

Practicum for Treatment Court Defense Attorneys





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Contents

Introduction.....	2
Communication	3
Practice: How to Talk to Your Client, the Team,	
and the Court	3
Scenario 1	3
Scenario 2	5
Legal Considerations.....	7
Practice: Understanding Program Goals.....	7
Scenario 1	7
Scenario 2	11
Practice: Challenging a Jail Sanction	15
Scenario 1	15
Scenario 2	18
Practice: Challenging a Termination Hearing.....	20
Scenario 1	20
Links to References.....	24



Introduction

This practicum is designed to help defense attorneys consider common topics and ethical challenges that can arise in treatment courts. The scenarios and sample responses are intended to help defense attorneys develop strategies for responding to clients' behavior, contested hearings, termination, and other program policy issues, while considering the individual circumstances of each treatment court participant and applicable state law. Created as a companion to the *Reference Guide for Treatment Court Defense Attorneys*, the practicum should be used in conjunction with the monograph *Critical Issues for Defense Attorneys in Drug Courts*, the *Adult Treatment Court Best Practice Standards*, and other All Rise publications and resources available at allrise.org. A complete list of references, with links, is given at the end.



Ethical rules to consider (from the American Bar Association's Model Rules of Professional Conduct):

Rule 1.2 Scope

Rule 1.4 Communications

Rule 1.6 Confidentiality

Rule 3.3 Candor to the Tribunal

Communication

Practice: How to Talk to Your Client, the Team, and the Court

STRATEGY FOR EACH SCENARIO:

1. Set out the parameters for communication and address concerns around confidentiality with the client.
2. Client needs to understand that defense counsel may share information with the team unless it is a matter that requires the client's consent and waiver of privilege.

SCENARIO 1: Client drank alcohol the day before the hearing. (Goal is to differentiate between an unambiguous lie and a failure to disclose a material fact to the proceeding.)

REFERENCES:

- American Bar Association's *Model Rules of Professional Conduct*
- *Critical Issues for Defense Attorneys*, pages 6, 27, and 28
- *Reference Guide for Treatment Court Defense Attorneys*



I. Client tells you before the hearing. The use did not show up on a urinalysis test and the client wants to accept a phase promotion.

a. Client doesn't want you to tell the court.

- *The test is past conduct versus future conduct: confidentiality will supersede candor to the tribunal if it is something that happened in the past, as there is no duty to divulge.*
- *Where client unambiguously lies under oath to the court, Rule 3.3 of the ABA's Model Rules imposes a duty of candor that supersedes the lawyer's duty of confidentiality.*

b. Client doesn't want you to tell the team at precourt staff meeting.

- *Defense counsel should encourage their client to be truthful in drug court treatment and hearings but should not be the conduit of confidential information to the rest of the team unless the client consents to disclosure.*
- *Use this opportunity to encourage your client to be honest and discuss the importance of honesty in the program.*

II. Client tells you after the hearing.

a. Client doesn't want you to tell the court. No phase promotion or incentive was received.

- *Neither the lawyer nor the client is obligated to disclose the fact of use.*

b. Client doesn't want you to tell the court. A phase promotion or incentive was received.

- *Differentiate between not disclosing and accepting a promotion based upon nondisclosure.*



SCENARIO 2: Precourt staff meetings are lengthy but not productive.

REFERENCES:

- *Best Practice Standards:*
 - Multidisciplinary Team standard, Provisions A, B, and G commentary
 - Roles and Responsibilities of the Judge standard, Provision C commentary
- *Critical Issues for Defense Attorneys*
- *Reference Guide for Treatment Court Defense Attorneys*

III. Team members are struggling with their roles.

- a. Team members are oversharing about your client in precourt staff meetings.
 - *Response: Does the team have a memorandum of understanding (MOU) between partner agencies that describes policies and procedures for sharing sensitive and confidential information? Is the team following the Best Practice Standards for precourt staff meetings? How can you bring this to the team's attention?*
- b. Team members are making recommendations that are not based on their role and expertise.
 - *Response: Who are the members of your team and what is the basis for their recommendations? Are the recommendations following the Best Practice Standards?*
- c. Team expects you to keep precourt staff meeting discussions confidential from the client. They view you as an attorney to the treatment court, not to an individual client.
 - *Response: Discuss ethical rules as they relate to individual versus aggregate clients and best practices for the role of defense counsel.*



IV. Team members are distrustful of each other and do not get along.

a. Treatment court materials are out of date.

- *Response: Court should have an operations manual and participant handbook. How regularly are they revised?*
- *What about materials that are up to date?*

b. Court has no governing body.

- *Response: Discuss what role the steering committee might have in MOUs, approval of the program's governing mission and objectives, and providing a commitment from all partner agencies.*
- *Use this opportunity to discuss best practices for team dynamics and defining roles.*



Legal Considerations

Practice: Understanding Program Goals

- **Proximal goals:** Goals that participants can achieve in the short term and sustain for a reasonable period of time.
- **Distal goals:** Goals that are too difficult for participants to achieve currently.
- **Managed goals:** Goals that participants have achieved and sustained for a reasonable time.

STRATEGY FOR EACH SCENARIO:

1. Consider the individual client's circumstances, characteristics, motivations, program phase, and input from the team.
2. Classify each infraction as a proximal, distal, or managed goal.
3. Identify an appropriate response to each infraction.

The goal of these scenarios is to practice fluency in goal classification and in identifying appropriate incentives, sanctions, or service adjustments.

SCENARIO 1: Client misses a treatment session.

REFERENCES:

- *Best Practice Standards, Incentives, Sanctions, and Service Adjustments standard*
- *Critical Issues for Defense Attorneys*
- *Reference Guide for Treatment Court Defense Attorneys*



I. Client is honest and discloses the missed treatment session to their case manager prior to the next court hearing.

a. Client is in the first phase of the program.

- i. It is the first missed treatment session.
 - *The missed treatment session is a proximal goal violation (attendance is a proximal goal).*
 - *The appropriate response is a verbal warning (first violation of a proximal goal warrants a low-magnitude sanction).*
 - *Use this opportunity to discuss any barriers that are preventing compliance. Also consider the appropriateness of providing an incentive to reward the client's honesty in disclosing the missed session. For example, ask the court to recognize the client's honesty.*

ii. It is the fifth missed treatment session.

- *The missed treatment session is a proximal goal violation.*
- *The appropriate response is a moderate- to high-magnitude sanction, such as instructive community service (several repeated violations of a proximal goal warrant a high-magnitude sanction).*
- *Use this opportunity to discuss examples of low-magnitude and high-magnitude sanctions.*

iii. Is there a difference between the missed treatment session and missed medication for addiction treatment (MAT)?

- *These are both proximal goal violations. If MAT is part of the agreed individualized treatment plan, it is treated the same as a missed treatment session.*
- *If MAT is not part of the agreed individualized treatment plan, it is not treated the same as a missed treatment session.*



- *MAT is treated like any prescribed medication and discussed with an authorized treatment provider.*
- iv. Does it matter if the client does not participate actively when attending treatment sessions?
 - *No. If the client is consistently attending scheduled treatment sessions, then attendance is a managed goal even if the client has not yet contributed productively in discussions.*
 - *There should continue to be intermittent incentives to maintain this managed goal.*
- b. Client is in the final phase of the program.**
 - i. It is the first missed treatment session.
 - *By the program's final phase, attendance should be a managed goal, but this is the first missed treatment session.*
 - *The appropriate response is to review the situation with the team, determine the circumstances surrounding the violation, and decide if a low-level sanction or service adjustment is warranted.*
 - ii. It is the fifth missed treatment session.
 - *By the program's final phase, attendance should be a managed goal, but this is the fifth missed treatment session.*
 - *The appropriate response is to review the circumstances surrounding the violation and decide if a service adjustment or a moderate- to high-magnitude sanction, such as instructive community service or curfew, is warranted.*



II. Client is dishonest and does not disclose the missed treatment session.

a. Client is in the first phase of the program.

- i. It is the first missed treatment session.
 - *The missed treatment session and the client's dishonesty are both proximal goal violations, although they may still be difficult for the client.*
 - *The appropriate response is for the judge to emphasize the importance of attending appointments and being honest, and then to provide a verbal warning. The program should also examine any lingering barriers to transportation to appointments.*
- ii. It is the fifth missed treatment session.
 - *The missed treatment session and the client's dishonesty are proximal goal violations.*
 - *Assuming no lingering transportation barriers exist, the appropriate response for the missed session is a moderate- to high-magnitude sanction, such as instructive community service, curfew, or travel restrictions.*
 - *There should also be a response to the client's dishonesty, depending on whether the client has previously been dishonest about missing treatment sessions. Repeated instances of dishonesty may warrant a higher-magnitude sanction.*

b. Client is in the final phase of the program.

- i. It is the first missed treatment session.
 - *Attendance is probably a managed goal and a low-magnitude sanction should be considered. The dishonesty could merit a higher-magnitude sanction at this phase of the program.*



ii. It is the fifth missed treatment session.

- *The missed treatment session and the client's dishonesty are both proximal goal violations.*
- *This is likely a rare scenario, but worth consideration.*

III. Client is suffering from mental health challenges and is dishonest.

- *Mental health is a responsivity factor that can cause a proximal goal to be a distal goal for this client. It may be too difficult for this client to achieve this goal, and a service adjustment may be necessary instead of a sanction. Sanctions are not appropriate for violations of distal goals.*
- *Use this opportunity to explain the difference between sanctions and service adjustments. Work through the above examples to discuss how this analysis applies.*

SCENARIO 2: Client has a positive urinalysis test.

REFERENCES:

- *Best Practice Standards, Incentives, Sanctions, and Service Adjustments standard*
- *Critical Issues for Defense Attorneys*
- *Reference Guide for Treatment Court Defense Attorneys*

IV. Client is honest and admits drug use.

a. Client is in the first phase of the program.

i. It is the first positive urinalysis test.

- *The positive test is a distal goal violation (abstinence is a distal goal for clients with moderate to severe substance use disorders).*
- *The appropriate response is a service adjustment to provide the client with additional or more appropriate treatment and/or supervision services to support their progress.*



- *Use this opportunity to consider whether the court should treat a missed urinalysis test as a positive urinalysis test. Is the court's response different from the treatment response?*
- ii. It is the fifth positive urinalysis test.
 - *The positive test is a distal goal violation (abstinence is a distal goal for clients with moderate to severe substance use disorders).*
 - *The appropriate response is a service adjustment to provide the client with additional or more appropriate treatment and/or supervision services to support their progress.*
 - *Use this opportunity to consider whether the court should treat a missed urinalysis test as a positive urinalysis test. Is the court's response different from the treatment response?*
- c. **Client is in the final phase of the program.**
 - i. It is the first positive urinalysis test.
 - *Abstinence is probably a managed goal for this client because they are in the final phase of the program and have no previous positive tests.*
 - *The appropriate response is not to overreact, but to determine the circumstances surrounding the violation and whether a sanction is warranted or a service adjustment is necessary.*
 - ii. It is the fifth positive urinalysis test.
 - *The team should consider whether abstinence has shifted from a managed goal to a distal goal for this client (i.e., does the client's drug use indicate a recurrence of substance use disorder (SUD) symptoms necessitating an adjustment to their treatment plan?).*



- *If abstinence is a distal goal for this client, a service adjustment is the appropriate response to provide the client with additional or more appropriate treatment and/or supervision services to support their progress.*
- *If abstinence remains a managed goal for this client because of symptom recurrence, the team should review the behavior to determine the specific causes of the violation and decide if a sanction or service adjustment is warranted.*

V. Client is dishonest and denies drug use.

a. Client is in the first phase of the program.

- i. It is the first positive urinalysis test.
 - *The client's positive drug test is a distal goal violation. The appropriate response is a service adjustment to provide the client with additional or more appropriate treatment and/or supervision services to support their progress.*
 - *The client's dishonesty is a proximal goal violation. The appropriate response is a verbal warning.*
 - *Use this opportunity to discuss the importance of honesty for meeting treatment needs and overall program compliance.*
- ii. It is the fifth positive urinalysis test.
 - *The client's positive drug test is a distal goal violation. The appropriate response to the client's drug use is to reassess treatment needs and make any necessary treatment or other service adjustments.*
 - *The client's dishonesty is a proximal goal violation. The appropriate response is to provide a moderate- to high-magnitude sanction, such as instructive community service, curfew, or travel restrictions.*



c. Client is in the final phase of the program

- i. It is the first positive urinalysis test.
 - *Abstinence is probably a managed goal for this client because they are in the final phase of the program and have no previous positive tests. However, honesty is a proximal goal.*
 - *The team should not overreact to the positive drug test. The team should examine the circumstances surrounding the positive test and determine whether a service adjustment or a sanction is necessary to get the client back on track.*
 - *The response to the dishonesty is a sanction; the sanction level depends on the client's history of honesty.*
- ii. It is the fifth positive urinalysis test.
 - *The team should consider whether abstinence has shifted from a managed goal to a distal goal for this client (i.e., does the client's drug use indicate a recurrence of SUD symptoms necessitating a clinical reassessment and an adjustment to the treatment plan?).*
 - *If abstinence is a distal goal for this client because of symptom recurrence, a service adjustment is the appropriate response.*
 - *If abstinence is still a managed goal for this client, the team should review the behavior to determine the specific circumstances surrounding the violation and decide whether a sanction or service adjustment is warranted.*

VI. Client is suffering from mental health challenges.

- *Mental health is a responsivity factor that can cause a proximal goal to be a distal goal for this client. It may be too difficult for the client to achieve this goal, and a service adjustment may be necessary instead of a sanction. Sanctions are not appropriate for violations of distal goals.*



- *Use this opportunity to explain the difference between sanctions and service adjustments. Work through the above examples to discuss how this analysis applies.*

Practice: Challenging a Jail Sanction

The goal of these scenarios is to recognize that jail sanctions are imposed only after verbal warnings and several low- and moderate-magnitude sanctions have been unsuccessful in deterring repeated infractions of proximal goals or when clients engage in behavior that endangers public safety.

SCENARIO 1: Client has a falsified (dilute) urinalysis test and has lost housing.

REFERENCES:

- *Best Practice Standards, Incentives, Sanctions, and Service Adjustments standard, Provision G commentary*
- *Critical Issues for Defense Attorneys*
- *Reference Guide for Treatment Court Defense Attorneys*

VII. Client admits the violation and admits returning to drug use. The team is recommending a jail sanction.

a. Client is in the first phase of the program.

- *Honesty is a proximal goal. The appropriate response to the falsified drug test is a low-magnitude sanction, assuming it is the client's first such test. Repeated falsified tests may warrant a higher-magnitude sanction. Discuss alternatives to a jail sanction. Note: Jail sanctions should not be administered (1) in the first 30 to 60 days of the program, (2) in response to distal goal violations, or (3) before several lower-magnitude sanctions have been tried.*



- *Abstinence is a distal goal for new treatment court participants. The appropriate response to the client's return to drug use is a service adjustment to provide additional or more appropriate treatment and/or supervision services to support their progress.*
- *Use this opportunity to discuss how the court can continue to encourage your client to be honest.*

b. Client is in the final phase of the program.

- *Honesty is a proximal goal. The appropriate response to the falsified drug test is a low-magnitude sanction, assuming it is the client's first such test. Repeated falsified tests may warrant a higher-magnitude sanction. Discuss alternatives to a jail sanction.*
- *Abstinence is a distal goal for new participants, but it is likely to be a managed goal by the time they reach the final phase of the program. The team should consider whether abstinence has shifted from a managed goal to a distal goal for this client (i.e., does the client's drug use indicate a recurrence of SUD symptoms necessitating an adjustment to their treatment plan?). If abstinence is a distal goal for this client because of symptom recurrence, a service adjustment is the appropriate response to their return to use. If abstinence is still a managed goal for this client, the team should review the behavior to determine the specific causes of the return to use and decide if a sanction or service adjustment is warranted.*
- *Use this opportunity to discuss how jail sanctions should be used in this scenario. Note: Jail sanctions should not be administered (1) in the first 30 to 60 days of the program, (2) in response to distal goal violations, or (3) before several lower-magnitude sanctions have been tried.*



- c. Client has received only verbal warnings.**
 - *What is the role of graduated sanctions, and does the client's current phase matter?*
 - *Discuss jail alternatives and structure the argument.*
- d. Client has had multiple previous high-magnitude sanctions.**
 - *If the client has already had several high-magnitude sanctions, a jail sanction may be an appropriate response to the client's dishonesty. However, best practice indicates that jail sanctions should not be more than 3 to 6 days in duration.*
 - *Does phase matter?*
 - *Discuss jail alternatives and structure the argument.*
- e. Team recommends jail until housing is available.**
 - *Jail should be used as a clear sanction for the violation, not preventive detention due to a loss of housing.*
 - *Before jail is used for any reason other than to avoid a serious and imminent public safety threat or to sanction a client for repeated infractions of proximal goals, the judge must find clear and convincing evidence that jail custody is necessary to protect the client from imminent and serious harm and the team must have exhausted or ruled out all other less restrictive means to keep the person safe. If no less restrictive alternative is available or likely to be adequate, then as soon as the crisis resolves or a safe alternative becomes available, the client is released immediately from custody and connected with needed community services.*



VIII. Client is denying the violation. An evidentiary hearing is necessary before the court can sanction your client.

a. How do you prepare?

- *How will you receive specific allegations and notice?*
- *What if the court refuses to set a hearing?*
- *When will you talk to the client, and what next steps will you take?*
- *What is the prosecution's burden of proof?*

b. How will you strategize with your client?

- *Does the potential sanction change if the client admits or denies the allegation?*
- *Will the client be released or held in jail pending the hearing?*

SCENARIO 2: Client's treatment provider reports that your client has been threatening treatment staff.

REFERENCES:

- *Best Practice Standards, Incentives, Sanctions, and Service Adjustments standard, Provision G commentary*
- *Critical Issues for Defense Attorneys*
- *Reference Guide for Treatment Court Defense Attorneys*

IX. Client is admitting the violation. The team is recommending a jail sanction.

a. Client is in the first phase of the program.

- *Following the rules of treatment and not committing a new crime are proximal goals. Discuss the added element of whether this behavior endangers public safety and whether that justifies a higher-magnitude sanction.*
- *Discuss jail alternatives and structure the argument.*



b. Client is in the final phase of the program.

- *Following the rules of treatment and not committing a new crime are proximal goals. Discuss the added element of whether this behavior endangers public safety and whether that justifies a higher-magnitude sanction, given that the client is now in the final program phase.*

c. Client is not stable and is suffering mental health symptoms.

- *Does the goal shift from proximal to distal?*
- *Discuss jail alternatives and structure the argument.*
- *Use this opportunity to consider the following:*
 - *Is the client receiving adequate treatment?*
 - *Are service adjustments needed?*
 - *Is the treatment environment appropriate for the client?*
 - *Are there more appropriate alternatives to incarceration, such as voluntary or involuntary hospitalization or treatment alternatives?*

d. Client has suffered a return to use, and the team recommends jail until inpatient treatment is available.

- *Jail should be used as a clear sanction for threatening treatment staff, not preventive detention due to a return to substance use.*
- *Discuss alternatives to jail that could keep the community safe while the client waits for an inpatient bed date.*
- *Client should be placed in jail only after the judge finds clear and convincing evidence that jail custody is necessary to protect the client from imminent and serious harm, and the team has exhausted or ruled out all other less restrictive means to keep the person safe. If no less restrictive alternative is available or likely to be adequate, then as soon as the crisis resolves or a safe alternative becomes available, the client is released immediately from custody and connected with needed community services.*



e. Team recommends 30 days in jail.

- *Best practice indicates that a jail sanction should not be more than 3 to 6 days in duration.*
- *Use this opportunity to structure arguments on how jail alternatives also promote public safety.*

X. Client is denying the violation. An evidentiary hearing is necessary before the court can sanction your client.

a. How do you prepare?

- *How will you receive specific allegations and notice?*
- *What if the court refuses to set a hearing?*
- *When will you talk to the client, and what next steps will you take?*
- *What is the prosecution's burden of proof?*

b. How will you strategize with your client?

- *Does the potential sanction change if the client admits or denies the allegation?*
- *Will the client be released or held in jail pending the hearing?*

Practice: Challenging a Termination Hearing

Goal is to discuss whether termination is appropriate based on the Best Practice Standards.

SCENARIO 1: The client has had chronic noncompliance that can be proved by a clear and convincing evidence standard. Noncompliance includes relapse and missed urinalysis tests, and as a result the client lost program-provided housing. The team is recommending termination after trying many different sanctions.



REFERENCES:

- *Best Practice Standards, Incentives, Sanctions, and Service Adjustments standard, Provision J commentary*
- *Critical Issues for Defense Attorneys*
- *Reference Guide for Treatment Court Defense Attorneys*

XI. Client has been engaged in treatment and wants to stay in the program.

a. Client is in the first phase of the program.

- *Criteria for termination are not met. The client is willing to receive treatment or other services required to achieve rehabilitation goals. The team should continue to work with the client.*

b. Client is in the final phase of the program.

- *Criteria for termination may be met. Consider what alternatives have been tried and whether the type of noncompliance matters in the analysis.*

c. Treatment is adequate for the client's needs.

- *Criteria for termination are not met. The client is willing to receive treatment or other services required to achieve rehabilitative goals. The team should continue to work with the client.*

d. Treatment is inadequate for the client's needs.

- *Criteria for termination are met. The client should not receive a harsher sentence upon termination if the services were not adequate to meet their needs. This is a consequence if the court does not offer adequate treatment.*

e. Client is engaged in behavior that endangers the community.

- *Criteria for termination are met. Encourage discussion of what constitutes this type of behavior.*



f. Client is engaged in behavior that does not endanger the community.

- *Criteria for termination are not met. Continued substance use alone does not qualify as endangering the community.*

XII. Client has not been engaged in treatment and wants to stay in the program.

a. Client is in the first phase of the program.

- *Criteria for termination are not met. Program completion is a distal goal; the client does not yet have managed goals.*

b. Client is in the final phase of the program.

- *Criteria for termination may be met. Consider what alternatives have been tried and whether the type of noncompliance matters in the analysis.*

c. Treatment is adequate for the client's needs.

- *Criteria for termination may be met. The client may be terminated for repeated failure to comply with treatment and supervision. If the client is still willing to receive treatment or other services required to achieve rehabilitative goals, the team may continue to work with the client.*

d. Treatment is inadequate for the client's needs.

- *Criteria for termination are met. The client should not receive a harsher sentence upon termination if the services were not adequate to meet their needs. This is a consequence if the court does not offer adequate treatment.*

e. Client is engaged in behavior that endangers the community.

- *Criteria for termination are met. Discuss whether the client should receive a negative consequence for neutral discharge and whether this constitutes neutral discharge.*



- f. Client is engaged in behavior that does not endanger the community.
 - *Criteria for termination may be met. The client may be terminated if it is no longer safe for them to be managed in the community.*

XIII. Client wants to terminate voluntarily.

- a. Does the analysis above change?
- b. Consider discussing the following with your client:
 - *How long have they been participating in the program?*
 - *What may be preventing them from being successful?*
 - *What is the client willing to do?*
 - *How can you best represent your client and convey this information to the team?*
- c. Other relevant discussions:
 - *The legal consequences of voluntary termination, such as the potential sentence or prosecution of the underlying charges.*
 - *The personal consequences to your client, such as future legal involvement, relationship issues, and health issues.*
 - *The external challenges and barriers that have brought them to this situation.*



Links to References

- [Adult Treatment Court Best Practice Standards \(All Rise\)](#)
- [Critical Issues for Defense Attorneys \(All Rise\)](#)
- [Model Rules of Professional Conduct \(American Bar Association\)](#)
- [Reference Guide for Treatment Court Defense Attorneys \(All Rise\)](#)



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