

DRAFT
MEMORANDUM

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From: Arwen Gaddis, arwengaddis @ vermontlaw.edu
Date: November 14, 2013
Re: Ethics of Pretrial Services Programs

INTRODUCTION

This memo addresses information regarding the ethics of a defense attorney advising a defendant to participate in a pretrial service program, such as the Rapid Intervention Community Court, Rapid Referral Program, or the Sparrow Project. This presents some dilemmas for a defense attorney, as a client could make inculpatory statements, including admissions or confessions, while participating in these types of programs. A defense attorney would need to be prepared if these statements could be used against the client in later judicial proceedings. The memo will also discuss participation in other non-judicial pretrial programs like Alcoholic Anonymous.

Initially, an attorney should consider the relevant Rules of Professional Conduct that may be specifically implicated by a defendant's participation in pretrial service programs. Federal statutes may also provide direction regarding confidentiality and immunity from prosecution. The research revealed no case law directly relating to a defense attorney's responsibilities; however the cases referred to below can help illuminate a defense attorney's advice to his or her client. Statutory protections as well as contractual arrangements regarding confidentiality and immunity are also important considerations about participation in these types of programs. The structure of treatment courts and certain pretrial programs may present particular conflict issues of which a defense attorney needs to be aware. Finally, since a major component of some

pretrial services programs and treatment courts is open communication, ethical responsibilities exist in relation to promoting a balance between the participant's interests and the need for this communication.

This memo will address each of these considerations in depth, beginning with the Rules of Professional Conduct. Next it will examine relevant federal statutes and regulations and their applicability to programs in Vermont, as well as case law regarding these federal directives. Third, this memo will address additional case law that emphasizes potential challenges which defense attorneys should consider. Then, relevant secondary sources highlight issues of conflict and confidentiality. Finally, a checklist is provided, consisting of major issues for attorneys involved in a treatment court or pretrial service program to consider.

RULES AND STATUTORY GUIDANCE

Rules of Professional Conduct

The use of pretrial service programs and/or treatment courts could present issues which specifically implicate certain rules from the Vermont Rules of Professional Conduct “V.R.Pr.C.” Among these are rules 1.1, 1.2, 1.4, 1.6, 1.14, 3.3, and 3.7. V.R.Pr.C. For a more detailed look at individual rules of conduct, the National Drug Court Institute has published a book which addresses each of the ABA Model Rules of Professional Conduct as applied to the drug court scenario. *ETHICAL CONSIDERATIONS FOR JUDGES AND ATTORNEYS IN DRUG COURT* (National Drug Court Institute, 2001), *CRITICAL ISSUES FOR DEFENSE ATTORNEY’S IN DRUG COURT*, (National Drug Court Institute 2003).

Rule 1.1 discusses an attorney’s competency to represent clients. V.R.Pr.C. 1.1. Regarding Rule 1.1, the National Drug Court Institute notes that an attorney needs to be familiar with the program in which a client may wish to participate. *Id.* at 10. Because defendants are

encouraged to participate in pretrial services or treatment courts relatively soon after the event resulting in arrest, it is necessary to gain access to discovery quickly. *Id.* at 12. This allows the attorney to be well-informed in order to best advise the client. *Id.*

Rule 1.2 contemplates the scope of an attorney's representation and their authority to make certain decisions. V.R.Pr.C. 1.2(a). Choosing to participate in pretrial service programs could be considered a tactical decision, and therefore a decision at the attorney's discretion. However, it is more likely to be considered a determination regarding the direction a case will take and "the purpose to be served by legal representation," and therefore be a decision for the client to make. V.R.Pr.C. 1.2 cmt.1. This is in part because of the potential implications of the pretrial service programs on the progression of a case and the amount of involvement which a client must have in the program. With this in mind, an attorney may want to discuss the pros and cons of participation in a program with the client in a similar manner as he or she would discuss the pros and cons of taking a plea deal. By doing this, the client is fully apprised of the potential repercussions of participation in the program and understands that his or her statements are not necessarily protected (unless that particular program otherwise offers protection).

