

The Difficult Role of the Defense Lawyer in a Post-Adjudication Drug Treatment Court: Accommodating Therapeutic Jurisprudence and Due Process

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INTRODUCTION

The traditional response to crimes committed by drug addicted individuals has often been to lock them up. Unfortunately, upon release 50% to 60% commit another crime. Drug treatment courts, in order to break the vicious cycle of addiction and crime, combine a treatment and restorative approach, supported by graduated sanctions and rewards. This approach is consistent with the emerging theory of therapeutic jurisprudence, which encourages evaluating the therapeutic or anti-therapeutic impact of the legal system. In theory, in addition to providing court monitored treatment, drug treatment courts also protect an individual's due process rights; but this can be compromised by the rush to get an individual into treatment. It is the defense lawyer who faces the most difficult challenges in attempting to balance a person's need for treatment and his or her due process rights. Many drug treatment courts are expanding from diversion to post-adjudication models. In the post-adjudication model a guilty plea is entered. 30% of the drug treatment court participants will fail in the program and then be directly sentenced. This article outlines the importance of due process prior to an individual entering a post-adjudication drug treatment court and suggests that positive therapeutic consequences and therefore better long-term outcomes result when due process is respected. This emphasis is labeled process oriented therapeutic jurisprudence.

DUE PROCESS

At the heart of the new and exciting therapeutic jurisprudence movement is a focus on whether the actions of those of us involved in the justice system produce therapeutic or anti-therapeutic consequences for individuals caught within the system.¹ Therapeutic consequences can be defined as those which promote an individual's overall well-being. How does therapeutic jurisprudence work within the realm of drug treatment courts? What is the relationship between therapeutic jurisprudence and due process? To what extent can this therapeutic focus coexist with the responsibilities of the criminal defense lawyer?

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¹ See Peggy T. Hora, William G. Schma & John T. Rosenthal, *Therapeutic Jurisprudence and The Drug Treatment Court Movement: Revolutionizing The Criminal*

After 30 years as a practicing lawyer, I find myself with two conflicting passions when trying to answer these questions relating to the role of criminal defense counsel, therapeutic jurisprudence and drug treatment courts.

First is the passion for zealous, caring, dedicated and competent representation. The defense lawyer has to make due process a reality and let the often indigent client know that somebody cares and will go to battle for him. Too often indigent defendants perceive that appointed counsel's only interest is to obtain a quick plea and move on to the next case. To those who do not understand the importance of due process, zealous representation may sound like immature gun slinging egotism. Yet, letting another individual know that he matters may also be a form of therapeutic jurisprudence. Perhaps zealous and caring representation should be called process oriented therapeutic jurisprudence.

A second and equal passion is for healing and restoration. Drug treatment courts are proving to be a great asset in ending the cycle of addiction and crime. Acknowledge your crime and your addiction (disease) and we will work with you in support of your return to a full life. Observing those who, through drug treatment courts, discover their self-worth and dignity after endless years of drug addiction is an uplifting experience. Perhaps this is best described as outcome oriented therapeutic jurisprudence.²

Drug treatment courts claim to balance my two passions for due process and for healing. However, my concern is that due process is often not an equal partner, especially prior to entry into a drug treatment court.³ The early drug treatment courts typically focused on defendants with minimal criminal backgrounds who were charged with less serious offenses. A person entered a treatment program and upon completion the charges were dismissed. This is a pre-adjudication model. Failure to complete the program led to reinstatement of the charges. In some of these courts the first paper signed by the defendant was a waiver of defense counsel. This presumably saves money, avoids delays and allows the healing to begin. In these outcome oriented benevolent drug treatment courts due process simply does not appear to be a value; in fact it is treated as a counter to the court's healing purpose.

Justice System's Response To Drug Abuse and Crime In America, 74 NOTRE DAME L. REV. 439 (1999). For an overview of therapeutic jurisprudence, see LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996).

