Defending Liberty Pursuing Justice

HIGHWAY TO JUSTICE

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From The ABA and The National Highway Traffic Safety Administration

Summer 2010

Evidence-Based Sentencing

By Hon. Karen Arnold-Burger, Overland Park, Kansas

Acting within the constraints of applicable presumptive or mandatory sentencing guidelines … judges typically rely on their instincts and experience to fashion a sentence based upon the information available about the offense and offender. But relying upon gut instinct and experience is no longer sufficient. It may even be unethical—a kind of sentencing malpractice that produces sentencing … decisions that are neither transparent nor entirely rational." -Prof. Richard E. Redding, Chapman University School of Law

Some say it was Albert Einstein who opined: *"The definition of insanity is doing the same thing over and over and expecting different results."* As we continue to rely on our gut instincts, as Prof. Redding correctly points out, our jails keep filling up and crime continues to rise. If our sentencings are so effective, why does the United States have 5% of the world population, but 25% of its prisoners? What if our instincts are wrong? What if everything we always thought was true about offenders, just ain't so? What if we began to realize that in our sentencing practices we are thinking like non-addicted, law-abiding citizens, who avoid negative ramifications and appreciate consequences, **not** like a criminal defendant? What if we found out some of our sentencing practices actually increased recidivism (the rate at which convicted offenders reoffend), instead of reducing it?

Although "unethical" and "malpractice" are certainly strong words, the trend in criminal justice today is clearly moving toward scientific-based sentencing options, sentencing based not on gut instinct and experience, but on a wealth of scientific studies that show judges what works and what does not work when it comes to the ultimate goal of reducing recidivism.

I know for those of us who have been around awhile, this all seems like "retro" sentencing. Up until the mid-70's there was a movement toward rehabilitation of criminal offenders. Unfortunately, rehabilitation programs were based on what we believed would work, not any empirical research as to what would work. We knew what would work with us if we were in that situation, so surely that would work with the offenders in our courtrooms. Decisions were made based on "clinical judgment," based solely on experience and intuition. Many of us remember the days, for example, of making all offenders with alcohol charges do 90 AA's in 90 days, without any evidence of the level or extent of their alcohol problem…or even if alcohol was **the** problem.

Then in the late 70's with the advent of sentencing guidelines, the conventional wisdom became fairness in sentencing as it relates to the crime of conviction and the offender's criminal history and a "get tough on crime" approach. There was a belief that little could be done to turn an offender's life around, because the rehabilitation movement had obviously failed. It must have, our jails were still full and recidivism was rising. Many jails and prisons stopped programming in the interest of balancing the budget, "since it doesn't work anyway." But, prison populations grew. Between 1974 and 2005 our federal and state prison population grew from 216,000 to 1,525,924, a sixfold increase. Local jails saw similar increases. Recidivism rates increased. In fact, some studies have now found that longer periods of incarceration for non-violent offenders may have actually made their behavior worse in the long run. If most defendants are reformed solely by punishment, we wouldn't have the highest number of prisoners per capita in the world.

But, harkening back to Bob Dylan, these times they are a changing and we do know more now than we did then. Today there is a growing body of solid research showing that certain "evidence-based" sentencing and corrections practices do work and reduce crime rates as effectively as jail and at much lower cost. Evidence-based sentencing involves the use of scientific research that is now available to improve the quality of decision making and reduce recidivism.

Why do we care about recidivism rates? Ninety-five percent of all state and federal prisoners will be released from prison at some point, the vast majority after only a few years. They usually return to the community from whence they came, the same community in which they were sentenced. If they have a high probability of reoffending, the crime will occur in our community. Therefore, if we reduce recidivism, we reduce the crimes in our community, thereby increasing public safety.

As Judge Michael Wolf put it in a recent law review article:

> *We must acknowledge that the reason for sentencing is to punish, but if we choose the wrong punishments, we make the crime problem worse, punishing ourselves as well as those who offend. If we are to think rationally about what is in our own best interest—that is public safety—we should try to determine what reduces recidivism.*

Many proponents of this position argue that we put too much focus on closing cases, disposition rates and moving offenders through the system. They propose that instead we should be focusing our performance measurements on recidivism rates. In fact, a Public Safety Policy Brief issued by the PEW Charitable Trust recommends that recidivism reduction should be an explicit sentencing goal. So how does this work?

