

persons outside the drug court team, including others in the prosecutor's office (who are not working in drug court).<sup>59</sup>

Just like defense counsel, prosecutors (or any other member of the drug court team except for the judge, treatment provider or case manager) may waive their appearance at staffings or status hearings. (See text under Rule 1.3).

### **RULE 1.7: Conflict of Interest: General Rule**

**(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:**

**(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and**

**(2) each client consents after consultation.**

**(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:**

**(1) the lawyer reasonably believes the representation will not be adversely affected; and**

**(2) the client consents after consultation.**

**When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.**

*Relevant provisions from the ABA Standards for Criminal Justice*

#### Prosecutors

Standard 3-1.3: Conflicts of Interest

(a) A prosecutor should avoid a conflict of interest with respect to his or her official duties.

(f) A prosecutor should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests.

#### Defense counsel

Standard 4-3.5: Conflicts of Interest

(a) Defense counsel should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests.

---

<sup>59</sup> *Confidentiality Laws*, National Drug Court Institute, 1999.

(c) Except for preliminary matters such as initial hearings or applications for bail, defense counsel who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another.

### *Commentary*

#### Adverse representation of multiple clients

Representation of multiple participants in drug court proceedings ordinarily does not raise different conflict of interest problems than other legal settings. As long as clients are not “defendant(s) in the same criminal case” a lawyer may represent multiple participants in the same drug court program. Absent special circumstances, such representation of one client is neither directly adverse to representation of other clients in the same program nor materially limited by obligations to those other clients. Instead, the clients share a common goal of recovery.

While routine events in criminal and juvenile drug courts are unlikely to present conflicts, it is possible that clients interests’ may become adverse. As a general matter, lawyers should consider any situation in which advancing the interests of one client harms another as a conflict of interests. For example, if one participant accuses another of selling drugs, one of the two is likely to be severely sanctioned (either the accused for dealing or the accuser for lying). Separate attorneys should be appointed for the hearing on this matter (and possibly for all future proceedings, if neither participant is expelled). If defendants have conflicting defenses to the charges pending against them in the same criminal case, they should have separate counsel advising them on entry to drug court. If the charges are resolved by entry into drug court (*i.e.*, the program is post-plea), the same counsel may then represent the clients while in the drug court program after obtaining the informed consent of both defendants. If the charges are not resolved by entry into drug court, however, separate counsel should continue to represent the defendants in drug court, or at minimum should be provided where termination of the program is at issue.

Counsel in family drug courts may be more likely to encounter conflicts of interest than lawyers in criminal or juvenile drug courts. For example, multiple representation of parents may be impossible where an initial harmony of interests gives way to competition for custody or disparate progress in treatment (if both parents have AOD addictions). Not only at the outset of the representation but throughout, the lawyer should ask whether representation of one client’s best interests will interfere with representation of another client’s best interests. Within the criminal context, any perception of conflict should be resolved in favor of separate representation. The other option, client consent, should be used only

when there is little risk of prejudice. Outside of the criminal context, the lawyer may seek client consent for most conflicts, but such consent requires full disclosure of the nature and risks of the conflict.

### Conflicts and the lawyer as “team member”

To some, the idea of the prosecutor and defense counsel collaborating as drug court “team members” raises at least the appearance of a conflict of interest: the lawyer’s membership in the team interferes with loyal performance of the lawyer’s primary duties to the client (whether the defendant or the state). As noted in the Overview to the lawyers’ section of this publication, this concern rests on a misunderstanding of the concept of team membership and possibly also on a misunderstanding of the concept of zealous representation. Within the drug court team and its shared goal of reducing participants’ AOD use and involvement with the criminal justice system, prosecutors and defense counsel have distinct roles and distinct loyalties. The fact that these roles are carried out with a (rebuttable) presumption of cooperation does not constitute a conflict of interest. That said, prosecutors and defense counsel should be conscious of the possibility that the close professional relationships and trust that frequently develop within the drug court team might dissuade them from pressing issues when appropriate to their distinctive roles.

