

Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender

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Recently, while waiting in the local community court¹ with a student from the Howard University School of Law Criminal Justice Clinic,² I witnessed a defendant requesting that a new lawyer be appointed to her case. The defendant complained to the judge that her court-appointed lawyer did not tell her what was going on in her case, and that he had been working against her. The judge asked us to take over the case, and we interviewed this new client. With tears streaming down her face, our new client explained that she felt that

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1. The District of Columbia has established a community court called the East of the River Community Court, which focuses on misdemeanor offenses that are alleged to have been committed in the sixth and seventh police districts in the city. Cases are automatically assigned to the calendar at the time of arraignment. A small cadre of attorneys represents the bulk of the defendants in the court. These attorneys are chosen by the presiding judge and meet regularly with her. A case manager is permanently assigned to the court and every case is assessed for the community programs (e.g., drug, diversion, and anger management) that are available. The judge sets strict conditions of release for the defendants, and routinely incarcerates those who violate their conditions. Outside of the District of Columbia, many community courts are in operation in the United States today, most notably the Red Hook Community Justice Center and the Midtown Community Court in New York City.

2. The Howard University Criminal Justice Clinic is an academic program offered by the School of Law. Third-year law students who are enrolled in a law school clinical program and have received a student bar certification from the District of Columbia Court of Appeals may represent adults charged with criminal misdemeanor offenses in the Superior Court under the supervision of a licensed attorney. *See* D.C. CT. APP. R. 48(b). The students are appointed to cases by the Court and represent defendants from arraignment through sentencing and some post-conviction matters. Frequently, they are appointed to cases on the Superior Court's specialized criminal calendars, including drug court, the domestic violence unit and the community court.

her lawyer was in collusion with the prosecutor and that he was working with the court to send her to jail and take her children away. She further recounted that at the last court hearing her lawyer had told the judge that she needed to be taken out of the community and away from her family in order to kick her drug habit. She explained to us that she had never met with her lawyer privately; instead, her only contact with him had been a group meeting with her and five other defendants thirty minutes before her arraignment. She had received some basic information from the attorney about what would happen to her in the community court, but he had not asked her anything about her case or considered whether she wished to challenge the police action that led to her arrest. The lawyer had told her that her court-assigned case manager would be her first point of contact in the community court. After recounting this, she indicated that she wanted more from her attorney than someone who was going to preach to her about the drug treatment she needed to turn her life around. She said that she had lost faith in her lawyer, and in the court system, because there was no one on her side to help her achieve what she desired.

This client's frustration with the adequacy of the defense services that she received while in a community court illustrates a number of problems with this increasingly popular model of court adjudication. Many specialty courts incorporate an alternative model of case adjudication, one that focuses on treatment and gives attention to the social issues of victims, the defendant, and the community.³ These new courts engage in problem-solving in order to reduce recidivism and to increase the effectiveness of the criminal justice system.⁴ However, the specialty court model of case adjudication presents a number of problems for clients and raises potential ethical and professional concerns for defense attorneys. These lawyers are frustrated with the realities of a practice that has been little helped by the sanitized and theoretical discussions in academic fora regarding the benefits of these courts. Defense attorneys in particular point to the number of ethical and professional role issues that arise in specialty courts, such as potential conflicts of interests, interference by judges and by treatment professionals with the defense attorney's role as advisor and counselor, and confusion regarding the definition

3. Bruce J. Winick, *Therapeutic Jurisprudence and Problem-Solving Courts*, 30 *FORDHAM URB. L.J.* 1055, 1060–61 (2003). Specialty courts consist of many types of courts that use as a central theme the notion that the court should address other social issues of defendants, such as drug abuse, domestic violence, and mental health counseling, and seek to solve them, instead of following the normal adjudicative practice of our courts. GREG BERMAN & JOHN FEINBLATT, *GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE* 9 (2005). Such courts also include notions of restorative justice in addition to therapeutic jurisprudence. See Candace McCoy, *The Politics of Problem Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 *AM. CRIM. L. REV.* 1513, 1524 (2003); BERMAN & FEINBLATT, *supra*, at 7; see also discussion *infra* Part I.A.

4. Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 *WASH. U. J. L. & PUB. POL'Y* 63, 68–69 (calling for broader thinking in evaluating community courts with emphasis on providing more services to those in need).

of zealous representation in a specialty court.

The rapid integration of specialty courts into the criminal justice system is ongoing. Over the past year, many new specialty or problem-solving courts⁵ have been created by court administrators, judges, policymakers, and attorneys, who are intent on effecting change in our criminal justice system.⁶ These courts use new models of practice and procedure to encourage the defendant's rehabilitation by mandating drug and alcohol treatment, requiring restitution or community service, or providing social services.⁷ The goal of these courts is to refocus the criminal justice system in order to produce different outcomes such as decreases in crime rates, recidivism rates, and drug usage.⁸

Advocates of the specialty court movement say that a focus on these outcomes is necessary because our criminal justice system is ineffective in many ways.⁹ Specialty courts value outcomes and results over the normal processes that we have enshrined in the traditional adversarial system.¹⁰

5. Many of these are called "problem-solving" courts because they are meant to address issues in the defendant's lives that have contributed to their involvement in the criminal justice system. BERMAN & FEINBLATT, *supra* note 3, at 33. In a recent address at Fordham Law School, New York State Chief Administrative Judge Jonathan Lippman noted the New York court system's embrace of specialty courts and defined the courts' brand of problem-solving: "Let me take a moment here to put problem solving courts in greater context. Problem solving justice is about modifying court processes to fit the problems that are driving the activity bringing cases into our different courts. It's about courts putting the individual front and center, and then fashioning individualized responses designed to change future behavior. . . . By helping to solve the problems that we confront in our courthouses, we help to solve the problems we face as a society." Jonathan Lippman, Chief Administrative Judge, Keynote Address at the Fordham Law School Symposium (Oct. 13, 2006), available at <http://www.courtinnovation.org/index.cfm?fuseaction=Document.viewDocument&documentID=740&documentTopicID=31&documentTypeID=10>.

6. There are almost 2000 specialty or problem-solving courts in operation in the United States today; these courts include drug courts, the most prevalent type, as well as others covering such subject matters as community issues, mental health, domestic violence, reentry, and prostitution. See BERMAN & FEINBLATT, *supra* note 3, at 9; Tamar Meekins, *Specialized Justice: The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 22–28 (2006).

7. Winick, *supra* note 3, at 1060–61.

8. See Judith S. Kaye, *Refinement or Reinvention? The State of Reform in New York: The Courts*, 69 ALB. L. REV. 831, 837 (2006); see also Judith S. Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts Are Run*, 48 HASTINGS L.J. 851, 855–56 (1997) (arguing the conventional court system does not address recidivism); see generally Hon. Peggy Fulton Hora, Hon. William G. Schma & John T. A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 462–68 (1999). Procedural due process, including attention to the fairness inherent in the process so that just results are accomplished, becomes less of a central goal in these new courts. See Kaye, *supra*, at 854.

9. See, e.g., BERMAN & FEINBLATT, *supra* note 3, at 17 (arguing that urban criminal courts are "crowded, chaotic, and overwhelming" and "lack . . . coherent logic").

10. *Id.* at 34–35. Indeed, many varieties of these courts seek to exclude adversarialism from their standard operating procedures. NAT'L ASS'N OF DRUG CT. PROFS. ("NADCP"), *DEFINING DRUG COURTS: THE KEY COMPONENTS* (Jan. 1997) (Key Component Number 2), available at <http://www.nadcp.org/docs/dkeypdf.pdf>; but see BERMAN & FEINBLATT, *supra* note 3, at 180–83

General jurisdiction courts have also taken notice of specialty courts, as judges and court administrators look for ways to incorporate principles and practices of specialty courts into their own courts.¹¹ Already some judges in general jurisdiction courts state that they are taking a more proactive approach by looking at particular problems in a case, such as the defendant's drug abuse, that may increase the likelihood that defendants will reenter the criminal justice system.¹²

With the entrance of specialty courts onto the criminal justice landscape, the expected roles of many actors in the system are changing. Defense attorneys in particular are expected by other actors in the specialty courts, such as judges, prosecutors, and case managers, to shed their staunch adversarialism and to conform the way they represent their clients to the goals of the specialty court.¹³ This expected change in defense role can present problems and

(arguing that while defenders and others in specialty courts collaborate to promote success for the defendant, there are still opportunities for defenders to advocate strongly on behalf of their clients).

11. See Phylis Skloot Bamberger, *Specialized Courts: Not a Cure-All*, 30 FORDHAM URB. L.J. 1091, 1099 (2003); Tamar Meekins, *You Can Teach an Old Defender New Tricks: Sentencing Lessons from Specialty Courts*, 21 CRIM. JUST. 28, 29 (2006). Additionally, court systems are looking at ways to integrate problem-solving into entire court systems. In California, a movement called "collaborative justice" seeks to enhance and expand the breadth of specialty courts and to integrate their principles into mainstream courts. See ROBERT WOLF, CALIFORNIA'S COLLABORATIVE JUSTICE COURTS: BUILDING A PROBLEM-SOLVING JUDICIARY (2005), available at http://www.courtinnovation.org/_uploads/documents/CA%20Story_1.pdf; see also Donald J. Farole, Jr. et al., *Applying Problem-Solving Principles in Mainstream Courts: Lessons for State Courts*, 26 JUST. SYS. J. 57, 58 (2005) (presenting results of study in California and New York examining the potential for applying specialty court principles in general jurisdiction courts). Moreover, law schools and continuing legal education programs are beginning to offer courses in problem solving. See, e.g., CENTER FOR CT. INNOVATION, PROBLEM-SOLVING JUSTICE: A LAW SCHOOL COURSE, available at http://www.courtinnovation.org/_uploads/documents/psjlawschoolcourse.pdf.

12. Bamberger, *supra* note 11, at 1099 (calling for more opportunities for specialty-court-like treatment and alternative sentencing opportunities in general jurisdiction courts for appropriate defendants). Additionally, the Conference of Chief Justices, Conference of State Court Administrators, and the American Bar Association have all called for the broad integration of specialty court principles and methods into the criminal justice system. Conf. of Chief Justs. & Conf. of St. Ct. Administrators, *Resolution 22: In Support of Problem-Solving Court Principles and Methods* (July 29, 2004), available at <http://cosca.ncsc.dni.us/Resolutions/CourtAdmin/Problem-SolvingCourtPrinciplesMethods.pdf>. Some have called this a paradigm shift in the way our criminal justice system works. McCoy, *supra* note 3, at 1527-28; NAT'L DRUG CT. INST. ("NDCI"), CRITICAL ISSUES FOR DEFENSE ATTORNEYS IN DRUG COURT I (2003), available at <http://www.ndci.org/CriticalIssues.pdf>; see also JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 39 (2001). A radical change in the focus of our justice system away from process-oriented rules and methodologies to those that focus on the outcome of a decrease in recidivism might detrimentally affect the most powerless in the criminal justice system: indigent criminal defendants. Meekins, *supra* note 6, at 33-37.

13. Nat'l Legal Aid & Defender Ass'n ("NLADA"), "A Level of Teamwork Not Often Seen": An Interview with Jeffrey S. Tauber, INDIGENT DEFENSE, Nov./Dec. 1997, at 23 ("It requires defenders to take a step back, to not intervene actively between the judge and the participant"), available at <http://www.nlada.org/DMS/Documents/998934264.745/Defenders%20in%20Drug%20Courts.doc>.

confusion for the individual defense attorney and client. Ethical dilemmas, potential violations of the various ethical and professional standards, and questionable representational practices may develop. Additionally, the specialty court model may encourage a culture of underzealous representation by some defenders that may set a dangerous precedent for the overall professional role of the defender in our criminal justice system.¹⁴

I, along with several other former public defenders who now work in academia, have called for a careful review of the impractical goals, due process shortcuts, and great potential for ethical challenges that exist in specialty courts. We have questioned the savior-like manifesto associated with specialty courts; that is, that this new form of criminal justice case processing can cure the ills of our system.¹⁵ Such a review may reveal the need for structural change in the prevailing specialty court model.¹⁶ At the very least, such a review and study may result in clearer guidelines for the way defense attorneys should function in these courts. This Article attempts to make an initial step in that direction.

Although several reviews of the general issues involved in specialty courts have been published, to date very little has been written about the ethical and professionalism issues¹⁷ that confront defense attorneys in specialty courts, for

14. See Meekins, *supra* note 6, at 32.

15. See, e.g., Mae Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37 (2001) (analyzing drug treatment court practices from the perspective of a criminal defense attorney practicing within one such court); Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459 (2004) (questioning the long-term viability of problem-solving courts); Eric Lane, *Due Process and Problem-Solving Courts*, 30 FORDHAM URB. L.J. 955 (2003) (analyzing whether problem-solving courts conflict with due process); Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205 (1998) (concluding that minimum requirements for responsible defense practice in drug courts are not likely to be met).

16. See Meekins, *supra* note 6; Tamar Meekins, *Book Review: Are the New "Good Courts" Just Too Good to Be True?*, 21 CRIM. JUST. 57, 58–60 (Spring 2006) (reviewing BERMAN & FEINBLATT, *supra* note 3).

17. "Professionalism" is a broad term that has been used by some to denote a lawyer's obligations to the legal system, clients, and other lawyers that are not mandated by laws and rules. RICHARD ZITRIN & CAROL LANGFORD, *LEGAL ETHICS IN THE PRACTICE OF LAW* 491–92 (2002); see also Monroe Freedman, *Professionalism in the American Adversary System*, 41 EMORY L.J. 467, 470 (1992) (offering definition of professionalism that is rooted in the values of our constitutionalized adversary system and that elevates the protection of client's legal rights and lawful interests); Timothy P. Terrell & James H. Wildman, *Rethinking Professionalism*, 41 EMORY L.J. 403 (1992) (evaluating the concept of professionalism: its purpose, history, importance, cultural implications, and six essential values). Professionalism generally includes aspirations such as personal dignity, integrity, civility, courtesy, candor, and fair play. Such obligations are not generally enforceable by attorney disciplinary authorities, but may form the basis for sanctions or damages. Additionally, a majority of state bar associations and local or voluntary bar associations has enacted a formal statement of professionalism, a civility codes, statement of principles or guidelines for professionalism. See ABA Center on Prof'l Responsibility, *Professional Codes / Reports*, <http://www.abanet.org/cpr/professionalism/profcodes.html> (listing professionalism codes and reports) (last visited May 15, 2007).

example, how the defender should function to best protect and advocate her client's wishes and interests.¹⁸ The National Drug Court Institute ("NDCI"), one of the leading government-funded organizations that focus on drug courts, has published only two monographs on these and similar issues.¹⁹ While they are an informative starting point for the study of defense ethics in specialty courts, the NDCI monographs do not critically examine the issues from a theoretical, practical, or, ironically, a problem-solving perspective. Instead, the monographs evidence the organization's bias in favor of drug courts, and ultimately dismiss or diminish the severity of the ethical issues faced by defense attorneys in these courts.²⁰ Similarly, the leading pro-specialty-court organization, the Center for Court Innovation ("CCI"), which has published a wealth of articles, monographs, and studies on the various types of specialty courts, has written little on the subject of attorney ethics.²¹ Even defender organizations such as the National Legal Aid and Defender Association ("NLADA") have not focused on the study and evaluation of this issue.²² NLADA has issued its *Ten Tenets of Fair and Effective Problem-Solving*

Additionally, a number of ABA sections have adopted formal statements or guidelines for civility and professionalism. *Id.* Some states also have professionalism commissions or bar committees that hold training sessions, meetings and law school programs focusing on civility and professionalism issues. See ABA Center on Prof'l Responsibility, Professionalism Commissions, <http://www.abanet.org/cpr/professionalism/profcommissions.html> (listing these commissions and explaining the formation and operation of such commissions) (last visited May 15, 2007).

18. Note that there may be a significant difference between a defense lawyer advocating for the client's wishes and pursuing the client's best interests as defined by other parties. Specialty courts advocate a model of 'best interests' representation where the defense attorney, much like the judge and treatment professionals, focus on the treatment, punishment, or services they deem clinically appropriate and in the defendant's best interests. Such an approach is directly opposite to the theory of client-centered representation that is embraced by a great number of defense attorneys. A client-centered representation model has as its goal the stated wishes of the client; often these stated interests may not represent what others consider best for the defendant.

19. NDCI, ETHICAL CONSIDERATIONS FOR JUDGES AND ATTORNEYS IN DRUG COURT (2001), available at <http://www.ndci.org/publications/ethicalconsiderations.pdf>; see also NDCI, *supra* note 12.

20. See NDCI, *supra* note 12, at 45; NDCI, *supra* note 19, at 1.

21. The Center for Court Innovation's website, <http://www.courtinnovation.org>, is a great source of information on the work that is being done in specialty courts across the country, particularly in the city of New York, the site of the organization's headquarters.

22. NLADA is the leading organization that represents the interests of public defenders and civil legal services attorneys. The organization provides training to defenders and assistance to governing officials with responsibility for indigent defense on state and federal levels. It also provides lobbying, research, and other services to individual or groups of defense attorneys. Specifically, current literature overwhelmingly focuses on drug courts, the most popular and prevalent form of specialty courts. In 1997, NLADA dedicated an issue of its monthly magazine, *Indigent Defense*, to drug courts. The issue covered several topics relevant to the implementation and maintenance of drug courts, yet only one article was dedicated to the ethics issues that arise for defenders. This article is helpful because it points out some general issues arising for defense lawyers; however, it does not fully delve into the reality or difficulty of practice for defenders in specialty courts. See Richard Burke, *Reconciling Drug Court Participation with Defender Ethical Standards*, INDIGENT DEFENSE, Nov./Dec. 1997, available at <http://www.nlada.org/DMS/Documents/998934264.745/Defenders%20in%20Drug%20Courts.doc>.

