

Prosecutor and Defense Attorney

Effectively Working Together

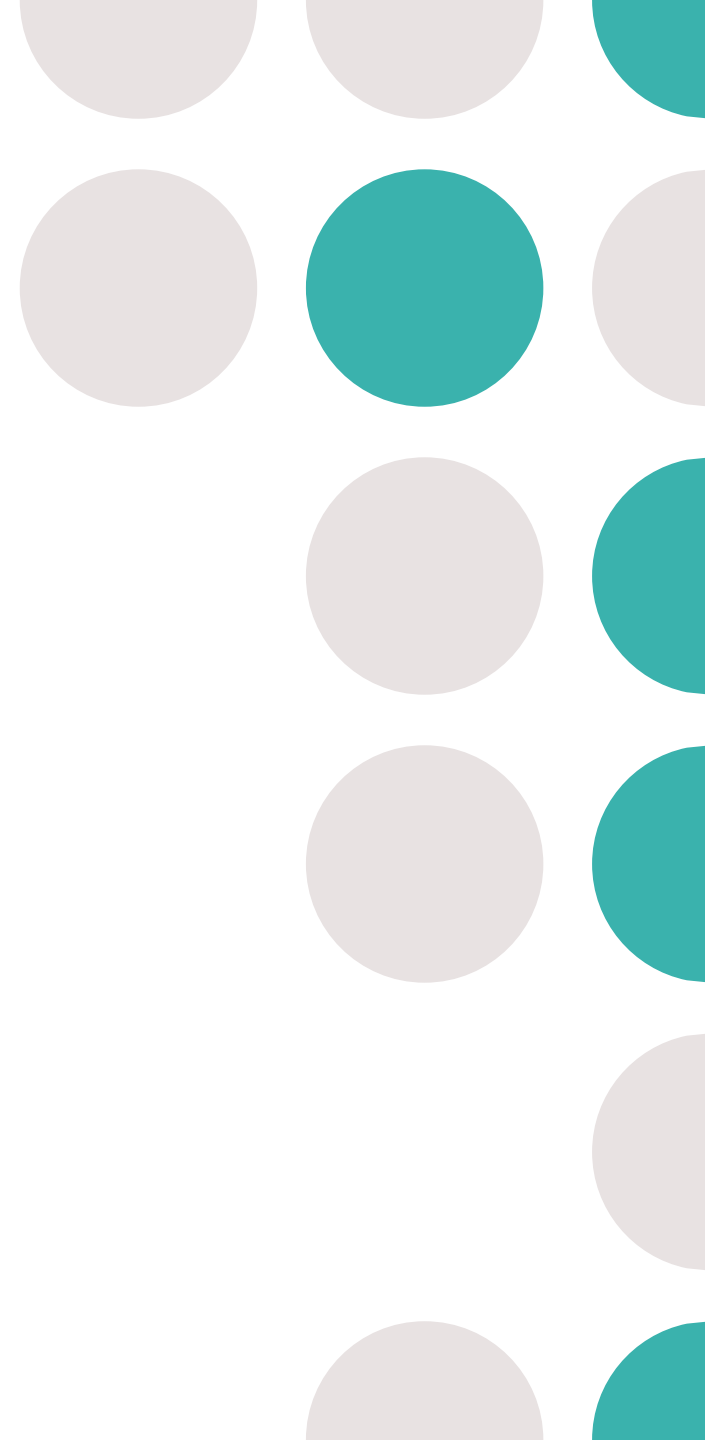
Presented by Honorable Peggy Davis, Ret.

Disclosure

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- Points of views or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

Objectives

- Identify standards of conduct for prosecutors and defense attorneys in treatment court
 - Learn how to advocate for the client within the nonadversarial principle of treatment court
 - Review best practices standards from the attorney's perspective
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TREATMENT COURT STANDARDS

- 2-2 The prosecuting attorney and defense counsel shall work to create a sense of stability, cooperation, and collaboration in pursuit of the treatment court program's goals. The pursuit of justice, due process and protection of public safety, as well as the preservation of the constitutional rights of treatment court participants will be ensured by both attorneys.
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Collaboration – Produces Positive Change in Criminal Justice

