It's a pleasure to present the August edition of our newsletter to friends and graduates of the Remington Center. As always, this edition is packed with news and reflections on our many clinical activities.

The “news” category includes a brief description of our 2008 awards to outstanding Remington Center students, a summary of recent faculty changes at the Center, and a short article about the Wisconsin Innocence Project’s latest success.

In the “reflections” category, we include thoughtful essays by students in the Family Law Project and the Wisconsin Innocence Project. We also reprint, by permission, an excerpt from a Wisconsin Law Journal profile of students in LAIP and the Prosecution Project.

We close with an informative—perhaps even provocative—essay by Clinical Associate Professor Ben Kempinen, on the ethical obligations of attorneys representing defendants in counties with treatment courts.

We hope that you enjoy the mixture of information, insight, and opinion in this edition of the Remington Center's newsletter. Remember, we'd love to hear from you! If you have responses, comments, or essays of your own, please email Meredith Ross at mjross1@wisc.edu. With your permission, we'd be happy to include them in the next edition.
UW law Rated #2 Nationwide in Clinical Education

Noting that “clinical education is the future of the law school profession,” the September 2008 edition of The National Jurist has rated the UW Law School second in the nation in providing hands-on lawyering opportunities for its students. In developing its ratings, the magazine divided the number of clinical opportunities available to students by the number of full-time students. UW came in right after Yale Law School, #1 on the list, tying for second with Drake University Law School. With an annual enrollment of 115 “in-house” clinical students and 45 externs, the Remington Center is obviously a very large part of this calculus.

2008 Outstanding Student Awards

During the Law School’s 2008 Spring Honors ceremony, awards were presented to two outstanding students in the Remington Center’s clinical projects. The first award was established by the family of the late attorney Melvin Friedman. At the request of the family, the Melvin Friedman Memorial Scholarship honors a student who has done outstanding work in the Wisconsin Innocence Project. Based on the recommendation of clinical faculty members Keith Findley, John Pray, and Byron Lichstein, the 2008 Melvin Friedman Memorial Scholarship was presented to Andy Becher. Andy showed extraordinary dedication to the Innocence Project, working incredibly long hours to master the factual and legal complexities of several enormous cases. He submitted high-quality drafts of postconviction motions, demonstrating excellent clarity and attention to detail; and, at the same time, provided extensive and insightful feedback on written drafts submitted by his colleagues.

The second award is the Catherine Manning Memorial Award. Catherine Manning was a clinical instructor in LAIP during 1988-89, who was tragically killed in a car crash. In her memory, the program established the Catherine Manning Award, which honors one or two students each year who have done outstanding work in a prison project, other than the Wisconsin Innocence Project. For 2008, the Remington Center’s clinical faculty unanimously agreed that Katie Holtz exemplified the hard work, empathy, and dedication to clients that we’ve come to associate with the Manning Award. Katie was enrolled in the Criminal Appeals Project in 2006-07, and worked as a Project Assistant “screening interviewer” for all the prison projects during 2007-08. During these two years, Katie demonstrated great skill in legal analysis, writing, oral advocacy, and professionalism. More significantly, she demonstrated tremendous energy, creativity, and commitment in assisting Remington Center clients.

For the Remington Center’s clinical faculty, both of these awards carry a great deal of meaning. We congratulate Andy and Katie on these honors, and appreciate their devotion to the program and to their clients.

Faculty Changes at the Remington Center

Change is a constant at the Remington Center. In the past few months, we have seen the departure of three clinical faculty members, who leave us for other opportunities. At the same time, we welcome three new clinicians to the Remington Center.

Clinical Professor Steve Meili has accepted a visiting professorship at the University of Minnesota Law School. For the past fifteen years, Steve has ably directed the Consumer Law Clinic, now incorporated into the Economic Justice Institute. After completing a two-year appointment in the LAIP project, Clinical Instructor William Rosales has moved on to pursue a Ph.D. in Sociology at UCLA. Finally, Clinical Assistant Professor William Carlos Weeden resigned in May. Carlos taught in the former Legal Defense Program from 1998-2007, and in the Economic Justice Institute’s Neighborhood Law Project from 2007-2008. Carlos will serve as the Deputy Chief Administrator of the Independent Police Review Authority in his hometown of Chicago. We send the warmest wishes to all of our departing faculty mem-

...
bers as they move on to new endeavors.

