

# CONFIDENTIALITY, ETHICS, AND SELECT CONSTITUTIONAL ISSUES IN TREATMENT COURTS

National Drug Court Institute  
Hon. Gregory G. Pinski  
Judicial Consultant



**NDCI**  
NATIONAL DRUG  
COURT INSTITUTE



# DISCLOSURE

This project was supported by Grant No. 2016-DC-BX-K007 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Department of Justice's Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the SMART Office.

Points of views or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.



“Somehow your medical records got faxed to a complete stranger. He has no idea what’s wrong with you either.”

# LEARNING OBJECTIVES

After this presentation, you will know:

- Compliance with confidentiality laws
- Ethical boundaries
- Select due process issues
- Select constitutional issues

**Saverne** (spr. -wärrn- (s. 2).  
**Saverth**, Thomas, ei  
 in der Gründung der Dom  
 zu Sülzen in Westwärrn  
 mochine, Geschichtliches).  
**Savi**, hinter lat. Tere  
 deutet Paul Savi, einen  
 1844 als Professor in Bif  
 rächen zoolog. und botan.  
 thologia toscana (4 Bde.).  
**Savigliano** (spr. -wifj-), Stadt im Kreis Sa  
 luzzo der ital. Provinz Cuneo in Piemont, rechts  
 an der Maia, an den Linen Carnagnola (Gares  
 und S. Saluzzo (12 km) des Mittelmeergees, in  
 fruchtbarer Ebene, ist regelmäßig gebaut und von  
 Mauern und Türmen umgeben, hat (1881) 9932  
 als Gemeinde 17450 E., in Garison ein Bataillon  
 des 8. Infanterieregiments und das 17. Kavallerie-  
 regiment (außer 2 Eskadren), eine Erziehliche mit  
 Gemälden des hier geborenen Giuliano (s. d. 1640),  
 genannt Carracino, eine Benediktinerabtei, großen  
 mit Schulhallen umgebenen Parkplatz, schönen  
 Trümpfbogen (Stadtthor); Tuch-, Seidenmanu-  
 fakturen, Weberei und Handel mit Vieh und Wein. —  
 Am 4. und 6. Nov. 1789 fielen hier Russen und  
 Österreicher unter Melas über die Franzosen (s. Hoff-  
 jano). S. in Schwertsart der Bielinisierleserinnen Ze-  
 reia und Maria Milanello.  
**Savigliano di Domagna** (spr. -winnj-),  
 -mannja), Stadt im Kreis Griena der ital. Provinz  
 Terzi, an der Via Aemilia und der Linie Bologna-  
 Rimini des Adriatischen Meeres, hat (1881) 2126  
 als Gemeinde 4561 E., und eine von dem hier ge-  
 borenen Altertumforscher Graf Herzog (s. d.) ge-  
 stiftete Akademie mit Bibliothek von 18 000 Bänden  
 und Münzsammlung.  
**Savigny** (spr. -winnj-), Friedr. Karl von,  
 Jurist, geb. 21. Febr. 1779 zu Frankfurt a. M., be-  
 sog 1798 die Universität Marburg. Nachdem er  
 auch verweilend in Göttingen, Leipzig und Halle  
 sowie Jena besuchte und einige Reisen gemacht hatte,  
 begann er 1800 in Marburg jurist. Vorlesungen, zu-  
 erst als Privatdocent, seit 1802 als außerord. Pro-  
 fessor. Auf mehrjährigen Reisen durch Deutschland  
 und Frankreich widmete er sich der Aufsuchung un-  
 bekannter Quellen des röm. Rechts und der Rechts-  
 geschichte. 1808 wurde er Professor der Rechte in  
 Landshut und 1810 bei Errichtung der Universität  
 in Berlin einer der ersten Lehrer an derselben. 1817  
 Mitglied des Staatsrats, 1819 Rat des für die  
 Rhein. Provinz errichteten Revisionstribunals und  
 seit 1812 vreuß. Minister für die Rechtswissenschaften  
 und Gelehrten. Er trat im März 1818 ins Privatleben  
 zurück und starb 25. Okt. 1861 in Berlin. S. gehörte  
 zu den Führern der sog. historischen Schule der  
 Rechtswissenschaft, obwohl man ihn, eine Folge aus  
 Schlegel'schen, obwohl man ihn, eine Folge aus  
 selben nennen kann. Innerhalb dieser Richtung  
 trat S. zur Zeit der Befreiungskriege den Ver-  
 schlag von Zülpkau, Schmid, Henner u. a., welche  
 ein vaterländisches, von der Herrschaft der fremden  
 Rechte befreites Gefes beizubehalten, in der viel-  
 bekämpften Schrift «Vom Verfall unserer Zeit für  
 1813; Neudruck, Jurist. I. B. 1892) entgegen. Die  
 Hauptabgigkeit S.'s war indessen histor. Unter-  
 suchungen sapsendend, denen man seine «Geschichte  
 des röm. Rechts im Mittelalter» (6 Bde., Heidelb.  
 Voelker, Ind. G.

# CONFIDENTIALITY

Treatment Court Key Component 1 requires that “drug courts integrate alcohol and other drug treatment services with justice system case processing.”

One benchmark is that the treatment court and treatment providers maintain ongoing communication, including frequent exchanges of timely information on a participant’s progress, consistent with federal and state confidentiality requirements.



# CONFIDENTIALITY ~ PART 2 REGULATIONS

## 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



# CONFIDENTIALITY

## PART 2 REGULATIONS UPDATE ~ IMPACT ON TREATMENT COURTS

- “Lawful holder” of information is covered
- Notice that includes a written summary of the federal law may be provided on paper or electronically
- Upon request, individuals who has included a general designation in the “To Whom” section of their consent form must be provided a list of entities to which their information has been disclosed.
- Permits an individual to include a general designation in the “To Whom” section of the consent form as well as an explicit designation of the “amount and kind” of SUD treatment information to be disclosed.
- Part 2 programs and lawful holders must have formal policies and procedures for addressing security, for both paper and electronic records, including sanitization of associated media.

# CONFIDENTIALITY

## PART 2 REGULATIONS UPDATE ~ IMPACT ON TREATMENT COURTS

- Lawful holders must have a written contract with a contractor stating the contractor or legal representative is fully bound by Part 2 upon receiving the information.
- Disclosures made with the participant's consent may not be accompanied by a short, abbreviated statement, "42 C.F.R. Part 2 prohibits unauthorized disclosure of these records."
- For disclosures for payment or healthcare operations, a lawful holder may not disclose those records to its contractors, subcontractors, or legal representatives to carry out payment and/or healthcare operations on behalf of the lawful holder.



# CONFIDENTIALITY HIPAA

**H**ealth **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

# CONFIDENTIALITY

The federal confidentiality laws apply to all records relating to the identity, diagnosis, prognosis, or treatment of any patient in a substance abuse program.

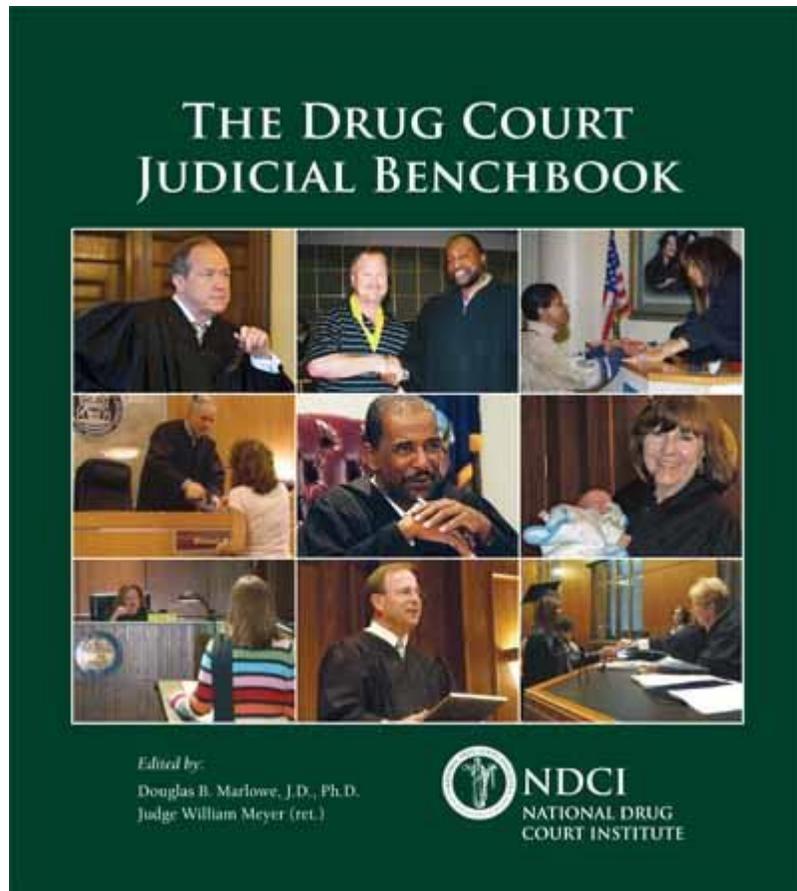
Drug testing results are protected if they are used for the diagnosis, treatment, or referral for treatment. Because of the therapeutic use of drug testing results, a court should generally consider them as covered by federal confidentiality laws.

# CONFIDENTIALITY HIPAA - DISCLOSURE

## Sample Forms

Sample Consent Form

Sample Disclosure  
Court Order



# CONFIDENTIALITY ~ RECOMMENDATIONS

- Read or translate consent and notice forms, if appropriate
- Enter into memoranda of understanding with team members concerning confidentiality
- Be mindful of mandatory disclosures
- Designate a privacy official who is responsible for privacy policies and procedures
- Update policies and forms frequently
- Ongoing training
- Physically safeguard information
- Staffing acknowledgement form

# CONFIDENTIALITY OPEN COURTROOMS

## *Florida vs. Noelle Bush*



The screenshot shows the top portion of a New York Times article. The navigation bar includes 'SECTIONS', 'HOME', and 'SEARCH'. The article title is 'Gov. Bush's Daughter Is Sentenced to Jail' and the date is 'OCT. 18, 2002'. The main text describes the sentencing of Noelle Bush to 10 days in jail for violating a drug treatment program.

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

# 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

# ETHICAL CONDUCT OVERVIEW

*Ex parte* communication

Judicial fraternization and  
impartiality

Role of defense counsel



# ETHICS ~ 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.”

Zai  
(f. l.)  
Zab  
in der  
zu Schi  
maßsch  
Savi  
deutet  
1844 als  
reihen zoolog.  
thologia toscana  
Zavigliano  
lujo der ital.  
an der Maira,  
und S. Salvo  
fruchtbarer Ebene,  
Mauern und Ziergärten  
als Gemeinde  
des 8. Infanterieregiments  
Gemälden des hier  
genannt Carraccio,  
mit Schulenhallen  
Trinmphbögen  
Seidenweberei und  
Am 4. und 6. Nov.  
Herrlicher unter  
iano). S. in  
relia und Maria  
Zavigliano di  
-mannja), Stadt  
Ferti, an der Via  
Aemilia und der  
Aemilia des Aemil  
als Gemeinde 4561  
leonen Altertum  
förierte Akademie  
mit Bibliothek von  
Zavigliano (spr.  
jurist, geb. 21. Febr.  
1779 zu Frankfurt  
die Universität Mar  
auch vertrittend  
Göttingen, Leipzig  
sowie Jena besuchte  
einige Reisen gemacht  
1800 in Marburg  
jurist. Vorlesungen,  
auch als Privatdocent,  
seit 1802 als außerord.  
Professor. Auf mehr  
jährigen Reisen durch  
Deutschland und Frankreich  
widmete er sich der  
Aufscheidung unbekannter  
Quellen des röm. Rechts  
und der Rechtsgeschichte.  
1808 wurde er Professor  
der Rechte in Gießen  
und 1810 bei Errichtung  
der Universität in Berlin  
einer der ersten Lehrer  
an derselben. 1817  
Mitglied des Staatsrats,  
1819 Rat des für die  
Provinz errichteten  
Revisionscollegiums  
und endlich 1842  
preuss. Minister für  
die Angelegenheiten  
der Justiz und des  
Verkehrs. Er trat im  
März 1848 ins Privatleben  
zurück und starb 25.  
Okt. 1861 in Berlin.  
S. gab die  
Rechtsgeschichte der  
Schlesier heraus, obwohl  
man ihn, edne Hugo  
und andere nennen kann.  
Innershalb dieser  
Rechtsgeschichte hat er  
zur Zeit der Befreiungs  
kriege den Verfall des  
Schmid, Henner u. a.  
welche Rechte bestritten  
waren, der Herrschaft der  
fremden besitzenden  
Schicht den Kampf  
gegenübergestellt, in der  
vielfachen Schrift «Der  
Verfall unserer Zeit für  
1815; Neudruck, Jurist.  
I. Bd. 1892) entgegen.  
Die Hauptaufgabe S.s. war  
indessen histor. Untersuchungen  
suspensend, denen man  
sine «Rechtsgeschichte  
des röm. Rechts im  
Mittelalter» (6 Bde.,  
Heidelb., 1844) als  
seiner  
tätige  
Sach  
beist.  
Schl.  
Rath.  
1837  
zu sein  
Za  
preuss.  
1814  
Berlin  
Diplom  
burg.  
Minist.  
licher  
Ankubr  
Jandbr  
zu der  
14. Juni  
tage zu  
ver sein  
den Auf  
führte  
bandlun  
handlun  
Breiten  
er zum  
Herde  
1868 tra  
einwille  
für den  
sowohl  
schwer  
wurde  
Genetm  
Staats  
Frankf  
Zavile  
Zavile  
etrust.  
Kontr  
weit der  
und Def  
bei süd  
Zavile  
Zavile  
Zavile,  
S. heißt  
dem Tod  
S. geht  
härteste  
Deutsche  
sänger  
von Ge  
der Const  
haben sie  
Hofer, 1861)

# ETHICS

## 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

# ETHICS ~ 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!***

# ETHICS

## 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.

# ETHICS ~ 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

# CONSTITUTIONAL ISSUES

## FIRST AMENDMENT – ALCOHOLICS ANONYMOUS

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

**WARNING**

# CONSTITUTIONAL ISSUES

## 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<sup>®</sup> 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)

# CONSTITUTIONAL ISSUES

## 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***

# CONSTITUTIONAL ISSUES

## 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<sup>®</sup>, Rational Recovery<sup>®</sup>, Smart Recovery<sup>®</sup>



# CONSTITUTIONAL ISSUES

## *WHAT IS DUE PROCESS?*

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





# CONSTITUTIONAL ISSUES DUE PROCESS ~ JAIL SANCTION

**YES!**

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

# CONSTITUTIONAL ISSUES

## DUE PROCESS ~ JAIL SANCTIONS



### The Constitution GUARANTEES Due Process!

Key Component 2: “Using a nonadversarial approach, prosecution and defense counsel promote public safety while protecting participants’ due process rights.”

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

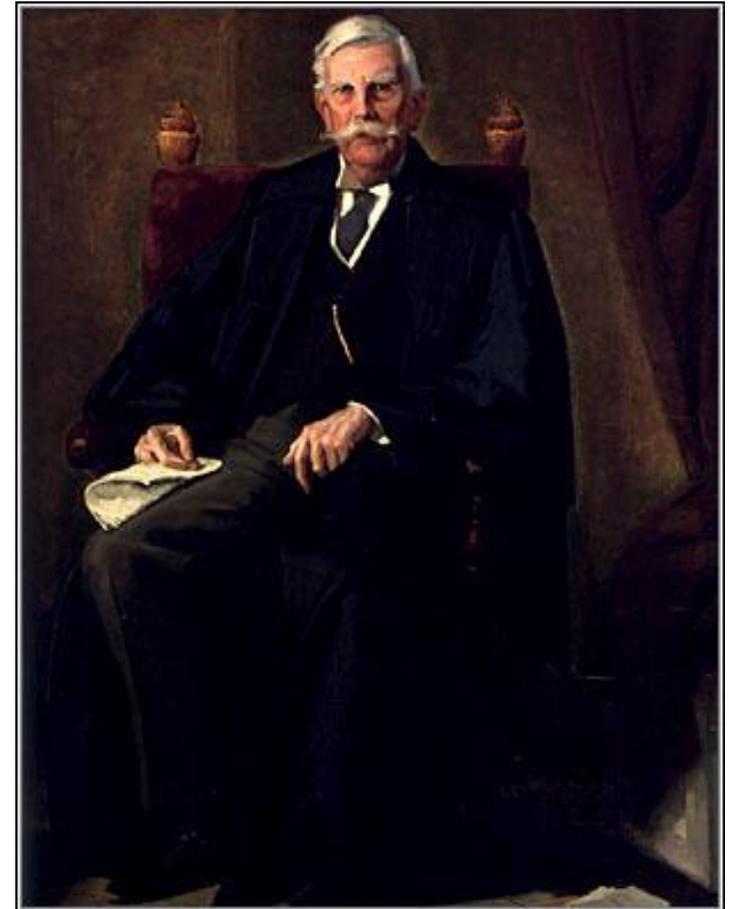
An evidentiary hearing with basic procedural protections is required because the participant may suffer a loss of a liberty or property right.

# CONSTITUTIONAL ISSUES

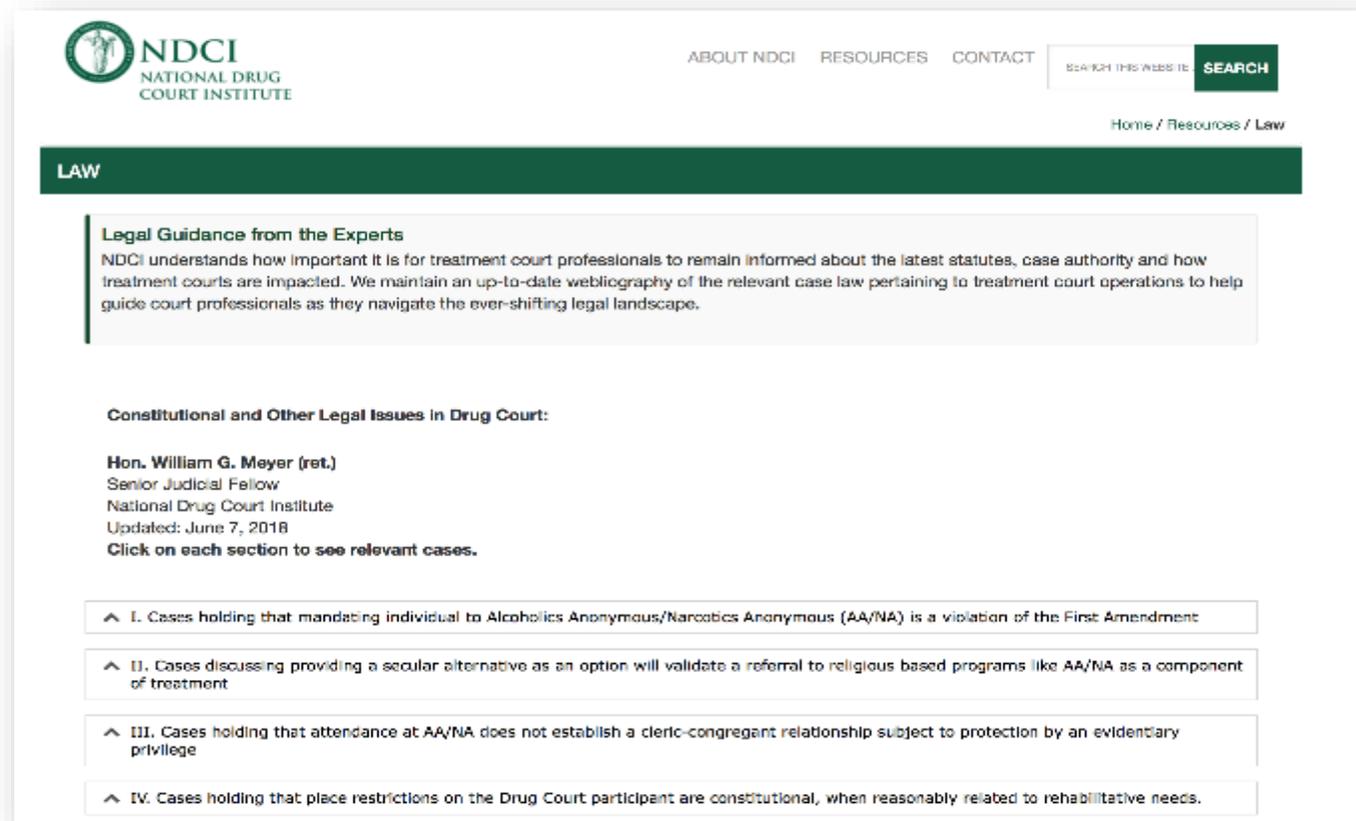
## A FINAL THOUGHT

**W**hatever 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)



# CONSTITUTIONAL ISSUES RESOURCES FOR TREATMENT COURTS



The screenshot shows the website for the National Drug Court Institute (NDCI). The header includes the NDCI logo and name, navigation links for 'ABOUT NDCI', 'RESOURCES', and 'CONTACT', and a search bar. A breadcrumb trail indicates the current page is 'Home / Resources / Law'. The main content area is titled 'LAW' and features a section for 'Legal Guidance from the Experts'. Below this, there is a heading for 'Constitutional and Other Legal Issues in Drug Court:' followed by the name and title of 'Hon. William G. Meyer (ret.)', a date of update (June 7, 2018), and a prompt to click on sections to see relevant cases. Four numbered sections are listed, each with an upward-pointing arrow icon.

