Issues Raised for Defense Counsel In Drug Court Representation Relevant to the ABA Canons of Ethics: Canons 2-4

Submitted to NDCI Committee Addressing Ethics and Confidentiality Issues Relevant to Drug Court Proceedings

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Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.

Summary of ABA Commentary:

A client is entitled to straightforward advice expressing the lawyer’s honest assessment. . . . Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. . . . Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied. . . In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client’s course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client’s affairs or to give advice that the client has indicates is unwanted, but a lawyer may initiate
advice to a client when doing so appears to be in the client’s interest.

**Issues Relevant to Drug Court Practice**

Defense counsel advising defendants who may be eligible for a drug court program must deal with the fundamental issue: what is best for the client? To advise the client to dispose of the case with minimal intrusion on the client’s personal life, on the one hand, or to advise the client to enter into a protracted, rigorously supervised program of treatment and other conditions which, while potentially benefitting the client in the long term, is far more intrusive in the client’s personal life during the short-term and will require him/her to waive constitutional and other legal protections to which he/she would otherwise be entitled?

**Suggested "Best Practices" in Drug Court Cases**

The defense attorney, as advisor, to drug court-eligible clients is ethically bound to go beyond the technical, legal issues of the case and to advise the client of available alternative courses of action when such alternatives may clearly be in the client’s best interests. In advising the client, defense counsel must provide his/her assessment of the strength of the case; a summary of the traditional process for its disposition and the likely outcome; and the benefits, drawbacks and requirements of participating in the drug court program. This review *must* include:

- the consequences of: having the criminal record and dispositional outcome that will likely result from the traditional processing of the case, including being on probation, if applicable, and the likely outcome of a violation of probation conditions;
- the likelihood and consequences of the client’s becoming re-involved with the justice system if he or she is drug dependent; and
- the benefits and drawbacks of participating in the drug court and the potential consequences for the client of program failure

It is appropriate that the attorney advise the client of the advantages of the drug court, regardless of the attorney’s personal opinions, and any attorney who does not do so may not be serving his/her client’s best interests. This advice, however, must be given within the context of full discussion of the legal issues presented by the case, alternative dispositional methods open for the client’s consideration, and the legal and other implications of these various alternatives. The advice provided by the defense attorney to a drug court-eligible client must meet the standards of providing counsel adequate to assure that, in the event the client decides to enter the drug court, any waivers he/she executes are fully voluntary and knowing of their implications and consequences.

**Frequently Asked Questions:**

1. **Question:** If an attorney believes, upon review of the facts and applicable law, that the case will be dismissed based on the filing of pretrial suppression motions but the filing of such motions
will preclude the defendant from entering the drug court because the decision as to how to proceed must be made promptly following arrest, should the attorney advise the filing of these motions even though he/she knows the defendant has a serious drug problem?

Answer: The attorney must present this information to the defendant, even with his/her advice to enter the drug court. The defendant, however, must make the final decision regarding how to proceed.

2. Question: Should an attorney advise a client to enter a drug court program before he/she has received the results of the drug analysis?

Answer: The attorney can advise the defendant to enter the program on a provisional basis, conditioned upon the receipt of a positive drug analysis, received within a specified (reasonable) period of time. In the event the drug analysis is negative, or not provided, the defendant should be able to withdraw from the program if he/she desires and proceed with a motion to dismiss the charge(s).

Advocate

Rule 3.1. Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Summary of ABA Commentary

The advocate has a duty to use legal procedure for the fullest benefit of the client’s cause, but also a duty not to abuse legal procedure. . . In determining the proper scope of advocacy, account must be taken of the law’s ambiguities and potential for change. . . The filing of an action or
defense is not frivolous merely because the facts have not first been fully substantiated. . . ; it is frivolous if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable to make a good faith argument on the merits.

