

Words to live by:

avoid professional  
malpractice by  
remembering your  
scope of practice!

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# Topics

- Not honoring confidentiality laws
- Not honoring boundaries and scope of practice
- Not watching legal issues
  - MAT, MOUD
  - Due Process
  - Prophylactic Incarceration

# **CONFIDENTIALITY LAWS**

Are NO joke.

# What about confidentiality rules and team members?

- It is a violation of Federal Rules of Confidentiality and the law, to use information learned in staffing (with waivers) for any other purpose.  
No search warrants, no grand jury proceedings, etc. Example: State v. Plouffe, 329 P.3d 1255 (Montana 2014) Prosecutor charged a participant with a new crime based on staffing information.
- Under 42 CFR § 2.35, information from a CJS release may be redisclosed and used only in connection to their official duties with respect to the [particular criminal](#) proceeding.
- The information may not be used in other proceedings, for other purposes or with respect to other individuals. (42 CFR § 2.12(d)(1))

**WHAT HAPPENS IN VEGAS.....**

What's the rule?

# Common staffing errors:

- Look up! Is everyone in the room covered by the waivers signed by the specific person?
  - Are there extraneous counsel, treatment agencies, or others in the room?
- Lawyers! How many levels of hearsay in staffing?
  - Informal doesn't mean illegal!
  - Not having lawyers in staffing? Not good!

# **Pay attention to who can see your files!**

- Or your data?
- Medical information in there?
- Treatment information in there?
- Who can see it, and what is public access? (Courts)

# WHAT ABOUT CONFIDENTIALITY OUTSIDE THE TEAM?

- Your family? **NOPE**
- The participant's family or friends? **NOPE**
- Other members of your office? **NOPE**
- Your first thought should always be “**NOPE**”. Unless there is a new waiver (clear with counsel) or the legal exceptions exist on the facts presented.

If you do this, you might be committing  
malpractice and violating the law !



# Pay attention!

- This stuff matters!
- Be diligent about those waivers!
- No redisclosure unless within the law!
- Information goes INTO the Court but doesn't come out, except for narrow reasons.
- REVISIT THIS AT LEAST ANNUALLY and with new staff!

**CONFIDENTIALITY  
EXCEPTION:  
BRADY ISSUES !**

# **ETHICS AND BOUNDARIES**

On the team

With the participants

## **Strange fact: treatment courts and programs develop role and boundary problems!**

- Some are traditional problems in a new context  
Ex parte contacts with members of the team.  
Emails containing “too much information”.  
Direct communications between judge and participants without filtering through counsel.
- Some are caused by the team blending “too much” and require strong judicial leadership to monitor.
- The role of the judge becomes very special to participants and easy to overstep.

## OBVIOUS EXAMPLES:

- **Violations of 42 CFR and HIPAA-** those are federal laws, and violations are both civil and criminal.
  - They can take your license to practice law, some violations are criminal in nature
  - Get waivers, and follow them scrupulously, retrain on this annually. CHECK your paperwork.
- **Ex parte communications:**
  - Judicial
  - Counsel
  - Others [including participants]
- **Ex parte activities:** Court and prosecution- cameo only! Have witnesses!

# WHAT is your business?

- Law?
  - Judge?
  - Counsel?
- Treatment Professional?
- Probation Officer?
- Assessor?
- Case Manager?
- Coordinator?

**Whatever your business is: **stay  
there!****

- Mind your ethics
- Mind your boundaries
- Mind your liability profile!

