

**The Public Defense Services Commission’s Guidelines
for Public Defense Attorneys in
Drug Court Programs**

D R A F T

To ensure that individuals who are eligible for drug court programs receive legal representation that is consistent with ethical, statutory and constitutional standards, PDSC adopts the following five guidelines for court-appointed attorneys who represent clients eligible for drug court programs. The primary purposes of these guidelines are to ensure: (1) that public defense clients make knowing, intelligent, voluntary and attorney-assisted decisions about whether to participate in a drug court program, and (2) that clients who participate in such programs receive effective representation during the period of their participation.

Guideline 1. Defense counsel shall establish and maintain an attorney/client relationship with the client.

Commentary

Although drug courts use a collaborative model to support clients who elect to participate in them, Oregon’s Rules of Professional Conduct govern the relationship between the client and the attorney in drug courts as they do in any other criminal proceeding, and counsel may not, for example, agree to the imposition of certain sanctions or disclosures of attorney-client communications in the course of representation without the client’s consent.

As noted by the National Drug Court Institute in “Ethical Considerations for Judges and Attorneys in Drug Court,” May 200, at page 21: In drug court cases, “defense counsel protect the participant’s due process rights while encouraging full participation. Defense counsel’s two duties reflect the normal, bidirectional nature of legal representation. With a participant in drug court, defense counsel explains the court’s processes, prepares the participant for appearances, and helps the participant to conform his or her behavior to the obligations undertaken on entering drug court. Within the drug court team, defense counsel ensures that the client’s perspective is heard and respected, the client’s rights are protected, and the court’s procedures are followed.”

Guideline 2. Before an eligible client decides whether or not to participate in a drug court program, defense counsel shall investigate and review the evidence with the client; provide the client with discovery materials, discuss the materials with the client; and determine and address whether the client’s circumstances,

such as immigration status or a mental health condition, could affect the client's decision to enter into a drug court program.

Commentary

Article 1, Section 11 of the Oregon Constitution provides, "In all criminal prosecutions, the accused shall have the right to be heard by himself and counsel...." This constitutional right to counsel would be meaningless without an adequate opportunity for counsel to inform himself or herself about the nature of the charges against the defendant, the factual and legal circumstance of the case and the background of the defendant.

The following Oregon State Bar Principles and Performance Standards for Counsel in Criminal Cases (the Oregon Standards) require defense attorneys to carefully review charging instruments, police reports, and relevant background information with defendants. The Oregon Standards also require counsel to conduct necessary independent investigation or consultation with experts in appropriate circumstances before advising their clients concerning participation in drug court programs.

STANDARD 1.1 – Prerequisites for Representation

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, training, experience, thoroughness, and preparation reasonably necessary for the representation. A lawyer should only accept an appointment or retainer if the lawyer is able to provide quality representation and diligent advocacy to the client.

STANDARD 1.2 – General Duties and Responsibilities of a Lawyer to Clients...

Upon being retained or appointed by the court, a lawyer should contact the client as soon as practicable and maintain regular contact thereafter. A lawyer should endeavor to establish a relationship of trust and open communication with the client and should diligently advocate the client's position within the bounds of the law and the Oregon Rules of Professional Conduct.

STANDARD 1.3 – Role of the Lawyer

Except as provided by Oregon Rules of Professional Conduct 1.2(b) and (c), a lawyer shall abide by a client's decisions concerning the objectives of representation in accordance with ORPC 1.2 and shall consult with the client as to the means by which they are to be pursued in accordance with ORPC 1.4. When representing a client with diminished capacity, the lawyer shall, as far as reasonably possible, maintain a normal attorney-client relationship with the client.

STANDARD 1.4 – Initial Client Interview

A lawyer should conduct a client interview as soon as practicable after being retained or appointed by the court, in order to obtain information necessary to provide quality representation at the early stages of the case and to provide the client with information concerning the lawyer's representation and the case proceedings.

STANDARD 2.7 – Independent Investigation

A lawyer should promptly conduct an independent review and investigation of the case, including obtaining information, research and discovery necessary to prepare the case for trial or hearing.

Guideline 3. Defense counsel shall conduct a confidential consultation with the client regarding all matters relevant to the decision to enter drug court, including:

- a. the nature and purpose of drug court,
- b. the rules regarding eligibility,
- c. the nature of a therapeutic courtroom and the roles of the court, the prosecutor and others,
- d. the difference between adversarial and non adversarial processes,
- e. the fees that may be imposed by the drug court,
- f. the drug court agreement and any related documents,
- g. the requirements for successful completion of the program, including the nature and extent of required treatment, the frequency of court appearances, and any other requirements of the program,
- h. the consequences of complying or failing to comply with drug court rules, including any system of graduated rewards and sanctions, including termination,
- i. the legal consequences of successful completion or voluntary or involuntary termination,
- j. any rights the defendant will be required to waive to enter drug court, such as the right to speedy trial, jury trial, and any other right that the defendant will be required to waive,
- k. the nature and extent of any investigation that will be done,
- l. whether pretrial motions may be litigated,
- m. the client's alternatives to drug court, the advantages and disadvantages of each alternative, and the likelihood of success of the alternatives in view of the information available from discovery, from the client and from any investigation conducted in the case,
- n. the legal protections that have been established by court order or agreement with the state that protect the client from the use of statements made or confidential medical, drug treatment or other records disclosed in drug court from use in other proceedings,

- o. the expectation of the court that the client will be open and truthful with the court and staff about substance use, assuming that adequate legal protections exist,
- p. the role of defense counsel in the drug court setting,
- q. that it is the client's decision whether or not to enter and remain in drug court, and
- r. the attorney's advice on whether the client should enter drug court (based on the client's legal interests and interest in recovery).

Commentary

STANDARD 2.8 – Pretrial Negotiations and Admission Agreements

A lawyer should:

1. *with the consent of the client explore... diversion and other informal and formal admission or disposition agreements with regard to the allegations...*
2. *...*
3. *fully explain to the client the rights that would be waived by a decision to enter into any admission or disposition agreement;*
4. *keep the client fully informed of the progress of the negotiations;*
5. *convey to the client any offers made by the prosecution and the advantages and disadvantages of accepting the offers;*
6. *continue to preserve the client's rights and prepare the defense notwithstanding ongoing negotiations; and*
7. *not enter into any admission or disposition agreement on behalf of the client without the client's authorization.*

Oregon Rule of Professional Conduct 1.1 requires that "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The National Drug Court Institute's model rules for defense attorneys in drug courts provides: "Defense attorneys' ethical obligation of competence includes a duty to explore disposition without trial, a duty to become familiar with all sentencing alternatives, a duty to obtain a thorough understanding of the drug court model and court practices and to participate in interdisciplinary training regarding substance abuse and treatment and locally available treatment options."

Guideline 4. Defense counsel shall:

- (a) be knowledgeable about: controlled substances and the nature of addiction, available treatment options, the treatment of coexisting disorders, links between domestic violence and substance abuse, the reliability limits of individual drug tests, confidentiality protections for drug records, medical and other records, and

- (b) have the training and experience needed to accurately assess the merits of the charges against the defendant and any substantive or procedural defenses that might be available, to communicate effectively with drug court clients and staff, and to protect the client's right to due process throughout the proceedings.

Defense counsel shall participate in CLE programs and other types of training that allow the attorney to remain current on legal and other issues affecting drug court clients.

Commentary

"Critical Issues for Defense Attorneys in Drug Court," Monograph Series 4, National Drug Court Institute, 2003.

STANDARD 1.1 – Prerequisites for Representation

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Lawyers for clients in drug courts should obtain adequate training in the following areas: cultural competence, treatment issues, reliability limits of individual drug tests, protection of due process rights, confidentiality protections for drug records, medical records and the like. Missouri defense attorneys' guidelines for representation in drug court, "Critical Issues for Defense Attorneys in Drug Court," Monograph Series 4, National Drug Court Institute, 2003.

Guideline 5. Defense counsel shall seek to participate in the planning, design, and operation of the drug court program.

Defense counsel's participation in the design, development, and operation of drug court programs will promote institutional values of fairness and efficiency without jeopardizing clients' legal interests. Some of the client interests that defense counsel should advance are: the recognition that client participation must be voluntary, that unsuccessful participants should not be penalized for voluntary or involuntary withdrawal from drug court, that eligibility criteria should be broad and should not discriminate on the basis of race or gender or any similar protected trait or membership in a protected group; that defense statements made in negotiations and in drug court are not to be used outside the drug court setting, that clients' rights to confidentiality are to be protected and no disclosure or use is to be made of confidential materials outside the terms agreed

upon, that treatment or other program requirements should be the least restrictive necessary to achieve agreed-upon goals, and that costs and fees should not be unduly burdensome.

Commentary

Derived from "Ten Tenets of Fair and Effective Problem Solving Courts," American Council of Chief Defenders, National Legal Aid and Defender Association, and "Critical Issues for Defense Attorneys in Drug Court," Monograph Series 4, National Drug Court Institute, 2003.