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JUDICIAL DIVISION

Evidence-Based Sentencing

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Evidence-based approaches are most commonly used as conditions of release on probation, parole or diversion. They are said to work best by targeting moderate to high-risk offenders. It is assumed that low-risk offenders are not likely to reoffend anyway and therefore should not monopolize resources for alternative programs—as they often do—and extremely high-risk offenders are not likely to be responsive to alternative programming. With this in mind, the use of a risk/needs assessment is a key component of this approach. These assessments are validated instruments, supported by credible recidivism research, that actuarially determine the risk that any particular offender will re-offend. They measure the risk factors (age, education, criminal history, lack of high school diploma, etc.), the protective factors (i.e., employed, family support, etc.) and the criminogenic needs (clinical disorders or functional impairments that if ameliorated would substantially reduce the likelihood of continued engagement in crime, like drug addiction, mental illness, etc.).

There are several such instruments currently in use around the country. The LSI-R™ (Level of Services Inventory-Revised), the Wisconsin Risk Assessment, the CAIS™ (Correctional Assessment and Intervention System) and the COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) are a few of the more common. All measure the risk of recidivism. There are also several tools that are used just for juveniles, and some solely for sex offenders.

The application of evidence-based sentencing continues, according to the experts, by requiring that any community programs in which the offender is required to participate, also be evidence-based, meaning completion has been shown to decrease recidivism. It requires that all staff involved in the process be trained on evidence-based practices. And, it does encourage swift and certain responses to probation violations, although not necessarily for the entire term of the sentence. Finally, it encourages police and community collaboration. See, *"Effective Alternatives to Incarceration: Police Collaborations with Corrections and Communities,"* by Joanne Katz, J.D. and Dr. Gene Bohham which can be accessed on-line at http://www.jdaihelpdesk.org/Docs/Documents/COPS%20Alternatives_to_Incarceration[1].pdf.

Returning to the quote opening this article, although there are no known cases of judges being disciplined or removed from office for utilizing sentencing practices that do not result in a scientifically supported outcome of reducing recidivism, judges do have a responsibility to become educated on this topic. A good place to start is the inaugural issue of *Chapman Journal of Criminal Justice*, produced by the University of Chapman School of Law in Orange, California. The entire first issue is dedicated to scholarly articles on evidence-based sentencing. It can be read online at: http://www.chapman.edu. Likewise, the National Center for State Courts has a Center for Sentencing Initiatives. The NCSC website contains links to several publications on the topic of evidence-based sentencing. *See,* http://www.ncsconline.org/csi/analysis.html; http://www.smartsentencing.com/ and http://www.pewpublicsafety.org. In addition, the National Judicial College has created a new *"Model Curriculum for Judges on Evidence-Based Sentencing to Improve Public Safety and Reduce Recidivism."* It can be accessed online at www.ncsconline.org/csi/education.html

DWI Laws OZ Style

Hon. Peggy Fulton Hora (Ret.), Judicial Outreach Liaison, Region 9, Walnut Creek, CA

I have just returned from South Australia (SA) where I studied, among other things, the current "drink driving" (as they call driving while impaired) laws. There are some glaring differences between their laws and ours that may be of interest.

Because there is no pesky Fourth Amendment or, for that matter, a Bill of Rights in Australia, the police can stop anyone and breath test them. They also recently started testing for illicit drugs as well. Over 660,000 South Australian drivers are stopped and tested each year (61% of licensed drivers). However, SA is 6th out of the eight states and territories in

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Editor's Note

Highway to Justice is a publication of the American Bar Association ("ABA") and the National Highway Traffic Safety Administration ("NHTSA"). The views expressed in *Highway to Justice* are those of the author(s) only and not necessarily those of the ABA, the NHTSA, or the government agencies, courts, universities or law firms with whom the members are affiliated.

We would like to hear from other judges. If you have an article that you would like to share with your colleagues, please feel free to submit it for inclusion in the next edition of *Highway to Justice*. Deadline for submission articles for inclusion in the fall 2010 issue is August 10, 2010.

To submit an article, please send it to Judge John Priester, Division of Administrative Hearings, Iowa Department of Inspections & Appeals, 3rd Floor Wallace State Office Building, Des Moines, IA 50319, or email to venspriester@prodigy.net.

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testing only 41% of the population; Tasmania, for example tests 139.8% and Victoria 70.1% of their populations annually. The SA police not only conduct checkpoints but also have mobile roving units specifically for DWI detection and test capabilities in all patrol cars.