Courts (“*Ten Tenets*”), which sets out some basic ground rules for the operation and design of these courts.²³ These tenets are basic concepts that the NLADA finds fundamental to the establishment of specialty courts, particularly since the defender voice is not always heard in the various stages of the implementation of a specialty court.²⁴ NLADA’s tenets give very short shrift to many of the ethical dilemmas that defense lawyers confront while practicing in specialty courts.²⁵

In light of the importance of these issues and the continued timeliness of the discussion, this Article considers some of the recurring ethical issues that may confront defense attorneys practicing in specialty courts and the impact on defense practice of written defender standards, such as the American Bar Association’s *Criminal Defense Standards*, the NLADA’s *Blackletter*

23. See NLADA, TEN TENETS OF FAIR AND EFFECTIVE PROBLEM-SOLVING COURTS (Jan. 2002), available at <http://www.nlada.org/DMS/Documents/1019501190.93/Ten%20Tenets-Final%20ACCD%20version.doc>. In summary, NLADA set forth the following basic guidelines for these courts:

1. Qualified representatives of the indigent defense bar shall have the opportunity to meaningfully participate in the design, implementation and operation of the court, including the determination of participant eligibility and selection of service providers. . . .
2. Qualified representatives of the indigent defense bar shall have the opportunity to meaningfully participate in developing policies and procedures for the problem-solving court that ensure confidentiality and address privacy concerns, including (but not limited to) record-keeping, access to information and expungement.
3. Problem-solving courts should afford resource parity between the prosecution and the defense. . . .
4. The accused individual’s decision to enter a problem-solving court must be voluntary. . . .
5. The accused individual shall not be required to plead guilty in order to enter a problem-solving court. . . .
6. The accused individual shall have the right to review with counsel the program requirements and possible outcomes. Counsel shall have a reasonable amount of time to investigate cases before advising clients regarding their election to enter a problem-solving court.
7. The accused individual shall be able to voluntarily withdraw from a problem-solving court at any time without prejudice to his or her trial rights. . . .
8. The court, prosecutor, legislature or other appropriate entity shall implement a policy that protects the accused’s privilege against self-incrimination.
9. Treatment or other program requirements should be the least restrictive possible to achieve agreed-upon goals. Upon successful completion of the program, charges shall be dismissed with prejudice and the accused shall have his or her record expunged in compliance with state law or agreed upon policies.
10. Nothing in the problem solving court policies or procedures should compromise counsel’s ethical responsibility to zealously advocate for his or her client, including the right to discovery, to challenge evidence or findings and the right to recommend alternative treatments or sanctions.

Id. at 2–3.

24. *Id.* (noting that “more often than not, defenders are excluded from the policy-making processes which accompany the design, implementation and ongoing evaluation of Problem-Solving Courts”).

25. *Id.* NLADA created these tenets based on the experience of pretrial services agencies and the collective expertise of the Chief Defenders, who were members of the body adopting the tenets. *Id.*

Guidelines, and various state standards.²⁶ I argue that detailed and definitive written defender standards and ethical guidelines are necessary to guide the defense attorney in the expanding area of specialty court practice. This is even more imperative because more and more judges are using specialty court principles in other courts. Judges, prosecutors, and other court personnel also need to be aware of the differences in the role and motivating principles that guide the work of the traditional defense attorney and which have implications for ethical issues in specialty courts. In Part I, I review the basic principles of specialty courts with an eye toward the ramifications of specialty court jurisprudence on the duties, responsibilities, and roles of defense attorneys. Part II examines some of the ethical rules and other standards that apply to the defense attorney practicing in these courts by presenting specific specialty court scenarios that can place the defense attorney in confusing and potentially no-win situations.²⁷ It is here that one can clearly see how specialty court principles may conflict with some traditional ethical guidelines for the defense attorney. I examine situations where the widely accepted model of specialty court practice is pitted against generally accepted norms of legal professionalism and ethical behavior. I argue that, unfortunately, the ambiguity that results from this conflict between ethical rules and specialty court jurisprudence can negatively influence the quality and extent of defense representation in specialty courts. In Part III, I posit that the introduction of specific standards and guidelines in these new courts is essential. New standards and guidelines would give clear guidance to attorneys practicing in specialty courts, despite the ethical issues that are inherent in specialty court jurisprudence. Additionally, I make some suggestions that can guide the further implementation of these courts and their principles in the criminal justice system.²⁸

I. GENERAL CHARACTERISTICS OF THE PREVAILING SPECIALTY COURT MODEL OF DEFENSE REPRESENTATION

There are many different types of specialty courts in operation today,

26. See AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION (3d ed. 1993), available at http://www.abanet.org/crimjust/standards/dfunc_toc.html; NLADA, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (3d ed. 2001) (known as the "BLACKLETTER GUIDELINES"), available at http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines; INST. FOR LAW & JUST., COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS (May 2001), available at <http://www.ojp.usdoj.gov/indigentdefense/compendium>.

27. In this Article, I review only a limited number of the ethical issues that emerge in specialty courts. Many others may exist, such as: (1) the meaning of informed consent in the conflicts rules as they apply to specialty courts; (2) issues concerning diminished capacity under Model Rule 1.14; and (3) the appointment of counsel issues that may arise under Model Rule 1.18.

28. In previous articles, I have made some related suggestions and have noted some lingering issues that could affect the further development and expansion of specialty courts. Meekins, *supra* note 6, at 30; Meekins, *supra* note 16, at 60.

ranging from drug courts, which are the most prevalent, to community and domestic violence courts.²⁹ Many other specialty courts—such as mental health, homelessness, prostitution, prisoner reentry, and gun courts—focus specifically on the type of offense charged or issues that arise in the defendants' lives.³⁰ These courts also employ differing methodologies to treat or address identified social issues, some of which are rooted in restorative or therapeutic justice theories, and which recur overall in specialty courts.³¹ This Part will describe the theoretical origins of specialty court models in therapeutic and rehabilitative justice and explain the key principles common to various court models. Furthermore, it will argue that the principles of specialty courts have started to creep into regular court practice, with potentially dangerous results. Defenders therefore have to understand the fundamental principles of these courts and fully understand how each one operates.

A. Therapeutic and Restorative Justice Origins

Many commentators have noted that the rise of specialty courts can be directly linked to the continuing and growing embrace of therapeutic jurisprudence and restorative justice—theories developed by Professors Bruce Winick and David Wexler in the 1980s.³² Other authors have noted that the general decline of the rehabilitative ideal in the criminal justice system and the increase in punitive and harsh sentencing, including mandatory minimums, have been a catalyst for the rise of specialty courts.³³ This section will explain

29. BERMAN & FEINBLATT, *supra* note 3, at 7–8.

30. Meekins, *supra* note 6, at 22–28. Other courts also employ methodologies similar to drug courts. In the juvenile context, drug, gun, truancy, and teen courts that use peer resources to adjudicate cases are using some of the key principles of specialty courts. See Daniel M. Filler & Austin E. Smith, *The New Rehabilitation*, 91 IOWA L. REV. 951, 967–75 (2006).

31. For a fuller discussion of the principles of specialty courts, see NADCP, *supra* note 10, and James Nolan, *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1546–63 (2003) (focusing on drug courts to analyze the theoretical goals of problem-solving courts). See generally McCoy, *supra* note 3 (advising caution and development of more clarified objectives before extending the drug court model to other social problems).

32. Nolan, *supra* note 31, at 1545; Winick, *supra* note 3, at 1062; Hon. Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 FORDHAM URB. L.J. 2063, 2063 n.1 (2002) (criticizing judges' involvement in problem-solving courts and use of therapeutic justice principles); Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AMER. CRIM. L. REV. 1513, 1521–26 (2003) (discussing the reasons for the rise of various treatment courts); Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 607 (2006) (citing Professor Susan Daicoff's theory that the comprehensive law movement includes these additional theories, which has resulted in a "broadened conception of the lawyer's role"); Bruce Winick & David Wexler, *Drug Treatment Court: Therapeutic Jurisprudence Applied*, 18 Touro L. REV. 479, 480 (2002) (noting that specialized treatment courts use concepts of therapeutic jurisprudence).

33. See, e.g., Filler & Smith, *supra* note 30, at 952 (attributing the rise of specialty courts to the "explosive rebirth of the rehabilitative ideal"); see also Hoffman, *supra* note 32, at 2083;

some of these theories and how practitioners have applied their tenets to specialty court jurisprudence.

Therapeutic jurisprudence is the study of “law as a therapeutic agent,”³⁴ and in the criminal justice setting, it seeks to address social and other factors that lead to an individual’s entry into the system.³⁵ Restorative justice takes this concept a step further by also focusing on the interests of all parties that have a stake in the criminal case, such as the victim and the greater community, and addressing how they have been affected by the defendant’s criminality.³⁶ The courts that embrace these theories will more frequently address treatment needs of the defendant, work to divert offenders from the criminal justice system, and help the parties access needed social services.³⁷

Although specialty courts focus on rehabilitation and alternatives to incarceration, they may use coercive tools such as restitution, mandatory mediation, community service, or jail time to achieve their desired outcomes and also often utilize coercive sanctions that impose immediate penalties for actions in violation of conditions set by the court.³⁸ The use of coercive tools is of concern to many defense attorneys. Specialty court attorneys are expected not to object to the use of these coercive tools because they are used in the pursuit of therapeutic jurisprudence or are otherwise in the client’s best interests.³⁹ This acquiescence by the lawyer in the punishment of his or her client runs afoul of traditional ethical rules.

B. Key Principles of the New Specialty Courts

Specialty courts have revised the structure and process of cases, and the administration of justice, in order to focus on outcomes and results rather than procedural due process.⁴⁰ The outcomes that are most praised by specialty

Hora, Schma & Rosenthal, *supra* note 8, at 456–63.

34. NOLAN, *supra* note 12, at 185 (quoting BRUCE WINICK & DAVID WEXLER, LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 179 (1996)).

35. NOLAN, *supra* note 12, at 185.

36. McCoy, *supra* note 3, at 1524–25. Therapeutic jurisprudence is also seen as a way of incorporating therapeutic values into all aspects of the legal system. Scholars have studied the extent to which these values can be manifested in family law, juvenile court systems, and civil courts, such as public benefits systems.

37. See Bruce Winick & David Wexler, *Drug Treatment Court: Therapeutic Jurisprudence Applied*, 18 TOURO L. REV. 479, 480–84 (2002).

38. Meekins, *supra* note 6, at 18–20. Examples of these sanctions include work details, incarceration, and other, sometimes unproven, behavior modification models. See, e.g., MONTGOMERY COUNTY, MD., CIR. CT., ADULT DRUG COURT POLICIES AND PROCEDURES MANUAL (2006) (“MONTGOMERY COUNTY MANUAL”), available at <http://www.montgomerycountymd.gov/mc/judicial/circuit/drugcourt/AdultDrugCourtPoliciesandProceduresManualOct03-2006.pdf>; see also Winick, *supra* note 3, at 1078–82, 1084–88 (discussing persuasion theory and behavioral contracting).

39. Hora, Schma & Rosenthal, *supra* note 8, at 479–80 (noting that defenders have to shed their traditional adversarial role in drug treatment courts).

40. BERMAN & FEINBLATT, *supra* note 3, at 6–7. The outcomes and results that matter most

court supporters are a reduction in recidivism rates and an increase in the number of defendants who successfully receive treatment.⁴¹ The elevation of these outcomes as central goals of specialty courts threatens the due process rights of defendants because less attention is paid to the fairness of the process that has subjected these defendants to the authority of the court.

Although specialty courts are not uniform in their construction, some key principles remain common to most. These key principles include (1) the early requirement of treatment; (2) the use of sanctions and rewards; (3) the team approach and the disavowal of adversarialism; and (4) the judge as the central figure. Specialty court officials should carefully review any practices that build on these key principles before implementation because of the potential for coercion, loss of liberty, and diminution of due process rights of defendants. Moreover, widespread implementation of these courts' fundamental principles may have a profound effect on our criminal justice system.⁴² Even aside from the great numbers of these courts that have been developed, more and more judges are utilizing some of the key principles in general jurisdiction courts.⁴³ The role of the defense attorney and ethical challenges faced by defenders are primary issues of concern in this context.⁴⁴

1. General Structure of the Specialty Court Model

In many of these courts, the routine adjudication of a case is abandoned; instead the case is placed on a special docket with a dedicated judge and prosecutor and specially assigned case management or treatment

to specialty court advocates and officials seem to be lower recidivism rates for individuals who go through the specialty court, improved court processing that is efficient and effective, lower costs, and enhanced quality of life for victims, defendants, and communities. *Id.* at 156; *see also* Nolan, *supra* note 31, at 1543. Procedural due process concerns that take a back seat in the specialty court context include the right to a speedy trial, the testing of evidence to see if it meets constitutional muster, and the provision of adequate time for discovery and investigation. Lane, *supra* note 15, at 960–88.

41. BERMAN & FEINBLATT, *supra* note 3, at 11.

42. Some members of the legal community—including lawyers, law professors, judges, and criminologists—have posited that the implementation of such a great many of these courts in different areas represents a paradigm shift in our criminal justice system. *See, e.g.*, Nolan, *supra* note 31, at 1564–65; NDCL, *supra* note 12; *see also* Meekins, *supra* note 6, at 33–37 (arguing that if this trend toward specialty court adjudication of criminal cases is a paradigm shift, then a real danger exists that there will also be a paradigm shift in the role and practice of criminal defenders, and that a change in the way defenders are viewed and carry out their function would be detrimental to our system of justice and will result in less protection of constitutional and other rights of criminal defendants).

43. For example, California's statewide court system has sought out ways to implement special problem-solving court models into its general jurisdiction courts. *See supra* note 11.

44. *See* PAMELA M. CASEY & DAVID B. ROTTMAN, PROBLEM-SOLVING COURTS: MODELS AND TRENDS 11 (2003) (noting that “ethical issues have been raised since the inception of these courts” but that a “broader range of voices and perspectives” on the issue is likely and “an important step” in the development of the courts), *available at* http://www.ncsconline.org/WC/Publications/COMM_ProSolProbSolvCtsPub.pdf.

professionals.⁴⁵ This judge is able to order any combination of treatment, conditions of release, or behavior modification methods, depending upon the identified issues in the case or in the defendant's life.⁴⁶ Ideally, the judge will be specially trained in the social issues that have contributed to the defendant's criminality, such as the nature of substance abuse, addiction, and recovery, or the psychosocial underpinnings of domestic violence.⁴⁷ As the case continues, the defendant interacts frequently with the judge, court-employed social workers, case managers, and other relevant professionals who are charged with assessing and monitoring any treatment issues or imposed conditions.⁴⁸ "Treatment" in the specialty court lexicon most often refers to substance abuse and addiction treatment.⁴⁹ Indeed, supporters of specialty courts state that "addressing addiction isn't just an afterthought—it's the heart of the matter."⁵⁰ However, given the explosion of specialty court methodology into areas other than drug courts,⁵¹ the "treatment" that may be required is sometimes more akin to punishment and can be counterproductive. For example, a judge might require a defendant to engage in community service as part of a court-assembled work detail. While working, the defendants are required to wear a

45. Gregory L. Acquaviva, *Mental Health Courts: No Longer Experimental*, 36 SETON HALL L. REV. 971, 985 (2006) (arguing that the implementation of mental health courts must enter a new phase of permanency with long term support, infrastructure, and continued maintenance).

46. Hora, Schma & Rosenthal, *supra* note 8, at 510–11; ROBERT V. WOLF, DON'T REINVENT THE WHEEL: LESSONS FROM PROBLEM-SOLVING COURTS 11 (2007) (explaining how "individualized justice" is one of the six principles of problem-solving justice); *see also* NOLAN, *supra* note 12, at 40.

47. *See* NOLAN, *supra* note 12, at 133–38, 150–51; *see also* BERMAN & FEINBLATT, *supra* note 3, at 8.

48. Hora, Schma & Rosenthal, *supra* note 8, at 509–10.

49. BERMAN & FEINBLATT, *supra* note 3, at 8–9.

50. *Id.* at 9. While advocates of specialty courts, especially drug courts, insist that early assessment and treatment are key, some of the most vocal supporters of specialty courts, including Berman and Feinblatt, do not discuss whether the treatment that is ordered by these courts is appropriate for a particular defendant. *See, e.g.*, David S. DeMatteo, Douglas B. Marlowe & David S. Festinger, *Secondary Prevention Services for Clients Who Are Low Risk in Drug Court: A Conceptual Model*, 52 CRIME & DELINQ. 114, 117 (Jan. 2006) (setting forth a conceptual framework for currently unavailable "secondary prevention" treatment which is more appropriate for low risk drug offenders who have different needs than met by traditional treatment programs). However, the pro-specialty-court lobby ignores the reality of limited treatment options in specialty courts. Courts often contract with a small number of treatment providers, who offer a limited number of treatment options. For example, few treatment providers offer 'dual-diagnosis' treatment, which is appropriate for those defendants who may have mental health issues that must be addressed in addition to substance abuse problems. The National Mental Health Association ("NMHA") has noted that those individuals with dual diagnoses or co-occurring disorders "must be treated in an integrated way." NMHA, *Policy Statement on Mental Health Courts* (2004), available at <http://www1.nmha.org/position/mentalhealthcourts.cfm>.

51. *See* BERMAN & FEINBLATT, *supra* note 3, at 7; *see also supra* notes 6, 11. Specialization of the court system may also expand more and more into our civil courts. For example, New York has experimented with housing courts which are used to promote compliance with orders issued in landlord-tenant court. BERMAN & FEINBLATT, *supra* note 3, at 193.

uniform with identifying court information emblazoned on the back, somewhat akin to a scarlet letter, signaling to the community that they are being forced by the criminal justice system to clean up the streets.⁵²

Two distinct models of specialty court operation have emerged: pre-adjudication and post-adjudication.⁵³ The decision whether to set up a court as a pre- or post-adjudication specialty court is an important one that can have broad ramifications for the success of the defendants enrolled in them, as well as for the ability of the defense attorney to adequately protect the rights, desires, and interests of the defendants.

