It’s a great pleasure to present the December edition of our newsletter to friends and graduates of the Remington Center.

Our newsletter begins with updates on recent events at the Remington Center. The newsletter also includes the second part of Clinical Associate Professor Ben Kempinen’s thoughts on the ethical obligations of defense attorneys in a “treatment court” setting. And, as always, the newsletter features thoughtful student essays. In this edition, we include essays by students enrolled in the Gary-P. Hayes Police-Prosecution Internship, the Restorative Justice Project, the Family Law Project, and the Oxford Federal Project.

We hope that you enjoy the mixture of information, opinions, and reflection in this edition of the Remington Center’s newsletter.

We are also in the process of developing an email list of our readers. We will continue to publish a hard copy of the newsletter twice a year. However, we do plan to use email to reach out to our readers for short contributions to the newsletter. A month or so before publishing each edition of our newsletter, we plan to send out an email asking readers to submit career updates, interesting stories, or opinions. So you can look forward to hearing from us next summer!

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Clinical Professor Michele LaVigne Selected as Clinical Teacher of the Year

Clinical Professor Michele LaVigne has been named the UW Law School’s Clinical Teacher of the Year for 2008. Prof. LaVigne is the first winner of this newly-established award honoring faculty who use clinical methodologies in their teaching. She was honored in mid-November at a dinner of the Law School’s Board of Visitors.

Prof. LaVigne directs the Remington Center’s Public Defender Project, and also founded the highly successful Mock Trial Program at the Wisconsin School for the Deaf in Delavan, Wisconsin.

In the Public Defender Project, Prof. LaVigne teaches a spring semester seminar and a trial advocacy course, in order to prepare students for their ten-week summer internships in Public Defender offices throughout Wisconsin. The students have such energy and enthusiasm that I am constantly reminded what an honor it is to be involved in this whole endeavor.”

She adds, “The other great kick is running into former students who have turned into top-notch lawyers, and who tell me how they are still using what they learned in their law school clinical work.”

In the past decade, Prof. LaVigne has focused her research on the intersection between deaf persons and the legal system. She co-authored “An Interpreter Isn’t Enough: Deafness, Language and Due Process,” (with McCay Vernon), 2003 Wis. L. Rev. 843, which discusses language acquisition and the situation of deaf and severely hard-of-hearing individuals in the criminal justice system. She has lectured to organizations of the deaf and hard-of-hearing, as well as to interpreter groups. In 2005, Prof. LaVigne received the Distinguished Member of the Year Award from the Wisconsin Association of the Deaf. She is currently working on an article outlining the consequences of communication disorders in juveniles.

Update on Legal Manual for Incarcerated Parents

Clinical Assistant Professor Leslie Shear, Director of the Remington Center’s Family Law Project, is pleased to announce that the long-awaited Legal Manual for Incarcerated Parents should be ready for distribution very soon. Although the Manual has taken much longer to create than Prof. Shear would have liked, she is confident that the end product will be worth the wait.

The Manual will be completely up-to-date, incorporating the recent changes to the Family Code, as well as those made to Wisconsin’s guardianship and CHIPS statutes.

Emily Gold, a former Family Law Project student who will graduate in December 2008, has been hired to assist with editing, research and graphics for the Manual. Her energy, ideas, organizational skills, and technical knowledge have already proved invaluable.

Due out in January 2009, the Manual will be available to Wisconsin prison libraries, prison social workers, community libraries, courthouses, and other community and social service agencies that request it. The Manual will provide incarcerated parents and their families “on the street” with the following:

• current, substantive and procedural legal information, including information about incarcerated parents’ rights and responsibilities in family and children’s/juvenile law matters (including divorce, paternity, legal custody and physical placement, guardianship, child support, grandparent visitation, CHIPS, JIPS, adoption and TPR);
• understandable expla-
nations of applicable statutes and case law;
• sample forms and letters tailored for use by incarcerated individuals;
• psychological and social service information and resources relevant to incarcerated parents and their children;
• community and educational resources they can consult prior to and after their release;
• basic parenting education materials; and
• guidance for representing and presenting themselves in court proceedings.