² Over 76% of adult male arrestees and over 50% of juvenile male arrestees test positive for drug use. The relationship between drug use and crime is clear. Breaking this cycle of drug abuse and crime promotes individual well-being as well as minimizing future contacts with the criminal justice system. See National Institute of Justice, ADAM: 1998 Annual Report on Adult and Juvenile Arrestees, (Washington D.C.: U.S. Department of Justice, 1999) 3. See also The National Center on Addiction and Substance Abuse at Columbia University, *Behind Bars: Substance Abuse and America's Prison Population* (1998).

³ For a skeptical view of drug treatment courts, see Morris B. Hoffman, *The Drug Court Scandal*, 78 N. C. L. REV., 1437 (2000).

At a recent training conference for jurisdictions planning drug treatment courts, a national drug treatment court expert spoke about the stakeholders in forming a drug treatment court and for emphasis put his prepared list of the key stakeholders on a screen for all to observe. A defense lawyer was not listed as a stakeholder! I pointed out this oversight, after which a public defender from another jurisdiction commented to me that his planning team did not seem to value his presence at the planning stage of a drug treatment court.⁴

The drug treatment court diversion or pre-adjudication model emphasizes immediate treatment driven intervention. Due process and adversarial defense lawyer conduct are seen as counterproductive. When weighing conflicting values the emphasis on treatment may be understandable when the only consequence of failure is to return to a neutral starting point. For better and for worse, the forms of drug treatment courts have been multiplying and changing. Today some drug treatment courts include defendants accused of felonies. These courts often insist on a guilty plea and may not set aside the plea, hence leaving the defendant with a permanent record. These are among the post-adjudication models.

Generally, 30% of all participants in drug treatment courts fail.⁵ In one Mentor Court defendants entered their plea within three days of arrest.⁶ In this court failure meant a return for sentencing and 30% of the participants returned for sentencing. This is a model court with a 70% success rate. However, was there adequate representation and due process for the 30% who failed and were then incarcerated? Should the outcome oriented therapeutic jurisprudence trump process oriented therapeutic jurisprudence in the post-adjudication model? I would not want to be the defense lawyer involved in a three-day rush to a guilty plea.

Knowing that 30% of the defendants will fail and in many drug court systems go directly to jail, how much due process should be compromised? For years my complaint with defense counsel has been that they often do not do enough. A quick plea and on to the next matter. The fact that appointed counsel represent well over 90% of criminal defendants generally means that there is no inherent trust by defendants in their counsel. Depending on the jurisdiction, a quick resolution may lead to more appointed cases for the defense lawyer and the lawyer has no intent or need to build a long-term relationship with the client. Many observers have written about the crisis in indigent representation. Drug treatment courts must not be allowed to add to this problem.

⁴ Drug Court Program Office, The Drug Courts Standards Committee and the National Association of Drug Court Professionals have prepared a document “Defining Drug Courts: The Key Components” which states for component 2 “Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants’ due process rights.”

⁵ As of February 29, 2000, according to statistics from the OJP Drug Court Clearinghouse and Technical Assistance Project at American University 200,000 individuals have been enrolled in adult drug court programs. Of these, 70% have graduated or remained in the program.

⁶ The National Association of Drug Court Professionals has designated a select group of drug treatment courts as Mentor Courts. These courts participate in running training programs for jurisdictions forming new drug treatment courts.

I am very uncomfortable with quick resolution for the sake of immediate intervention. At the same time I do not challenge treatment professionals who emphasize the importance of taking advantage of a crisis for immediate intervention. The question is how much are we willing to see sacrificed in due process and in the defense attorney-client relationship for the sake of immediate treatment? The following outlines general standards for defense counsel, which have been compromised in the early pre-adjudication diversion model drug treatment courts for the sake of a therapeutic outcome.⁷ This compromise must be re-evaluated as the consequences of failure become more punitive in the plea based post-adjudication drug treatment courts.⁸

CLIENT INTERVIEW

What are the facts of the offense, arrest, searches, interrogations and lineups? What about witness statements, physical evidence, and the crime scene? Who should be interviewed; which experts could help? As quickly as possible all prosecution information must be reviewed and analyzed with the defendant.

