



Legal Issues for Treatment Court Professionals

Developed by All Rise.

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**All Rise
publication:**



A Practitioner's Guide to Constitutional and Legal Issues in Adult Drug Courts

Eligibility



Eligibility and Equal Protection



Common equal protection challenges:

- “I want treatment court, but they won’t let me in!”
- “I want treatment court, but my jurisdiction doesn’t have one!”

Eligibility and Equal Protection



- 14th Amendment EP clause: Requires state governments to treat similarly situated persons in like manner
- But many government actions affect people differently
- The real question is: does the government action affect a fundamental right or a suspect class (race, ethnicity, religion, nationality, gender)?
- If not, the government action is valid if it has a **rational basis**

Eligibility and Equal Protection



- There is no fundamental right to participate in treatment court
- And justice-involved persons are not a suspect class
- Therefore, a defendant can be excluded from treatment court for any legitimate reason (rational basis)

Eligibility and Equal Protection



- Bottom line: Most equal protection challenges related to treatment court eligibility/access will fail
- But be careful to avoid policies/practices that affect a suspect class (race, ethnicity, religion, nationality, gender); these are presumptively unconstitutional

Alienage



- “Alienage” refers to a person’s status as a non-citizen
 - Alienage is a suspect class → strict scrutiny
 - Therefore, a ban on non-citizens entering treatment court would be impermissible
- But what about those who immigrate illegally?
 - NOT a suspect class → rational basis review

Alienage



- Can treatment courts exclude those who immigrate illegally?
- Yes, if there is a legitimate government purpose
- Likelihood of deportation
 - People v. Espinoza, 132 Cal. Rptr. 2d 670 (Cal. Ct. App. 2003) (upholding exclusion where the substantial likelihood of the defendant's deportation would prevent them from completing the program)

Indigence



- Can a treatment court exclude a person because they can't afford fines or fees?
- No, violates equal protection
 - Mueller v. State, 837 N.E.2d 198 (Ind. Ct. App. 2005) (can't deny prosecutor diversion program for inability to pay)
 - State v. Shelton, 512 S.E.2d 568 (W. Va. 1998) (can't deny home detention for inability to pay for monitoring)

Admission



Waiver of Rights



Defendants traditionally must waive several constitutional rights when pleading guilty:

- Right to trial
- Right to confront witnesses
- Right against self-incrimination
- Right to appeal

Waiver of Rights



- But there are special considerations for treatment courts
- Waiver of appeal may be limited
 - People v. Kitchens, 46 A.D.3d 577 (N.Y. App. Div. 2007)
(general waiver of appeal does not foreclose appellate review of due process claim that sentencing court failed to hold a hearing regarding the circumstances surrounding defendant's failure to complete drug treatment program)

Waiver of Rights



- Can a treatment court participant be required to waive the right to a termination hearing?
- No
 - State v. Laplaca, 27 A.3d 719 (N.H. 2011) (rejecting hearing waiver: “defendant could not have knowingly and intelligently waived his right to a hearing to contest the allegations of misconduct against him without full knowledge of what those allegations were”)

Search Waivers



- Can treatment courts require participants to submit to warrantless searches?
- Yes, in post-plea treatment courts
 - People v. Ramos, 101 P.3d 478 (Cal. 2004) (by accepting probation, defendant waives Fourth Amendment rights and has no reasonable expectation of traditional Fourth Amendment protection)

Search Waivers



- But in pre-plea treatment courts, maybe not
 - U.S. v. Scott, 450 F.3d 863 (9th Cir. 2006) (pretrial liberty interests are “far greater” than a probationer’s, holding invalid Nevada’s the pretrial release condition authorizing warrantless search)
- Recommended approach: Make case-specific finding as to why a search waiver is needed
 - State v. Ullring, 741 A.2d 1065 (Maine 1999)
 - In re York, 892 P.2d 804 (Cal. 1995)

