Law School 101 for Treatment Court Professionals

National Drug Court Institute
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Judicial Consultant

Presented by:

Judge Christine Carpenter, Ret.

NDCI
NATIONAL DRUG COURT INSTITUTE

DISCLOSURE

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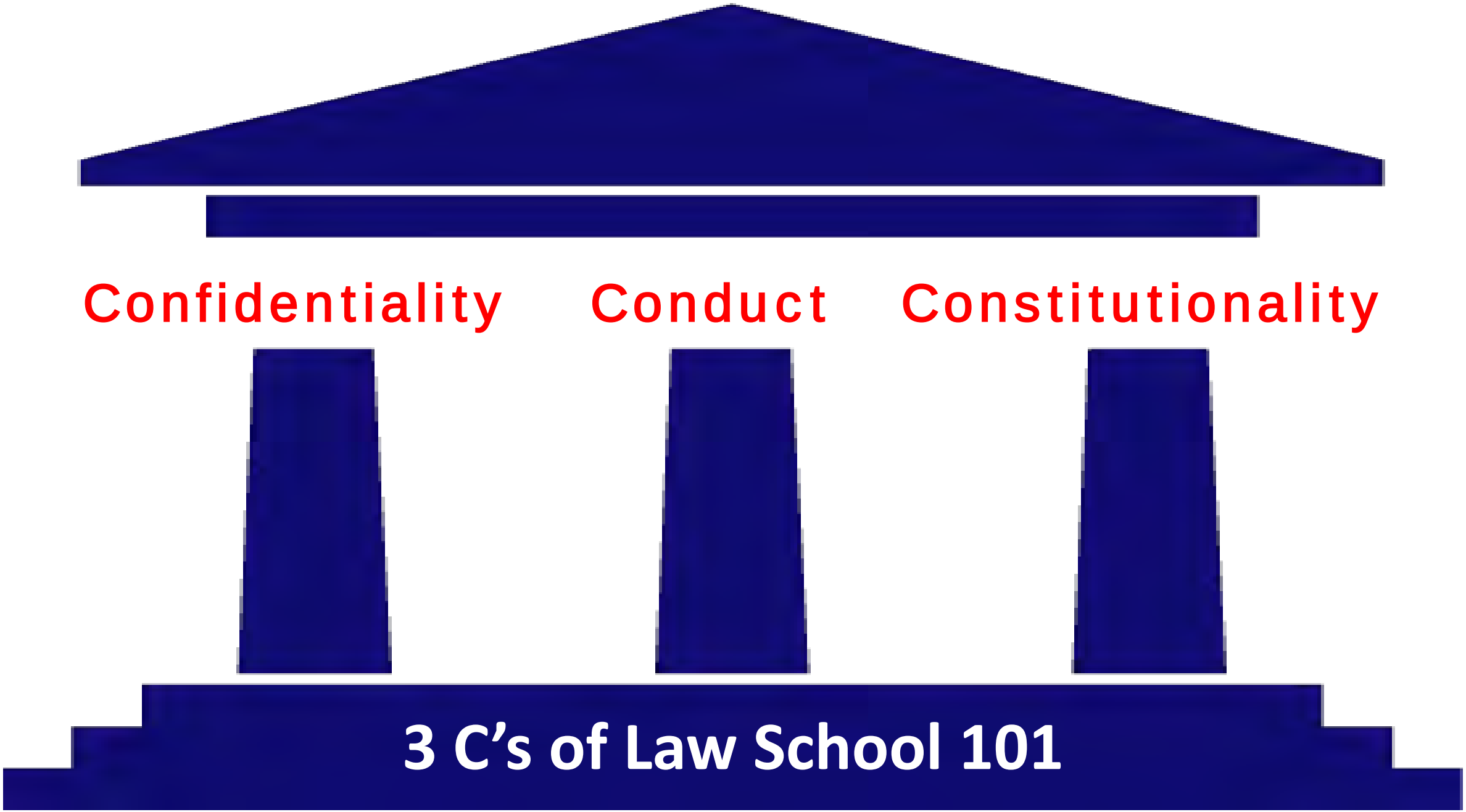
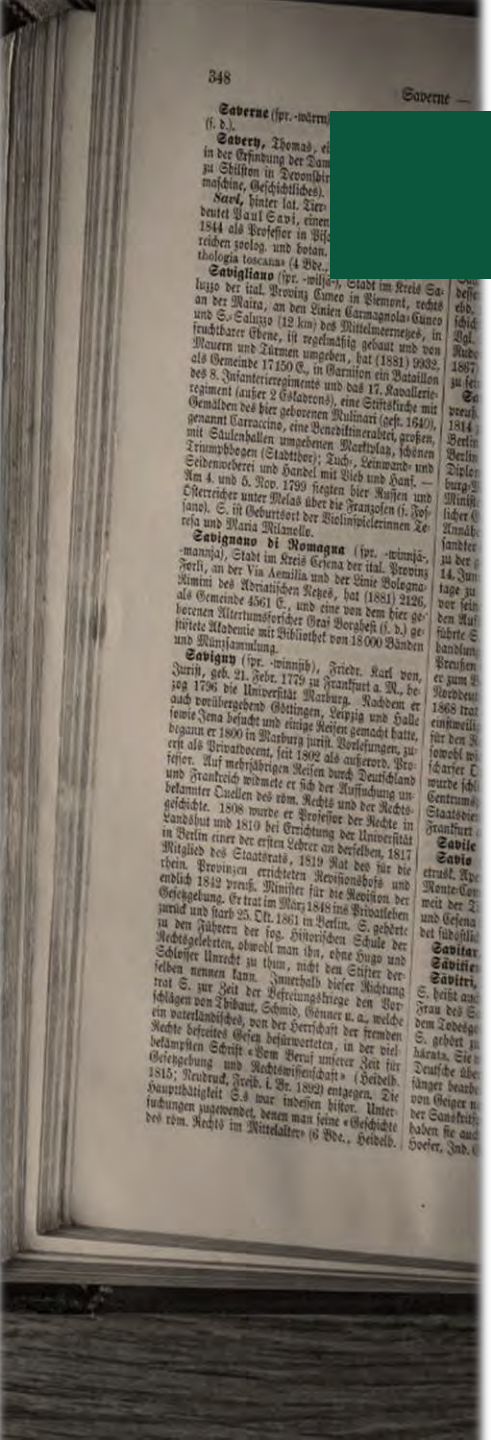
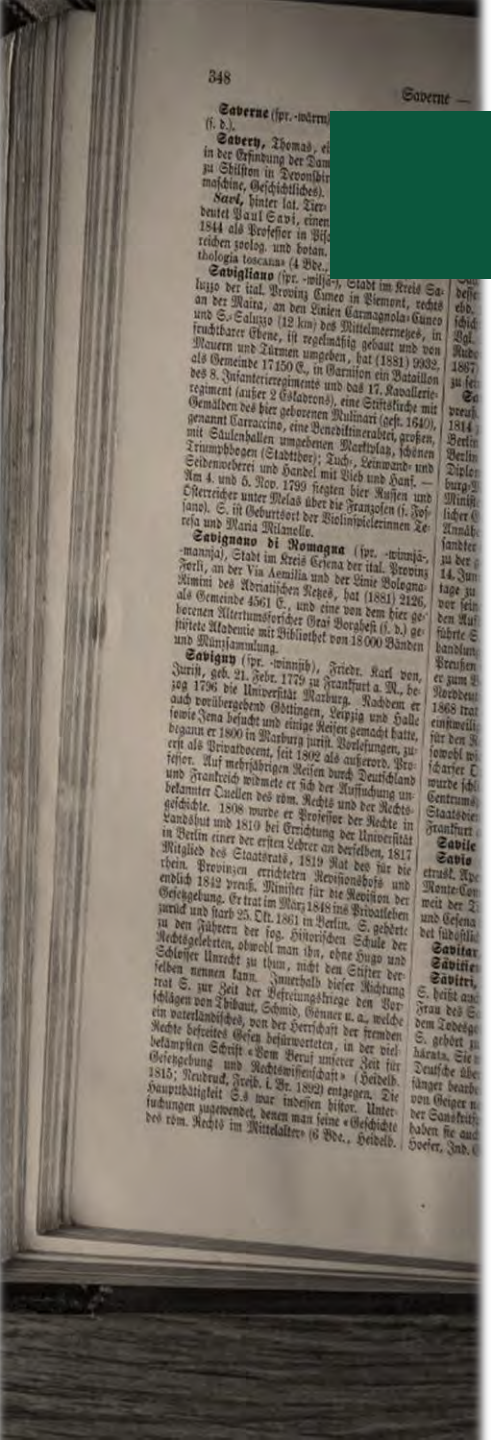