My experience is that it can take many interviews before a defendant is willing to open up. Trust has to be earned. I am questioning the assumption that adversarial preparation is anti-therapeutic. Not caring is anti-therapeutic. Rushing a defendant into making a decision with the knowledge that he could fail in drug treatment court is anti-therapeutic. From 1970-1972 I worked as an appellate defender. True or false, almost every incarcerated inmate blamed not the cop, judge, or prosecutor, but the defense lawyer for his imprisonment. It was the defense lawyer who let him down, did not try and did not care.⁹

⁷ Criminal defense standards require “zealous and quality representation” at all stages of the criminal process. See National Legal Aid & Defender Association, Performance Guidelines for Criminal Defense Representation, Guideline 1.1. See also ABA Standard 5-1.1 Standard for the Administration of Assigned Counsel Systems, and ABA Defense Foundation Standard, Standard 4-1.2 which requires “effective, quality representation.”

⁸ For a fuller discussion and various defense perspectives, see National Legal Aid & Defender Association articles at www.NLADA.org/indig/nd/97. Of particular interest among these articles, see Robert Burke, *Reconciling Drug Court Participation with Defender Ethical Standards* and Michael P. Judge, *Critical Issues for Defenders in the Design and Operation of a Drug Court*. See also Hora, *et al.*, *supra* note 1, at 513-16 (for a discussion of the advantages of a pre-adjudication model over a post-adjudication Drug Treatment Court). See also Mae C. Quinn, *Whose Team Am I On Anyway? Musings Of A Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37 (2000/2001). Unlike my article, Quinn focuses on the defense role once a client is in a post-adjudication drug treatment court and raises serious questions about the defense lawyer’s ethical and legal obligations. Quinn challenges whether a defense lawyer can be a team player within the ethical and constitutional obligations of providing effective and zealous representation. Quinn argues that sanctions within drug treatment courts are analogous to probation violations and require the same level of adversarial defense representation. On this point I differ and believe that there is a difference between sanctions within the post-adjudication drug treatment court and the probation violation and sentencing process. However like the pre-admission concerns which I raise, Quinn’s concerns merit serious consideration.

⁹ For an excellent discussion of the role of the defense lawyer as a therapeutic agent for positive change and the need for improved defense lawyer counseling skills, see Bruce J. Winick, *Redefining The Role Of The Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, 5 PSYCHOL. PUB. POL’Y & L. 1034(1999).

PRELIMINARY REVIEW AND DISCOVERY

Counsel cannot provide adequate advice without doing a thorough review of the evidence and of the applicable law. This often takes time! Are the client's stories verifiable, are there other ways of analyzing the scientific information, was the search justified, what do other witnesses say? When a defense lawyer gives advice it should be based on knowledge not expediency. I like to think that demonstrating care for the people represented by treating them all as valued human beings has a therapeutic effect.

CONDUCTING A PRELIMINARY EXAMINATION

Not often, but sometimes cases are dismissed at this preliminary hearing. More often weaknesses in witness stories can be discovered for later usage. Often a defendant finally recognizes some harsh realities. At times the defense lawyer will explain to the defendant that for strategic reasons it is not in the defendant's best interest to conduct a preliminary examination. The point is that the defendant knows that his lawyer cares about him and that he is not being treated like misplaced luggage on an airport conveyor belt.

Long after the crisis that brought me into their lives, I still have a meaningful relationship with many of my former clients. Most clients know when another person has taken them seriously, put in genuine effort and treated them with respect.

