

SUBSTANCE USE DISORDER AND TREATMENT COURTS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM

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Abstract The global issue of drug and alcohol addiction leads to the commission of crimes, wasted lives, and unnecessary deaths. Although judicial systems in every country are positioned to encourage treatment of this disease, the focus is too often on imprisonment. One promising alternative is “Treatment Courts,” a relatively recent program in the United States. This program incentivizes citizens accused of crimes by providing rewards for successful completion. Beyond other benefits, this alternative to confinement provides reduced punishment, and in some instances, even dismissal of the offense. This article explores treatment courts and other emerging American alternatives to imprisonment.

Keywords

substance use disorders,
alcohol and drug abuse,
criminal justice system,
treatment courts,
United States of America

1 Introduction

Drug and alcohol addiction can often be found at the heart of the American Criminal Justice System. In fact, without alcohol and drugs, the workload of the criminal justice system in the United States, and perhaps the world, would be greatly reduced. Many crimes are directly related to substance use disorders (“SUD”), while others are committed as a result of the offender using both legal and illicit substances. According to the National Institute on Drug Abuse, an estimated 65 percent the United States prison population suffers from a substance use disorder, while another 20 percent who did not meet the criteria for an addiction diagnosis were under the influence of drugs or alcohol when committing their crime.¹

While certainly no universal “cure” or solution has yet been developed for a substance use disorder, certain alternatives to incarceration have proven to be of significant assistance to overcome this challenge. One under-used alternative is treatment courts, which provide specialized court dockets that allow the criminally accused to undergo long-term substance use treatment while under court supervision. Not only do treatment courts provide an effective alternative to incarceration, but in some instances may allow first time offenders to have their offenses dismissed and expunged. The current challenge lies in convincing those involved in certain criminal justice systems in the United States and other countries that have yet to adopt similar programs to more frequently adopt alternatives such as treatment courts instead of incarceration.

To better understand the issues surrounding addiction in the criminal justice system, one must understand the underlying elements. This article seeks to (1) explain substance use disorder, (2) identify the legal rationales of different forms of criminal punishment, (3) explore the roles of the lawyers involved in the criminal justice system, and (4) review the benefits of Treatment Courts.

¹ National Institute on Drug Abuse, Criminal Justice Drug Facts. Retrieved from <https://nida.nih.gov/publications/drugfacts/criminal-justice> (January 22, 2025).

2 Substance Use Disorder

To properly address this issue, one must first understand the definition of “substance use disorder,” or as it is commonly abbreviated, “SUD.” A substance use disorder has been defined as a “treatable mental disorder that affects a person’s brain and behavior, leading to their inability to control their use of substances like legal or illegal drugs, alcohol, or medications.”² Though often also characterized as an “addiction,”³ the National Institute of Mental Health notes that symptoms of substance use disorder can be moderate to severe, “with addiction being the most severe form of SUD.”⁴ The U.S. Department of Health and Human Services has estimated 46.3 million people in America suffer from a substance use disorder.⁴

Because lawyers do not typically receive any medical or psychological counseling education, we must exercise caution not to provide medical advice, as doing so may bring additional harm to our clients. For example, defense attorneys should never advise a client to stop drinking or consuming intoxicating substances abruptly, as such advice could lead to serious health consequences to clients. In fact, acute, complete alcohol withdrawal may lead to significant health risks, or even death (Trevisan et. al, pp. 61-66). It is always preferable to instead refer a client to a medical health professional for evaluation and treatment.

In cases where the client does obtain a substance abuse assessment, it is also important to know how to interpret the results. In the United States, the most common resource used to diagnose mental health conditions, including substance use disorder, is the Diagnostic and Statistical Manual of Mental Illnesses (currently in 5th edition), also often referred to as “DSM-5.”⁵ An assessment will likely also

2 National Institute of Mental Health, Substance Use and Co-Occurring Mental Disorders. Retrieved from <https://www.nimh.nih.gov/health/topics/substance-use-and-mental-health> (January 22, 2025).

3 See: Mayo Clinic, *Drug addiction* (substance use disorder). Retrieved from <https://www.mayoclinic.org/diseases-conditions/drug-addiction/symptoms-causes/syc-20365112> (January 22, 2025).

4 National Institute of Mental Health, Substance Use and Co-Occurring Mental Disorders. Retrieved from <https://www.nimh.nih.gov/health/topics/substance-use-and-mental-health> (January 22, 2025); U.S. Health and Human Services, SAMHSA Announces National Survey on Drug Use and Health (NSDUH) Results Detailing Mental Illness and Substance Use Levels in 2021. Retrieved from <https://www.hhs.gov/about/news/2023/01/04/samhsa-announces-national-survey-drug-use-health-results-detailing-mental-illness-substance-use-levels-2021.html> (January 22, 2025).

5 See: Cleveland Clinic, DSM-5. Retrieved from <https://my.clevelandclinic.org/health/articles/24291-diagnostic-and-statistical-manual-dsm-5> (January 22, 2025).

refer to the suggested treatment, based upon “ASAM Criteria.” The abbreviation “ASAM” refers to the American Society of Addiction Medicine.⁶ Taking the time to educate oneself about the criteria will help both lawyer and client better understand the results of an assessment. The ASAM website also has a link to a free brief assessment⁷ to learn about what level of care might meet the client’s needs. Defense lawyers may also refer this resource to the prosecution to help educate the government representative about the illness from which the client suffers. This is especially important when the results of the assessment indicate that the client does not meet the criteria for treatment.