Police there rely heavily on the breath testing devices, as they do not conduct field sobriety tests such as horizontal gaze nystagmus, Rhomberg or walk-the-line. In court they merely testify as to objective symptoms such as red and watery eyes, odor of an alcoholic beverage, and an unsteady gait. That testimony along with the breath test is pretty much all the evidence given in a DWI trial.

Current sentencing laws are confusing and counterproductive. Different consequences result from different blood alcohol rates. Currently, blood alcohol concentration (BAC) is the basis for the amount of a fine and the length of driver's license suspension. But, given the volatile nature of alcohol, a person caught driving with a .08 g/dL could have easily started driving with a .12 g/dL. Moreover, blood alcohol concentration is not necessarily related to a problem in controlling alcohol consumption.

Impaired driving with a BAC below .08 g/dL is not sanctioned beyond a license suspension. This is despite the fact that it is illegal, as it is in most other industrial countries, to drive with a BAC of .05 g/dL or above. Likewise, installation of ignition interlock devices (IID) is required when the defendant's BAC is .15 g/dL or above or between .09 g/dL and .14 g/dL if the defendant has a prior offense. But an IID is not required if the BAC is .05-.08 g/dL.

Currently only someone caught driving within three years of a previous conviction, about one-third of all such offenses in 2008 in SA, must be assessed for substance use disorders (SUD). Since "first time" drivers are likely to be assessed as having a SUD 40-50% of the time and multiple offenders 85-90%, one of my recommendations will be to assess all drivers who drive impaired. Currently, if they have a SUD, then they must lose their license for a minimum of six months and can only reinstate *"when the person no longer suffers from alcoholism."* If that were to be followed it would result in a lifetime suspension since one can never be cured of alcoholism.

Cultural differences are always fascinating and I enjoyed my work with the government in Adelaide. As you can see, Australia is ahead of us in some respects and behind in others.

DWI Court Presentation to Highlight ABA Annual Meeting

Interested in starting or improving a DWI Court based on the Drug Court model in your jurisdiction? At the American Bar Association's Annual Meeting in San Francisco in August, there will be a panel presentation concerning establishing and operating DWI Courts. The Panel is sponsored by the National Highway Traffic Safety Administration, and entitled "Driving Them To Sobriety: The Mechanics of Creating and Operating a DWI/Drug Court."

After an introduction by Missouri Chief Justice William Ray Price, the session will begin with an overview by a judge who runs one of the four nationally-recognized DWI/Drug Academy Courts. Peggy Hora, a Judicial Fellow of the National Association of Drug Court Professionals will provide a detailed ethical review of DWI/Drug Court operations. The discussion will then focus on team building.

The basics of building a DWI/Drug Court team will be presented by the American Bar Association/NHTSA Judicial Fellow who will be joined by a leading prosecutor and defense attorney to discuss the roles that each has in the operation of the DWI/Drug Court team. Finally, the program will turn to the important issue of how to fund your DWI/Drug Court in this era of scarce resources.

Please plan to attend this informative and interesting presentation in San Francisco on Saturday, August 7th, from 1 pm until 4 pm.

Judge Keith Rutledge Named Region 7 Judicial Outreach Liaison

David Keith Rutledge has been named Judicial Outreach Liaison for NHTSA Region 7 (representing Arkansas, Iowa, Kansas, Missouri, and Nebraska). Judge Rutledge served as Circuit Judge of the Sixteenth Judicial District in Arkansas and as Circuit Judge of the Fourth Division of the Sixteenth Judicial District. He is a graduate of the University of Arkansas at Fayetteville and its Law School.

Judge Rutledge will bring a unique perspective to the position having served as Arkansas State Drug Director for four years, a legislative assistant to the Governor, and a Chief Prosecuting Attorney.

While State Drug Director and Chair of the Arkansas Alcohol and Drug Abuse Coordinating Council Judge Rutledge was active in numerous outreach programs including establishment of a Drug Court Judge position on the Council, obtaining funding for a Juvenile Drug Court, and extensive work with the Department of Community Corrections in establishing drug courts across the state. He coordinated with the Criminal Justice Institute on establishing a Drug Endangered Children Program in Arkansas. He served as chair of the Advisory Committee, coordinating with various groups and organizations such as Mothers Against Drunk Driving, the Arkansas Highway Traffic Safety Agency, the Office of Alcohol and Drug Abuse Prevention, the Office of Arkansas Beverage Control and the Arkansas State Police on developing policies aimed at

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Judge Keith Rutledge

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underage drinking and driving and drug abuse.