## **RULE 1.14: Client under a Disability**

**(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client/lawyer relationship with the client.**

### *Commentary*

#### Disability due to intoxication

Because drug court participants are, by definition, substance abusers, the possibility that a client will be incapacitated is always present. This is a particular concern during early stages of the program – at precisely the time that the defendant is expected to make significant decisions about entry into the program and waiver of legal rights. Drug court lawyers should learn to recognize signs that their clients are under the influence. When alcohol or drug ingestion has temporarily disabled a client, the client is legally incapable of executing waivers or participating in judicial proceedings. The attorney should postpone consultation

with the client until the client recovers. If the client is severely intoxicated, the attorney should seek medical treatment for the client.

### Dual diagnosis

Alcohol or drug abuse can often mask, and sometimes exacerbates, underlying mental illnesses such as depression and schizophrenia.<sup>60</sup> Counsel should be aware of programs that specialize in treating patients with both AOD addiction and mental illness and recommend placement in such programs when appropriate. The fact that a client may be suffering from mental illness “does not diminish the lawyer’s obligation to treat the client with attention and respect. A client with a mental infirmity may still possess the ability to understand, deliberate upon, and reach reasonable conclusions about matters affecting his or her own well-being.”<sup>61</sup> Counsel should work with other drug court team members to encourage that same level of understanding of the special challenges facing dually diagnosed participants.<sup>62</sup>

## **RULE 2.1: Advisor**

**In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.**

*Relevant provisions from the ABA Standards for Criminal Justice*

### Defense counsel

Standard 4-5.1: Advising the Accused

(a) After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

---

<sup>60</sup> See generally, *Assessment and Treatment of Patients with Coexisting Mental Illness and Alcohol and Other Drug Abuse*, Treatment Improvement Protocol (TIP) Series 9, Center for Substance Abuse Treatment, Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services, Washington, DC, 1995.

<sup>61</sup> ABA Criminal Justice Standard 4-3.1 comment.

<sup>62</sup> For more information on dual diagnosis, contact the National Mental Health Association at 703-684-7722 or [www.nmha.org](http://www.nmha.org).

(b) Defense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea.

### *Commentary*

Rules 1.2 and 1.4 focus on the lawyer's duty to support the client's informed choices. Rule 2.1 broadens the definition of the information that the lawyer is expected to provide to the client. In communicating with defendants eligible for, or participating in, drug court, counsel should provide complete information about the client's legal predicament and options. However, consideration of risks and benefits need not be limited to the short term (*i.e.*, the sanctions that the defendant faces in the matter at hand). Consistent with the duty to provide "independent professional judgment and render candid advice," the lawyer may "discuss[] with the defendant the long-term benefits of sobriety and a drug-free life." A lawyer who encourages suitable clients to enter drug court does not act paternalistically (*i.e.*, usurping the client's autonomy) so long as the lawyer truthfully states the client's options outside of drug court and that the ultimate choice belongs to the client.

It is appropriate that the attorney advise the client of the advantages of the drug court, regardless of the attorney's personal opinions, and any attorney who does not do so may not be serving his/her client's best interests. This advice, however, must be given within the context of full discussion of the legal issues presented by the case, alternative dispositions open for the client's consideration and the legal and other implications of these various alternatives. The advice provided by the defense attorney to a client who is eligible for drug court must meet the standards of providing adequate counsel. This assures that, in the event that the client decides to enter the drug court, any informed consent forms that he or she may execute are fully voluntary and knowing of their implications and consequences.<sup>63</sup>

Once in drug court, the lawyer's counseling role includes not only encouraging the client to progress in treatment but also helping the client to address other problems that may be impeding his or her recovery, such as homelessness or unemployment.

### **RULE 3.1: Meritorious Claims and Contentions**

**A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification**

---

<sup>63</sup> *Confidentiality Laws*, National Drug Court Institute, 1999.

**or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.**

*Commentary*

The last sentence of Rule 3.1 raises squarely the question of zealous advocacy in drug court: must defense counsel mount a vigorous legal challenge to every threatened sanction against a client? This provision of Rule 3.1 should be understood as an exception to the first sentence's prohibition of frivolous claims and defenses and is merely permissive. Defense counsel cannot be sanctioned for "putting the government to the test," but ethical responsibility to the client does not mandate such a response. Use of available defenses, like other attributes of representation, should be guided by the client's best interest. This is a norm determined through the lawyer's consultation with the client, rather than an abstract understanding of zealous representation.

