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**BUREAU OF JUSTICE ASSISTANCE (BJA) DRUG COURT
CLEARINGHOUSE**

**FREQUENTLY ASKED QUESTIONS SERIES: (1) ROLE OF PARTICIPANT’S SENSE
OF PROCEDURAL FAIRNESS OF DRUG COURT PROCESS IN ACHIEVING DRUG
COURT EFFECTIVENESS; (2) DEGREE TO WHICH STAFFINGS UNDERMINE
SENSE OF PROCEDURAL FAIRNESS IF PARTICIPANT IS NOT PRESENT**

Subject: Role of Participant’s Sense of Procedural Fairness in Achieving Drug Court Effectiveness and Degree to which Staffing Undermine Sense of Procedural Fairness if Participant Is Not Present
From: BJA Drug Court Clearinghouse
Date: June 5, 2009

QUESTION

Judge Kevin Burke, who established the drug court in Hennepin County (Minneapolis), Minnesota ... has developed some hypotheses which he would like to run by colleagues who have been involved with drug courts. He also included a 2007 article on "procedural fairness" which he and Judge Steven Leben published in *Court Review*, the journal of the American Judges Association. Cited in that article are several works by Tom R. Tyler whose research has indicated that "...most people care more about procedural fairness -- the kind of treatment they receive in court -- than they do about "distributive justice", i.e., winning or losing the particular case." and that "...procedural fairness can reduce recidivism because fair procedures cultivate the impression that authorities are both legitimate and moral..." and promotes trust and confidence in the legal system.

With that backdrop, the following is Judge Burke's query:

Nearly all the initial evaluations of drug courts have been positive and yet many of these programs reflect very different approaches as to who was eligible etc. My hypothesis is that, without realizing it, in some cases the early drug courts uniformly provided a strong sense of procedural fairness to the defendants. They were given lots of opportunity to be heard, they were treated with respect and there was a strong commitment by the judges to make sure that they understood why the decisions or orders were made. I suspect that few if any of the judges were aware of Professor Tom Tyler's research but that those initial judges were just naturally inclined to act that way in a courtroom. That perhaps is the most important "lesson" to be learned from drug courts and is certainly the most important thing to take to other aspects of courts. I'm curious if my hypothesis rings true with others.

I'm also wondering if the pre hearing staffings that many drug courts conduct, where the defendant is not present, may in the long run be counterproductive because they give the impression, at least in the defendant's mind, that the decision as to how to proceed in his/her case has already been made and that his/her voice will not really be heard even if he/she has an opportunity to speak.

The following are the responses received to date:

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RESPONSES

DRUG COURT JUDGES

FLORIDA

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I commend Judge Burke for his work on drug courts and look forward to his article. I agree with the premise that individuals who encounter the justice system respond better when they feel they have been treated with “procedural fairness.” This is especially true in drug courts. However I think there is a more fundamental component underlying the exceptional outcomes. Despite the differences in drug courts, all of them convey a genuine concern for the well-being of each client through their procedures, resources, and most importantly, personal interactions with the client by every team member (not just the judge). I know this sounds extremely “touchy – feely” and is not listed as one of the ten key components, however unless we can convince the addict that we (the system) care about him/her, it is extremely difficult, if not impossible, to overcome their distrust of the system and all those who work in it.

Concerning the pre-court staffing, our drug courts do not permit the client to attend. I’m unaware of any studies suggesting that one approach produces better outcomes or undermines the “procedural fairness” effect. One of the purposes of the staffing was to develop a strategy for the client’s court appearance so that the court “effect” would have maximum therapeutic value. If the clients were present for the staffing, we would be hampered in this effort which might diminish the positive impact of the courtroom experience. Additionally, we were concerned that the staffing would devolve into an unstructured adversarial hearing. Of course, the court and team made sure at the time of entry that the client fully understood the processes and restrictions and agreed to them. Considering the pros and cons, our experience suggests the “procedural fairness” concern does not outweigh the therapeutic benefit of excluding the client from the pre-court staffing.

