

A Defense Attorney's Ethical Responsibilities in a Specialty Court*

I. Introduction

Problem-solving courts are a reaction to a four-decade-long campaign of mass incarceration and overcriminalization in the United States that has left jails overcrowded and taxpayers with an \$80 billion annual bill.¹ Jails currently hold more people with mental health illness and substance abuse disorders than any other public institution.² Consequently, states and counties can no longer afford to entertain America's "tough on crime" approach to criminal justice, which has in large ignored defendants' social and medical needs and failed to curb recidivism rates.³ One way that stakeholders can curb recidivism is by redistributing their time and resources into various specialty courts designed to address the social problems underlying a defendant's entry into the criminal system.⁴ The underlying goal is holistic—courts can preserve human dignity and help defendants become productive members of society rather than perpetual offenders of a criminal justice system.⁵

Crime is not a monolith. Applying a one-size-fits-all justice system is neither an effective use of our tax dollars nor a realistic criminal justice model, especially for defendants with drug addiction, mental illness, and other social problems that lead individuals into contact with the law in the first place.⁶ Filtering these people into a traditional criminal justice system traps them in a proverbial revolving door—offenders are arrested for petty crimes, incarcerated,

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¹ Rebecca Vallas, *The Mass Incarceration of People with Disabilities in America's Jails and Prisons*, CTR. FOR AM. PROGRESS (July 18, 2016, 12:01 AM), <https://www.americanprogress.org/issues/criminal-justice/reports/2016/07/18/141447/disabled-behind-bars/>.

² *Smart Justice*, THE MEADOWS MENTAL HEALTH POLICY INST., <http://texasstateofmind.org/focus/smart-justice/>.

³ See Marc Mauer, *Is the 'tough on crime' movement on its way out?*, MSNBC (May 28, 2014, 9:06 AM), <http://www.msnbc.com/msnbc/sentencing-reform-the-end-tough-crime>.

⁴ See Tamar M. Meekins, *"Specialized Justice": The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 3 (2006) [hereinafter Meekins I]; John E. Cummings, *The Cost of Crazy: How Therapeutic Jurisprudence and Mental Health Courts Lower Incarceration Costs, Reduce Recidivism, and Improve Public Safety*, 56 LOY. L. REV. 279, 291 (2010).

⁵ Cait Clarke & James Neuhard, *"From Day One": Who's in Control as Problem Solving and Client-Centered Sentencing Take Center Stage?*, 29 N.Y.U. REV. L. & SOC. CHANGE 11, 30 (2004).

⁶ See Cummings, *supra* note 4, at 280, 285--86.

released, homeless, and re-imprisoned—never receiving the support and structure they need to reintegrate into society.⁷ William Kelly, Director of the Center for Criminology and Criminal Justice Research at the University of Texas, questions whether a system allowing thousands of similarly situated defendants to cycle in and out of jail is really accomplishing long-term public safety.⁸

Problem-solving courts attempt to solve the “revolving door syndrome.”⁹ In general, they provide eligible defendants with effective intervention, treatment, services, and supervision through a “team” of professionals including a judge, prosecutor, social worker, caseworker, and defense attorney.¹⁰ The courts address a myriad of social issues from domestic violence and homelessness to prostitution and gambling.¹¹ Because their designs are tailored to meet individualized needs, the methodology in one court does not necessarily fit the mold of another.¹²

Many defense attorneys and clients have the same interest in stopping the revolving door of the criminal justice system. As mass incarceration increased, advocates began defending their clients in a holistic defense and client-centered way in an attempt to help their clients not recidivate.¹³ Holistic defense, first developed at a small public defender’s office in New York, attempts to broaden the role of the defense attorney by offering more comprehensive representation.¹⁴ It focuses on clients’ social and non-criminal legal needs in addition to the criminal case with the goal of making long-term impacts in clients’ lives.¹⁵ These

⁷ See *id.* at 287.

⁸ WILLIAM R. KELLY, *CRIMINAL JUSTICE AT THE CROSSROADS* 130 (2015).

⁹ Cummings, *supra* note 4, at 290.

¹⁰ REBECCA SILBER, RAM SUBRAMANIAN, AND MAIA SPOTTS, *JUSTICE IN REVIEW: NEW TRENDS IN STATE SENTENCING AND CORRECTIONS 2014-2015* 12, New York: Vera Institute of Justice, 2016.

¹¹ Maura D. Corrigan & Daniel Becker, *Moving Problem-Solving Courts into the Mainstream*, 82-JAN MICH. B.J. 14, 15 (2003); Tamar M. Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75, 83 (2007) [hereinafter Meekins II].

¹² Corrigan & Becker, *supra* note 11.

¹³ See Tamar M. Meekins, *You Can Teach Old Defenders New Tricks*, 21-SUM CRIM. JUST. 28, 32, 35 (2006) [hereinafter Meekins III].

¹⁴ See Norman Lefstein, *Time to Update the ABA Ten Principles for the 21st Century*, 40 THE CHAMPION 42, 48 (2016); Robin Steinberg, *Heeding Gideon’s Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961, 962 (2013).

¹⁵ Lefstein, *supra* note 14.

goals largely compliment the objectives of specialty courts.¹⁶ Similarly, client-centered lawyering incorporates the ideals of holistic defense—defenders prioritize the dignity and autonomy of the client in their representation.¹⁷ It is a model based on the idea that the client is the central decision-maker and the attorney should help inform the client’s decision in a way that promotes the client’s desires and wishes, even when the outcome of the criminal case can be compromised due to other needs.¹⁸ Client-centered lawyering in the abstract is commendable, however, its application in a traditional specialty court can be more challenging.¹⁹ Clients’ objectives and stated interests are often overshadowed by the specialty court “team’s” predetermined notion of the client’s “best interest.”²⁰ Consequently, the defense attorney and client are pressured to fall in line.

This paper will examine how stakeholders can design a system that achieves the goal of reducing mass incarceration and recidivism, while at the same time ensuring that defense attorneys are able to meet their ethical obligations to clients. Measures that can be put in place to ensure ethical representation of clients in specialty courts include designing pre-adjudication courts and demanding vertical representation.

II. The Evolution of Problem Solving and Specialty Courts

The development of specialty courts, or problem-solving courts, can be linked to the criminal justice system’s continuing embrace of restorative justice and therapeutic jurisprudence as advocates have realized that incarceration often doesn’t ‘work’.²¹ The theories are rooted in concepts of rehabilitation and emphasize treatment, not incarceration, as the desired goal of justice.²² Therapeutic jurisprudence is the study of “the law as a therapeutic

¹⁶ See *id.* at 50; *supra* notes 4-5 and accompanying text.

¹⁷ See Lefstein, *supra* note 14, at 50.

¹⁸ Meekins II, *supra* note 11, at 117, 118.

¹⁹ See Julie D. Lawton, *Who is My Client? Client-Centered Lawyering with Multiple Clients*, 22 CLINICAL L. REV. 145, 147 (2015).

²⁰ Meekins II, *supra* note 11, at 118.

²¹ *Id.* at 83.