We are also pleased to introduce our new clinicians. The Economic Justice Institute, the home to the Remington Center’s civil legal clinics, is proud to announce the addition of two new Clinical Instructors, Sarah Orr and Mitch, who joined EJI in May. They are both undoubtedly competent, having participated as students in the very same clinical projects that they now lead.

Sarah is the new Clinical Instructor for the Consumer Law Clinic. A 1993 UW Law graduate, Sarah comes to us from the Coalition of Wisconsin Aging Groups (CWAG), where she had been the Managing Attorney for the Legal Services Department since 2007. Prior to that, Sarah worked as a supervising attorney for CWAG’s Benefit Specialist Program and as a staff attorney.

Sarah brings a wealth of knowledge and experience to her position. She was a Board member for the Consumer Clinic and a former clinical student of Steve Meili, the Clinic’s previous director. Thus, she is very familiar with the types of cases and demands of the project. In her previous position at CWAG, Sarah spent several years training and supervising new attorneys as well as provid-

ing guidance and leadership to both student interns and advocates. She has experience in addressing consumer issues that directly affect the elderly and is eager to continue broadening her experience in the areas addressed by the Consumer Clinic. In fact, in the short time that Sarah has been with the Clinic, she has managed the settlement of a class action against an internet payday lender. She guided the CLC students in negotiations and preparation of the settlement agreement with the lender – a great result for many Wisconsin consumers who become trapped in destructive loan cycles with payday lenders.

Mitch, the new Clinical Instructor for the Neighborhood Law Project, is another graduate of the Consumer Law Clinic as well as LAIP and the Criminal Appeals Project. After graduating from UW Law in 2003, Mitch was one of the founders of Community Justice, Inc., a non-profit charitable law firm in Madison that provides direct legal services to low-income individuals. His practice involved many of the same issues that confront the students in the Neighborhood Law Project, a community-based poverty law clinic that assists low income people who have landlord/tenant disputes or wage claims, or who are facing denial or termination of their government benefits. Mitch is passionate about public interest law and education. He already has become involved as a Board member of the State Bar’s Public Interest Law Section and has organized successful continuing legal education programs at the State Bar Convention as well as training other attorneys in the areas of small claims and housing law.

Finally, Katie Holtz joined us in May as a Clinical Instructor in the LAIP project. A 2008 UW Law graduate, Katie has extensive experience in public service and clinical education. Katie earned a degree in Marketing and Government from the College of William and Mary in 2001, and later worked in political and non-profit fundraising in Washington and Milwaukee. As a law student, Katie interned in the Criminal Appeals Project, the Family Court Assistance Project’s Restraining Order Clinic, the Legal Aid Society of Milwaukee, ABC for Health, and the State Public Defender’s Office in Milwaukee. As a 3L, Katie worked as a “screening interviewer” for the Remington Center, interviewing inmates to determine whether their requests should be referred to our projects for student assistance. As noted above, Katie was the recipient of the 2008 Catherine Manning Memorial Award as an outstanding student in our prison-based clinical projects. With this background, Katie has been able to jump into the role of a supervising attorney in LAIP.

We welcome the energy and commitment of these new clinicians. In the short time since joining us, they have already made a positive mark on their projects.

Charges Dismissed against Wisconsin Innocence Project Client

Audrey Edmunds is a client of the Remington Center’s Wisconsin Innocence Project who was convicted in 1996 of killing an infant in her care. On July 11, 2006, Ms. Edmunds won complete freedom when the state dismissed all charges against her.

Ms. Edmunds had been convicted of reckless homicide and served 11 years in prison, but steadfastly maintained her innocence, denying that she had shaken seven-month-old Natalie Beard. In January of 2008, the Wisconsin Innocence Project won her a new trial by presenting new medical evi-
dence that had emerged in the years since her first trial. In granting Ms. Edmunds a new trial, the Wisconsin Court of Appeals cited “significant controversy” in the medical field about shaken baby syndrome (the opinion is available on the Court of Appeals’ web site at http://wcca.wicourts.gov/index.xsl).

After the Wisconsin Innocence Project succeeded in winning a new trial for Ms. Edmunds, it turned the case over to new trial counsel, Stephen Hurley and Dean Strang, who represented her at the July 11th hearing, at which all charges were dismissed.

Several classes of Wisconsin Innocence Project students worked with Professor Keith Findley on the case, including Anwar Ragep, Laura Bayard, Steve Grunder, Nicole Moody, Molly Gena, Karl Hayes, Shelley Fite, Ryan Worrell, Kelda Roys, Cara Coburn, and Jim Rhinerson.

