The emergence of problem-solving courts\(^1\) as an option for offenders with serious substance abuse problems is among the most discussed recent innovation in the criminal justice system. Although it affects only a small percentage of cases,\(^2\) its novelty and abandonment of the traditional adversary model has generated both substantial praise and substantial criticism. The most outspoken criticism has come from the defense bar, perhaps surprising given that problem-solving courts can offer a chance for treatment instead of punishment and, if successful, can benefit a client in ways not possible with traditional case processing.

There appear to be two reasons for these criticisms. One is the assertion by several proponents of problem-solving courts that defense counsel should abandon his traditional role in favor of a collaborative approach to advance treatment objectives.\(^3\) Although well intentioned, this assertion is flawed in its failure to recognize the centrality of client autonomy in determining defense counsel’s role\(^4\) and in its failure to acknowledge that defense counsel may have several distinct roles in the context of problem-solving courts. A second source of defense criticism is grounded in two deep seated and persistent

\(^1\) Throughout this paper the terms “problem-solving courts” and “treatment courts” will be used interchangeably.


\(^4\) It may very well be that some clients would opt for a collaborative therapeutic form of representation. However, others may not and both as a matter of Constitutional law and lawyer ethics rules that choice belongs to the client and no one else.
beliefs among many defense attorneys. First is the belief that only traditional adversary processes adequately protect a defendant’s interests and second, that effective representation can only be achieved by the aggressive assertion of procedural protections. This view is present in academic discussions, finds support in several of the proposed revisions to the ABA Standards for the Defense Function and in the reports of national defense organizations. Given that problem-solving courts present a different model they are seen as a threat to the fairness of our justice system, the interests of individual defendants, and the very essence of the defense function.

The intimation that only one systemic design and one approach to advocacy are appropriate is unfortunate for several reasons. Like the arguments of proponents of problem-solving courts this viewpoint undervalues client autonomy and fails to acknowledge that well informed and competent clients may very well choose treatment over litigation. Defense counsel’s preference for litigation should not trump an informed client’s wishes. Second, an exclusive focus on litigation fails to acknowledge that the vast majority of cases are settled and not tried with procedures not altogether different than those in problem-solving courts. A preoccupation with adversary processes risks undervaluing the distinct skills necessary for effective advocacy in non-adversary

5 A third concern is perceived structural and operational flaws in certain courts. Examples cited in the literature include the belief that prosecutors “dump” weak cases into treatment, Quinn, Whose Team Am I On Anyway? Musings of a Public Defender About Drug Treatment Court Practice, 26 N.Y.U. Rev. L & Soc. Change 37, 58-59 (2001), improperly require a treatment decision before the case can be thoroughly investigated Id. at 54-56, and impose harsher treatment of failed participants than those eschewing treatment courts altogether. Id. at 61-62. These are flaws of design or implementation rather than theory and are correctable. A defense presence in the planning and oversight of the court can prevent such procedures from inclusion in the local court design at all.


7 Several of the proposed Defense Function Standards focus on the role of counsel in contested cases – Part VII (Trial), Part VIII (Post-Trial Motions and Sentencing) and Part IX (Appeal and Post-Conviction Remedies). The focus of the remaining standards, although broadly framed, is defense counsel in a traditional role.

8 In September of 2009, the National Association of Criminal Defense Lawyers issued a report entitled America’s Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform. http://www1.spa.american.edu/justice/documents/2710.pdf; On the whole, the report is critical of problem-solving courts and reflects a clear preference for counsel to act as a partisan advocate in an adversary framework. In the author’s view, the report was written, and testimony and factual submissions selectively included, to support NACDL’s predisposition against problem-solving courts rather than to create a report that could make valuable contributions to the dialogue about the role of defense counsel in such courts.

9 For example, the Sourcebook of Criminal Justice Statistics Online reported that 95.1% of federal criminal cases in 2009 were resolved by plea rather than trial. http://www.ussc.gov/ANNRPT/2009/table11.pdf[May 28, 2010]
settings. Third, a defense predisposition against innovation does not prevent system experimentation. It only prevents the defense bar from meaningful involvement in the planning and implementation of such efforts.

