed by our

198. Admittedly, this argument may not have as much sway in jurisdictions like the Bronx, where defendants are required to waive their right to appeal to participate in the court.

199. MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. (1983) (“Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client.”); *id.* R. 1.16 cmt. (“A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.”); *cf.* NAT’L LEGAL AID & DEFENDER ASS’N, *supra* note 87, § 8.7 cmt. (“This Guideline assumes counsel’s presence at sentencing . . . Counsel must not treat, and must not allow the court to treat, a sentencing hearing as a routine matter.”).

200. *Cf.* AM. BAR ASS’N COMM. ON THE PROSECUTION & DEF. FUNCTIONS, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 34–35 (“Defense counsel should present to the court any ground which will assist in reaching a proper disposition favorable to the accused . . . Counsel should alert the accused to his right of allocution, if any, and to the possible dangers of making a judicial confession in the course of allocution which might tend to prejudice his appeal.”); NAT’L LEGAL AID & DEFENDER ASS’N, *supra* note 87, § 8.7 (“Counsel should be prepared at the sentencing proceeding to take the steps necessary to advocate fully for the requested sentence and to protect the client’s interest . . . Where appropriate, counsel should prepare the client to personally address the court.”).

201. *See, e.g.*, *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (reiterating that defendants “are entitled to the effective assistance of competent counsel”).

202. *See, e.g.*, *Strickland v. Washington*, 466 U.S. 668 (1984) (finding defense counsel’s failure to investigate mitigating evidence in sentencing phase of capital trial was neither so deficient nor so prejudicial as to constitute ineffective assistance violative of Sixth Amendment); *Harris v. Reed*, 894 F.2d 871 (7th Cir. 1990) (holding that defense attorney rendered ineffective assistance at defendant’s murder trial by failing to call any witnesses).

203. *Strickland*, 466 U.S. at 687.

justice system's interest in finality and the problems inherent in second-guessing an attorney's strategic decisions,<sup>204</sup> and is not the standard by which practicing attorneys should measure their own performance.<sup>205</sup> As has been pointed out by NLADA, practices on the part of an attorney that do not rise to the level of ineffectiveness under *Strickland* may still violate controlling legal and ethical norms.<sup>206</sup>

The American Bar Association's Model Rules of Professional Conduct<sup>207</sup> provide that as a client's representative, a lawyer must be willing to perform several functions.<sup>208</sup> These include serving as an advisor, an advocate, a negotiator, and an intermediary on behalf of a client. Thus the role of an effective attorney is not limited to a particular trial-based function.

For instance, Model Rule 1.3 provides: "A lawyer shall act with reasonable diligence and promptness in representing a client."<sup>209</sup> As a commentary to this rule, the drafters state:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.<sup>210</sup>

NLADA's guidelines for defense attorneys explain that zealousness and quality representation are in fact "the paramount obligation" of defense attorneys and must be provided at "all stages of the criminal process."<sup>211</sup>

204. Compare *Weekley v. Jones*, 76 F.3d 1459 (8th Cir. 1996) (holding that failure to present evidence of insanity is legitimate strategy) with *Genius v. Pepe*, 50 F.3d 60 (1st Cir. 1995) (finding that attorney's strategy, which involved foregoing insanity defense, was ineffective assistance of counsel).

205. See NAT'L LEGAL AID & DEFENDER ASS'N, *supra* note 87, § 1.1 cmt. ("Actions or inactions that do not meet the test for ineffective assistance of counsel in a given case may still constitute poor representation").

206. *Id.* (citing *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988)).

207. Each state has its own set of ethical rules, usually based upon the American Bar Association (ABA)'s Model Rules of Professional Conduct, the ABA Model Code of Professional Responsibility, or some combination of both. While a majority of states have adopted a form of the Model Rules, only the individual state standards are legally binding, regardless of whether they correspond to the ABA model. THOMAS D. MORGAN & RONALD D. ROTUNDA, *PROFESSIONAL RESPONSIBILITY* 12 (5th ed. 1991).

208. MODEL RULES OF PROF'L CONDUCT pmbl. (1983).

209. *Id.* R. 1.3.

210. *Id.* R. 1.3 cmt.; see also NAT'L LEGAL AID & DEFENDER ASS'N, *supra* note 87, § 1.1; Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 77 (1995) (observing that "criminal defense lawyers are ethically required to serve as zealous advocates and to vigorously challenge the state's case").

211. NAT'L LEGAL AID & DEFENDER ASS'N, *supra* note 87, § 1.1; see also *id.* cmt. (explaining that zealousness and quality representation are lens through which all actions of defense attorneys must be examined).