## Rule #1

- Your professional ethics are not reduced based on a program design.
- The ethics that control your profession remain intact *or are increased.*
- ***Support the professional ethics of your team members. There are things they cannot do!***



# BOUNDARIES WITH PARTICIPANTS

# Professional list of things not to do in treatment courts or in government programs:

- Loan money
- Co-sign loans for cars or homes
- Date *or worse*
- Visit homes (Judge)
- Attend searches (Judge)
- Take participants to support groups
- Have participants to your home for video games
- Show off Nazi memorabilia in chambers/courtroom (or really anywhere)
- Collect urine from participants
- Privately journal or communicate
- Have them into chambers alone
- Take participants out to lunch or dinner as an incentive.
- Have them work on your house, do your garden or be a handyperson
- Trips to Disneyland

*If you do this, you might be committing malpractice!*

## AND DON'T HANDLE GUNS WITH FELONS.

- *Or fraternize with participants: In re Day*, 413 P.3d 907, 362 Or. 547 (Or. 2018)
- **Judge** was suspended from office, others lacked boundaries as well.

TEAM BLURRING OF LINES

# RESPECT BOUNDARIES

- You are a member of your profession, not another.
- Mind your ethics and stay out of theirs.
- Respect each other-LISTEN
- It is the strength of the team and the blending of professions that works.

## Professional confusion...

- Treatment professionals trying to be probation officers
- Probation officers trying to be treatment, when they are not licensed?
- A bench officer who acts as the DA?
- A bench officer who acts as the defense?

*If you do this, you are undoubtedly committing malpractice!*

# Or a confidentiality AND judgment problem?

- How about a district attorney who discounts treatment advice because his wife is a nurse and tells him different?

*If you do this, you are committing malpractice and violating the law!*

- Agreeing to be a probation officer for clients when probation team members will not serve them.

(District attorney)

- Defense counsel acting as a probation officer-but lacks the authority of the Court.

**If you do this, you ARE committing malpractice!**



## **Ex parte conversations?**

- Between participants and judges?
- Between the DA and participants?
- Between one attorney and the Judge?

**Some folks want to be treatment  
professionals without training!  
Sometimes they are lawyers or judges.  
Sometimes they are probation.  
Or, persons in recovery without training.  
**NOT YOUR JOB!****

- "Just because you've had your appendix out doesn't  
qualify you to take out mine."

"Ethics for Addiction Professionals". Second edition, 1994. LeClair Bissell,  
M.D., C.A.C.; James E. Royce, S.J., Ph.D.

# **Yes, we work as a team!**

- But we work as a team from different professions
- We see things differently, and often what others may not see.
- We know things that others may not (or cannot) know about.
- BUT we don't practice the profession of the other team members!

## Examples:

- Any lawyers in the room?

- Do you like it when someone tells you how to practice law?
- Do you sometimes tell probation or treatment how to do their work? Unless it is legal advice, you MAY be committing malpractice!

- Judges?

- Same questions!
- Do you choose treatment levels of care? Or do you order them? If you overrule treatment, you MAY be outside your scope of practice!

## **Examples: ethics don't disappear because I'm on a team!**

- As a prosecutor, I cannot:
  - Allow a defendant to suffer a due process violation.
  - Reveal the existence of a search warrant
  - Allow a Brady violation
- As a defense attorney, I cannot:
  - Allow a perpetration of a fraud upon the Court
  - Reveal information subject to privilege.

- As a Judge, I cannot:  
Defer decisions to the team  
Conduct ex parte conversations or Court  
Discuss individual legal matters before me.  
Ignore the law or Constitution.

- As a treatment professional, I cannot exceed the scope of my license or practice or breach a code of ethics.
- As a medical professional, I cannot exceed the scope of my license or practice or, breach a code of ethics.
- As a social worker, I cannot exceed the scope of my license or practice or, breach a code of ethics.
- As a law enforcement officer, I cannot exceed the scope of my job, ethics, or training.
- **AS A JUDGE OR ATTORNEY, I cannot exceed the scope of my license or practice or breach a code of ethics or Judicial Canons.**
- However, it is possible for folks to have additional ethical requirements placed on them which exceed traditional ethics when they work on a treatment team.

## THUS ...

- Mind your boundaries and your ethics.
- You may do harm, and you may lose your license, job, or your freedom.
- “Team” does not mean your ethics are reduced  
EVER. Period.