The pre-adjudication model of specialty courts offers the defendant admission either as a condition of pretrial release or as a diversion program, without requiring the defendant to waive due process rights or submit a guilty plea to the charged offense.⁵⁴ That is, the defendant is allowed to enter treatment prior to any substantive disposition of the case. If the defendant is not successful in treatment, the case returns to a pretrial stance, and the defendant can elect to go forward with a trial or challenge the constitutionality of police action.⁵⁵ Citing problems in such areas as regaining contact with witnesses, reconstructing the case, and scheduling police officer time, some prosecutors have argued that it is unduly burdensome on their offices and highly resource intensive to delay a case for the entire period of treatment, and then to return to a trial posture.⁵⁶ Pre-adjudication courts can offer dismissal as a reward for successful completion of a treatment program or specified

52. Some defendants in Washington DC's community court can be seen around the streets of downtown Washington sweeping and picking up trash and litter. They are dressed in bright jumpsuits with the letters "Community Court" emblazoned across the back. Similar practices have occurred throughout our history—for example, men working on chain gangs in Southern states were forced to wear distinctive black and white striped uniforms—and are all marked by sense of humiliation and shaming. The efficacy of such practices in changing behavior remains to be seen and may, in fact, without a balance of self-esteem building or other services to address additional needs, work to incite additional negative behavior. See Terrence Miethe, Hong Lu & Erin Reese, *Reintegrative Shaming and Recidivism Risks in Drug Courts: Explanations for Some Unexpected Findings*, 46 *CRIME & DELINQ.* 4, 522 (2000) (detailing empirical study of several drug courts and discussing findings which note that drug courts are more stigmatizing than traditional courts and do not employ sufficient reintegrative tools).

53. Meekins, *supra* note 11, at 30–31; Hora, Schma & Rosenthal, *supra* note 8, at 513.

54. Boldt, *supra* note 15, at 1255–56; Hora, Schma & Rosenthal, *supra* note 8, at 513. Diversion programs also come in many forms and are operated by many different criminal justice entities, including police departments, prosecutorial authorities, pretrial services agencies and court systems. The main goal of a diversion program is to divert an appropriate defendant or case away from the criminal justice system or traditional forms of punishment. Officials point to many successes to be gained from well-run diversion programs, including reduced case loads and helping a specific person or group. C. Wayne Johnson & Carl Hoffmeyer, *Principles of Prosecution Diversion Policies*, THE PROSECUTOR, Nov. 2005, at 18. Additionally these programs help to reduce the likelihood of recidivism, provide an incentive to defendants to change their behavior and habits, conserve of court time and promote rehabilitation. Thomas Ulrich, *Pretrial Diversion in the Federal Court System*, FEDERAL PROBATION, Dec. 2002, at 30.

55. Boldt, *supra* note 15, at 1255–56.

56. Hora, Schma & Rosenthal, *supra* note 8, at 514–15.

conditions of release,⁵⁷ in which event the defendant's due process rights are not directly implicated.⁵⁸

The post-adjudication model is more problematic for many defense attorneys and treatment professionals, but can also be very attractive to prosecutors, because it allows the criminal case to be disposed of even though the defendant will remain in contact with the court throughout the course of treatment. In the post-adjudication model, a defendant must initially enter a plea of guilty to the charged offense or offenses or to a bargained-for plea agreement and waive his or her pretrial due process rights in order to be eligible for the treatment program.⁵⁹ Sentencing is deferred until the defendant completes treatment.⁶⁰ In some post-adjudication courts, the case is dismissed or the government enters a *nolle pro se qui* (i.e., a dismissal) after successful completion of the treatment.⁶¹ Alternatively, the defendant may be merely guaranteed a probationary term instead of imprisonment after successful completion of treatment.⁶² In other courts, no promises are made but the judge is expected to reward the defendant at sentencing for her compliance.⁶³ If the defendant is not successful in treatment, then he or she is sentenced in the normal manner.⁶⁴ The post-adjudication model is somewhat favored by the prosecution, as it allows them to close cases without regard to success or failure of treatment.⁶⁵

Post-adjudication courts may be less therapeutic because they coerce treatment. The decision to enter a guilty plea in order to receive treatment must be made early in a case, at a time when the defendant may perceive this as the only way that she can be released from jail. The decision to enter the program may be motivated less by the recognition of a need for or acceptance of treatment and more by a desire for liberty.⁶⁶ Because of this heightened level of coercion, mental health professionals have stated that this model has no

57. Boldt, *supra* note 15, at 1255.

58. See M. Susan Ridgely & Martin Y. Iguchi, *Coercive Use of Vaccines Against Drug Addicts: Is It Permissible and Is It Good Public Policy?*, 12 VA. J. SOC. POL'Y & L. 260, 311 (2004) (discussing how drug court policies and procedures can implicate due process rights); *but see* Boldt, *supra* note 15, at 1258 (arguing that the two different models of specialty courts make no difference because the end result may be that the defendant has to waive "factual and technical legal defenses").

59. Defendants are sometimes required to waive the rights to (1) a speedy trial; (2) a jury trial; and (3) a preliminary hearing. See Nolan, *supra* note 31, at 1559. Also, to enter the treatment court, a defendant will have to forego certain defenses that may establish reasonable doubt, including challenges to overreaching by the police. *Id.*

60. *Id.* at 1561; *see also* Boldt, *supra* note 15, at 1255.

61. Boldt, *supra* note 15, at 1255.

62. Hora, Schma & Rosenthal, *supra* note 8, at 515.

63. *See id.* at 515.

64. *Id.* at 515.

65. *See id.*

66. See NLADA, *supra* note 23, at 2 (Tenet 5 expressly disfavors the post-adjudication model, stating that "the accused individual shall not be required to plead guilty in order to enter a problem solving court," and arguing that a guilty plea has no therapeutic value.).

therapeutic value.⁶⁷

2. Early Requirement of Treatment

Specialty court policy mandates that whatever treatment is deemed necessary or important for a defendant must be imposed at the outset of the case.⁶⁸ The supporters of this principle argue that capitalizing on the defendant's crisis following arrest may make the defendant more accepting of the treatment, allowing the treatment to have greater effect.⁶⁹ At this time, the defendant needs the support of a zealous defender, who can make sure that the defendant's decision to accept the treatment or to enter the court program is fully informed,⁷⁰ and who can challenge what may be a forced entry into the specialty court against the client's wishes. Although prompt treatment is a key component of many specialty courts, the reality is that the accelerated timelines, plus the defender's often heavy caseload, may frustrate the defender's ability to carry out these duties or to fulfill his or her ethical responsibilities. The defender often has insufficient time to investigate the case or to prepare and seek out alternatives.⁷¹ This lack of defender resources, combined with (in some cases) active or passive judicial intervention to curb zealotness, in addition to the inherently coercive effect of the accelerated timeline principle, create a scenario that is confusing and dangerous for the defendant and counterintuitive for the defender.⁷²

3. Routine Use of Sanctions to Coerce Compliance

Almost all of the literature describing drug and other specialty courts touts

67. See, e.g., NMHA, *supra* note 50 (condemning the post-adjudication model).

68. NADCP, *supra* note 10, at 13 (Key Component 3: "Eligible participants are identified early and promptly placed in the drug court program.").

69. *Id.*

70. The terminology section of the Model Rules defines "informed consent" as "denot[ing] the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." MODEL RULES OF PROF'L CONDUCT R. 1.0 (2004) ("MODEL RULES"). The comments to some of the rules seem to suggest that the lawyer must take additional precautions to determine that the client understands the issues and available options. MODEL RULES R. 1.1, 1.2, 1.4 cmts. (2004).

71. Boldt, *supra* note 15, at 1257-58 (noting the 'catch-22' situation where a defender's obligations require "adequate factual and legal evaluation of the case," yet such obligation undermines the therapeutic goal of prompt treatment).

72. Coercion at this point in the case is intense because the defendant is forced to make an immediate choice put to him by the court and treatment officials at a time when he or she may be in the throes of an addiction, or facing other trauma, beyond the trauma of arrest and the specter of jail time. The defendant may well have to quickly make a choice between treatment or challenging the charges he or she faces and enforcing his or her right to zealous legal representation. Additionally, extra-legal concerns, including family obligations, the specter of loss of employment or disclosure of private information to employers, and an expectation of radical change in lifestyle, complicate the defendant's ability to make a quick decision at this point.

the use of sanctions to coerce compliance with treatment or other conditions imposed in the specialty court.⁷³ Those favoring sanctions as a key component in specialty court jurisprudence argue that sanctions are effective because they assist with behavior modification and push a defendant to accept treatment.⁷⁴ The courts use increasingly severe sanctions depending upon the number or intensity of the defendant's violations, failures, or relapse episodes.⁷⁵ As a first sanction, the judge may order a defendant to meet with his case manager to be reoriented to the rules and principles of the treatment program. Later sanctions might include assignment to group or individual therapy sessions or an order to spend time watching court proceedings.⁷⁶ The most severe sanctions range from community service, restitution, and the forfeiture of rights or privileges, to, at worst, a period of incarceration.⁷⁷

The frequent use of sanctions is an important concern. Usually, when a defendant agrees to enter or is assigned to the specialty court, the list of sanctions is automatic and non-negotiable; there is little, if any, opportunity for challenge by the defender.⁷⁸ Judges in jurisdictions which technically allow challenges may discourage their use through direct statements to the attorney.⁷⁹

73. See, e.g., NADCP, *supra* note 10, at 23 (Key Component 6: "A coordinated strategy governs drug court responses to participants' compliance."). While the explanation of this component rarely uses the term "sanctions," sanctions are one of the most prevalent aspects of drug and other specialty courts. See Nolan, *supra* note 31, at 1542–43. The comments to Key Component 6 note that responses to noncompliance must occur and offer examples of sanctions. NADCP, *supra* note 10, at 23–24; see also Boldt, *supra* note 15, at 1258–60; James R. Brown, *Drug Diversion Courts: Are They Needed and Will They Succeed in Breaking the Cycle of Drug-Related Crime?*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 63, 91–93 (1997).

74. See, e.g., Brown, *supra* note 73, at 65. Some courts implement a system of tangible rewards as well, although these rewards have not been recently touted as essential. These rewards may have no relation to treatment goals or to improving lifestyle, but rather may have a 'game show' quality. See Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1498 (2004). One author writes that a judge allowed participants to "draw from a fish bowl for prizes which may range from nothing . . . up to a TV." *Id.* The use of rewards may have some value; however, they should be meaningful, symbolic, and substantial. The most helpful rewards would seem to be those that improve quality of life or self-esteem, offer long-term benefits, and support ideals the defendant wishes to promote.

75. See, e.g., MONTGOMERY COUNTY MANUAL, *supra* note 38, at 13 (describing "mandatory" sanctions); but see MONTGOMERY COUNTY, MD., CIR. CT., DRUG COURT CLIENT HANDBOOK 7, 9, available at <http://www.montgomerycountymd.gov/mc/judicial/circuit/drugcourt/AdultDrugCourtParticipantHandbook.pdf> (If client is not "meeting [his or her] obligations to the program . . . recommendations may include a range of sanctions." The length and severity of sanctions are under the defendant's control.).

76. Both of these are practices routinely used in the Washington, D.C. Drug Court. NOLAN, *supra* note 12, at 99–100.

77. NADCP, *supra* note 10, at 24–25.

78. The sanctions are often set up during the design and planning phase of the specialty court. Importantly, in many instances defenders have not been included in the pre-implementation team or consulted regarding the appropriateness of sanctions or other policies or procedures. NLADA, *supra* note 23, at 1. NLADA has noted that this is an important issue, which should be addressed when specialty courts are developed. NLADA, *supra* note 23, at 2 (Tenets 1 and 2).

79. See *infra* note 173.

Such challenges may be met by judicial anger towards the client and may result in harsher sanctions or the imposition of additional conditions. Moreover, judges may adopt a dismissive or pro forma reception to even bona fide challenges. This may lead a defender to forego challenging a sanction, to mount a half-hearted challenge, or to acquiesce to the court, even when the defendant wants to challenge the sanction.⁸⁰ Failing to challenge the basis for a sanction, the imposition of the sanction, or its severity could constitute a violation of the attorney's ethical rules. Certainly, these failures are at odds with the notion of zealous advocacy that underpins the widely understood role of defense lawyers.⁸¹

4. *The Team Approach and the Disavowal of Adversarialism*

In specialty courts, the attorneys, judges, case managers, and other treatment professionals are considered to be members of a collaborative team dedicated to realizing the defendant's "best interests."⁸² In the name of the 'best interests' of the defendant, the parties are expected to collaborate and cooperate on whatever the court or treatment professionals have determined to be the goal for the defendant, be it successful completion of substance abuse treatment, participation in group counseling, punitive community service, or monetary restitution.⁸³ The judge is no longer the disinterested, impartial gatekeeper for the process, the lawyers are not partisans, and the non-legal team members may have greater interaction with, or develop a closer relationship to, the defendant than the defense attorney.⁸⁴ This principle of specialty courts is highly criticized because of its move away from the traditional adversarial form of adjudication.⁸⁵ The design of the specialty court discourages any challenge, argument, or assertion of rights that may interfere with the course of treatment.⁸⁶ Defendants may have to forgo standard adversarial challenges to

80. The lack of action by defense counsel in challenging sanctions in specialty courts has not been extensively evaluated by commentators. These observations are based upon my past and ongoing experience as a criminal defense lawyer practicing in these courts in Washington, D.C., and my observations of specialty courts in Maryland and Virginia.

81. See, e.g., Monroe Freedman, *The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases*, 31 HOFSTRA L. REV. 1167 (2003) (arguing that, in a capital case, lawyers' ethical and professional obligations require them to engage in zealous advocacy and allow them to raise all conceivable arguments). MODEL RULES, *supra* note 70, pmb. paras. 8–9 (noting that zealousness is a basic principle underlying the Model Rules).

82. See NADCP, *supra* note 10, at 11–12 (Key Component 2 calls for prosecution and defense to work together to promote public safety.).

83. Hora, Schma & Rosenthal, *supra* note 8, at 469, 476.

84. See NOLAN, *supra* note 12, at 77–81; BERMAN & FEINBLATT, *supra* note 3, at 37; Lisa Schreibersdorf, *The Pitfalls of Defenders as "Team Players"*, INDIGENT DEFENSE, Nov./Dec. 1997, available at <http://www.nlada.org/DMS/Documents/998934264.745/Defenders%20in%20Drug%20Courts.doc#Pitfalls>.

85. NADCP, *supra* note 10, 11–12 (Key Component 2 advocates a non-adversarial approach in drug court.).

86. Hora, Schma & Rosenthal, *supra* note 8, at 479.

the imposition of charges or to the manner in which evidence was gathered.⁸⁷ Defendants also may not be able to assert their right to silence, speedy trial, or other constitutional guarantees.

In a non-adversarial specialty court, the professional role and duties of a defense attorney are diminished or even extinguished. Clients and observers may not even understand why the defense attorney is present, as he does not appear to have a functional representational role. Attorney-client confidentiality may be breached by the interaction with third parties.⁸⁸ The retreat from adversarialism may also affect the attorney's duties with respect to conflicts of interest, competence and preparation, and communication with the defendant.

5. *The Judge as the Central Figure*

The role of the judge in specialty courts is distinct in that he or she takes a more activist role, scheduling frequent court hearings in order to determine the defendant's compliance with specific conditions and to allow for more interaction between the judge and the defendant.⁸⁹ Hearings may even take place without the presence of the defense attorney.⁹⁰ In court, the judge addresses the defendant directly and sometimes intensely.⁹¹ Some of the supporters of drug court have likened the judge's interaction with the defendant in the courtroom and the judge's overall persona in the court as a "performance" or as "theater."⁹² Unfortunately, this 'theater' is very real for defendants, and it can pressure them into making incriminating statements, which are then used against them.⁹³ The 'theater' of the specialty court also raises ethical issues as the defender is expected to stand by and allow the judge to interact in various ways with the defendant.⁹⁴ Supporters argue that frequent hearings will increase the likelihood that a defendant will succeed in treatment and will encourage him not to re-offend.⁹⁵ Treatment court advocates theorize that the regular intervention of an authority figure in the defendant's life will send a message that the judge is "closely following compliance."⁹⁶ Still, breaches in attorney-client confidentiality, conflicts of interest, and the

87. Quinn, *supra* note 15, at 54–56.

88. Boldt, *supra* note 15, at 1266–69 (noting the very difficult choices that defendants and their attorneys must make when disclosing information in specialty courts).

89. NOLAN, *supra* note 12, at 61–74; *see also* NADCP, *supra* note 10, 27–28 (Key Component 7 calls for "ongoing judicial interaction" with the defendant.).

90. *See* Quinn, *supra* note 15, at 64; NOLAN, *supra* note 12, at 40.

91. Nolan, *supra* note 31, at 1543.

92. NOLAN, *supra* note 12, at 61–74.

93. *See, e.g., id.* at 74 (recounting the "dramaturgical format" of a Niagara Falls drug court in which a judge continually questioned and accused a defendant until he admitted possession of additional drugs).

94. *See supra* note 13.

95. NADCP, *supra* note 10, at 27–28 (Key Component 7).

96. *See, e.g.,* BERMAN & FEINBLATT, *supra* note 3, at 113.

compromised role of the defense lawyer are possible negative consequences of the activist judge model.

II. SELECTED DEFENDER ETHICAL ISSUES ARISING IN SPECIALTY COURTS AND COURTS USING SPECIALTY COURT PRINCIPLES

What principles should guide defense attorneys in specialty courts? Many advocates of specialty courts have sought to create court procedures and policies that disregard the traditional roles and expectations of the participants.⁹⁷ Consequently, ethical rules and defender standards⁹⁸ drafted in contemplation of the traditional adversarial system may not be sufficient to protect the defendant's interests and rights. Additionally, judicial and legislative officials seeking to set up new specialty courts may lack the experience and financial resources to determine appropriate policies and procedures to protect the defender against being required to abandon her role as advocate. Specialty court defenders are therefore left without specific guidance for their practice.