3 The Legal Rationales of Punishment

Despite the large number of Americans who suffer from SUD, this condition is rarely considered when punishing those convicted of alcohol or drug related crimes. Rather than seeking to treat underlying addiction issues, the primary legal rationales of punishment used in the courts within the United States include: (1) Restraint/Incapacitation; (2) Rehabilitation; (3) Education; (4) Deterrence; and (5) Retribution (Cohen, § 1:5).

3.1 Restraint/Incapacitation

Restraint, of course, incapacitates the offender from potentially harming others and provides some retribution for violating the laws of society. The United States leads the world in total prison population according to World Prison Brief.⁸ The problem, though, is that we cannot lock up these offenders forever. Once they are released, most will return to their prior habits and continue to violate the law. Clearly, those who suffer from substance use disorder are more inclined to re-offend because the underlying problem is never really addressed. This underlying SUD problem may be psychological, physiological, or, most commonly, simply undiagnosed.

⁶ See: American Society of Addiction Medicine, About the ASAM Criteria. Retrieved from <https://www.asam.org/asam-criteria/about-the-asam-criteria#:~:text=The%20ASAM%20Criteria%20is%20the,addiction%20and%20co%2Doccurring%20conditions> (January 22, 2025).

⁷ Treatment connection, Addiction Treatment Needs Assessment. Retrieved from <https://www.treatmentconnection.com/assessment> (January 22, 2025).

⁸ Prison Studies, Highest to Lowest - Prison Population Total. Retrieved from https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All (January 22, 2025).

Moreover, given the advances in technology, alternatives to this form of punishment readily exist at a cost that is minimal compared to incarceration. These alternatives include tamper-proof GPS tracker bracelets, continuous alcohol-monitoring (CAM) bracelets,⁹ portable alcohol-monitoring devices,¹⁰ and ignition interlock devices.¹¹

At the very least, offenders should be provided an opportunity to only be incarcerated when not working at their regular employment (work-release). Accordingly, most, if not all, defendants are able to serve any confinement in a house-arrest environment using today's technology. Such options reduce the risk of the offender injuring others, and, particularly in the case of young offenders, avoids situations where jail inmates may convert an immature offender into a hardened criminal (Cohen, § 1:5). At least one study has verified that a non-residential program of house arrestees showed better results, with lower recidivism rates, than the residential program of community treatment centers (91.8 versus 73.8 percent) (Sandhu, H. S., Dodder, R. A., Mathur, M., pp. 131-144). If house-arrest and work-release were used more frequently, the savings in costs to the government alone would be enormous. Accordingly, incarceration should not be looked upon as the first solution.

While each of these alternatives to incarceration have their own advantages and disadvantages, one or more may also be used in conjunction with a court treatment program to promote rehabilitation and incorporate the offender into society as a sober, successful individual.

3.2 Rehabilitation

Establishing the goals of rehabilitation with a SUD individual should begin with an assessment of the offender's level of addiction/abuse followed by treatment. This may include detoxification group counseling, individual counseling and/or

⁹ See, e.g.: Scram Systems, SCRAM CAM Provides Accountability and Encourages Compliance. Retrieved from <https://www.scramsystems.com/monitoring/scram-continuous-alcohol-monitoring/> (January 22, 2025). Author's note: The author is a paid consultant for Scram Systems and LifeSafer.

¹⁰ See, e.g.: Life Safer, Portable Alcohol Monitoring Device by LifeSafer. Retrieved from <https://www.lifesafef.com/portable-alcohol-monitoring/> (January 22, 2025). Author's note: The author is a paid consultant for Scram Systems and LifeSafer.

¹¹ See, e.g.: Life Safer, What is an ignition interlock device? Retrieved from <https://www.lifesafef.com/ignition-interlock-devices/what-is-an-ignition-interlock/> (January 22, 2025). Author's note: The author is a paid consultant for Scram Systems and LifeSafer.

counseling focused on re-integrating the offender back into society as a productive member of the community.

As part of rehabilitation, it is imperative that the offender show a strong commitment to the necessary treatment and continuing counseling in order to maintain sobriety. It is relatively easy for a court or probation officer to confirm an offender's commitment by requiring proof of treatment, ongoing aftercare, and/or random drug/alcohol screening.

Closely monitored supervised release (also known as probation or a "compliance program" (*See* the Deterrence discussion below) is an excellent way to monitor the rehabilitation of an offender. "When it is managed well, supervised release can serve the complementary goals of protecting the public and rehabilitating an offender who is returning to free society. Supervised release should not be an afterthought; it deserves careful and thoughtful attention from the sentencing judge."¹²

3.3 Education

Education, an often-ignored factor, is very important in preventing recidivism. This is especially true of crimes stemming from underlying substance use disorder. Many offenders may not yet have been diagnosed with a substance use disorder. Understanding one's diagnosis, as well as how consumed substances are processed in the human body is imperative to correcting future behavior. For instance, learning how various abused substances affect one's body and the period of time that one remains impaired after consuming the substance(s) helps an offender better understand the consequences of their actions. Some believe that it is equally important for offenders to understand how their actions affect not only their own families and acquaintances but also the families of their victims.¹³

¹² United States v. Lewis, 823 F.3d 1075, 1080 (7th Cir. 2016).