**Issues Relevant to Drug Court Practice**

The drug court is often described as a "nonadversarial proceeding". However, it is *nonadversarial only in terms of the relationships of the treatment providers and the justice system officials involved in the program and their recommendations regarding the treatment regime and responses to noncompliance and/or progress that the drug court "team" (e.g., prosecutor, defense counsel, judge and treatment professional) believe to be in the client’s best interests. The adversarial process, from a criminal justice system perspective, has therefore simply been placed in abeyance while the client participate in the drug court program. The charges against the defendant, however, are still active as well as any orders that have been entered as a pre-requisite for program participation. In the event the client fails in the program, the weight of the adversarial process will therefore be imposed on him/her -- and, in some cases, without certain constitutional and other protections that might otherwise have been available had he or she never entered the drug court program. A drug court client’s need for representation by a vigorous defense advocate throughout the period of his/her participation in the program does not cease, therefore, upon program entry, although the role which the defense counsel may play during the period of the client’s participation may shift while the attorney is acting as a member of the drug court team.

Because of the informality of communication among the drug court "team" and the continuing stress communicated to drug court defendants to be honest, a range of information can also be gathered during the course of the drug court process that might not otherwise have been accessible to the prosecution. Defense counsel must make special effort in the design phase of the drug court program to develop assurances that this information will not be used against the defendant, either in the instant case or any subsequent matters.

**Suggested "Best Practices" in Drug Court Cases**

The defense counsel therefore has a continuing duty to serve as advocate for his/her client, taking whatever advocacy actions may be needed at any point in time in the process. Information can be offered by the defendant, for example, during his/her in-court colloquies with the judge that go beyond the framework for the nonadversarial process of the drug court hearing. Similarly, allegations regarding the defendant’s noncompliance with treatment program conditions can be presented as a basis for recommending the defendant’s termination from the program and the consequent imposition of the criminal sanctions that had been held in abeyance. The defense counsel, as advocate, must represent his/her client vigorously in these situations to prevent, for example, the protocols developed by a treatment professional relating to program acceptance and
termination, from being extended to the justice system without an independent judicial
determination regarding the propriety for program termination.

Because the adversary legal process is still operating, although held in abeyance, during the
client’s participating the drug court, the defense counsel must guard against the misuse of
information that is gathered in the drug court process if/when the original charges are re-
instituted or if subsequently, years later, new charges are brought.

**Frequently Asked Questions**

1. **Question:** Since the drug court proceeding is considered *nonadversarial*, should drug court
   clients be represented by defense counsel at the drug court hearing?

   **Answer:** Absolutely. While the proceeding may be nonadversarial, the client is still a criminal
defendant subject to the criminal sanctions applicable to his/her case, should he/she not complete
the drug court successfully. Moreover, there is no way of knowing what will occur at the drug
court hearing, what the defendant may be asked or volunteer. Regardless of whatever memorandum
of understanding may have been developed as to the subsequent prosecutorial use of information
obtained at the hearing, the statements of a defendant — particularly one who is drug dependent
— may well go beyond the scope of information envisioned by these MOU’s.

2. **Question:** Should the defense counsel object to questions the judge may ask the defendant at the
drug court hearing?

   **Answer:** Although generally the direct dialogue between the judge and the defendant is
considered a critical component of the drug court process, the defense attorney should be
prepared to object to a question if he/she anticipates the answer can be potentially injurious to
either the defendant or others and the question and answer are not critical to the nature and scope
of information the judge needs to adequately review the defendant’s progress in the program.

3. **Question:** Should defense counsel advise a client to plead guilty in order to be able to enter a
   drug court program which, upon completion, will result in the striking of the guilty plea, without
adequate investigation of the law and facts of the specific case?

   **Answer:** No, unless the plea can be entered conditionally so as to permit the attorney to further
investigate the matter. Such investigation, however, must be conducted promptly and restricted to
relevant law and facts applicable to the determination of guilt.

4. **Question:** Should the prosecutor be able to use information obtained during the course of a drug
court program which the defendant successfully completed, with charges expunged, several years
ago, in proceedings related to a new charge for which the defendant has just been arrested?
Answer. Any information that has been available to the prosecution can potentially be used. It is important, therefore, to assure in the design of the drug court program that no information gathered by anyone (attorney or other) about any participant during the course of the program can be used for any purpose other than for the purposes of his/her treatment. The Los Angeles Treatment Court requires that these records be sealed.

Rule 3.2. Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Summary of ABA Commentary

Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates. . . . The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay.