MAINE

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I think Judge Burke is absolutely correct in the emphasis on procedural justice. In the past several years, I have included this topic in addition to the dynamics of therapeutic jurisprudence in all my presentations to community groups and at conferences although I am not aware of systematic research in drug court settings on procedural justice. My observations of Maine’s drug court judges is that they uniformly apply the principles Judge Burke’s article references. I don’t know, however, if this is due to personality or a conscious understanding of the potential benefits. There is a risk attendant to excluding drug court clients from pre-court meetings as noted by Judge Burke. One judge I know of addresses this by asking drug court team members to summarize what they discussed in the pre-court meeting in open court with all clients present and then offering the client a chance to speak, particularly on important matters or those likely to result in a sanction. On multiple occasions, the judge has subsequently disagreed with the preliminary conclusions of the drug court team, based on what the client has to say. This suggests to clients that decisions made in pre-court meetings are not final until the client has an opportunity to weigh in. Another judge requires clients to present requests both in writing to the team and to verbalize those requests (curfew

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extension, phase advancement, etc.) in open court before a decision is made although the team has preliminarily discussed the request without the client present.

MARYLAND

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I agree with the premise that drug courts, when they work well, promote that sense of procedural fairness, and it is one of the things that makes the process more effective. The participants feel they have significant input in decisions, they feel the judge and others on the "team" are invested in their success, and that sense of the deck being stacked against you, or the State having more "power" is not present in a review session. Just dialing down the rhetoric and advocacy, and focusing on problem solving dramatically shifts the dynamic. In addition, the holistic approach, where you look at barriers to success from the perspective of the participant, and not just focus on their shortcomings, supports the belief that the process is fair to participants.

The question of whether the pre-court meeting cut against this sense of procedural fairness is an interesting one. At first blush, I can understand why that argument is made - the sense by the participant that things are discussed out of their presence and decided in advance undermines the notion of fairness. But the other side is that those pre-court meetings permit candid debates about different perspectives, and they allow the team to work through those differences so the court reviews don't become adversarial or contested. I don't think the information would be shared in as candid or productive a fashion if it was done in a courtroom, particularly if there are other participants present in court, as is the case in our drug courts. It also enables the team to talk about how to motivate the participant, and deal with other longer range planning which would not occur the same way in their presence. To the extent that you lose a little with the meeting outside their presence, I think that loss doesn't have to be significant, if the participants know that final decisions by the drug court judge aren't made until the in court review, and that preliminary decisions are sometimes changed based upon what evolves in court. I personally think I would lose a lot in my understanding of individual participants if we did not have the pre-court reviews.

MONTANA

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I have been involved in drug courts for nearly 20 years in one way or another. I believe the most important aspect of drug court and a major reason that they work so well is the frequency of interaction between the judge and the participant and how the judge handles him/herself with the participant at the status hearing.

As you indicate, the status hearing on a weekly or bi-weekly basis allows for a relationship to develop between the judge and the participant and the opportunity for the participant to be heard and for the judge to provide a rationale to the participant for the decision that **s/he** makes. The decision is ultimately not made by the team at staffing; it is ultimately made by the judge at the bench although he has considerable input from the team. Staffing ahead of the docket to my knowledge has never been a problem for a participant and often a judge will say "we decided this in staffing; however, after hearing from you and considering the situation, I am going to postpone that decision and give you a chance to do this." It is always clear that it is the judge who ultimately determines what happens at the status hearing. My belief is

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that the participant grows to appreciate the fact that time is spent prior to the docket in staffing on their particular case.