²² Meekins I, *supra* note 4, at 15.

agent”—it focuses on the social factors that lead the offender to incarceration.²³ Typically, the theory balances intervention and treatment with accountability and responsibility.²⁴

Restorative justice theorists view the criminal justice system with a wider lense.²⁵ They observe the interests of all stakeholders in a criminal case, including the victim and the public, to determine how the offender’s actions affect these different players.²⁶ Under the auspices of these theories, specialty courts provide participants with access to social services, with an eye toward facilitating a safer future for its community.²⁷ In their pursuit of therapeutic jurisprudence, however, courts often expedite the entry process and use coercive adjudication models that require participants to plead guilty as a precondition of entry.²⁸ While these practices are utilized in the name of rehabilitation, they often have detrimental effects on participants. Likewise, the expectation that defense attorneys will act as “team players” can have serious consequences on their ethical obligations.²⁹ Specialty courts have had largely positive effects on the justice system—but these benefits must not overshadow a court’s responsibility to maintain procedural fairness and ensure that the attorney’s ethical values are upheld in the process.³⁰

Drug courts pioneered the specialty court movement.³¹ Consequently, they are the most prevalent specialized court in the United States, numbering over 3,000 nationwide.³² Their cost savings and success in reducing recidivism has spurred a proliferation of other specialized courts including mental health courts, which are loosely modeled after drug courts.³³ Mental health courts embrace treatment as a central tenet and alternative to incarceration.³⁴ The courts divert defendants whose mental illness contributed to their entry into the criminal

²³ See Meekins II, *supra* note 11.

²⁴ Kelly, *supra* note 8, at 173.

²⁵ See Meekins II, *supra* note 11, at 84.

²⁶ *Id.*

²⁷ See *id.*

²⁸ *Id.*

²⁹ See *id.* at 76.

³⁰ *Id.* at 125.

³¹ Corrigan & Becker, *supra* note 11.

³² Drug Courts, NAT’L INST. OF JUSTICE (Jan. 10, 2017), <https://www.nij.gov/topics/courts/drug-courts/Pages/welcome.aspx#note1>.

³³ Kelly, *supra* note 8, at 198.

³⁴ Meekins I, *supra* note 4, at 22.

justice system out of jail and into treatment centers.³⁵ While mental health courts operate under the guise of therapeutic jurisprudence, their practices are often idiosyncratic and have no definitive model.³⁶ Some courts are stand-alone courts with a judge and court staff dedicated to mental health cases, and others simply have a separate mental health docket for selected offenders.³⁷ Despite their variations, mental health courts share elements in common.³⁸ Many programs have judicially supervised individual treatment plans, which are designed and implemented by mental health professionals, court staff, and, ideally, defenders.³⁹ Generally, the planning and development process takes place in staffing meetings.⁴⁰ The client's progress is then reviewed at status hearings and judges implement sanctions if necessary.⁴¹

For many defendants, drug addiction and mental illness overlap.⁴² By definition, an individual who is diagnosed with both mental illness and substance use disorder has a co-occurring disorder.⁴³ Around 72% – 74% of defendants in the justice system who have mental illness also have co-occurring substance abuse disorders.⁴⁴ While no single factor can explain the high rates of overlap, the National Drug Court Institution points to self-medication as a large contributor—in an effort to cope with or mask their mental health symptoms, individuals resort to alcohol and illegal drugs.⁴⁵ People without health insurance or a strong support system are also more likely to self-medicate as access to prescription drugs can be expensive and difficult to obtain.⁴⁶ Defendants with co-occurring disorders require unique and individualized treatment that a drug court or mental health court may not be able to provide.⁴⁷ Successful co-occurring courts require flexibility in treatment and methodologies and specially

³⁵ *Id.* at 25.

³⁶ Kelly, *supra* note 8, at 198.

³⁷ *Id.*

³⁸ *Id.* at 199.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See HENRY J. STEADMAN ET AL., NAT'L DRUG COURT INST., SIX STEPS TO IMPROVE YOUR DRUG COURT OUTCOMES FOR ADULTS WITH CO-OCCURRING DISORDERS 2 (Apr. 2013), <http://www.ndci.org/wp-content/uploads/C-O-FactSheet.pdf>.

⁴³ *Id.* at 1.

⁴⁴ *Id.* at 3.

⁴⁵ *Id.* at 9.

⁴⁶ See Harris, Katherine M, and Mark J Edlund. "Self-Medication of Mental Health Problems: New Evidence from a National Survey." *Health Services Research* 40.1 (2005): 117–134. *PMC*. Web. 1 Mar. 2017; STEADMAN, *supra* note 42, at 7, 9, 12.

⁴⁷ See STEADMAN, *supra* note 42, at 1.

trained team members to ensure that defendants receive the correct diagnosis and proper medication.⁴⁸ Treatment must be individualized.⁴⁹ While drug courts often address relapse by implementing “sticks,” in a co-occurring court, relapse is often reframed as a common and natural step to recovery.⁵⁰ Considering the high percentage of defendants with drug addiction and mental illness overlap, counties should strive to have a co-occurring specialty court or specialty docket with the resources and staff to address this prevalent population.⁵¹

Veterans courts are another offspring of drug courts.⁵² They treat an array of issues including alcohol and substance abuse, homelessness, and mental illness such as PTSD and other signature wounds of war.⁵³ Although veterans courts address many of the social issues in which other specialty courts focus, the individuals are a niche population that experience unique stressors.⁵⁴ The court’s ability to deliver effective psychological care and treatment requires providers knowledgeable in deployment and capable of empathizing with the military experience.⁵⁵ Veteran court efforts show promising results.⁵⁶ A 2011 study of veteran graduates from eleven of the then fourteen veterans courts “showed a less than 2% recidivism rate.”⁵⁷ There are now around 435 veteran treatment courts throughout the country and, thanks to their success, continue to proliferate.⁵⁸

A largely unintended and generally ignored consequence of this proliferation has brought the criminal defense attorney center stage. Specialty court advocates view defenders’ traditional Rambo-style lawyering as detrimental to a specialty court’s success and ultimately to the effective treatment of the defendant.⁵⁹ The judge expects a collaborative effort from each

⁴⁸ *Id.* at 6.

⁴⁹ *Id.* at 10.

⁵⁰ *Id.*

⁵¹ *See id.* at 1–6.

⁵² Alana Frederick, *Veterans Treatment Courts: Analysis and Recommendations*, 38 LAW & PSYCHOL. REV. 211, 217 (2013–2014).

⁵³ *Id.*

⁵⁴ *Id.* at 217–19.

⁵⁵ *See id.* at 217.

⁵⁶ *See id.* at 225.

⁵⁷ *Id.*

⁵⁸ Tori DeAngelis, *Courts for veterans see exponential growth*, 77 AM. PSYCHOL. ASS’N 11 (Dec. 16, 2016), <http://www.apa.org/monitor/2016/12/courts-veterans.aspx>.

⁵⁹ *See Meekins II, supra* note 11, at 78.

team member and full cooperation from the defense attorney.⁶⁰ In other words, the defense attorney sits idly by while her client processes through a treatment program, encouraging the participant to comply with all demands and requests from the judge.⁶¹ But defenders have an unyielding constitutional responsibility to ensure procedural fairness and an ethical duty to zealously advocate for their client.⁶² Yet many judges believe zealous advocacy is incompatible with the practices of a specialty court.⁶³ Defense attorneys are ultimately placed in a lose-lose situation—they either compromise their ethical duties to stay in compliance with the judge’s expectations or zealously advocate for their client, impeding the objectives of specialty courts.