The content and format of the Manual have been greatly enhanced by Prof. Shear’s collaboration with the Honorable Moria Krueger, a retired Dane County circuit court judge, and Attorney Iris Christenson. Both are on the board of Family Connections of Wisconsin, Inc., a non-profit agency whose mission is to help maintain and strengthen relationships between children, their incarcerated parents, and caregivers for the benefit of the children and the wider community. Once a month, screened and trained Family Connections volunteers take children from Dane County to visit their mothers at Taycheedah Correctional Institution in Fond du Lac and the J.C. Burke Center in Waupun. Family Connections also offers a program called “Reading Connections,” so that mothers who do not see their children on a regular basis can record themselves reading books to their children, and then send those recordings to the children. More information about Family Connections can be found at: http://www.madison.com/communities/fcw/.

**Street Outreach Courts May Address Public Nuisance Behavior in Madison**

*By Ryan X. Farrell*

Third Year Law Student

The challenge seemed daunting from the outset: how can the police, prosecutors, and social service providers work together to counteract the growing public nuisance problem in downtown Madison? This was the question posed to a dozen students in Clinical Associate Professor Michael Scott’s spring 2008 seminar, “Selected Problems in Policing.”

The Madison Police Department (MPD) had approached Prof. Scott with a law enforcement dilemma: how to effectively respond to the chronic nuisance street offender? Public nuisance behavior can be defined as behaviors that lower quality of life by preventing community members from feeling comfortable in public spaces, but that do not rise to the level of serious crimes in the view of prosecutors.

Each year, the MPD makes thousands of contacts with a limited number of individuals who frequent the State Street area. The cause of the interaction varies, but the types of behavior most commonly seen include aggressive pan-handling, intimidation, trespassing, chronic alcoholism, burglary, disorderly conduct, and other low-level misdemeanors or ordinance violations - all resulting in a disproportionate consumption of police time and energy. Under the guidance of Prof. Scott and Clinical Associate Professor Ben Kempinen at the Law School, and with assistance from Cpt. Joe Balles of the MPD, a group of law students spent the semester analyzing public safety problems caused by the transient/homeless population in downtown Madison.

As our research project continued through the spring, it came to center around homeless individuals. Homelessness itself has a multitude of causes and effects that can evoke strong emotions on all sides. The class did not look to define a class of individuals based on their homeless status, but rather focused on a set of behaviors, reported by the police, that tended to cause disorder and lawlessness in downtown Madison. The data that emerged would present an interesting and troubling picture of Wisconsin’s state capitol.

Over an eight-month period in 2007, Madison logged 1,481 individuals staying at city homeless shelters. Of these individuals, over a third had diagnosed mental illnesses, 41% reported substance abuse problems, and 14% were veterans. The number of homeless individuals staying in Madison shelters reached the highest rate since 1990. Solving the problem of public nuisance behavior within this population required the involvement of a variety of stakeholders, including city and county government, public and private social service providers, hospitals, community
The project continued into the summer in Madison as the focus of the Gary P. Hayes Police-Prosecution Internship Project, with third-year law students Chad Wozniak and Ryan Farrell organizing a task force that developed into the Public Nuisance Work Group. The Work Group held meetings over the summer, hosted by the United Way of Dane County. After a thorough analysis of police data, several interesting conclusions could be drawn about the public safety problem in downtown Madison.

From January through May of 2008, the MPD received 1,120 calls for service relating to public nuisance-type behavior, such as detox trips, disorderly conduct, and trespassing. These calls were generated by 269 different individuals. Breaking down the data by number of contacts, however, it became evident that around twenty individuals were responsible for 34% of these calls to the MPD. Of the nuisance offenders, 98 individuals required 5 or more calls for service, and 50% of the offenders reported no permanent address (NPA). Others listed local shelters or halfway homes as their address. Based on the most frequent street-level offenders in central Madison, a list was created in order to track the characteristics of those who required the most police calls.

Based on the data, the Work Group reached two seemingly contradictory conclusions:

From a shelter perspective, only 51 of 1,111 shelter visitors (4.5%) were frequent offenders on the MPD list. From a law enforcement perspective, however, 51 out of 82 (62%) of the city's most frequent public nuisance offenders were listed as NPA. The individuals with the most (5+) contacts were overwhelming of NPA-status.

By reviewing the data, it became apparent that a majority of Madison's most frequent public nuisance offenders were homeless, but that the majority of homeless residents of Madison were by no means frequent law-breakers.

