NADCP

National Association of Drug Court Professionals

RESPONSE TO THE REPORT OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL):

AMERICA'S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM

Introduction

In September of 2009, the National Association of Criminal Defense Lawyers (NACDL) published a report purporting to identify deficiencies in the practices of Drug Courts. This report reflected the culmination of several months of hearings held by the NACDL, in which witnesses were invited to testify as to their anecdotal observations of these programs.

Many of the factual assertions made in the NACDL report are unsupported by the research evidence, and several of the recommendations are untenable as a practical matter and unsupportable on legal and constitutional grounds. This document addresses the factual inaccuracies contained in the NACDL report and explains why several of the recommendations cannot be implemented in practice.

The NACDL report does, however, offer a number of recommendations that are well-reasoned and highly consistent with generally accepted practices in Drug Courts. These areas of common ground offer an important opportunity for NACDL and the Drug Court field to work collaboratively to improve outcomes for some of our most vulnerable citizens and advance the interests of public health and public safety in our communities.

The Critical Role of Defense Counsel

Before addressing the specific allegations contained in the NACDL report, it is important to recognize the critical role of defense counsel in Drug Courts. The Board of Directors of the National Association of Drug Court Professionals (NADCP) passed a unanimous resolution which provides as follows:

> "The National Association of Drug Court Professionals (NADCP) recognizes the immeasurable importance of defense counsel as a Drug Court team member and strongly recommends the presence of defense counsel at all Drug Court staffings and court sessions."

As early as 2002, the National Drug Court Institute (NDCI) convened an expert panel of public defenders and private defense counsel to identify and resolve potential role conflicts for defense attorneys in Drug Courts. The panel issued best-practice recommendations to assist defense counsel to contribute to the positive effects of Drug Courts while still fulfilling their ethical and legal obligations.[1] Indeed, recent research confirms that regular involvement of defense attorneys in team meetings and status hearings significantly enhances outcomes in Drug Courts.[2]

As always, the Drug Court field stands ready to continue working collaboratively with defense counsel to address any and all concerns they may have related to Drug Court practices, and to further enhance their critical contributions to the Drug Court field.

Science Over Anecdotes

It does not advance the search for truth when advocacy organizations hold their own "hearings" without a neutral arbiter, choose whom to call as "witnesses" and then hand-select which aspects of the unsworn and non-cross-examined "testimony" to highlight in their conclusions.

There is a scientific adage that the plural of anecdote is *not* data. Drug Courts have been so successful not because they have relied on the testimonials of political allies, but because they have withstood, time and again, rigorous scientific scrutiny. It is through continued scientific scrutiny that the positive benefits of Drug Courts will be further extended, and any negative effects of these programs, if they are found to exist, will be identified and rectified.

Drug Courts Save Lives and Money

The NACDL report makes the astounding statement that "Drug court is intensive, expensive, and often not effective" (p. 46). Nothing could be farther from the truth.

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[1] *See* NAT'L DRUG CT. INST., CRITICAL ISSUES FOR DEFENSE ATTORNEYS IN DRUG COURT (Monograph Series No. 4, 2003), *available at* www.ALLRISE.org.

[2] *See* SHANNON M. CAREY ET AL., EXPLORING THE KEY COMPONENTS OF DRUG COURTS: A COMPARATIVE STUDY OF 18 ADULT DRUG COURTS ON PRACTICES, OUTCOMES AND COSTS (NPC Res. 2008), *available at* www.npcresearch.com.

By 2006, the scientific community had concluded beyond a reasonable doubt from what are called *meta-analyses* (highly advanced statistical procedures) that Drug Courts reduce crime[3] and return net financial benefits to society which are several times the initial investments.[4] The same conclusion has been reached on the basis of scholarly literature reviews conducted by the U.S. Government Accountability Office (GAO)[5] and the National Institute of Justice (NIJ).[6]

A national study funded by NIJ and recently completed in 2009—called the Multi-Site Adult Drug Court Evaluation, or MADCE— has confirmed, yet again, that Drug Courts reduce crime, reduce substance abuse, improve family relationships, and increase employment and school enrollment.[7]

No other correctional rehabilitation program has nearly as much evidence supporting its effectiveness or cost-effectiveness as Drug Courts.

Unproven Side-Effects of Drug Courts

Even beneficial treatments can have the potential to cause unwanted side-effects. For example, aspirin is proven to alleviate pain, but in some cases can cause unintended ulcers or blood thinning. Such side-effects are most likely to occur if the treatment is not properly administered as prescribed. By analogy, there is always the possibility that some Drug Courts might overstep their authority or mishandle their operations to the detriment of some of their participants.