III. Due Process Considerations in a Specialty Court

In an ideal mental health court, routine adjudication is abandoned and candidates are identified and diverted theoretically within 24 hours of arrest.⁶⁴ Early identification of candidates alleviates overcrowding problems and enables quicker recovery because incarceration can have negative effects on the mental health of a defendant and only minimal types of services are available in jails.⁶⁵ By expediting the identification process, defendants can relocate to an appropriate facility instead of languishing in a jail that is ill-equipped to handle their needs.⁶⁶ Courts should strive for early identification of eligible defendants, but the ultimate decision to enter the court should be voluntary and the product of well-informed and competent advice from the defense attorney instead of a desperate act to be released from jail.⁶⁷

⁶⁰ *Id.*

⁶¹ See *id.* at 91–92.

⁶² See JOEL M. SCHUMM, AMERICA’S PROBLEM-SOLVING COURTS: THE CRIMINAL COST OF TREATMENT AND THE CASE FOR REFORM 12, 33 (Sept. 2009), file://oca-pfps01/data/TIDC/Interns/Morgan%20Shell/problem-solvingreport.pdf; Meekins III, *supra* note 13, at 29.

⁶³ See Meekins II, *supra* note 11, at 78.

⁶⁴ See Cummings, *supra* note 4, at 295; Meekins II, *supra* note 11, at 86; Meekins I, *supra* note 4, at 16.

⁶⁵ Meekins I, *supra* note 4, at 25.

⁶⁶ See *id.*

⁶⁷ See SCHUMM, *supra* note 62, at 16, 28, 52, 55. Early release also prevents the higher risk of recidivism that occurs with each day in jail. See NAT’L INST. OF JUSTICE, IMPACT OF PRISON EXPERIENCE ON RECIDIVISM (Oct. 2008), <https://www.nij.gov/topics/courts/drug-courts/pages/work.aspx>.

A person sitting in jail is on the cusp of despair and her decision to enter a problem-solving court is often short-sighted and likely motivated by a desire for liberty.⁶⁸ It is in these delicate moments that courts require people to make the potentially life-altering decision to enter a specialty court.⁶⁹ Not surprisingly, many are quick to sign away their rights without understanding the risks that accompany their decision when it means release from jail.⁷⁰ However, voluntary entry into a program protects defendants from becoming mere vehicles for coerced treatment.⁷¹ Voluntariness, in this setting, means a decision that is entered into with a fully informed understanding of the program requirements as well as the risks and benefits of entry and without the choice of treatment or a lengthy jail stay until a trial or sentencing date.⁷²

Specialty courts generally employ a pre-adjudication or post-adjudication model.⁷³ The type of model a court chooses can mitigate, or exacerbate, many of the risks that accompany entry into specialty courts.⁷⁴ In a pre-plea pre-adjudication model, the court admits the participant after charges have been dropped or while charges are pending without requiring the client to enter a guilty plea.⁷⁵ In other words, a defendant may “enter treatment prior to any substantive disposition of the case.”⁷⁶ Conversely, a post-adjudication model requires a participant to enter a guilty plea before entering the program.⁷⁷ The court will then either hold a participant’s guilty plea in abeyance and condition dismissal on successful completion of the treatment program, commonly referred to as post-plea pre-adjudication, or uphold the guilty plea with an understanding that the judge will reward the participant for her compliance during sentencing.⁷⁸

⁶⁸ Clarke & Neuhard, *supra* note 5.

⁶⁹ *See id.*

⁷⁰ Meekins II, *supra* note 11, at 88.

⁷¹ SCHUMM, *supra* note 62, at 52.

⁷² Meekins II, *supra* note 11, at 89; Caitlin T. Harrington, *Breaking the Cycle and Stepping out of the “Revolving Door”: Why the Pre-Adjudication Model is the Way Forward for Illinois Mental Health Courts*, 2013 U. ILL. L. REV. 319, 341 n. 199 (2013).

⁷³ Meekins II, *supra* note 11, at 87.

⁷⁴ *See id.*

⁷⁵ SCHUMM, *supra* note 62, at 17.

⁷⁶ *See Meekins II, supra* note 11, at 87.

⁷⁷ *See id.*

⁷⁸ *Id.* at 88; SCHUMM, *supra* note 62, at 17.

The responsibility to advise a client on whether or not to enter into a specialty court falls on the client's defense attorney who is obligated by the Model Rules of Professional Conduct (Model Rules) to provide competent and diligent advice.⁷⁹ This duty requires the attorney to, among other things, investigate the case, view discovery, seek out potential alternatives, argue for the least restrictive bail or bond conditions, and argue against entry guidelines if necessary.⁸⁰ But a court's accelerated entry program strains the attorney's ability to carry out these ethical responsibilities.⁸¹ Attorneys are ultimately rushed into advising their client to enter a program that conditions eligibility upon the entry of a guilty plea and that requires clients to waive certain constitutional rights.⁸² Courts should focus on implementing an adjudication model that protects defendants and defense attorneys even in an expedited entry proceeding by allowing entry pre-adjudication.⁸³

Employing a pre-adjudication model can stave off various risks that accompany entry into a mental health court. Pre-adjudication models give individuals immediate access to treatment without requiring that participants prematurely waive their due process rights.⁸⁴ With a pre-adjudication model, participants enter into treatment with an understanding that charges will be dismissed upon completion of a program.⁸⁵ Failure to complete the program, however, won't result in an automatic conviction.⁸⁶ Under its "no harm no foul" mantra, a defendant who fails to complete treatment can simply return to processing through the

⁷⁹ See MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3; Meekins II, *supra* note 11, at 89.

⁸⁰ Meekins II, *supra* note 11, at 89.

⁸¹ *Id.*

⁸² See Harrington, *supra* note 72, at 348. By entering a guilty plea, defendants waive various constitutional rights including the right to a jury trial, the right to a speedy trial, the right to a preliminary hearing, the right to confront one's accuser, and the protection against self-incrimination. Florida v. Nixon, 543 U.S. 175, 187 (2004).

⁸³ See SCHUMM, *supra* note 62, at 25, 54.

⁸⁴ *Id.*; Meekins II, *supra* note 11, at 87.