THEY ARE NOT ALL GUILTY

Due process must not be under-valued. Barry Scheck and the Innocence Project remind us of the tragedies of rushed justice. There have now been 92 post-conviction DNA exonerations. When DNA evidence has been available and relevant, more than 50% of the time it has supported the innocent-claiming incarcerated inmate. Unfortunately, DNA is not a factor in most cases. However, according to Scheck the DNA exonerations demonstrate that of these cases: 84% were in part based on mistaken identification (often cross-racial), 23% included bad confessions (often to avoid mandatory sentences), 33% were influenced by bad forensics, 50% involved police misconduct (evidence not disclosed), 42% prosecutor misconduct and 25% testimony from jailhouse snitches (to improve their situation).¹⁰

At the core of all these causes of false convictions is the question: What was the defense lawyer doing? The ultimate therapeutic tragedy is for an innocent person to be incarcerated. We must not allow the need for treatment to lead innocent people into the criminal justice system.

¹⁰ Presentation "Wrongful Convictions, Causes and Remedies" by Professor Barry S check to Criminal Defense Attorneys of Michigan Practice Conference, March 2, 2001, Novi, Michigan. See also BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (March, 2001).

WHEN TO PLEAD INTO A DRUG TREATMENT COURT

A guilty plea should never be entered until there has been a thorough investigation of the facts and law. The wonderful potential of the outcome oriented therapeutic models must be balanced against the values of process oriented therapeutic jurisprudence. Due process must not be rushed or undervalued. In the post-adjudication drug treatment courts, which are based on guilty pleas, there must be a knowing and informed plea. The stakes, which include a permanent record and a trip to jail or prison for the 30% who cannot complete the treatment program, are too high to allow for any shortcuts.

Prior to entering a guilty plea a defendant must know the strengths and weaknesses of the case against him. To provide anything less than quality and zealous representation prior to a guilty plea will leave the failed 30% of drug court participants believing that they were sold out.

WAIVERS

The easy answer to all due process questions is having a waiver signed. A guilty plea is the ultimate waiver of all the protections of a trial. Hence, motions, preliminary examinations, and counsel can all be waived. One therapeutic view is that the honest admission of a crime is the beginning of recovery. Without disagreeing, I'd also contend that rushed waivers in post-adjudication drug treatment courts could turn into feelings of betrayal and dehumanization. Of all defendants, the addicted and desperate most need time to make an informed decision. The decision can only be informed if defense counsel has done his or her job. A decision to waive possible defenses is perfectly acceptable, as long as it is made after counsel and the defendant have analyzed the facts, law, strengths, weaknesses and then balanced the alternative courses of action. While rushed waivers may protect the professionals in the system, they do not serve the defendant.

CLIENT RELATIONSHIP

I am most proud of my file of client thank you letters. Most of these people and I have lost track of each other over time, while with others I still occasionally communicate. I hope none would ever again need the services of a criminal defense lawyer. These are special relationships. Another person has shared with me his worst life situation and trusted me to provide solid legal and personal advice.

When I think about referring a person to another lawyer, my primary concern is that the lawyer exemplifies attributes of caring, is honest and a good communicator. Knowing the law is only a preliminary qualification; the key is being the kind of decent person that I would trust to take care of a friend. I know many lawyers who have been practicing in a therapeutic way without ever thinking about it. They simply are good people who happen to be lawyers. Time spent listening to a client and honestly reviewing the situation develops a relationship that allows a person to feel good about the process, no matter what decisions are made.

THE INHERENT THERAPEUTIC VALUE OF DUE PROCESS

I have outlined my observations that caring and thorough representation is more than just a matter of legal ethics¹¹ and defense lawyer obligation, but can also be a critical aspect of the healing, i.e., therapeutic process. This may be a new discussion within the drug court movement, but an analogous discussion has been taking place within the area of mental health civil commitments. Therapeutic Jurisprudence co-founder Bruce Winick's observations of the importance of "process" in mental health commitment cases are equally instructive to Drug Treatment Courts.¹²