Having these discussions also ensures that the attorney is complying with Rule 1.4 regarding communication. V.R.Pr.C. 1.4. Specifically, under this rule, an attorney must consult with a client regarding the goals of the case and explain the matter in a way such that the client can make an informed decision. V.R.Pr.C. 1.4(a)(2), (b). Relating to both scope and communication, the National Drug Court Institute discusses the importance of acknowledging a client's wishes regarding participation in a drug court or pretrial service program. CRITICAL ISSUES at 11. "Even fierce drug court proponents recognize the importance of voluntary choice as the first step in the therapeutic process." *Id.* This includes whether a defendant actually

wishes to obtain sobriety or simply avoid a criminal conviction by participating. *Id.* at 13.

Additionally, if an attorney wanted to further safeguard him or herself, requiring a client who wishes to participate in a pretrial service program to sign a written informed consent may be an option. V.R.Pr.C. 1.4 cmt. 5.

Rule 1.6 regarding confidentiality is also implicated by a client's participation in pretrial service programs. V.R.Pr.C. 1.6. In pretrial service situations, difficulties could arise in determining whether certain information is confidential or whether its disclosure is implicitly authorized in order to facilitate the client's overall goals for the case. V.R.Pr.C. 1.6 cmt. 2, 4, 5. The rule does not specifically contemplate the pretrial service program situation. Therefore, many programs and courts are dealing with this dilemma by using signed consents to release of information from participants. This approach is discussed below in more detail.

Confidentiality in Voluntary Treatment

Another issue of confidentiality arises when a defendant is not involved in a specific pretrial service program or treatment court, but instead decides to undertake treatment voluntarily. For example, the defendant is accused of a DUI. He is not participating in a pretrial service program such as the Sparrow Program or in a treatment court such as the Windsor County DUI Docket. The defendant discloses to his attorney that he has decided to go into residential treatment and will not be able to appear at his next court date. In this instance, an attorney is faced with the issue of whether he or she can and should disclose this information to a court.

The attorney would need to discuss the positive and negative aspects of revealing this to the court. Positive aspects may include less-stringent bail and release requirements and a showing that the defendant is taking the charges seriously. Negative aspects would be that this

could indicate guilt of the defendant. This information could potentially be excluded at trial in order to prevent jurors from drawing unfair conclusions about the defendant's culpability; however if the defendant's participation in treatment is discussed in open court then it would be public record. (This could be overcome by an *in camera* disclosure.) Based on a discussion of these pros and cons with the client, the attorney and client may or may not choose to disclose this information.

A further complication could arise if tactically the attorney feels disclosure of this information would be best, but the client does not wish to inform the court about his treatment. It is unclear under these circumstances whether an attorney can go against the client's wishes, however considering the importance of the client's relationship with his attorney it may be wisest to not disclose the information.

It's important to note that in this particular instance, an attorney can indicate that the client will be unavailable for his court date due to medical issues which the attorney is not at liberty to discuss. While this response is vague, it would protect the client from the potential negative consequence of disclosure.

Another consideration for defense attorneys falls under Rule 1.14, regarding the defendant's capacity. V.R.Pr.C. 1.14. As discussed by the National Drug Court Institute, it will be important that an attorney recognize the signs of substance withdrawal and understand the effects that it may have on a client's ability to make decisions. CRITICAL ISSUES at 17. If the client seems unable to properly handle making a decision at a certain time, it may be the attorney's duty to seek additional time from the court, prosecution, and/ or pretrial service program in order for the defendant to be able to make sound judgments. *Id.*

Rule 3.3 requires an attorney to be candid with the Court and is also relevant to a client's participation in pretrial service programs. V.R.Pr.C. 3.3. An attorney may be placed in a difficult position if he or she knows in confidence that a client participating in a pretrial service program has had a relapse in their substance use while under a condition of release which prohibits use of that substance. However, the language of the rule and comment 12 may indicate why this is not a problematic issue. Specifically, the rule prohibits a lawyer from misrepresenting a client's participation in criminal conduct "related to the proceeding." V.R.Pr.C. 3.3(b), cmt.12. This indicates that the specific focus of the rule is to protect the integrity of the court and the judicial process. V.R.Pr.C. 3.3 cmt.12. The comment specifically indicates the importance of a lawyer to not participate in or allow a client to participate in tampering with witnesses, jurors, or evidence. V.R.Pr.C. 3.3 cmt.12. According to the National Drug Court Institute it is the attorney's duty to inform the court if his or her client unambiguously lies under oath. CRITICAL ISSUES at 15. This is a distinctly different issue from a lawyer passively withholding from the court that his or her client has violated conditions of release through substance use or relapse. The National Drug Court Institute also expounds on this in relation to the situation where a defense attorney is acting passively while the judge and defendant communicate or if the attorney is not present. *Id.* Here, because the attorney is not assisting by questioning the defendant or presenting arguments on his or her behalf, the attorney is not necessarily bound to reveal the client's confidentialities, even if they are in opposition to that which the client told the court. *Id.*