My experiences with and observations of Wisconsin problem-solving courts showed a very different picture than described by many proponents or critics of these courts. I did not observe pressure on defense attorneys to abandon their traditional duties nor did I observe systems where adversary safeguards were jettisoned in favor of treatment. Instead, I observed communities where for the most part judges, attorneys, and health care providers worked together in good faith to see if new responses to drug and alcohol abuse might accomplish that which traditional approaches could not. In these communities the roles and practices of defense attorneys were multi-faceted and nuanced in ways not mentioned in academic discussions. Counsel’s actions fit into one or more of three distinct roles: (1) as a member of the problem-solving court planning or advisory group, (2) as a member of the problem-solving court treatment team, and (3) as a lawyer for an individual client.

Although Wisconsin attorneys did not self-describe their roles exactly as described here their actions seemed to naturally fit into one or more of these three categories. These distinctions provide a way of conceptualizing counsel’s work in problem-solving courts which maintain the promise of a vibrant defense role while respecting the basic responsibilities of a lawyer to his client.

The first of these roles – as a member of a problem-solving court planning or advisory committee – did not implicate the representation of clients at all and should not be viewed through the lens of the traditional lawyer-client paradigm. Rather, it involved the role of the lawyer as “an officer of the legal system and a public citizen having special responsibility for the quality of justice”. This role was distinct from the lawyer

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10 The author has been involved in criminal law practice and teaching since 1976, both in the classroom and in the variety of clinical offerings at the Remington Center, a program at the University of Wisconsin Law School.

In the summer and fall of 2006 the author inventoried local innovations in selected Wisconsin communities in a project jointly sponsored by the Law School and the Wisconsin Supreme Court’s Planning and Policy Advisory Committee Alternatives to Incarceration Subcommittee (recently renamed the Effective Justice Strategies Subcommittee). Perhaps the most impressive finding was a growing transition from a purely adversarial model to greater collaboration among local shareholders and a willingness to experiment with new alternatives to achieve public safety. The emergence of problem-solving, or treatment courts, was a central feature of these new efforts.

At the time of my investigation thirteen treatment courts were in operation in Wisconsin. Now there are at least twenty that are either fully operational or in the planning stages. During the summer of 2006 the author observed five of these courts in great detail, in Barron, Dane, Eau Claire, La Crosse, and Waukesha Counties. He interviewed team members and other interested criminal justice actors, observed team meetings and court sessions, and reviewed procedure and policy manuals, statistical reports, and memoranda of understanding among local system actors. Since that time he has continued to track these efforts throughout Wisconsin. [include NACDL testimony]

11 See ABA Model Rules of Professional Conduct, Preamble, paragraphs one and six.
representing a client, and did not interfere with any duty owed individual clients. This role gave voice to defense perspectives and provided opportunities to influence all aspects of system operations.

The second role – defense counsel as a member of a problem-solving court treatment team – was novel and unique. The defense attorney team members I observed were wholeheartedly committed to the treatment team concept – its focus on participant accountability, information-sharing and collaborative decision-making. Fidelity to the team raised several complex but soluble issues if the defense attorney team member was expected to simultaneously represent treatment court clients or had previously represented offenders now involved in treatment.

The final role – the attorney representing a client – implicated the traditional duties of counsel. In the context of problem-solving courts the most important responsibility of counsel was to make sure the client made an informed choice whether to seek treatment or not. In such cases the client was typically in the throes of drug or alcohol addiction, complicating their ability to process information and make sound choices. The consultation involved additional challenges – the need to be knowledgeable about addictive behaviors, the client’s unique medical situation and receptivity to treatment, the nature and structure of the local program, and whether available treatment resources were responsive to the client’s needs. Much has been made about the problem-solving model’s rejection of traditional adversary safeguards. However, as long as the choice is that of the client, and is voluntary and informed, counsel’s distaste for treatment is irrelevant. And, of course, if the client rejected treatment the representation continued on a traditional path.