TENNESSEE

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My perspective of “procedural fairness” and “distributive justice” will probably differ, to some degree, from other Drug Court Judges. It is essential for you to understand the operation of the Davidson County Drug Court. It is a long-term residential treatment facility built to accommodate 118 individuals. I hold court at that facility every Tuesday evening. Because all residents are present at each court session they are aware of any action I take regarding one or more of their number. The difference between my operation and other drug courts is that the residents are free to discuss, among themselves, any action I might take. I have found that they do, in fact, pay close attention to court decisions.

The population of the community is mixed. I am always concerned about my rulings. Do males or females perceive that they are treated differently? Is there a racial disparity in my actions? Am I swayed by the age of the individual? These are some of the questions that linger in my mind.

Besides my duties as a drug court judge, I also carry a complete load as a criminal court judge. Wednesdays in my court are usually devoted to hearing probation violations. Customarily we bring residents from the residential facility to the courtroom to observe these violations. Most of the violations involve drug or alcohol in some fashion. It is very interesting to observe the reaction of the residents when they hear some of the stories told by the probationers. All of the residents are multiple offenders. They are very familiar with the Criminal Justice System. They are highly amused when a probationer tells me that they were once addicted, but are now **cured.**

When I appear at the facility after a criminal court session the residents always want to discuss what they heard in court. I find their opinions to be highly valuable. They are very frank about their feelings. They are very interested in what they see in the criminal court.

AUSTRALIA

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Regarding the query regarding why drug courts work I think the procedural fairness aspects of the courts' operation is important and may well promote drug court participants' respect for the process.

The problem in identifying the therapeutic element that produces the desired effect --- decreased recidivism and decreased substance abuse --- is that there are multiple elements in a drug court that potentially can promote these goals. When I was Geraldton Magistrate in Western Australia operating a TJ ,problem solving court style program for offenders with substance abuse, domestic violence and other problems we administered an exit survey to participants. Most acknowledged that the role of the magistrate was helpful. However, most participants also valued the assistance of their community corrections officer, some also of

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their lawyer and the prosecutor. Then there is the actual treatment programs and the interaction between participants and the treatment professionals. With the Geraldton program I suggested in an article that there may be a synergy operating in relation to several active elements with therapeutic effects. The same may be the case with drug courts.

Another issue is that judging practices differ from drug court to drug court. Although there is some research on the positive effects of judicial interaction in drug courts, research is yet to establish the most effective judging style. TJ work drawing from behavioural science research suggests evidence based judging practices but they have largely not been evaluated in the judicial context. As I pointed out in a recent article, these practices bear some significant similarities to transformational leadership practices used to successfully promote behavioural performance in diverse community and business settings. Procedural justice is an important aspect but not the sole aspect of a judging approach (See David Wexler's article on TJ and procedural justice).

I attach an article where I explore the connections between problem solving judging, therapeutic jurisprudence and transformational leadership. In the final paragraph I suggest the possibility of a synergy working in problem solving courts.¹

I am currently in the final stages of preparing a draft problem solving bench book for the Australasian Institute of Judicial Administration and the Legal Services Board of Victoria. I suggest in the bench book that, unlike in other court processes, there is little precedent to guide judges as to how to operate in these courts. Many of the principles have been suggested by TJ and by the experience of judges who preside in these courts. The Canadian NJI manual is also useful. (See: <http://www.nji.ca/nji/Public/documents/Judgingfor21scenturyDe.pdf>)

There is a need, in my opinion, for there to be more uniform standards to assist judges presiding in these courts.

OTHERS

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For what it's worth, I agree that perception of procedural justice is likely to be a critically important factor in drug court outcomes. Research by Tyler and others in the context of generic court proceedings and law enforcement encounters provide ample justification for its importance.