¹³ *See, e.g.*, Mothers Against Drunk Drivers Victim Impact Panel. Retrieved from <https://maddvip.org/> (January 22, 2025). ("The purpose of the Victim Impact Panel (VIP) program is to help drunk and drugged driving offenders to recognize and internalize the lasting and long-term effects of substance-impaired driving. The classes seek to create an empathy and understanding of the tragedy, leave a permanent impression that leads to changes in thinking and behavior and prevents future offenses.")

3.4 Deterrence

In addition to fear of incarceration, monetary fines, or fear of losing civil liberties enjoyed in the U.S. (such as the right to carry a weapon), the restrictions associated with various types of probation are viewed as an actual deterrent. Typically, an offender on probation is required to regularly report to a supervisor (a probation officer) to ensure the probationer has not re-offended; is currently employed; and is otherwise in compliance with the court's conditions of release. These conditions often include items such as payment of fines and court costs, or service of volunteer community work.

Some members of society, however, characterize probation (also referred to as a "compliance program" by the American Bar Association¹⁴) as insufficiently onerous to deter future criminal activity. The threat of probation revocation, however, combined with other restrictions and/or punishment is generally sufficient in cases involving substance abuse. Probation revocation poses a very real risk of both easier apprehension and greater punishment than would otherwise be originally imposed. The key here is to consider both "special" deterrence as well as "general" deterrence to formulate an appropriate sentence for the defendant. To further explain, *special* deterrence includes conditions designed to deter the particular offender, while *general* deterrence is a broader concept focusing on punishment used to deter persons in general.

3.5 Retribution

Finally, in reference to retribution for damages caused by a criminal act, this factor can be accomplished without the need for incarceration. In fact, for most offenders, financial retribution can be more quickly produced if they are not incarcerated. This also provides the additional benefit of avoiding the real risk of being dismissed from the offender's job. Retributive justice may also be accomplished with volunteer community work, house-arrest, fines, and other alternatives. However, when dealing with this issue, each case must be determined upon its own facts.

¹⁴ American Bar Association Project on Standards for Criminal Justice, Standards Relating to Probation 1 (Approved Draft 1970); *Accord*, United States v. Lewis, 823 F.3d 1075 (7th Cir. 2016) (Supervised release is an important part of a federal criminal sentence, and, when managed well, can serve the complementary goals of protecting the public and rehabilitating an offender who is returning to free society.); State v. Le Veque, 426 P.3d 461 (2018) (Rehabilitation and public safety are dual goals of probation.).

There is a distinctly different (and perhaps much more effective) method related to the concept of fining the offender in some European countries. While the courts within the United States generally set fines for a certain type of offense to be within a certain range (*e.g.*, \$50 to \$2,500) without regard to one's actual income, some countries in the European Union (*e.g.*, Germany, Switzerland, and Finland) set fines for some crimes based on a percentage of the offender's income—arguably a much more equitable method of actual punishment for those with higher incomes.¹⁵

Furthermore, restitution to the victims is an important factor when sentencing these defendants. Surprisingly, most defendants feel the need to provide restitution to any party injured as a result of their actions. This allows a defendant to take responsibility and “forgive themselves” for their mistakes in judgment. In situations where a defendant is unable to make financial restitution, a court can easily sentence the offender to volunteer community work in an amount substantially equal to what they would have otherwise been able to earn had they been employed in their profession.

4 The Role of Defense Counsel, Prosecutors and Judges

Candidly, there is no one solution that fits every fact pattern. The burden to find a solution to the substance abuse problem our society currently faces rests in large part with the criminal justice system because those who suffer from a substance use disorder often find themselves as convicted offenders. Only rarely are they able to recognize and overcome this problem on their own. Accordingly, the lawyers involved as litigators, and ultimately the judge, must take on the role as problem-solvers to assist community efforts to address this epidemic within the boundaries of the criminal justice system. Let's briefly explore the obligations of each.

¹⁵ *See generally*: Erasmus University Rotterdam, Should rich people pay a higher price for (traffic) violations? Retrieved from <https://www.eur.nl/en/news/should-rich-people-pay-higher-price-traffic-violations> (January 22, 2025); NBC News, Traffic fines based on wealth? Europe tries it. Retrieved from <https://www.nbcnews.com/id/wbna34792272> (January 22, 2025).

4.1 Defense Counsel

Criminal defense lawyers in the United States must abide by their ethical obligations as dictated by each individual state. Generally speaking, however, the rules are at least loosely based on the Model Rules of Professional Conduct published by the American Bar Association.¹⁶

Unfortunately, some practitioners may believe that a client's potential substance use disorder may not play an important factor in the attorney's representation. In fact, some may argue that a defense lawyer's obligation to provide "zealous advocacy" trumps the necessity of identifying and addressing a substance use disorder. The Model Rules themselves, however, provide a more inclusive view. Interestingly, the rules do not compel counsel to provide a "zealous" representation. In fact, the words "zeal" or "zealous" do not even appear within the actual Model Rules of Professional Conduct themselves but are only included in the preamble and one comment (Harrington & Bennechi, 2021).¹⁷ Additionally, in the Model Rules, an attorney's duty as "Counselor" (in Rule 2) precedes that of "Advocate" (Rule 3). Lawyers all too often narrow the focus of representation on their Rule 3 role as "Advocate," while failing to recognize the extent of the Rule 2 duty as "Counselor."