Redrawing Boundaries in the Family Law Project

By Ashley M. Senary
Second Year Law Student

I spent the better part of my summer at the Remington Center’s Family Law Project (FLP) asking people how they feel. After squeezing too many nuggets of information concerning easements into my laptop as a 1L, and unabashedly carrying a pocket Constitution in my book bag, my first legal job didn’t land me in the courthouse. It landed me in houses of a very different sort, ones without copies of the Constitution, and with people who have little knowledge of their rights, and occasionally without working telephones—the houses of my clients’ mothers, fathers, sisters, friends, ex-wives, children, and children’s mothers.

My fellow FLP students and I have discussed on many occasions how our tasks at the Remington Center diverge sharply from those of our other student colleagues in LAIP, the Oxford Project, and the Wisconsin Innocence Project. In FLP, we are often the very embodiment of “counselor.” “Facilitators” was the word another FLP student generated for us, and it’s stuck.

The lessons taught in law school did not prepare us for the often deeply personal family law matters we unravel, tugging on the threads of what it means to be human. Although we solve problems that have to do with boundaries, encumbrances and lines, they do not involve real estate boundaries, title encumbrances, or lot lines. The problems we work on arise from the boundaries and encumbrances created by parents’ isolation behind prison walls and the effects of their pre-incarceration behaviors on their families. They are made more difficult by the lines drawn in the sand by hurt and angry people at times in the past.

Our clients are concerned about the well-being of their children, and often desperately wish to see them. They hope to re-establish relationships with those they hurt, alienated, or angered before they were incarcerated. And more often than not, they simply want us to help them inject balance and stability into their own, or their children’s, lives.

At a time in my law school career when I had just dressed myself in adversarial armor, my “opposing party,” for lack of a better term, was often someone with whom my client has had a deep and personal relationship. Sometimes my clients were still angry and bitter, warning me of their ex’s conniving ways or particularly difficult personality. As the summer went on, it became clear that my clients’ characterizations often came from a very limited perspective, and I could sometimes play an important role in altering that perspective.

One experience in particular sticks out as an example of both facilitation and perspective. Our client had been looking for the mother of a child she claimed to be his, and for whom he was accumulating quite a support debt. He wondered if the 15-year-old boy he had never seen was really his child. After three long years of detective work by former FLP students, I found myself sitting at my desk with the mother’s phone number. I dialed (slowly). She answered. They don’t have a class for this, I thought. I explained who I was and for whom I was making the call. She quickly became hostile, and I became tongue-tied. Three years we’ve been looking for her, I thought, and I’m
going to destroy it all, right here in my cubicle. And so I reverted to the lawyer I secretly hoped I would always be, but wasn’t sure would cut it in “the real world.” One who was extremely kind, asked for her opinion, and listened empathetically and intently.

The tense call was morphing into a long, pleasant conversation. The mother opened up and told me that she had not seen or heard from my client in 15 years, and that her son believes that her husband is his father. As I thought about what this phone call might mean for her and her son, I asked her: “What would you like to see happen? Though I can’t give you legal advice, I would really like to know how you feel about this. It will help me.” And she poured 15 years of anger, hope and questions into a first-year law student. She ended by asking how a person like my client got a person like me to help him.

I passed along to my client the offer from his son’s mother to allow him to begin writing to their son, and to “start being a father.” Next, the student lawyer in me asked him if he wanted to continue pursuing efforts to reopen the paternity judgment, or perhaps he would like to seek a court order for visits or to reduce his child support. Something to file in court, I thought.

I should be able to file something for him. He declined, assuring me that we had done everything he asked for, and he was so thankful for our help.

“How do you feel?” I asked him.

“Great.”

Without a single motion drafted, file-stamped or ruled on.

Surprisingly, I felt great, too.

My Experience in the Wisconsin Innocence Project

By Crystal Banse
Second Year Law Student

I was flattered when I was accepted into the Wisconsin Innocence Project because it is something I read about in the news long before I decided to go to law school, and to be a part of it is a little bit surreal. Even so, I was a bit hesitant about taking the clinical position because I do not plan to pursue a career in criminal law. Still, litigating cases based on claims of innocence sounded fascinating, and after I talked to some current and former students, including [former Innocence Project client and student] Chris Ochoa, my mind was made up.

I have learned that effective lawyers are good investigators, listeners, mediators, and advocates. And I have experienced firsthand the preparation, review, research, and brainstorming that are part of the day-to-day routine in litigation.

