Ethical Issues for Prosecutors in Collaborative Courts

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(published in SAMHSA/GAINS Center Newsletter, March 2015)

This article is the second in a series of articles focusing on legal ethics and therapeutic jurisprudence written by Jennifer Johnson, JD, Criminal Defense Attorney in the San Francisco Behavioral Health Court. In this month’s e-Newsletter we explore some of the challenges that prosecutors face in collaborative court systems.

According to the American Bar Association, the prosecutor in a criminal case has a duty to seek justice, not merely to convict. Our criminal justice system places great discretion in the hands of a prosecutor and with that discretion, tremendous power and responsibility. The role of the prosecutor is to serve the community, protect public safety, and punish criminal behavior.

Collaborative courts take a long term approach to public safety by addressing the mental health and substance use disorders at the heart of so much criminal behavior in our communities. The emphasis on treatment over incarceration redefines the roles of the lawyers in those courtrooms. In this discussion, we focus on prosecutors and highlight some of the ethical challenges they face, particularly in courts that serve clients with serious mental illness.

First, a collaborative court cannot function without a cross-agency, team approach with shared treatment goals for participants. Many criminal cases that are accepted into collaborative courts could easily be decided by a jury—a process that involves much less risk for the office of the prosecutor. In agreeing to an alternative court, the prosecutor must cede some decision making power and opt for a case disposition that gives deference to a treatment team.

Second, the decision to allow a person to participate in treatment in lieu of incarceration may go against the desire of a victim in a case. While a prosecutor is not bound by the wishes of a complaining witness, the public holds the office to a high standard. Ignoring the wishes of the very people the office seeks to protect invites both risk and criticism.

Third, many courts in this country operate on a “harm reduction” model with regard to substance abuse. While the long-term goal for each client is abstinence, courts and treatment programs may tolerate a certain amount of substance use on the way to that end goal. Although that may be in the best treatment interest of a particular person, it puts the prosecutor in the awkward position of turning a blind eye to illegal behavior in a public forum.

Finally, public safety is a primary concern for any prosecutor’s office. Treatment courts, particularly
mental health courts, are increasingly expanding eligibility criteria to include crimes of violence and felony charges. In agreeing to work with this population, the prosecution takes on additional risk. Why would a prosecutor support a collaborative court given the minefield of ethical issues outlined above?

The collaborative justice movement shows great potential for helping reverse decades of misguided criminal justice and mental health policy. Treatment courts represent an expanded view of the prosecutor’s duty to the community and a recognition that public safety is enhanced when people with mental illness and substance use disorders have access to treatment. In this changing legal landscape, prosecutors are being asked to seek justice in a non-traditional way and should be aware of the ethical tensions that these collaborative programs necessarily invite.