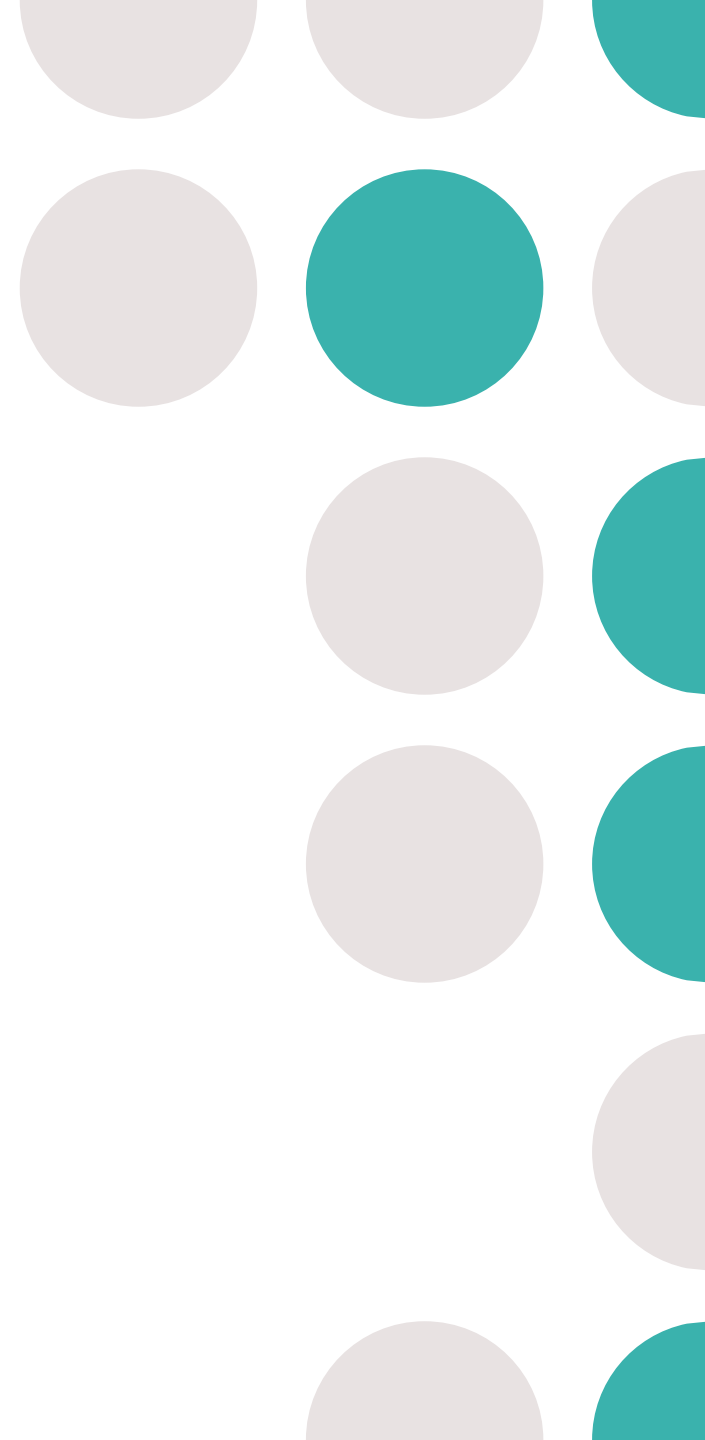
- Common goals:
 - Ensuring treatment court produces best possible outcomes for our communities and our participants
 - Reducing recidivism
 - Increasing community safety
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ABA Criminal Justice Standards



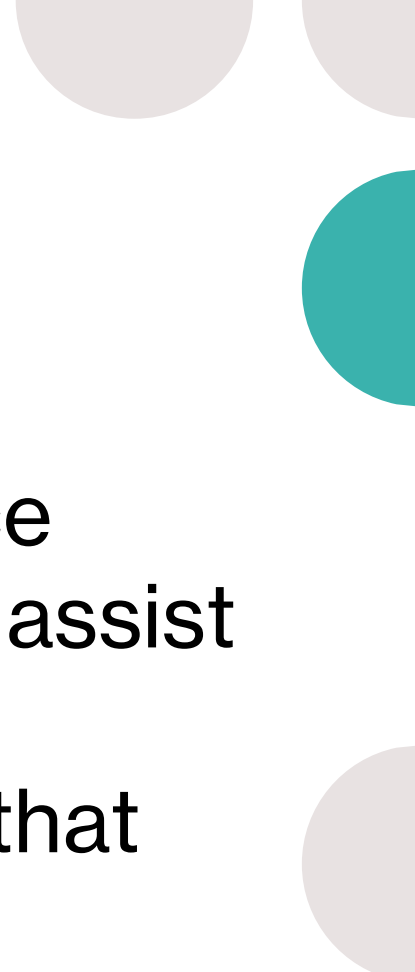
Functions and Duties of the Prosecutor, Standard 3-1.2

- (e) The prosecutor should be knowledgeable about, consider, and where appropriate develop or assist in developing alternative to prosecution or conviction that may be applicable in individual cases or classes of cases.
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- The prosecutor's office should be available to assist community efforts addressing problems that lead to, or result from, criminal activity or perceived flaws in the criminal justice system.
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- (f) The prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system. The prosecutor should seek to reform and improve the administration of justice.
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BJA – Justice Center, Council for State Governments – Association of Prosecuting Attorneys, National Association of District Attorneys