The supervising attorneys are brilliant and quirky, and they do a phenomenal job of teaching while actually practicing law. I have learned that effective lawyers are good investigators, listeners, mediators, and advocates. And I have experienced firsthand the preparation, review, research, and brainstorming that are part of the day-to-day routine in litigation.
ing potential clients and witnesses that same week. Initially, it was intimidating, but I quickly became more confident in my interviewing and legal writing skills. I found myself learning how to be more objective and to ask more questions.

Participating in the Wisconsin Innocence Project has taught me a great deal about how the criminal justice system operates and highlighted its shortcomings. Learning about tunnel vision, false confessions eyewitness misidentification, and ineffective assistance of counsel while dealing with these issues in real cases, has put it all in perspective. I remain fundamentally perplexed by the reality that it is so much more difficult to get someone exonerated than it is to convict them in the first place. My experience has shown me that there are be some cases where our clients may very well be innocent, but there is not enough evidence to prove their claims. In turn, there are also some cases where we will never know what happened, or even if our client is telling the truth.

Have also learned a lot about myself this summer. I feel as though I have finally found my professional niche. My work is engaging and rewarding, and I looked forward to coming to work every day. Furthermore, the experience has instilled in me a passion for litigation. I never thought I would be one who would want to argue in court, but I am inspired after this summer. From the colorful characters we meet in our quests for justice to the cases that are fishing expeditions at best, I am continually engaged and challenged. Participating in the Wisconsin Innocence Project has truly been an amazing opportunity, and I am so glad to be part of it.

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### The Power of Rationalization

**By Luca Fagundes**  
Second Year Law Student  
_Somewhere Outside of Waupun_

These directions do not seem right. Adam is not the greatest co-pilots after all we got lost just leaving Madison today. But I digress. We are in the MIDDLE of NOWHERE! Mapquest had to route us around the flooding on I-39, so I hope this route will get us there. We are headed to Dodge Correctional Institution. I am meeting with a client for the first time. I had the “no-merit” letter written two weeks ago, but I couldn’t get myself to mail it before meeting with him. It is an amazing feeling of power, one which I do not enjoy, to know that I alone have the ability to close his file forever. So this trip may prove futile, but I least I’ll be able to say I was thorough in my analysis of his case.

Every time I pull into one of these small, sleepy farm towns I feel as if I’m in a John Grisham novel. The large, rusty pickup trucks at the Main Street, and the tiny diner we decide “that’s where we’re having lunch!” There’s something comforting about it all.

Standard procedure at Waupun. Empty pockets into the locker, pass through metal detector, wait for an escort. The more I do these visits, the easier they become. But today we have been double-booked into one interview room. When the guard asks who I’m meeting, I answer, to which she says “oh, he’s fine, I’m putting you guys upstairs then.” I am in an administrator’s office, with no guard in sight, alone in a room with the inmate. Is this one of those situations where your mind says “hey, something’s not right here” and you react? What can I do here? Well, if the guard is ok with it, it must be fine. And it is.

My client is a young, jovial, and exceptionally bright guy who seemed to be “ok” behind bars. He is so glad to see me, and hangs on every word I say during our one hour together. He is so glad to see me, and hangs on every word I say during our one hour together. I think that communication is the single most important component of competent and responsible legal representation. My client has tons of questions, because apparently his previous attorneys failed to simply talk to him about his case, his ideas, and his defense strategies. There’s a reason that case titles read “State v. CLIENT.”

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Madison

It’s been six weeks and the “screener” has not mailed us any documents. It’s crazy to think that our best efforts could land this guy in a worse position than he’s in now. He seems to be satisfied with his situation—after all the deal he got is amazing—so it won’t too difficult to close this case.

As for the first client, I’ll keep working on his case. I have tried repeatedly to contact the witness who may recant. The next step will be to try and meet her in person. But it doesn’t seem fair that the client sits in prison and I could be driving right now to try and meet this witness, instead of sitting here writing this essay. Sometimes the agony is overwhelming, and other times I forget about him for a few days.

Lying in bed, trying to fall asleep, that’s when sometimes it’s really hard to stop thinking about this case. I believe in this client wholeheartedly. But then again, is it possible that he did it and is hoping that I’ll help a guilty man go free? Or, even if he didn’t commit this crime, maybe by some Karma-like force, he’s serving time for crimes he was never caught for? I suppose either is possible. But that sounds like a rationalization for inaction. All I can do is just keep plugging away and hope that I can find the truth about his case. After all, isn’t truth what the justice system is supposed to be all about?