⁸⁵ DOUGLAS B. MARLOWE ET AL., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURTS IN THE UNITED STATES 40 (2016). A true pre-diversion program is generally governed by Chapter 76 of the Government code rather than Chapter 42A of the Code of Criminal Procedure, which generally governs post-adjudication models. See Email from Dib Waldrip, Judge for the 433rd Judicial Dist., to Jim Bethke, Executive Director, Texas Indigent Defense Commission (Jan. 24, 2017, 08:45 CST) (on file with author). If the program is post-plea pre-adjudication, it will likely be governed by the "deferred adjudication" provisions of Chapter 42A of the Government Code. *Id.*

⁸⁶ See SCHUMM, *supra* note 62, at 17.

criminal justice system.⁸⁷ Designing a model that is nonthreatening and non-penal is imperative to rehabilitation—it allows the “team” to devote its time and energy to actual treatment.⁸⁸ The model gives the “team” the flexibility to observe the client, learn how the individual responds to medication, and make adjustments accordingly all while preventing the defendant’s further penetration into the criminal justice system.⁸⁹

Ethically speaking, defense attorneys favor this model because their clients are not admitting guilt prior to entering the program.⁹⁰ The National Legal Aid and Defender Association (NLADA), in its *Ten Tenets of Fair and Effective Problem Solving Courts (Ten Tenets)*, recognizes that requiring guilty pleas as a condition of entry into a specialty court has no therapeutic value and expressly denounces the model.⁹¹

Despite the benefits of a pre-adjudication model, post-adjudication is the current trend throughout the United States.⁹² The requirement that defendants plead guilty before entering a mental health court undermines any true sense of recovery.⁹³ Although the model is acclaimed for unloading heavy court dockets, critics argue that it is not in keeping with the therapeutic ideals upon which specialty courts were created.⁹⁴ Their creation was a reaction to the ineffectiveness of incarceration in rehabilitating offenders and curbing recidivism rates.⁹⁵ By focusing on criminalization, a post-adjudication model reverts back to that traditional mode, making treatment a mere afterthought.⁹⁶ The model is coercive because it uses the treatment program as bait essentially conditioning rehabilitation on conviction.⁹⁷ Even if the court agrees to reduce sentencing upon successful completion of the program, short periods of incarceration

⁸⁷ See *id.* Advocates also point out that a pre-adjudicatory program deters defendants from treating the program as a free pass through the court system. See MARLOWE, *supra* note 85; Harrington, *supra* note 72, at 341, 344.

⁸⁸ Harrington, *supra* note 72, at 343.

⁸⁹ *Id.*

⁹⁰ MARLOWE, *supra* note 85, at 40. One state district judge explained that regardless of whether the model is pre- or post- adjudication, the potential for a due process violation depends in large part on the agreements that are made as part of admission into a program. See Email from Dib Waldrip, *supra* note 85.

⁹¹ See NLADA, TEN TENETS OF FAIR AND EFFECTIVE PROBLEM-SOLVING COURTS (Jan. 2002), https://learning.csgjusticecenter.org/wp-content/themes/c4-mhc/content/Module_3_Prep_Work/Ten_Tenets_Final_ACCD_version.pdf.

⁹² SCHUMM, *supra* note 62, at 17.

⁹³ See Meekins I, *supra* note 4, at 25, 42.

⁹⁴ See *id.* at 14, 17.

⁹⁵ See Kelly, *supra* note 8, at 173.

⁹⁶ See Harrington, *supra* note 72, at 347.

⁹⁷ See Meekins I, *supra* note 4, at 18.

alone can lose individuals their children, jobs, houses and can complicate applications for public benefits.⁹⁸ These circumstances drive people into the criminal justice system in the first place.⁹⁹ A post-adjudication model “is more likely to be oil for the revolving door of U.S. justice.”¹⁰⁰

The post-adjudication model is problematic because neither a defendant nor her attorney knows when entering treatment whether she can successfully complete the program.¹⁰¹ Individuals react differently to treatment, and at least in a co-occurring court, relapse is a natural process to recovery.¹⁰² This uncertainty may deter defendants from treatment and put defense counsel in the impossible position of competently counseling a client.¹⁰³ The purpose of specialty courts is to treat the symptoms driving defendants into the criminal justice system—post-adjudication models are antithetical to these stated goals.¹⁰⁴

The current trend of post-adjudication courts is a by-product of the prosecutor’s powerful, and the defender’s insignificant, influence and participation in the design and implementation of specialty courts.¹⁰⁵ As quoted by one former federal prosecutor: “We now have an incredible concentration of power in the hands of prosecutors.”¹⁰⁶ Tradition expects prosecutors to first advocate for the government.¹⁰⁷ Specialty courts challenge this notion.¹⁰⁸ They require prosecutors to discard their tough on crime persona that permeates the culture of a prosecutor.¹⁰⁹ The transition is surely challenging and all prosecutors have not yet converted.¹¹⁰ Defenders’ questions and input are still often regarded as an impediment and their participation is not welcomed.¹¹¹

⁹⁸ Lefstein, *supra* note 14, at 48–49.

⁹⁹ *Id.*

¹⁰⁰ Kelly, *supra* note 8, at 130.

¹⁰¹ See Harrington, *supra* note 72, at 348.

¹⁰² STEADMAN, *supra* note 42, at 10.

¹⁰³ Lefstein, *supra* note 14. See Harrington, *supra* note 72, at 348.

¹⁰⁴ Lefstein, *supra* note 14. See Harrington, *supra* note 72, at 348.

¹⁰⁵ Meekins I, *supra* note 4, at 42, 43.

¹⁰⁶ Kelly, *supra* note 8, at 150.

¹⁰⁷ *Id.*

¹⁰⁸ See generally *id.* at 150–52.

¹⁰⁹ *Id.* at 150.

¹¹⁰ See *id.*

¹¹¹ Meekins I, *supra* note 4, at 43.

Because of the prosecutor’s influence in the court system, specialty court designs tend to reflect the interests of prosecutors.¹¹² A post-adjudication model alleviates caseloads and protects the state from having to reopen a case in the event that the defendant fails treatment.¹¹³ Defenders, on the other hand, are essentially forced to counsel their client to plead guilty if they want them to receive treatment.¹¹⁴ While a pre-adjudication model may require more work on the part of the prosecutor, no amount of work can justify an adjudication model that takes advantage of vulnerable defendants and causes defenders, whose job it is to protect this vulnerable population, to compromise their ethical duties. Just as defense attorneys have to readjust their adversarial approach to adjudication, prosecutors must discard the notion of a defender as a form of resistance and embrace the big picture goals of specialty courts.¹¹⁵

IV. Considerations in Designing a Specialty Court

To have a robust and procedurally fair system, defense counsel must have substantial input in the design and initial implementation of the court.¹¹⁶ Their participation can be the difference between a client-centered court and a court designed merely to cut caseloads, where incarceration dominates rather than treatment.¹¹⁷ The NLADA expresses that the “composition of the group should be balanced so that all functions have the same number of representatives at the table.”¹¹⁸ More active participation will allow them to expose the legitimate ethical concerns that accompany post-adjudication models.¹¹⁹ More importantly, it will pressure the “team” to employ a model that is procedurally fair to participants.¹²⁰ Finally,

¹¹² See Kelly, *supra* note 8, at 149; Clarke & Neuhard, *supra* note 5, at 30.

¹¹³ Meekins I, *supra* note 4, at 42, 48. Prosecutors argue that it would be too burdensome on the state to suspend a case for an entire period of treatment and return to a trial posture if the participant fails to complete the program. Meekins II, *supra* note 11, at 87.

¹¹⁴ See SCHUMM, *supra* note 62, at 25.

¹¹⁵ See generally Kelly, *supra* note 8, at 150—51; Meekins I, *supra* note 4, at 43—48.

¹¹⁶ NLADA, *supra* note 91.

¹¹⁷ See Meekins II, *supra* note 11, at 117—18; Meekins III, *supra* note 13, at 31.

¹¹⁸ NLADA, *supra* note 91.

¹¹⁹ SCHUMM, *supra* note 62, at 40—41.