- As leading public servants, prosecutors have the opportunity . . . connections to community-based treatment and supports in their jurisdictions. They can also help change the status quo and move the criminal justice system toward more fair, just, and equitable outcomes through their charging decisions, diversion offers, recommended sentences, and engagement with victims. **And while connecting people to appropriate treatment improves public safety, these diversion efforts also reduce court backlogs, allowing prosecutors the ability to focus on cases involving more serious, violent crime.**
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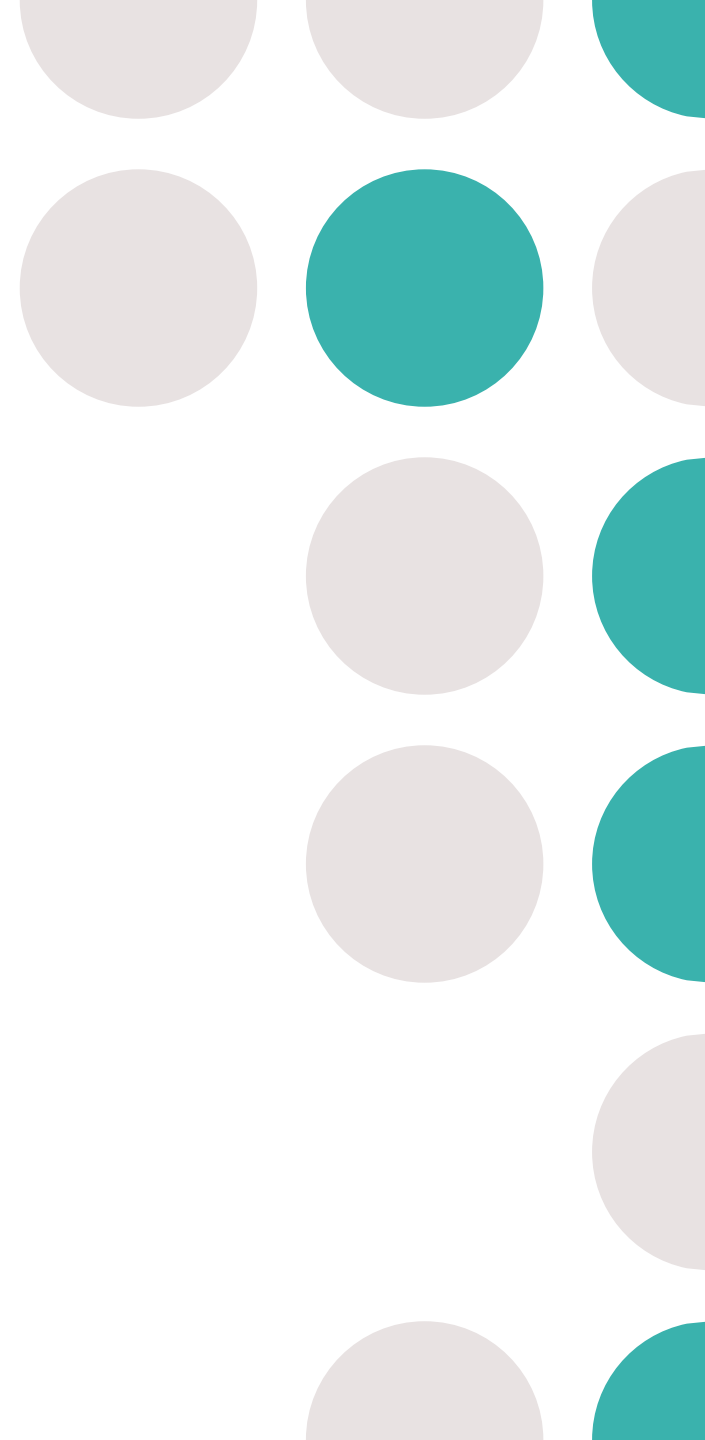
Functions and Duties of Defense Counsel, Standard 4-1.2

- (f) Defense counsel should be knowledgeable about, consider, and where appropriate develop or assist in developing alternatives to prosecution or convictions that may be applicable in individual cases, and communicate them to the client.
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- Defense counsel should be available to assist other groups in the community in addressing problems that lead to, or result from, criminal activity or perceived flaws in the criminal justice system.
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- (e) Defense counsel should seek to reform and improve the administration of justice.



Critical Issues for Defense Attorneys in Drug Court Monograph – All Rise





Sixth Amendment Right To Counsel

- The right to counsel attaches when formal adversarial proceedings are initiated, specifically when liberty is at risk.
 - The presence of defense counsel in drug court is constitutionally required at all critical stages, just as it is in the traditional system.
 - Plea, probation violation hearing, terminations, sanctions, modification of conditions of probation and/or term of probation
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Balancing Competing Concerns