Model Rule 2.1: Advisor

Counselor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.¹⁸

¹⁶ ABA, Model Rules of Professional Conduct - Table of Contents. Retrieved from https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/ (January 22, 2025).

¹⁷ See also: ABA Model Rules of Professional Conduct ("Model Rules"), Preamble, Paragraph 2, 8, and 9 Retrieved from https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/ (January 22, 2025); Model Rule 1.3, Comment 1 Retrieved from https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_3_diligence/ (January 22, 2025).

¹⁸ ABA, Model Rules of Professional Conduct – Rule 2.1: Advisor. Retrieved from

It should be noted that this rule mandates that in addition to advising clients on the law as it relates to their case, defense attorneys are further obligated to render advice based upon other considerations to the client's situation, including "moral, economic, social and political factors."¹⁹ Obviously, it is imperative that defense counsel learn as much as possible about the client's case in order to properly advise the client. This includes learning as much as possible about the client themselves.

A client's mental health condition (including SUD) may impact many facets of the case, including but not limited to:

- Hindering the client's ability to participate in their own defense. If a client suffers from SUD, the practitioner must be certain that the client is able to make voluntary and knowing decisions as it relates to his or her case at all relevant moments. Caution should be exercised to ensure that the client is not impaired when making critical decisions (*e.g.*, signing fee agreements, approving investigative expenses, signing plea agreements, waiving constitutional rights, etc.); and
- Impeding the client's ability to comply with orders of the court. One must know more than simply the facts of the case to be able to set a client up for success. Although some lawyers believe the greatest success may be an acquittal, defense lawyers do a disservice to their clients (and possibly violate their ethical duties) if they focus solely upon the ultimate result. Defense lawyers must take the time to understand their clients' limitations in relation to potential bond or probation conditions and seek alternative conditions when appropriate and possible.
 - The SUD may preclude the client's ability to comply with pre-trial court orders. For instance, these questions must be considered:
 - Was a bail bond condition ordered prohibiting consumption of alcohol?
 - Is a monitoring device required?

https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor/ (January 22, 2025).

¹⁹ Ibid.

- Will the client be able to comply?
- If not, to avoid a bond violation, it may be necessary to have the client evaluated by a mental health professional to seek alternative solutions.
- The client’s ability to satisfactorily complete conditions associated with a favorable plea agreement or with probation following a guilty verdict must also be addressed. A favorable plea reduction is not a successful result if your client is unable to mentally or physically comply with the conditions set by the court. Defense lawyers should also counsel their client about potential probation violation consequences.

So, how can criminal defense lawyers get to intimately know their clients and their backgrounds in practice? This requires asking questions not typically asked of clients. Such inquiries include, at a minimum, validated screens or assessments relating to general health, Alcohol and Other Drug Abuse (AODA), trauma, occupation history, medical history (including mental health), family dynamics, and/or general psychological issues. Such screening is available at a fairly low cost.²⁰ Defense lawyers should additionally investigate available treatment centers and consider sentencing options other than incarceration to fully mitigate their clients’ punishment.

This author proposes that the ethical obligations of a criminal defense lawyer require a focus on both defending the allegations in court as well as rendering candid advice relating to the client’s physical and psychological issues, if any. Many undiagnosed and untreated medical conditions can ultimately lead to serious physical harm—and a client suffering from SUD is no different. On a human level, criminal defense lawyers are generally known to care deeply about their clients, and should encourage those suffering from SUD to seek treatment and enter recovery. Lawyers should address a mental health condition arguably not only in terms of the personal well-being of their client, but for the ultimate well-being of the client’s case. The argument, however, can be made that there is little distinction between the two.

²⁰ See, e.g.: Justice Story. Retrieved from <https://www.justicestory.com/#overview> (January 22, 2025); see also, Oberman, S., Taylor, L. §9.01[A] and Form 9-1.

Listening to clients and showing empathy goes a long way in helping a client overcome their disability. Note that intellectual clients tend to question everything asked or suggested by their attorney. This, however, is not a reason to avoid the conversation. At the very least, defense counsel should inquire, either verbally or via a questionnaire for the client to later complete, about their alcohol and/or drug use. Sample questions would include:

How much alcohol they consume daily/weekly?

Do they perceive that they have a problem with alcohol/drugs?

Have they ever consumed so much that they lost consciousness? and

Does their spouse, children, or extended family complain about their drinking?

The discussion between lawyer and client about mental health issues, and particularly SUD, can become uncomfortable for both—especially because lawyers are not trained mental health professionals. One approach to resolving this issue is having the client evaluated for substance abuse issues by a mental health professional. Too often, prosecutors not only immediately assume a client is guilty, but also assume that the client has committed crimes related to substance use many times before the current arrest. In fact, the United States Federal Bureau of Investigation reports that the average drunk driver has driven while under the influence more than 80 times before their first arrest.²¹ Accordingly, it may be in the client's best interest to obtain an assessment early on in their representation so that an accurate depiction of the client may be presented to the prosecutor during plea negotiations when attempting to resolve the case prior to trial. Regardless of the assessment outcome, the results of the assessment may be used to provide an incentive to the prosecutor to agree to a compromise resolution that is favorable to the defendant. Furthermore, even if never shown to the prosecutor, the assessment itself may be sufficient to convince the client to undergo substance abuse treatment in order to ensure the client will comply with any pre-trial release conditions or probation requirements.