Confidentiality
Conduct
Constitutionality
3 C's of Law School 101



LEARNING OBJECTIVES

After this presentation, you will know:

- Compliance with confidentiality laws
- Maintain ethical boundaries
- Avoid the appearance of judicial impropriety
- Role of defense counsel
- Medication assisted treatment laws
- Use of prescription medications
- First Amendment and Alcoholics Anonymous®
- First Amendment and participant restrictions
- Jail sanction and termination due process issues
- Illegality of preventive detention



CONFIDENTIALITY

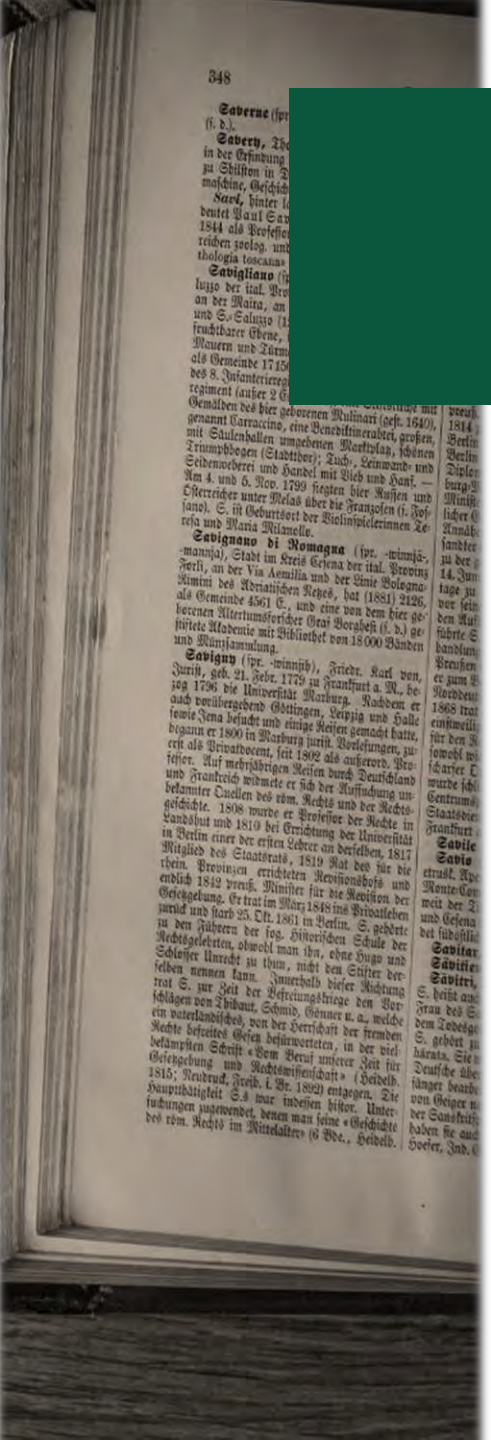
What are Part 2 Regulations?

- Title 42, Part 2 of the Code of Federal Regulations addresses use of substance use disorder information in non-treatment settings
- Part 2 ensures a patient receiving substance use treatment does not face adverse consequences in criminal proceedings and civil proceedings such as those related to child custody, divorce, or employment.
- Separate regulations from HIPAA.

Does it apply to treatment courts?

- Yes, if the treatment court, its state funding agency or any tax exempt entity or a treatment provider receives federal funds. This is broadly interpreted. Assume it applies to your court.
- Yes, if it is patient identifying information

Source: SAMHSA, Disclosure of Substance Use Disorder Patient Records: *Does Part 2 Apply to Me?* https://www.samhsa.gov/sites/default/files/does-part2-apply.pdf



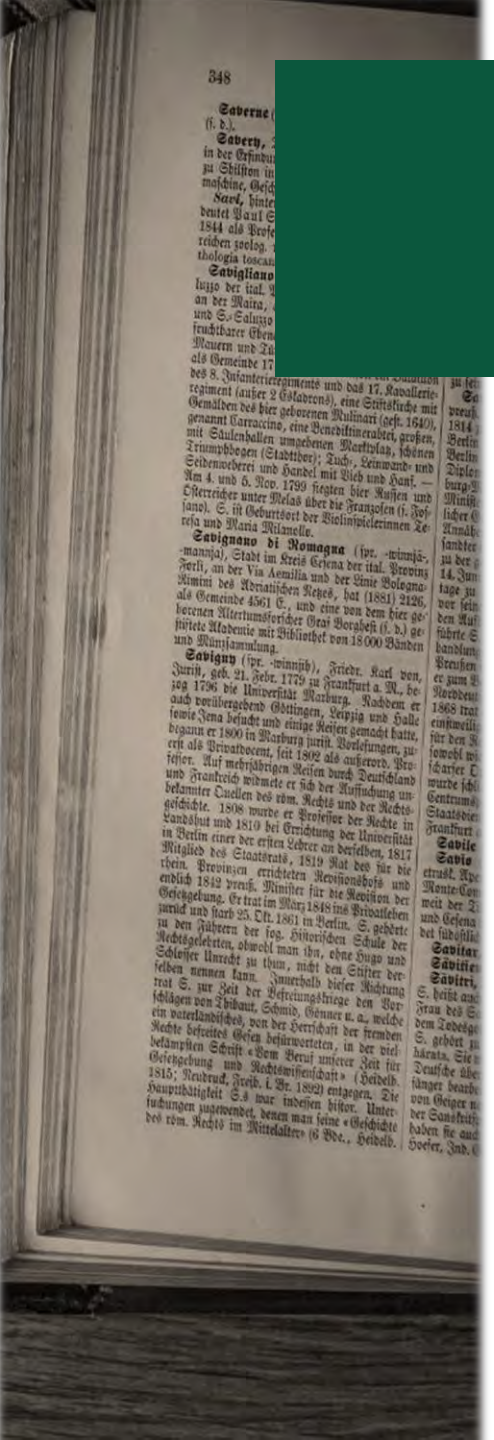
Confidentiality
Part 2 Regulations ~ Disclosure

Treatment Courts Should Use Consent Forms

- Advisement of rights
- Consent must include the patient name, entity, purpose, statement of revocation, expiration, signature and date, and how to report violations
- Ensure the consent form specifically references 42 C.F.R. Part 2

Other means of disclosure are VERY LIMITED

- Civil subpoena – must show good cause
- Criminal subpoena – must show good cause and serious crime