Participation



Confidentiality

- Two major federal laws
 1. HIPAA
 2. 42 CFR Part 2



HIPAA



HIPAA (Health Insurance Portability and Accountability Act)

- Applies only to health care providers who transmit health information in electronic form “in connection with a transaction”
- *Generally does not apply to treatment courts*
- However, applies to treatment providers and other health care providers that serve participants

42 CFR Part 2



- Restricts the disclosure and use of *substance use disorder patient records*
- Covers all records containing patient-identifying information
- Applies to all federally-assisted programs that provide substance use disorder services and *lawful holders* of protected information, ***including treatment courts***

42 CFR Part 2



- Cannot disclose patient-identifying information unless the patient consents in writing
- Written consent MUST contain the elements in 42 CFR § 2.31 (last updated April 16, 2024)
- See <https://www.ecfr.gov/current/title-42/chapter-I/subchapter-A/part-2/subpart-C/section-2.31>

Medical Marijuana



- Can a treatment court prohibit medical marijuana use?
- The law continues to evolve
- States fall into two major “camps”
 1. Permitted
 2. Case-by-case

Medical Marijuana



Camp #1: Must be PERMITTED

- Arizona: Reed-Kaliher v. Hoggatt, 347 P.3d 136 (Ariz. 2015)
- Montana: State v. Nelson, 195 P.3d 826 (Mont. 2008)
- Pennsylvania: Gass v. 52nd Judicial Dist., 232 A. 3d 706 (Pa. 2020)
- Oregon: State v. Heaston, 482 P.3d 167 (Or. Ct. App. 2021)

Medical Marijuana



Camp #2: Permitted CASE-BY-CASE

- California: People v. Leal, 149 Cal. Rptr. 3d 9 (Cal. Ct. App. 2012)
- Colorado: Walton v. People, 451 P.3d 1212 (Colo. 2019)
- New York: People v. Stanton, 60 Misc. 3d 1020 (Sullivan County Ct. 2018)

Medical Marijuana



- Treatment courts must follow the law in their state
- If the state's appellate courts have not weighed in, it is probably safe to prohibit medical marijuana use on a case-by-case basis
 - Recommendation: Make a finding on the record articulating the reasons why medical marijuana is being prohibited in that case

Medication for Addiction Treatment



- Can a treatment court prohibit MAT or require participants to discontinue use?
- The law is evolving, and the U.S. Department of Justice is stepping in and suing states under the **Americans with Disabilities Act**.

Americans with Disabilities Act



The Americans with Disabilities Act (ADA) has three major requirements:

1. The person has a “disability”: physical or mental impairment that substantially limits a major life activity
2. The person is otherwise qualified for the program
3. The person is denied access to the program because of the disability

MAT and the ADA

Pennsylvania settlement (February 2024)

- DOJ sued PA for prohibiting drug court participants from using MAT
- Settlement includes:
 - New court policies allowing MAT
 - Training for court personnel on opioid use disorder and MAT

PRESS RELEASE

Justice Department Secures Agreement with Pennsylvania Courts to Resolve Lawsuit Concerning Discrimination Against People with Opioid Use Disorder

Thursday, February 1, 2024

Share >

For Immediate Release

Office of Public Affairs

Pennsylvania Courts Will Compensate Victims, Revise Policies and Train Personnel to Prevent Further Discrimination

MAT and the ADA



Massachusetts settlement (December 2021)

- State parole board only allowed Vivitrol—no other MAT allowed
- Parole board agreed to a settlement, terms including:
 - Individualized assessment of prospective parolees
 - No medication mandates
 - Training for all board members, parole officers, and other staff

MAT and the ADA



In addition, some recent federal court cases have opened the door to successful ADA claims:

- Pesce v. Coppinger, 355 F. Supp. 3d 35 (D. Mass. 2018)
 - Defendant in active recovery for two years with help of methadone
 - Facing 60 days in prison on a probation violation
 - Jail would require defendant to discontinue methadone
 - Court granted preliminary injunction under ADA and 8th Amendment
 - Ordered the jail to allow methadone

MAT and the ADA



- Smith v. Aroostook County, 376 F. Supp. 3d (D. Maine 2019)
 - Defendant in active recovery for 10 years with buprenorphine
 - Defendant convicted of theft and sentenced to 60 days jail
 - Jail would not allow her to continue MAT
 - Court found that jail's denial of necessary medication was based on stigma around OUD/MAT and in violation of the ADA
 - Jail ordered to provide defendant with buprenorphine

MAT and the ADA



- So, what's the bottom line?
- Recent federal cases + DOJ enforcement actions = strong indication that denying MAT is a violation of the Americans with Disabilities Act

****NEVER DENY MAT****
when properly prescribed

12-Step Programs



- Can treatment courts mandate Alcoholics Anonymous (AA) or Narcotics Anonymous (NA)?
- No
- Why? Because of the 1st Amend. Establishment Clause
 - Kerr v. Farrey, 95 F.3d 472 (7th Cir. 1996) (holding that a prison violates the Establishment Clause by requiring attendance at NA meetings which used “God” in its treatment approach)

12-Step Programs



- SMART Recovery (smartrecovery.org)
- LifeRing Recovery (lifering.org)
- Secular Organizations for Sobriety (sossobriety.org)

Geographic Restrictions



- Can a treatment court prohibit a person from going to certain locations?
- Yes, if reasonably related to rehabilitation needs and narrowly drawn. Consider:
 - Geographic size of the area
 - Whether there is a compelling need to enter the area
 - Whether supervised entry is feasible



Association Restrictions

- Can a treatment court prohibit a person from associating with specific individuals?
- Yes, if the restriction is reasonably related to the participant's rehabilitation needs and narrowly drawn
- Must be specific



What About Spouses?

- Spousal contact restrictions get heightened scrutiny
- Must be *narrowly tailored* and *no more restrictive than necessary*
 - U.S. v. Rodriguez, 178 Fed. Appx. 152 (3rd Cir. 2006) (upheld restriction b/c def. committed crimes at husband's behest)
 - Dawson v. State, 894 P.2d 672 (Alaska Ct. App. 1995) (struck down restriction b/c no effort to tailor the scope of restriction to specific circumstances)

Dress Restrictions



- Can a treatment court impose restrictions on clothing?
- Yes, if reasonably related to the offense and preventing future criminality
- Must give the participant adequate notice
 - U.S. v Brown, 223 Fed. Appx. 722 (9th Cir. 2007) (restriction on clothing “which may connote membership in” specific gangs was overly vague)

Employment Restrictions



- Can a treatment court require a participant to get a job?
- Yes (sort of): They can require good-faith efforts
 - U.S. v. Melton, 666 F.3d 513 (8th Cir. 2012) (lack of good-faith effort to seek employment is a ground for revoking release)
 - Garrett v. State, 680 N.E.2d 1 (Ind. Ct. App. 1997) (vacating probation revocation because insufficient evidence that failure to secure employment was due to lack of effort)

Employment Restrictions



- Can a treatment court prohibit a participant from getting certain types of jobs?
- Yes, when the restriction is reasonably related to the defendant's crime and the goals of probation
 - Thomas v. State, 710 P.2d 1017 (Alaska Ct. App. 1985)
(upholding probation condition prohibiting defendant from working in commercial fishing after related theft conviction)

Monitoring and Sanctions





Staffing Meetings

- Staffing meetings are typically:
 - Held outside regular court sessions
 - Informal, off-the-record meetings
 - For the team to share information about clients
 - To prepare for formal status hearings
 - **Not** for making formal findings or decisions



Staffing Meetings

- When conducted properly, normal due process rights do not apply to staffing meetings
- Defendant is not entitled to be present
- Need not be open to the public or on the record