²¹ See, e.g., Fox 17, FBI: Average drunk driver has driven drunk more than 80 times before first arrest, Retrieved from <https://fox17.com/news/local/fbi-average-drunk-driver-has-driven-drunk-more-than-80-times-before-first-arrest> (January 22, 2025).

What about situations when the substance-abusing client appears for court while under the influence? At this point, defense lawyers must rely on their ethical obligations. The following ABA rule provides some guidance.

Model Rule 1.14: Client with Diminished Capacity

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

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6.²² When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

If the client is suffering from SUD to the extent that it negatively impacts their ability to make decisions and participate in their defense, counsel is ethically obligated to take special action to protect the client. The fact that SUD is a mental illness must not be overlooked, and when necessary, counsel must approach such clients with the special care required by our ethical rules. For instance, the substance abusing client may be exploiting the attorney-client relationship with numerous calls or visits to counsel when the client is under the influence. If the situation becomes overwhelming, defense counsel may need to terminate the relationship. In this

²² ABA, Confidentiality of Information, Retrieved from https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/ (January 22, 2025).

situation, practitioners may wish to review Model Rule 1.16²³ to reexamine one's duties as they relate to clients with diminished capacity.

4.2 Prosecutors

Prosecutors should also be open to alternatives to incarceration. From the perspective of both society in general, as well as from the defense, this means that when a plea offer is made, extra consideration should be given to those who agree to help themselves by undergoing a SUD assessment and/or treatment.

As American lawyers learn early on, the functions and duties of prosecutors in the United States are quite different from those of defense counsel. Perhaps it was best stated by the Tennessee Supreme Court in the case of *Foute v. State*,

[The prosecutor] is to judge between the people and the government; he is to be the safeguard of the one and the advocate for the rights of the other; he ought not to suffer the innocent to be oppressed or vexatiously harassed, any more than those who deserve prosecution to escape; he is to pursue guilt; he is to protect innocence; he is to judge of circumstances, and, according to their true complexion, to combine the public welfare and the saf[e]ty of the citizens, preserving both, and not impairing either; he is to decline the use of individual passions, and individual malevolence, when he can not [sic] use them for the advantage of the public; he is to lay hold of them where public justice, in sound discretion, requires it.²⁴

This sentiment is also reflected in Standard 3-1.2 of the ABA “Criminal Justice Standards for the Prosecution Function.”²⁵ Specifically, section (b) states,

(b) The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing

²³ ABA, Declining or Terminating Representation. Retrieved from [https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_16_declining_or_terminating_representation/\(January 22, 2025\)](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_16_declining_or_terminating_representation/(January 22, 2025)).

²⁴ *Foute v. State*, 4 Tenn. 98 (Tenn. 1916).

²⁵ ABA, Criminal Justice Standards: Prosecution Function. Retrieved from [https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/\(January 22, 2025\)](https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/(January 22, 2025)).

appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.²⁶

Section (e), however, is even more relevant to the topic of this article,

(e) The prosecutor should be knowledgeable about, consider, and where appropriate develop or assist in developing alternatives to prosecution or conviction that may be applicable in individual cases or classes of cases. The prosecutor's office should be available to assist community efforts addressing problems that lead to, or result from, criminal activity or perceived flaws in the criminal justice system.²⁷

Accordingly, the prosecution should take measures to assist community efforts to address problems that lead to criminal activity. This may be accomplished by encouraging an assessment and treatment as outlined above for those suffering from SUD.

4.3 Judges

Finally, judges should be amenable to treatment options rather than limit sentencing choices to jail (*e.g.*, incapacitation) or deterrence (*e.g.*, probation). Monitoring alternative options will necessarily take more time and resources, but many of the time-consuming tasks can be primarily overseen by probation officers, or similar assistants to the courts. These treatment options can be made as a condition of probation, or as a sentencing option in lieu of jail. It is important for judges to participate in these programs. Judges hold a special role of authority not only in the criminal justice system, but in our society in general.

²⁶ Ibid.

²⁷ Ibid.

5 Treatment Options and Benefits of Treatment Courts

The treatment options available to the courts are numerous and diverse. They can be as simple and inexpensive (free) as Alcoholics Anonymous meetings,²⁸ which are available world-wide, or a similar alternative that can take place either in-person or online²⁹; counseling by someone who is properly qualified and licensed to provide substance use disorder counseling;³⁰ intensive outpatient treatment;³¹ inpatient treatment, which may provide safe detoxification treatment in addition to more frequent counseling over a period of weeks;³² and/or treatment with the injectable drug, Vivitrol®, a long-acting (usually 30 days) form of naltrexone. While this drug is not appropriate for all individuals, many of the author's clients have had success with this drug, which works by blocking the euphoria that alcohol and opioids provide.³³

There is, however, another treatment option that has been successfully implemented by some criminal justice systems in the United States. It is generically referred to as a "Treatment Court."³⁴ There are a number of variations of Treatment Courts, such as *Adult Drug Courts*,³⁵ "... the most carefully studied and well-proven intervention in [the United States] for leading people with substance use disorders out of the justice system and into lives of health and recovery";³⁶ *Veterans Court*, structured to address issues associated with those who have served or are currently serving in the

²⁸ See, e.g.: Alcoholics Anonymous, Have a problem with alcohol? There is a solution. Retrieved from <https://www.aa.org/> (January 22, 2025).