¹²⁰ *Id.* at 40.

inclusion of the defense bar will prevent time-consuming efforts to undo problems that could have been avoided initially.¹²¹

Despite the NLADA's recommendations, defense attorneys commonly voice their frustration at the lack of input they have in specialty courts, especially at the design phase.¹²² They believe the defender has become a mere collaborator in a problem-solving court.¹²³ She bears no vestige of the adversarial defender.¹²⁴ In the name of cooperation, the attorney is expected to fall in line with the adjudication model and treatment and sanction recommendations of the judge and court staff and forgo challenges to any part of the process.¹²⁵

Defense attorneys cannot become lapdogs for the state.¹²⁶ A paradigm that applauds a defender who fails to advocate her client's objectives would be an unfortunate byproduct of the benefits that specialty courts bring to the criminal justice system.¹²⁷ By the same token, defense attorneys should strive to be cooperative and forthcoming when feasible in furtherance of the underlying goals of specialty courts.¹²⁸ As recommended by the ABA House of Delegates in 2012, defenders should provide more comprehensive representation—they must consider the full range of social issues confronting the client.¹²⁹ For many defendants, the criminal case is the least challenging or pressing issue in the client's life.¹³⁰ Defenders cannot lose sight of this reality. The universal goal of defense attorneys is to obtain the best case disposition for their client.¹³¹ But the added objective is to help make a long-term difference in the client's life.¹³² Staunch adversarialism may hamper these objectives.¹³³ An effective system

¹²¹ *Id.*

¹²² See Meekins II, *supra* note 11, at 91.

¹²³ Meekins I, *supra* note 4, at 3, 8.

¹²⁴ *Id.* at 38.

¹²⁵ See JUDGE KAREN FREEMAN-WILSON ET AL., NDCI, ETHICAL CONSIDERATIONS FOR JUDGES AND ATTORNEYS IN DRUG COURTS 20 (2001) [hereinafter FREEMAN-WILSON I]; Meekins II, *supra* note 11, at 92, 111; Meekins I, *supra* note 4, at 39.

¹²⁶ See SCHUMM, *supra* note 62, at 38.

¹²⁷ Meekins I, *supra* note 4, at 37.

¹²⁸ See FREEMAN-WILSON I, *supra* note 125, at 21; SCHUMM, *supra* note 62, at 30.

¹²⁹ Lefstein, *supra* note 14.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ See Meekins II, *supra* note 11, at 91.

will require give-and-take on both ends—the “team” should embrace this notion.¹³⁴ Advocates such as the National Association of Criminal Defense Lawyers are optimistic that advocacy is not inconsistent with the goals of specialty courts.¹³⁵ When the two conflict, however, counsel cannot acquiesce her ethical duties.¹³⁶ Nevertheless, a defense attorney’s presence throughout *each stage* of the specialty court process will allow attorneys to provide more comprehensive representation and will alleviate problems that arise from their absence at critical stages in the development of the courts.¹³⁷

V. The Ethical Consequences of Absent Attorneys

Despite the importance of a defense attorney’s active participation, many specialty courts employ horizontal representation, a representational scheme whereby one defense attorney is assigned to all cases that come through a courtroom on a specific day.¹³⁸ Under this design, defense attorney A will represent the client during one proceeding before passing the client off to defense attorney B to cover the client in a subsequent proceeding, and so on.¹³⁹ One state district judge explained that many mental health courts in Texas go beyond this representational model.¹⁴⁰ They have a defense attorney on the team, but the attorney is not the post-plea attorney representing the defendant.¹⁴¹ The attorney should “speak up” in team meetings to advise the participant to seek counsel when she thinks the team is encroaching on the defendant’s rights.¹⁴² The problems underlying this design are multifaceted.¹⁴³ The representation of a client from the beginning to end of a case is imperative to develop a meaningful attorney-client relationship and establish trust between the client and attorney.¹⁴⁴ In fact, the ABA rejects the use of horizontal representation in any form in its *Ten Principals of a*

¹³⁴ See *id.* at 51.

¹³⁵ SCHUMM, *supra* note 62, at 38.

¹³⁶ *Id.* at 39.

¹³⁷ See Meekins I, *supra* note 4, at 10.

¹³⁸ SCHUMM, *supra* note 62, at 40.

¹³⁹ See *id.*; Jon Mosher, *Continuous representation of the defendant by the same attorney – ABA Principle 7*, SIXTH AMENDMENT CTR. (July 2, 2014), <http://sixthamendment.org/continuous-representation-of-the-defendant-by-the-same-attorney/>.

¹⁴⁰ See Email from Dib Waldrip, *supra* note 85.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ See Mosher, *supra* note 139.

¹⁴⁴ *Id.*; SCHUMM, *supra* note 62, at 40.

Public Defense Delivery System.¹⁴⁵ The model is problematic because each new attorney must familiarize herself with the case and re-interview the client, making clients feel like they have been processed by the system.¹⁴⁶ The client does not have an advocate whom they can build a trusting relationship with, and may receive conflicting advice from different attorneys.¹⁴⁷ From an ethical standpoint, how can an attorney diligently and competently advocate for and protect the interests of a client, especially a client with mental illness, when the attorney meets the individual, for instance, on the same day the attorney is to represent the client in a court hearing or status meeting.¹⁴⁸ As recommended by the ABA, all specialty courts should implement vertical representation, whereby the same attorney represents the client throughout the entire process including pre-admittance to the program.¹⁴⁹ This is especially important at staffing meetings.¹⁵⁰

Judges require court appearances and staffing meetings frequently throughout a client's treatment program.¹⁵¹ In staffing meetings, the "team" initially meets behind closed doors to develop an appropriate treatment plan for the participant and later to discuss the participant's progress.¹⁵² One judge pointed out that "the best advocacy is done in [these] team meetings."¹⁵³ It is here that attorneys should explain their client's unique circumstances and argue against methodologies that don't align with the client's interests.¹⁵⁴ The attorney should be informed of problems or issues before the meeting, so they can address it with their client and address it at the staffing if necessary.¹⁵⁵

¹⁴⁵ See ABA, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 3 (2002), <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>; Boucher, *supra* note 47, at 1081.

¹⁴⁶ Mosher, *supra* note 139.

¹⁴⁷ See Anne Bowen Poulin, *Strengthening the Criminal Defendant's Right to Counsel*, 28 CARDOZO L. REV. 1213, 1255 (2006).

¹⁴⁸ See generally SCHUMM, *supra* note 62, at 40; Mosher, *supra* note 139.

¹⁴⁹ See ABA, *supra* note 145.

¹⁵⁰ See SCHUMM, *supra* note 62, at 40—41. The ABA even suggests that comprehensive representation requires defense attorneys to prepare their client for reentry into society *after* completion of a jail sentence. Lefstein, *supra* note 14, at 50.

¹⁵¹ See SCHUMM, *supra* note 62, at 31.

¹⁵² *Id.*

¹⁵³ *Id.* at 32.

¹⁵⁴ See *id.*

¹⁵⁵ See *id.* at 31—32.

Despite the importance of such proceedings, many defense attorneys are not invited or fail to appear at the meetings.¹⁵⁶ An attorney's absence from a staffing meeting, however, could implicate Model Rules 1.1 and 1.3.¹⁵⁷ The latter requires an attorney to pursue matters on behalf of a client "despite opposition, obstruction or personal inconvenience."¹⁵⁸ Their presence is especially important here because defendants are generally not allowed to attend.¹⁵⁹ Clients must therefore rely completely on their defense attorney to protect their interests as well as relay information back to them.¹⁶⁰

But presence alone will not mitigate a defender's ethical responsibilities. Rule 1.01 of the Texas Disciplinary Rules of Professional Conduct (Texas Rules) explains that in providing competent and diligent representation, a lawyer should act "with zeal in advocacy upon the client's behalf."¹⁶¹ Likewise, the preamble states that it is a lawyer's responsibility to "zealously pursue clients' interests."¹⁶² Without these mandates, defenders would have a difficult time painting a full picture of a client's individualized needs to the "team."¹⁶³ For example, imagine that a treatment team under a post-adjudication model prescribes a client medication that is regularly taken by patients with the client's same illness. The team, however, is unaware of the adverse effects the medication has on the client. In fact, the medication makes the client mentally fuzzy and sends her into a deeper depression—details the client has expressed only to the defense attorney. The defender does not challenge the court order, because such challenges are discouraged in specialty courts.¹⁶⁴ Instead, the defense attorney encourages the client to complete the court-ordered treatment. She has an adverse reaction, fails the program, and her suspended conviction is entered into the court system. Although this hypothetical is extreme, it evinces the kind of atmosphere a post-adjudication model envisions.¹⁶⁵

¹⁵⁶ *Id.* at 34.

¹⁵⁷ *Id.* at 32, 37.

¹⁵⁸ MODEL RULES, *supra* note 79.

¹⁵⁹ *See* SCHUMM, *supra* note 62, at 32.

¹⁶⁰ *See id.* at 32, 37.

¹⁶¹ TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01 cmt. 6 (2013).

¹⁶² TEX. DISCIPLINARY R. PROF'L CONDUCT PMBL (2013).

¹⁶³ SCHUMM, *supra* note 62, at 32.

¹⁶⁴ *See* Meekins I, *supra* note 4, at 45.

¹⁶⁵ *See generally id.* (explaining that a defender has no power to advocate for the defendant's wishes or needs in specialty courts).

A defender who fails to challenge a team’s decisions for the sake of team collaboration is not in zealous pursuit of the client’s stated interest and is arguably breaching a duty of competence and diligence.¹⁶⁶ That defender is also failing to engage in client-centered representation, and is not being an effective advocate for the client. In accordance with the Model Rules, and in furtherance of a client-centered approach to representation, even if the client’s stated interest appears irrational or not in the client’s best interest, a defender is obligated to follow her client’s stated objectives.¹⁶⁷ This requirement collides with the specialty court’s “best interest” mantra.¹⁶⁸ Clients may not always want what is in their best interest, but our legal system recognizes their autonomy and dignity.¹⁶⁹ Participants might also doubt a system that allows a defense attorney to override a client’s stated interest.¹⁷⁰ Even defendants suffering from mental illness are not going to trust a process in which they have no voice.¹⁷¹

To the extent that the rules are ambiguous, legal ethicists theorize that attorneys can decide the appropriate lens in which they decipher the ambiguity.¹⁷² Zealous advocacy justifiably can mean different things to different attorneys.¹⁷³ The National Drug Court Institute explains that zealous advocacy “does not require hostility or antagonism.”¹⁷⁴ It fails, however, to define zeal.¹⁷⁵ The NLADA, in *Ten Tenets*, interprets “zeal” more broadly.¹⁷⁶ The association explains that “[n]othing in the problem solving court policies or procedures should compromise counsel’s ethical responsibility to zealously advocate for his or her client.”¹⁷⁷ While it does not expect a defender to intervene to the point of gridlock, it expressly includes challenging evidence or findings and recommending alternative treatment or sanctions in its interpretation of zealous advocacy.¹⁷⁸

¹⁶⁶ See SCHUMM, *supra* note 62, at 32; Meekins II, *supra* note 11, at 108; Meekins I, *supra* note 4, at 4.

¹⁶⁷ See MODEL RULES, *supra* note 79, R. 1.2(a); Meekins II, *supra* note 11, at 117.

¹⁶⁸ See Meekins II, *supra* note 11, at 117.

¹⁶⁹ *Id.* at 118.

¹⁷⁰ See SCHUMM, *supra* note 62, at 32.

¹⁷¹ *Id.*

¹⁷² Meekins II, *supra* note 11, at 94.

¹⁷³ *Id.* at 90.

¹⁷⁴ FREEMAN-WILSON I, *supra* note 125, at 21.

¹⁷⁵ See *id.*; Meekins II, *supra* note 11, at 109.

¹⁷⁶ See NLADA, *supra* note 91.

¹⁷⁷ *Id.*

¹⁷⁸ See *id.*

The ambiguous ethical questions and expectations accompanying representation in a specialty court present defense attorneys with a daunting task. While zealous advocacy might hinder the progress of specialty courts, it is worth considering the consequences that underzealous representation in specialty courts could have on a defendant's procedural and due process rights.¹⁷⁹ Destructive partisan certainly does not facilitate effective problem solving.¹⁸⁰ But attorneys cannot wholly abdicate their ethical responsibilities for the sake of team camaraderie.¹⁸¹

Still other advocates of problem-solving courts believe these ethical problems are misguided because critics inflate the role of attorneys and the concept of a "team" in specialty courts.¹⁸² They argue that the image of a defense attorney as an overzealous adversary who will spare nothing to achieve victory for her client is not realistic.¹⁸³ Likewise, zealous representation should not be misunderstood to mean that lawyers are legally obligated to use a certain style of litigating, negotiating, or counseling.¹⁸⁴ The term zealous, for legal purposes, encompasses the duty of competence and diligence.¹⁸⁵ Critics often mistake the notion of "team player" as a shared practice in which prosecutors act as therapists and defenders regularly endorse sanctions.¹⁸⁶ In reality, "team player" does not reflect interchangeable roles.¹⁸⁷ While prosecutors and defenders start with an expectation of cooperation rather than conflict in achieving their shared goals, which gives rise to the notion of a "team," they maintain distinct roles within the team model.¹⁸⁸ The prosecutor is still primarily enshrined with protecting the public's safety and ensuring the candidate complies with the drug or mental health court requirements.¹⁸⁹ But her responsibilities also extend to the defendant's recovery and reduction in recidivism.¹⁹⁰ Meanwhile, the defender protects the defendant's due process

¹⁷⁹ Meekins II, *supra* note 11, at 111; *supra* notes 161—63 and accompanying text.

¹⁸⁰ See SCHUMM, *supra* note 62.

¹⁸¹ See generally Meekins II, *supra* note 11, at 112.

¹⁸² See FREEMAN-WILSON I, *supra* note 125, at 21.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ See *id.*

rights and encourages full participation, reflecting the “normal, bidirectional nature of legal representation.”¹⁹¹ In essence, the defense attorney zealously advocates through diligent and competent representation, which entails prepping the individual for appearances and helping the client conform her behavior to the terms of the court’s requirements.¹⁹² The defender ensures that the client’s stated interests are voiced and the client’s rights are protected.¹⁹³ This image of the current atmosphere in specialty courts, however, may oversimplify the problem.¹⁹⁴

VI. Meeting a Client’s Non-Legal Needs in Specialty Courts

A defense attorney must take on additional roles in a mental health court that move beyond the traditional “bidirectional nature of legal representation.” Model Rules 1.1 requires a lawyer to “provide competent representation to a client.”¹⁹⁵ Attorneys should possess the necessary legal knowledge, skills, thoroughness, and preparation to fulfill this mandate.¹⁹⁶ They must look beyond the law to “moral, economic, social and political factors that may be relevant to the client’s situation.”¹⁹⁷ Application of this mandate in a specialty court setting entails providing counseling, finding appropriate treatment for the client’s individualized needs, looking for housing and employment options, educating herself on treatment and sentencing options, and preparing a participant for reentry into society after completion of a program.¹⁹⁸ This expansive job description is a tall order for an attorney juggling multiple cases.¹⁹⁹

As an initial matter, the defender should have equal access to training on issues including treatment, social services, sociological issues, and sanctions.²⁰⁰ But the rule contemplates knowing more than the basic information gained at training.²⁰¹ Defenders are responsible for protecting clients from harmful treatment and intervention strategies proposed

¹⁹¹ *Id.*

¹⁹² *See id.*

¹⁹³ *Id.*

¹⁹⁴ *See generally* Meekins II, *supra* note 11, at 109.

¹⁹⁵ MODEL RULES, *supra* note 79.

¹⁹⁶ SCHUMM, *supra* note 62, at 30.

¹⁹⁷ MODEL RULES, *supra* note 79, R. 2.9.

¹⁹⁸ *See* Lefstein, *supra* note 14, at 50; Clarke & Neuhard, *supra* note 5, at 22, 23.

¹⁹⁹ SCHUMM, *supra* note 62, at 32.

²⁰⁰ Meekins II, *supra* note 11, at 113.

²⁰¹ *See id.*; MODEL RULES, *supra* note 79, R. 2.9.

by the “team.”²⁰² Consequently, defense attorneys should hire social workers and non-legal experts to help them gain understanding in areas they are not sufficiently trained.²⁰³ Model Rule 2.1 explains that “where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation.”²⁰⁴

The infiltration of social workers and non-legal experts on “defense teams,” requires careful consideration into an attorney’s duty of confidentiality and attorney-client privilege.²⁰⁵ Model Rule 1.6 prohibits “[a] lawyer from reveal[ing] information relating to the representation of a client unless the client gives informed consent [or] the disclosure is impliedly authorized.”²⁰⁶ This duty extends to non-attorneys who help carry out the attorneys’ ethical duties.²⁰⁷ Similarly, the attorney-client privilege applies to all communications made in confidence between privileged persons for the purpose of seeking or providing legal assistance to the client.²⁰⁸ Social workers have long been recognized as agents of attorneys for the purposes of this privilege.²⁰⁹

As required by Model Rule 1.6, attorneys must ensure that their agents strictly abide by these rules despite any expectation of disclosure by the “team.”²¹⁰ The Model Rules expect a defense attorney to protect the client against “unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons participating in the representation.”²¹¹ The interaction between an attorney’s, and ultimately her agent’s, duty of confidentiality and her participation as a full-fledged team member may create a perception that the judge can count on the attorney to disclose information that would otherwise be

²⁰² See KELLY, *supra* note 8, at 159.

²⁰³ See NAT’L LEGAL AID & DEFENDER ASS’N, THE INTERDISCIPLINARY DEFENSE TEAM & CONFIDENTIALITY: WHAT DEFENDERS NEED TO KNOW 5 (2016), <http://files.constantcontact.com/33b98981401/e874688d-381b-4f33-9931-b785e0997ea7.pdf>.

²⁰⁴ *Id.* at 10; MODEL RULES, *supra* note 79, R. 2.1.

²⁰⁵ SCHUMM, *supra* note 62, at 34.

²⁰⁶ MODEL RULES, *supra* note 79, R. 1.6.

²⁰⁷ NAT’L LEGAL AID & DEFENDER ASS’N, *supra* note 203, at 6.

²⁰⁸ *Id.* at 7.

²⁰⁹ *Id.* at 8, 9.

²¹⁰ MODEL RULES, *supra* note 79, R. 1.6.

²¹¹ *Id.*

deemed privileged and confidential.²¹² Specialty court advocates insist that the efficacy of these programs depend on these disclosures as well as honest and open dialogue and diffusion of information among the “team.”²¹³ However, an attorney and her hired staff are restricted from revealing such information unless the client gives informed consent.²¹⁴ It is difficult to image a situation in which a client would consent to the disclosure of information that would knowingly harm her.

Often, participation in veterans and mental health courts requires waivers of confidentiality protections.²¹⁵ Even if the client consents to disclosure, critics argue that defense counsel should still advocate for the most narrowly construed waiver possible that still allows for effective functioning of the court.²¹⁶ Blanket waivers of clients’ rights to confidentiality are ill advised—a client would feel betrayed by her attorney and social worker who disclose confidences to the team that ultimately result in sanctions.²¹⁷ In a jurisdiction that makes waiver of confidentiality a precondition to entry, attorneys must communicate to the client the nature and scope of the waiver at the beginning of representation.²¹⁸

Narrowly tailored waivers, however, may still result in conflicts of interest. The Texas and Model Rules place an attorney’s duty of loyalty with the client.²¹⁹ When that loyalty is compromised, a conflict of interest arises.²²⁰ Despite these well-established rules, judges in specialty courts expect the defense attorney to be forthcoming with their client’s communication.²²¹ The NCDI and the NLADA give little guidance on prioritizing the appropriate interest when such conflicts arise.²²² The Model Rules provide some direction, but no solution.²²³ Rule 1.7 prohibits a lawyer from representing a client when representation may be

²¹² JUDGE KAREN FREEMAN-WILSON ET AL., NDCI, CRITICAL ISSUES FOR DEFENSE ATTORNEYS IN DRUG COURTS 7 (2003), <http://www.ndci.org/wp-content/uploads/Mono4.CriticalIssues.pdf> [hereinafter FREEMAN-WILSON II].

²¹³ See SCHUMM, *supra* note 62, at 34; Meekins II, *supra* note 11, at 104.

²¹⁴ SCHUMM, *supra* note 62, at 34.

²¹⁵ See FREEMAN-WILSON I, *supra* note 125, at 41.

²¹⁶ *Id.*

²¹⁷ SCHUMM, *supra* note 62, at 34.

²¹⁸ See FREEMAN-WILSON I, *supra* note 125, at 7.

²¹⁹ TEX. DISCIPLINARY R. PROF. CONDUCT 1.06 cmt. 1 (2013); FREEMAN-WILSON II, *supra* note 212, at 13.

²²⁰ See *id.*

²²¹ Meekins II, *supra* note 11, at 104.

²²² *Id.* at 106.

²²³ See *id.* at 106—07.