The search for innovative solutions to Madison's public nuisance problem led to the idea of homeless courts. Homeless courts represent a response taken by a number of communities that have resulted in a high level of success in counter-acting nuisance behavior. In 1989, San Diego County was the first community in the nation to implement these so-called "homeless courts," or "street outreach courts." Since then, several metropolitan areas, including Los Angeles, San Antonio, Denver, and Salt Lake City, have established homeless courts, as have smaller communities such as Albuquerque, Sacramento, and Ann Arbor. The potential of homeless courts lies in the possibility of reducing court and jail costs, building community collaboration, improving access to the courts, and assisting homeless people gain access to vital services and treatment.

**How do Homeless Courts work?**

Homeless courts are an entirely voluntary process – the first step in an individual's taking responsibility for his or her conduct. By signing up for homeless court, the participants search for justice and a way to reconcile their past with their future. Homeless offenders are given an opportunity to resolve the charges brought against them by establishing a holistic plan for self-improvement, developed by a case worker, in lieu of jail time and fines. Homeless courts rely on homeless service agencies to address the underlying problems homelessness represents: drugs, alcohol, health problems (mental and physical), and economic calamity.

Here is an outline of how a homeless court might work in Madison:

- The MPD, UW Police, and Capitol Police create a list...
of the “frequent offenders,” individuals who routinely and consistently get arrested, cited, or transported to detox for public nuisance-type behaviors.

- For these individuals, officers issue citations for Disorderly Conduct or other state-level crimes instead of municipal ordinance violations.
- A designated prosecutor reviews the case files of each “habitual street-level offender” and, if the offender has prior convictions, charges the offender as a repeat offender under Wis. Stat. §939.62. The result is to increase the maximum potential for each of the offender’s misdemeanor offenses to up to two years.
- Finally, the offender is offered the possibility of having the charges dismissed if he or she participates in the homeless court’s program.

The carrot-and-stick approach of homeless courts removes the status quo of the ‘revolving door court system’

As the summer came to a conclusion, the Hayes interns had set a dialogue in motion that continues to this day. A variety of stakeholders have come to the table to share data about the troubling state of homelessness in Madison and work together for innovative strategies to solve the problem. The summer provided examples of how difficult it can be to enact systematic change when institutions are resistant or skeptical of new strategies. However, by using data and making connections across participants in the criminal justice system, the ability to take creative approaches in solving public-safety problems has become a real possibility.

The possibility of an enhanced sentence for repeat-offenders gives them a strong incentive for agreeing to participate in the program. Homeless courts give a second chance to offenders and offer them a chance to receive the help they need. Once an offender completes his or her plan of action, the charges are dismissed. The success rates of such courts around the country have been high, far higher than the current system at reducing reoffending by individuals who have frequently caused nuisances on the street.

Referring to the system of homeless courts, a designated prosecutor reviews the case files of each “habitual street-level offender” and, if the offender has prior convictions, charges the offender as a repeat offender under Wis. Stat. §939.62. The result is to increase the maximum potential for each of the offender’s misdemeanor offenses to up to two years. Finally, the offender is offered the possibility of having the charges dismissed if he or she participates in the homeless court’s program.

Remorse and Forgiveness

By Christopher Behrens
Second Year Law Student

It didn’t take long for me to be introduced to what it would be like working as a student intern at the Restorative Justice Project. Before my summer with the Remington Center had even officially begun I was meeting with one survivor of a horrible crime to prepare for a victim-offender conference that occurred just a few weeks later.

This woman’s teen-aged son was stabbed to death in their home while she and her husband were sleeping in the next room. According to testimony of some of the offenders, this was the result of a drug robbery gone wrong. The offenders were a group of four teenagers, one a family friend of the victim, who conspired to rob the victim because they believed that he dealt marijuana and carried cash.

According to the description of the crime by the offender involved in the conference, the original plan was to “jump” the victim just as he was getting home. The offender said they actually waited outside of the victim’s home for “what seemed like forever” that night. Eventually they concluded that the victim was probably already in the house and decided to go into his room through the window. Two of the offenders propped open the victim’s window using a screwdriver, while the other two waited in the car.

Once in the room, the offender grabbed the bag containing the cash and drugs and then headed to the car, leaving the second offender behind in the room. He said, “Dead men don’t talk.” The offender said that nobody had expected anything bad to happen, and that he thought that it was just going to be a “quick and easy” robbery. He said that he would have stopped things if he thought it was possible that someone was going to lose his life.