Moreover, the specialty court advocates expect that attorneys will modify their roles to accommodate the principles and methodology of the specialty court.⁹⁹ However, such role modification may restrict the defender's ability to provide competent and quality representation for defendants in specialty courts. Moreover, this may undermine the expectations of the defendant, who may not understand the changed role of his or her attorney in the specialty court. Even a defender who recognizes the benefits of the specialty court rubric may have difficulty accepting this model without guarantees that the client's rights will be adequately protected.

A. Fundamental Ethical Rules and Defender Standards

The Model Rules of Professional Conduct ("Model Rules") promulgated by the American Bar Association and the individual state codes represent the currently accepted fundamental rules and standards regarding the lawyer's professional role.¹⁰⁰ These rules do not include any distinctions, special circumstances, or exclusions for specialty court practice.¹⁰¹ To the extent that

97. *Id.* at 115–17.

98. See INST. FOR LAW & JUST., *supra* note 26.

99. See *supra* note 13.

100. The Model Rules of Professional Conduct are an advisory code and are adopted in whole or in part by individual states. Lucian T. Pera, *Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct*, 30 OKLA. CITY U. L. REV. 637, 639–40 (reviewing the ABA's progress in setting the standard for legal ethics in this country). Some states still use the precursor Model Code of Professional Responsibility, which many found to be more protective of the lawyer-client relationship. See MODEL CODE OF PROF'L RESPONSIBILITY (1983) ("MODEL CODE"); MONROE FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 5 (3d ed. 2004).

101. See MODEL RULES, *supra* note 70, pmbl. (noting the scope of the Model Rules).

the rules are ambiguous, individual attorneys may interpret them.¹⁰² Legal ethicists have theorized that individual attorneys can decide the appropriate lens through which to view the ethics rules.¹⁰³ For example, legal ethicists who embrace a client-centered mode of practice say that in exercising judgment in ethical issues, a lawyer must be guided foremost by the defendant's expressed wishes, unless those wishes would require the attorney to act illegally.¹⁰⁴

Even though the ethical rules apply to specialty court practice, none seems to be specifically tailored to apply to the new roles of attorneys in these courts. The preambles to the 1983 and 2002 versions of the Model Rules both focused on adversarial representation as a priority among the several different functions of the traditional lawyer.¹⁰⁵ Recent updates have addressed lawyers who take on nontraditional roles, such as that of a third-party neutral, but not specialty court practice in particular.¹⁰⁶

102. *Id.* pmb. para. 9 (noting that "many difficult issues of professional discretion can arise" for the attorney seeking to follow ethical mandates and that "sensitive professional and moral judgment" will resolve such issues).

103. ZITRIN & LANGFORD, *supra* note 17, at 1–3.

104. Katherine Kruse, *Fortress in the Sand: The Plural Values of Client Centered Representation*, 12 CLINICAL L. REV. 369, 369–70 (2006). The client-centered approach to legal representation is considered to be most prevalent taught in law school clinics today. *Id.* at 369. First introduced in the academic setting in the 1970s by David Binder and Susan Price, it encompasses many modes of practice. *Id.* However, the approach poses interesting issues when determining the degree of a lawyer's intercession in client decision-making. *Id.* at 371–72. Some lawyers embrace a client-centered, client-empowering method of lawyering that places the client in a more influential decision-making position, while at the same time encouraging joint strategizing and decision-making. *See* V. Pualani Enos & Lois H. Kanter, *Problem Solving in Clinical Education: Who's Listening? Introducing Students to Client-Centered, Client-Empowering, and Multidisciplinary Problem-Solving in a Clinical Setting*, 9 CLINICAL L. REV. 83 (2002). Several other models of lawyering are discussed and theorized in academic literature. Professor Susan Carle divides these models of lawyering into two camps: client-centered and "justice-centered." Susan Carle, *Power as a Factor in Lawyer's Ethical Deliberation*, 35 HOFSTRA L. REV. 115, 121 (2006). Carle finds that the justice-centered model "emphasizes a lawyer's duty to attend to the overall justice or morality of the issues they handle on behalf of clients," meaning that a lawyer, in determining how to discharge lawyerly duties, must consider the utility of a client's interests or wishes to society generally. *Id.* at 121–28. One of the leading justice-centered commentators Carle identifies is William Simon, who has described and advocated for other views of lawyering besides client-centered approaches. *Id.* at 122. Calling Simon a "legalist," Carle says Simon finds justice in a lawyer's own interpretations of legal rules. *Id.* at 123–24. Simon's context-specific approach theorizes that the lawyer may need to act in a way or adopt a mode of lawyering that seeks to promote justice in a particular context. *See also* WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 9 (1998).

105. *See* MODEL RULES OF PROF'L CONDUCT pmb. (1983); MODEL RULES, *supra* note 70, pmb.

106. *See* MODEL RULES, *supra* note 70, R. 2.4 cmt. When a lawyer functions as a neutral, he or she is not expected to function as a client representative but rather as a facilitator, evaluator, or decision-maker in the civil justice system. *Id.* R. 2.4 cmt. paras. 1–2. Although the lawyer-neutral does not have to act with the zeal traditionally reserved for defenders, specialty court practice cannot be compared to this non-traditional role. In fact, no specialty court advocates have equated the role of the defender in specialty courts with that of a third-party neutral.

In the 1960s and 1970s, after *Gideon v. Wainwright*¹⁰⁷ established the defendant's constitutional right to representation, national, state, and local organizations began realizing the need for defense attorney standards to ensure that poor defendants were receiving adequate representation and to eliminate certain deficiencies that had developed in indigent defense delivery systems, such as statewide disparities in access to representation, the lack of training for defenders, and inconsistent hiring standards.¹⁰⁸ As part of this movement, the ABA and other organizations drafted standards for indigent defense representation. Initially, such standards focused on the organization, funding, and scope of indigent defense, as well as the provision of basic procedural safeguards for indigent defendants.¹⁰⁹ Later standards focused on the selection, salary, workload, and administrative support of defenders, and recommended some basic requirements to ensure that defense attorneys were experienced and well educated.¹¹⁰ However, it was not until the 1990s and 2000s that NLADA and the ABA drafted extensive standards and guidelines that gave very specific guidance to defense counsel on how to perform at various stages in the criminal justice process.¹¹¹ These standards focused on their roles and a variety of duties to fulfill ethical and professional mandates.¹¹² While not mandatory, these standards provide a model for individual defender offices and state legislative or other governmental bodies that have authority over indigent defense systems.¹¹³ A growing number of state systems have adopted standards that guide the practice of indigent defense.¹¹⁴

107. 372 U.S. 335 (1963).

108. Scott Wallace & David Carroll, *The Implementation and Impact of Indigent Defense Standards*, 31 S.U. L. REV. 245, 249 (2004) ("Public defense services in the U.S. are constitutionally mandated in any case which might result in a sentence of incarceration, under a line of U.S. Supreme Court cases commencing with *Gideon v. Wainwright* in 1963.").

109. *Id.* at 251–53. The National Conference of Commissioners on Uniform State Laws promulgated the Model Public Defender Act with substantial input from the NLADA and from committees and sections of the American Bar Association. See Nat'l Conf. of Commissioners on Uniform St. Laws, MODEL PUBLIC DEFENDER ACT (1970), available at http://www.nlada.org/Defender/Defender_Standards/Model_Public_Defender_Act. The Act was a general statement of best practices that was primarily focused on setting up an institutional defender agency consistent with the case law that mandating counsel in criminal cases for indigent defendants. The Act focused on such issues as efforts to revise systems for delivery of indigent defense services, including quality, training, and retention. See *id.* Prior standards sought to establish statewide defender systems to remedy county-by-county disparities in indigent defense services.

110. See NLADA, GUIDELINES FOR LEGAL DEFENDER SYSTEMS IN THE UNITED STATES (1976), available at http://www.nlada.org/Defender/Defender_Standards/Guidelines_For_Legal_Defense_Systems.

111. ABA, *supra* note 26; BLACKLETTER GUIDELINES, *supra* note 26.

112. See *supra* note 111.

113. See Wallace & Carroll, *supra* note 108, at 253.

114. In 2000, the Department of Justice compiled all of the then-existing defender standards and guidelines into a five volume set that it distributed to a number of defender agencies and nonprofit organizations. *Id.* at 252 & n.14, 253. Additionally, a host of states, including Washington, Georgia, California, New York, and recently Montana, have implemented standards. See Press Release, NLADA, New Standard Is Set for Criminal Justice in Montana (June 9, 2005),

The NLADA's *Blackletter Guidelines*, drafted initially in 1995, set out specific duties and timelines to guide the traditional adversarial defender's practice at every stage of a case.¹¹⁵ For example, Guideline 2.2 discusses how defenders should handle initial interviews with clients, setting forth the tasks that counsel should complete in preparation for the interview, including obtaining copies of the charging documents and pretrial release reports and becoming familiar with different types and conditions of pretrial release.¹¹⁶ The guideline also explains the purpose of the interview and the information to be acquired from and provided to the client.¹¹⁷ Specific guidelines such as these help guarantee that the client's rights are protected.

Even with comprehensive model standards for defenders in traditional adversarial practice, questions still remain as to whether these standards are sufficient to address all issues raised in defense practice, and whether they reflect the present-day realities of the justice system.¹¹⁸ In 2001, an Advisory Commission of Chief Public Defenders and researchers commissioned a survey study, which was sent to public defender agencies across the country to assess the impact of the various state, local, or organizational standards.¹¹⁹ A majority of survey respondents noted that the standards needed to be expanded or updated, and over 40% of the responses noted a desire for guidance on the appropriate role of the defense lawyer in specialty or problem-solving courts.¹²⁰ The results of the survey therefore reflect a desire on the part of defenders for updated standards in traditional and non-traditional defense functions.¹²¹

available at http://www.nlada.org/News/News_Press_Releases/2005060919193205.

115. See BLACKLETTER GUIDELINES, *supra* note 26.

116. *Id.* § 2.2.

117. *Id.* § 2.2(b). The ABA Defense Function Guidelines are less specific, but do provide some guidance. See ABA, *supra* note 26, § 4-1.2. With respect to client interviewing, the ABA guidelines merely state: "As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused. In so doing, defense counsel should probe for all legally relevant information without seeking to influence the direction of the client's responses." *Id.* § 4-3.2.

118. Wallace & Carroll, *supra* note 108, at 253. Wallace and Carroll noted that other questions arose, such as whether the standards should be revised or updated to satisfy funding issues and constitutional requirements, and how to measure the efficiency and effectiveness of the standards in improving quality of service, workload, and management. *Id.*

119. *Id.* at 256–57.

120. *Id.* at 279. The survey was answered by the directors of various public defender offices and reflected a desire for guidance on several issues relevant to management and operations of institutional defender agencies. *Id.* at 257. The authors note that 41% of the survey respondents who believed that criminal defense standards should be expanded or updated noted that they sought more guidance on numerical caseload standards. *Id.* at 280. In other responses, the survey analysis revealed a desire for more guidance on internal staffing issues, representation of the mentally ill, civil commitment of sex offenders, duties regarding emerging forensic technologies, and the appropriate defender role in problem-solving courts. *Id.* at 281.

121. Reviewing or examining ethical norms for defenders and the extent to which the norms may apply or be violated in a defense practice in specialty courts, is impossible without an examination of the *Strickland* standard, which dictates the threshold level of the quality and quantity of defense services offered to defendants in a criminal cases. See *Strickland v.*

Specific specialty court defense standards would help to protect the rights of specialty court clients and would provide needed direction for defenders practicing in these courts.

B. Do the Ethical Rules and Defender Standards Adequately Regulate Defender Behavior and Professionalism in Specialty Courts?

Few lawyers, academics, judges, or court officials have tackled this issue. In one of the very few written resources on ethics and professionalism issues for defense attorneys practicing in specialty courts, *Ethical Considerations for Judges and Attorneys in Drug Courts*, the National Drug Court Institute (“NDCI”) found that, while some problems may arise, the traditional defender advocacy model can, for the most part, be reconciled with drug court jurisprudence.¹²² The NDCI publication reviewed the language of the Model Rules and the ABA Standards for Criminal Justice but found no cause for concern for defense attorneys practicing in drug courts.¹²³ While acknowledging that “drug courts reshape the professional roles of judges and lawyers working in them,” the manual concluded that “practitioners in drug court need heightened ethical sensitivity . . . but the proper exercise of the roles of judge or lawyer in drug court need not conflict with the professionals’

Washington, 466 U.S. 668, 699 (1984). In *Strickland*, the Court found that the Sixth Amendment’s right to the assistance of counsel means merely that the lawyer needed to exercise reasonable professional judgment. *Id.* at 699. Many defense attorneys are aware of the low level of competence that our courts have set as the measuring ground to determine the constitutionality of defense representation. *Strickland* “established a two prong test for actual ineffectiveness.” Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1107–08 (2004). The defendant must show that the representation was objectively deficient and thereby actually prejudicial. *Id.* Recent court decisions limited to death penalty cases show that the standard gives little guidance for the attorney practicing in specialty courts. See, e.g., *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (holding attorney did not conduct a thorough investigation); *Wiggins v. Smith*, 539 U.S. 510, 534–38 (2003) (holding defense counsel did not investigate mitigation evidence in death penalty case). Additionally, the *Strickland* standard is unlikely to be tested in the context of specialty courts, because matters in these courts are rarely appealed. Many of the specialty courts are set up such that defendants have to accept guilty pleas in order to be eligible for the court. When a defendant accepts a guilty plea, she waives the right to appeal the conviction, except with regard to some very narrow issues, such as a challenge to an allegedly illegal sentence. See FED. R. EVID. 11 (2007).

122. NDCI, *supra* note 19, at 1. This publication’s focus is not solely on defense attorneys. It also reviews ethical issues with regard to the role and actions of judges who preside in specialty courts through a review of the 1998 version of specific canons of the Model Code of Judicial Conduct. Additionally, the manual also reviews the role and practice of prosecutors in these courts by reference to the ABA’s Prosecution Function Standards, *supra* note 26. Two years after *Ethical Considerations* was published, NDCI reviewed some of these same issues in a new publication, *Critical Issues*. See NDCI, *supra* note 12, at 45. In that publication, NDCI focused solely on issues related to the defense practice in specialty courts and employed more public defenders and defense attorneys to comment on the issues. *Critical Issues* took a more realistic approach to defense practice in these courts and seemed to focus more on problematic issues that have arisen. *Id.*

123. NDCI, *supra* note 19, at 20–22, 58–59.

ethical obligations.”¹²⁴

NDCI’s conclusions ignored the realities of practice. For example, in reviewing some of the issues that might appear under Model Rule 1.3’s requirement of diligence, NDCI noted that the drug court principle that a participant enter the treatment program within a “relatively short time” after arrest necessarily will limit the amount of time a defense attorney will have to become familiar with the defendant’s case.¹²⁵ The manual recognized that this places “an even greater demand on defense counsel” than the prosecutor “if [he or she is] to fulfill [his or her] professional obligations,” and if the defendant is able to make a “fully informed choice.”¹²⁶ Even with such recognition, the manual dismissed the concern. The NDCI writers concluded that the obligation of diligence under the Rules could be easily met by the defender fulfilling his or her obligations to investigate the charges pending against the defendant, evaluate the range of defenses available, and advise the client.¹²⁷ The writers ignored the impossibly short time period within which all of these duties must be accomplished,¹²⁸ and failed to acknowledge the reality of heavy caseloads, daily trial calls, and other demands making it impossible for the defender to investigate and research a specialty court case so as to appropriately advise a client on the full range of options. The writers suggested that defense counsel arrange for conditional enrollment¹²⁹ in the drug court, allowing the defendant

124. *Id.* at 1, 58–59.

125. *Id.* at 32.

126. *Id.* The requirement of immediate treatment and the short “window of opportunity” to enter the treatment program is a central principle of drug courts and is one of the Key Components. *Id.* (citing NADCP, *supra* note 10, at 13) (Key Component 3 states that “eligible participants are identified early and promptly placed in the drug court program.”). This is also a general tenet employed by other specialty courts besides drug courts. *See* BERMAN & FEINBLATT, *supra* note 3, at 8–10.

127. NDCI, *supra* note 19, at 32–34. Some defender guidelines require the attorney to fully investigate a case before advising the client to take a plea or other disposition of the case. ABA, *supra* note 26, §§ 4–4.1 (advising prompt investigation); BLACKLETTER GUIDELINES, *supra* note 26, § 4.1 (describing duty to conduct an independent investigation); *see also* MODEL RULES, *supra* note 70, R. 3.1 (requiring a defender in a criminal case to defend the proceeding in a manner that requires that the government establish every element of the offense). However, in some specialty courts, defense attorneys may not be expected to investigate the factual allegations of a criminal offense, or to mount a challenge to a sanction.

128. The time period between arrest and the decision to enter a specialty court, of course, varies by jurisdiction. Some specialty courts, such as the Midtown Community Court in New York City, automatically place the case on the specialty court calendar and require the decision to immediately make the decision to stay on the calendar or face adjudication in the general jurisdiction court. BERMAN & FEINBLATT, *supra* note 3, at 62. Others allow the defendant some time to make the decision and allow for referrals from other general jurisdiction courts. *See, e.g.*, MONTGOMERY COUNTY MANUAL, *supra* note 38, at 9–11.