Judge Rutledge received the Director's Award for Distinguished Service presented by John Walters, Director of White House Office of National Drug Control Policy, and was recognized for outstanding service as State Drug Director by the Arkansas Department of Health and Human Services, and the Office of Alcohol and Drug Abuse Prevention. He has been a frequent speaker to various organizations and has taught criminal justice at Remington College.

A National Helpline for Judges Helping Judges

Judges who need assistance because of alcoholism, substance abuse, addiction or mental health issues may reach other judges, who are in recovery or who have gone through treatment, by calling a helpline sponsored by the American Bar Association. Judges who have volunteered to be a personal resource to other judges throughout the US and Canada are uniquely positioned to share their experiences, strengths and hope.

Both judges in need of help and those interested in serving as a peer-to-peer volunteer should call 800-219-6474 during business hours Central time. All information is confidential and protected by statute.

The National Judges' Assistance Helpline is a service of the ABA Commission on Lawyer Assistance Programs Judicial Assistance Initiative and administered by the Texas Lawyers' Assistance Program.

Dates to Remember

June 20 – July 4, 2010

4th of July Impaired Driving Prevention Campaign

Aug 20 – Sept 4, 2010

Labor Day Impaired Driving Prevention Enforcement

Drunk Driving: Over the Limit. Under Arrest National Crackdown
August 20 – September 6, 2010
December 16 – January 3, 2011

Effective June 1, 2010, Judge G. Michael Witte resigned his position as Judicial Outreach Liaison for NHTSA Region 7. On June 17 he will become the Executive Secretary of the Indiana Supreme Court Disciplinary Commission, the chief prosecutor for lawyer misconduct for the State of Indiana.

We are grateful to Judge Witte for his contributions to the program and wish him the best in his new position.

CONTACT INFORMATION

To learn more about programs offered by NHTSA, please contact one of the following:

Hon. Karl Grube, Judicial Outreach Liaison, Region 4 (Alabama, Florida, Georgia, South Carolina, Tennessee): kgrube@jud6.org
Hon. David Keith Rutledge, Region 7 (Nebraska, Iowa, Kansas, Missouri, Arkansas): dkrutledge@sbcglobal.net
Hon. Frederic B. Rodgers, Judicial Outreach Liaison, Region 8(North Dakota, South Dakota, Wyoming, Colorado, Utah, Nevada): Frederic.rodgers@judicial.state.co.us
Hon. Peggy Hora, Judicial Outreach Liaison, Region 9 (Arizona, California, Pacific Territories): peggyhora@sbcglobal.net
Hon. Mike Padden, Judicial Outreach Liaison, Region 10 (Alaska, Idaho, Oregon, Washington, Montana): m_john_p@msn.com
Hon. John Priester, Judicial Fellow, venspriester@prodigy.net
Hon. Brian MacKenzie, Judicial Fellow, mackenzieb@oakgov.com

Highway to Justice Celebrates a Decade in Print

Hon. Karl Grube, Senior Judge, Judicial Outreach Liaison, Region 4, St. Petersburg, FL

Cartoon in First Edition of Highway to Justice

It was late 1999, I still had some hair and I would soon be running for my sixth term as a Florida County Court Judge. I had the privilege of serving as the third ever ABA/NHTSA Judicial Fellow and one of my assignments was to design and edit a newsletter to be inserted in the ABA's Judicial Division Record. I was also given the privilege of proposing a name for the new insert, although without any guarantee that it would be adopted by those "in authority" at NHTSA. My choice was "Highway to Justice." Little did I know that the title and masthead had to be vetted through NHTSA's Impaired Driving Division. Surprisingly, after some months of debate, and some lobbying by my supporters, this was the title chosen.

The first issue featured my front page introductory article entitled *"A New Newsletter for the New Millennium."* In it, I wrote the following:

A NEWSLETTER FOR PEOPLES' COURT JUDGES

This is a newsletter that is devoted to you, the judges, magistrates, and hearing officers who preside in and adjudicate motor vehicle and pedestrian related cases in our Nation's "Peoples' Courts." Peoples' Court judges are often neglected because some people feel that traffic courts and traffic related cases are really not that important or significant. What they forget is that for many citizens, hundreds of thousands of them annually, these "Peoples' Courts" are where many receive their first and sometimes their most lasting and only impression of what justice really means to them as individual human beings. For many the judges of these courts are the personification of that entire branch of government that we call the judiciary.