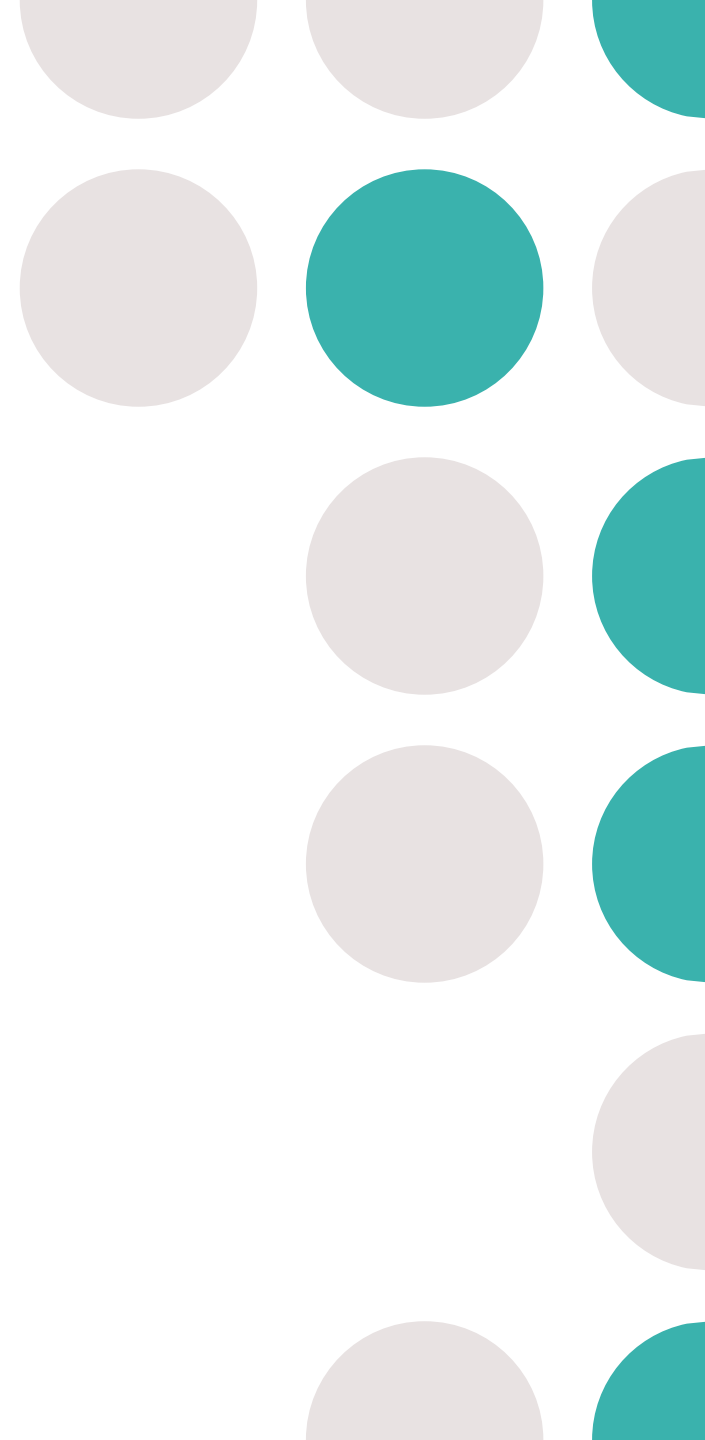
For the participant: Explains the court's processes, prepares for appearances, and helps the participant to conform his or her behavior to the obligations undertaken on entering drug court.

Within the drug court team: Defense counsel ensures that the client's perspective is heard and respected, the client's rights are protected, and the court's procedures are followed.



Effective Advocacy in Drug Court

- Understanding the role of defense counsel
 - Knowing the policies and procedures of the program
 - Participating and collaborating as a team member
 - Protecting due process and confidentiality
 - Continuing multidisciplinary training
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Assertive Collaboration

- Spectrum that ranges from problem solving and collaboration to negotiation and litigation
 - Non adversarial does not prohibit advocacy
-



Relationship with Client

Client satisfaction is based on their experience during the process, not the outcomes

Participatory Model





Defense Counsel Advice to Client

- Same as in traditional settings
 - Advise of other legal alternatives
 - Informed decision about whether drug court is the right option
 - Benefits and costs of participating in drug court
 - Ethical duty to follow client's stated interests
-

Confidentiality Waiver v Attorney Client Privileged Information

- Confidentiality waivers
 - Relevant portions of health information is disclosed to team
 - Assists with addressing SUD and long-term recovery
 - Privilege
 - Communication between the client and the attorney
 - May not be disclosed without client's permission
 - Exception
 - Harm to others
 - False statements to the court
-



Advocate – Negotiate

- A form of collaborative problem solving
 - Brings participant's interests to the table
 - Explains participants perspective
-

Litigate – Adversarial Hearing

Liberty interest at stake

Disagreement over a sanction

Discrepancy in information



Ensure program integrity



Ensure operation according to the research and science



Protect against policies that can do harm

Prosecutor and Defense Attorney



Adult Treatment Court Best Practices Standards

Standard I:
Target Population



**Ensure that Everyone
Who is Appropriate
Has Access to
Treatment Court**

High Risk – High Need

What does the data of your criminal justice population tell you?

