

SUSPICIOUS OF DRUG COURTS? DON'T BE.

A judge's perspective.

BY JUDGE DONALD DOWD

DRUG COURTS ARE A MURKY CONCEPT TO MANY CRIMINAL DEFENSE ATTORNEYS

who are naturally suspicious and reluctant to advise a client to enter a program that exists outside the realm of “normal” criminal courts tightly governed by the Texas Code of Criminal Procedure, Texas Penal Code, and other statutes.

This article will explain the basics of how a drug court is structured and what defendants may expect upon entering one. It should also address common concerns about drug courts and help defense attorneys advise their clients when participation in a drug court is an option.

Like other jurisdictions, Texas supports drug court programs as a means to reduce recidivism in cases where drug and alcohol addiction have played a role in the defendant's behavior and to save money as an alternative to incarceration.¹ A 2002 study by the Judicial Advisory Council indicated that those completing a drug court program had a recidivism rate of 3.4 percent compared to 26.6 percent in the general criminal population.² In a 2007 study conducted in Kentucky, the average annual cost per capita for persons in drug courts was \$3,083, compared to the per capita cost of \$17,194 for persons in prison.³

Statutory provisions for the creation and operation of Texas drug courts are in Section 123.002 of the Government Code.⁴ Senate Bill 462,⁵ passed by the 2013 regular session of the Legislature, creates a Specialty Courts Advisory Council appointed by the governor to establish uniform standards for Texas specialty courts.

There are currently 155 “specialty” or “problem-solving” courts in 46 different counties in Texas.⁶ Consequently, many defendants are receiving plea bargain offers from prosecutors that involve required participation in a drug court program. The offer may come in the form of pre-trial diversion or as a condition of probation.



Not everyone is a good candidate for a drug court program. Participation in the program requires a sincere desire to free oneself from addiction and a corresponding effort on that person's part.

While each drug court has somewhat different procedures concerning how it accomplishes its goals, all drug courts should have the key components recommended by the National Association of Drug Court Professionals Drug Court Standards Committee.⁷

COMPONENT NO. 1: Drug courts integrate alcohol and other drug treatment services with justice system case processing.⁸

This requirement basically means that, in order to operate and receive funding, a drug court must have the following professionals as actively participating team members: a trial court judge of a district court or county court at law, a prosecutor, a defense attorney, a probation



officer, a treatment representative, and a law enforcement officer.

COMPONENT NO. 2: Using a non-adversarial approach, all involved attorneys promote public safety while protecting participants' due process rights.⁹

Perhaps the most controversial aspect of the drug court program, this requirement means that the prosecutor and defense attorney must shed their traditional adversarial roles in favor of using a team approach to try to help the individual recover from addiction.

The prosecutor must have substantial say in who is accepted into the program. After all, most participants will enter through the plea bargain process. At the same time, the prosecutor must also be willing to agree that positive drug tests will not result in additional charges filed against the defendant.

The defense attorney's role is also controversial. Unlike

his or her usual responsibilities, the defense attorney is not concentrating on obtaining a not-guilty verdict or the least possible sentence for the client. Many defense attorneys do not understand that *they* will not be the defense attorney for the client in the drug court program.

The drug court defense attorney serves more of an advisory role by becoming familiar with the conviction and sentence of each defendant, advising each defendant of the nature and purpose of the drug court, reviewing the rules for participation, telling the defendant the consequences of failing to abide by the rules, and explaining the rights that the defendant is either temporarily or permanently giving up.

COMPONENT NO. 3: Eligible participants must be identified early and placed promptly in the drug court program.¹⁰

Studies have shown that a defendant is more likely to be amenable to treatment and less likely to be in denial immediately after an arrest.¹¹ Eligibility for entry into the program is based upon written criteria contained in the individual drug court's operating procedures manual.

A defense attorney should have a copy of his or her jurisdiction's drug court manual and be familiar with the requirements for eligibility.

Persons with prescription drug addiction are frequently denied admission because of the difficulty in monitoring that person's progress in the program.

As far as eligibility, perhaps the most important criterion is the recognition by the defendant of his or her addiction to drugs or alcohol and a willingness to undergo treatment for that addiction.

COMPONENT NO. 4: Drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services.¹²

Treatment is an integral part of the process; without treatment, relapse is almost guaranteed. Perhaps the most important component of treatment is the use of a licensed professional counselor, or other professional treatment provider, who holds group counseling sessions at least once per week for the drug court participants. Funded by the program, this provides participants with a resource that many would be unable to afford outside of the program.