At times, vigorous defense of the client may be required. Although the drug court is often described as a "nonadversarial proceeding," it is nonadversarial only in terms of the relationships of the treatment providers and the justice system officials involved in the program. It takes into account their recommendations regarding the treatment regime and responses to noncompliance and progress that the drug court "team" believes to be in the client's best interests.

Even if the client admits to certain allegations that may be lodged against him or her, the attorney should object if the sanctions imposed are disproportionate to the offense or inconsistent with sanctions imposed on similarly situated participants. Likewise, the attorney should interpose himself or herself between the client and the court if the judge asks questions likely to elicit irrelevant and prejudicial information from the client or if the court bases its decision on information that the attorney deems unreliable.<sup>64</sup> In these situations, it may be better to ask for a sidebar rather than directly contradict the judge in front of the participant.

In other circumstances, a vigorous legal effort can be counterproductive for the client's progress in treatment. For example, if a client admits to the lawyer that he or she has relapsed, and the relapse has been detected through urinalysis, but the lawyer perceives procedural defects in the urinalysis collection and reporting, the lawyer should discuss with the client the possibility of admitting to the relapse and accepting the court's sanction. The lawyer should directly address the problem of

---

<sup>64</sup> Burke, Robert, "Reconciling Drug Court Participation with Defender Ethical Standards, *Indigent Defense*, Vol. 1, No. 3 Nov/Dec. 1997), p. 6.

relapse rather than raise the available defenses. The decision to forego the procedural defense, however, should be made by the client (*see* Rule 1.2), subject to the attorney's right to withdraw from the representation under Rule 1.16.

### **RULE 3.2: Expediting Litigation**

**A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.**

*Relevant provisions from the ABA Standards for Criminal Justice*

#### Prosecutors

##### Standard 3-2.9: Prompt Disposition of Criminal Charges

(a) A prosecutor should avoid unnecessary delay in the disposition of cases. A prosecutor should not fail to act with reasonable diligence and promptness in prosecuting an accused.

#### Defense counsel

##### Standard 4-1.3: Delays; Punctuality; Workload

(a) Defense counsel should act with reasonable diligence and promptness in representing a client.

##### Standard 4-3.2: Interviewing the Client

(a) As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused. In so doing, defense counsel should probe for all legally relevant information without seeking to influence the direction of the client's responses.

##### Standard 4-3.6: Prompt Action to Protect the Accused

Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights.

#### *Commentary*<sup>65</sup>

As stated in Key Component #3, the effectiveness of drug court depends in part on compressing the time between arrest, a participant's entry into the program, and commencement of treatment. Expediting the time for the screening, program

---

<sup>65</sup> For further review, *see* ABA Model Rule 1.3 and Commentary.

eligibility determination, and initial drug court hearing is therefore a critical component of the drug court process. In order to have adequate legal advice regarding the appropriateness of the drug court, it is vital that clients meet with counsel as soon as possible after their arrest or other event precipitating entry into drug court. As noted in this publication's commentary to Rules 1.2 and 1.3, the need for a client's consent may arise before counsel has adequate information regarding the case. In that situation, counsel should contact informed parties (usually police officers or prosecutors) to obtain additional information. Where adequate information still is not available, counsel may arrange for conditional entry into a drug court program, subject to withdrawal for defined factual grounds (e.g., a negative urinalysis). Defense counsel and prosecutors should establish mechanisms for rapid exchanges of information with safeguards for confidentiality and other interests of both parties.

### **RULE 3.3: Candor toward the Tribunal**

**(a) A lawyer shall not knowingly:**

- (1) make a false statement of material fact or law to a tribunal;**
- (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;**
- (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or**
- (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.**

**(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.**

**(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.**

*Relevant provisions from the ABA Standards for Criminal Justice*

#### Prosecutors

Standard 3-5.6: Presentation of Evidence

(a) A prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity.

#### Defense counsel

#### Standard 4-7.5: Presentation of Evidence

(a) Defense counsel should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to take reasonable remedial measures upon discovery of its falsity.