²⁹ See, e.g.: Sober Recovery, 7 Popular Alternatives to Alcoholics Anonymous (AA). Retrieved from <https://www.soberrecovery.com/addiction/5-popular-alternatives-to-alcoholics-anonymous-2/> (January 22, 2025).

³⁰ See: Treatment Improvement Protocol (TIP) Series, No. 65, Substance Abuse and Mental Health Services Administration, Chapter 4. Retrieved from <https://www.ncbi.nlm.nih.gov/sites/books/NBK601481/> (January 22, 2025).

³¹ American Addiction Centers, Intensive Outpatient Program (IOP): What is It & Find IOPs Near Me. Retrieved from <https://americanaddictioncenters.org/intensive-outpatient-programs> (January 22, 2025).

³² Addiction Group, What is Inpatient Detox & How is It Different from Outpatient. Retrieved from <https://www.addictiongroup.org/treatment/detox/inpatient/> (January 22, 2025).

³³ See: Drugs.com, Vivitrol. Retrieved from <https://www.drugs.com/vivitrol.html> (January 22, 2025).

³⁴ All Rise, About Treatment Courts. Retrieved from <https://allrise.org/about/treatment-courts/> (January 22, 2025).

³⁵ See generally: *ibid.*; U.S. Department of Health and Human Services, What Are Drug Courts? Retrieved from <https://www.hhs.gov/opioids/treatment/drug-courts/index.html> (January 22, 2025); National Institute of Justice, Overview of Drug Courts. Retrieved from <https://nij.ojp.gov/topics/articles/overview-drug-courts> (January 22, 2025); National Treatment Court Resource Center, What Are Drug Courts? Retrieved from <https://ntcrc.org/what-are-drug-courts/> (January 22, 2025); National Institute of Justice, Drug Treatment Courts. Retrieved from <https://nij.ojp.gov/library/publications/drug-courts> (January 22, 2025).

³⁶ All Rise, About Treatment Courts. Retrieved from <https://allrise.org/about/treatment-courts/#adult-drug-court> (January 22, 2025).

military;³⁷ *Impaired Driving Treatment Court*, which focuses on “... treating the underlying alcohol or polysubstance use disorders fueling dangerous behavior by repeat impaired drivers;”³⁸ *Family Treatment Court*, which “... provide[s] a pathway to reunification for parents who have lost or are at high risk for losing custody of their children due to child abuse or neglect related to substance use and/or mental health disorders;”³⁹ and others.⁴⁰

There are in excess of 4,000 drug court programs currently operating within the United States, serving over 150,000 individuals each year.⁴¹ It is estimated that this reduces crime by 58 percent, and US\$6,000 are saved per participant by reducing recidivism.⁴² Every state contains at least one drug court program.⁴³ While this may appear like a lot of programs and participants, consider that in 2018 and 2019, each, there were about one million arrests made in the United States for only the crime of driving under the influence of alcohol and/or drugs.⁴⁴

Impaired Driving Treatment Courts estimate that 33 percent of drivers arrested for impaired driving have had a previous drunk driving arrest.⁴⁵ More disturbingly, over a half of drivers involved in serious/fatal crashes tested positive for at least one drug. The need to reduce recidivism is clearly apparent.

These treatment courts provide an “alternative to incarceration that combine[s] public health and public safety approaches to connect people involved in the justice system with individualized, evidence-based treatment and recovery support

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ National Treatment Court Resource Center, What Are Drug Courts? Retrieved from <https://ntcrc.org/what-are-drug-courts/> (January 22, 2025).

⁴² All Rise, About Treatment Courts. Retrieved from <https://allrise.org/about/treatment-courts/#adult-drug-court> (January 22, 2025).

⁴³ National Treatment Court Resource Center, What Are Drug Courts? Retrieved from <https://ntcrc.org/what-are-drug-courts/> (January 22, 2025).

⁴⁴ U.S. Centers for Disease Control and Prevention, Impaired Driving Facts. Retrieved from <https://www.cdc.gov/impaired-driving/facts/index.html> (January 22, 2025), citing Federal Bureau of Investigation “2018 Crime in the United States” and Federal Bureau of Investigation “2019 Crime in the United States.”

⁴⁵ All Rise, Impaired Driving Solutions. Retrieved from <https://allrise.org/about/division/impaired-driving-solutions/> (January 22, 2025).

services.”⁴⁶ These treatment court programs can include many different conditions. Some of the more common conditions are:

- a. Participation over a series of months (or longer) to establish and maintain long-term recovery strategies;
- b. Frequent and random drug tests;
- c. Clinical treatment for substance use disorders;
- d. Individualized case management services, including finding low cost (or no-cost) treatment, connecting participants to employment opportunities, community service, pro-social activities, and education;
- e. Required frequent appearances in court; and
- f. Rewards for maintaining treatment plans and sanctions for failure to meet obligations.⁴⁷

One of the tangential benefits of these Treatment Courts is that they allow participants to receive moral support from other offenders in the program. Participants remain in the program for a sufficiently long period of time to build relationships with others facing similar health and legal problems. Participants, as a group, encourage others to take the necessary steps to successfully complete the program with graduation ceremonies. Individual participants also provide encouragement before graduation by demonstrating to others that sobriety can be achieved and maintained. The author’s informal discussions with treatment court participants indicate that this demonstration of long-term sobriety is as important, if not more important, than the graduation ceremony.