Three Remington Center Students Featured in Wisconsin Law Journal

Editor’s note: The July 28, 2008 edition of the Wisconsin Law Journal included a feature article describing the learning experiences of law students in a variety of summer internships. Three of the students interviewed were involved in Remington Center summer internship projects: LAIP student San Juanita Lopez and Gary P. Hayes Police-Prosecution interns Chad Wozniak and Ryan Farrell. Below is an excerpt from the article, reprinted by permission of the Wisconsin Law Journal. The full article, including photos, is available online at: http://www.wislawjournal.com/article.cfm/2008/07/28/The-Interns-of-Summer

From “The Interns of Summer,” by Jane Pribel

July 28, 2008 Wisconsin Law Journal

Law student spends her summer with prisoners

Empathy. It’s a quality that law student San Juanita Lopez says can’t be taught in a classroom, and one that she hopes will make her a better lawyer.
in the future. In her pre-law school days, Lopez worked with marginalized groups, such as the homeless and at-risk teens. That was an excellent experience; yet, it didn’t fully prepare her for what she’s doing this summer, after completing her first year at the University of Wisconsin Law School. She is working at several state prisons in southeastern Wisconsin for the Legal Assistance to Institutionalized Persons Project through the UW’s Frank J. Remington Center. The assignment pays a stipend of $2,500 for the summer, plus coursework credit. But the monetary compensation pales in comparison to what she’s acquired, and the opportunity “to do something meaningful.” “I recently had to write a reflective essay about what I’ve learned so far,” she says. “What I realized is, I’ve had a real shift, from that first prison visit, when I was really anxious and hypersensitive about the possibility of doing all the wrong things, to now, when I understand that there might be more than one way to accomplish a goal.”

“‘I’ve had a real shift, from that first prison visit, when I was really anxious and hypersensitive about the possibility of doing all the wrong things, to now, when I understand that there might be more than one way to accomplish a goal.’”

“I’m getting more comfortable with the idea that I won’t have all the answers, but I can probably figure out how to find the answers.” Under the supervision of Prof. Mary Prosser, Lopez has helped inmates with a wide variety of legal issues, such as drafting sentence modification motions, advising on the laws of deportation and legal re-entry into the U.S., and regaining a driver’s license to allow an inmate ready for release to be able to drive himself to a job, so he can support himself and his child. “My clients have been extremely appreciative for my help and respectful. For the most part, they have realistic expectations — they don’t get angry if I have to give bad news. And they’re remarkably hopeful,” she says.

“It’s really changed my thinking, and how I view inmates. I think I better understand them now. I frequently see a lot of tragedy in them. They’re not bad people, but they’ve done bad things and made poor choices. For a lot of them, other factors, beyond their control, went into that, like a lack of parental supervision and exposure to drugs and alcohol at an early age.

“I have a client who’s just 30 years old. It struck me when I heard that, because I’m 29 — just about the same age. He’s been in prison since he was 14. He has been imprisoned longer than he’s been in the free world. It’s made me think about things like, if he ever had a chance given the environment he grew up in, and why some people in similar circumstances overcome them and others don’t.”

Long-term, the experience has helped solidify her interest in a career in government service, post-law school.

In the short-term, the experience has shown her how legal research isn’t just a mental exercise, but it can really make a difference in someone’s life. “I’m learning how to do things, not just about things.”

Summer project builds homeless court

Once an individual becomes known among the regulars of Madison’s State Street as homeless, he becomes a target. When he walks that approximate six-block stretch, it’s likely that he’ll be approached at least two or three times by people trying to sell him alcohol or drugs. “They’re mostly men. There’s incredible pressure on them to consume cheap drugs and booze. And, it’s really not a ‘community,’ in the sense that they don’t tend to look out for each other,” says Ryan Farrell. Farrell can accurately describe the homeless experience because he has talked to many homeless people. He’s dedicated a good portion of this year learning about it, and devising a response from the local legal system on how to help that population, as well as enhance public safety. Farrell and Chad Wozniak, a fellow third-year student at the University of Wisconsin Law School, are spending their summer drafting a proposal for the creation of a special court to
serve Madison’s homeless and transient population. They are doing this through the Gary P. Hayes Police-Prosecution Project of the UW’s Frank J. Remington Center. Homeless courts have been successfully implemented elsewhere, Farrell explains. The idea originated in San Diego, and has since been replicated in Salt Lake City, Sacramento, Phoenix, and — notably for Madison because there are many similarities — Ann Arbor, Mich., where it’s called the “Street Outreach Court.” The theory is fairly straightforward. Under the status quo, many homeless and transient individuals tend to have lengthy records of mostly municipal ordinances, where they’ve been assessed fines that they have no means to pay. Accordingly, they’re jailed and released, without treatment, so there’s ongoing accountability.