CONFIDENTIALITY
HIPAA - SUMMARY

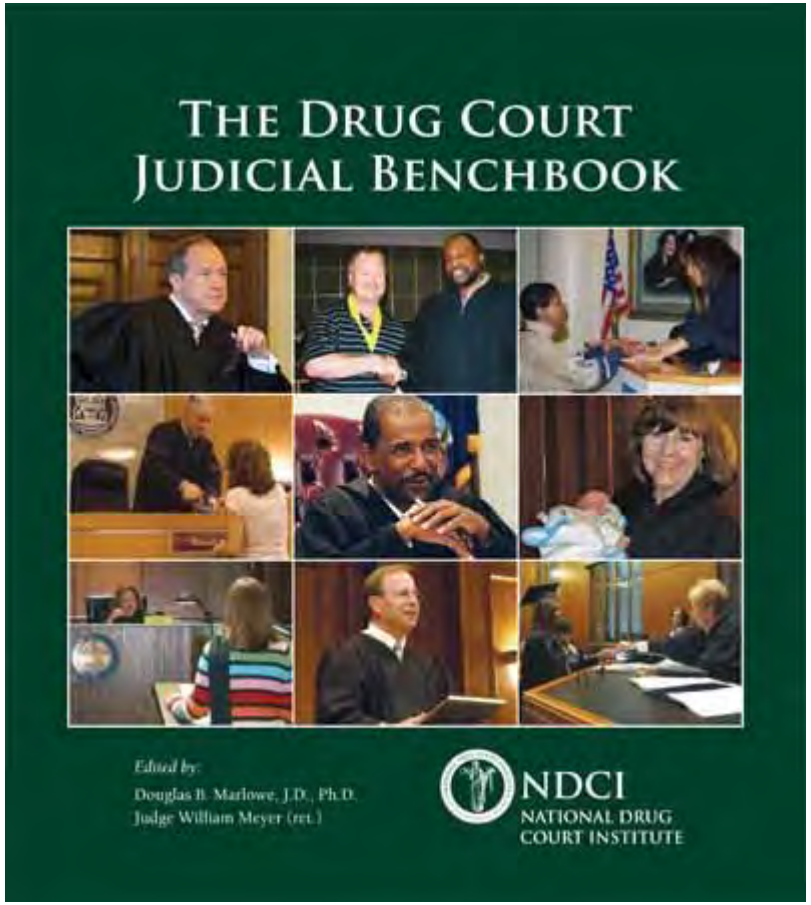
Health **I**nsurance **P**ortability **A**ccountability **A**ct

HIPAA does not apply to courts, court personnel, accrediting agencies, jails, or law enforcement personnel

Treatment courts are impacted by HIPAA because it applies to treatment providers and medical providers on the treatment court team and protected health information is re-disclosed to the treatment court team

CONFIDENTIAL

CONFIDENTIALITY
HIPAA - DISCLOSURE



Sample Forms

Sample Consent Form

Sample Disclosure
Court Order

Confidentiality
Open Courtrooms

Florida vs. Noelle Bush

SECTIONS HOME SEARCH The New York Times

ARCHIVES | 2002

Gov. Bush's Daughter Is Sentenced to Jail

OCT. 18, 2002

Gov. Jeb Bush's daughter, Noelle, was sentenced today to 10 days in jail for violating the terms of a court-ordered drug treatment program that she entered to avoid trial on charges of trying to buy an antidepressant drug with a fraudulent prescription.

Judge Reginald K. Whitehead of Circuit Court in Orange County sentenced Ms. Bush, 25, after citing accusations that crack cocaine had been found in her shoe at a treatment center in Orlando.

- Public access to the courts is paramount
- Treatment court proceedings must be open so participants can learn from others
- If treatment court proceedings are closed, other participants and families would be excluded

Confidentiality
Open Courtrooms - Recommendations

- Don’t discuss protected health information
- Be cautious about discussing sensitive matters
- Use the NADCP Judicial Benchcard
- Use Motivational Interviewing
- Use courtroom as a classroom

CONFIDENTIALITY ~ STAFFING

Washington cases:

- Participant terminated from drug treatment court argued the closed staffing violated his constitutional right to open court proceeding
- Court held that drug courts are philosophically, functionally, and intentionally different from ordinary criminal courts. Staff meetings are not subject to the open courts provision of the state constitution.
- Staffing is not a "critical stage of the proceedings" allowing a defendant to be present

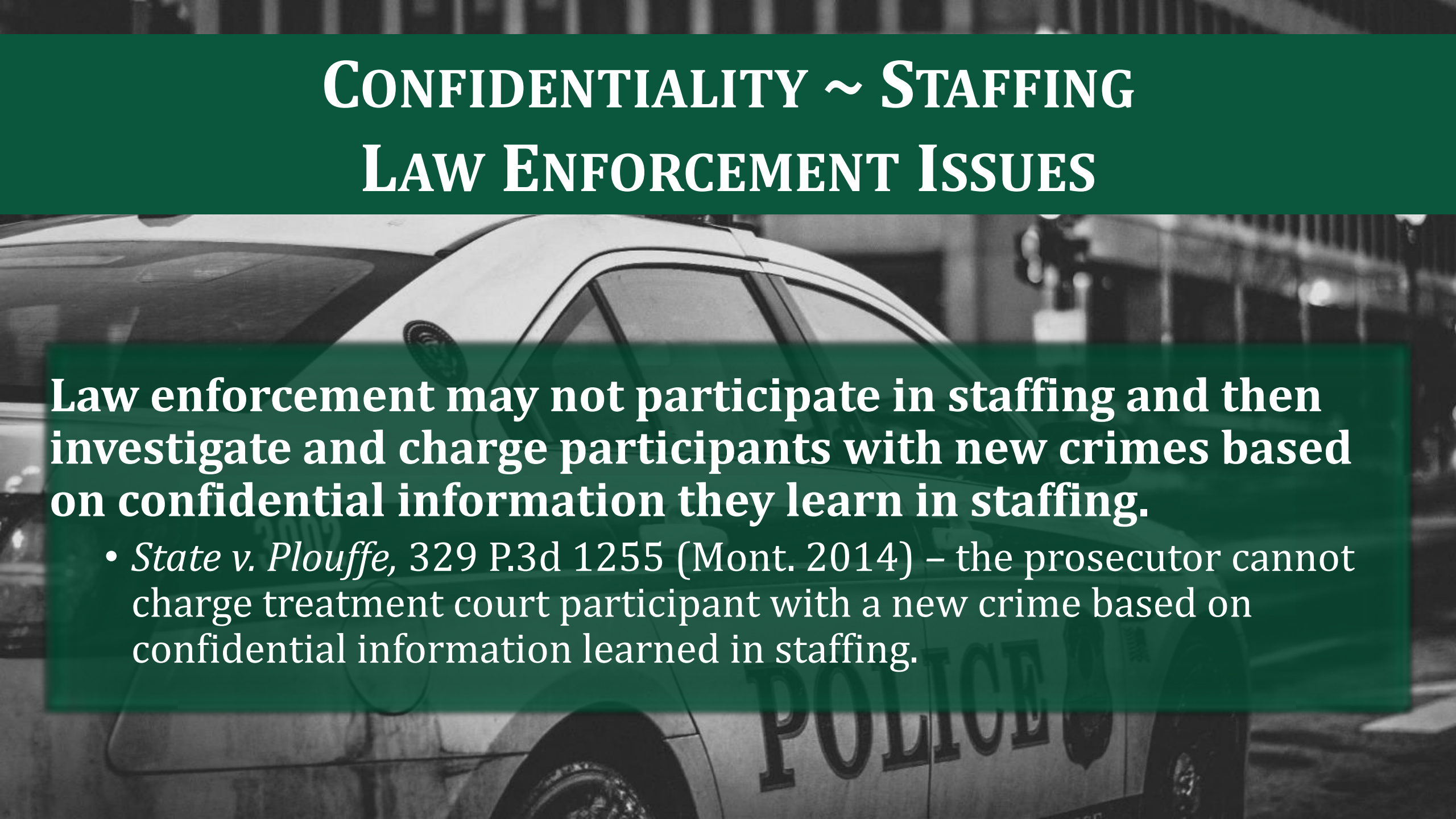
Source: State v. Sykes, 339 P.3d 972 (Wash. 2014); State v. LeClech, 2015 Wash. App. Lexis 1642.

Confidentiality ~ Staffing
Law Enforcement Issues

Law enforcement participation in staffing is important

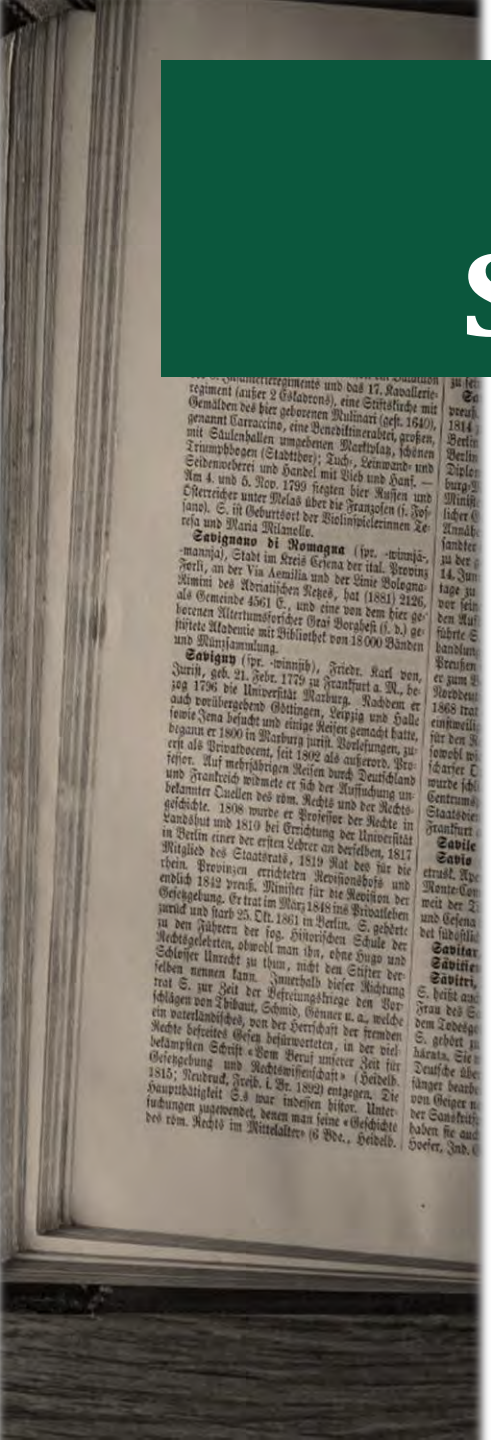
- Build community support
- Build participant rapport
- Contribute valuable information
- Reduce recidivism and save taxpayer costs

Confidentiality ~ Staffing
Law Enforcement Issues



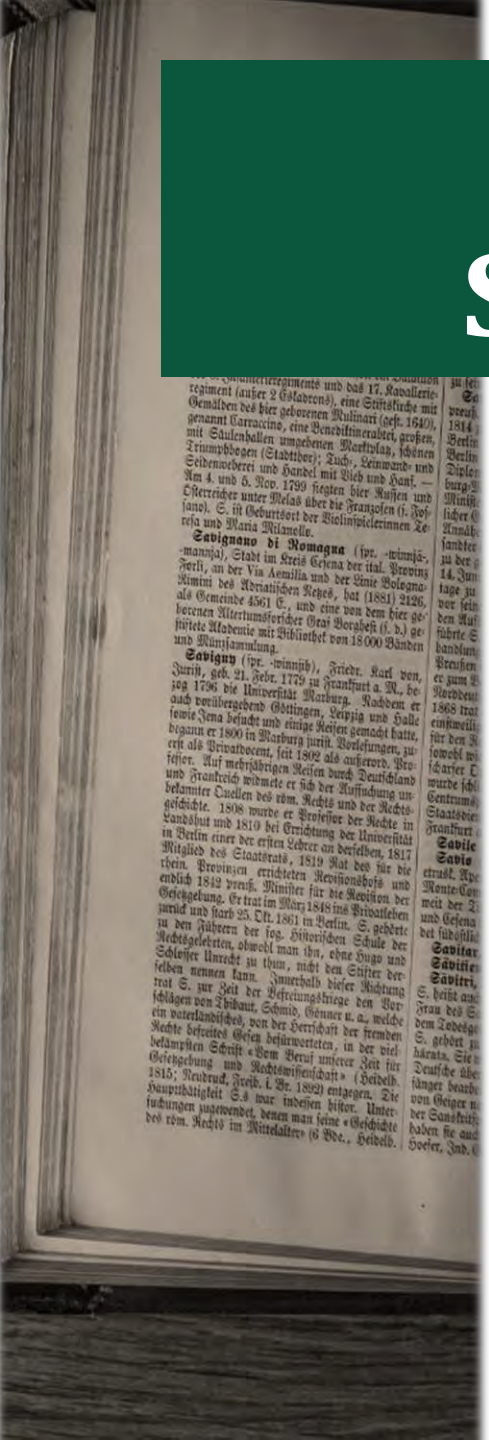
Law enforcement may not participate in staffing and then investigate and charge participants with new crimes based on confidential information they learn in staffing.

- *State v. Plouffe,* 329 P.3d 1255 (Mont. 2014) – the prosecutor cannot charge treatment court participant with a new crime based on confidential information learned in staffing.



Confidentiality Staffing Recommendations

- Close treatment court staffing in your policies and procedures manual
- Implement a standing order closing treatment court staffing
- Require team members to sign in at staffing and acknowledge the confidential nature of the meeting



Confidentiality Staffing Recommendations

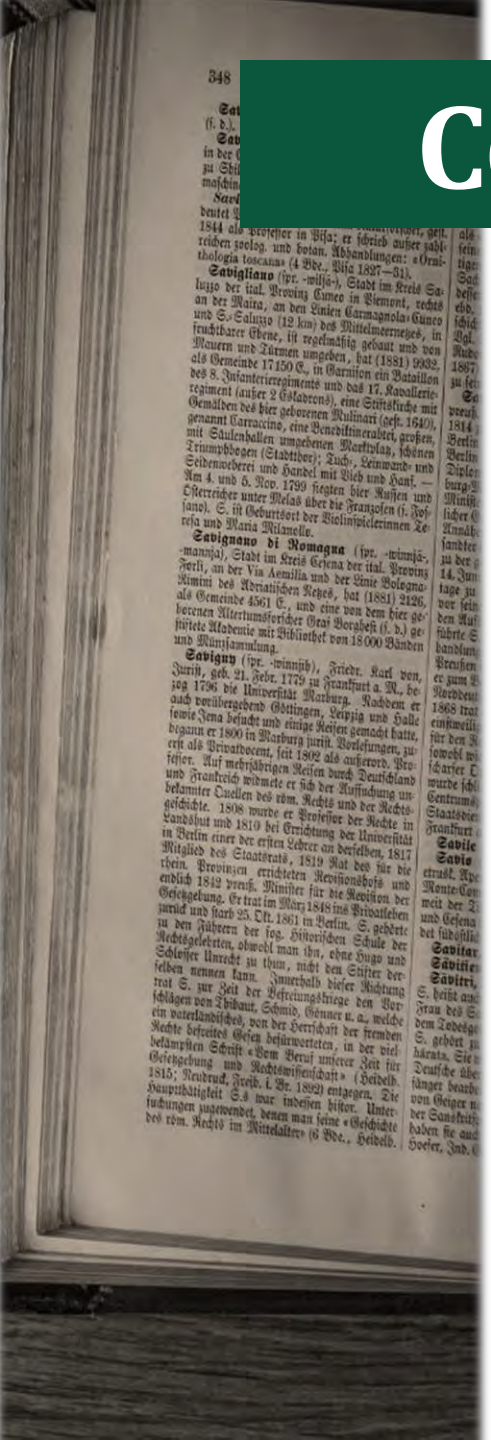
- Include a provision in the participant handbook that there is no right for a participant to attend staffing
- Control attendance at staffing to key team members
- Don’t charge participants with new crimes based on information learned in staffing
- Confidentiality principles apply to all team members

Conduct Overview

Ex parte communication

Judicial fraternization and impartiality

Role of defense counsel



CONDUCT ~ EX PARTE COMMUNICATION

Ex parte communication is information a judge receives about a pending case when both the prosecutor and defense attorney are not present. *Ex parte* communication is improper and prohibited.

To address this rule in treatment courts, many states have enacted exceptions in their professional conduct rules to allow for *ex parte* communication:

"A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, drug courts, or the water court. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others."

Conduct
Ex Parte Communication Recommendations

- Disclose *ex parte* information to the entire team
- Establish channels of communication (e.g. require participants to talk with their attorney or probation officer before communicating with the court).
- Maintain ethical boundaries, even if there is an exception to the rule
- Use e-mails to communicate information between team members
- Require participants to read letters or assignments in court

Conduct ~ Relations with Participants

DO NOT *take participants to support meetings*

DO NOT *visit participant homes*

DO NOT *invite participants to your home to play video games*

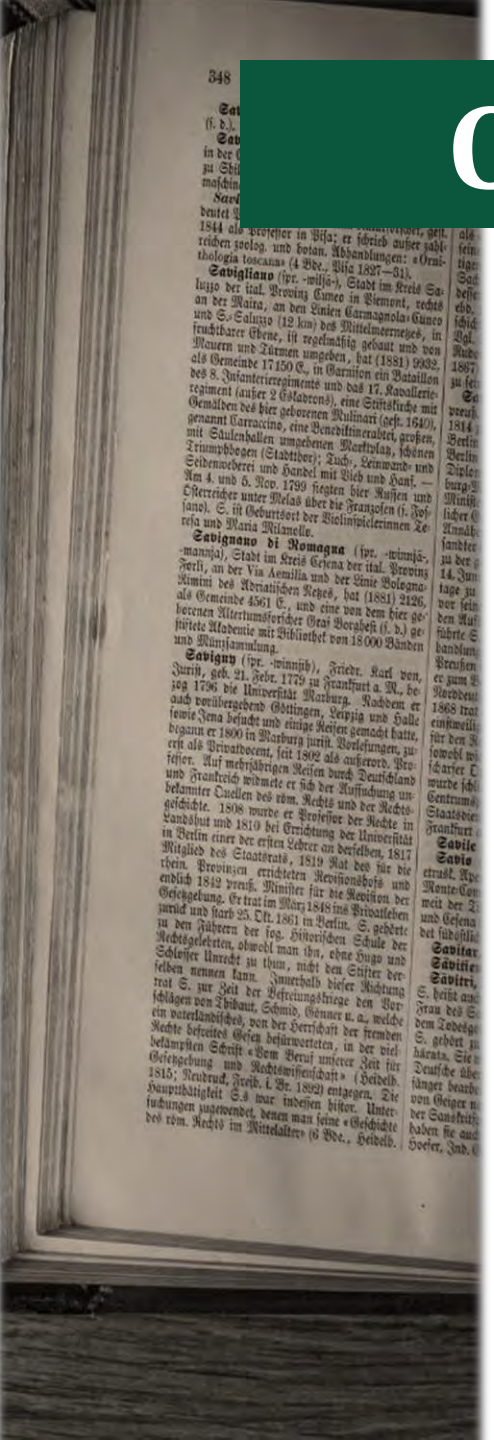
DO NOT *collect participant UAs*

STAY IN YOUR LANE!

Conduct
Relations with Participants Recommendations

"But, I want to show my participants that I care…"

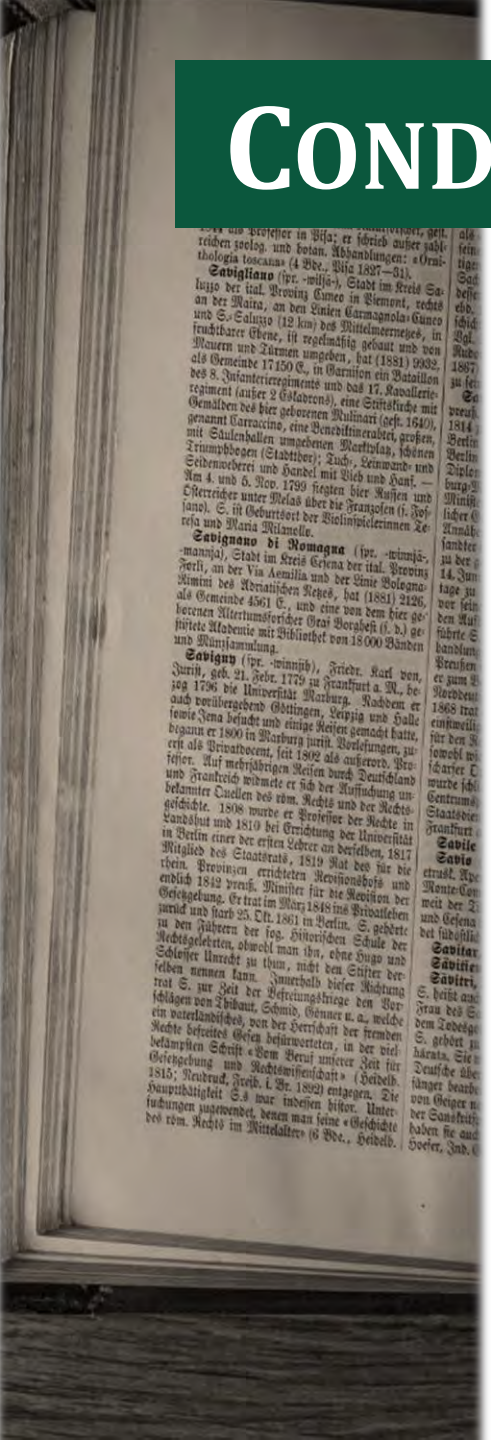
If there was a picnic and the district attorney, defense counsel, law enforcement, other members of the drug court team, and drug court participants were present and the judge made a cameo appearance and said a few words of encouragement, such conduct would not violate the Canons.



Conduct ~ Defense Attorney Role

- Ensure participant rights are protected (including *ex parte* communication)
- Advocate for participant interests
- Handle day-to-day legal issues
- Attend staffing and court
- Refer participants to treatment court
- Liaison to the bar
- Address due process issues and evidentiary hearings
- Be part of the team, but don't accept "just being a team player"
- Remind team members to stay in their lane

Conduct ~ Defense Attorney Obligations



To competently represent a client in treatment court, a defense attorney must be familiar with core treatment court concepts:

- Treatment
- Eligibility criteria and enrollment processes
- Policies and procedures
- Incentives and sanctions
- Due process issues
- Sentencing alternatives (advocating courts to enroll participants)
- Best Practice Standards

Constitutionality Overview

CONSTITUTIONALITY
MEDICATION ASSISTED TREATMENT

Can a treatment court prohibit Medication Assisted Treatment (MAT) because it substitutes one addiction for another?

CONSTITUTIONALITY
MEDICATION ASSISTED TREATMENT GRANT REQUIREMENTS

Beginning in 2015, treatment courts receiving federal funding must attest in writing that they will not deny an otherwise eligible participant's use of MAT and they will not require discontinuance of medications as a condition of graduation.

CONSTITUTIONALITY
MEDICATION ASSISTED TREATMENT NADCP POSITION

Best Practice Standard I(E): "…numerous controlled studies have reported significantly better outcomes when addicted offenders received medically assisted treatments including opioid antagonist medications such as naltrexone, opioid agonist medications such as methadone, and partial agonist medications such as buprenorphine."

Board Position Statement: Treatment court professionals must:

- Learn about MAT
- Consult with experts on MAT options
- Eliminate blanket prohibitions of MAT
- MAT decisions are based on medical evidence
- Impose consequences for abuse or unlawful use of MAT medications

CONSTITUTIONALITY
MEDICATION ASSISTED TREATMENT VALID PROHIBITIONS

When can a treatment court prohibit MAT and retain federal funding?

- The client is not receiving the medications as part of treatment for a diagnosed substance use disorder; or
- A licensed prescriber, acting within the scope of their practice, has not examined the client and determined the medication is an appropriate treatment for their substance use disorder; or
- The medication was not appropriately authorized through prescription by a licensed prescriber.

Constitutionality
Medication Assisted Treatment Legal Challenges

MAT prohibitions are invalid under:

Americans with Disabilities Act (ADA)

Rehabilitation Act of 1973

Fourteenth Amendment due process guarantees

Eighth Amendment cruel and unusual punishment

Constitutionality
Recommendations on Prescription Medications

Participant Use of Prescriptions:

- Use a prescription notification form
- Use releases to obtain records
- Refer participants to providers with MOUs with the treatment court
- Control and monitor use

CONSTITUTIONALITY
FIRST AMENDMENT – ALCOHOLICS ANONYMOUS

Treatment courts can ***refer*** participants to deity-based programs such as Alcoholics Anonymous®, but courts cannot ***require*** participation in such programs without violating the First Amendment.

CONSTITUTIONALITY
FIRST AMENDMENT – ALCOHOLICS ANONYMOUS

Why does *requiring* attendance at deity-based programs violate the First Amendment?

The First Amendment Establishment Clause prohibits the government from establishing or requiring religious practices.

Deity-based programs like Alcoholics Anonymous® require:

- Confess to God "the nature of our wrongs" (Step 5)
- Appeal to God to "remove our shortcomings" (Step 7)
- By "prayer and meditation" make "contact" with God to achieve the "knowledge of the will" (Step 11)

CONSTITUTIONALITY
FIRST AMENDMENT – ALCOHOLICS ANONYMOUS

IT DOESN'T MATTER:

- Treatment court is voluntary
- AA doesn't require belief in God, just a higher power
- It's just a reference to God
- Treatment providers require AA, not the treatment court

Courts have uniformly held that requiring attendance at AA/NA violates the First Amendment

CONSTITUTIONALITY
FIRST AMENDMENT – ALCOHOLICS ANONYMOUS

Recommendations:

- Courts have held that if a secular alternative is available, there is no First Amendment violation by referring to AA/NA.
- Secular alternatives include, among others, LifeRing Secular Recovery®, Rational Recovery®, Smart Recovery®

LifeRing® Secular Recovery

Rational Recovery®
Box 800, Lotus CA 95651 • 530-621-2667 • 530-621-4374 Since 1986
How to Quit Your Addiction Right Now - For Life

SMART Recovery®

Constitutionality

First Amendment – Area Restrictions

Despite the absence of an express guarantee, state and federal courts have recognized the right to travel as a fundamental right entitled to constitutional protection.

Although requirements vary by state, courts can impose reasonable place and area restrictions if the restriction is:

- Related to offender or the underlying offense
- Narrowly drawn
- Related to rehabilitation needs of the offender

Constitutionality

First Amendment – Association Restrictions

The First Amendment encompasses the right of association.

Courts can impose restrictions on associating with other felons, drug users, etc.

Restrictions interfering with the fundamental constitutional right of marriage require heightened consideration.

CONSTITUTIONALITY
FOURTH AMENDMENT ~ SEARCHES

The Fourth Amendment guarantees freedom from unreasonable searches and seizures.

Probationers have greatly diminished expectations of privacy and warrantless searches are permitted.

Mandatory search waivers are constitutional and totally suspicionless searches are permitted.

Source: *Samson v. California,* 547 U.S. 843 (2006)

CONSTITUTIONALITY
WHAT IS DUE PROCESS?

Before depriving a citizen of life, liberty, or property, the government must follow fair procedures.

CONSTITUTIONALITY
DUE PROCESS ~ TERMINATION

A hearing is required before terminating a participant from treatment court.

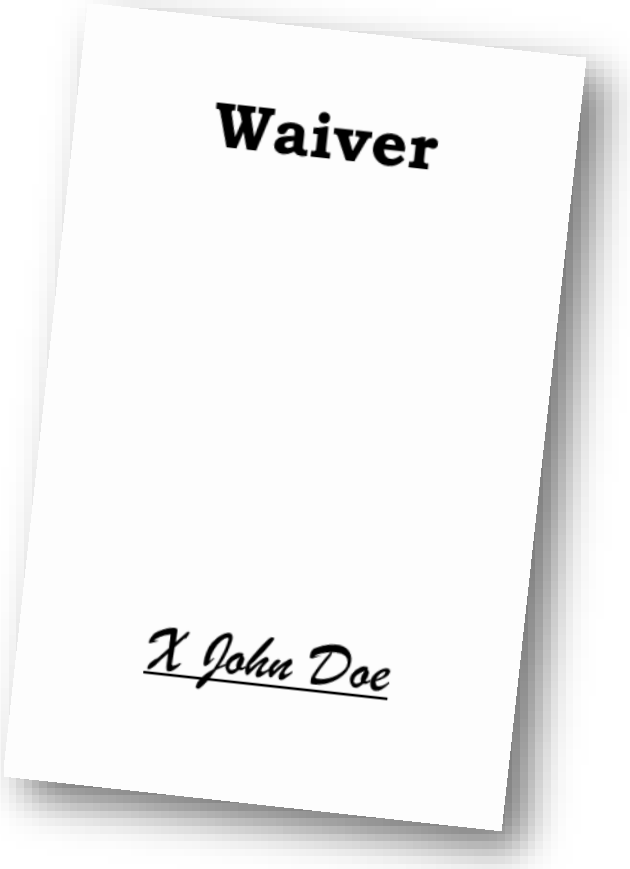
CONSTITUTIONALITY
DUE PROCESS ~ REQUIREMENTS

What fair procedures are required?

- Probable cause determination
- Written notice
- Right to appear
- Cross-examine and call witnesses
- Burden of proof
- Independent magistrate
- Reasons for decision
- Right to counsel (state-by-state determination)

CONSTITUTIONALITY
DUE PROCESS ~ WAIVER

A treatment court cannot require participants to waive a termination hearing as a condition of participation.



Source: *State v. LaPlace,* 27 A.3d 719 (N.H. 2011); *Staley v. State,* 851 So. 2d 805 (Fla. Ct. App. 2003).

CONSTITUTIONALITY
DUE PROCESS ~ JUDICIAL IMPARTIALITY

Can a treatment court judge preside over a participant's termination hearing and probation revocation hearing?

Oklahoma Supreme Court: Requiring the district court to act as treatment court team member, evaluator, monitor, and final adjudicator in a termination proceeding could compromise the impartiality of a district court judge assigned the responsibility of administering a treatment court participant's program.

Minnesota Court of Appeals: If probation is revoked based on treatment court termination, the defendant is entitled to a judge other than the treatment court judge to preside over the probation revocation proceedings.

CONSULT STATE ETHICS OPINIONS!

CONSTITUTIONALITY
DUE PROCESS ~ JUDICIAL IMPARTIALITY

Recommendations

Ask a participant whether he or she wants the treatment court judge to recuse from the termination hearing

Provide an opportunity to consult with counsel

Notify the participant of their rights at the hearing

CONSTITUTIONALITY

DUE PROCESS ~ JAIL SANCTION

YES!

If a treatment court participant denies misconduct, is a hearing required before a jail sanction is imposed?

CONSTITUTIONALITY
DUE PROCESS ~ JAIL SANCTIONS

The Constitution <u>GUARANTEES</u> Due Process!

Key Component 2: "Using a nonadversarial approach, prosecution and defense counsel promote public safety while <u>protecting participants' due process rights</u>."

Courts require evidentiary hearings when jail is a possible sanction and the participant denies the factual basis for the sanction

An evidentiary hearing with basic procedural protections is required because the participant may suffer a loss of a liberty or property right.

CONSTITUTIONALITY
DUE PROCESS ~ JAIL SANCTIONS

Besides violating a participant's constitutional rights, YOU can be sanctioned too!

A Mississippi judge was removed from office for:

- Jailing a participant for 24 days for unspecified violations
- Keeping participants in treatment court indefinitely, some for over four years
- Refusing to conduct jail sanction hearings

"We agree that Judge Thompson's lack of understanding and appreciation for basic legal principles … of due process safeguards cannot be overlooked."
– Mississippi Supreme Court

Source: Mississippi Comm'n on Jud. Perf. v. Thompson, 169 So. 3d 857 (2015).

CONSTITUTIONALITY

DUE PROCESS ~ PREVENTIVE DETENTION

It is lawful to place a participant with a substance use disorder in jail while you are waiting for a placement bed to become available?

CONSTITUTIONALITY
DUE PROCESS ~ PREVENTIVE DETENTION

“But, if I release her, she will OD…”

Preventive detention is **UNCONSTITUTIONAL!**

Treatment courts **CANNOT** jail participants because they need inpatient treatment and a bed is not available without basic due process protections.

CONSTITUTIONALITY
DUE PROCESS ~ PREVENTIVE DETENTION

Why Is Preventive Detention Wrong?

- The Sixth Amendment guarantees the right to a speedy and public trial and arrested persons cannot be detained for extended period without a trial.
- The Eighth Amendment allows for reasonable bail and prohibits cruel and unusual punishment.
- Jail is not treatment.
- There is no evidence that preventive detention reduces crime, treats substance use disorders or instills fear.

CONSTITUTIONALITY
DUE PROCESS ~ PREVENTIVE DETENTION

Unlawful Preventive Detention Exposes Treatment Courts to CLASS ACTION LAWSUITS

Recently, the Seventh Circuit Court of Appeals made this observation about a treatment court in Indiana:

"Unfortunately, the drug treatment court in Clark County was not one of the success stories. Under the stewardship of Judge Jerome Jacobi, the court ran roughshod over the rights of participants who frequently languished in jail for weeks and even months without justification. The jail stays imposed as sanctions for noncompliance [and awaiting placement in treatment facilities] were arbitrary and issued without due process."

Source: Hoffman v. Knoebel, 894 F.3d 836 (7th Cir. 2018)

Constitutionality
Due Process ~ Preventive Detention

Recommendations

- Hold a hearing with testimony by a treatment provider concerning the participant's substance use or mental health needs.
- Document the efforts taken to secure a treatment bed placement.
- Make a probable cause determination.
- Set bail.
- Exhaust other less restrictive alternatives (e.g. house arrest, halfway house, GPS monitoring, etc.)
- Rely on other non-compliance issues to justify the sanction (e.g. missing appointments, curfew, etc.)

Constitutionality
Due Process ~ Preventive Detention

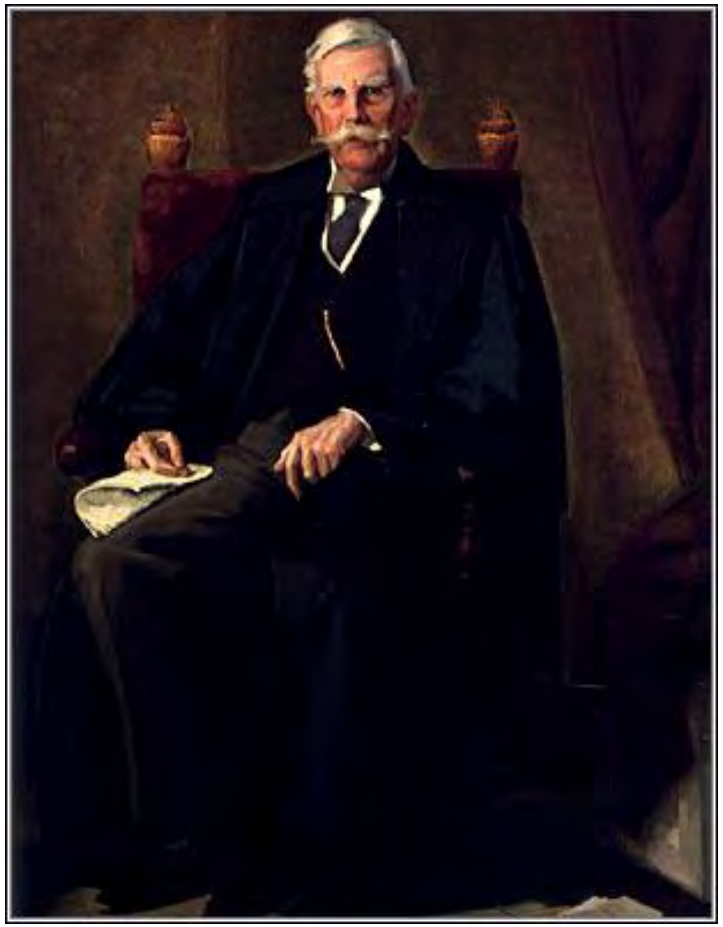
Recommendations

- Rely on treatment provider recommendations for alternatives.
- Allow consultation with an attorney.
- Set review dates, as well as an automatic release condition when a treatment bed is available.
- Explore a civil commitment proceeding.