There is no universal model for drug court programs, but there are two common ways in which people enter drug court. In one model, defendants who meet eligibility requirements are diverted from traditional court proceedings into drug court prior to pleading [guilty] to a charge. This is commonly called pre-trial or deferred prosecution. In another model, defendants who meet eligibility requirements plead guilty to their charges, and their sentences are deferred or suspended while they participate in the drug court program. This model is referred to as [a] post-

⁴⁶ See: All Rise, About Treatment Courts. Retrieved from <https://allrise.org/about/treatment-courts/#adult-drug-court> (January 22, 2025).

⁴⁷ National Treatment Court Resource Center, What Are Drug Courts? Retrieved from <https://ntcrc.org/what-are-drug-courts/> (January 22, 2025).

adjudication [deferral].”⁴⁸ Accordingly, whether pre-trial, a deferred prosecution (sometimes also referred to as a diversion), or post-trial adjudication, the benefit of successfully completing the treatment court program can be as beneficial to the participant as a dismissal, and often expungement (erasure from public record) of the charge.

However, in practice, dismissal or expungement is not always the case. Sometimes, a successful completion is a condition of a plea agreement to amend the charge to a different, usually less serious, charge before entry of a guilty plea. Completion may be required to amend the conditions of probation or to shorten the term of probation. Alternatively, it may simply be required as a condition of probation.

The drug [treatment] court programs are generally managed by a multidisciplinary team that may consist of a combination of judges, prosecutors, defense attorneys, substance use treatment providers, an evaluator, court coordinator, community supervision personnel, law enforcement officers, and social workers.⁴⁹ Support from others representing law enforcement, the family, and the community is encouraged through participation in hearings, programming, and events such as graduation from the program.

Extensive training is provided at little to no cost to those associated with the treatment court program. Some of the topics addressed in training include: Client Screening; Case Processing; Alcohol and Drug Testing; Incentives and Sanctions; Cultural Awareness; Improved Client Retention; Relapse Prevention; New Team Members; Team Building; Strategic Planning; Team Member Turnover; and Program Sustainability.⁵⁰ Other training topics include: Developing Eligibility Criteria; Performing Clinical Assessments; Developing a Treatment Plan; Supervising the Offender; Forging Community Partnerships; Judicial Considerations; Case Management Strategies; Addressing Transportation Issues; Evaluating the Program; and Ensuring the Program’s Sustainability.⁵¹

⁴⁸ Ibid.

⁴⁹ See generally: National Association of Drug Court Professionals. Retrieved from <https://allrise.org/> (January 22, 2025).

⁵⁰ All Rise, DWI Court Technical Assistance. Retrieved from <https://allrise.org/trainings/dwi-court-technical-assistance/> (January 22, 2025).

⁵¹ National Center for DWI Courts, The 10 Guiding Principles of DWI Courts (2010). Retrieved from <https://allrise.org/publications/the-10-guiding-principles-for-dwi-courts/> (January 22, 2025).

So, the next question is: how effective are these programs? Studies on this topic have focused on the drug court treatment programs.

The National Institute of Justice (NIJ) funds research on drug court processes, impact, and cost-efficiency. One evaluation tracked 10 years of cohorts in the Multnomah County [in the state of Oregon] Drug Court and found rearrests were lower five years or later for participants than for comparable individuals; however, reductions ranged from 17 to 26 percent across cohorts with changes in programming and judge assignments. NIJ's Multisite Adult Drug Court Evaluation found that programs significantly reduce drug use and criminal offending — both during and after program participation. Compared to traditional case processing and supervision, drug courts have higher investment costs, especially in treatment services. However, savings associated with victim and criminal justice system costs are more significant due to fewer crimes, rearrests, and incarcerations.⁵²

Of course, treatment courts are not a panacea to prevent all recidivism. For instance,

Drug courts that target individuals with high criminogenic risk and high substance abuse treatment needs yield the most effective interventions and maximize return on investment. NIJ's Evaluation of Second Chance Act Adult Reentry Courts found mixed impact and cost results: one demonstrated reduced rearrests, convictions, and reincarcerations, meaning lower costs; whereas recidivism rates decreased but not significantly in two sites, and increased in the other sites, meaning higher costs. Also, program success may relate to consistent treatment resources for a target population with substance use disorders, wraparound services for multiple criminogenic needs, and judicial use of incentives and sanctions.⁵³

However, even beyond the effectiveness issues, treatment courts require substantial funding, training, and personnel support. In the United States, a large majority of the funding is obtained from various governmental agencies.

⁵² National Institute of Justice, Overview of Drug Courts. Retrieved from <https://nij.ojp.gov/topics/articles/overview-drug-courts> (January 22, 2025).

⁵³ *See* *ibid.*

Of course, legal challenges have also arisen. These include, among other issues, the right of participants to take their prescribed medications (including prescribed marijuana) while participating in a drug court program,⁵⁴ due process issues regarding the drug court procedures in terminating a participant,⁵⁵ and whether the imposition of sanctions by the treatment court constitutes double jeopardy or *res judicata*.⁵⁶ None of these legal challenges, however, seem to challenge the basic ideologies of the program or its effectiveness.

6 Conclusion

“Treatment courts demonstrate justice reform, they are on the front lines of the addiction and mental health epidemics, they help people overcome the odds and inspire the public, and they offer redemptive or human-interest stories as communities come together to support a graduate or hold a celebratory ceremony, and as families are reunited.” (Deutsch & Neiberger-Miller, 2021, p. 4).