When the mother and her husband found their son lying in his room after being stabbed,
the mother said that she could not even cross the threshold to help him because she was so shocked. She said that the 911 operators could not understand her because she was so hysterical. Her husband unsuccessfully tried to resuscitate her son. For a time, she and her husband were considered as possible suspects, and were not even allowed in the house to get clothes for their son for his funeral, because it was a crime scene.

And after all of this, the mother wanted to meet with one of the four people involved. She said that she wanted to meet with this particular offender because he seemed like he was sincerely sorry for her losing her son. She said that she did not want to have any contact with the other offenders. Her husband was not interested in meeting with any of the offenders, but said that he would participate as a support person for his wife.

The Restorative Justice Project’s director, Pete DeWind; a co-facilitator from the Office of Victim Services and Programs at the Department of Corrections; and the recently departed student intern on the case, Luke Schmerberg, got things started a few weeks before my arrival by meeting separately with the offender and with the mother. The offender agreed to meet because he hoped that this would give him an opportunity to express his remorse, apologize, and hopefully help the victim’s family to heal.

So after numerous meetings/phone calls with both the mother and offender, and some logistical work with the prison, the mother was ready to meet with one of the people involved in her son’s murder, almost eight years after that horrible night.

On the day of the conference we met separately with the mother and her husband, and with the offender. The mother and offender both seemed very nervous, but both said that they were ready to go ahead with the conference. I remember being very anxious as well, because I just didn’t know what to expect.

After quick introductions and an explanation of how the meeting would be conducted, the mother started the dialogue in tears, saying that she didn’t know what to say. She then asked the offender numerous questions, but only waited for responses to a few. She asked him about prison life, the night of the murder, the days preceding and following the murder, and the trial. She asked him how the murder had changed him, and asked him to imagine what it would be like to be her. She told him about how the murder had affected her and her family.

The offender answered the questions that she wanted him to answer, but also asked her some questions and made some statements of his own. He told the mother that he was extremely sorry and that he thought about her and her family every day. He said that he took full responsibility and that he wanted to change. He told her that it wasn’t her fault, that she shouldn’t feel guilty for not being able to help her son, and that it was he and the other offenders who had to take on that responsibility and that guilt.

To conclude the meeting, the mother told the offender that she forgave him and that she hoped he would never have to suffer the pain that she and her family had to endure. I thought that the meeting went very well. The mother showed a lot of emotion, but controlled it enough so that she and the offender could have a meaningful conversation. I was surprised that she only took one break. The offender also handled his emotions well, and it was obvious, at least to me, that he took responsibility for his actions and felt awful for what had happened to the victim and his family. I was surprised about how much the offender said as, based on our preparation meetings with him, I expected him to have pretty limited answers. Instead he seemed very willing to answer any question that the mother asked, and seemed to do so honestly. Of course I can’t be sure if everything he said was sincere, but I believe that it was and I really think that the mother did as well.

In the weeks following the conference we spoke with both the mother and offender and they both said that they were glad they had the conference. The mother said that even her husband, who had been opposed to the idea, was glad that he sat in and believed that the of-
Beyond First Impressions

By Amber Stevenson
Second Year Law Student

As I approach my six-month mark as a Family Law Project student, it amazes me how far I have come since my first client interview in a correctional facility. In particular, I now realize that first impressions are not indicative of your client’s true character and ability. Moreover, you should never allow first impressions to narrow your perspective of potential outcomes for your client. As your relationship with your client grows, so do the possibilities.

I met Bob (not his real name) during my first solo visit to prison, just one week after the beginning of my summer at the Family Law Project. As any diligent Remington Center student would do, prior to the interview I carefully scrutinized all the documents and letters in my possession relating to Bob’s family law case. I learned that Bob was a sex offender, as he had been convicted of first degree sexual assault of his children’s 14 year-old babysitter. Before my first interview with him, I found his picture on the DOC sex offender registry website, and immediately wished I had not done that.

Our interview started with Bob explaining that he wanted regular visits with his son. He also expressed concern for his son’s safety, indicating that his wife’s boyfriend has been extremely violent in front of Bob’s children, and may be on drugs. At the same time, Bob appeared extremely anxious and jumpy; his eyes kept wandering and darting, and they too often landed on my chest (or so I thought). At some point he told me he was on a number of different medications for anxiety and depression. Although I did not want to let his criminal offense bias me, I could not help feeling quite uncomfortable throughout the interview. The long drive back to Madison gave me plenty of time to wonder how I would be able to work with Bob for the rest of the year.