129. Conditional enrollment would allow a defendant to begin treatment and then later decide not to accept the treatment offered, but to elect instead to challenge the case under traditional adversarial processes, i.e., to litigate a dismissal or suppression motion. Such a procedure might be similar to the process by which conditional guilty pleas are accepted. Conditional guilty pleas allow a defendant to litigate a particular issue, usually a suppression of evidence, then, upon an adverse determination, plead guilty while still retaining the right to appeal the judge’s decision on

to begin treatment while the lawyer continues to investigate.¹³⁰ Unfortunately, not all drug courts have a conditional enrollment mechanism,¹³¹ and the notion of conditional enrollment may conflict with a basic principle underlying drug courts: that a defendant must recognize his or her problem and commit to treatment and a modification of behavior.¹³²

Two years after the publication of the NDCI's manual, the organization published another primer for defense attorneys who practice in drug courts.¹³³ NDCI's *Critical Issues for Defense Attorneys in Drug Court* took a somewhat more realistic approach and recognized that drug courts represent a "paradigmatic shift away from conventional notions" in our adversary system, and, as such, may come with "some ethical, legal and practical conundrums" for defense attorneys.¹³⁴ This later publication acknowledged that the "proper role of the defense lawyer remains ambiguous" in drug courts, and that the goals of the drug court methodology can at times conflict with well-established ethical rules.¹³⁵ Even with its specific recognition of the conflicts with ethical rules,¹³⁶ NDCI's monograph still concluded that defense lawyers could "successfully practice in drug courts" without foregoing their ethical duties.¹³⁷ This publication did not purport to give answers to defense attorneys who "sometimes walk a delicate, ethical tightrope" between the therapeutic theories of drug court and their obligations as zealous advocates.¹³⁸ Rather, the monograph only sought to provide a general ethical discussion that it characterized as a "theoretical tool" defense attorneys could use to mediate ethical conflicts.¹³⁹ However, such generalized, theoretical guidance offers no relief for defenders practicing in specialty courts. A more specific approach, recognizing the variety of specialty court models but focusing on the basic, non-traditional principles of these courts and examining common scenarios, would be of more use to specialty court defenders.

While the list of problematic areas for defense counsel practicing in specialty courts may be long, this Article will focus only on a limited number of scenarios concerning the attorney-client relationship. The context in which a

suppression. FED. R. CRIM. PROC. 11(a)(2).

130. NDCI, *supra* note 19, at 32–33.

131. Montgomery County, Maryland, is one such jurisdiction. See MONTGOMERY COUNTY HANDBOOK, *supra* note 78.

132. See NADCP, *supra* note 10, at 13 (Key Component 3).

133. NDCI, *supra* note 12.

134. *Id.* at 1. The authors seem to more fully recognize and give credence to the inherent incongruities between drug court practice for defenders and the traditional, adversarial practice. *Id.* at 3–4 ("Properly balancing these competing concerns gives rise to a host of complex, ethical questions and challenges for the defense attorney.").

135. *Id.* at 4.

136. *Id.* at 6.

137. *Id.* at 45.

138. *Id.* at 1.

139. *Id.*

defender must function is central to understanding the issues that arise in specialty courts. The specific scenarios described below, drawn from a fictional community court that embodies key principles of therapeutic jurisprudence, will help to illustrate some of the defender's ethical concerns.¹⁴⁰

C. Reviewing Defender Ethical Issues: A Hypothetical Community Court Scenario

A local court jurisdiction has implemented a new community court program, which uses a team approach to determine the measures, conditions, and services that should apply to a particular defendant or case. The new court is tagged as a model for the state and has received funding from the state judiciary control board. The initial funding is for a two-year phase of design, implementation, and assessment. Funding for later years is to be determined by the success of the program, as measured by changes in recidivism rates. The team members include the chief judge of the local court, who will preside over the court docket, a local prosecutor who is the chief of the office's misdemeanor unit, a supervisor in the court's administrative services office, a case manager from the local pretrial services office, and a staff attorney from the local public defender's office. This public defender has been in the office for about three years and usually handles general felony cases. The initial proposal for the community court was conceived and submitted by the chief judge without the input of other criminal justice stakeholder organizations due to the brief time allowed by the legislature for the submission of proposals.¹⁴¹

140. I have used a hypothetical model in this Article because it can more adequately frame the issues and their context. This method is used in many ethical casebooks, presumably because it is hard to address ethical issues in a vacuum. See, e.g., ZITRIN & LANGFORD, *supra* note 17, at 3 (describing how they use "a problem-driven approach . . . [through] real world examples of the situations that face practicing lawyers every day"). Often real-world ethical problems are very complex and require fact-specific resolutions.

141. While the instances of a court implementing a specialty court without all stakeholder input, including that of the defense bar, are decreasing, it has not been a rare occurrence in the fifteen or so years since implementation of the first drug court. NLADA, *supra* note 23, at 1. This issue has been highlighted in the NLADA's tenets. *Id.* at 2 (Tenet 1). In many jurisdictions, criminal justice stakeholder organizations or representatives meet to coordinate responses to particular issues or problems, as well as to troubleshoot procedures and new innovations to the system. Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation and the Politics of Science*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 271, 316–20 (2006). Such stakeholder organizations would include the court, pretrial services agencies, the corrections department, the police, the prosecutor, the institutional defender agency, and a representative of the contract defense bar. Washington, D.C.'s Criminal Justice Coordinating Council also includes representatives from the city council and other law enforcement and youth services agencies. Criminal Justice Coordinating Council, Mission Statement, <http://www.cjcc.dc.gov> (last visited May 15, 2007) (follow "Mission Statement" hyperlink). Its mission states that it serves "as the forum for identifying solutions, proposing actions and facilitating cooperation that will improve public safety and the related criminal and juvenile justice services for District residents, visitors, victims and offenders." *Id.* The mission statement also notes that it employs strategies of "collaboration, community involvement and effective resource utilization" and is "committed to developing targeted funding strategies and comprehensive management information through

The court is to begin operations within one month of receipt of the grant. During the first month, the chief judge brings in all members of the team for a two-day retreat to set up the program based upon the proposal accepted by the legislature. Due to time constraints, the team adopts policies and procedures without spending significant time or resources on the research of existing programs in other jurisdictions. The chief judge emphasizes that positive results are needed to keep the court in operation and notes that the court will be extremely beneficial to their respective constituents, the community, victims, and defendants.

Cases involving ‘quality of life crimes,’ which can be misdemeanor or low-level felony offenses, are to be prospectively assigned to the new docket.¹⁴² For each case, the judge initially makes a bail or bond decision that requires the defendant to undergo an assessment focusing on his or her addiction level and the appropriate treatment. Thereafter, the team, including the judge, prosecutor, case manager, and defense attorney, will meet to determine additional conditions of release to be imposed on the defendant, including an assessment of any other treatment or social service needs and a set of conditions to address any of these identified needs.

The next hearing will be a status hearing, usually fixed within one week of arraignment. At this hearing, the judge orders the defendant to abide by the conditions of release and informs him or her that if he or she violates any of the conditions of release, the judge will impose sanctions. Additionally, the defendant is told that the case may be dismissed or the charge reduced to a lesser offense if he or she abides by the conditions of release for a prescribed period of time. The assigned public defender meets each defendant at this first status hearing¹⁴³ and replaces the attorney who represented the defendant at the arraignment.¹⁴⁴

integrated information technology systems and social-science research.” *Id.* Several other cities, counties, and states have similar agencies, including New Mexico and Georgia. Taslitz, *supra* note 141, at 317–18.

142. Several community courts and other specialty court types utilize this manner of case selection. For example, Berman and Feinblatt list many quality of life crimes in describing Midtown’s Community Court, including “illegal vending, low-level drug possession, disorderly conduct, shoplifting, vandalism and the like,” and note that while these are often labeled “‘victimless’ crimes,” they “assault the neighborhood on a daily basis.” BERMAN & FEINBLATT, *supra* note 3, at 66.

143. The court may even go forward with proceedings without having a defender present to represent the client. Quinn, *supra* note 15, at 64–67 (criticizing practice of conducting status hearings without presence of defender).

144. Different jurisdictions use different models of assigning public defenders or other court-appointed attorneys to indigent criminal cases. For example, in Washington, D.C., attorneys from the Public Defender Service (“PDS”), the institutional defender agency, are assigned only a percentage of the misdemeanor criminal cases that are charged each year. This is because the statute creating home rule in the District of Columbia only allows for the PDS to represent a maximum of 60% of the indigent criminal defendants charged with District of Columbia Code offenses. D.C. CODE § 11-2601 (2006) (creating the PDS); *see also* Meekins, *supra* note 6, at 28–29. Other indigent criminal defendants are represented by private attorneys paid by a voucher

Because our hypothetical court employs the post-adjudication model, the defendant must decide at the first status hearing if he or she will accept the government's offer of a plea agreement. In some instances, the plea agreement includes a deferred sentencing arrangement.¹⁴⁵ Upon successful completion of the conditions of release, the defendant is sentenced to a short probation period. If a defendant declines the plea agreement and wishes to go to trial, the matter is then reassigned to another docket where the defendant will have a different defense attorney, prosecutor, and judge.¹⁴⁶

For the cases that remain on the community court's calendar, the judge schedules status hearings every two to three weeks to ascertain the defendant's compliance with the required conditions of release and to make any changes in the treatment or social services needed to aid the defendant. Prior to each of the status hearings, the community court team meets in a staffing conference to review the case without the defendant present.¹⁴⁷ The case manager prepares a written report on each defendant. Each member of the team is expected to give input on the case while keeping the best interests of the defendant and community in mind.

At the status hearings, the judge tells the defendant of the report from the treatment team or case manager. This report will note the defendant's progress in the required conditions of release, including any treatment. The entire interaction is between the judge and the defendant. The judge speaks directly

system. Meekins, *supra*, at 28–29. The Department of Justice has compiled information on local systems for the appointment of counsel to indigent criminal cases and promulgates standards for such systems. See INST. FOR LAW AND JUST., *supra* note 26.

145. A deferred sentence requires the defendant to enter a guilty plea but defers sentencing for a period of time to allow the defendant to complete the conditions or treatment goals set by the judge. David Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 ST. THOMAS L. REV. 743, 755–57 (2005). If the defendant successfully completes the conditions or treatment, the court or government may dismiss the case without a judgment of conviction. Meekins, *supra* note 11, at 29. In other cases the defendant may not be eligible to have a case dismissed because of a prior record or other factors that render him or her ineligible. *Id.* In those cases, the defendant is offered a plea agreement and, if he or she accepts, enters the guilty plea, and sentencing is delayed until the defendant completes the judge-ordered conditions or treatment program. See *id.* at 29.

146. This is an important area of concern for those studying specialty courts. In our hypothetical community court, it would seem that the defendant must forego the benefits of treatment in order to contest the charges leveled against her by the government. See, e.g., Quinn, *supra* note 15, at 60–61.

147. Such pre-court meetings are often called staffing conferences, and, according to drug court jurisprudence, are opportunities for the parties to discuss any treatment issues in the defendant's life and to air any disputes among the legal representatives out of the presence of the defendant. See NOLAN, *supra* note 12, at 73 (recounting many aspects of the "drug court theater"). The theory of staffing conferences holds that treatment goals are furthered when the team is able to meet without any adversarial lawyering. See *id.* A judge in Boston takes part in these pre-court meetings and then responds in open court with the defendants before him as if he has heard the information regarding compliance for the first time. *Id.* This deception by the judge is intended to "make[] him look to those clients like he knows everything about their life, and that he remembers it week for week." *Id.*

to the defendant—makes comments, asks questions, and expects answers. Although the defense attorney is present, she may only consult with the defendant if the defendant requests this consultation or if she needs to schedule additional hearings.

After nine months of operation, the community court docket has 200 cases on average. Each case is held on the docket for at least four months, sometimes longer if treatment or other conditions imposed by the judge require additional time for completion or if the defendant takes longer than expected to adjust to treatment.¹⁴⁸

1. *A Conflict of Interest?*

The interests of the specialty court and the interests of the client may collide, and the lawyer then has a dilemma in his or her duty of loyalty: Does he or she side with the court or with the defendant? The traditional adversarial defender would never consider disclosing client information to the court, the prosecutor, or others when it would be detrimental to the client's interests,¹⁴⁹ when it would reveal client confidences or secrets,¹⁵⁰ or before full discussion with and consent by the client.¹⁵¹ However, a lawyer who is a specialty court

148. Some, but certainly not enough, of the specialty court judges and treatment professionals recognize that relapses are bound to occur as defendants who are adjusting to the rigors and lifestyle changes of substance abuse treatment reorient their lives and priorities. See Miethe, Lu & Reese, *supra* note 52, at 522. Such an analysis may also hold true for other forms of treatment, counseling or lifestyle modification, such as anger management and conflict resolution. Unfortunately, judges routinely penalize defendants for relapse, according to an automatic sanctions protocol adopted by the particular specialty court, or by extending the period that defendants are under the supervision of the court. See, e.g., Adele Harrell, Shannon Cavanagh, and John Roman, *Evaluation of the D.C. Superior Court Drug Intervention Programs*, NAT'L INST. OF JUST. RES. IN BRIEF, Apr. 2000, available at <http://www.ncjrs.gov/pdffiles1/nij/178941.pdf> (evaluating then-existing programs available in D.C. Superior Court, including the sanctions docket, which imposed automatic sanctions for defendants who violated conditions of the program). Moreover, the NMHA has also noted that relapse is bound to occur during the recovery process, and the organization cautions that relapse should not be used as a justification to extend the time that an individual stays in mental health court. NMHA, *supra* note 50.

149. For example, the comments to the Model Rules note a situation of a directly adverse conflict arising because a lawyer has to elicit testimony from a witness that is detrimental to the lawyer's other client. See MODEL RULES, *supra* note 70, R 1.7 cmt. para. 6. The notion of what is "directly adverse" must take into consideration the detrimental effect on another client represented by the lawyer. *Id.*

150. Although Model Rule 1.6 does not include a reference to secrets, many state codes include the notion that the attorney must protect not just the client's confidences, which are communicated to the attorney, but also the broader category of secrets, which "embraces confidences and much more," including "information that relates to the representation which the client has asked the lawyer to keep confidential, or disclosure of which would be embarrassing or detrimental to the client." FREEDMAN & SMITH, *supra* note 100, at 131. The Law Governing Lawyers also includes secrets, and it covers "all information relating to representation of a client." *Id.* at 131 n.14.

151. See MODEL RULES, *supra* note 70, R. 1.4(b) (requiring the lawyer to communicate with the defendant to the "extent reasonably necessary to allow the defendant to make informed decisions").

team member may disclose information to the court without the defendant's consent because, unlike in the traditional adversarial model, specialty court principles put the client's best interests before his stated interests. In this model, honesty and openness on the part of the defender are thought of as necessary to the client's treatment or addiction recovery.

Staffing conferences are a setting in which the defender is simultaneously expected to wear the hats of the defendant's advocate and the court's representative. This is an impossible task for many lawyers.¹⁵² A defender may feel pressure to shed the role of individual advocate and to disclose information that the defendant does not want disclosed during these staffing conferences or other team meetings.

For example, in our hypothetical specialty court, the assigned public defender will participate in her client's staffing conferences with the drug court team and then later represent her client during court hearings. The defender also meets periodically with the other community court team members on macro level court issues, such as reviewing the general policies and procedures of the court, determining if new treatment programs or modalities should be added, and conferring with other members of the criminal justice system or the government to provide information on the court program. The attorney also may attend bi-monthly community meetings as a representative of the court to discuss community concerns and problems. Law enforcement representatives are always in attendance, as well as officials from the prosecutor's office and community leaders. The defender is expected to report on the progress of the community court, to listen to residents' complaints about particular types of crimes and persons or groups responsible, and to report back to the judge and other team members. The information from the community meetings is used to focus law enforcement efforts, to address restitution needs or the community's desires for other sentencing or release conditions, and to disseminate the information to other team members who will act consistently with their respective roles.

Even if these meetings do not force the defender to reveal privileged client information, her participation still raises ethical concerns regarding the defender's proper role. Different groups or constituencies, including the court, the community, and the defendant, have differing expectations which may pull the defender in multiple directions. The court and other team members might expect that the attorney, as a member of the specialty court team, will act as a representative of the court and explain the court processes to community members. Our hypothetical public defender might have to extol the virtues of the specialty court program even though it does not work for certain clients. The team expects that the defender and other team members in attendance will report any information learned at the community meeting, including

152. NOLAN, *supra* note 12, at 73.

information that might compromise the interests of past, current, or future specialty court clients.¹⁵³ The community could readily see the defender as part of the court—in essence a court official—who can appropriately relate their concerns and issues, and will suggest appropriate changes or additions to court policies as they suggest.¹⁵⁴ The community sees the defender not as a partisan advocate with a client, but rather as an extension of the community court system or law enforcement team. In contrast, a defendant familiar with traditional criminal courts will expect that his attorney places his or her interests before all others, including those of the court and the community.

On the other hand, the defender's duty to the specialty court implies that the defender could not use information gained as a court representative for the defendant's benefit if doing so might be detrimental to the court's goals or operations. For example, suppose our defender attends a meeting of the specialty court team and learns that the court is exploring the adequacy of a particular drug treatment facility after hearing of allegations of fraud, unqualified professionals leading drug therapy sessions, and an investigation that could lead to the loss of the facility's license. The defender's duty to the specialty court team and desire to see to the court's success may preclude her from using this information to assist a current client facing sanction for failure to successfully complete the program operated by the allegedly inadequate drug treatment facility. The client would want to argue that the problems at the facility were the cause of his failure and submit this information to the court as the basis for opposition to the imposition of a sanction. The defender would be forced to decide where her loyalty lies. However, if she chooses loyalty to the specialty court and fails to disclose the information to her client, then she may be in violation of the ethical rules.¹⁵⁵

In its initial publication, the NDCI stated that no conflicts existed for the defender (or prosecutor) who acted as a team member, and that those who view the collaboration between normal adversaries as the appearance of a conflict of

153. The following hypothetical illustrates this possibility: Suppose during the community meeting the defender learns that a new area of the community has become an open-air drug market. The defender tells the judge, prosecutor, and other team members about this information, and the prosecutor begins a new deployment of police to the area to pick up suspected drug users and to begin collecting information regarding those who hang out in the area. The public defender's client, who lives nearby and sometimes hangs out in this area, is then stopped by the police. The police then report back to the prosecutor that the defendant is hanging out in the area. The prosecutor tells the judge, and the judge may then believe that the defendant, who is a specialty court client, is engaging in risky behavior by being in this area. The judge then orders that the defendant refrain from being in this area. The defendant's liberties have therefore been restricted based upon the report back from the defender to the specialty court team.