- Are you involved in determining the eligibility criteria?
- Are we targeting the population that will generate the greatest impact in our community?
 - Community supervision
 - In jail
 - Offenses, other than drug possession, that are committed because of substance use or mental health issues
 - Felonies, Misdemeanors, DWI's, Probation Violations

Target Population – High Risk

- Significant risk for committing a new crime or failing to complete less intensive dispositions
 - Risk does not refer to danger to the community
 - Consider:
 - Current felony or serious misdemeanor – domestic violence?
 - Prior felony convictions
 - Charges or histories that include property, financial crimes, drug sales and non-aggravated assaults
-

Target Population – High Need

Moderate to severe
substance use disorder

Manifested by:

- Substantial inability to reduce or control use
- Persistent substance cravings
- Withdrawal symptoms
- Pattern of recurrent binge episodes

Ensure that the eligibility and exclusion criteria are objective and evidence based

- Clearly defined
 - No influenced by:
 - Personal Impressions
 - Perceived levels of motivation
 - Prognosis for success
 - No voting
-



**Do not deny access to
individuals who are receiving
Medication of Addiction
Treatment or require
psychiatric medication**



Does your eligibility requirements exclude people who have limited access to resources?

Such practices increase disparities

Lack of stable housing

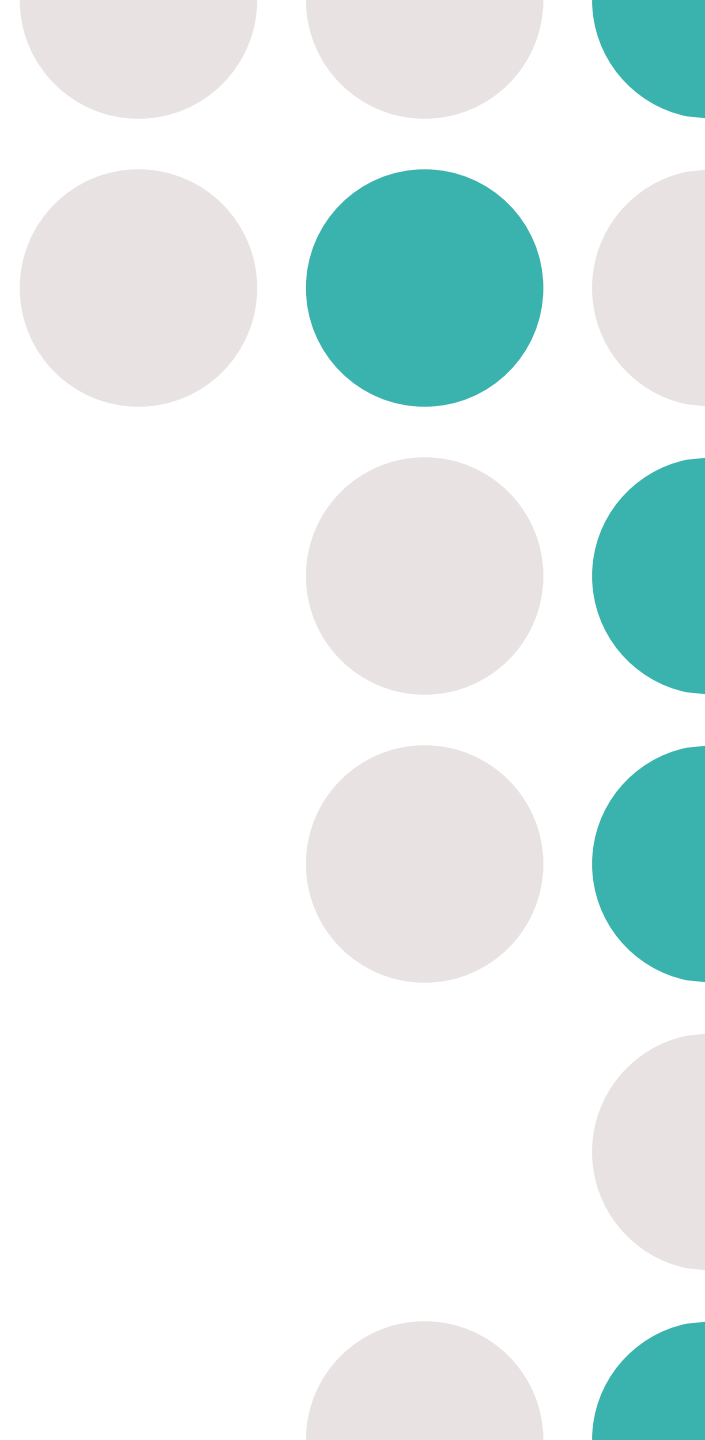
Reliable transportation

Payment of program fees and/or fines

Sober prior to entry

Are you able to take high value cases?