In a drug court model, rather than abandoning their roles, the involved disciplines expand them. The disciplines collaborate on a single mission to create a more effective and efficient system

# The role of counsel:

- NOT to be treatment professionals, probation officers, or other roles, i.e. stay in your own lane.
- To remember the role within the team construct as well as ethical context.
- The role of the defense counsel is particularly difficult and may require patience from the bench on occasion.
- RECALL: while the ex parte rules have changed for judges, they have not changed for counsel.

CRIMINAL CONDUCT BY  
TREATMENT COURT FOLKS

# THIS SEEMS BAD.....

- A former Lawrence County Treatment Court program supervisor is in the county jail for alleged misconduct during her involvement with running the county drug court operations. The Lawrence County District Attorney's office has filed charges against Jennifer Lynn Leasha, 39, of 125 Hillcrest Acres in North Beaver Township for allegedly sexually soliciting drug court offenders, and for allegedly trying to get one of them to commit a burglary and kill her estranged husband.
- [www.ncnewsonline.com/news/former-drug-court-official-charged/article\\_046da970-b21d-11e9-b5b7-cb4409e47458.html](http://www.ncnewsonline.com/news/former-drug-court-official-charged/article_046da970-b21d-11e9-b5b7-cb4409e47458.html)

## Gross abuse of power by LE

- <http://www.wsmv.com/story/34654368/woman-admits-relationship-with-deputy-while-inmate> sheriff deputy and drug court participant
- <http://www.wftv.com/news/local/2-volusia-county-deputies-off-job-over-drug-court-sex-scandal/625727529> sheriff deputies and drug court participant

## Two victims: Oklahoma case

- Appellant befriended drug court participant, J.M. On February 7, 2006, Appellant repeatedly telephoned J.M. and requested that she travel from Custer County to his hotel room in Oklahoma City. J.M. acquiesced when Appellant demanded that she meet him or he would vote for her termination from drug court. When she arrived at the hotel, Appellant provided J.M. with alcohol, engaged in sexual intercourse with her, and performed oral sodomy on her person. Thereafter, Appellant engaged in sexual intercourse with J.M. at her home, at the home of a friend of the Appellant's, at a motel, and at Appellant's home while his wife was on vacation. At Appellant's home, Appellant gave J.M. alcohol, engaged in several instances of intercourse, and performed oral sodomy upon J.M. Appellant and J.M. travelled to Oklahoma City for Drug Court Day at the State Capitol. Appellant repeatedly demanded and engaged in instances of sexual intercourse with J.M. in his hotel room.

- During this time frame, Appellant intervened in J.M.'s urinalysis testing at the Custer County Jail. Appellant instructed his employees to permit J.M. to test in the courthouse bathroom which was nicer than the jail restroom. On at least two separate occasions, Appellant intervened and stopped the jail employees from reporting J.M. for a positive test, took J.M. for a mouth swab test, and had the jail employees discard the positive urinalysis test.
- On January 3, 2007, Appellant assisted the drug court compliance officer with an investigation into drug court participant, B.B. Appellant discovered that B.B. was in violation of the Drug Court's rules. He contacted the Drug Court Judge and pursuant to her order took B.B. into custody. The compliance officer assisted and investigated other drug court participants while Appellant drove B.B. to the jail. Through repeated comments on her future, Appellant painted the grim picture of jail, termination from Drug Court, and imprisonment for B.B. Appellant told B.B. that he could save her from prison and make her stay in the jail more comfortable. He pulled off the road near two barns and told B.B. that he would help her if she would help him. Appellant directed B.B. to perform oral sodomy on his person and engaged in sexual intercourse with B.B. The records within the sheriff's department reflected that it took Appellant approximately 44 minutes to transport B.B. the 5 mile distance from her home to the jail.