Additional treatment services usually required include attendance at 12-step programs, medical detoxification when necessary, and sometimes, inpatient or outpatient treatment prior to or after entry into the program.

Co-occurring problems such as mental illness and primary medical problems will impair an individual's success in treatment and, therefore, have to be addressed by the drug court team. These professionals will usually help the individual apply for mental health services or other available treatment services.

COMPONENT NO. 5: Frequent alcohol and other drug testing to monitor abstinence.¹³

It is absolutely necessary for the drug court team to know when a person has relapsed. Frequent court-ordered drug testing is essential for following the person's progress in the program. Usually, this consists of random testing at least twice per week. A drug court team may use a color-coded call-in program in which a person who is assigned that color will be tested on that day.

To be effective, the testing must be totally random and frequent. The team is challenged to keep up with the nature and types of drugs that may be used by the defendant.

One of the most difficult aspects of drug testing is the diluted test. A test is considered diluted when it registers an abnormally low level of creatinine, a biological-waste material that is produced by muscle metabolism. A normal creatinine level is around 130 mg/DL.¹⁴ A urine sample that tests below 20 mg/DL for creatinine is considered by most drug courts to be intentionally diluted.

COMPONENT NO. 6: A coordinated strategy governs drug court responses to participant's compliance.¹⁵

Research shows that addiction is a chronic, relapsing condition. This means that overcoming the disease is a learning process. It is not uncommon for a participant to test positive for drugs or alcohol during the first stage of the program, and even in later stages.

When that occurs, the drug court team should try to fashion an appropriate response. Most teams use a reward and punishment approach. For example, a first relapse may result in a reprimand from the judge. Continued sobriety results in small rewards such as candy, compliments from the judge, participation in a prize drawing, or other positive reinforcement.

Depending upon the particular program, the participant may move from one stage to another by remaining drug-free for a certain amount of time, usually not less than 30 days without relapse during the earlier stages and incrementally increased periods during later stages.

For many participants, this may be the longest period of remaining drug-free that they have experienced in years. Remaining drug-free for an extended length of time will instill confidence and allow the participant to move through the phases and, eventually, graduate from the program. Most programs conduct a small ceremony at which friends and family are invited to celebrate the success of the participant.

While most drug court teams will tolerate numerous relapses and some behavioral failures, most also require the expulsion of a defendant who commits a new offense (other than use or possession of drugs).

COMPONENT NO. 7: Ongoing judicial interaction with each drug court participant is essential.¹⁶

The judge is not only the leader of the drug court team

but also has the final say in all decisions regarding the defendant. Like the prosecutor and the defense attorney, the judge's role in the drug court differs from the judge's traditional role as a trial judge. Essentially, the judge is to encourage appropriate behavior and to discourage and penalize inappropriate behavior. In other words, the judge and the team have received special training for their roles. While they are not chemists or physicians, they have been trained in the basics of the disease of addiction and psychopharmacology.¹⁷

In most drug court programs, the judge meets with the team prior to taking the bench. In this staff meeting, each drug court participant is discussed, and an appropriate action plan is put forth for that participant. The judge then meets with each participant in a status hearing before the bench. The exchange is usually informal and often lasts for several minutes, and as time goes on, the judge becomes very familiar with even the smallest details of the defendant's personal life.

The judge can use statutory provisions to help the drug court participant. For those who have lost their driver's license, the drug court judge is empowered, by statute, on his or her own motion, to grant an occupational drivers license to a drug court participant who otherwise meets the requirements for an occupational license.¹⁸

In addition, the judge has the power to suspend any requirement that a person work a specified number of community service hours.¹⁹ Finally, when a defendant successfully completes a drug court program (except those convicted of felony DWI), he or she may file a petition for an order of nondisclosure of criminal history records under Texas Government Code Section 411.081. If the court finds the order to be in the best interest of justice, it will enter an order of nondisclosure as if the defendant had received a discharge and dismissal under a typical deferred community supervision (with respect to records and files related to the defendant's arrest for which the defendant entered the program). The defendant must not have a prior felony conviction, be convicted of an Article 42.12, Section 3g offense or a sexually violent offense, or be convicted of another felony before the second anniversary of his or her successful completion of the program.

In Senate Bill 1477, the 78th Legislature also amended Chapter 552 of the Government Code to exempt records subject to an order of nondisclosure under the Public Information Act's Section 552.142(a) (2004).

Additionally, persons receiving a nondisclosure order are permitted to deny their arrest and prosecution reflected in the records subject to the order except in subsequent criminal proceedings under Section 552.142(b) of the Texas Government Code. Private entities that use records subject to a nondisclosure order to compile or disseminate criminal history for compensation are liable to the state for a civil penalty under Section 552.1425 of the

Texas Government Code.

COMPONENT NO. 8: Monitoring and evaluation measure the achievement of program goals and gauge effectiveness of the court.²⁰

Each drug court operating with a grant from the state of Texas is required to monitor and keep records of the progress of its participants and to report to the state data necessary to evaluate the program. One member of the drug court team is responsible for keeping up with the records of the program and making the necessary reports to the state. The governor's office periodically conducts audits of each program, sometimes sending personal representatives to observe the operation of the court.

COMPONENT NO. 9: Continuing interdisciplinary education promotes effective drug court planning, implementation, and operations.²¹

All drug court staff are required to continue to be involved in education and training. Many drug courts visit other drug courts to compare notes on what is effective and ineffective. Regional and national drug court training continues to provide innovative developments regarding the nature of addiction, drug testing standards and procedures, and responses to relapse and noncompliance.

COMPONENT NO. 10: Forging partnerships among drug courts, public agencies, and community-based organizations generates local support and enhances drug court effectiveness.²²

Drug courts are encouraged to provide seminars about the program and its goals to educate community organizations, law enforcement, and treatment and rehabilitation providers. Many drug court team members take volunteer drug court participants to Rotary and Lion's Club meetings, law-enforcement events, and other venues to give others an idea of how the program works and what it is doing for its participants. Ideally, the drug court team will meet regularly with faith-based and community organizations to help provide guidance and direction to the program.

HOW IT WORKS

As can be seen by the 10 key components, a drug court operates quite differently from an ordinary court. It is not an adversarial system in the traditional sense. The goal of everyone involved in the program—including the judge, the prosecutor, the treatment provider, the defense attorney, the law enforcement officer, and the community-supervision members—is to ensure that each participant successfully graduates.

The team will try to give effect to the variables involved in imposing an appropriate response to a violation of the drug court program. For example, new partic-

ipants are expected to relapse more frequently than those who have been in the program for as long as a year. Consequently, the sanctions for a new defendant will be less severe than those for a long-term participant.

On the other hand, if the participant repeatedly tests positive, is not progressing, is committing numerous behavioral violations, or commits a new offense, the drug court judge may choose to eject the participant from the program. Failure to successfully complete the program is usually considered a violation of the conditions of probation and may result in the filing of a motion to revoke probation and the assessment of sentence by the trial judge.

Where a defense attorney has a client whose drug or alcohol addiction has contributed to an offense, the offer of probation may be one in which the defendant agrees to serve time, accepts pre-trial diversion, or agrees to a term of probation with the successful completion of drug court as a condition.

CRITICISM

Some experts argue that a defendant is better off accepting a jail term rather than entering drug court.²³ They argue that defendants who fail to complete drug court are more likely to receive higher sentences. There is no anecdotal evidence that those defendants are receiving greater sentences than those whose probations are revoked for violating any other terms or conditions of probation.

These same experts also argue that a large percentage of drug court participants fail to complete the program. In truth, the degree of success of the participants is directly proportional to the degree in which a particular drug court fulfills the 10 key requirements and the degree of effort put forth by the participants themselves.

Not all who have studied the drug court model support it. In a 74-page paper, the National Association of Criminal Defense Lawyers issued a critical analysis of drug courts.²⁴ While recognizing that drug courts have some benefits, this report alleges that drug courts are not the answer to the nation's criminal drug problems and that resources spent on drug courts would be better utilized to promote other health services for defendants who are addicts. The report also asserts that decriminalization of drug possession is a better answer and notes the organization's perception of the "many alleged procedural flaws" and "weaknesses" of drug courts in protecting defendant's rights.

On the other hand, those in support of drug courts have given a reasoned rebuttal to the NACDL paper.²⁵ Even if some of the NACDL arguments have merit, they furnish little help to a defense attorney who has a client facing the choice of incarceration versus enrollment in drug court and who can ill afford to wait for NACDL's

suggested changes to be implemented (assuming they are ever adopted).