- Violent Offenses
- Evidence does not support blanket exclusions
 - Increases equitable access
 - Case-by-case
- Persons convicted of violent crimes do not recidivate at a higher rate
 - Less likely to be rearrested than those incarcerated for drug or property offenses
- Perform as well or better than persons charged with drug or property offenses



**You may
receive
funding to
these types
of
crime/history**

Veterans Treatment Court

Current charge or prior conviction
for violent misdemeanors

Prior violent felony arrest without
conviction

Bja.ojp.gov

Drug Sales Cases

- Evidence does not support blanket exclusions
 - If sale served to support a compulsive use disorder rather than financial gain, treatment court may be appropriate
 - Perform as well or better than persons charged with drug or property offenses
-

Are you involved in developing eligibility criteria that provides a legal incentive to participate?

- Diversion:
 - No jail/prison time
 - Continuance on probation
 - Discharge from supervision upon successful completion of the court
 - Driver's license for DWI Courts
 - Realistic expectations
 - Support
-

Prosecutor Role v. Defense Counsel

Defense attorneys will advocate for admission of probation violators and other aggravating cases with clients with substantial criminal histories

Prosecutors will be required to consider the wishes of victims and the community or other stakeholders

Principle

Do not mix together people with different risk and need levels

Consider: Alternative Tracks

Remember:

Requiring unneeded services makes people worse

Not providing sufficient services makes people worse

And mixing people with different needs together makes everyone worse



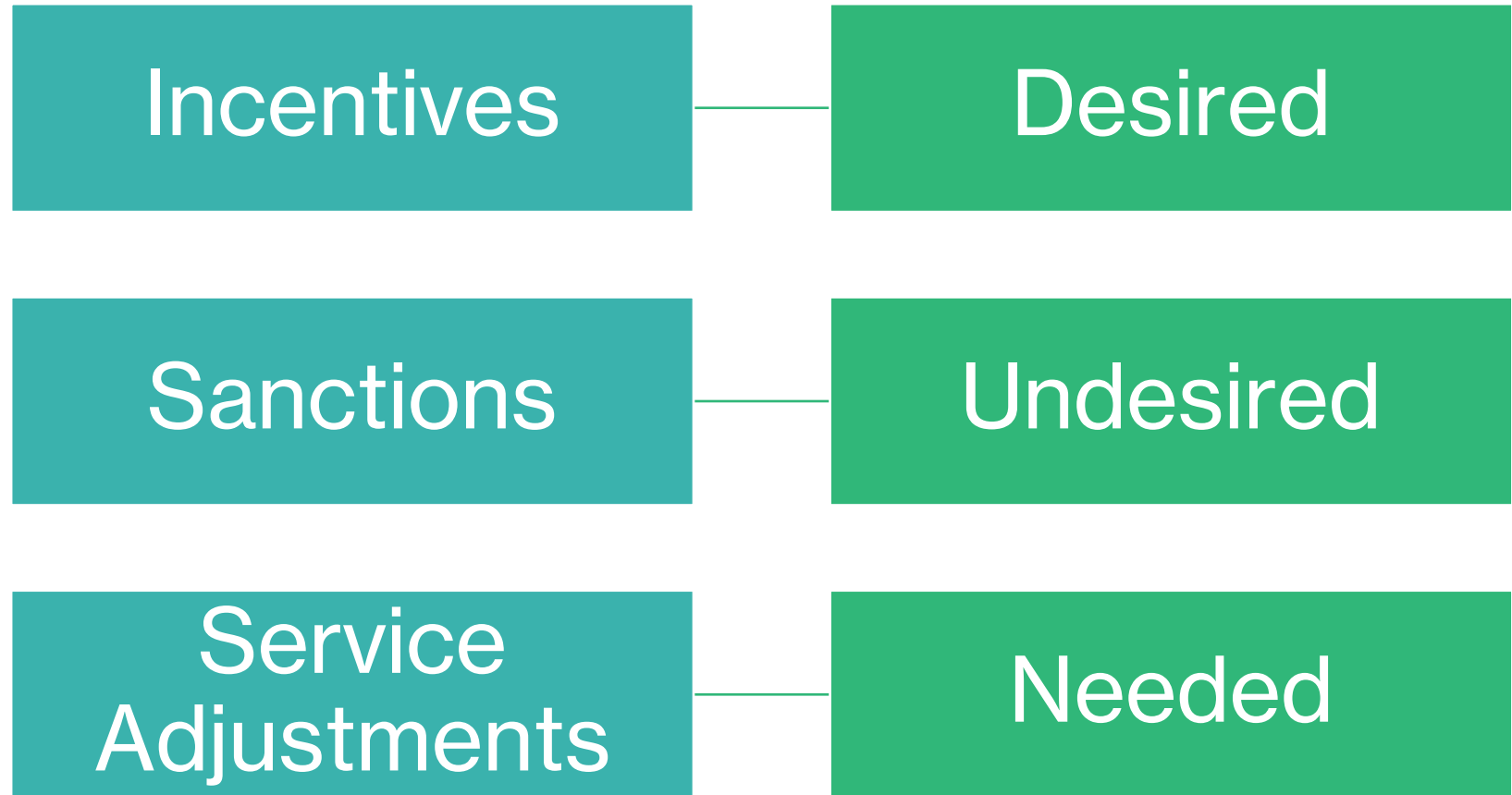


Adult Treatment Court Best Practices Standards IV

Incentives, Sanctions and Service Adjustments



Critical Distinction



Jail - Recommendation

- Not in the first 30-60 days
 - Only for proximal infractions after low/moderate have been unsuccessful
 - No more than 3-6 days in length
 - Not for distal infractions
 - Not for treatment – Not a level of care
 - Not to deter overdose
 - Not preventative detention - Negative consequences
-

Jail While Awaiting Treatment Bed

- Not to prevent overdoses or self-harm without first conducting an adversarial hearing and judge determines by clear and convincing evidence that:
 - Necessary to protect from imminent and serious harm, and
 - Safety cannot be ensured through less restrictive means
-

Prescription Medication

- Cannot refuse admission, impose sanctions, or discharge participants unsuccessfully for taking prescribed medications
 - MAT
 - Psychiatric
 - Medical conditions
- Require participant to inform the prescribing medical practitioner they are in treatment court and the execution of a release of information

Marijuana

Medical

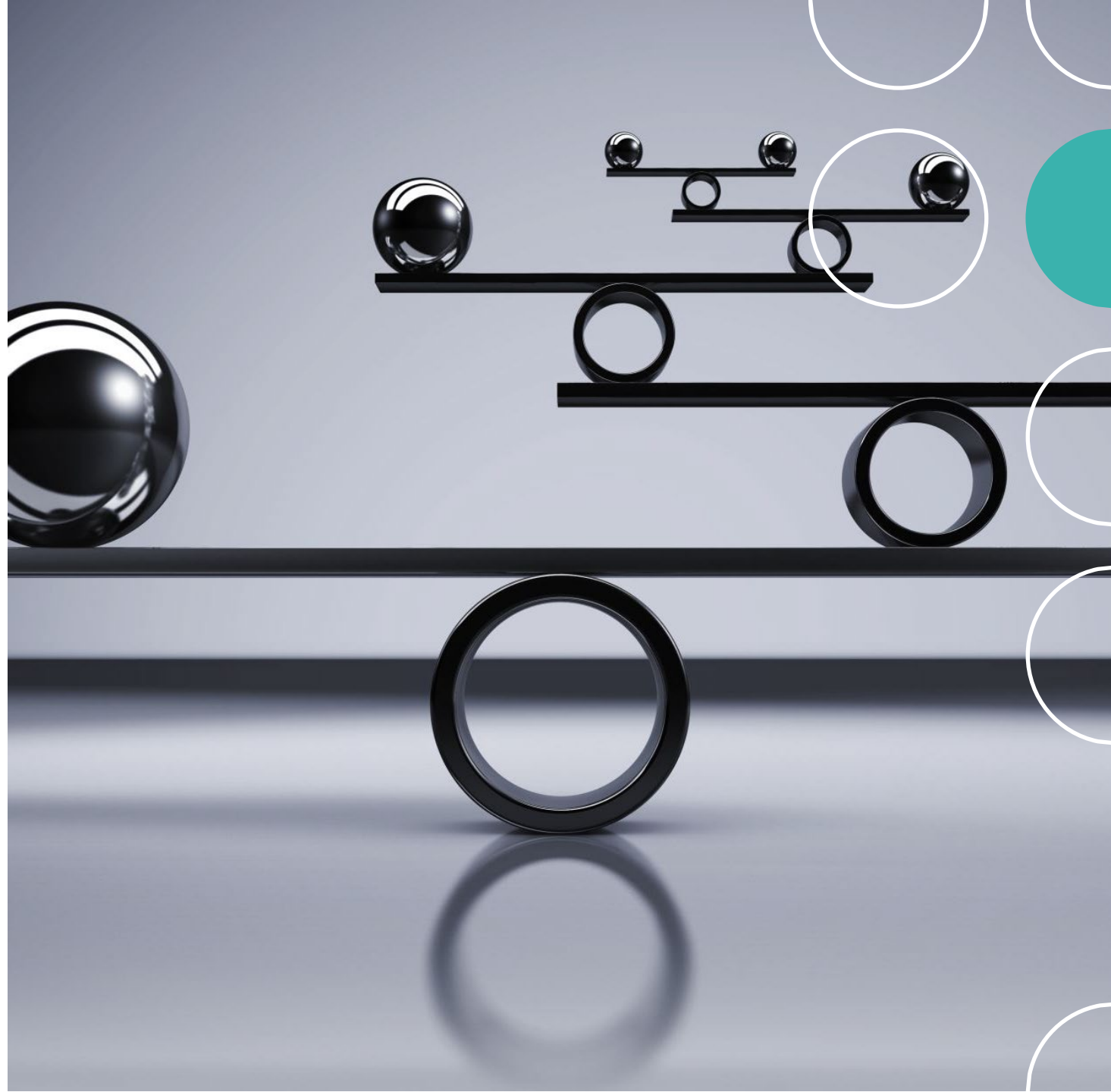
- Treat the same as other prescribed medication
- Look to state statute