Some in authority feel that motor vehicle related cases are simple unsophisticated matters that present little in the way of challenging legal issues and have little effect on the lives of those who appear in court. We, the Peoples' Court judges, know differently. What we know is that motor vehicle cases are in fact among the most complex cases in terms of issues involving the admissibility of scientific evidence. The Doppler principle, Retrograde Extrapolation, Lateral Gaze Nystagmus, Infrared Spectrometry, Gas Chromatography, and Laser Speed Measurement technology. These are but a few of the recent scientific applications that present legal and evidentiary issues that we Peoples' Court judges must adjudicate on a daily basis.

Other articles in the first edition included: *"Getting Off the Bench and into the Community," "Safe Communities Coordinators Help Judges Make Community Outreach Programs Easy and Successful," "Judicial Leadership Conference Yields Outreach Programs and Opportunities for Special Court Judges," "A Court Technology Program Available for You," "A Visit to the NHTSA Homepage,* www.nhtsa.dot.gov," and *"Reflections of a Disappointed Victim Witness."* Not yet having developed the ability to cajole others into submitting material, all of the articles, except two, were written by me. Ten years ago there were no Judicial Outreach Liaisons. We now have six, as well as an Administrative Law Judicial Fellow, all of whom are frequent and eloquent contributors of articles.

One of the articles in the first issue that I remain proud of was a true account told to me by a victim witness who was subpoenaed to traffic court as a result of being rear-ended by a defendant cited for careless driving. When the officer failed to show, the case was summarily dismissed without any explanation and without the judge having inquired of the victim witness if he could present testimony that might have allowed the court to render a verdict. In my article, *"Reflections of a Disappointed Victim Witness,"* I questioned whether we as judges need to do a better job of explaining court procedures to those who appear, whether victims are also entitled to Due Process and whether it is appropriate to routinely dismiss crash-related cases when the citing officer fails to appear, but independent witnesses are present.

In my first experience as a newsletter editor, I learned that when you don't have enough articles or ones of sufficient length, fillers such as cartoons can save the day and take up what otherwise would be gaping white spaces. This is where my friend Judge Steven Rushing came to my rescue. He is an accomplished cartoonist with several books of law and court-related cartoons. His nationally syndicated comic strip and books are entitled "Legal Insanity" and continue to be best-sellers. Thanks to Steve who provided me with the two court-related cartoons that appear below and the left to use any of his cartoons in the first and in subsequent issues of the newsletter.

This year *Highway to Justice* celebrates its tenth anniversary. It continues to be a valuable tool to inform, educate, and even motivate judges and others who are connected with traffic safety and the criminal justice community (and even be cited in a State opinion). It was an honor to be able to launch volume one, number one of our newsletter. Thanks to the ABA's Judicial Division and NHTSA, as well as the many contributors and the succession of fine editors for making *Highway to Justice* possible year after year. Hopefully it will continue to serve those who work to serve justice, save lives and make our streets and highways safer.

Cartoon in First Edition of Highway to Justice

Solving the Ethical Problems in Problem-Solving Courts

Hon. Peggy Fulton Hora (Ret.), Judicial Outreach Liaison, Region 9, Walnut Creek, CA

Non-adversarial justice[1] , arguably one of the bases of problem-solving courts such as Driving While Intoxicated (DWI) Courts, raises unique concerns particularly in the area of professional ethics. Ethical rules are based upon an adversarial process and it is a challenge to see how they may fit into a treatment court. "The wording of State codes of judicial ethics may appear to discourage or place little value on problem-solving and court and community collaboration."[2] Is there an inherent conflict between a non-adversarial system in problem-solving courts and ethical duties of judges and lawyers?[3] The answer, ultimately, is "No" but there are pitfalls to avoid along the way.

Prosecutor/Defense Attorney Ethical Challenges

A prosecutor's duty is to protect and promote public safety. And, since we know that DWI Courts reduce repeated driving while impaired, nothing could protect the public more from the carnage on our highways caused by alcohol and other drugs. Defense counsel often express concern about the possibility that prosecutors will overcharge cases if there is a problem-solving court despite their duty not to do so under Model Rule 3.8. There is no proof that this actually happens and one study found that cases in California and Arizona were actually being undercharged so defendants would be eligible for drug court.[4] It appears that most prosecutors in treatment courts have found a new way to define a win.