154. See, e.g., Anthony Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J. LAW & POL'Y 63, 65, 90–91 (2002) (describing the movement from drug courts to community courts and noting suggestions to broaden the impact of community courts).

155. Model Rule 1.7 proscribes any outside personal interests or activity that would "materially limit" the lawyer's representation of the client. MODEL RULES, *supra* note 70, R. 1.7(a)(2).

interest misunderstood the concept of the team and the requirements of zealous representation.¹⁵⁶ NDCI found that the distinctive roles and loyalties of the parties are not divided, but instead argued that there is only a presumption of cooperation, which does not violate ethical rules.¹⁵⁷ While taking this position, NDCI nonetheless found it necessary to caution defenders to be “conscious of the possibility that the close professional relationships and trust” in the team might impair their ability to press issues that are appropriate for their distinctive role.¹⁵⁸ NDCI gave defense attorneys no guidance as to what interests to prioritize when true conflicts of interests and impaired loyalty situations arise.¹⁵⁹

The situation in which NDCI suggests caution is a conflict of interest as proscribed by the Model Rules. ABA Model Rule 1.7 proscribes representation by a lawyer where the representation may be “materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”¹⁶⁰ The proscription embodies the notion that the loyalty of an attorney cannot be divided between different entities that may have conflicting interests in a particular case or whose interests are not reconcilable.¹⁶¹ In specialty court, the defender’s ability to represent her client might be materially limited because of the lawyer’s personal interest in maintaining professional relationships with other members of the team.¹⁶² The strength of professional and personal relationships that develop between lawyers working closely together cannot be discounted. This is of particular concern in specialty courts, which embrace collaboration and encourage the development of a closely knit team.¹⁶³

NDCI’s second publication, *Critical Issues for Defense Attorneys in Drug Courts*, was focused solely on issues relevant to defense attorneys.¹⁶⁴ This publication more clearly stated the challenge for defense attorneys, noting the pressure that the defender may feel to disclose confidential or secret information of the client in furtherance of the team approach.¹⁶⁵ The publication also noted that it is potentially detrimental to the attorney-client

156. NDCI, *supra* note 19, at 44.

157. *Id.*

158. *Id.*

159. *See id.*

160. MODEL RULES, *supra* note 70, R. 1.7(a)(2); *see also* ABA, *supra* note 26, § 4-3.5 (prohibiting detrimental affect on professional judgment by the “political, financial business, property or personal” interests of the lawyer).

161. Indeed, “[l]oyalty and independent judgment are essential elements in the lawyer’s relationship to a client.” MODEL RULES, *supra* note 70, R. 1.7 cmt. para. 1. Freedman and Smith also note that loyalty is “often cited as a particular ethical concern,” and that like zeal, it is pervasive in the attorney-client relationship and helps to maintain trust and confidence between an attorney and her client. FREEDMAN & SMITH, *supra* note 100, at 274.

162. *See* MODEL RULES, *supra* note 70, R. 1.7(a)(2); ABA, *supra* note 26, § 4-3.5.

163. *See* NADCP, *supra* note 10, at 11–12, 23–25 (Key Components 2, 6).

164. NDCI, *supra* note 12, at 1.

165. *Id.* at 7.

relationship for the defendant to see his or her lawyer disclose confidential information without permission.¹⁶⁶ However, the publication simply concluded that the defender should draw “firm boundaries” with the court and refuse to disclose the client’s information.¹⁶⁷ This instruction is easier said than done, and, moreover, it fails to recognize the nature of conflicts of interest. A conflict “exists whenever the attorney-client relationship or the quality of the relationship is at risk,” even without an actual disclosure of confidential information or an actual limitation on the representation.¹⁶⁸ NDCI’s conclusion that a lawyer should stand firm, therefore, does not solve the problem for defenders faced with this issue, and fails to offer any guidance to the defender trying to avoid circumstances that might divide her loyalties.¹⁶⁹

2. Zealous Representation

Perhaps the largest area of criticism of the defender’s role, in addition to being the largest area of confusion about the practice and ethical mandates of representation in specialty courts, concerns the level of zeal the defender must demonstrate when representing a client in one of these courts. These ethical concepts go to the heart of adversarialism, and are therefore most in jeopardy in situations where adversarialism is disavowed in favor of team collaboration. The traditional adversarial process, maligned by some commentators¹⁷⁰ yet touted by others (including vocal and prominent members of the defense bar),¹⁷¹ is uniformly discouraged in specialty court practice.¹⁷²

166. *Id.*

167. *Id.*

168. FREEDMAN & SMITH, *supra* note 100, at 269 (quoting Geoffrey C. Hazard, Jr. & W. William Hodes, THE LAW OF LAWYERING § 10.4 (3d ed., 2001)) (internal quotations omitted). No valid distinction exists between actual or potential conflicts of interest because the lawyer must always be cautious concerning risks to the attorney-client relationship, and not solely to the extent to which the relationship is damaged. FREEDMAN & SMITH, *supra* note 100, at 281. This is a prospective calculation of peril; should a lawyer delay action to determine the extent of damage to the relationship, the lawyer’s loyalty has already been compromised in violation of the Rules.

169. *See* NDCI, *supra* note 12, at 7.

170. *See, e.g.,* Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403 (1992) (criticizing the criminal adversary system through a look at the English inquisitory model and concluding that some reforms are needed to insure fairness in our system); MARVIN E. FRANKEL, *PARTISAN JUSTICE* (1980) (questioning the values that are part of our adversarial system of justice); *see also* SIMON, *supra* note 104 (criticizing client-focused views of lawyering, noting lawyers’ duties to rights of third parties and to justice, and developing an approach to lawyering and ethics that focuses on contextual judgment).

171. *See, e.g.,* Johnnie L. Cochran, *How Can You Defend Those People?*, 30 LOY. L.A. L. REV. 39, 42–43 (1996) (noting that justice, fairness, and basic civil rights are reasons for defense work); Cristina C. Arguedas, *Duties of the Criminal Defense Lawyer*, 30 LOY. L.A. L. REV. 7, 11–12 (1996) (noting the duties of a criminal defense lawyer and arguing that the job is crucial to preserving a free society); Abbe Smith, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 521–35 (1999) (arguing that despite maligned of criminal defense, it is a noble profession consistent with deeply held moral and religious values).

172. NADCP, *supra* note 10, 11–12 (Key Component 2).

For example, a judge in a specialty court, or general jurisdiction court that has adopted specialty court practices, may prevent a defense attorney from zealously questioning the recommendations of the treatment or social workers, or from challenging the court-imposed sanctions on her client for violations of the specialty court agreement.¹⁷³ Specialty court advocates argue that sometimes the defender should stand by while the court process takes effect. Because the judge has a more central role in the specialty court,¹⁷⁴ he or she may have more power to stifle zealous representation that focuses on due process issues. In a specialty court, the judge and other team members might believe that defender zealousness could jeopardize the efficiency of the court. Moreover, judges and others may fear that the defender's zeal in challenging sanctions or other practices of the court might signal to the defendant that the court's requirements are unfair or unnecessary, thereby thwarting the expected success for that defendant.¹⁷⁵

While the Model Rules have no specific rule requiring zealous representation (as opposed to its predecessor, the Model Code of Professional Responsibility¹⁷⁶), the preamble notes that a lawyer should "zealously assert the client's position."¹⁷⁷ Many state codes, as well as defender guidelines and standards, specifically note the requirement of zeal in the representation of clients.¹⁷⁸

Zeal can be measured by the dedication, commitment, or passion with which the lawyer pursues the client's interests, and, according to Freedman and Smith, is "pervasive" in ethical responsibilities because it "informs all of the lawyer's other ethical obligations."¹⁷⁹ Zealousness can mean many different things to different lawyers. To some it merely means discharging lawyerly

173. See *supra* note 13; see also Schreibersdorf, *supra* note 84, at 14–15 (recounting statements of a judge describing the choice by defenders between zealous advocacy and the team player role). See also Hora, Schma & Rosenthal, *supra* note 8, at 479.

174. See BERMAN & FEINBLATT, *supra* note 3, at 35–36, 109–15; Meekins, *supra* note 6, at 49–50.

175. Lisa Schreibersdorf, the Executive Director of the Brooklyn Defender Services and former attorney with the New York Legal Aid Society, notes a letter from a treatment court judge that specifically stated that lawyers were less advocates and more counselors in these new courts. Schreibersdorf, *supra* note 84, at 14–15. The judge also suggested that "defender advocacy on points of law may have no place in her court" and that the clients should not see defense advocacy as a "substitute for accepting responsibility for their behavior." *Id.*

176. See MODEL CODE, *supra* note 100, DR 7-101 ("Representing a Client Zealously").

177. *Id.* pmbl. para. 2; see also FREEDMAN & SMITH, *supra* note 100, at 82 (explaining the requirements of "Zeal Under the Ethical Rules").

178. See, e.g., BLACKLETTER GUIDELINES, *supra* note 26, § 1.1(a) (Standard 2: "Role of Defense Counsel"); WASH. ST. BAR ASS'N BOARD OF GOVERNORS, DEFENDER STANDARDS (1990), (endorsing the ABA requirement of zealous advocacy). Note that the ABA Defense Function Guidelines do not specifically note a requirement of zeal but do note that the defense lawyer "serves as the accused's counsel and advocates with courage and devotion." See ABA, *supra* note 26, § 4-1.2.

179. FREEDMAN & SMITH, *supra* note 100, at 71.

duties in a manner that furthers the interests of the clients.¹⁸⁰ To others it requires that the lawyer advocate for the client's position by any legal means available, and weigh some ethical obligations, such as attorney-client confidentiality, above other ethical norms.¹⁸¹ To others, zealouslyness is a political statement that empowers clients or causes that are traditionally underrepresented or discriminated against in the law.¹⁸² Neither of the NDCI publications extensively discussed the ethical requirement of zealous representation. The first publication merely noted its position that zealous advocacy is not "total war" and "does not require hostility or antagonism."¹⁸³ NDCI may be correct in this regard; however, it fails to appropriately define zeal or consider the extent to which this requirement is central to ethical norms.¹⁸⁴ These differing views highlight the difficulty faced by the specialty court defender, who lacks meaningful guidance on the issue of zealousness.

Consider, for example, our hypothetical community court example where the defender is assigned to the specialty court on a full-time basis. At status hearings, the judge directly interacts with the defendants and asks many questions about the treatment program, the difficulty of staying clean, recent happenings in the defendant's neighborhood or life, and other issues normally reserved for private consultation with defense counsel. At many of these hearings the judge insists that the defendant tell the court if he has been using drugs.¹⁸⁵ Sometimes the judge even asks where the defendant purchased the drugs and for how much.¹⁸⁶ The prosecutor is present during these exchanges, making notes, although an agreement with the specialty court prohibits the office from prosecuting a defendant based upon the statements or disclosures made in court or reported to the court by treatment professionals.¹⁸⁷

180. *See id.* at 72.

181. *See* Abbe Smith, *Telling Stories and Keeping Secrets*, 8 UDC/DCSL L. REV. 855 (2004) (commenting on a lawyer's unethical behavior in disclosing confidential information in a film documentary and finding that lawyers are powerful storytellers but must hold the ethical requirement of confidentiality inviolate).

182. *See* Margaret Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1197 (2005) (considering whether criminal defenders are "cause lawyers" (those who use the law as a means of creating social change and to help individual clients), examining the ethical challenges faced by cause lawyers, and concluding that criminal defenders can practice in a way that furthers their own moral, philosophical or political agenda).

183. NDCI, *supra* note 19, at 21.

184. *See id.*

185. *See, e.g.*, NOLAN, *supra* note 12, at 70–89.

186. *Id.*

187. In some but not all specialty courts, the prosecuting attorney may agree not to use any of the incriminating statements made by the defendant before a judge in open court or to a treatment professional during the course of treatment in any subsequent proceedings in the specialty court. *See, e.g.*, MONTGOMERY COUNTY MANUAL, *supra* note 38, at 23. Such agreements may preclude the prosecutor from using the statements directly against the defendant in the particular case or in a subsequent case as substantive evidence. *Id.* However, such agreements may not preclude the prosecutor from using the statements to impeach the defendant in a subsequent prosecution or,

In a traditional court, a defender would object to these questions as potentially incriminating.¹⁸⁸ The classic defender role is to interpose himself or herself between the defendant and the state, protecting the defendant from overreaching by the court, police, or prosecutors, as well as from inexperienced action by a defendant that may jeopardize his or her freedom or specific interests in a case.¹⁸⁹ In specialty court, however, the defender is expected not to intervene or to advise her client how to respond.¹⁹⁰ Instead, she is expected to encourage the defendant to volunteer any and all information bearing on his progress in the specialty court and to answer the judge's questions in full. Moreover, the attorney is expected to affirmatively encourage the defendant to complete the court-ordered treatment and any other conditions of release, even in the face of reluctance or opposition by the defendant.¹⁹¹

In still other instances, defenders may fail to provide zealous representation because they fear they will lose future appointments and therefore suffer economic harm.¹⁹² In a number of jurisdictions where specialty courts operate, institutional defender agencies do not represent all the indigent clients in the jurisdiction.¹⁹³ In these jurisdictions specialty court judges routinely appoint attorneys other than public defenders to the cases on the court docket.¹⁹⁴ The judge may feel that overzealous representation will hinder the process of treatment and bog down the efficiency of the specialty court; therefore, he or she may not appoint an attorney who has shown that he or she will challenge the specialty court procedures.¹⁹⁵ The appointed defender therefore will feel that it is in his or her economic interest to follow the non-

should treatment fail, in a trial of the original charges or at sentencing. *See, e.g.*, FED. R. EVID. 409. Moreover, the prosecutor may still use the defendant's statements as a lead in an ongoing investigation, resulting in evidence against the defendant that might not have been uncovered but for the defendant's statements. *See* Boldt, *supra* note 15, at 1297–99 (calling for defenders to draft narrowly worded consent forms to guard against broad ranging disclosure of confidential information). This is because the prosecutor may be able, after the fact, to show that the uncovered evidence was gained from a legitimate source wholly independent of the compelled statement. *See* Kastigar v. United States, 406 U. S. 441, 453 (1972) (explaining allowable "derivative use" of evidence when prosecution shows an independent source even in situation where defendant given immunity).

188. Meekins, *supra* note 6, at 51–52.

189. *Id.* at 9–10.

190. *See* NOLAN, *supra* note 12, at 78 (“[A]mong the defense lawyer’s new roles . . . is . . . encouraging the defendant ‘to be truthful with the judge and with treatment staff’”); *see also* Hora, Schma & Rosenthal, *supra* note 8, at 479 (arguing that a defense attorney may forgo motions to suppress evidence because they “might delay the process or prevent the defendant from accepting responsibility for . . . drug use” or counsel a client “to disclose continued drug use . . . to foster honesty and reduce the barriers to effective drug treatment”).

191. For example, specialty court advocates expect that defense attorneys will encourage their clients to admit to a violation of a court order, because such recognition is considered a therapeutic step in support of treatment.

192. *See* Meekins, *supra* note 6, at 49–50, 53.

193. *See supra* note 144.

194. *Id.*

195. Meekins, *supra* note 6, at 49, 53.

adversarial mantra of the specialty court so that the judge will continue to appoint him or her in future cases. For example, the defender may fail to contest a sanction, may fail to argue for a different course of treatment, or may be reluctant to disagree with any procedure in the specialty court because of the judge's power to impact the defender's livelihood.¹⁹⁶

Professor Abbe Smith has cautioned that "one can only imagine what criminal representation would look like if there were no ethical requirement of zealous criminal defense."¹⁹⁷ Unfortunately, we need not imagine, for in some specialty courts we can readily see what defender representation looks like when it is not fulfilled zealously. One need only witness the instances where the attorney stands idly by while the client is interrogated by the judge in open court and then sanctioned by the judge for a violation without even an argument for mitigation by the defender.¹⁹⁸

Compromising the defender's ability to zealously represent his or her client puts the client's interests in grave jeopardy. This is especially true in the criminal defense context due to the rights and liberties at stake for the defendant.¹⁹⁹ Although a number of specialty courts embrace therapeutic jurisprudence and work to further the defendant's best interests, the defendant is still at risk of losing constitutionally and statutorily guaranteed rights, including his or her very liberty, if a sentence of imprisonment is imposed. These courts seem to have embraced a 'by any means necessary' approach that embodies the paternalistic notion that the court is best able to identify and meet the client's best interests and needs.

Moreover, one must consider the effect underzealous representation in specialty courts will have on the entire profession. On a macro level, the ethical rules are enacted for many reasons, including the improvement of the public image of the legal profession.²⁰⁰ When, in response to the argument that lawyers are destructively partisan and overzealous in their practice, courts develop procedures that institute a culture of underzealousness, the image of

196. *Id.*; see also Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL'Y 83, 129 n.250 (2003) (stating that even in non specialty courts, the low hourly rates and maximums for court appointed attorneys cause a crisis in access to justice and the quality of lawyering).

197. Smith, *supra* note 196, at 128.

198. This happens with frequency in the drug court in the District of Columbia and the accompanying due process and ethical issues has been noted by other scholars. Boldt, *supra* note 15, at 1264-65. Of course, this argument refers to those times when the lawyer is not strategically or tactically allowing such questioning and has prepared the client to respond by discussing the client's options and ramifications of his or her answers and actions. The experienced defense attorney employs many methods and options to zealously represent their client. Sometimes this involves utilizing the defendant's voice in making an argument or taking a position. This can be done through a letter written to the judge prior to sentencing, or in allowing the defendant to address the court, or when the lawyer can control the situation. See, e.g., Meekins, *supra* note 6, at 45 (noting effectiveness at sentencing of preparing defendant to address the court).