We need more research on this issue in drug courts, but there is some supporting evidence already. In addition to Mike Rempel's excellent research and the excellent comments of others below, I would add the following references:

A study by Denise Gottfredson found that perceptions of procedural fairness mediated better outcomes in drug courts. See "How Drug Treatment Courts Work: An Analysis of Mediators. Denise C. Gottfredson et al. *Journal of Research in Crime and Delinquency*. 2007;44;3DOI

NPC Research (Mike Finigan's group) has evaluated 18 drug courts in terms of their adherence to the Ten Key Components. They found significantly better outcomes for drug courts in which the prosecution and defense counsel attended all drug court staffings. They also found significantly better outcomes when the drug court had clear guidelines about graduation requirements, treatment requirements, and expected sanctions and rewards for specific infractions and accomplishments. Although they did not couch this in terms of procedural justice, the issue of following clear guidelines is likely to implicate perceptions of fairness. Also, their finding that staffings improve outcomes is consistent with the

¹ See Michael S. King." Problem-solving court judging, therapeutic jurisprudence and transformational leadership." 2008.17 JJA 155 (Lawbook), also available at www.american.edu/justice
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philosophy of drug courts and would suggest staffings may not interfere with clients' perceptions of fairness.

Citation for the NPC study: Carey et al. (2008). Exploring the Key Components of Drug Courts: A Comparative Study of 18 Adult Drug Courts on Practices, Outcomes and Costs. Portland, OR: NPC Research. Available at www.npcresearch.com

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The Multi-Site Drug Court Evaluation (MADCE), a 5-yr study that the National Institute of Justice funded and that will be completed in about a year, will answer Judge Burke's first question positively. (i.e., yes, drug court participants perceive the court process, and the judge in particular, as more fair than the comparison group; and yes, these perceptions do in fact partly -- though by no means fully -- explain why drug courts work; that is, offenders with more positive perceptions of justice are, in turn, less likely than others to commit new crimes and use drugs at follow-up.)

I cannot comment on the hypothesis related to staffings except to say that, as part of the MADCE, we plan ultimately to try to tease out whether variations in the use of staffings affect outcomes.

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As you know, I know and very much like your procedural justice paper. In fact it --and my comment on it -- are translated into Spanish for distribution in Puerto Rico and elsewhere in Latin America. I'm copying social worker, Carrie Petrucci, who did work asking TJ² type judges what they did and what they thought worked. The basic list of their responses constitutes a page of the Canadian Judicial Manual at www.nji.ca. As you know from my own comment, I think procedural justice takes us a good way, but other techniques -- like follow-up hearings and judicial encouragement of family involvement -- are likely also most important. (Some domestic violence studies so suggest as I recall). The excellent Canadian Manual is also being translated into Spanish and, as you know from my *Court Review* essay, I think it should be distributed along with your procedural justice white paper. Procedural justice goes a long way but other therapeutic jurisprudence principles -- some of which were also intuited by early drug court judges (praise and graduation ceremonies; follow-up hearings; family involvement) -- are also important and are outside the standard ambit of procedural justice.

In regard to pre-hearing staffings: I have been troubled by the constrained advocacy in the role of defense counsel. I surely don't think s/he should simply be member of the team, and at a minimum, if there is pretrial staffing s/he should say: "Judge: I need to address this with my client and s/he and I may have an argument to make at the hearing on this point and I trust you will hear us out at that point with an open mind", etc. In my new book (*Rehabilitating Lawyers*) I print an excellent critique of the issue of drug court advocacy issue by Tamar Meekins, and I largely agree with what she says. A TJ approach can be taken in drug court or general criminal court without restricting advocacy, and I think an unrestricted advocacy approach will be better in terms of due process and also in therapeutic terms. How 'open' will a judge appear to an offender if s/he perceives the judge's mind is already completely made up even before the hearing? So that's my main beef with prehearing staffing. And I think that, if the lawyer's role were different, s/he could talk to his/her client about what's going on, etc., and maybe things wouldn't appear to be already set in stone. But maybe even more needs to be done to diminish the perception -- or the reality -- of a decision already having been made.

² Therapeutic Jurisprudence

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We welcome any additional comments or perspective on this issue.

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