Other rules which could be implicated by pretrial service programs include: Rule 1.2 regarding an attorney's duty to act with "dedication to the interests of the client" V.R.Pr.C. 1.3 cmt.1; Rule 2.1 discussing an attorney's role as advisor to his or her client in legal as well as

other related matters V.R.Pr.C. 2.1, cmt. 4, 5; and Rule 6.4 which contemplates an attorney's participation in law reform activities V.R.Pr.C. 6.4.

Finally, Rule 3.8 relates to the special responsibilities of a prosecutor. V.R.Pr.C. 3.8. This rule does not specifically address the use of statements by a defendant made while participating in pretrial service programs, however comment one is worth considering. "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." V.R.Pr.C. 3.8 cmt.1. This rule may indicate that a prosecutor should carefully consider the use of otherwise admissible statements from a defendant who is participating in a pretrial service program for substance abuse, and balance the overall value of those statements against the potential benefit of people addressing their substance issues by participating in the program.

SAMHSA

The issue of confidentiality in relation to substance abuse was contemplated by the federal government when establishing the Substance Abuse and Mental Health Services Administration (SAMHSA). According to 42 U.S.C.A. §290dd-2, records of a patient are to remain confidential. No patient record "may be used to initiate or substantiate any criminal charges against a patient or to conduct any investigation of a patient." 42 U.S.C.A. §290dd-2(c).

Some exceptions to this confidentiality and immunity exist. A record may be disclosed if there is prior written consent of the patient. 42 U.S.C.A. §290dd-2(b)(1). A record may also be disclosed if such disclosure is authorized by a court based on an application for "good cause." 42 U.S.C.A. §290dd-2(b)(2)(C). The statute explicitly gives an example of "good cause" as

preventing "a substantial risk of death or serious bodily harm" and lays out a balancing test for a court to follow in making such determinations. 42 U.S.C.A. §290dd-2(b)(2)(C).

42 C.F.R. "Part 2"

In Confidentiality and Communications, the Hon. William Meyer (retired judge) discusses the federal laws concerning confidentiality in drug courts. William G. Meyer, *Chapter 9: Confidentiality, in CONFIDENTIALITY AND COMMUNICATIONS: A GUIDE TO THE FEDERAL ALCOHOL AND DRUG CONFIDENTIALITY LAW AND HIPAA*, 161 (Legal Action Center, 2012). These are specifically 42 C.F.R. §2 ("Part 2") and the Health Insurance Portability and Accountability Act (HIPAA). *Id.* at 161. Meyer indicates that most drug courts would qualify under "Part 2" confidentiality. *Id.* at 162. This is because (1) a drug court is a program that involves substance abuse education, treatment, and prevention, and (2) it is regulated or assisted by the federal government. *Id.* Meyer further discusses why most state and local court systems would qualify as recipients of federal assistance and therefore be held to "Part 2" confidentiality standards. *Id.* at 163.

The regulations in "Part 2" are promulgated by SAMHSA to implement Congress's mandate for confidential and immunity from further prosecution. 42 U.S.C.A. §290dd-2; 42 C.F.R. §2.12. This confidentiality is quite extensive and includes identification of those participating in a program, and their records, diagnosis, and treatment plans. 42 C.F.R. §2.12(a), §2.12(e)(3). These regulations apply to a vast array of programs which are considered "federally assisted." 42 C.F.R. §2.12(b), 2.12(e)(2). "Federally assisted" encompasses programs conducted by a department or agency of the federal government, licensed or certified by a department of agency of the federal government, or supported by federal funds (including assistance in any form or through IRS tax deductions or exemption status). 42 C.F.R. §2.12(b).

While these regulations do not prevent a state from having more restrictive confidentiality laws, “no State law may authorize or compel any disclosure prohibited by these regulations.” 42 C.F.R. §2.20.