- In May, 2007, J.M. informed Appellant that she could not do it anymore. Appellant informed her: "Well, you know what that means." (Tr. V, 1210, 1453-54). Subsequently, J.M. tested positive on her urinalysis test at the Custer County Jail. She tried to get Appellant to intervene both before and after the test, however, he ignored her requests. J.M. was placed in the Custer County Jail and sanctioned to one year inpatient treatment by the Drug Court. As she left the courtroom, she screamed: "I've effed [sic] the sheriff all this time, you can't do this to me." (Tr. V, 1211, 1490-92).
- J.M.'s cousin, C.T., contacted Appellant and informed him that J.M. had DNA evidence proving their sexual relationship. Appellant offered to help C.T.'s brother get out of prison if she would obtain the evidence from J.M. and bring it to him.
- <https://law.justia.com/cases/oklahoma/court-of-appeals-criminal/2010/461458.html>



JUSTICE NEWS  
Department of Justice  
Office of Public Affairs  
FOR IMMEDIATE RELEASE  
Friday, December 14, 2012

Former Lincoln County, Missouri, Sheriff's Office  
Detective Sentenced on Sexual Abuse Charges-  
"Tracker"

2018 UPDATE: multi million dollar judgment, interesting  
turn on who was the responsible party: court, or Sheriff?  
Respondeat Superior?

- MORRISTOWN - A Drug Court participant who admittedly was tipped off to surprise drug screenings and given drug testing kits by a Sussex County Sheriff's officer in exchange for having a sexual relationship with him was given a second chance Wednesday to stay in the program and avoid a prison sentence.

## **Drug testing labs....**

- Two Arrested for Falsifying Drug Tests in Exchange for Sexual Favors (2017-Texas)

## JUDGES

- **Former Judge Casey Moreland arrested by FBI on obstruction of justice charges**
- Ex-judge Casey Moreland accused of taking money from drug court program he started 3/1/18
- Coordinator also snared.

# LEGAL ISSUES:

MAT

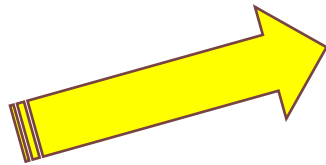
Prophylactic Incarceration

Failure to follow due process

Prospective waivers of rights

# MAT: LEGAL ISSUES ABOUND!

**My  
advice!**



**Always start from here:**

- 1. Are you a medical doctor?**
2. Do you have a license to practice medicine?
3. Do you specialize in addiction medicine?

**If any answer is NO, stay out of the discussion!**

# The Bottom Line from the Feds

Under no circumstances may a drug court judge, other judicial official, correctional supervision officer, or any other staff connected to the identified drug court deny the use of these medications when made available to the client under the care of a properly authorized physician and pursuant to regulations within an Opioid Treatment Program or through a valid prescription.

## NET MESSAGE:

- Beware of blanket MAT issues:
- Make a record of denials, or policies
- **Be aware that your “beliefs” are not medicine.**
- Failure to recruit/obtain accessible MAT is a growing area of liability.
- It violates the law, and Best Practice Standards.



# Can we mandate cessation as a condition of Drug Court or government program completion? Or, admission?

**NO-** In all cases, MAT must be permitted to be continued for as long as the prescriber determines that the medication is clinically beneficial. Grantees must assure that a drug court client will not be compelled to no longer use MAT as part of the conditions of the drug court, if such a mandate is inconsistent with a licensed prescriber's recommendation or valid prescription.

# LITIGATION IN THIS AREA IS **HOT!**

- Pennsylvania    [https://www.ada.gov/ujs\\_comp.pdf](https://www.ada.gov/ujs_comp.pdf)
- Massachusetts
- Colorado
- Rhode Island
- Indiana

**Violations of the ADA are being prosecuted by DOJ**

# Can I choose which medications can be used in our court?

- **NO**

- Are you a physician?
- Are you an addiction treatment physician?
- You are trying to practice medicine without a license!