Issues Relevant to Drug Court Practice

The drug court is designed to promote the defendant’s entry into the program and commencement of treatment as soon as possible after arrest. Expediting the time for the screening, program eligibility determination, and initial drug court hearing is therefore a critical component of the drug court process. In order to have adequate legal advice regarding the appropriateness of the drug court, it is vital that the defendant meet with defense counsel within a few days of arrest -- often at a time when the defense counsel might not have access to adequate information regarding the case, under the traditional adjudication process.

Suggested "Best Practices" in Drug Court Cases

In designing a drug court program, defense counsel must work with law enforcement and prosecutorial officials to develop procedures to assure that adequate information regarding drug court cases is available to defense counsel at the time they meet with drug court-eligible clients so that they can meaningfully advise their clients regarding the nature and strength of the charges against them, the likely outcome if they pursue the traditional process, and the relative merits of the drug court program.

Frequently Asked questions:
**Question:** If a defense counsel does not have access to all of the information (e.g., police reports, lab results, criminal history, etc.) he/she feels necessary to adequately advise his/her client, should he defer his/her advise until such information is available?

**Answer:** No. He/she should call the prosecutor and/or arresting officer to obtain whatever information he/she needs or, if the information will not be available for some time, discuss the possibility of the defendant entering the program with stipulations regarding what will happen if the information, when provided, does not support the appropriateness of the client’s participation. A specific time limit within which the necessary information is to be provided should also be set.

**Rule. 3.3: Candor Toward the Tribunal**

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclose by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by rule 12.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall information the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

**Summary of ABA Commentary**
The advocate’s task is to present the client’s case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate’s duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client’s behalf, and not assertions by the lawyer. However, an assertion purporting to be on the lawyer’s own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. . .

When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client’s wishes. When false evidence is offered by the client, however, a conflict may arise between the lawyer’s duty to keep the client’s revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures. . . Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client’s deception to the court or to the other party. . . Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjures testiomy, there has been dispute concerning the lawyer’s duty when that persuasion fails. If the confrontation with the client occurs before the trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available. . . If perjured testimony or false evidence has been offered, the advocate’s proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedied the situation or is impossible, the advocate should make disclosure to the court. . . The general rule — that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client -- applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer’s ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions, these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. . . Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy.
Issues Relevant to Drug Court Practice

Although drug court clients generally execute waivers permitting disclosure of otherwise confidential treatment-related information, thus permitting this information to be discussed at pre-court staffing sessions with the drug court "team", and in open court for the purpose of reporting on each participant’s progress and planning for subsequent treatment and ancillary services, the client does not waive his/her privilege to a confidential client/attorney relationship. Thus the defense attorney is, on the one hand, bound to maintain the confidentiality of information obtained from the client during the course of his/her representation, and, on the other, ethically obligated to affirmatively disclose any false representations being made to the court. The frequency of drug court hearings (weekly in many jurisdictions) and the informal nature of judge/client communications at these hearings, significantly increases the potential likelihood of situations arising in which the defense counsel recognizes that the defendant is either not being totally candid with the judge or perpetrating an outright lie.

Suggested "Best Practices" in Drug Court Cases

The defense counsel must stress to the client the importance of total honesty in the court process generally and, particularly, in the drug court process where honesty is considered a prerequisite to recovery. If the defendant insists on perpetrating a fraud upon the court, despite the defense counsel’s protestations to be candid, the defense counsel must withdraw his/her representation. If the falsity becomes apparent at the hearing, so that the defense counsel has no time to urge the client to be candid, and withdrawal is not feasible at that point, the defense counsel must not participate in the fraud but, rather, simply permit his/her client to respond to the questions posed by the judge, without making any representations whatsoever, thereby permitting the client the right to exercise his/her constitutional right to testify without in any way contributing to the deception the client is attempting to perpetrate upon the court. Following the hearing, the defense counsel must talk with his/her client immediately regarding the prerequisite of honesty in order for him/her to represent the client. If the client refuses to be honest with the court or continues in his/her deception, the attorney must withdraw.

Frequently Asked Questions.

1. **Question**: Client has disclosed to his/her attorney that he has been water loading to achieve a negative drug test. Should the attorney disclose the client’s dishonesty to the court?

   **Answer**: While the attorney-client privilege precludes the attorney from disclosing the client’s fraud, the attorney cannot perpetuate this fraud upon the court, either passively or actively. The attorney should make it clear to the client that he cannot represent him if he is not truthful. If time precludes this discussion, the attorney should refer any inquiries from the court to the client directly and make no representations on his/her behalf. Immediately after such a situation occurs, the defense attorney must inform the client that, if his/her deceit continues, the defense attorney
will seek to withdraw his/her representation.