199. See Smith, *supra* note 196, at 92 (considering criminal defense differently).

200. FREEDMAN & SMITH, *supra* note 100, at 6.

the profession and of the defense community continues to be tarnished. Community members may feel that they cannot expect a high degree of professionalism, expertise, or commitment from defense lawyers when underzealousness is the norm.

Additionally, if the emergence of drug and specialty courts is a “paradigm shift” in the way we administer justice in criminal courts around the country, then the decline of zealousness could become the norm.²⁰¹ This is a dangerous and unacceptable notion given that many jurisdictions already have severe resource problems in providing quality defender services to indigent criminal defendants.²⁰²

Therefore, despite the arguments of some specialty court proponents, we must work to make sure that zealous representation becomes the norm for specialty court defense practice.

3. Competence

Yet another ethical issue facing defenders practicing in specialty courts is the frequent lack of training and resources needed to gain competence in the

201. See Meekins, *supra* note 6, at 33–37.

202. Many commentators have noted the problems with the quality and quantity of available indigent defense services in this country. See Wallace & Carroll, *supra* note 108 (presenting results of a study of defenders requesting updated and expanded standards and guidelines); Bruce Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169 (2003) (noting examples of the poor quality of defense representation and the ethical issues raised).

On the fortieth anniversary of *Gideon v. Wainwright*, the American Bar Association Committee on Legal Services and Indigent Defense and various state commissions and task forces examined the delivery of indigent defense services nationwide. ABA, GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE (2004), <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf>. Not surprisingly these groups found many problems associated with access to attorneys and with the quality of defender services for poor people accused of crimes. *Id.* The report made nine basic findings: (1) Indigent defense “remains in a state of crisis,” lacking “fundamental fairness” and “plac[ing] poor persons at risk of wrongful conviction;” (2) funding is “shamefully inadequate;” (3) lawyers sometimes “fail[] to furnish competent representation;” (4) “[l]awyers are not provided in numerous proceedings in which a right to counsel exists;” (5) “[j]udges and elected officials often exercise undue influence over indigent defense attorneys;” (6) “[i]ndigent defense systems frequently lack basic oversight and accountability;” (7) reform efforts “have been most successful when they involve multi-faceted approaches;” (8) “[t]he organized bar too often has failed to provide the requisite leadership” in indigent defense; and (9) “[m]odel approaches . . . exist . . . but these models often are not adequately funded and cannot be replicated elsewhere absent sufficient financial support.” *Id.* The findings signal a continued crisis in defense representation which has not been abated by the entry of specialty courts onto the landscape.

Even more recently, the Hurricane Katrina disaster, which devastated the gulf coasts of Louisiana and Mississippi, highlighted the continuing crisis in indigent defense services. The effects of the disaster were keenly and acutely felt in the criminal justice system of New Orleans, which completely fell apart as a result of the hurricane. Georgia N. Vagenas, *One Year Later: The Right to Counsel Still Elusive for Indigent Defendants in New Orleans*, 10 DIALOGUE 1, 31 (2006), available at <http://www.abanet.org/legalservices/dialogue/downloads/dialogue2006sum.pdf>.

specialty court's methodology. Even if the defender is provided with training, the practical reality is that most indigent defense agencies do not have sufficient resources to adequately address their overwhelming caseloads, let alone manage the shorter timeframes and more complicated issues that arise in specialty courts. In spite of these challenges, Model Rule 1.1 requires attorneys to possess the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."²⁰³

Our community court hypothetical envisions that the defender will be fully immersed in the court's methodology. Indeed, as a member of the team, she should be offered the opportunity, just like the judge and prosecutor, to attend training sessions on topics such as emerging treatment modalities and scientific, sociological, and psychological views on how sanctions and rewards work to coerce compliance with ordered conditions. Our defender also has prior experience in criminal cases, which she attained before becoming involved in the community court. In our scenario, therefore, it would seem that the competence of the defender will sufficiently satisfy the standard contemplated by Model Rule 1.1.²⁰⁴ Unfortunately this ideal defender is not available in many jurisdictions. A dearth of financial resources in many defender agencies²⁰⁵ means defense attorneys have few opportunities to gain knowledge regarding the specialty court's differing methodology or specialized knowledge of social service or other treatment issues that are the center of discussion in these courts.²⁰⁶

Even if the specialty court defender receives specialized training, he or she could nevertheless violate Model Rule 1.1 because he or she may lack the necessary time, information, and resources to develop the client's case before deciding on a course of action.²⁰⁷ The rule contemplates more than having basic information gained from training sessions, knowledge about court processes, or generalized experience in criminal cases. It requires in some cases that the attorney have expertise in a particular field of law.²⁰⁸ The sufficiency of the lawyer's expertise has to be judged by reviewing several relevant factors, including the time and attention that the attorney can devote to the matter.²⁰⁹ In particular, the drafters found that "the preparation and study the lawyer is able to give to the matter" is relevant,²¹⁰ and that the scope of

203. See MODEL RULES, *supra* note 70, R. 1.1.

204. See *id.* R. 1.1 cmt.

205. ABA, *supra* note 202; see also NLADA, *supra* note 23, at 2 (Tenet 3).

206. See, e.g., William H. Simon, *Criminal Defenders and Community Justice: The Drug Court Example*, 40 AM. CRIM. L. REV. 1595, 1605-07 (2003) (reviewing some ethical issues in community courts, noting that additional training and development may be needed, and concluding that defense attorneys' new role in community courts need not compromise fundamental ethical commitments).

207. See MODEL RULES, *supra* note 70, R. 1.1.

208. *Id.* R. 1.1 cmt. para. 1.

209. *Id.*

210. *Id.*

thoroughness and preparation necessary includes inquiry into and analysis of the factual and legal elements of the problem.²¹¹ In some specialty court cases, the defender may not be able to fully evaluate the factual and legal elements involved in the case. This is because he or she has too little time or resources to investigate and research the case before a disposition is due or the defendant's decision to enter is required.²¹²

Specialty court jurisprudence puts a premium on immediate attention to treatment issues, and calls for early admission into a specialty court docket so that services can be provided with minimum delay.²¹³ The drafters of the Model Rules noted that the necessary level of an attorney's preparation will be "determined in part by what is at stake."²¹⁴ In the specialty court situation, as in all criminal cases, much is at stake, including significant constitutional rights of the defendant.²¹⁵ The defendant must decide whether to waive important constitutional rights and could face short-term imprisonment for failure to meet the requirements of the program, longer-term confinement in an inpatient treatment program, or the maximum penalty on the underlying charge if he or she is convicted of the original crime as a result of failing out of the program.²¹⁶ Therefore, the defender's level of competence should be of the highest level.²¹⁷ However, defense attorneys in specialty courts may not meet the ethical competence requirement because of the time and attention it takes to evaluate a defendant's case before advising him of potential options, principally, whether or not the client should consent in the first place to the community court program.

Moreover, because specialty or problem-solving courts are thought of as an 'experiment' in criminal justice,²¹⁸ and are able to change and adapt as scholarship, evaluation and statistical evidence recommend,²¹⁹ the court may respond by changing methodologies, changing social service and treatment providers, or changing administrative or case processing policies. For example, many drug courts initially experimented with an expanded notion of rewards for defendants who progress in substance abuse treatment; however, rewards

211. *Id.* R. 1.1 cmt. para. 5.

212. Boldt, *supra* note 15, at 1257–58.

213. NADCP, *supra* note 10, at 13 (Key Component 3).

214. MODEL RULES, *supra* note 70, R. 1.1 cmt. para. 5.

215. *See* Quinn, *supra* note 15, at 73–74. These rights include those pursuant to the Fourth, Fifth (including due process protections including the right to challenge the introduction of evidence), and Sixth Amendments (including the right to the effective assistance of counsel, compulsory process and speedy trial) to the U.S. Constitution, and others including the right to a jury trial, the burden of proof beyond a reasonable doubt, and the right to appeal an adverse verdict.

216. *See* Nolan, *supra* note 31, at 1559.

217. *See* MODEL RULES, *supra* note 70, R. 1.1 cmt. para. 5.

218. Casey, *supra* note 15, at 1517–18.

219. *Id.*

now are mostly focused on praise and positive reinforcement by the judge.²²⁰ Defenders who practice in these rapidly changing courts may not have the time, resources, and training to study the ramifications of such changes before the court asks them to provide competent representation to clients.

Again, the first NDCI manual did not find Model Rule 1.1 to be a problem for defenders practicing in specialty or drug courts and simply noted that, with regard to the drug court model and practice, attorneys need only: (1) have a thorough understanding of the model and the court's practices; (2) be familiar with the court's procedures, general therapeutic strategies and treatment providers; and (3) play a role as an institutional participant in the design phase of the drug court and later assign experienced practitioners to full-time practice in the drug court.²²¹ The manual argued that full-time commitment helps to "build effective relationships with other members of the drug court team."²²² The manual does not mention the difficulty surrounding the defender's duty to investigate and advise the client regarding entry into drug court and the complex evaluation that is necessary to discharge this duty adequately.²²³ Moreover, while the later NDCI publication did acknowledge the need for the attorney to evaluate the underlying case and render advice to the defendant on the "merits of [the] case versus . . . entering into a drug court program,"²²⁴ it says nothing about the time and resource problems associated with garnering this information and rendering this advice.²²⁵

Supporters of specialty courts might retort that this issue is overblown; that traditional practice in an adversarial court is no different, especially in those instances where the government offers a plea bargain and sets a time limit on the decision to take it. Supporters might argue that the defender may still have inadequate time to investigate the matter, or that investigation, even with the benefit of sufficient time and expense, might still leave the defendant without a way to gauge the likelihood of success at trial. Either way, the traditional defendant is in the same position as his or her counterpart in a specialty court.²²⁶

Such an argument fails to recognize that the list of unknown consequences

220. See, e.g., MONTGOMERY COUNTY HANDBOOK, *supra* note 75, at 8. These courts theorized that the defendant who complied was already rewarded with a drug-free life and decreased involvement in the criminal justice system. See *id.*

221. NDCI, *supra* note 19, at 23–25.

222. *Id.* at 25.

223. See *id.* at 23–25.

224. NDCI, *supra* note 12, at 10.

225. See *id.*

226. Moreover, in those jurisdictions which restrict plea bargaining, the defendant has no guarantee that he will receive the bargained-for sentence even after a plea bargain. In the District of Columbia, the judge retains the authority to sentence a defendant to any appropriate penalty for the crime in which a guilty plea is entered. Any agreements as to sentence by the prosecutor are merely caps on their allocation and are not binding on the court prior to the court's acceptance of the plea agreement. See D.C. SUPER. CT. R. CRIM. P. 11.

to the defendant is greater in the specialty court context because so many factors are dependent upon the defendant's response to the treatment or plan imposed by the judge. Many more variables will exist than in the traditional context that will need to be evaluated by the defender, including the odds of the defendant's success in treatment, the extent to which other life issues will have a bearing on the treatment plan, and a prediction as to the effect on the treatment plan of any future changes in the defendant's lifestyle. In the traditional court, the attorney can draw on the experience of colleagues and others to gauge the sentencing behavior of the judge, and can often request more time to investigate or contest the government's evidence. Continuance requests are more likely to be granted in general courts because, unlike in specialty courts, immediate treatment is not a fundamental principle of the court.

In sum, all of the challenges to providing competent representation facing defenders in traditional courts are magnified in specialty courts, increasing the likelihood of ethics violations by specialty court defenders.

4. Communication with the Defendant

Specialty court practice also can have negative implications for communications between lawyers and clients. Model Rule 1.4, which sets forth the basic requirements regarding communication between lawyer and client, requires prompt communication with the client regarding matters of importance in the case and requires that the lawyer sufficiently explain a matter to a client so that the client can make informed decisions.²²⁷ The judge's central role in specialty courts puts clients in the confusing position of not knowing which member of the court is his or her primary advocate. In every court hearing, the judge takes center stage and questions, rewards, chastises, counsels, and advises the client.²²⁸ The attorney in a number of instances is left out of the picture, and is sometimes not present at court hearings. As a result clients may not believe their defense attorney is necessary, or may confuse the roles of judge and attorney, viewing the judge as legal advocate and counselor.²²⁹

Outside of the courtroom, the attorney's role is also diminished. Heightened reporting and relaxed confidentiality rules may elevate the roles of the case manager and other treatment professionals.²³⁰ Defendants may rely on treatment professionals for advice and help more than their lawyers, especially

227. MODEL RULES, *supra* note 70, R. 1.4.

228. See NOLAN, *supra* note 12, at 70–75; Hoffman, *supra* note 32, at 2064 (explaining how the “new strain of rehabilitationism has produced a judiciary more intrusive, more institutionally insensitive, and therefore more dangerous”).

229. The judge's changed role in specialty courts may ultimately violate the judge's own ethical and professional standards. See Hoffman, *supra* note 228, at 2086–94 (explaining that the judge's role in specialty courts is problematic because it diverges from widely held traditions for judges and may impinge on the functions of other branches of government).

230. Boldt, *supra* note 15, at 1263–67.

since clients may see these non-legal professionals as having more authority and power in the courtroom to direct the client's life. Because the specialty court focuses on treatment outcomes, much information is needed from treatment providers, therefore a danger exists that what the case manager recommends may be held in higher regard by the defendant and the court than the advice of the defender.²³¹ Even if a defender does zealously represent her client, in jurisdictions that use staffing conferences prior to court hearings, the defendant does not have a chance to witness firsthand his or her attorney's zealously because the defendant is not allowed to attend the staffing conference.²³²

5. Decision-Making

Specialty court practice embraces a 'best interests of the client' approach²³³ that conflicts directly with the defender's ethical responsibility to allow her client to direct the course of representation. In criminal cases under Model Rule 1.2(a), certain specified decisions must be left to the defendant, including "a plea to be entered, whether to waive jury trial and whether the client will testify."²³⁴ Although the attorney must consult with the client on the best course of action in these areas, once the client makes his or her choice, the lawyer must abide by that decision.²³⁵ But the rule also notes the distinction between objectives and means; it states that a lawyer "shall consult with the client as to the means by which [the client's objectives] are to be pursued."²³⁶ Model Rule 1.4(b) states that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."²³⁷ The means-objectives dichotomy, however, is not satisfactory for many attorneys or defendants, who instead demand a client-centered theory of practice, which requires that even strategic and tactical decisions be left to the defendant.²³⁸ This client-centered lawyering model focuses on the client as the central decision-maker and master of his or her own destiny.²³⁹

231. *Id.* at 1267. This is because of the deference that is accorded to the recommendations, reports, and statements of treatment personnel, pretrial services officers, or case managers—they are equal members of the team. Hora, Schma & Rosenthal, *supra* note 8, at 469.

232. *See supra* note 147 (discussing the components of staffing conferences). However, the likelihood is that attorneys participating in the staffing conference become just another member of the meeting. The formality, tradition, and aura of the courtroom is absent, as well as the focus on the client.

233. Hora, Schma & Rosenthal, *supra* note 8, at 479–80.

234. MODEL RULES, *supra* note 70, R. 1.2(a) ("Scope of Representation and Allocation of Authority Between Client and Lawyer").

235. *See id.*

236. *Id.*

237. MODEL RULES, *supra* note 70, R. 1.4(b) ("Communication").

238. *See supra* note 104 (discussing client-centered representation).

239. *Id.*

Since client-centered defense representation promotes the client's desires and wishes, the defendant's wishes serve to establish the direction that the lawyer takes with respect to sentencing, even in instances where the defendant's wishes appear irrational or idiosyncratic.²⁴⁰ For example, in a case arising in a traditional court, even where it is clear to the defender that a defendant needs some form of treatment, if the client would rather take jail time or a sanction in lieu of treatment the defense lawyer must argue against that treatment program. Defendants, like others, may not always desire what is in their so-called best interests. However, our legal system has long recognized client autonomy and dignity.²⁴¹ The 'best interests' approach of specialty courts brings together a host of well-meaning professionals—the 'team'—who are trying to define what is best for the defendant.²⁴² The defendant's stated, sometimes idiosyncratic, interests may be lost in this system because experts or professionals do not deem them appropriate to treatment. The 'best interests' mantra of specialty courts therefore collides with client-centered representation, and the defender who embraces the client-centered approach may have trouble reconciling it with his or her own self-defined professional identity.²⁴³

III. WHERE DO WE GO FROM HERE? THE EFFICACY OF SPECIFIC ETHICAL RULES FOR SPECIALTY COURTS

The Model Rules and efforts to guide practice in alternative courts are insufficient to reconcile the ethical and professional dilemmas faced by defenders in specialty courts.²⁴⁴ The ethical rules and current defender guidelines were drafted in the context of the traditional adversarial process and do not contemplate the issues that may be raised in the specialty court. These resources do not specifically set forth the ethical challenges that can be raised in specialty courts, and do not take a position with respect to the contours and limits of defense attorney practice in these new courts. For example, defenders may not be sure how to resolve the team player role with that of their loyalty to

240. Kruse, *supra* note 104, at 400–04 (noting that this client-centered theory focuses on client autonomy in decision-making).

241. See FREEDMAN & SMITH, *supra* note 100, at 52–69.

242. Hora, Schma & Rosenthal, *supra* note 8, at 453.

243. While client-centered representation is a buzz phrase to some in the lexicon of criminal defense, there are still a number of attorneys who practice the more traditional paternalistic form of lawyering that emphasizes that the lawyer is the expert and is better able to make strategic decisions in a criminal case. See STEFAN H. KRIEGER ET AL., *ESSENTIAL LAWYERING SKILLS* (2003) (contrasting the traditional mode of the attorney as advisor and counselor who directs the case with the professional who works with the client as a team member). Of course, even in the traditional model, certain key decisions are left to the client as dictated by the ethical rules, such as the decision to waive a jury trial or plead guilty. See MODEL RULES, *supra* note 70, R. 1.2(a).