This essay has five parts. The first reviews Wisconsin problem-solving court practices. There is great variation in the structure and operation of problem-solving courts. A basic understanding of common Wisconsin practices provides a context from which the suggestions offered can be critically examined. Next are discussions of the distinct defense counsel roles observed in communities with problem-solving courts and the ethical implications of separating the roles of counsel in this way. Throughout, the essay notes whether and how the proposed ABA Criminal Justice Standards and existing ethics rules address the issues raised. Finally, some thoughts are offered on how the observations of Wisconsin lawyers might contribute to local and national discussions of how to preserve the fundamental responsibilities of defense counsel while at the same time encouraging system innovation.

The reader may find it odd that a paper presented as part of a national dialogue about the proposed ABA Defense Standards makes scant mention of them. This is not an oversight. It is because they add little to the discussion of the defense role in problem-solving courts. Whether the issues presented should be discussed in these or in other standards is for others to decide. What is clear is that these issues need to be discussed as problem-solving courts continue to proliferate throughout the country.

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12 The ABA’s practice of having distinct standards for overlapping practice areas often makes it challenging for the casual observer to understand what the ABA’s position is on a particular issue. For
I. Wisconsin Problem-Solving Courts: Common Themes and Practices

A. The Impetus for Creation of Problem-Solving Courts

Concerns over costs – typically projections of a need for a new jail – and dissatisfaction with the adequacy of traditional approaches to alcohol and substance abuse triggered the creation of problem-solving courts in Wisconsin counties. The impetus to create this alternative was, without exception, local in nature with little input or assistance from the state. More often than not discussions were begun by a local judge or county government official.

B. Planning and Advisory Committees

In each community an advisory and planning committee was formed. The group typically consisted of a local judge, a county board member, a prosecutor, a representative from law enforcement and the local Public Defender. The group visited communities with existing problem-solving courts and attended nationally sponsored training sessions. If a decision to create a problem-solving court was made the group collectively decided threshold questions such as the target population, admission criteria, the legal status of treatment participants and treatment court procedures. Although the dynamics and allocation of authority within these advisory groups varied from county to county, the broad spectrum of membership, including the Public Defender, served to ensure that the ultimate court design reflected a composite of interests and points of view. After the creation of a problem-solving court these committees continued in an advisory role to monitor and assess court operations.

C. Treatment Court Funding

Most counties received external financial support for training and start up costs. After the court was established, program costs were usually absorbed by each county or, in a few instances, with additional public or private grants. In several northwestern Wisconsin counties the state corrections agency provided funding and supervisory resources to the local problem-solving court. This was a direct response to a perceived epidemic of methamphetamine abuse in those areas for which traditional responses had proven ineffectual.


13 During the mid- to late-1990’s Congress provided substantial financial and technical support to communities wishing to create problem-solving courts. See McCoy, supra n. 2 at 1519-1527. All of the Wisconsin communities that created problem-solving courts sought to take advantage of these resources. At the state level the Wisconsin legislature created the Treatment Alternatives and Diversion (TAD) grant program by 2005 Wisconsin Act 25, which provided additional funding support.

14 There was no visible private defense presence in Wisconsin in the planning and oversight process. This was likely a function of the financial difficulty in making a time-consuming commitment and the relatively small size of the private defense bar rather than a lack of interest.
Treatment services were the largest operational expense. In some instances they were covered by reallocation of existing county resources and in others through contracts with private service providers. All counties believed costs would be offset by savings in reduced jail populations and that even greater future savings would be realized as program graduates successfully reintegrated into their communities. Participants were usually required to pay a fee to partially defray program costs and encourage development of financial responsibility. Community service was available to those unable to pay the fee.

D. Problem-Solving Court Structure

In structure, philosophy and operation, problem-solving courts differed substantially from traditional criminal courts. The National Association of Drug Court Professionals has identified ten “key components” of this type of court. They include:

(1) Integration of treatment services with traditional case-processing,
(2) Adopting a non-adversarial, team approach to offenders’ problems,
(3) Prompt identification and placement of offenders in the problem-solving court program,
(4) Providing a continuum of services depending on the particular offender’s needs,
(5) Regular monitoring of a participant’s compliance with program requirements,
(6) Combining a system of prompt rewards and sanctions for program participants,
(7) Regular judicial interaction with each program participant,
(8) Adequate record-keeping to continually monitor the achievement of program objectives,
(9) Continuing inter-disciplinary education and evaluation of best practice strategies, and,
(10) