Sharing Information and Due Process
Arizona Problem Solving Courts Conference
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Introductions

- Barbara Marshall, Division Chief, Juvenile Crimes Division, Maricopa County Attorney’s Office
- Michelle Rosenberg, Supervisor for Specialty Courts Group, Maricopa County Public Defender’s Office
- Arlette Itami, CEO, Community Support Services and CEO, Alcohol Detection Services of Central and Northern Arizona
- Sean Kewin, Therapist, Cactus Counseling Associates, PLLC, Pima County
- Judge Jennifer Campbell, Yavapai County Superior Court
- Robin Hoskins, Special Projects Coordinator, Maricopa County Superior Court
Roles

Describe your role:

- As a member of the Problem Solving Court Team

- Fulfilling the role while working collaboratively with the team

- Difficulties regarding Due Process
Prosecutor’s Role

- Protect public safety
- Represent community concerns

1. Obedience to law
2. Defendant’s recovery
3. Successful reintegration into community
Prosecutor Role

- Rule 3.8, AZ Rules of Professional Responsibility
  A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.

- NDAA Prosecution Standards
  A prosecutor should zealously protect the rights of individuals, but without representing any individual as a client.
  A prosecutor should put the rights and interests of society in a paramount position in exercising prosecutorial discretion in individual cases.
Prosecutor Role

- Problem Solving Court Model
  1. Review participants for eligibility
  2. Actively participate in staffings in a non-adversarial manner
  3. Share common goal of successful treatment completion
  4. Recommend sanctions when compliance not met
  5. Assess appropriateness of continued probation for re-arrests
Public Defender Role

- Provide sound legal advice prior to client being placed in Drug Court
- Balance competing concerns – zealous, partisan advocate v. team player
- Assist client in articulating questions/concerns
- Protect client’s due process rights while encouraging full participation
- Ensure that client’s perspective is heard and respected, client's rights are protected, and court procedures are being followed.
Public Defender Role

- **ER 1.1. Competence:** A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

- **ER 1.3. Diligence:** A lawyer shall act with reasonable diligence and promptness in representing a client.
Public Defender Role

- Problem Solving Court Model
  1. Review participants for eligibility
  2. Promote rights, health and well-being of client
  3. Actively participate in staffings in a non-adversarial manner
  4. Share common goal of successful treatment completion
  5. Due process
  6. Assess appropriateness of continued probation for re-arrests
  7. Advocacy
Treatment Provider Role

- Work with the court to report client progress
- Use of a court-based treatment plan
- Areas of confidentiality are retained, participant gives permission for disclosure to court
- Often walk a fine line between too much disclosure and not enough
- Understand and fulfill the contractual relationship with the referring agency, the court, and comply with State Revised Statutes
Treatment Provider Role

- Problem Solving Court Model
  1. Actively participate in staffings with possible solutions and recovery oriented goals
  2. Make treatment recommendations and identify and/or provide continuum of care needs
  3. Provide Evidence Based Treatment
  4. Support client’s in their recovery path through confidentiality yet maintain accountability to treatment team
Judicial Officer Role

- Presides over court proceedings
- Leader of the team
- Monitors application of disciplines, sanctions and incentives while maintaining integrity of court
- Speaks directly to client, asking about progress, exhorting them to try harder and applauding their accomplishments
- Decides ultimate program outcome of graduation or incarceration
Judicial Officer Role

- **Canon 1, Arizona Code of Judicial Conduct.**

  A judge should uphold and promote independence, integrity and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.

- **Drug/ DUI Court Key Component #6**

  A coordinated strategy governs drug court responses to participants’ compliance.
Sharing information

Every staffing is a potential ethical dilemma.

How do you convey information?

- To the Client
- To each other
Prosecutor

- Victim’s of crime are not the prosecutor’s clients, but ABA Criminal Justice Standards require prosecutors to keep victims informed.
- Many problem solving courts focus on offenses for which there is no discrete victim.
- When sharing information, prosecutor’s must observe confidentiality requirements established by law, the problem solving court’s rules, and the court’s memorandum of understanding.
- Provide information in general terms (e.g., “the defendant is doing well in probation.” rather than “the defendant is doing well in drug court”).
ER 1.4. Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in ER 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;
Public Defender

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) In a criminal case, a lawyer shall promptly inform a client of all proffered plea agreements.
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ER 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d), or ER 3.3(a)(3).

(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

(c) A lawyer may reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime.
(d) A lawyer may reveal such information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(2) to mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(3) to secure legal advice about the lawyer's compliance with these Rules;
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(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) to comply with other law or a final order of a court or tribunal of competent jurisdiction directing the lawyer to disclose such information.

(6) to prevent reasonably certain death or substantial bodily harm.
ER 1.14. Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
(c) Information relating to the representation of a client with diminished capacity is protected by ER 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under ER 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

- **ER 3.3. Candor Toward the Tribunal**
  (a) A lawyer shall not knowingly:
  (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
  (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by ER 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.
Public Defender

Sharing Information with the Client:

- Must keep client reasonably informed
- Counseling function – get clients on board/engaged
- Promote understanding
- Discuss staffings
- Discuss helpful v. harmful disclosures and potential outcomes with both
- Explain privilege against self-incrimination
Public Defender

Sharing Information with the Team:

- Limited ability due to client confidentiality
- Articulate clients views and concerns
- Provide suggestions based on conversations with client
Treatment Provider

- Support and encourage clients to disclose problematic situations independently to probation officer and Drug Court team (i.e. attorneys and judge) with the knowledge it will be brought up in staffing if needed.

American Counselor Association Code of Ethics B.2.d.

Minimal Disclosure:

To the extent possible, clients are informed before confidential information is disclosed and are involved in the disclosure decision-making process. When circumstances require the disclosure of confidential information, only essential information is revealed.
E. A licensee of an agency that provides DUI treatment shall ensure that, for each DUI client, a written report is prepared and provided to the DUI screening agency and, if applicable, the referring court according to the timeline established by the DUI screening agency and the DUI treatment agency that includes:

1. Whether the DUI client:
   a. Enrolled in DUI treatment and the date of enrollment;
   b. Complied with the requirements of DUI treatment; and
   c. Completed DUI treatment and, if so, the date of completion;
2. The DUI client's progress in DUI treatment; and
3. Any recommendation for additional DUI treatment.
H. A licensee of an agency that provides DUI treatment shall ensure that a record is maintained for each DUI client that contains:

1. Information and documents received from the screening agency or the referring court regarding the DUI client, if any;
2. The DUI client's assessment and treatment plan required in R9-20-209;
3. Documentation of each group counseling session in which the DUI client participated, including:
   a. The date of the group counseling session,
   b. The topics discussed, and
   c. The DUI client's progress in meeting treatment goals;
Treatment Provider

4. Documentation of the DUI client's exit interview required in subsection (F)(2);

5. A copy of the report provided to the DUI screening agency or referring court as required in subsection (E); and

6. Documentation of any other written information from or verbal contact with the DUI screening agency or the referring court, if any.
Treatment Provider

Sharing information with the client

- Should all setbacks during client’s recovery be seen as punishable acts or as part of the recovery process?

- Sometimes in treatment, a relapse is an opportunity for movement forward in treatment.

- Agencies are not directed by Statute to provide detailed noted regarding a client’s relapse or what the client discusses in group.
Treatment Provider

- Sharing Information with the Team:
  
  American Counselor Association Code of Ethics
  B.3.b. Treatment Teams:
  When client treatment involves a continued review or participation by a treatment team, the client will be informed of the team’s existence and composition, information being shared, and the purposes of sharing such information.

- Have release of information signed for probation officer as main contact and any other member of team.
A judge may initiate, permit, or consider ex parte communications...when serving on therapeutic or problem-solving courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.
Health Insurance Portability and Accountability Act (1996)

- Protects confidentiality and security of patient information
- Treatment programs may only release information or records
  1. With a knowing and written consent from the participant
  2. A proper consent can authorize all parties involved in your Problem Solving Court (covered “entities”)
- HIPAA prohibits a treatment program from making treatment conditional upon client signing a Release of Information form
- Judges and/or Probation can make signing a Release of Information form a condition of participation in a Problem Solving Court program.
Elements of a Release of Information

- Who may make the disclosure
- To whom the disclosure may be made
- Participant’s name
- Purpose of disclosure
- What kinds of information may be disclosed
- Participant’s signature
- Written and dated
- Limited in time
- Consent cannot be revoked in Problem Solving Court setting
Ethical Responsibilities

- How do you reconcile your ethical responsibilities and the best interest of the client?
Questions?