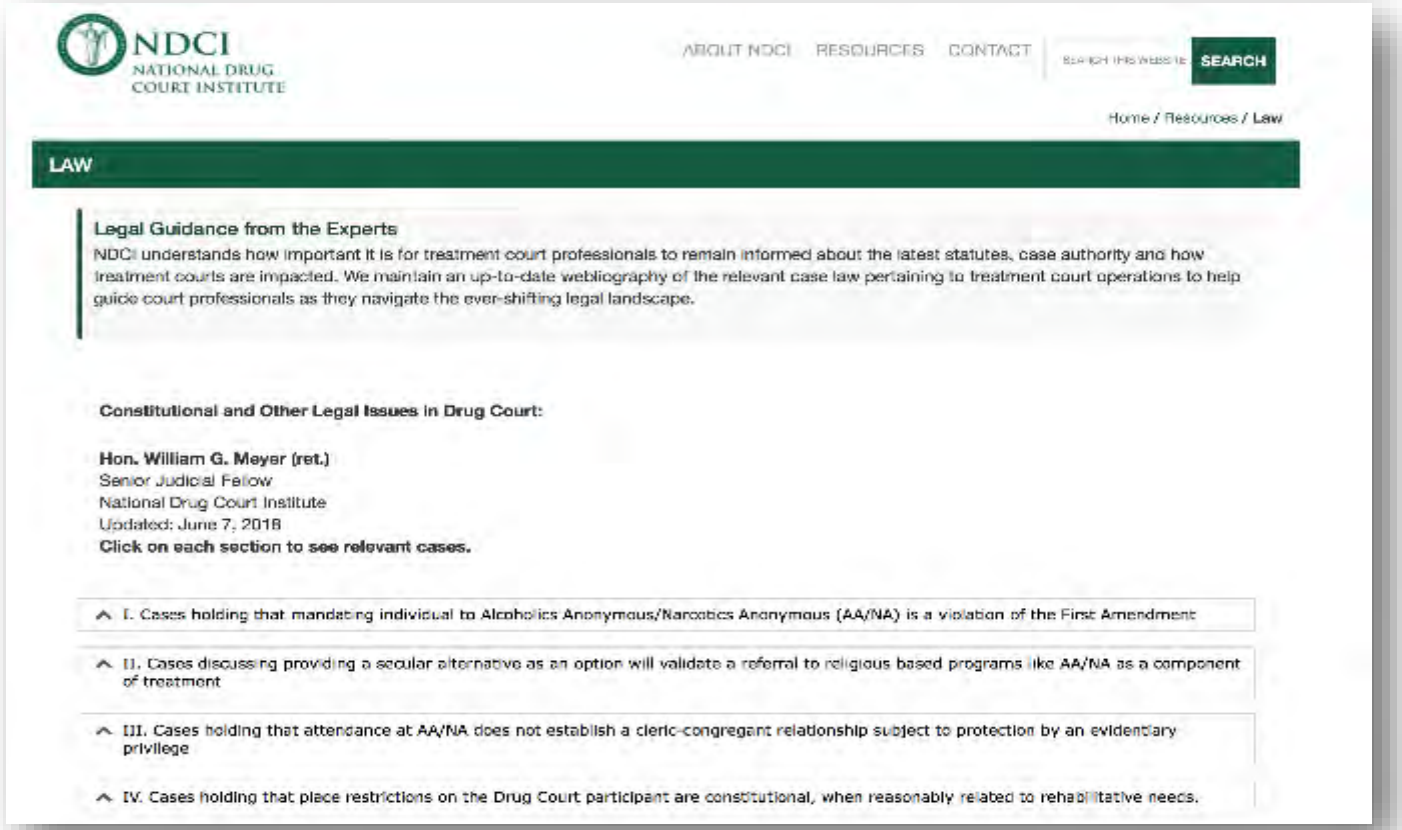
CONSTITUTIONALITY
A FINAL THOUGHT

Whatever disagreement there may be as to the scope of due process, there is no doubt that it embraces the fundamental concepts of fairness and opportunity to be heard.

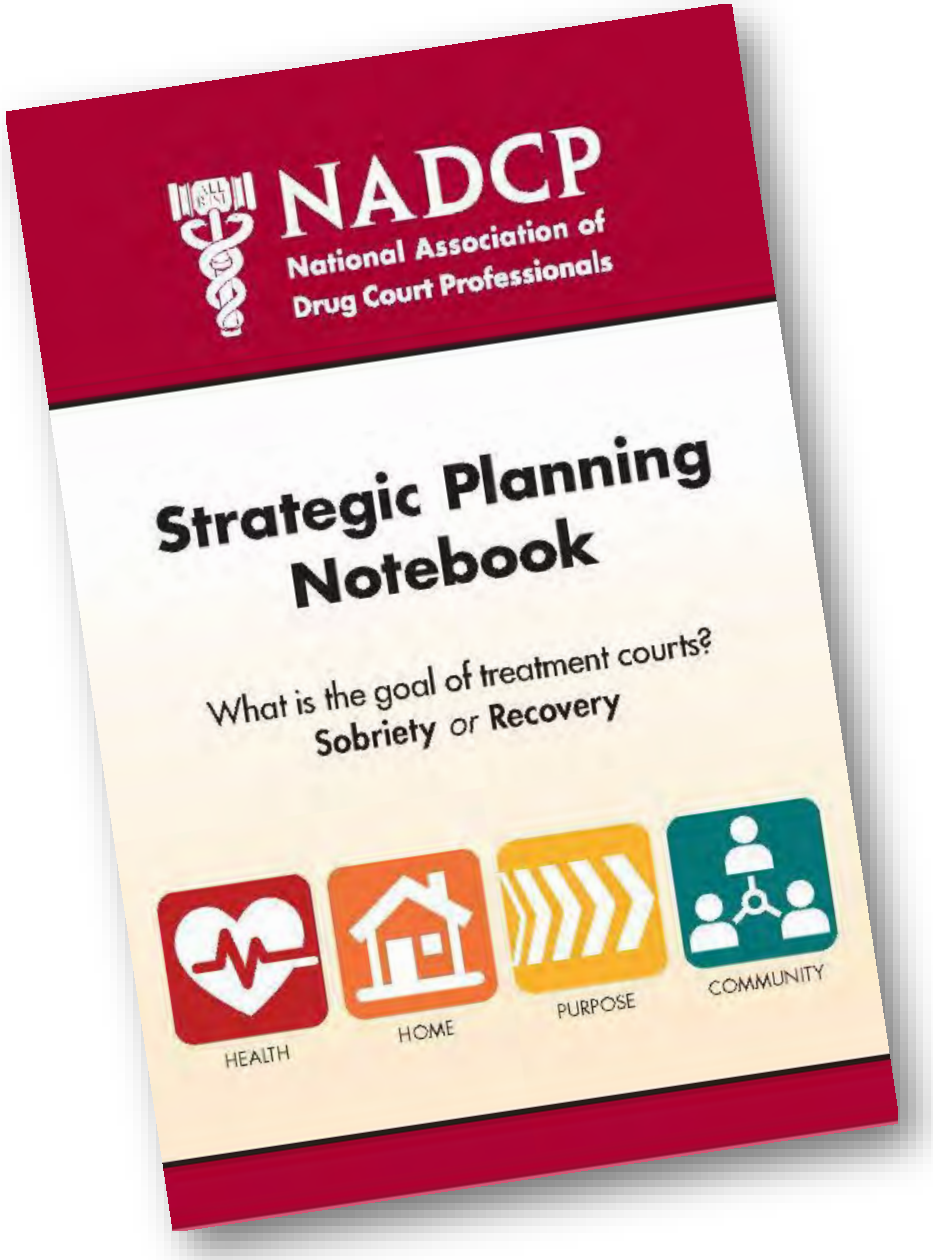
--- Justice Oliver Wendell Holmes,
Frank v. Mangum, 237 U.S. 309 (1915)



CONSTITUTIONALITY
RESOURCES FOR TREATMENT COURTS



https://www.ndci.org/resources/law/



Strategic Planning Notebook

Connect how the topic relates to recovery

Write down these connections to recovery

Share ideas on how to incorporate the topic into your program