#### *Commentary*

This Rule prohibits a lawyer from deceiving the court or allowing a client or witness to do so. The Rule does not require full disclosure by the lawyer of all information about the client, even if the information would be material to the proceeding. For example, if a client informs the lawyer that the client has used a prohibited substance but the use has not been detected, neither the lawyer nor the client is obligated to disclose this fact. Where a client unambiguously lies to the court, however, Rule 3.3 imposes a duty of candor that supercedes the lawyer's duty of confidentiality.

This situation is likely to arise with some regularity in drug courts. It is important to keep in mind that drug court defense attorneys, as in traditional courtrooms, should always encourage the client to be honest. This candor, however, takes on additional importance in drug court, as client honesty is a critical element to his or her recovery and to the success of the drug court program.

In some cases, clients may falsely deny having used drugs recently, or they may affirmatively deny that they have "water loaded" to distort urinalysis results. Drug court attorneys should handle these situations just as attorneys in other court proceedings would. First, they should privately exhort the client to be truthful, emphasizing the benefits of doing so and the possible consequences of attempting to perpetrate a fraud on the court. This is the best and recommended practice for drug court defense counsel. If that fails, however, the attorney should seek to withdraw from representing the client. (However, this may pose a problem to the client and the attorney on two levels. First, it signals the judge that the client is not being truthful. Second, it is difficult to assign another defense attorney to a drug court client.) Then, as a last resort, the attorney must disclose the client's fraud. Although crises of this nature will undoubtedly strain the lawyer/client relationship, demanding honesty from the client both fulfills the attorney's ethical duty and promotes the client's recovery.

A more difficult issue arises with respect to a client's criminal history. Where a client has a criminal record that would render the client ineligible to participate in drug court, but the prosecution has not discovered the client's record, must the defense counsel disclose to the court the client's ineligibility? Resolution of this question turns on whether the client or defense counsel can be deemed to have impliedly represented the client's eligibility to the court. Counsel who knows of a client's ineligibility because of criminal history, and knows that the court is

unaware of the client's record, should ensure that the client has not misrepresented the client's history in a screening interview. Failure to correct such a misrepresentation clearly violates Rule 3.3.

### **RULE 3.4: Fairness to Opposing Party and Counsel**

**A lawyer shall not:**

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;**
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;**
- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;**
- (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;**
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of acts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or**
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
  - (1) the person is a relative or an employee or other agent of a client; and**
  - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.****

*Relevant provisions from the ABA Standards for Criminal Justice*

#### Prosecutors

Standard 3-3.11: Disclosure of Evidence by the Prosecutor

- (a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of

the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

(b) A prosecutor should not fail to make a reasonably diligent effort to comply with a legally proper discovery request.

### Defense counsel

Standard 4-4.5: Compliance with Discovery Procedure

Defense counsel should make a reasonably diligent effort to comply with a legally proper discovery request.

### Commentary

The adversarial system contemplates that the evidence in a case is to be marshaled competitively by the contentious parties. However, drug courts are “nonadversarial.” Despite the “nonadversarial” nature of the drug court proceedings, however, the attorney’s ethical obligation to maintain the privilege of all communication with his or her client conducted in the course of his or her representation overrides any request to disclose information that might otherwise be available. The attorney, nevertheless, must not take any action to falsify or affirmatively withhold evidence from the court that materially bears on the defendant’s situation, his or her eligibility for the program, or his or her performance while participating.

## **RULE 3.5: Impartiality and Decorum of the Tribunal**

**A lawyer shall not:**

**(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;**

**(b) communicate ex parte with such a person except as permitted by law; or**

**(c) engage in conduct intended to disrupt a tribunal.**

*Relevant provisions from the ABA Standards for Criminal Justice*

### Prosecutors

Standard 3-2.8: Relations With the Courts and Bar

(b) A prosecutor’s duties necessarily involve frequent and regular official contacts with the judge or judges of the prosecutor’s jurisdiction. In such contacts the prosecutor should carefully strive to preserve the appearance as well as the reality of the correct relationship which

professional traditions, ethical codes, and applicable law require between advocates and judges.

(c) A prosecutor should not engage in unauthorized ex parte discussions with or submission of material to a judge relating to a particular case which is or may come before the judge.