2. **Question**: Defense counsel knows the client has a substantial criminal record. The prosecutor’s record search, however, indicates no prior history. Defendant corroborates this in open court. Should the defense attorney alert the court to the error?

   **Answer**: As long as the defense counsel made no representations to the court regarding his/her client’s record defense counsel is not ethically obligated to correct the public record if his knowledge of the error was obtained pursuant to his confidential relationship with his/her client.

**Rule 3.4. Fairness to Opposing Party and Counsel**

A lawyer shall not:

(a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of acts in issue except when testifying as a
witness, or state a personal opinion as to the justness of a cause the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

1. the person is a relative or an employee or other agent of a client; and
2. the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.

Summary of ABA Commentary

The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contention parties. . . . it is not improper to pay a witnesses’ expenses or to compensate an expert witness on terms permitted by law.

Issues Relevant to Drug Court Practice

1. Despite the "nonadversarial" nature of the drug court proceedings, the attorney’s ethical obligation to maintain the privilege of all communication with his/her client conducted in the course of his/her representation overrides any request to disclose information that might otherwise be available. The attorney, nevertheless, must not take any action to falsify or affirmatively withhold evidence from the court that materially bears on the defendant’s situation, his/her eligibility for the program, or his/her performance while participating.

2. In the traditional criminal process, a defense counsel may want to independently corroborate the results of an assessment of his/her client’s substance dependency and/or a urinalysis result, or seek to introduce the testimony of independent experts regarding his/her client’s substance abuse treatment needs. Experts who would provide this testimony would also be available to the state. In the drug court process, the "nonadversarial" nature of the proceedings precludes the use of independent experts to potentially
corroborate the position of one party or the other. All tests and expert testimony in the drug court is designed to be used by the drug court "team" to develop, manage, and modify, as needed, the client’s treatment plan.

Frequently asked questions

1. **Question:** Defense attorney has learned that his/her drug court-eligible client is known among his associates as an easy source for procuring drugs. — a situation that would likely preclude the defendant from participating in the drug court program. Should the attorney alert the prosecutor to the individuals who might provide testimony regarding the defendant’s drug dealing?

   **Answer:** The defense attorney has not affirmative obligation to disclose information to the prosecutor that may adversely affect his/her client. The attorney is, however, ethically obligated to advise his/her client to testify truthfully and not to perpetrate a fraud upon the court (See also Rule 3.3)

2. **Question:** Should the defense counsel rely upon the substance abuse assessment conducted for his/her client by the drug court case program? Or should an independent assessment be procured?

   **Answer:** The defense counsel can and should rely on the substance abuse assessment conducted by the drug court program. If there is any need for follow-up, this need can be discussed with the "team".

**Rule 3.5 Impartiality and Decorum of the Tribunal**

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person except as permitted by law; or

(c) engage in conduct intended to disrupt a tribunal.
Summary of ABA Commentary

Many forms of improper influence upon a tribunal are proscribed by criminal law... the ABA Model Code of Judicial Conduct. A lawyer is required to avoid contributing to a violation of such provisions. The advocate’s function is to present evidence and argument so that the cause may be decided according to law.

Issues Relevant to Drug Court Practice

Because of the informality of many aspects of the drug court process, it has not been uncommon for a member of the "team" to call the drug court judge to alert him/her to a development warranting the scheduling of an emergency hearing on the one hand or, on the other hand, simply to describe special progress the client is making. Although attorneys generally abide by the prohibition against ex parte communications, other non-legal members of the drug court team are not bound by these rules. A treatment provider, for example, may contact the judge to let him/her know of a problem the client is having in treatment sessions.

Suggested "Best Practices" in Drug Court Cases

These contacts should be avoided. A mechanism should be established to provide for notification to the team of situations warranting emergency action regarding a client. These mechanisms should provide for all "team" members to be notified simultaneously, with no communication by one to the judge outside of the presence of the others.

Frequently Asked Questions:

**Question:** A participant has not been attending required treatment sessions. How should this nonattendance be dealt with?