To help in drafting the specifics, Farrell and Wozniak have gone on countless walk-alongs with the capitol, university and Madison police, and they have spent many hours getting to know the homeless, who tend to congregate on or near State Street. They’ve also talked to many prosecutors, social workers, and just about anyone who has a stake in the problem, as well as doing research on the other cities’ courts, to learn how they work, and the best practices that emerged from them.

They are completing their proposal and hope to generate some interest from the Dane County judiciary as to how it can be put in place. Perhaps the biggest hurdle they’ll face, they say, is finding the monetary resources for treatment for those who would opt for the program. In the short-term, they say, inpatient treatment is expensive — but it can produce long-term results that ultimately save taxpayer dollars, compared to the costs of future arrests and prosecutions.

Farrell says the summer experience has been an incredibly invaluable supplement to his legal education in the classroom. “I’m getting a more full perspective on what happens outside the courtroom. I’ve seen the frustrations that police on the beat feel, and I’ve seen how full the jails are. I’ve come to see how different actors — law enforcement, politicians and judges — have competing ideas, visions and pressures, in how they approach solving problems.

“And, I’ve come to see that there are always questions or criticisms from the various constituencies. Frankly, that’s sometimes a little frustrating. But it’s to be expected when trying to tackle an issue of this magnitude.”

The two have received modest stipends of $2,800 from the law school for their work. The goal for the summer wasn’t to make a lot of money, but rather, to make a difference.

And, if the proposal isn’t adopted by summer’s end, they’ll keep working on it into their last year of law school. Farrell isn’t sure what he’ll be doing a year from now, but thinks he’ll probably be playing some role in the criminal justice system. He also hopes that, should the proposal become a reality, he’ll become a resource to others looking to create similar courts.
Treatment Courts and Client Representation

By Ben Kempinen
Clinical Associate Professor

In the December 2006 issue of this newsletter, I described promising new collaborative strategies in Wisconsin’s criminal justice system. Among the fastest growing of these strategies is the problem-solving or treatment court. There are now at least twenty such courts in Wisconsin that are either operational or in the planning stage. Their emergence holds promise for the treatment of offenders with serious substance abuse problems. At the same time, their design and structure represent an extraordinary departure from a traditional adversary approach to criminal justice, and invite consideration of the appropriate roles of the trial judge, prosecutor, and defense counsel in this new environment.

This is the first of two essays on the ethical implications of treatment court for judges, prosecutors, and defense attorneys. The defense attorney, in particular, may have several different roles, including representation of individual clients in communities with treatment courts, involvement in the planning and evaluation of treatment courts, and membership on the treatment court team.

Treatment courts are designed for the offender who admits guilty, has a serious substance abuse problem, and wants to do something about it. They are not for defendants who claim innocence or want a traditional defense.

On the surface, treatment courts may not seem that different from traditional trial-level criminal courts. However, their design and procedures are dramatically different. A judge-led treatment team develops a plan for each participant and meets regularly to monitor performance. A participant must comply with all treatment requirements and appear regularly, often weekly, in court--a drastic departure from the typical case where a matter is disposed of in a single brief hearing.

Personal accountability is a core feature of treatment courts. Rules are clearly defined, with successes rewarded and violations sanctioned. Successful completion of the treatment program can result in dismissal of charges or a lesser penalty--and, perhaps most significantly, the chance for a drug- or alcohol-free life. Failure to comply with program requirements can lead to termination from the program and reinstatement of the case in criminal court.

Defense Perspectives on Treatment Courts

Wisconsin defense attorneys’ reactions to treatment courts parallel those of defense counsel throughout the country. Many know something about the model, but few have an in-depth knowledge of the theory, procedures, and practices underlying this approach to substance abuse. Most are encouraged by the clients’ chance for treatment but are wary, concerned over the lack of traditional due process protections and fearful that participation could be disastrous for a client lacking in discipline and maturity.