# CHALLENGING BLANKET MAT PROHIBITIONS:

- The Americans with Disabilities Act (ADA)  
Prohibits discrimination by state and local governments
- Rehabilitation Act of 1973 (RA)  
Prohibits discrimination by federally operated or assisted programs.  
See: *Discovery House, Inc. v. Consol. City of Indianapolis*, 319 F.3d 277, 279 (7<sup>th</sup> Circuit. 2003) (“the ADA and The RA...fun along the same path, and can be treated in the same way”).
- Due Process protections of the 14<sup>th</sup> Amendment  
1983 Civil Rights violations....
- 8<sup>th</sup> Amendment-cruel and unusual punishment.

# BE CAREFUL

- Beisel v. Espinosa, Florida, 2017, United States District Court Tampa Division, case No.8:17-cv-51-T-33TBM, pro per misfires, but has instructive language. **[Adult Drug Court allows MAT but local FDC does not-equal protection and discrimination]**
- ADA, Rehabilitation Act of 1973, and some of 42 USC Section 1983 applies to FTC. Some tort claims may also lie.
- Monitor the Legal Action Center, NY NY for updates

# **BLANKET DENIAL OF MAT ACCESS IS DISCRIMINATION BECAUSE OF A DISABILITY.**

- Disparate treatment

Thompson v. Davis, 295 F.3d 890 (9<sup>th</sup> Circuit 2002) denial of parole because of addiction is subject to disparate treatment analysis of ADA.

- Reasonable Accommodation

ADA requires reasonable accommodation to avoid discrimination.

- Disparate Impact

Title II ADA prohibits eligibility requirements that screen out or tend to screen out individuals with a disability, unless the criteria are essential to the provision of services.

# **WATSON V. KENTUCKY, E.D KENTUCKY, 7/7/15 (F. SUPP.2D)**

- Watson requires the state court take her off the conditional release terms or remove the “blanket prohibition on her taking suboxone, methadone or any other drugs that she needs to treat her addiction. The state attorney clarified that there was not a Blanket prohibition on MAT, but agreed that “it’s generally the Court’s practice to allow MAT if the doctor will show medical need.”
- Relief denied. Her challenge on federal grounds was denied stating the claim could be handled on the state level.

# DUE PROCESS AND BLANKET PROHIBITIONS OF MAT

***Constitutional due process requires reasonableness or a rational basis for conditions of treatment and supervision of persons on probation or in drug court.***

- Probation terms and conditions should be reasonably related to the crime and the rehabilitative needs of the individual and protection of the community People v. Beaty, 181 Cal.App.4th 644, 105 Cal.Rptr.3d 76 (2010)
- Judge must impose individualized conditions to meet community and individual needs. Commonwealth v. Wilson, 11 A.3d 519 (Pa. Super. 2010).



## **S U M M A R Y :**

- Drug Court blanket prohibitions of MAT offend the ADA and RA.

Drug Court is a program covered by the statutes

Drug Court eligible persons have a disability. (DUI Court too)

Drug Court eligible persons do not as a class, constitute a substantial risk

Blanket denial of MAT is discrimination because of a disability.

## **GENERAL RULE:**

- blanket prohibitions of MAT are a due process violation because they are not rationally (scientifically based).
- They are not reasonable because they are not consistent with individualized sentencing and treatment
- They do not give parties a fair opportunity to present their case, since one alternative is foreclosed.

TO REVIEW:

CAN THE COURT COMPEL THE USE OF MAT? OR  
COMPEL THE TERMINATION OF MAT?

- **Question one: are you a physician who is an expert in MAT?**
- That should answer your question.
- The answer is **NO**.
- Sell v United States 539 U.S. 166 (2003)  
There are some recent changes for psychotropic meds, but not these.