“materially limited by the lawyer’s responsibilities to another client, a former client *or by a personal interest of the lawyer.*”²²⁴ In a specialty court setting, this could occur at any stage of the process.²²⁵ Attorneys are ultimately forced to choose between the team and their client.²²⁶ According to Rule 1.7, a conflict of interest exists when the attorney-client relationship *is at risk.*²²⁷ Even if an attorney refuses to disclose her client’s information, a conflict of interest has arguably already arisen.²²⁸

VII. Moving Forward

The potential ethical problems that accompany specialty court systems seem daunting. Despite these hurdles, many counties in Texas have experienced great success in their implementation of mental health defender programs, which are funded in part through the Texas Indigent Defense Commission’s (TIDC) discretionary grant program.²²⁹ Since 2003, the TIDC has provided more than \$6.4 million in discretionary grants for mental health related programs.²³⁰ The programs have produced better outcomes for defendants and saved counties significant amounts of money.²³¹ Specifically, the Mental Health Public Defender Office in Travis County experienced lower recidivism and re-arrest rates and faster case dispositions than its non-PD clients (prior to the implementation of the Managed Assigned Counsel program, which has a designated mental health panel).²³² Likewise, the Mental Health Managed Assign Counsel program in Collin County saved the county over \$640,000 in 2015 by reducing the number of jail bed days utilized for competence restoration.²³³ Other mental health programs including Fort Bend County, Wichita County, Lubbock County, and Harris County have also experienced

²²⁴ MODEL RULES, *supra* note 79, R. 1.7 (emphasis added).

²²⁵ See SCHUMM, *supra* note 62, at 33–34.

²²⁶ See Meekins II, *supra* note 11, at 106. Judges disfavor challenges to judge’s treatment decisions and in some cases, a challenge to the treatment is perceived as a material breach of the specialty court contract. Meekins I, *supra* note 4, at 22.

²²⁷ Meekins II, *supra* note 11, at 107.

²²⁸ *Id.*

²²⁹ See Texas Indigent Defense Commission, TIDC Local Mental Health Needs Assessment Survey Results (Feb. 24, 2017) (on file with TIDC).

²³⁰ See Texas Indigent Defense Commission, FY18/19 Requests for Funding for Early Identification and Specialized Representation of Defendants with Mental Illness (2017) (on file with TIDC).

²³¹ See *id.*

²³² See *id.*

²³³ *Id.*

positive results.²³⁴ In 2015, the mental health defender programs in Texas provided representation on over 8,600 cases.²³⁵ Today, almost every county that has established a mental health defender program through TIDC's grant program continues to operate these programs with success.²³⁶

TIDC estimates that nearly 95,000 persons annually have mental health issues and are in need of appointed counsel in Texas.²³⁷ It is estimated that the current mental health defender programs are meetings around 9% of the need for specialized counsel.²³⁸ TIDC is requesting additional appropriations before the 85th Legislature to fill this gap. In a 2017 survey distributed to approximately 1,000 constitutional, county, and district court judges in Texas, 70% of respondents said their jurisdiction had no mental health court program or docket.²³⁹ The silver lining, however, is in the attention government entities are paying to mental health issues on a macro level in Texas. In December 2016, the Texas Judicial Council's Mental Health Committee met to discuss the development of a permanent judicial commission on mental health, which would provide a vehicle for the judiciary's participation in mental health initiatives.²⁴⁰ Likewise, while Governor Abbot and state leadership asked state agencies to scale back funding requests in the 85th Legislature, exemptions for these cuts were granted to particular areas including mental health.²⁴¹

Providing adequate funding to mental health programs is essential to the integrity of specialty courts. Both attorneys in defender programs and private bar attorneys should be thoroughly trained in the various complexities of mental health, including basic ethics and

²³⁴ *See id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ TIDC Local Mental Health Needs Assessment Survey Results, *supra* note 229.

²⁴⁰ Texas Judicial Council, Mental Health Committee Recommendation: To Establish a Permanent Judicial Commission on Mental Health 1 (Dec. 28, 2016) (on file with TIDC).

²⁴¹ Julie Butterfield, *Mental health care funding dodges cuts in Texas' 85th legislative session*, CMTY. IMPACT NEWSPAPER (Nov. 9, 2016, 1:30 PM), <https://communityimpact.com/houston/guides/2016/11/09/mental-health-care-funding-dodges-cuts-texas-85th-legislative-session/>.

practice standards.²⁴² Thorough training will help defenders in their ethical pursuit to provide competent and diligent representation.²⁴³

VIII. Conclusion

Progress in our criminal justice system requires the adoption of big picture goals.²⁴⁴ Stakeholders must approach specialty courts with an understanding of the purpose behind their inception.²⁴⁵ Incarceration failed to reduce recidivism and increase public safety—specialty courts were a reaction to this failure.²⁴⁶ The courts refocused taxpayer dollars to address treating the actual causes of defendants' entry into the criminal justice system.²⁴⁷ As a result, the roles and responsibilities of various actors changed.²⁴⁸ To move the criminal justice system forward, both defense attorneys and prosecutors must embrace these changes.²⁴⁹

By the same token, counties cannot blindly embrace new adjudication models without addressing the potential ethical consequences that accompany them.²⁵⁰ Stakeholders should strive to develop programs that eliminate the ethical concerns that post-adjudication models pose for defense attorneys.²⁵¹ Whatever model a court implements, judges, prosecutors and defense attorneys must ensure that it is procedurally fair and protects defense attorneys from committing ethical violations.²⁵²

While defense attorneys cannot shed their duty of zealous advocacy, they must keep in mind that overzealousness is detrimental to the success of the program, and to the treatment of the client.²⁵³ At the same time, judges and prosecutors must recognize the important role defense attorneys play in safeguarding their defendants' constitutional rights.²⁵⁴ A successful

²⁴² Meekins II, *supra* note 11, at 53.

²⁴³ See SCHUMM, *supra* note 62, at 30, 54.

²⁴⁴ See KELLY, *supra* note 8, at 130.

²⁴⁵ See *generally id.* at 154—55.

²⁴⁶ See *id.* at 125, 139.

²⁴⁷ See *id.* at 139.

²⁴⁸ See *id.* at 154.

²⁴⁹ See *id.* at 154—55.

²⁵⁰ See Meekins II, *supra* note 11, at 125.

²⁵¹ See SCHUMM, *supra* note 62, at 25, 54.

²⁵² *Id.*

²⁵³ See Meekins III, *supra* note 13, at 31.

²⁵⁴ Meekins II, *supra* note 11, at 126.

specialty court will ultimately require adjustments from all parties.²⁵⁵ But specialty courts are changing people's lives.²⁵⁶ They are providing them with help they could otherwise never receive in a traditional adjudicatory system. In turn, taxpayers' money is being more wisely utilized to curb recidivism and make communities safer.²⁵⁷ Specialty courts are sure to pose challenges to defense attorneys, prosecutors, and the system as a whole—but the ends certainly justify the means.

²⁵⁵ See KELLY, *supra* note 8, at 154—55.

²⁵⁶ See, e.g., SCHUMM, *supra* note 62, at 51 (describing the success of a mental health program in Austin that helped an elderly man with mental health issues obtain his SSI benefits, which in turn helped keep him out of jail). *Id.*

²⁵⁷ See Judge Donald Dowd, *Suspicious of Drug Courts? Don't Be.*, TEX. BAR JOURNAL (Apr. 2014), https://www.texasbar.com/AM/Template.cfm?Section=Texas_Bar_Journal2&Template=/CM/ContentDisplay.cfm&ContentID=25588.