Defense counsel often speak of their duty to "zealously represent" their client despite the fact that the standard was changed decades ago. "[R]easonable diligence and competence" is the wording found in ABA Model Rule 1.3 and "devotion and courage" in advocacy is found in ABA "Defense Function Guidelines." To competently represent a client in accordance with Model Rule 1.1 in a collaborative court the lawyer must familiarize herself with treatment modalities, procedures, bases for sanctions or termination, and other factors unique to such a court. The lawyer must also be facile with this information in order to help the client to exercise "informed consent" as is required by Model Rule 1.4. Moreover, Model Rule 2.1 can be read to anticipate interdisciplinary behavior by lawyers in a problem-solving court by stating "…[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."

The State Bar of Michigan has taken a unique position on defense counsel's involvement in practices such as restorative justice and problem-solving courts. "When there is a defender office, one function of the office will be to explore and advocate for programs that improve the system and reduce recidivism. The defense attorney is in a unique place to assist clients, communities and the system by becoming involved in the design, implementation and review of local programs suited to both repairing the harm and restoring the defendant to a productive, crime free life in society."

Judge's Ethical Challenges

Particular issues arise for judges in problem-solving courts. One such problem is the prohibition against *ex parte* communication found in Model Code Judicial Conduct, Canon 3B(7). A practice associated with collaborative courts is a staffing which takes place out of the presence of the defendant and before the court session. In the staffing both counsel, community corrections, treatment, case managers and others all discuss the progress of the participant. When this is the practice, there must be an explicit waiver of protections against *ex parte* communication on file signed by the defendant or the judge may be subject to discipline.[5]

Since the process of a treatment court provides the ability for the judge to become quite familiar with the participant and the problems he or she has, judges need to be concerned about their ability to remain impartial and avoid the appearance of bias as is required by Canon 3E(a).

Most ethical concerns about treatment courts were set aside when the Conference of Chief Justices and the Conference of State Court Administrators voted unanimously to support problem-solving courts in 2000. One caveat, however, arises in domestic violence courts that are still adversarial and where traditional ethical rules apply given the focus on the victim and offender accountability.[6]

For purposes of judicial immunity, drug court and other problem-solving courts are the same as traditional courts.[7] The one thing that the drug court team can be sued for is violating a defendant's First Amendment rights regarding religion. Multiple courts have held that requiring Alcoholic Anonymous meetings violates the establishment clause and that this principle is so well recognized that there is no immunity from civil rights lawsuits.[8]

As with all new practices, problem-solving courts have brought a new lens with which to view ethical considerations. It is clear that ethical rules may apply differently in problem-solving courts but none are completely abrogated.

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[1]See, e.g., Drug Court Key Component #2: "Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights." "Defining Drug Courts: The Key Components," Bureau of Justice Assistance (1977) http://www.ojp.usdoj.gov/BJA/grant/DrugCourts/DefiningDC.pdf

[2]Rottman, David and Pam Casey, "Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts," National Institute of Justice Journal (1999)

[3]Simon, William H., *Criminal Defenders and Community Justice: The Drug Court Example*, 40 AM CRIM. L. REV. 1595, 1596 (2003)

[4]Riley, J. et al., "Just Cause or Just Because? Prosecution and Plea-Bargaining Resulting in Prison Sentences on Low-Level Drug Charges in California and Arizona," (2005)

[5]See, e.g., NY Opinion 04-88: March 10, 2005, Advisory Committee on Judicial Ethics, NY State Unified Court System

[6]See, e.g., NY Ethics Advisory Opinion 08-191 holding a judge may not receive an award from the domestic violence council because it would violate the appearance of impropriety

[7]See, e.g., Ray, Phil, "State Office: Man Can't Sue Drug Court Judge," *Altoona Mirror* (Ap. 7, 2009)

[8]The quasi immunity provided government officials and workers in the field are extinguished if they violate an established constitutional right. Forcing prisoners, parolees and defendants into AA and NA programs is a violation of an established constitutional right. Notice is assumed. See, e.g. Hanas v. Inner City Christian Outreach, Inc. 542 F.Supp.2d 683 (E.D. Mich. 2008) finding liability against a drug court case manager. A drug court director and community services board were not granted limited immunity in Thorne v. Hale, 2009 U.S. Dist. LEXIS 25938 (E.D. Va. March 26, 2009)