For the defense attorney whose client is an addict, to recommend accepting a plea offer of jail time in lieu of treatment in a drug court program, the defense attorney should keep in mind that the client's "graduation rate"—as measured by freedom-from-addiction—is likely to be zero unless the client is enrolled in some type of alternative treatment as part of the plea process. The recidivism rate for untreated addicts is much higher than those who receive treatment in a drug court or other program. If the client is seriously motivated to address not only the criminal charges but also the underlying addiction, drug courts should seriously be considered as an option.

ENSURING SUCCESS

How then, does the defense attorney determine whether a client is likely to be a successful candidate?

It is suggested that the following questions be considered:

1. Is the defendant truly addicted to drugs or alcohol or is this substance abuse simply a behavioral trait?
2. Does the defendant admit to having a serious problem with using drugs or alcohol?
3. Is the defendant truly motivated to change?
4. Does the defendant have the strength of character to make the changes needed?
5. Is the defendant aware of what exactly will be expected to successfully complete the program?
6. Does the defendant have the resources (transportation, money for fees, etc.) to comply?
7. Is the defendant aware of the consequences of failure to complete the program?
8. Is the defendant willing to accept the uncertainty of the program in lieu of the certainty of a jail term?
9. Has the defendant obtained a copy of the written requirements of the program for that jurisdiction and reviewed them along with an attorney?
10. Does the defendant have a support group (spouse, children, other family, etc.)?
11. Does the drug court in that jurisdiction operate in accord with the 10 key components?
12. Do the judge and defense attorney ensure that the defendant's procedural rights will be protected?

Hopefully, using these questions as a framework will assist defense attorneys in advising clients. The drug court program should not be entered into lightly, and it is not for everyone. Those involved with the criminal justice system do not all agree that it is an appropriate model. There is no question that unless a defendant shows a real

commitment, he or she is probably better off accepting another outcome. For those who do enter and successfully complete a drug court program and, thereby, obtain freedom from addiction, it is a life-changing event, both for the defendants and their families. **TBJ**

NOTES

1. Office of the Governor, Rick Perry, Criminal Justice Division Programs, Specialty Courts at <http://governor.state.tx.us/cjd/programs>.
2. Texas Dept. of Criminal Justice, Community Justice Assistance Division, March 3, 2003.
3. National Center for Policy Analysis, "Do Drug Courts Work?," Aug. 10, 2010, by Jessica Huseman.
4. Chapter 123.002 provides:

The commissioners court of a county or governing body of a municipality may establish the following types of drug court programs:

(1) drug courts for persons arrested for, charged with, or convicted of:

(A) an offense in which an element of the offense is the use or possession of alcohol or the use, possession, or sale of a controlled substance, a controlled substance analogue, or marijuana; or

(B) an offense in which the use of alcohol or a controlled substance is suspected to have significantly contributed to the commission of the offense and the offense did not involve:

(i) carrying, possessing, or using a firearm or other dangerous weapon;

(ii) the use of force against the person of another; or

(iii) the death of or serious bodily injury to another . . .

TEX. GOV'T CODE § 123.002.

5. Senate Bill 462 R., Leg. (2013). (Huffman).
6. Office of the Governor, Rick Perry, Criminal Justice Division Programs, Specialty Courts at <http://governor.state.tx.us/cjd/programs>, supra.
7. The National Association of Drug Court Professionals Drug Court Standards Committee. (1997, January). *Defining Drug Courts: The Key Components* (No. 96-DC-MX-K001). Washington, DC: U.S. Department of Justice, Office of Justice Programs.
8. Id.
9. Id.
10. Id.
11. Id.
12. Id.
13. Id.
14. The form of metric measurement: milligrams per deciliter.
15. Id.
16. Id.
17. The branch of psychology concerned with the effects of drugs on the mind and behavior.
18. Section 469.009, V.T.C.A., Health and Safety Code. See Tex. Gov't Code SS 123.008.
19. Section 469.008, V.T.C.A., Health and Safety Code. See Tex. Gov't Code SS 123.009.
20. Id.
21. Id.
22. Id.
23. "Want to Go to Drug Court? Say Goodbye to Your Rights", Mike Riggs, Reason online magazine (August 17, 2012).
24. "America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform," National Association of Criminal Defense Lawyers (2009).
25. "Position statement released by the National Association of Drug Court Professionals regarding the report released by the National Association of Criminal Defense Lawyers (NACDL)," National Association of Drug Court Professionals (2009).



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