Similar to my concern that "due process" is valued but not practiced in some Drug Treatment Courts, Winick observes the wide gulf between the "law on the books and law in action" in civil commitments.¹³ Civil commitment "due process" can be a sham which can "have severe anti-therapeutic consequences . . ." as the shallow process undermines the participant's "trust and confidence."¹⁴ Winick cites the work of social psychologists that a participant's perception of being treated with "respect," "politeness" and "dignity" "enhance treatment efficacy."¹⁵ Winick's further observations that "promoting the client's legal rights can be good for his or her mental health" and that the attorney . . . should never act in ways that suggest betrayal of the client" are equally important to the structuring of drug treatment courts.¹⁶

DRUG TREATMENT COURTS AND THERAPEUTIC JURISPRUDENCE

Today 50% to 60% of addicted offenders commit further crimes after their release from jail or prison.¹⁷ The approach of locking them up and then dropping them back into society is a costly and inhumane failure. Within the drug treatment courts supportive judges, prosecutors, defense lawyers and treatment professionals strive cooperatively to help the addict break a life cycle of addiction and crime. The overall well-being of the individual is of paramount value. The

¹¹ For an excellent review of the interplay between drug courts and canons of ethics, see *Ethical Considerations for Judges and Attorneys in Drug Courts*, prepared by the National Drug Court Institute (May, 2001), distributed through the U.S. Department of Justice, Office of Justice Programs, Drug Court Programs Office, available at www.ojp.usdoj.gov and at www.ndci.org. See also Quinn, *supra* note 8.

¹² See Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37(1999).

¹³ *Id.* at 40.

¹⁴ *Id.* at 58.

¹⁵ See Tom R Tyler, The Psychological Consequences of Judicial Procedures. Implications for Civil Commitment Hearings, Alexander Greer, et al., *Therapeutic Jurisprudence and Patients' Perceptions of Procedural Due Process of Civil Commitment Hearings*, in *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* 923 (David B. Wexler & Bruce J. Winick eds. 1996).

¹⁶ *Supra* note 12, at 54.

¹⁷ A startling 75% of those in drug treatment courts committing a crime have previously been incarcerated. See Drug Court Activity Update: Composite Summary Information, February 29, 2000, 01? Drug Court Clearinghouse and Technical Assistance Project, American University, www.american.edu/justice.

potential outcome is so good that it is easy to forget the setting. When the setting includes a guilty plea and a felony as the cost of admission to a drug treatment court the process becomes as important as the potential outcome. A defendant must fully participate in the decision to enter a drug treatment court, trust that he has been provided with full information and perceive that his views have been fully heard.¹⁸ The therapeutic or anti-therapeutic aspects of the process deserve attention, so as not to undermine the potential good of drug treatment courts.¹⁹

CONCLUSION

I hope these thoughts challenge the scholars and practitioners of therapeutic jurisprudence and drug treatment courts to focus on the importance of due process and even to recognize that due process can also have a therapeutic value. Most would agree that the best result is a drug-free client. However, this is not just a treatment program, but a program within the criminal justice system often resulting in serious consequences for the defendants. Failures will occur among those suffering from the disease of addiction. When these people are incarcerated after a rushed process, it will be the inadequate defense lawyer who will be blamed. With a greater appreciation for the therapeutic values involved in a caring and thorough representation, this need not be the case. Especially in the post-adjudication drug treatment court model, what constitutes therapeutic jurisprudence is not an easy question. However, there is a tremendous value in constantly asking ourselves about the therapeutic or anti-therapeutic consequences of our actions. It is the right question and the right focus. Drug treatment courts should be able to provide both a therapeutic process and a therapeutic outcome.

¹⁸ For a fuller analysis of the importance of “participation, dignity and trust,” see Tyler, *supra* note 15.

¹⁹ This article has not focussed on the therapeutic, ethical, defense lawyer and due process issues once an individual is admitted to a drug treatment court. My primary concern has been the pre-admission process. For further information, see Hora, *et al.*, *supra* note 1; Hoffman, *supra* note 3; National Legal Aid and Defender Association articles cited in *supra* note 8; and Quinn, *supra* note 8.