PROSPECTIVE WAIVERS OF  
RIGHTS TO DUE PROCESS

# HE WAIVED HIS RIGHTS! NOPE!

- Hendrick v. Knoebel, (SD Indiana 5/10/2017) (“Though we need not rule on Defendants' argument concerning the waiver provision in the DTC Agreement, we note our serious doubts as to its enforceability under Indiana contract law, given the conspicuous lack of parity between the parties, the absence of specificity in the provision's language, the fact that it purports to absolve the DTC's employees of liability for intentionally tortious conduct, and the fact that the DTC Program is an entity of the local government performing a public service. See generally *LaFrenz v. Lake Cty. Fair Bd.*, 360 N.E.2d 605, 608 (Ind. Ct. App. 1977). Moreover, because the provision implicates federal common law by purporting to waive federal statutory and constitutional rights, the likelihood of its enforceability is increasingly remote. Federal courts are rightly skeptical, albeit not uniformly dismissive, of claims that a plaintiff has waived his constitutional rights or has released a defendant from liability for violating them. We “indulge every reasonable presumption against waiver of fundamental constitutional rights,” *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Bayo v. Napolitano*, 593 F.3d 495, 503 (7th Cir. 2010), and we acquiesce in a waiver only if it has been “knowing, intelligent, and voluntary.” *Schriro v. Landrigan*, 550 U.S. 465, 484 (2007). The lack of specific language in the agreement before us, in conjunction with its prospectivity, not only falls short of eliciting “an intentional relinquishment or abandonment of a known right or privilege,” *Patterson v. Illinois*, 487 U.S. 285, 292-93 (1988), but also encourages DTC staffers to violate the DTC participants' constitutional rights, knowing they are acting with impunity. Enforcing such an agreement is inconsistent with the public interest given its potential for abuse and cancellation of the participants' primary means of vindication.”)

# FAILURE TO FOLLOW DUE PROCESS=LAWSUIT YOU WILL LOSE

## Due Process violations

- You cannot waive your rights to a hearing in advance-it is not a knowing and intelligent waiver
  - **You must provide due process if “the defendant will potentially suffer a loss to a recognized liberty or property interest” (Gagnon v. Scarpelli)**
  - **Termination: yes**
  - **Sanctions: Courts are split-trend is toward yes.**
  - The level of due process is consistent with that of a violation of probation.
  - Make sure you have a written record of the rights and waivers.
- 
- Vary by model and legal status, but there are due process mandates to follow in each case.

CUSTODY TO SAVE A LIFE

If you do this, you might be committing malpractice!

# PROTECTIVE OR PROPHYLACTIC INCARCERATION

- What law or legal theory allows this?
- What about the 8<sup>th</sup> Amendment?
- Violations of probation: watch your record and the length of the hold.
- Pursue civil proceedings if necessary.
- IF you do this, make it rare and LAY A GOOD RECORD with testimony regarding the issues, the efforts to address the issues in alternative less restrictive manners, and testimony from a health or treatment professional regarding severity of the threat. Set frequent reviews and look to reduce harm or release if stable.



# Avoid common legal errors!

## **Don't violate the First Amendment!**

- NO mandatory 12 step without alternatives offered.
- Stay away orders on married people. Be very careful or don't.  
[relationships are always a problem in these Courts, avoid stay away orders when you can.]
- Restrictions on places are ok if narrowly drawn and based in facts.

## 42 USC 1983

### CIVIL RIGHTS PROCEEDINGS.

- Quasi-immunity for 1983 action extinguished if violates an established constitutional right
- Notice is assumed that requiring AA is a violation of the First Amendment
- Drug court case manager not immune (*Hanas v. Inner City Christian Outreach, Inc.* 542 F.Supp.2d 683, 701 (E.D. Mich. 2008))
- Mandatory damages.

# Violations of due process rights

- Civil liability-limited liability does not extend as far as it used to.
- Removal from Bench (Mississippi Commission on Judicial Performance v. Thompson (5/2015) 169 So3rd 857

If you do this, you might be committing malpractice!

## **Avoid problems:**

- Know the law and follow the law. These are Courts of Law.
- *Stay in your professional lane*
- Respect your team and their professions.
- Follow best practices as a team
- Train, train, train.
- AVOID MALPRACTICE