Sanctions and Due Process



- What kinds of due process protections are required when a treatment court imposes sanctions on a participant?
- There is a split of authority on this question

Sanctions and Due Process



- Some states have said sanctions can be imposed without a formal hearing or full due process
 - State v. Rogers, 170 P.3d 881 (Idaho 2007) (sanctions do not implicate the same due process concerns as termination, and therefore informal hearings are permitted)
 - Commonwealth v. Nicely, 326 S.W.3d 441 (Ky. 2010) (treatment court sanctions do not require same due process as probation revocation because participants waive those rights)

Sanctions and Due Process



- But others disagree
 - State v. Brookman, 190 A.3d 282 (Md. 2018)
 - In re Miguel R., 63 P.3d 1065 (Ariz. Ct. App. 2003)
(juvenile case; applicability to adult treatment courts unclear)

Sanctions and Due Process



Recommended approach:

When a participant challenges allegations of noncompliance, "the court should give the participant a hearing with notice of allegations, the right to be represented by counsel, the right to testify, the right to cross-examine witnesses, and the right to call his or her own witnesses."

--Drug Court Judicial Benchbook

Preventive Detention



- Using jail to protect participants from harm is akin to preventive detention or involuntary commitment
- Typically requires finding that (1) person poses immediate danger to self or others, and (2) no less restrictive alternative is available.
 - United States v. Salerno, 481 U.S. 739 (1987) (preventive detention requires clear and convincing evidence that no conditions of release can reasonably assure safety)

Alternatives



1. Medication for addiction treatment (MAT)
2. Responsible person stays with participant and alerts staff
3. Daily reporting to treatment program, court, or probation
4. Specialized group for persons at acute risk for overdose
5. Daily peer support groups
6. Peer specialist work with participant and attend appointments
7. Home visits, curfew, or home detention

Termination



Termination/Due Process



- Due process protections are required whenever a defendant faces the possible loss of a recognized “liberty interest”
- Freedom from jail is certainly a liberty interest
- So due process is required for treatment court termination

Termination/Due Process



- What process is due?
 - Written notice of the alleged violations
 - Disclosure of evidence
 - Right to appear
 - Right to present witnesses and confront adverse witnesses
 - Neutral and detached magistrate
 - Written findings with reasons

--Morrissey v. Brewer, 408 U.S. 471 (1972)

Judicial Recusal



- Can the treatment court judge preside over the termination/ sentencing hearing?
- Every defendant facing termination/sentencing is entitled to a “neutral and detached magistrate.”
- There is a split of authority on this issue.

Judicial Recusal



- Most jurisdictions have taken a case-by-case approach to recusal
- The traditional standard is whether the judge's impartiality might reasonably be questioned by person of ordinary prudence with full knowledge of the facts and circumstances

Termination/Judicial Recusal



- Traditional view: the “mere fact” that the judge presiding over the termination was also the drug court judge is not enough, by itself, to require recusal
 - Conner v. State, 248 A.3d 318 (Md. Ct. App. 2021)
 - State v. Wells, 162 N.E.2d 835 (Ohio 2020)
 - State v. Belyea, 999 A.2d 1080 (N.H. 2010)

Termination and Judicial Recusal

- However, several jurisdictions have adopted a blanket rule requiring recusal when the defendant asks for recusal
 - State v. Marcotte, 943 N.W.2d 911 (Wis. Ct. App. 2020)
 - State v. Cleary, 882 N.W.2d 899 (Minn. Ct. App. 2016)
 - Alexander v. State, 48 P. 3d 110 (Okla. Crim. App. 2002)

Termination and Judicial Recusal

- Recommended approach:

If participant objects to treatment court judge presiding at termination hearing, the hearing should be heard by another judge.

--Alexander v. State, 48 P. 3d 110 (Okla. Crim. App. 2002):

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**THANK
YOU!**