**Answer:** The treatment provider should report the nonattendance to the team and follow the procedures established for scheduling an emergency hearing regarding the nonattendance. Where possible, a range of graduates sanctions for noncompliance with various drug court conditions should be established before hand that can be automatically applies in situations not warranting special team consideration and judicial action.

Rule 3.6. Trial Publicity

(a) A lawyer who is participating or has participated in the
investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved:

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior or a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Summary of ABA commentary:

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. . . The public has a right to know about threats to its safety and measures aimed at assuring its security.

Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings and perhaps other types of litigation. Rule 3.4 (c) requires compliance with such rules.

The Rule sets forth a basic general prohibition against a lawyer’s making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceedings.. . The rule applies only to lawyers who are, or have been involved in the investigation or litigation of a case, and their associates.

There are . . . certain subjects which are more likely than not to have a material prejudicial effect on a proceeding. . . including those in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission or statement given by a defendant or suspect or that person’s refusal or failure to make a statement.

Issues relevant to Drug Court Practice

Because of the informality of the drug court process and the availability of treatment-related information to the "team" not normally accessible, but for the client’s waiver of confidentiality, the information discussed at pre-court staffing and in open court may be prejudicial to the defendant in the event he/she is terminated from the program unsuccessfully and becomes subject to the adversarial process that has been held in abeyance. Defense counsel must (a) not disclose this information and (b) assure that procedures are developed to preclude its disclosure by other members of the drug court team who may not be bound by these rules.
Suggested "Best Practices" in Drug Court Cases

Defense counsel involved with drug court programs must assure the restricted use of information that may, pursuant to the client’s waiver of confidentiality, be discussed at pre-court staffings or in open court. Special provisions must also be developed regarding the access of this information by the media. It is desirable to attempt to restrict the availability of this information to the pre-court staffing and to permit its introduction at the court hearing in only summary terms. Nevertheless, because of the colloquy between the judge and defendant that takes place at the hearing, potentially prejudicial information may be presented which must not be available for use by courtroom observers under any circumstances.

Frequently Asked Questions:

**Question:** Can a newspaper reporter report information about the situation of a participant that became apparent during the course of a drug court hearing which was accessible to the public and which the reporter attended?

**Answer:** Special provisions must be developed regarding (1) the type of information that will be presented in open court (as opposed to the pre-court staffings); (2) who has access to the drug court hearings; and (3) the use to which such information can be made by those in attendance.

Transactions with Persons Other than Clients

Rule 4.1. Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of a material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 1.6.
Summary of ABA Commentary

A lawyer is required to be truthful when dealing with others on a client’s behalf, but generally has no affirmative duty to inform an opposing party of relevant facts... This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances... Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client’s crime or fraud. The requirement of disclosure created by this paragraph is, however subject to the obligations created by Rule 1.6.

Issues Relevant to Drug Court Practice

During the course of representing a drug court client, the defense attorney may become aware of numerous facts that bear directly or indirectly on the client’s situation — e.g., past sexual exploitation, drug use by family members, etc. This information, obtained during the course of the attorney-client relationship, is subject to the attorney-client privilege. The defense attorney, however, may also learn of criminal activities of the client (e.g., actively selling drugs) which might otherwise preclude the client’s participation in the drug court program as well as subject him/her to prosecution for these criminal acts.

Suggested "Best Practices" in Drug Court Cases

Unless requested by the client, the attorney has no duty to disclose information that has no bearing on the client’s eligibility for the drug court program or does not contribute to the perpetration of a fraud upon the court and, in fact, is ethically bound to nondisclosure as long as the nondisclosure does not contribute to the perpetration of a fraud upon the justice system. However, in situations in which the information contributes to a fraud perpetrated upon the court or to the concealment of a crime, the requirements of Rule 3.3 apply.

Frequently Asked Questions:

Question: The defense attorney has learned during the course of representing a drug court client that the client was sexually abused by his mother for from ages 5 - 15. The defendant, age 30, now resides with his significant other. Should the attorney disclose this information, which is very relevant to the defendant’s current substance abuse problems?

Answer: No, unless the defendant specifically requests the disclosure. This information is subject to the attorney-client privilege and its nondisclosure does not contribute to the perpetration of a fraud on the justice system.

(See also Questions re Rule 3.3)