Other defense attorneys seem predisposed against treatment courts as a matter of principle. They point to the wholesale waiver of procedural rights and the lost opportunity to challenge the charges, and believe that these are improvidently discarded in favor of what they view as an unproven product. A few defense attorneys are only generally aware of how treatment courts function and may view them simply as another path to seek concessions from the prosecutor. They may be willing to advocate for a referral without a clear understanding of what the program requires, or whether the client...
has a realistic chance of success.

The Role of Defense Counsel Representing Clients in Communities with Treatment Courts

The advent of treatment courts changes the details, but not the structure, of the responsibilities defense counsel owes the client. Unchanged are the responsibilities to protect client confidences, SCR Rule 20:1.6; guide the client to an informed decision on how to proceed, SCR Rules 20:1.2 and 20:1.4; and vigorously and competently pursue the client’s objectives until the matter is resolved, SCR Rules 20:1.1 and 20:1.3. In my experience, three aspects of representation merit special attention in the treatment court context: explaining the treatment option; advocating for admission into the program; and determining how to best support the client during participation in the program.

Client Autonomy and Adequate Consultation

In the spirited debate over the wisdom of the treatment court model, one important issue is often overlooked: what does the client want to do?

A corollary is the lawyer’s responsibility to ensure that the client’s choice is informed. SCR Rule 20:1.0(b). All defense attorneys and many criminal defendants have had prior experience with traditional case resolution patterns, and consultation with the experienced client in such a situation may simply involve a review of information already known. But the calculus of adequate consultation changes when the option of treatment court is introduced, because it is both new and dramatically different. My sense is that the most Wisconsin defense attorneys realize this and appropriately view consultation as critical when considering the treatment court option.

From my observations and discussions with experienced Wisconsin defense attorneys, I have developed a sense of “best practices” in consultation this context, including: (1) a thorough assessment of the strength of the state’s case and the possibility of success in contesting the charges; (2) a candid and informed discussion about the client’s substance abuse problem and commitment to confront it; and (3) an explanation of precisely what the treatment court experience would involve on a day-to-day basis, including program requirements, available concessions, and the consequences of failure.

One concern reflected in treatment court literature is whether pressure to promptly enroll in treatment may interfere with defense counsel’s ability to thoroughly investigate the case prior to the client’s decision on treatment court. This would be particularly troublesome if participation required conviction of a serious criminal offense. This time pressure was not obvious in the Wisconsin communities I visited and observed. More often than not, demand for treatment court placements far exceeded resources, resulting in delays in referrals, screening, and admissions. This gave defense counsel adequate time to investigate the case and consult with the client. If the problem of time pressure were to be more prevalent, then accommodations for expedited discovery or conditional admission decisions would become necessary.

Counsel must also understand the client’s clinical needs. Defense attorneys are generally aware when a client uses drugs or drinks to excess. However, my sense is that attorneys rarely delve deeply into this aspect of their client’s situation, either because they do not want to be intrusive or because they don’t view intoxication as a legal defense or otherwise relevant to the charges.

When treatment court is an option, more information is necessary. Ideally, defense counsel would be knowledgeable about addictive behaviors and the client’s suitability for treatment. Perhaps a more realistic approach would be to seek a professional assessment of the client. This could inform counsel of the nature of the client’s
dependency and motivation to change, as well as the viability of available resources. This information would improve the dialogue with the client and obviate the need to rely solely on the opinions of treatment court screeners.

The client must also understand the dramatic differences between the treatment court model and traditional case-processing procedures, including: (1) admission criteria; (2) available concessions; (3) the procedural rights and possible defenses waived as a condition of involvement; (4) the waiver of confidentiality protections; (5) the likely conditions of involvement and daily scrutiny by treatment providers; (6) the necessity of repeated court appearances and an ongoing dialogue with the treatment court judge; (7) awareness that the team would discuss the client’s case file in detail during their weekly meetings; (8) what, if any, role defense counsel would have at any role at all during treatment; and (9) the consequences of violating program rules. Only with a complete understanding of all these aspects of treatment court can the client’s choice to participate be truly informed.

Of course, such a discussion presupposes that counsel knows how the local treatment court functions. General information about treatment courts is available in all communities. Policy and procedures manuals and periodic reports are a helpful source of information. Treatment team members are eager to share their views about the program. Treatment court hearings are open to the public and the treatment teams are generally amenable to allowing visitors to observe team conferences. Defense counsel would do well to take advantage of all of these sources of information and to advise the client to do so as well.