It has been about six months since my first meeting with Bob. In that time, we have met and spoken by phone countless times. And we have both made a lot of progress. With the assistance of the Family Law Project, Bob has seen a light at the end of the tunnel. He is off all of his medications and instead, he lifts weights, runs daily and participates in various clubs and groups available at his institution. As a result of a family court hearing, Bob now has weekly phone calls and monthly visits with his eleven-year-old son. Their first visit was just this past November; it was the first time they had seen each other in over a year. According to the family friend who brought Bob’s son to the prison, the reunion was very emotional and happy for father and son alike.

As for myself, the stereotypes and fears I started with have evaporated. Instead of discomfort with Bob’s nervous glances and gestures, I now find myself feeling empathy and admiration for the self-discipline, courage, and positive approach he has demonstrated. Although it is clear that I have been successful in achieving my client’s legal goals, I realize that my greater success was in helping Bob regain a sense of hope and connection with himself, as well as with his son. I now fully appreciate that the support and advocacy we give our clients actually can free them up to tap into their own perseverance, self-awareness, and inner strength so that they can move beyond their past into a better future.

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Culture Shock

By Adam Stevenson
Second Year Law Student

In the beginning of our law school experience, we are strangers in a strange land. One of our first lessons about the legal world is that our profession could not exist without clients. Our clients should be
the center of our roles in the legal system, whether they are Fortune 500 corporations, organizations, or prison inmates. That ideological point was made very clear, but the practical application of that ideal was rather murky. That idea is made even more difficult when applied to the realm of criminal defense work. When selected to participate in the Remington Center’s prison-based clinical opportunities, many of us had questions about our abilities to represent inmates. We questioned not only our legal ability to provide adequate representation, but also our moral and ethical ability to do so. I can only imagine the possible difficulties for a seasoned lawyer in dealing with the moral conflicts involved in representing a person charged with a crime. In our case, those difficulties have been magnified not only by our inexperience, but also by the fact that by the time we meet our clients, they have already been convicted and sentenced by the criminal justice system.

The six of us in the Oxford Federal Project thought we had received a pass on some of the more difficult issues facing our fellow clinical students. Instead of the wide range of more violent offenses that students working in the Wisconsin prison system would have to deal with, we were sure that the clients we would be representing would have been convicted of crimes involving conduct that was slightly “easier” to take from a moral perspective. We were sure that we would meet individuals whose conduct involved drugs or robbing a bank. The apparently “victimless nature” of those offenses puts the six of us in the federal project somewhat at ease.

On my trips to FCI-Oxford, the relative ease that I had experienced was turned on its head. In particular, I had an opportunity to work with two clients whose offense conduct presented real difficulties for me. One client had been convicted of transporting a minor across state lines to engage in prostitution, while a second had been convicted of possessing child pornography. The minute I opened up both clients’ files, I felt myself hit a wall. I instantly questioned my role in this situation. Could I work with these people given what they had been convicted of? I sat back for a bit and thought about it and then I shut both client’s files deciding that the less I knew of their past, the better I would be able to meet these individuals with a clear mind.

When the two clients walked in, I had the same reaction with both. Instead of seeing faces or people, I saw a walking personification of their convictions. For a moment, I could think of nothing more than what these two people had done, not who each was as a person. At that moment, I snapped out of it and reminded myself that everyone needs to have a fair shot in the legal world. I tried to push out the previous knowledge that I had of these two individuals in order to give them both a clean slate. From the moment that they sat down and started talking, I was able to see them both as people with legitimate legal concerns, not as walking objectifications of their past. It was at that moment that I realized just how a client must be the center of the legal profession. No matter what people may have done or who they may be, they still may have legal concerns that need to be addressed.

The first client had a double jeopardy claim. While I eventually concluded that it would not provide a basis for post-conviction relief, it was certainly not a frivolous claim and was well worth looking into. A sense of relief seemed to fill the client simply by having his questions answered and his situation fully explained to him. Had I dismissed the client from the beginning simply because of what he had done in the past, he would have been left confused about his situation, wondering if he had been wronged by the system because of the nature of his actions.

The second client questioned whether a state deferred adjudication, which did not result in a conviction, could be used as a “prior conviction” resulting in an enhanced federal sentence. As I researched his concern, I began to think that there might be merit to the client’s legal argument. I’ve continued to work on his case, trying to find a way to help him seek relief for his claim.