“Part 2” also contemplates under what conditions information may be shared or released. 42 C.F.R. §2.31-35. It requires that notice of federal confidentiality requirements be distributed to patients and that patients have access to their own records. 42 C.F.R. §2.22, §2.23. Information may be released if there is a written consent containing all nine elements required under the regulation. 42 C.F.R. §2.31. Further, if the patient has signed a written consent, some disclosure of information is allowed within the criminal justice system in order to facilitate disposition of a criminal proceeding. 42 C.F.R. §2.35. Limited exceptions to the need for patient consent to release of information exist for medical emergencies, crimes occurring on the treatment premises, internal treatment communications (such as billing), and limited mandatory disclosure situations. §2.51, 2.12(c)(5), 2.12(c)(3), Meyer at 165.

SAMHSA-Related Case Law

The Maine Supreme Court addressed 42 U.S.C.A. §290dd-2 in *State v. Boobar*, 637 A.2d 1162 (Me. 1994). In this case, the defendant voluntarily engaged in AA meetings in jail while awaiting his trial for murder. *Id.* at 1165. During one of his meetings with his AA leader, Daniel DesIsles, the defendant made statements which DesIsles interpreted to be admissions to the murder. *Id.* at 1169. The court held that the protections of non-disclosure under 42 U.S.C.A. §290dd-2 did not apply in this case. *Id.* The court reasoned that the federal statute did not apply, because the AA meetings and the defendant's conversations with DesIsles took place at the jail, which was not a recipient of federal funds. *Id.* The court further held that the defendant's

conversation with DesIsles was not protected by clergy or psychotherapist privileges, because DesIsles was neither a clergy member nor a psychotherapist. *Id.* at 1169-70.

The Tenth Circuit looked at the applicability of 42 U.S.C.A. §290dd-2 in regards to an unidentified homeless person who was treated in a hospital emergency room for an overdose. *Center for Legal Advocacy v. Earnest*, 320 F.d3 1107 (10th Cir. 2003). According to the court, the emergency room did not qualify as a federally assisted substance abuse program under which the confidentiality regulation of 42 U.S.C.A. §290dd-2 would apply. *Id.* at 1112. Looking to additional SAMSHA regulations in 42 C.F.R. §2.12(e) the court reasoned that the confidentiality did not apply specifically because (1)"the primary function of the emergency room personnel" was not to provide "alcohol or drug abuse diagnosis, treatment, or referral" and (2) the emergency room did not hold itself out to the community as a facility for such purpose. *Id.* at 1111-12.

In a civil case, the Vermont Supreme Court noted "the purpose of the federal statute [42 U.S.C.A. §290dd-2] is to encourage patients to seek treatment for substance abuse by assuring them that their privacy will not be compromised." *In re B.S.*, 659 A.2d 1137, 1139 (Vt. 1995). It is likely that many Vermont substance abuse treatment programs, including treatment courts, are covered by 42 U.S.C.A. §290dd-2 under the "Part 2" regulations on confidentiality and immunity from prosecution. This is due to the expansive definition of "federal assistance" and that all of these programs are specifically for the purpose of substance abuse treatment. 42 C.F.R. §2.12(b). However, it is important to verify the applicability of these restrictions when considering a program with which one is unfamiliar.

HIPAA

According to Judge Meyer, HIPAA does not automatically apply to drug courts, however courts may consider using a "HIPAA Order" to facilitate only the necessary communication amongst team members. *Id.* at 161-62. Valerie Raine from The Center for Court Innovation, explains that HIPAA and 42 C.F.R. "Part 2" cover much of the same restrictions on confidentiality and immunity. Valerie Raine, *Ethics, Confidentiality, and HIPAA!*, 1, 10, <http://www.ok.gov/odmhsas/documents/Specialty%20Court%20Conference-Valerie%20Raine-Ethics,%20Confidentiality.pdf> (last visited Oct. 4, 2013). Additionally, "Part 2" is more specific to substance abuse treatment. *Id.* Because of this, "Part 2" is generally the governing law. *Id.*

However, while HIPAA may not directly apply to treatment courts, it will likely affect the courts indirectly. Office of Court Drug Treatment Programs, *Memorandum: Privacy Regulations promulgated under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and their impact on Drug Treatment Court Operations*, 1,2, <http://www1.spa.american.edu/justice/documents/2542.pdf> (last visited Oct. 4, 2013). This is because HIPAA restrictions will generally apply to the treatment facilities attended by participants of the court. *Id.* Therefore, written consents and an administrative order from the judge, which gives specific guidelines for the use of disclosed information, may be employed by treatment courts in order to engage in the necessary communication for the system to function. Meyer at 162. Judge Meyer suggests that these tools should respect "the spirit of HIPAA" by remaining limited in scope. *Id.* When considering a client's participation in a treatment court, an attorney should review these consents and orders to ensure that participants' confidentiality is effectively protected.

ADDITIONAL CASE LAW

Courts have also examined issues regarding confidentiality outside of the context of SAMHSA, HIPAA, or court affiliated programs. Understanding how some courts have regarded confidentiality as it relates to Alcoholics Anonymous can be helpful when advising a client. A brief look at case law regarding physician-patient privilege is also beneficial to providing sound advice.

Holdings Regarding Alcoholics Anonymous

The Seventh Circuit Court addressed the confidentiality of statements made to AA volunteers in *U.S. v. Schwensaw*. 151 F.3d 650 (7th Cir. 1998). In this case, the defendant made inculpatory statements to volunteer AA hotline workers and left evidence of a crime with the workers. *Id.* at 652-53. The court held that these statements and evidence were not protected by psychotherapist-patient privilege, because the volunteers with whom the defendant spoke were not counselors. *Id.* at 657. The court specifically noted that "the hotline volunteers have no formal counseling or therapy-related training, and their primary responsibility is to provide information about Alcoholics Anonymous meetings." *Id.* at 652. Further, the court indicated that it was clear that the defendant was not speaking with the volunteers "for purposes of diagnosis or treatment and thus did not engage in 'confidential communications.'" *Id.* at 657. Therefore, this holding may not apply in a situation where a defendant is engaging in pretrial service programs specifically for the purpose of obtaining a diagnosis and treatment.

The Second Circuit also took up the issue of AA meetings and inculpatory statements by defendants in *Cox v. Miller*, 296 F.3d 89 (2nd Cir. 2002). Here, the defendant participated in AA meetings prior to any charges being brought against him. *Id.* at 91. The court specifically noted that one of the steps of the AA's 12 step program requires members "to admit to God, themselves, and another human being the exact nature of their wrongs." *Id.* During his time

with AA, the defendant admitted to at least seven members that he had committed a double homicide while extremely intoxicated. *Id.* Police eventually gained knowledge of this information from one of the AA members, and charges were brought against the defendant. *Id.* The court concluded that these admissions did not fall within the clergy privilege. *Id.* at 106. Although AA is a religion-based program, the defendant did not make the confessions "for the purpose of seeking religious counsel" *Id.* The overarching issue in the case was whether New York's law regarding the clergy privilege, which protected some communications with clergy members but did not protect communications between AA members, violated the Establishment Clause. *Id.* at 112. It is possible therefore that this holding would not be applicable to other types of pretrial service programs which are evaluated under the psychotherapist-patient privilege.

While these cases do not specifically highlight the ethical responsibilities of the defense attorney, the view that courts have taken regarding the confidentiality (or not) of AA meetings can help a defense attorney better advise his or her client of all the possible risks of AA meetings in association with treatment.

Physician-Patient Privilege

Another consideration which is applicable to how a defense attorney advises his or her client is the physician-patient privilege. In *Whalen v. Roe*, the United States Supreme Court noted that physician-patient privilege does not exist at common law, and in states where it has been enacted by the legislature it is subject to many exceptions. *Whalen v. Roe*, 429 U.S. 589, 601 (1977). The Vermont Supreme Court addressed physician-patient privilege in *State v. Hohman*. 392 A.2d 935 (Vt. 1978). (This case was reversed on other grounds in *State v. Willis*. 494 A2d 108 (Vt. 1985)). In *Hohman*, the defendant raised an insanity defense to a murder

charge. *Id.* at 937. The trial court granted the State's motion to review the defendant's record from the psychotherapist. *Id.* at 938. The Court concluded that under 12 V.S.A. §1612 psychotherapist-patient privilege applies and "any admissions made during that consultation [with the psychotherapist] which tend to prove the commission of the crime charged are privileged and cannot be introduced at a trial for that crime." *Id.* at 938.

Although these cases do not directly address the ethical role of the defense attorney in advising a client, understanding the State's laws on physician-patient privilege can help inform a defense attorney's decisions and advice.

DIRECTION FROM ADDITIONAL SOURCES

Specifically Concerning Conflicts of Interest

In *Participation of Defense Attorneys in Drug Courts*, Michael Tobin explains the two potential roles for defense attorneys to fill in the drug court system, and considers the potential conflicts of interest that could arise for defense attorneys. MICHAEL TOBIN, *Participation of Defense Attorneys in Drug Courts*, 8 DRUG COURT REV. 96 (2012). Ideally, one defense attorney acts as a member of the drug court team, but is not an advocate for a particular participant. *Id.* at 99. Tobin refers to this member as the "defense representative." *Id.* This person focuses primarily on advocating for policies that will improve the overall efficacy of the drug court for participants. *Id.* at 107. Significantly among these issues will be confidentiality for clients and the use of their statements in later proceedings. *Id.* at 123-24.

Tobin refers to the more traditional role of a defense attorney as "adversary" counsel. *Id.* at 110. This attorney's primary focus is specifically to advocate for the client's interests and goals. *Id.* Tobin highlights areas of concern for adversary counsel. Among these is making sure

that a client is fully apprised of the potential rights he or she may be waiving by participating in the drug court such as the right to counsel during drug court hearings or confidentiality of his or her treatment records. *Id.* (“Ideally, Drug Court participants should have access to adversary counsel throughout the process.” *Id.* at 112.) A participant will also need to be adequately informed of the consequences for not successfully completing the treatment court. *Id.* at 111.

Because of these distinctions, the roles of the "defense representative" and the "adversary" counsel may sometimes have conflicting goals. *Id.* at 116. If an attorney is going to be fulfilling both of these roles, various potential conflicts of interest may recur. *Id.* at 115. Some of these conflicts could arise in advising a participant how freely he or she should speak in court, determining the types of sanctions imposed for non-compliance, determining who should or should not be admitted to the program, and voting on certain issues based on whether the defense representative or his or her firm represents a participant as adversary counsel. *Id.* at 115-118, 126.

Confidentiality and Immunity from Prosecution

Participation in pretrial service programs or treatment courts could present issues regarding confidentiality and immunity from additional charges. This is because participants' statements and records could form a foundation for prosecution of additional charges. This could potentially “chill” open communication of the participants; however, this open communication is a vital component of effectively treating substance abuse. Therefore, it is an important part of participation in these programs to contemplate potential solutions before these issues arise.

One solution to this is to consider applicable statutes. As discussed above, federal funding may likely be tied to specific statutory requirements of confidentiality and/or immunity

from prosecution under 42 C.F.R. §2.12. Currently, Vermont does not have a statutory requirement for confidentiality or immunity regarding statements and records of pretrial service program participants or treatment court participants. However, as these programs become more established and possibly more uniform throughout the state, this may be an issue the legislature will consider.

Another solution to consider if a program does not qualify under SAMSHA restrictions is employing contractual agreements for confidentiality and/or immunity from prosecution arising from statements made during participation in these programs. This approach is already being employed in various programs throughout Vermont. For example, both the Sparrow Project in Windsor County and the Rapid Intervention Community Court in Chittenden County use contracts to ensure that the participants are able to freely communicate in the program without fear of those statements being used against them. These contracts include provisions that the participant understands (1)"any statements of disclosures [he/she] makes during [his/her] enrollment in treatment, counseling, or court proceedings, in regard to alcohol, drug use or drug-seeking behavior shall be held confidential according to Federal and State confidentiality laws," (2)"the result of [his/her] drug test will not be used against [him/her] to bring new charges, and (3) the disclosure of "information related to a relapse and/or drug and/or alcohol use during [his/her] participation in [the program] will not be used against [him/her] to bring new charges."
The Sparrow Project Protocol and Manual, The Sparrow Project, 9 (Sept. 26, 2013), <http://forms.vermontlaw.edu/criminaljustice/Windsor/IP3/Sparrow/ProtocolAndManuals/SparrowProjectProtocolRevised11-29-12.pdf>.