**NDCI**  
NATIONAL DRUG  
COURT INSTITUTE

ABOUT NDCI RESOURCES CONTACT

SEARCH THIS WEBSITE **SEARCH**

Home / Resources / Law

**LAW**

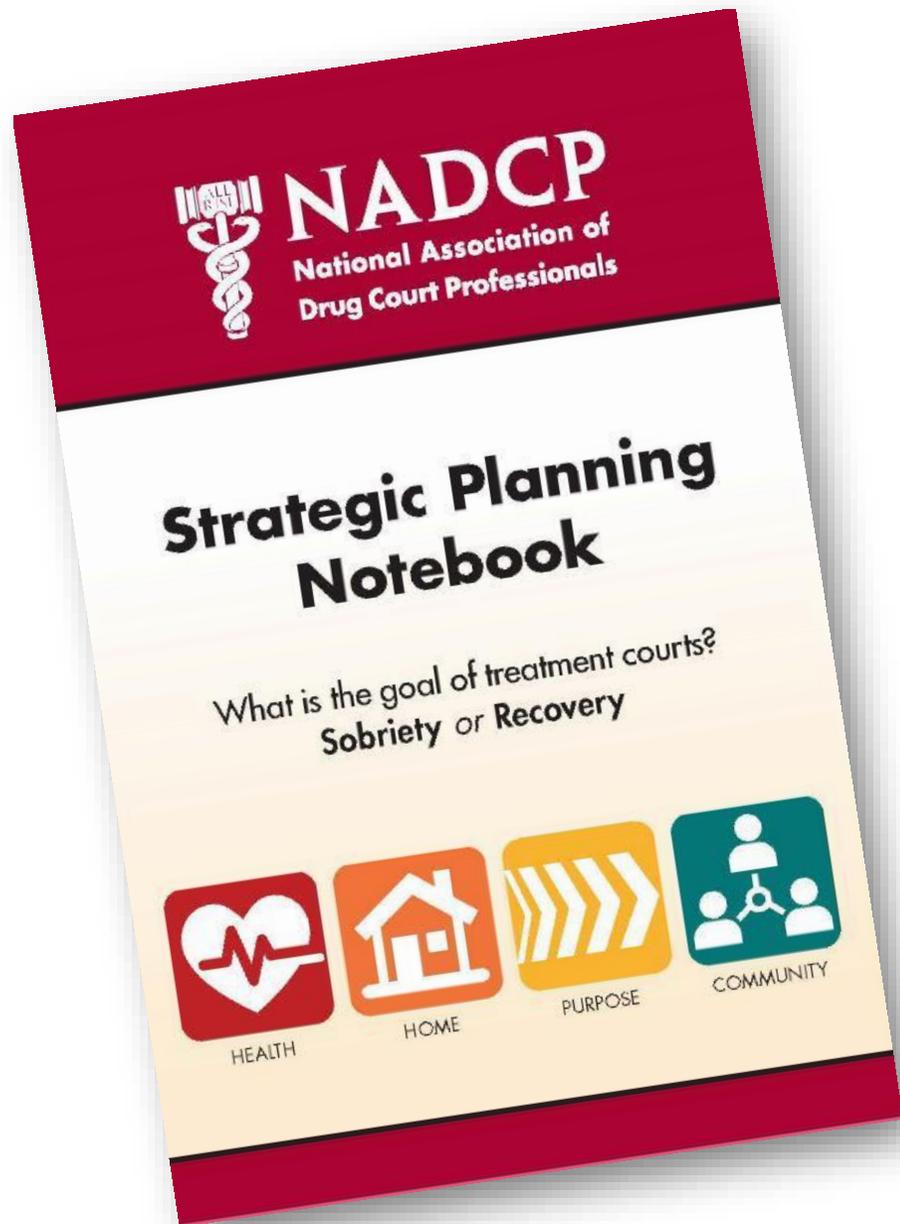
**Legal Guidance from the Experts**  
NDCI understands how important it is for treatment court professionals to remain informed about the latest statutes, case authority and how treatment courts are impacted. We maintain an up-to-date webliography of the relevant case law pertaining to treatment court operations to help guide court professionals as they navigate the ever-shifting legal landscape.

**Constitutional and Other Legal Issues in Drug Court:**

**Hon. William G. Meyer (ret.)**  
Senior Judicial Fellow  
National Drug Court Institute  
Updated: June 7, 2018  
Click on each section to see relevant cases.

- ▲ I. Cases holding that mandating individual to Alcoholics Anonymous/Narcotics Anonymous (AA/NA) is a violation of the First Amendment
- ▲ II. Cases discussing providing a secular alternative as an option will validate a referral to religious based programs like AA/NA as a component of treatment
- ▲ III. Cases holding that attendance at AA/NA does not establish a cleric-congregant relationship subject to protection by an evidentiary privilege
- ▲ IV. Cases holding that place restrictions on the Drug Court participant are constitutional, when reasonably related to rehabilitative needs.

<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