However, the NACDL "study" assumes numerous facts which are simply not in evidence. It assumes, for example, that Drug Courts discriminate against racial minorities and the poor in admission decisions (pp. 23), do not allow sufficient time for evidentiary discovery (pp. 24-26),

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[3] *See* David B. Wilson et al., *A Systematic Review of Drug Court Effects on Recidivism*, 2 J. EXPER. CRIMINOLOGY 459 (2006); Christopher T. Lowenkamp et al., *Are Drug Courts Effective: A Meta-Analytic Review*, Fall J. COMMUNITY CORRECTIONS 5 (2005); JEFF LATIMER ET AL., CANADA DEPT. JUSTICE, A META-ANALYTIC EXAMINATION OF DRUG TREATMENT COURTS: DO THEY REDUCE RECIDIVISM? (2006); DEBORAH K. SHAFFER, RECONSIDERING DRUG COURT EFFECTIVENESS: A META-ANALYTIC REVIEW 3 (Dept. Crim. Just., U. Nevada, 2006); STEVE AOS ET AL., WASHINGTON STATE INST. PUB. POL'Y, EVIDENCE-BASED ADULT CORRECTIONS PROGRAMS: WHAT WORKS AND WHAT DOES NOT (2006).

[4] AVINASH S. BHATI ET AL., TO TREAT OR NOT TO TREAT: EVIDENCE ON THE PROSPECTS OF EXPANDING TREATMENT TO DRUG-INVOLVED OFFENDERS 56 (Urb. Inst., 2008); AOS ET AL., *supra*.

[5] U.S. GOV'T. ACCOUNTABILITY OFF., ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES (2005).

[6] NAT'L INST. JUST., DRUG COURTS: THE SECOND DECADE 3 (2006).

[7] Shelly B. Rossman et al., *Substance abuse findings from the Multi-Site Adult Drug Court Evaluation (MADCE)*. Presentation at the 2009 Annual Conference of the American Society of Criminology (Urb. Inst., 2009); Michael Rempel et al. *Do drug courts reduce crime and produce psychosocial benefits?* Presentation at the 2009 Annual Conference of the American Society of Criminology (Urb. Inst, 2009).

impede input from defense counsel (p. 28) and sentence terminated defendants more harshly than if they had never entered the program in the first place (p. 29).

Yet, none of these accusations is backed up with a shred of reliable data. Not one empirical study is cited to confirm any of the untoward effects being attributed by the NACDL to Drug Courts. Only the carefully selected anecdotal testimony of individual witnesses is cited to support these accusations, which does not shed any meaningful light on such critical issues.

In some instances, the NACDL cites findings unrelated to Drug Courts to criticize Drug Court practices. For example, a study of California's "Proposition 36" is cited to support the assertion that Drug Courts discriminate against racial minorities (p. 42 fn. 391). However, Proposition 36 is a probation-supervised initiative which does *not* apply the Drug Court model.

It would not be a difficult matter to study these questions in a scientifically defensible manner. If such negative effects do exist, then corrective measures can be developed and evaluated to address them. And finally, practice guidelines can be developed to ensure that all Drug Courts adhere to best practices and take reasonable efforts to avoid foreseeable injuries. There is no need to "throw out the baby with the bath water." The indicated remedy is not to abandon the most successful program we have in the criminal justice system. The appropriate course of action is to conduct more sophisticated research to further improve Drug Courts, and to develop standards to guide the actions of Drug Court professionals.

To the extent that the NACDL advocates for the support of good-quality research to address these issues and to rectify any problems if they are found to exist, the Drug Court field stands ready to work side by side with them in such a critical effort.

Prosecutorial Gatekeeping

The NACDL recommends that prosecutors should no longer serve as the initial gatekeeper for determining eligibility for Drug Courts (pp. 11-12). Instead, it recommends that panels or commissions be created with broad stakeholder representation to determine eligibility criteria and make entry decisions.

This recommendation is untenable as a practical matter and probably unconstitutional. It is well-settled law that prosecutors enjoy broad and largely unfettered discretion in charging and plea-bargaining practices.[8] NACDL's proposal would probably violate the Separation of Powers Doctrine, which prevents the courts and legislature from infringing on this exclusive power of the executive branch. In fact, challenges to the prosecutor's gate-keeping function in Drug Courts have been consistently rebuffed by a number of appellate courts.[9]

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[8] *See* Wayte v. United States*,* 470 U.S 598 (1985); U.S. v. Armstrong, 517 U.S. 456 (1996).

[9] *See, e.g.,* Woodward v. Morrissey*,* 991 P.2d 1042, 1045 (Okla. 1999) (holding judicial review of D.A.'s decision to admit defendant to Drug Court would violate separation of powers doctrine); State v. Taylor, 769 So.2d 535, 538 (La. 2000) (finding statutory authorization making prosecutor the initial gatekeeper to Drug Court was

Although prosecutors cannot be forced to relinquish their gatekeeper role, they can, and many have, done so on a negotiated basis. Indeed, such collaborative decision-making is strongly encouraged by the Drug Court field, and has taken greater hold in the criminal justice system largely as a by-product of the proven success of Drug Courts. Drug Courts have led the way for the criminal justice system in developing a collaborative-justice model that makes such team decision-making possible and desirable.

A Pre-Plea Model?

The NACDL makes two policy recommendations that are mutually inconsistent. On one hand, it wants Drug Courts to treat high-risk offenders, including violent offenders, who would otherwise be jail or prison-bound (p. 23). On the other hand, it also wants Drug Courts to be pre-plea programs that do not require a guilty plea for entry (p. 25).