As I continued to work with those inmates and my other clients, I interacted with individuals in the legal system, federal and state government, and other arenas who could not look past the inmate’s criminal past. I understood
the need to look at the legal issues in the context of what a person did and was convicted of; but to allow that to cloud one’s judgment of that person unfairly prejudices people who are already starting off with a “handicap.” Had I retained the same prejudiced opinion of my clients that I had initially, there would have been no one to fight for these people to advance their very legitimate legal concerns. By focusing on the issues at hand, I was able to help my clients navigate through the legal labyrinth with some guidance as opposed to sending them into the maze on their own without a map or compass.

Throughout my time in law school, I frequently equated legal education as akin to learning a new language. I expressed my belief that an integral part of learning any language was an immersion in an area where the language is spoken. That was my view going into the Oxford Project. My clinical experiences have helped me refine my “law as a language” metaphor. Learning to become an effective lawyer is much more than just learning the statutes, case law, and various Latin phrases that are so prevalent in the profession. In reality, it is really about learning the culture of the legal world, with immersion still being a key component.

Undoubtedly, you can learn to speak a foreign language and you would be able to get by in the language’s native country. However, in order to fit in to a new world, you must learn as much as you can about the diverse cultural aspects of daily life. In addition to learning the legal language, a student needs to learn the skills of client interaction, ethical practice, and other practical skills in order to be more than just a legal robot able to take a legal problem and spit out a legal solution.

When I entered my time with the Oxford Project, I had a minor grasp of the language, but I was somewhat hesitant about some of the aspects of the “foreign” criminal defense culture had in store for me. After my experiences spending “time abroad” through my clinical practice, I think that I’m a bit more fluent in the legal language, and now I’m even starting to grasp the cultural experience. Hopefully, one day, I’ll be able to look back at these experiences a naturalized citizen of this legal

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**The Potential of a Greater Defense Presence in Developing Public Safety Policies**

Historically, the defense bar has not been an equal player at the policy-making level in local criminal justice systems. Traditional formulations of local justice systems reflect a balkanized, parochial approach to public safety. Each entity often protects its own resources and authority, and views other entities as adversaries rather than partners. The results of this approach have not been encouraging, in terms of either public safety or cost effectiveness. This is why many communities are abandoning traditional approaches in favor of collaborative responses to local problems, collectively defining priorities, deciding on appropriate responses, and evaluating their effectiveness. Problem-solving or treatment courts are an example of this new way of thinking.

**By Ben Kempinen**

Clinical Associate Professor

*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 strategies is the problem-solving or treatment court. The emergence of these courts 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 second of two essays on the ethical implications of treatment court for defense attorneys. The August, 2008 issue focused on the responsibilities of a defense attorney representing an individual client in a community with a treatment court. This essay focuses on the defense attorney’s roles as a member of a treatment court planning group and as a member of the treatment team.

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A defense presence contributes to the quality of local policy-making... in ways unattainable solely through representation of individual clients.

Defense Attorneys as Members of Treatment Court Planning Committees

In all Wisconsin communities, the Public Defender’s Office was invited to provide a member of the treatment court planning group. In all communities, public defenders accepted the invitations and have made valuable contributions to the overall operation of the treatment court.

In this capacity, the public defenders did not represent individual clients; rather, they shared their knowledge and experience in designing the treatment court program. A defense presence at this stage has enormous potential value. Public defenders can share the collective knowledge of the defense bar in the selection of the target population, and advocate for procedural fairness. A defense perspective can make valuable contributions in the discussion and resolution of several recurring treatment court issues, including:

(1) What are the admission criteria and should they be uniform or flexible?
(2) What concessions should follow a participant’s successful completion of treatment?
(3) Should participants and their attorneys have some form of access to the team discussions and information upon which treatment decisions are made?
(4) What waivers of confidentiality are necessary and appropriate?
(5) What safeguards are necessary to protect the privacy of the participant’s treatment records during and after participation in the program?
(6) Should the participant’s admissions of criminal conduct be immunized if required as a condition of program involvement?
(7) What due process protections should apply when the treatment team seeks to remove a participant for rule violations?
(8) Should there be a written contract between the participant and treatment team? If so, what information should be included and who should sign the contract?
(9) Should early discovery procedures be developed to permit prompt treatment court decisions after the commencement of charges?
(10) If a participant is terminated from the program, how should the case be transferred back to a traditional prosecution track?

Advocating for a process with built-in procedural protections is more effective and efficient than litigating such issues one case at a time. An ongoing presence on the planning committee allows the Public Defender’s Office to track each
The two most striking features of these conferences were an ambitious, proactive approach to gathering information about each program participant and a collective desire to do everything possible to fashion a successful treatment plan. Each treatment court had a treatment team led by the presiding judge. Its members generally included a prosecutor, a public defender, the sheriff, treatment personnel from the county human services agency, and a community corrections agent.

The treatment team determined who should be admitted into the program, and, once admitted, developed treatment plans and monitored the progress of each participant. Central to their work was the weekly team conference. At this conference, typically held in the early morning before participants appeared in court, each participant’s file was thoroughly reviewed and discussed. The two most striking features of these conferences were an ambitious, proactive approach to gathering information about each program participant and a collective desire to do everything possible to fashion a successful treatment plan.

Defense Counsel as Members of the Treatment Court Team

Membership on the treatment court team places defense attorneys in a unique role. Based on my observations of these teams at work, it seemed clear that the public defenders did not—and should not—represent individual participants in the program. Perhaps my view of the proper formulation of the public defenders’ role is best understood by considering what the treatment teams did and how its members interacted.

All team members participated fully in the team conferences. All were long-term community members, familiar with many of the individuals involved, what local resources might be most appropriate, and the risks and benefits of various treatment approaches. They shared their views openly with the team. On several occasions the public defender team member noted that a participant was a former or current agency client. I did not see any cases in which the team member’s client was an active participant, although apparently this occurs from time to time throughout Wisconsin.

Frequently team discussions focused on how to respond to rule violations. The discussions were fascinating. The members’ perspectives did not follow stereotypical patterns, with the prosecutor seeking punishment and the defense minimizing the violation. Instead, all team members embraced the notion that they were members of a unified group whose objective was to help a participant succeed.

Hearings in treatment courts were markedly different from those which follow a traditional model. Case numbers and statutory references were replaced by first names and treatment language. The team reviewed each case during its pre-hearing conference and tentatively determined what action to take—a reward, a sanction, modification of conditions or some other response. For the most part, the judge was in complete control, calling each participant up to the bench, reviewing the state of their progress and implementing the team’s recommendation, subject to on-the-spot adjustments in response to the participant’s input. The case managers were also an important and visible presence. The prosecutor and public defender played lesser roles at the hearings. Unlike traditional criminal case hearings all participants were required to remain for the entire court session—not only for their own case.

Most participants’ questions were directed to the judge. They ranged from questions about the treatment plan, the consequences of relapse, and
even questions about landlords, paychecks, and utility bills. The participants clearly saw the judge as the primary authority and also as a source of help and guidance. On two or three occasions, the participant had a question he or she did not wish to discuss in front of the entire audience. The judge suggested he speak with the public defender. It was not clear what, if any, clarification of role or confidentiality of discussions accompanied these conversations.

### Wisconsin Efforts to Redefine Roles

From the earliest stages, Wisconsin treatment court team members have acknowledged that their responsibilities and relationships would be substantially different from a traditional adversary model. They continue to work to implement practices that balance a problem-solving approach while respecting traditional ethical and procedural constraints. Their early efforts have not drawn clear distinctions between the various roles of defense counsel in treatment courts—as member of the initial planning group, as a member of the treatment team, or as an attorney representing a client.

Mixing the distinct defense roles of representing a client, participating in policy-making, and being a treatment team member makes client identification and analysis of ethical issues unnecessarily complex. In my view, separate treatment of the roles of defense attorneys should be a part of efforts to further define these roles and the ethical guidelines that inform lawyers in these distinct positions.

### Many Perceived Problems with Treatment Courts Disappear if the Distinct Roles of Defense Attorneys in Treatment Courts Are Considered Separately.

A recurring problem with attorney ethics rules is the challenge of articulating standards general enough to apply to all practice contexts yet specific enough to provide meaningful guidance. Frequently problems exist simply because rule drafters did not anticipate all situations to which the rules would apply. This is certainly true in the context of treatment courts. Nonetheless, ethics rules apply to all licensed attorneys and cannot be ignored in pursuit of higher principles. Given the wide variation in ethics rules from jurisdiction to jurisdiction, my comments will focus on issues with the current A.B.A. Model Rules of Professional Conduct.

As I have suggested earlier, many perceived problems with treatment courts disappear if the distinct roles of defense attorneys in treatment courts are considered separately. There is neither the need, nor any benefit, to viewing all roles as controlled by the lawyer-client paradigm. However, even with separation of the roles, ethical questions remain, particularly for public defenders as treatment court team members. The following are a sampling of the issues I have observed and my thoughts on how they might be resolved.

#### 1. Conflicts of Interest

Clarity in the definition of defense roles in treatment courts is necessary to avoid conflicts of interest. Potential difficulties exist in a variety of treatment court contexts.

The public defender team member should never simultaneously represent a client participant. As a member of the team, the public defender is responsible for collaborating with fellow team members to implement each participant's treatment program, a protocol which always requires the participant to be open, honest, and accountable. In contrast, a basic axiom of the lawyer-client paradigm is client autonomy to determine the course of the representation—the power to make good or bad decisions and the responsibility of counsel to use all lawful means to avoid or mitigate the negative consequences of the client's choices. A defense attorney would be in an untenable situation if, while a treatment team member, the attorney represented a client who had violated treatment conditions and sought help to avoid being accountable. Only a policy that prohibits active representation of participants by team members effectively avoids this dilemma. A case-by-case recusal policy would be undesirable because it would remove the public defender from the team in cases where recusal was required.

Under the principles of imputed disqualification, the public defender team member must also be cautious when colleagues represent individual team members. If the team member sees him- or herself outside of the attorney-client role, then Rule 1.10(a) suggests that a conflict can be avoided. Different jurisdictions deal with imputed conflicts differently, with some permitting screening with notice and others requiring a written waiver of the conflict. Regardless of the particular rules, an internal screening policy should be implemented to ensure that the team mem-
ber does not have access to confidential information related to colleagues’ clients.

2. **Confidentiality**

Rule 1.6 requires, with limited exceptions, that all information related to the representation of a client remain confidential. Absent a client waiver, this cannot be reconciled with a team member’s responsibility to be open with fellow team members. Waivers of confidentiality would be required from any current or former client of a team member, in order to permit open discussion with the team.

Confidentiality issues may also arise if the attorney for the participant continues representation and direct contact between the attorney and team is deemed desirable. In this case Rule 1.6 would require informed consent from the client-participant.

Rule 1.6 requires only informed consent to disclose confidences rather than written confirmation from the client. Nonetheless, good practice commends the practice of including these waivers in the program contract. These solutions would be workable only so long as the client or former client does not rescind the waiver, a choice that ethics rules allow.

3. **Contacts with Represented Persons**

Rule 4.2 prohibits an attorney representing a client in a matter from having contact with a person represented by counsel in the same matter. Only the attorney and not the client can consent to such contacts. If one assumes that an attorney team member represents the team, this rule would prohibit the attorney from contact with represented participants during the treatment court process absent the consent of the participant’s lawyer. Conceptualizing attorney team members outside of the attorney-client paradigm – as attorneys without clients – would avoid problems with Rule 4.2.

4. **Contact with Unrepresented Persons**

A.B.A. Rule 4.3 provides that counsel for a client should clarify his or her interest when confronted with an unrepresented person in a situation where there may be ambiguity about the lawyer’s role. Wisconsin’s version of this rule requires clarification in all cases, not only when confusion is apparent. WSCR 20:4.3. Like Rule 4.2, this provision would apply only if the attorney team members were seen as representing the team. However, their role is envisioned, it would seem good practice to explain their role to each par-

5. **Ex Parte Communications**

Rule 3.5 prohibits an attorney from having ex parte contacts with the court. Unlike Rules 4.2 and 4.3, the text of Rule 3.5 does not limit its reach to representation of clients. As a consequence, the rule appears to prohibit contacts by the attorney team members with the judge in the absence of the participant or participant’s lawyer, regardless of how the case is handled.

My thoughts are shared with the hope that they will stimulate thought... accommodating new and promising alternatives to “business as usual” in our criminal justice system.

My thoughts are shared with the hope that they will stimulate thought and discussion that will advance the objective of accommodating new and promising alternatives to “business as usual” in our criminal justice system, while simultaneously preserving the bedrock values of vigorous and competent representation by defense counsel for all those charged with a criminal offense.