244. Indeed, even in the traditional courts, current ethical rules and practice standards still may be difficult to navigate for the defense attorney and many real situations may arise with no clear answer specified by the ethical rules. Attorneys are expected to use discretion in making the appropriate decision or resolution. MODEL RULES, *supra* note 70, pmb. para. 9.

the individual client or to their clients as a group. The defender's practice is further complicated by the fact that specialty court design is not uniform; these courts are constantly reevaluated and adjusted to respond to problems presented in practice.²⁴⁵

The need for more specialized guidance has been noted by others who have called for a change in the ethical landscape when it comes to specialized areas of practice or non-traditional roles for lawyers. For example, Professor Menkel-Meadow has said that traditional ethics rules provide inadequate guidance and best practices for attorneys who take on these "new roles," such as mediator, facilitator, or traditional arbitrator.²⁴⁶ She has noted the lack of clarity in the Model Rules for those attorneys who practice outside of the traditional adversarial mode.²⁴⁷ Further, she has argued that attorneys practicing in this area need a discussion of best practices to help guide their practices.²⁴⁸

Is the defense attorney's role in a problem-solving court a "new role,"²⁴⁹ which cannot properly be guided by traditional ethical rules? For all practical purposes, the specialty court defender's role is indeed a new, less adversarial role. However, a wholesale embrace of a new defense role would be unwise and dangerous to our criminal justice system. The rights that are at stake in criminal cases are so fundamental, and the liberty interests and potential stigmatizing effect of a conviction are so profound, that it is crucial to be cautious in requiring a different mode of criminal defense. A paradigm shift in the way we practice criminal defense would change the very character of our criminal justice system.

It is essential in these new courts that we provide guarantees that defense attorneys will continue to be zealous, partisan advocates for the defendant. To ensure that defendants are receiving quality representation, each jurisdiction must create special rules or guidelines for their specialty courts that address the ethical problems created by specialty court practice. Additionally, judges, court systems, institutional defender agencies, and state bar agencies must monitor and enforce these standards. Federal, state, and local appropriations, along with private grants, are necessary to provide the additional resources to

245. For example, a drug court may utilize a pre-adjudication model for misdemeanor drug offenses; a domestic violence court may employ a post-adjudication model and defer sentencing to allow for the defendant's completion of specifically ordered treatment or other conditions; and a community court may be organized as a general jurisdiction court (unlike in our scenario) that uses specialty court jurisprudence in a more comprehensive sentencing process. See Meekins, *supra* note 6, at 17.

246. Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63, 66 (2002).

247. *Id.* Even in calling for a new breed of attorney who goes beyond the adversarial partisanship characteristic of so much civil litigation, Menkel-Meadow notes that a concern for procedural justice should still be a priority for an attorney. *Id.* at 69.

248. *Id.* at 66.

249. See *id.*

design, implement, and evaluate special ethical rules that would be more appropriate for attorneys working in these courts.

A. Initial Steps Toward a Defender Code of Ethics for Specialty Courts

There have been some steps made toward the implementation of a national defender code of ethics or guidelines for practice in specialty courts. As discussed above, NLADA and its American Council of Chief Defenders has issued its *Ten Tenets of Fair and Effective Problem-Solving Courts*.²⁵⁰ The professed goal of the *Ten Tenets* is to “increase both the fairness and the effectiveness of Problem-Solving Courts, while addressing concerns regarding the defense role within them.”²⁵¹ Several of the tenets embody concerns for defender ethics and professionalism issues, as well as concern for the defender’s ability to protect the rights of defendants who enter the various problem-solving or specialty courts.²⁵² The tenets are stated as declarations unaccompanied by extensive comments or analysis. In several instances, the tenets are presented without any commentary at all.²⁵³ It is therefore difficult to ascertain the reasoning behind NLADA’s embrace of these specific principles or the organization’s experience with, or research into, problems that have arisen in specialty courts. Perhaps NLADA has received anecdotal information from its membership and its purpose is therefore to note caution with regard to some troubling issues; however, the bases, purposes, and underlying assumptions of the tenets are unclear. The NLADA should study this issue more comprehensively and amend its *Ten Tenets*, if appropriate. Such action would give guidance to defense attorneys, specialty court judges, prosecutors, and other officials.

Several of the NLADA tenets are noteworthy. The third tenet focuses on the financial resources that are available to defenders to become trained in and learn about these new courts.²⁵⁴ It notes that “[p]roblem solving courts should afford resource parity between the prosecution and defense.”²⁵⁵ Specifically, it calls on all institutional members of the specialty court team to seek to make sure that defenders and defender organizations are able to obtain grant money or other resources to train their lawyers on specialty court issues and to be able to hire additional staff as needed.²⁵⁶ The concern for training and resource parity implicates the ethical requirement of a competent, thorough, and adequately prepared defender.²⁵⁷ It also reflects the performance guidelines set out by NLADA that require familiarity with the governing law, procedures, and

250. See NLADA, *supra* note 23.

251. *Id.* at 1.

252. See *id.*

253. See *id.* at 2–3 (Tenets 6, 8–10).

254. See *id.* at 2 (Tenet 3).

255. *Id.*

256. *Id.*

257. See MODEL RULES, *supra* note 70, R. 1.1.

practices, and the defender standards promulgated by the ABA.²⁵⁸

NLADA's fifth tenet opposes a post-adjudication model for specialty courts.²⁵⁹ The comment notes that requiring a guilty plea before entering treatment does not have therapeutic value.²⁶⁰ As noted above, the post-adjudication model may also implicate Model Rule 1.1 because of the inhibited ability of the defense counsel to adequately advise the defendant before a guilty plea is entered. The defender does not have the time and resources to investigate and evaluate the case in order to be able to give adequate advice and counsel to the defendant before the decision to plead or to enter the specialty court is made.

Closely related to the fifth tenet is the sixth, which admonishes specialty court officials and advocates to allow for closer and more extensive interaction between defender and client before the decision to enter the treatment court is made.²⁶¹ The sixth tenet states that there should be a "reasonable amount of time" for counsel to meet with the client regarding the program and investigate the case.²⁶² While this tenet also embodies a concern for Model Rule 1.1's requirement of competence and the overall requirement of zeal,²⁶³ it unfortunately gives no guidance about what a reasonable amount of time is or what the extent and scope of defense counsel's investigation should be in the context of a specialty court docket.²⁶⁴ Moreover, the sixth tenet gives no guidance to defense counsel about the discussions that she should have with the client, especially with respect to what should be said about the specialty court program and the "possible outcomes."²⁶⁵

The tenth, and last, of the NLADA tenets specifically concerns ethical requirements, and seems to be directed at defense counsel, but should be understood and followed by other specialty court players as well.²⁶⁶ The tenet

258. Especially relevant are Guidelines 1.2 ("Education, Training and Experience of Defense Counsel") and 1.3 ("General Duties of Defense Counsel"). BLACKLETTER GUIDELINES, *supra* note 26, §§ 1.2, 1.3; *see also* ABA, *supra* note 26, §§ 4-4.1.

259. NLADA, *supra* note 23, at 2 (Tenet 5: "The accused individual shall not be required to plead guilty in order to enter a problem solving court.").

260. NLADA, *supra* note 23, at 2 (Tenet 5).

261. NLADA, *supra* note 23, at 2 (Tenet 6). Tenet 6 states that "[t]he accused individual shall have the right to review with counsel the program requirements and possible outcomes. Counsel shall have a reasonable amount of time to investigate cases before advising clients regarding their election to enter a problem solving court." *Id.*

262. *Id.*

263. *See* MODEL RULES, *supra* note 70, R. 1.1.

264. *See* NLADA, *supra* note 23, at 2 (Tenet 6).

265. *See id.* These discussions should be extensive and should cover many aspects of the case, including factual investigation, the strength of the government's case, court processes, substantive legal defenses, motions, case strategy and tactics, the policies and procedures of the specialty court, the requirements of potential treatment that may be ordered, the defendant's ability to comply, the possible case outcome, the length of the case, social and background history, and other issues that will arise depending on the type of case.

266. *Id.* at 3 (Tenet 10).

embodies the notion of zealous advocacy in specialty courts and states that “nothing in the . . . policies or procedures should compromise counsel’s ethical responsibility to zealously advocate for his or her client”²⁶⁷ In adopting this tenet, NLADA seemed to be expressly encouraging a broad interpretation of zealous advocacy in specialty courts, the contours of which would seem to be at odds with the type of advocacy encouraged by NDCI.²⁶⁸ NDCI and other supporters of specialty courts expect that zealous advocacy in these types of courts will mean not intervening at all times when the defender would normally intervene in a traditional adversarial setting. However, NLADA’s tenth tenet—expressly including advocacy in the areas of “the right to discovery, to challenge evidence or findings and the right to recommend alternative treatments or sanctions”²⁶⁹—seems to exemplify the traditional notion of the zealous advocate at all stages of the case.²⁷⁰

The NLADA tenets, though a promising start, should be adapted, expanded, and modified to more fully describe these ethical issues and to offer guidance to defenders who are seeking more support for their work in specialty courts.

B. The Missouri Drug Court Defender Guidelines

The state of Missouri has enacted specific standards for defense attorneys practicing and representing clients in its drug courts that take a significant first step towards addressing the ethical issues identified in this Article.²⁷¹ While the guidelines specifically noted that they represent “what is expected of the Public Defender in drug courts,”²⁷² they also note their applicability to other types of specialty courts, including family drug courts, parenting courts, DUI courts, mental health courts, and domestic violence courts.²⁷³ Therefore, these Guidelines are an important resource for practice in Missouri specialty courts. They can fill in the gaps between the ethical rules and other defender standards occasioned by practice in these new courts. They can also encourage dialogue regarding the extent of guidance that is necessary and feasible for defenders practicing in specialty courts.

These guidelines give important direction to the defender at the critical

267. *Id.*

268. *See* NDCI, *supra* note 12, at 3–9.

269. NLADA, *supra* note 23, at 3 (Tenet 10).

270. Some specialty court advocates may argue that defense attorneys’ zealous advocacy is satisfied if the defender meets with the defendant prior to the decision to enter the court and that no concerns arise during the treatment phase. However, these supporters misunderstand the extent and scope of the obligation of zealousness. It extends to all phases of a case and has to be exercised whenever the defendant’s liberty or interests may be in jeopardy or need to be protected.

271. *See* NDCI, *supra* note 12, app. at 57–63 (reprinting MISSOURI DEFENSE ATTORNEY’S GUIDELINES FOR REPRESENTATION IN DRUG COURT).

272. *Id.* at 58.

273. *Id.* at 63.

stage of the initial client meeting, outlining fourteen separate points of discussion and disclosure to the client.²⁷⁴ The guidelines also cover such important areas as maintaining complete and current files; conducting preliminary discovery and factual investigation; preparing for hearings; and avoiding conflicts of interest.²⁷⁵ The guidelines further discuss the role of the public defender in the planning and operation of a drug court on a macro level.²⁷⁶ They are an important first step in fully evaluating the ethical issues present in specialty courts.

However, the Missouri guidelines are not a perfect or comprehensive statement of how the defender should practice in specialty courts. For example, Guideline 12.3(b)(8) notes that the attorney should explain to the client the attorney's potential departure from traditional attorney roles, including "possible agreement to or advocacy of sanctions."²⁷⁷ Defenders who have developed a client-centered and vigorously zealous approach, including myself, would find it inappropriate in almost any situation to agree to or advocate for a sanction upon a client's violation of a condition of release. Such action seems at odds with the notion of zealously advocating for the client's wishes and objectives. In addition to this example, the guidelines tell defenders to encourage a client's "open and truthful" communication "with the judge and treatment staff."²⁷⁸ Such guidance is problematic; it supports the notion that judges should question defendants directly about matters that may not relate to their treatment or which have marginal relation thereto. Certainly the fact of a positive drug test is proof enough of drug usage, absent some failure in the testing method or protocol. Requiring the defendant to discuss the matter in open court may impinge on constitutionally protected rights and may discourage the development of the attorney-client relationship. Moreover, the guidelines note that the public defender has "dual roles in drug court: attorney for the client and participant in the planning and operation of a drug court."²⁷⁹ Unfortunately, this bold statement seems to equate these roles and does not note the potential conflict of interest that could develop in the duality. The guidelines do later note that the "role is that of attorney for the client" which includes "maintaining the traditional defense attorney's function of protecting the client's legal interests."²⁸⁰ Even with this clarification, the defender may need additional guidance on how to handle conflicts of interest that may arise or how to spot these issues as they develop. The Missouri Guidelines, in their present state, may be of limited utility in resolving some of the ethical issues that arise in specialty court.

274. *Id.* at 57–63.

275. *Id.* at 58–59.

276. *Id.* at 57–63.

277. *Id.* at 58.

278. *Id.* at 60.

279. *Id.* at 58.

280. *Id.* at 58–59.

C. Other Proposals to More Clearly Resolve Ethical Issues Raised by Specialty Courts

Such entities as NLADA, the ABA, and institutional defender agencies should study and evaluate the ethical issues raised by specialty court practice and expand upon the important tenets that NLADA has noted as necessary for fair and effective problem-solving courts. These new guidelines should apply to all attorneys representing indigent defendants in that jurisdiction. The state should also provide the resources necessary to create fully successful courts, including funding for monitoring of ethical and professional guidelines and training for defenders, judges, and other participants in the specialty court.

Many of the general defender standards and guidelines that have been enacted in the past apply to attorneys practicing in institutional indigent defender agencies and do not by their language or scope apply to the private attorney who is court-appointed to represent indigents.²⁸¹ Specialty court standards or guidelines should apply to all defenders who practice in the specialty court because the status of the attorney's employment has no bearing on the breadth of ethical issues that the attorney may confront. Such standards could even be incorporated into the contracts that are made between the court and the private attorney.

The standards should also include an independent mechanism to insure compliance, or at the very least to monitor compliance, in order to make sure that specialty court defenders follow the new rules and apply them in a fair and just way to all their specialty court clients. For example, in funding statewide defender agencies, the state should provide for personnel and other resources to review appointments to specialty courts and to review performance of attorneys handling these cases. This can be done through periodic reviews of performance, evaluation of statistical data, and interviews with presiding judges.

Jurisdictions that have implemented specialty courts should also increase the availability and scope of training for defenders, much like that called for by NLADA in its *Ten Tenets*.²⁸² As I have previously argued, both "institutional defender agency attorneys and private bar attorneys should be trained thoroughly on all aspects of the specialty court, including the science of

281. In some jurisdictions a court-appointed system of legal representation for indigent cases takes care of most, if not all, of the cases in a criminal court. *See, e.g.*, 11 D.C. CODE §§ 2601–09 (2006). Some localities or states, however, do not have an institutional indigent defender agency and rely on appointed counsel for representation in indigent cases. *See, e.g.*, NLADA, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS (1989), available at http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Administration_Of_Assigned_Counsel#threeoneb.

282. *See* NLADA, *supra* note 23, at 2 (Tenet 3: "Problem solving courts should afford resource parity between the prosecution and the defense. All criminal justice entities involved in the court must work to ensure that defenders have equal access to grant or other resources for training and staff.").

addiction, therapeutic and restorative justice principles, procedural and substantive due process, ‘available treatment programs and sanctions, client assessment tools, treatment cycles and methodologies and . . . the court’s documentation and processes.’”²⁸³ Importantly, to put defense attorneys on notice of the problematic ethical concerns in specialty courts, they should receive training in basic ethics and practice standards, as well as in the issues that arise in the context of specialty court practice.

IV. CONCLUSION

To date, no national defender organization or similar group has critically assessed the impact of specialty courts. No organization has reviewed the general impact of the large number and type of specialty courts on the administration of justice overall, including the impact on defender practice and the ramifications for our adversarial system. This may be because many individuals and groups are reluctant to criticize specialty courts, as even the most zealous defense attorney sees the benefit of a judicial regime that looks for alternatives to incarceration and focuses on the treatment and other issues that may be extant in the client’s life or that led to his or her entry into the criminal justice system.²⁸⁴ Although specialty courts have great potential to have a positive impact on recidivism by addressing the social issues underlying a defendant’s criminal activity, we should not blindly embrace these new models of adjudication. These courts may provide much-needed treatment and alternatives to incarceration for many criminal defendants. However, the adversarial system is traditionally how we test the charges against defendants and guarantee that the defendant’s fundamental constitutional rights are protected. We cannot adopt an alternative model of adjudication without ensuring that the defendant’s rights will continue to be protected.

Like many other defenders, judges, prosecutors, and court officials who have studied these issues, I am not opposed to specialty courts, but I believe that such alternative practices must be implemented in a way that will not hurt the interests of those who are most vulnerable to changes in the system: criminal defendants. A number of specialty court models discount the importance of procedural due process rights, such as the right to a speedy trial and to challenge the admissibility of evidence because of illegal police

283. Meekins, *supra* note 6, at 53 (citing Burke, *supra* note 22); *see also* NDCL, *supra* note 12, app. at 53–55 (reprinting THE NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS’ BOARD OF DIRECTORS’ RESOLUTION REGARDING INDIGENT DEFENSE IN DRUG COURTS (2001)) (stating that the “inclusion and training of private counsel appointed to represent indigent defendants in drug court is necessary, particularly in jurisdictions which do not have an institutional public defense entity”); Simon, *supra* note 206, at 1605.

284. *See* Meekins, *supra* note 11, at 29; *see also* *What Does It Mean To Be A Good Lawyer?*, 84 JUDICATURE 206 (John Feinblatt & Derek Dinckla, eds., 2001); BERMAN & FEINBLATT, *supra* note 3, at 131–50 (reporting on specific case studies of individuals who have benefited and triumphed through their participation in the Midtown Community Court in Manhattan).

procedures. These issues are not seen as important as determining what is in the client's 'best interests' and working to achieve that goal. Supporters and officials of these courts must come to recognize the importance of the defender's traditional role in safeguarding the defendant's fundamental constitutional rights. In particular, all stakeholders must insist upon guidelines and standards that respect defenders' professional responsibilities to their clients.