

The Role of Prosecutors in Drug Treatment Courts

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The Justice Programs Office, a center within the School of Public Affairs at American University (JPO at AU) is the home of the resource center for the BJA Adult Drug Court Program. This fact sheet is part of a series created to respond to significant issues facing the field. For more information about JPO at AU, go to www.american.edu/justice.

Prosecutors in drug courts take on different roles and responsibilities than of those found in criminal courts. In a traditional court of law, the prosecutor is obligated to seek justice by convicting those who have violated the law.¹ In drug courts, prosecutors are expected to use a therapeutic approach, with a willingness to work with others on the drug court team, and support the mission and goals of problem-solving courts.² Prosecutors in drug courts also work proactively through the creation of policies, procedures, and eligibility criteria, as well as in identifying areas that the drug court team can continue to improve on. A prosecutor can lead proactively within his or her team by consulting the core competencies, a few of which are expanded upon in this fact sheet.

Drug Court Prosecutor Core Competencies

The National Drug Court Institute's (NDCI) Adult Drug Court Planning Initiative outlined core competencies in their *Core Competencies Guide* that prosecutors can consult for guidance when working in a drug court.

1. Participates fully as a drug court team member, committing him or herself to the program mission and goals and works as a full partner to ensure their success.
2. The prosecutor, while in drug court, participates as a team member, operating in a non-adversarial manner, promoting a sense of a unified team member.
3. As part of the drug court team, in appropriate non-court settings (i.e. staffing), the prosecutor advocates for effective incentives and sanctions for program compliance or lack thereof.
4. Ensures community safety concerns by maintaining eligibility standards while participating in a non-adversarial environment which focuses on the benefits of therapeutic program outcomes.
5. Monitors offender progress to define parameters of behavior that allow continued program participation and suggest effective incentives and sanctions for program compliance.
6. Is knowledgeable about addiction, alcoholism and pharmacology generally and applies that knowledge to respond to compliance in a therapeutically appropriate manner.
7. Is knowledgeable of gender, age and cultural issues that may impact the offender's success.
8. Contributes to the team's efforts in community education and local resource acquisition.

The Gatekeeper and Developing Eligibility Criteria

One of the more unique roles of prosecutors in drug courts is their role as the gatekeeper. They create the conditions that a potential participant must meet to enroll in drug court, determining who is allowed in

and who is kept out. This role has evolved since drug courts first began, though. Originally, the only populations that were eligible for drug courts were those whom the prosecutor agreed to divert from the traditional criminal justice system.⁴ Core Competency 4 in the *Core Competencies Guide* by NDCI assists with addressing the challenging balance that prosecutors

now face in drug courts.⁵ Prosecutors can work to fulfill this competency in a number of ways, but because the prosecutor is perceived as the gatekeeper, they are tasked with developing or reviewing the eligibility criteria. This is also the medium to address community safety concerns in a consistent and objective manner. The transformed role of the prosecutor means that they are also responsible for repairing the gate as the drug court progresses, based on reviewing data that is collected on each participant.

A single person is incapable of predicting how a participant will progress through a drug court program, so to ensure due process, it is vital for prosecutors to develop eligibility criteria and use an evidence-based assessment tool. Criteria must be evidence-based in order to target the ideal population that will maximize cost savings and public safety outcomes, while maintaining consistency among the participant population.⁶ Introducing evidence-based tools to assess the risk and needs of a potential participant is the only way to remain consistent and objective. It can also assist with eliminating racial disparities among drug court populations. Some drug courts may screen a potential participant for suitability after conducting a risk and needs assessment. This is an unnecessary step, as it introduces subjectivity and undermines the results of the risk and needs assessment. The risk and needs assessment should determine whether or not an offender is eligible to participate in drug court.⁷ In addition to developing the criteria, prosecutors should monitor participant behavior for compliance and use their rights to work toward dismissal of participants who no longer meet eligibility criteria.⁸

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Commitment and Teamwork

Another way that prosecutors are proactive within the drug court team is by being fully committed to the program's mission and goals, as suggested by Core Competency 1 in the *Core Competencies Guide* by NDCI. This assists with finding a sense of camaraderie when working with defense counsel to ensure positive outcomes for participants. Additionally, a prosecutor can initiate a legal screen for cases referred to

the program and notify the judge or other attorneys that a potential participant may not be an ideal candidate, solely through identifying a legal disqualifier, which should be outlined in the eligibility criteria. They can also maintain updated records of participant performance and ensure participants have completed necessary waivers and contracts.⁹

It is important that the prosecutor approaches the drug court by working in a non-adversarial manner, outlined by Core Competency 2 in NDCI's *Core Competency Guide*. A prosecutor can fulfill this competency by being present at all drug court team meetings, also known as staffings, in addition to all drug court hearings. This provides an opportunity for prosecutors to share and obtain information regarding participant compliance and progress in treatment with other team members, without anyone committing ex parte communication. It also provides the prosecutor with an opportunity to advocate for effective sanctions and incentives when non-compliance needs to be addressed.