Confidentiality is also an important component of effective and ethical representation. Lawyers “shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation.”<sup>212</sup> The Model Rules go on to explain that “[a] fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.”<sup>213</sup> In addition, “the confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever the source.”<sup>214</sup>

Moreover, consistent with Sixth Amendment principles, Model Rule 1.7 creates a duty of loyalty to the client on behalf of the attorney.<sup>215</sup> This loyalty is breached “when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer’s other responsibilities or interests.”<sup>216</sup>

Given these principles, what role should an attorney play in drug treatment court status hearings in a post-plea jurisdiction? Consider the situation where a defendant is alleged to have failed several urinalysis tests and, as a result, is being threatened with the sanction of a period of time in jail or a weeklong detoxification in a hospital. According to DOJ’s *Key Components*, it would appear that in such situations the defense counsel should simply explain to the defendant that her in-court statements will not subject her to further prosecution, inform her that she “will be expected to speak directly to the judge, not through an attorney[,]” and encourage her “to be truthful with the judge and with treatment staff.”<sup>217</sup> If, however, the attorney were to provide such advice and stand by, allowing the court to impose whatever sanction it chose, her conduct would seem to be less than satisfactory under the law. First, for a lawyer to advise the client to fully

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212. MODEL RULES OF PROF’L CONDUCT R. 1.6 (1983). Note that beyond the ethical duty imposed upon attorneys to maintain information in confidence, state and federal laws and regulations also prohibit the disclosure of certain protected information. See, e.g., 42 C.F.R. § 2.11 (1995). For a discussion of federal confidentiality laws and their interplay with drug treatment court practices, see generally FEDERAL CONFIDENTIALITY LAWS, *supra* note 90.

213. MODEL RULES OF PROF’L CONDUCT R. 1.6 (1983).

214. *Id.*

215. MODEL RULES OF PROF’L CONDUCT R. 1.7 (1983).

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third party, or by the lawyer’s own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.

*Id.*

216. *Id.* R. 1.7 cmt.; see also NAT’L LEGAL AID & DEFENDER ASS’N, *supra* note 87, § 1.3(b).

217. KEY COMPONENTS, *supra* note 57, at 14.

disclose the drug use information to the court could certainly chill all future communications regarding drug use between client and attorney if the result of such disclosure is a sanction such as incarceration. Moreover, given that a defense attorney must act zealously at all stages of a criminal proceeding, the attorney would seem to have a duty to try to prevent the court from imposing sanctions infringing a defendant's liberty or other rights—regardless of whether the client had previously agreed to sanctions for infractions.

One helpful analogy is that of a defendant who is placed on probation and agrees to abide by certain terms. If a defense attorney attends a probation revocation hearing, advises her client to disclose all violations of the probation's terms, and offers no argument on behalf of the client, in mitigation or otherwise, the advice of counsel would be considered unsatisfactory by most—unless the court had made some offer of a lesser sentence if the defendant would admit to the wrongdoing and forgo a formal hearing.

Consider, also, a scenario where drug court staff calls aside a defense attorney for arguing too vehemently against a jail sanction for a client failing to comply with the rigors of the drug court program.<sup>218</sup> Does the explanation that the treatment court utilizes a "team approach" where all players work towards the goal of maintaining a client's sobriety, permit a defense attorney to abandon strong advocacy efforts? In my opinion, an attorney who chooses this course would be legally ineffective<sup>219</sup> given the conflict presented<sup>220</sup>—whether to heed the suggestions of the court staff<sup>221</sup> and forgo arguments that would ordinarily be made on behalf of a client, simply to become a better member of the drug court team. While a defense attorney may assist in helping a client achieve sobriety, drug courts should not require counsel to abandon other legally mandated goals, such as protection of a client's liberty interests, even if these conflict with the goals of the rest of the "team."

In addition, the appropriate role of counsel at status hearings extends beyond simply advocating against sanctions for clients who are alleged to have broken drug court rules. In most settings, due process requirements

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218. This hypothetical is based upon an experience of one of my colleagues.

219. See *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (holding that attorneys are ineffective when their ability to make independent decisions for clients are blocked by official government action); *Cuyler v. Sullivan*, 446 U.S. 335 (1980) (holding that conflict of interest adversely affecting defense attorney's performance results in ineffective assistance of counsel).

220. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. (1983) (admonishing attorneys not to allow other obligations to prevent them from taking appropriate action for client).

221. Official government action creates a conflict of interest "when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Strickland*, 466 U.S. at 686.

dictate that defense counsel be provided with timely notice of alleged violations of their clients,<sup>222</sup> as well as an opportunity to meaningfully challenge them in order to provide competent representation.<sup>223</sup> Particularly when alleged violations relate to positive drug test results which can be of questionable reliability,<sup>224</sup> defense counsel should be permitted to challenge the accuracy of such allegations. To ensure a defendant's right to due process of law and effective representation, courts should conduct some sort of evidentiary hearing to determine if a violation has occurred before imposing sanctions.