This would mean that serious and potentially dangerous offenders would face no legal repercussions whatsoever if they failed to complete treatment or even to attend treatment in the first instance. Following months of noncompliance with supervision and continued abuse of illegal drugs, they would essentially be placed back in the same legal position as if they had never attempted Drug Court. When we consider the safety of our communities, such a proposal cannot be taken seriously.

Historically, Drug Courts began as pre-plea programs because they were treating mostly first-time drug-possession offenders. As the research evidence indicated that Drug Courts should be targeting the more serious offender populations, they moved toward treating recidivist and higher-risk participants. In so doing, they were required to shift their practices to follow a *post-plea, pre-adjudication* model. In this model, defendants are required to plead guilty to the charge(s) or stipulate to the facts in the arrest report as a condition of entry; however, the plea or stipulated agreement is held in abeyance and may be vacated or withdrawn upon successful completion of treatment. This arrangement provides additional leverage for programs to keep the offenders engaged in treatment and ensure they meet their obligations to public safety.

More importantly, this model avoids the problem of cases going "cold" while offenders are attending treatment. In most Drug Courts, it usually takes several months before a noncompliant participant is sanctioned with termination. This is because Drug Courts typically offer multiple chances for offenders to get and stay clean and sober. After several months, however, the evidence is likely to become stale and witnesses' recollections are apt to fade. For this reason, prosecutors understandably want a guilty plea to be entered before allowing defendants several months to engage in trial-and-error efforts at treatment.

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proper prosecutorial function which passes constitutional separation of power scrutiny); Flynt v. Commonwealth, 105 S.W.3d 415, 426 (Ky. 2003) (concluding trial court could not permit pre-trial diversion to Drug Court over objection of District Attorney because it would violate constitutional separation of powers doctrine); State v. Diluzio, 90 P.3d 1141 (Wash. App. 2004) (holding prosecutor retained authority to make initial Drug Court referrals pursuant to separation of powers doctrine and consistent with plea bargain powers).

Experienced and well-informed prosecutors are unwilling to offer pre-plea diversionary dispositions to other than the lowest-level offenders. In fact, statutes in many jurisdictions do not permit such diversion opportunities for serious or recidivist offenders. Because low-level offenders are rarely jail or prison-bound to begin with, such an approach would have no appreciable impact on our costly and ineffective prison system, nor would it keep us any safer. Given this fact, moving to a pre-plea model would be nothing short of impractical both for Drug Courts and for our national drug policy.

It should also be recognized that the most rapidly developing model of Drug Courts is a *post-conviction* model for probationers or probation violators.[10] Because these individuals have already been adjudicated and sentenced, a pre-plea disposition would be unavailable for them under any circumstances.

Common Ground

The NACDL offers several additional recommendations which are well-reasoned and actually quite consistent with generally recommended best practices in Drug Courts. Among these are the following recommendations:

- Defense attorneys, judges and other personnel assigned to Drug Courts should be experienced, well trained, and assigned to the program for more than one-year rotations.
- Drug Courts should develop and publish consistent standards concerning their eligibility criteria, graduation requirements, and the imposition of sanctions and incentives.
- Drug Courts should target their services to higher-risk offenders, including non-drug offenders whose crimes were fueled by a compulsive addiction.
- Defense attorneys assigned to Drug Courts should be present, whenever reasonably possible, at all staffings and court hearings.
- Assuming that defense counsel are regularly present at staffings and court hearings, there is no need or justification for *ex parte* communications between the judge and other parties to the proceedings.
- Drug Court judges should entertain a request by either party for recusal from sentencing individuals who are being terminated from the program, if no exigencies are present.
- Defense counsel in Drug Courts should represent the stated interests of their clients, rather than determine for themselves what is in their clients' best interest.
- Defense counsel in Drug Courts should be permitted to speak in court on behalf of clients who cannot express themselves effectively due to language barriers, intellectual limitations, anxiety or other impairments.

[10] C. WEST HUDDLESTON ET AL., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES (Nat'l. Drug Ct. Inst., 2008).

- Ethical obligations are the same for private defense attorneys as for public defenders when representing participants in Drug Courts.

Unfortunately, the NACDL report obscures this fertile common ground by turning a blind eye to the research evidence proving the effectiveness of Drug Courts, and by giving undue credence to unproven allegations of harmful side-effects. These caviling objections are not merely disingenuous; they pass up a critical opportunity for NACDL and the Drug Court field to work collaboratively to address areas of mutual concern, improve outcomes for our most vulnerable citizens, and advance the cause of rational drug policy for this country.

Drug abuse is a serious matter that requires sustained and constructive thought, not extreme positions. It is hoped that NACDL sees its way clear to come to the table to work constructively with Drug Courts and other interested organizations to solve one of our nation's most complicated social problems. Given how much is at stake, this is no time to be trading baseless accusations in "studies" that ignore data. Rather, we must commit ourselves ever more faithfully to rigorous and valid scientific inquiry to accomplish our most pressing aims.

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