A study by NPC Research, *Exploring the Key Components of Drug Courts: A Comparative Study of 18 Adult Drug Courts on Practices, Outcomes, and Costs*,

examines the Key Components that have guided the formation of drug courts since 1997. This study provides evidence that certain strategies can provide courts with cost-saving outcomes, such as increased graduation and reduced recidivism rates.¹⁰ Drug courts where the prosecutor attended staffings saw more than two times greater savings in outcome costs.¹¹ Drug courts where prosecutors were expected to attend all hearings had 34% greater cost savings, compared to courts that did not require regular attendance by prosecutors, which only had 11% in cost savings. Average graduation rates for courts that required prosecutor attendance were found to increase by 15% when compared to those where attendance occurred occasionally or not at all.¹²

Advocating for Sanctions and Incentives

Core Competency 3 in NDCI's *Core Competency Guide* suggests that prosecutors must advocate for sanctions that are imposed immediately after non-compliant behavior.¹³ NPC Research provides evi-

dence that when sanctions are imposed immediately, it can result in a 100% increase in cost savings.¹⁴ Prosecutors should argue for a swift response so that opportunities to sanction non-compliant behavior or incentivize compliant behavior are not missed.¹⁵ Proactive prosecutors can use this area to research and develop innovative behavior modifications. Advocating for swift sanctions should not be mistaken for using jail as a sanction more often. Some prosecutors believe in the power of incarceration and may believe that the logical response to non-compliant behavior is sanctioning jail time. However, research shows that over-using jail as a sanction, a week or more at one time, can increase recidivism rates.¹⁶ Additionally, prosecutors should work to monitor records of sanctions and incentives for each participant to guarantee consistency within a drug court program.¹⁷

Common Challenges for Prosecutors

In developing a court's eligibility criteria, prosecutors may be challenged by balancing their responsibility to protect public safety. Many prosecutors may be concerned about allowing offenders with mental health disorders or non-drug-related charges into the program. Evidence suggests that including these populations can result in additional cost-saving outcomes.¹⁸ NPC Research found that drug courts that excluded offenders with serious mental health problems had over 50% less cost savings when compared to courts that did not exclude that population.¹⁹ Although drug courts may experience higher investment costs for offenders with non-drug-related charges because some may require more legal services, courts will experience a greater improvement in outcome costs, such as a lower recidivism rate.²⁰ Drug courts that accepted participants with non-drug-related charges, such as property theft, prostitution, and forgery, saw a 41% reduction in recidivism, when compared to programs that only accepted those with drug-related charges, which saw a 21% reduction in recidivism.²¹

When a drug court does not have a full-time prosecutor appointed to the program, ethical and legal considerations regarding communication must be taken into account. Ex parte communication occurs when information is shared by the prosecutor or defense counsel without the other side present. For example, ex parte

communication can occur when a prosecutor is absent from hearings or staffings. This is an unethical practice in a traditional court and has been deemed unethical in drug courts, too, making it even more imperative that a prosecutor is present for staffings and hearings. Another ethical and legal consideration that prosecutors must be wary of concerns communication with victims. A jurisdiction may allow someone to participate in the drug court program when they have been charged with an offense involving an identifiable victim. Prosecutors must keep victims informed about the progress of the defendant in their case while ensuring confidentiality of the participant enrolled in drug court. Confidentiality requirements are established by law, and through drug court policies and the court's memorandum of understanding. Prosecutors can disclose information to victims in general terms without disclosing the participant's status in drug court, but instead referring to the participant's status on probation.²²

Prosecutors may also come across the issue of collaboration with the defense counsel on the drug court team may be perceived as a conflict of interest interfering with each lawyer's primary responsibilities. This perception is based on a misunderstanding of what team

membership and zealous representation means within the drug court setting. Prosecutors should maintain their loyalty, specifically to public safety, while contributing ideas and information to the drug court team. Even so, prosecutors should remain conscious that working closely with defense counsel can cause a prosecutor to be easily discouraged from bringing up issues that may be appropriate for his or her role.²³

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Conclusion

Prosecutors working in drug courts must work to find the unique balance between protecting public safety and building consistent eligibility criteria that maximize cost-saving outcomes. Although they are often seen as the gatekeeper, prosecutors can use their leadership and commitment to the drug court program to encourage teamwork from other members of the drug court team. NDCI's *Core Competencies Guide* and *Ethical Considerations for Judges and Attorneys in Drug Courts* are excellent resources that can assist prosecutors with upholding their responsibilities,

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maintaining ethical standards, and overcoming potential challenges that they may encounter while working with a drug court program.^{24 25}

Endnotes

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