## V.

### SUGGESTIONS FOR THE FUTURE OF DRUG TREATMENT COURTS

There can be little doubt that drug treatment courts may provide an attractive alternative to traditional case processing to the defense bar—for instance, by allowing defendants charged with felony-level drug charges to have their cases dismissed or resolved with only a misdemeanor conviction. And drug courts such as the Bronx Treatment Court have generated many success stories—helping move drug addicts towards sobriety. Nevertheless, as this article only begins to demonstrate, such “problem-solving” courts present their own unique set of potential problems for the criminal defense practitioner.

Given the issues raised, it is clear that drug treatment courts as an institution, and the practices that have developed therein, must undergo greater scrutiny and analysis. The implications—both theoretical and actual—of the “teamwork” approach advocated by drug court proponents must be rigorously reviewed. Specifically, future assessments of drug

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222. *Cf. Hagar v. State*, 1999 OK CR 35, 990 P.2d 894 (Okla. Crim. App. 1999) (holding that in drug treatment court, in order to meet due process and statutory requirements, written notice must be provided to defendant setting forth alleged violations of drug court rules before defendant can be terminated from drug court program).

223. *Cf. State v. Valentine*, No. 98-1-06965-8, 2000 WL 628996, at \*1 (Wash. Ct. App. May 15, 2000) (reversing and ordering hearing because defendant's “due process rights were violated when the trial court terminated her from the Drug Court program without affording her a meaningful opportunity to respond to the allegations of noncompliance”); *cf. NAT'L LEGAL AID & DEFENDER ASS'N*, *supra* note 87, § 8.7:

In the event that there will be disputed facts before the court at sentencing, counsel should consider requesting an evidentiary hearing. Where a sentencing hearing will be held, counsel should ascertain who has the burden of proving a fact unfavorable to the defendant, be prepared to object if the burden is placed on the defense, and be prepared to present evidence, including testimony of witnesses, to contradict erroneous or misleading information unfavorable to the defendant.

*Id.*

224. *See, e.g., Bowen v. State*, 531 S.E.2d 104 (Ga. Ct. App. 2000) (reversing revocation of probation because drug test used not shown to be reliable).

courts should spend less time simply lauding the concept of court-monitored treatment as judicial innovation, and instead ask more probing questions about what is actually happening in such forums on a day-to-day basis and whether such practices comport with the law. Those practicing within drug courts, including defense attorneys, must give voice to their experiences,<sup>225</sup> play a more substantial role in drug court discourse, and be included in future conversations about the evolution of these developing institutions.

Only with honest, in-depth studies in hand can members of the legal community begin to undertake modifications necessary to improve drug court practice, such as development of clear guidelines for drug court professionals that reflect prevailing legal and ethical standards.<sup>226</sup> Any suggested model rules drafted only by drug court proponents who do not see problems with existing practices, or who fail to take into account the past experiences and problems faced by practitioners, must be met with skepticism. Model rules must seek to ensure that aside from receiving treatment, defendants in drug courts are also provided with effective assistance of counsel and due process of law. They should specifically outline permissible procedures at all stages of drug court proceedings—including status hearings. Ultimately, state legislatures may need to adopt enforceable guidelines so that violations may be remediable.

With regard to effective representation within drug courts, the burden should not simply fall upon public defender offices without the provision of additional resources. For each drug court that is created in a particular region, court-appointed attorneys and other court staff are called upon to change their practices and provide a broader range of services. Accordingly, in every jurisdiction that has a drug court, local institutional defenders should be provided with additional funding to meet the challenge. With such funds, public defender offices can begin to develop greater drug court expertise and better represent drug court clients on a day-to-day basis.

In the end, I do not advocate abandonment of the drug court model, but a pulling back on the reigns of the present high-speed drug court “movement.” Only in this way will we be able to adequately evaluate where drug treatment courts have been and more thoughtfully determine where they should be going. If we do not take the time to pause for such

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225. On December 1, 2000, NLADA included as part of its Washington, D.C., conference a panel presentation entitled, “The Defender Role in Problem-Solving Courts: Ethics and Advocacy.” More such discussions should take place across the country and include the voices of practitioners.

226. Some defender organizations have begun to develop their own proposed sets of guidelines for specialized courts. For instance, the American Council of Chief Defenders has drafted ten principles for problem solving courts intended “to ensure that such courts afford equal participation to defenders and protect clients’ rights. See Nat’l Legal Aid and Defender Ass’n, *Reno Launches NLADA American Council of Chief Defenders*, INDIGENT DEF. (Oct./Nov. 2000), available at <http://www.nlada.org/p-defend11-01.html>; see also COOPER, *supra* note 197.

deliberate analysis, necessary modification, and future planning, drug courts may never attain unconditional legal legitimacy. And this public defender, for one, will continue to have legal and ethical reservations when called upon to play a role on a drug court “team.”