#### Standard 3-5.2: Courtroom Professionalism

(a) As an officer of the court, the prosecutor should support the authority of the court and the dignity of the trial courtroom by strict adherence to codes of professionalism and by manifesting a professional attitude toward the judge, opposing counsel, witnesses, defendants, jurors, and others in the courtroom.

### Defense counsel

#### Standard 4-7.1: Courtroom Professionalism

(a) As an officer of the court, defense counsel should support the authority of the court and the dignity of the trial courtroom by strict adherence to codes of professionalism and by manifesting a professional attitude toward the judge, opposing counsel, witnesses, jurors, and others in the courtroom.

(b) Defense counsel should not engage in unauthorized ex parte discussions with or submission of material to a judge relating to a particular case which is or may come before the judge.

### *Commentary*

### Ex parte contacts

Because of the nature of the drug court process, ex parte contacts with the drug court judge are not uncommon. For example, treatment providers often provide the judge with information relating to participants without counsel for any of the parties present. Ex parte contacts involving non-lawyers are governed by Canon 3B(7) of the Code of Judicial Conduct.<sup>66</sup> With few, narrowly circumscribed exceptions, the fact and substance of all ex parte contacts should be disclosed promptly to all parties to the matter.

While some ex parte contacts may be appropriate in the drug court context, lawyers on the drug court team should avoid all ex parte contacts with the judge. The court should develop a mechanism to provide notification to the team in

---

<sup>66</sup> See this publication's commentary on Canon 3B(7) at pp. 9-11 of this text.

situations that warrant emergency action. Ideally, the mechanism should permit simultaneous notice to all team members.

### Courtroom decorum

The requirements of decorum in Rule 3.5 and Criminal Justice Standards 3-5.2 and 4-7.1, like the parallel requirement in Canon 3B(3) of the Code of Judicial Conduct, may be raised by those who witness clapping and other celebrations in drug court. However, decorum does not mean staid detachment; it indicates conduct appropriate to the dignified and effective functioning of the court. Where celebrations of success are consistent with principles of impartial treatment of participants and respect for the judicial office, both prosecutors and defense counsel may participate in these celebrations.

### **RULE 3.6: Trial Publicity**

**(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.**

**(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.**

**(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).**

### **RULE 3.8: Special Responsibilities of a Prosecutor**

**The prosecutor in a criminal case shall:**

**\*\*\*\***

**(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6;**

**(g) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.**

*Relevant provisions from the ABA Standards for Criminal Justice*

Prosecutors

Standard 3-1.4: Public Statements

(a) A prosecutor should not make or authorize the making of an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the prosecutor knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding.

(b) A prosecutor should exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under this Standard.

Defense counsel

Standard 4-1.4: Public Statements

Defense counsel should not make or authorize the making of an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if defense counsel knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding.

*Commentary*

Drug courts often experience tension between the benefits and costs of publicity. On the one hand, drug courts need to develop ties to, and support within, the community, connections that depend on public awareness of drug court. On the other hand, participants have significant expectations of confidentiality (expectations backed by law) that could be damaged by even the most positive publicity. For example, the common practice of inviting media to drug court graduations creates a risk that protected information about participants, including the fact of their alcohol and other drug (AOD) treatment, will not only be disclosed but broadcast. To assure compliance with applicable law, each drug court should establish procedures for media and public relations and develop guidelines about the types of information that can be disclosed and the persons entitled to make such disclosures.<sup>67</sup> The best practice with respect to the media is to let the participants

---

<sup>67</sup> For further information about confidentiality in drug court, see *Confidentiality Laws*, National Drug Court Institute, 1999.

know, in advance, that the media will be present. Ask each participant if he or she would like to be featured on television, the radio or in print and ask him or her each to sign a consent form with respect to the specific media event. All efforts to shield participants from identification should be made unless the individual specifically agrees, in writing, to appear.

The risks associated with discussing specific cases in public are not present when a lawyer speaks about the justice system in general terms. Attorneys in drug courts should try to educate members of their local bar about drug courts, such as by conducting training sessions or writing articles in local legal publications. Public defenders and other attorneys with large drug court practices should encourage and assist other lawyers in enrolling eligible clients in the drug court program.