Recreational

- Can prohibit if reasonably related to purposes of probation and sentencing, rehabilitation and/or public safety
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Adult Treatment Court Best Practices Standards II

Equity and Inclusion

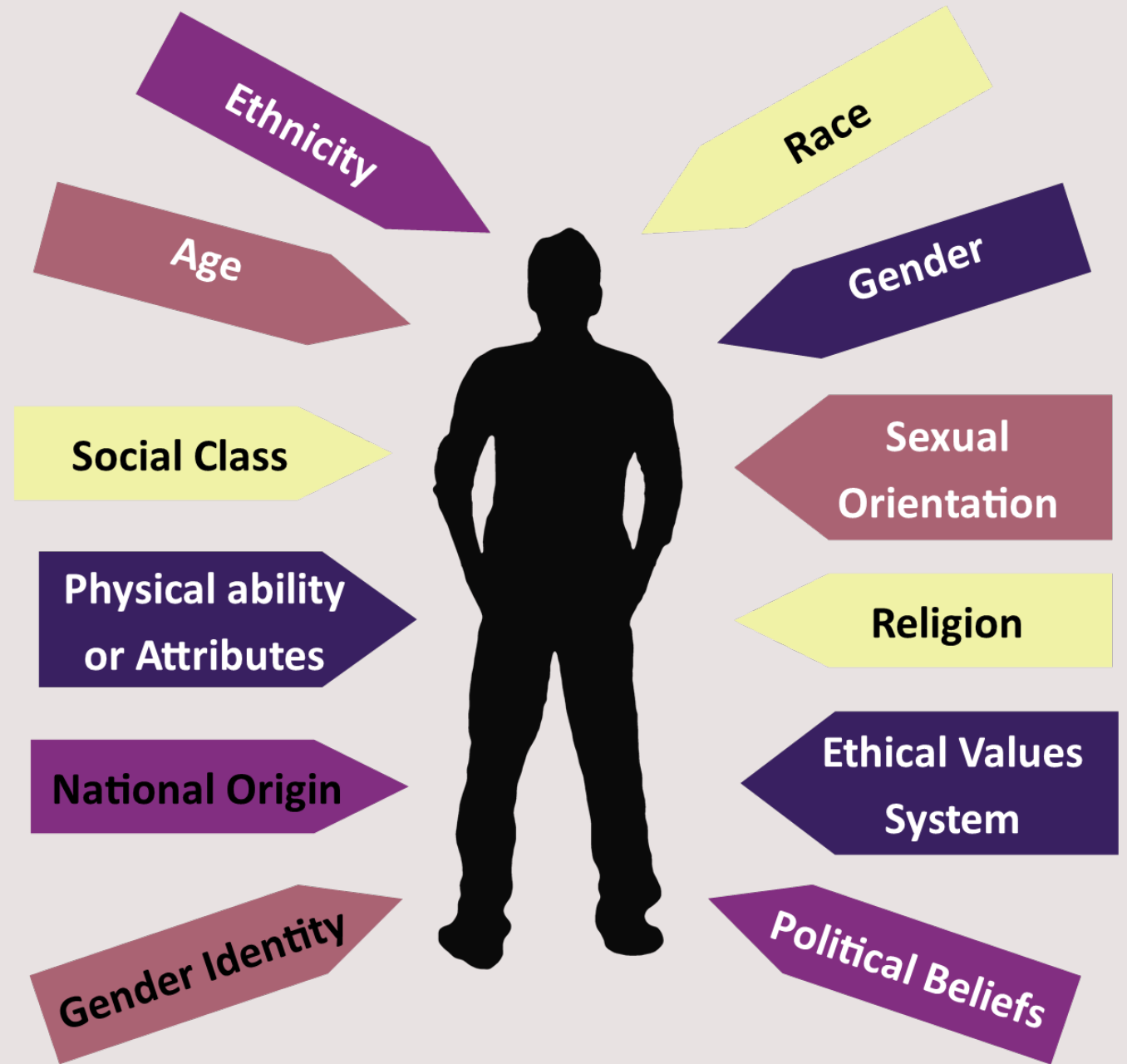


Diversity Is Reality

Diversity is the range of human differences.

Inclusion is an act and takes practice.

Equity acknowledges that we all do not start from the same place.



Be Careful - Intent vs. Impact

REQUIREMENTS FOR PROGRAM ENTRY WORTH EXAMINING IN GREATER DETAIL

- Transportation
- Program fees
- Sober
- Housing
- Attitude





Journal of Advancing Justice

- Research outlines practices that work
- Consider adding these to your program to improve outcomes

JOURNAL
for Advancing Justice

AJ Advancing
Justice

Helpful Resource:

The Equity
& Inclusion
Toolkit

E&I Assessment and Toolkit



Equity & Inclusion



EQUIVALENT ACCESS ASSESSMENT *and* TOOLKIT

Adult Drug Court
Best Practice Standard II