Despite relatively few challenges, treatment courts are making it clear that the team approach to formulating an individualized treatment plan for each participant combined with the accountability for the actions and long-term supervised treatment results in a reduction in recidivism. This option can ultimately save thousands of dollars for every enrolled participant. The savings can then be used by law enforcement to focus on violent criminals, or those who are not yet ready to become productive members of society. From the criminal defense/offenders’ viewpoint, treatment courts provide an opportunity for offenses to be amended to lesser charges, reduce the conditions and/or terms of probation, and sometimes eradicate the offense from public record. Most importantly, though, the criminal justice system is taking measures to resolve the underlying problems of offenders instead

⁵⁴ See United States Attorney’s Office Press Release, *U.S. Attorney’s Office Settles Disability Discrimination Allegations with the Massachusetts Trial Court Concerning Access to Medications for Opioid Use Disorder*. Retrieved from <https://www.justice.gov/usao-ma/pr/us-attorney-s-office-settles-disability-discrimination-allegations-massachusetts-trial> (January 22, 2025); *Gass v. 52nd Judicial District, Lebanon County*, 232 A. 3d 706 (Penn. 2020)(permitting the use of medical marijuana by individuals under court supervision).

⁵⁵ *Gross v. Maine*, Case No. CR-11-4805 (Penobscot Sup. Ct. Feb. 26, 2013). (Participant has the right to notice of termination allegations and the evidence against him, right to call and cross-examine witnesses, a hearing at which he is present, a neutral magistrate, written factual findings and the right to counsel).

⁵⁶ *Hickman v. State*, 81 N.E. 3d 1083 (Ind. App. 2017) (Hickman not entitled to accrued time against his sentence for time spent in a halfway house as part of a reentry-court program); *In re O.F.*, 773 N.W. 2d 206 (No. Dak. 2009)(Doctrine of double jeopardy did not prevent the juvenile court from punishing juvenile for committing delinquent act of mistreating an animal after he had already been sanctioned with additional community service by the juvenile drug court based on the same underlying conduct.)

of just sentencing offenders to jail. This solution frequently allows the offender to become more likely to re-offend in the future simply.

Case-law

- Foute v. State, 4 Tenn. 98 (Tenn. 1916).
Gass v. 52nd Judicial District, Lebanon County, 232 A. 3d 706 (Penn. 2020).
Gross v. Maine, Case No. CR-11-4805 (Penobscot Sup. Ct. Feb. 26, 2013).
Hickman v. State, 81 N.E. 3d 1083 (Ind. App. 2017).
In re O.F., 773 N.W. 2d 206 (No. Dak. 2009).
State v. Le Veque, 426 P.3d 461 (2018).
United States v. Lewis, 823 F.3d 1075, 1080 (7th Cir. 2016).

References

- Cohen, N. (2024). *Law of Probation & Parole*. New York: Clark Boardman Callaghan.
- Deutsch, C. & Neiberger-Miller, A. (2021). Media Guide for Treatment Courts, National Association of Drug Court Professionals. Retrieved from: <https://allrise.org/publications/media-guide-for-treatment-courts/> (January 22, 2025).
- Harrington, D. & Bennechi, S. K. (2021). Is it time to remove “zeal” from the ABA Model Rules of Professional Conduct? *Ethics & Professionalism, American Bar Association Litigation Section*. Retrieved from: <https://www.jdsupra.com/legalnews/is-it-time-to-remove-zeal-from-the-aba-4010162/> (September 17, 2024).
- Oberman, S. & Taylor, L. (2024). *Drunk Driving Defense, Ninth Edition*. Wolters Kluwer Legal & Regulatory U.S.
- Professional Conduct? *Ethics & Professionalism, American Bar Association Litigation Section*. Retrieved from: <https://www.jdsupra.com/legalnews/is-it-time-to-remove-zeal-from-the-aba-4010162/> (January 22, 2025).
- Sandhu, H. S., Dodder, R. A. & Mathur, M. (1993). House Arrest: Success and Failure Rates in Residential and Nonresidential Community-Based Programs. *Journal of Offender Rehabilitation*, 19(1/2), pp. 131-144.
- Trevisan, L. A., et. al. (1998). Complications of Alcohol Withdrawal. *Alcohol Health and Research World*, 22(1), 61-66.

Povzetek v slovenskem jeziku

Globalni problem odvisnosti od drog in alkohola vodi v zagrešitve zločinov, zapravljanje življenj in nepotrebne smrti. Čeprav so pravosodni sistemi v vsaki državi postavljeni tako, da spodbujajo zdravljenje tega zdravstvenega stanja, je osredotočenost prevečkrat na zaporni kazni. Ena obetavna alternativa so t. i. 'zdravstvene oziroma terapevtske obravnave', ki predstavljajo relativno nov program v Združenih državah Amerike. Ta program spodbuja posameznike, ki so obsojeni storitve kaznivih dejanj, z zagotavljanjem nagrad za uspešen zaključek. Namesto da bi bili poslani v zapor so obravnavani v okviru sodnih sistemov, ki jim omogočajo dostop do zdravljenja, svetovanja in drugih podpornih storitev. Razen drugih koristi, ta program nudi tudi zmanjšano zaporno kazen, in v nekaterih primerih celo opustitev pregona. Članek raziskuje o sodiščih za zdravljenje in drugih novejših alternativah zaporne kazni v Ameriki.