Advocating for Admission into a Treatment Court Program

If the client chooses treatment, counsel must be able to effectively advocate for admission to the program. This requires knowledge of the admission criteria and process by which admission decisions are made. From my observations, these are more varied and complicated than one might imagine. Each county treatment program has a different local target population and admissions criteria. Moreover, individual admission decisions typically have two parts: a referral (usually from the district attorney) and a screening to determine suitability for treatment. In most counties, there is substantial flexibility in both. As a matter of policy, one might prefer greater clarity and consistency; however, this flexibility provides opportunities for the advocate who is aware of the unwritten nuances that define how decisions are made and can therefore effectively prepare the client for an intake interview.

After acceptance into the program, all participants must sign a written contract incorporating treatment and conduct requirements. Counsel would do well to review the contract, seek modifications if appropriate and possible, and make sure the client understands the contract entails. Some counties anticipate the involvement of defense counsel, and included a signature line for defense counsel. Others do not. There are also wide variations in the information included in the contracts, some thoroughly describing all aspects of the program and others providing a much more abbreviated document.

If the treatment court is a pre-conviction model, proceedings are suspended at the point of entry into treatment. With a post-conviction model, the participant is required to enter a plea of guilty and be sentenced, typically to probation, with the treatment plan incorporated as a condition of supervision.

The Role of Defense Counsel after Admission into the Treatment Program

Once a client is admitted into treatment, almost all similarities with traditional procedures cease. It is during this period – when the client is an active participant – that effective representation is still largely undefined.

Literature from other jurisdictions suggests there is a continuing defense presence throughout the course of the program. Certainly, as long as a serious criminal case remains open and unresolved and the client is subject to difficult and demanding conditions, there would seem to be value in a continuing defense presence.

Nonetheless, this was not the model I observed in Wisconsin.

I observed pre-hearing team conferences in five jurisdictions...
and hundreds of participant appearances from the summer of 2006 to the present. Not once did I see a defense attorney in a team conference or hearing. While different teams had differing views on whether defense counsel could or should attend team conferences, there was nothing to prevent counsel from attending their client’s hearings. It is possible that some attorneys continued to assist and advise their clients outside of the actual hearings. However, there was no visible defense involvement during the time the participant was actively engaged in treatment court.

It seems that part of the explanation is uncertainty about what exactly defense counsel’s role might be during treatment, either in or out of court. Given the manner in which team conferences and treatment court hearings were conducted, there was little room for an active adversarial presence. Still, an occasional appearance in court, along with availability, would keep counsel informed about the treatment court in general and the client’s progress (or lack of progress) in particular. It would also give the client a confidential source of advice and support through a difficult period. To be sure, defining the appropriate role of counsel during the treatment court program remains a work in progress. Nonetheless, the complete absence of counsel seems undesirable and inconsistent with notions of competent and vigorous advocacy.

Removal from the Program for Violation of the Rules

All treatment courts I observed had procedures to remove participants for failure to follow program rules. Most infractions resulted in immediate and temporary sanctions – a night in jail, increased screening, or more frequent reporting requirements. Clearly the team’s focus was to help the participant succeed rather than removal from the program. However, inevitably some participants do not comply with the program requirements and are terminated.

Termination was handled differently in different counties. In some, a due process hearing was held in open court with representation by counsel. In others, termination was summarily ordered, with few if any due process protections. If a participant was terminated, the case was returned to the criminal court in which it originated at the point at which proceedings were suspended for entry into treatment.

The involvement of counsel at the termination stage could be valuable to the client, particularly if counsel had a continuous presence and was fully informed about the client’s program experience. Counsel could work to ensure fair procedures in connection with the termination decision; challenge the factual basis for termination; seek to negotiate a less severe sanction; or help the client most effectively state his or her case in ways the client could not do alone.

Successful Completion of the Program

A graduation ceremony of sorts was held when a participant successfully completed treatment. I observed a handful of these hearings. Typically the participant was praised for his or her hard work, awarded a certificate of completion, and applauded by all other participants present for the day’s hearings. These were among the most remarkable hearings I have seen in more than thirty years of practice and teaching. I did not see defense attorneys at any of these hearings. These ceremonies were followed by a court hearing to finalize any promised concessions. Although most such hearings were perfunctory, there would be value in the presence of defense counsel to make sure the matter was accurately and properly resolved.

As in any other case, the defense attorney has an important role to play for a client who is considering or participating in a treatment court program. The more counsel knows about this theory of treatment and about the client, the more effectively counsel will be in helping the client decide whether to seek admission to treatment; and, if the client chooses treatment court, in supporting the client’s efforts to successfully complete the program.