### **Rule 4.1. Truthfulness in Statements to Others**

**In the course of representing a client a lawyer shall not knowingly:**

- (a) make a false statement of a material fact or law to a third person; or**
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 1.6.**

*Relevant provisions from the ABA Standards for Criminal Justice*

#### Prosecutors

Standard 3-3.11: Disclosure of Evidence by the Prosecutor

(c) A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.

Standard 3-4.1: Availability for Plea Discussions

(c) A prosecutor should not knowingly make false statements or representations as to fact or law in the course of plea discussions with defense counsel or the accused.

Standard 3-5.2: Courtroom Professionalism

(a) As an officer of the court, the prosecutor should support the authority of the court and the dignity of the trial courtroom by strict adherence to codes of professionalism and by manifesting a professional attitude toward the judge, opposing counsel witnesses, defendants, jurors, and others in the courtroom.

## Defense counsel

### Standard 4-3.7: Advice and Service on Anticipated Unlawful Conduct

(b) Defense counsel should not counsel a client in or knowingly assist a client to engage in conduct which defense counsel know to be illegal or fraudulent but defense counsel may discuss the legal consequences of any proposed course of conduct with a client.

### Standard 4-6.2: Plea Discussions

(c) Defense counsel should not knowingly make false statements concerning the evidence in the course of plea discussions with the prosecutor.

### Standard 4-7.5: Presentation of Evidence

(a) Defense counsel should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to take reasonable remedial measures upon discovery of its falsity.

## *Commentary*

A lawyer is required to be truthful when dealing with others on a client's behalf but generally has no affirmative duty to inform an opposing party of relevant facts. This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6.

During the course of representing a drug court client, the defense attorney may become aware of numerous facts that bear directly or indirectly on the client's recovery (*e.g.*, past sexual exploitation or drug use by family members). This information, obtained during the course of the attorney/client relationship, is subject to the attorney/client privilege. The defense attorney, however, may also learn of criminal activities of the client (*e.g.*, actively selling drugs) which might otherwise preclude the client's participation in the drug court program as well as subject him or her to prosecution for these criminal acts.

Unless requested by the client, the attorney does not have a duty to disclose information that has no bearing on the client's eligibility for the drug court program or does not contribute to the perpetration of a fraud upon the court. In situations in which the information contributes to a fraud perpetrated upon the court or to the concealment of a crime, the requirements of Rule 3.3 apply.

## **RULE 4.2: Communicating with Person Represented by Counsel**

**In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.**

*Relevant provisions from the ABA Standards for Criminal Justice*

### Prosecutors

#### Standard 3-3.10: Role in First Appearance and Preliminary Hearing

(a) A prosecutor who is present at the first appearance (however denominated) of the accused before a judicial officer should not communicate with the accused unless a waiver of counsel has been entered, except for the purpose of aiding in obtaining counsel or in arranging for the pretrial release of the accused. A prosecutor should not fail to make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel.

### *Commentary*

Because of an atmosphere of cooperation that often (and rightly) surrounds drug court proceedings, a participant may attempt to discuss his or her case with a prosecutor<sup>68</sup> rather than his or her own counsel. Though the prosecutor may provide the participant with strictly factual information (*e.g.*, about the requirements for progress to the next phase of treatment), a better practice is for the prosecutor to refer all inquiries from participants to defense counsel or the drug court coordinator. It is important for both participants and the lawyers themselves to understand that observance of distinct roles promotes the unity of the ultimate purpose in drug court.

## **CONCLUSION**

As delineated throughout the text of this publication, the ethical duties of judges and attorneys in drug court do not significantly differ from those in traditional courtrooms. However, it is important for these practitioners to be aware of, and practice, a heightened ethical obligation in the drug court program. With

---

<sup>68</sup> This also occurs when a participant tries directly to contact the judge. For more information on judicial contact, *see* Code of Judicial Ethics, Canon 3B(7) on ex parte contacts with participants.

some education on key issues, drug court judges and lawyers can operate in drug court and adhere to the strict ethical standards set forth for them in the Model Code of Judicial Conduct, the Model Rules of Professional Conduct, and the ABA Standards for Criminal Justice. Drug court practice can enable judges and attorneys to fulfill the highest aspirations of their professional ethics while embarking on an innovative way to stop the cycle of drug addiction and crime.