When participating in a treatment court or pretrial service program, it is important to consider confidentiality and immunity of participants' statements and records. An attorney can

find potential solutions by looking to the applicability of state and federal statutes for guidance or determining if contracts between participants and the State are already in existence for the intended program. If such contracts are not being used, consider approaching the opposing party to see if one of these existing contracts could be adapted and applied to another program.

Checklist

Below is a checklist of some of the most important aspects to consider when dealing with a pretrial service program or a treatment court. While some of this is most applicable to defense attorneys, anyone involved in this process should consider these main points in order to have an organized plan in place for the pretrial service program or treatment court.

Whether to Participate?

- How long will the program last and what will it entail?
- What does the prospective participant hope to achieve with the program?
- What are the potential positive and negative consequences of participation?
- Can the prospective participant realistically complete the program? (Would participation in the program set him/her up for failure?)

Confidentiality

- Are there existing confidentiality and/or immunity agreements?
- What statutory protections are in place?
- Is there a reason why SAMHSA and/or HIPAA protections may not apply?
- What documents are used by the program or court to facilitate compliance with these restrictions?
- How will the prosecution abide by the confidentiality and/or immunity restrictions?
- What case law exists to guide confidentiality issues?
- Are statements or records protected by another means, such as privilege?

Potential Conflicts

- What conflicts could arise?
- What is the plan of action to deal with such conflicts?
- What are each team member's responsibilities/ job definitions?
- What are the applicable Rules of Professional Conduct that each team member should keep in mind?

Communication

- Has all the above been explained to prospective participant?
- Does the prospective participant understand all of the above?
- Is there a record memorializing the understanding?

CONCLUSION

A number of resources can be considered when determining a defense attorney's responsibilities to a potential participant in a pretrial service program or treatment court. Specific Rules of Professional Conduct are implicated by a defendant's participation in a treatment court or pretrial service program. Among these, are the scope of the attorney's representation and which decisions are specifically those of the client to make, confidentiality concerns, an attorney's candor with the court, and a client's capacity to make decisions. Clear communication with the client is an over-arching aspect of these issues.

It is important to consider whether the pretrial service program or treatment court qualifies under SAMHSA regulations. If the program or court (1) receives federal funding according to the definition in 42 C.F.R. §2.12(b) and (2) its main purpose is for the education and treatment of substance abuse, then certain confidentiality and immunity requirements apply. These SAMSHA regulations provide the base-level for confidentiality protection, but a state may use stronger restrictions if the legislature so chooses. If the program or court falls under SAMHSA regulations, then it must determine a way for team members to engage in necessary communication about participants. This can be accomplished by having participants sign applicable consent to release of information forms. Due to the expansive definitions of 42 C.F.R. §2.12, many Vermont programs are likely to come under the SAMHSA purview; however this should be verified in order to best understand the system with which one will be involved.

While a treatment court will not be restricted by HIPAA protections of confidentiality, the participating treatment facilities likely will be. It will be necessary for judges to issue "HIPAA Orders" and for consents to release to be signed by participants in order for the

treatment court team members to engage in the necessary communication. These orders and consents should be reviewed to ensure that the “spirit of HIPAA” is respected.

Research did not reveal case law specifically addressing the ethical role of a defense attorney in advising his or her client whether to participate in pretrial service programs directed towards substance abuse. However, other considerations can help inform a defense attorney's advice to a client. An attorney can gain guidance by considering how courts have looked at confidentiality of programs such as AA. Further, a state's statutes regarding psychotherapist or physician–patient privilege and the court's interpretation of those statutes can also help guide a defense attorney to the best ethical advice for his or her client.

A defense attorney is in a unique position when clients participate in a treatment court or pretrial service program. Therefore, an attorney must be observant of potential conflicts of interest which could arise. This is particularly true if the attorney acts as a "defense representative" for a treatment court and either represents participants him or herself as "adversary" counsel or is a member of a firm or organization which does so.

Issues of confidentiality and immunity could arise if not addressed at the participant's entrance into a program. These are vital considerations to safeguard the rights of participants and allow participants to communicate freely and receive appropriate treatment. These issues can be addressed by looking to applicable statutes, including SAMHSA and HIPAA, or by all parties agreeing to a contract with specific terms regarding confidentiality and immunity.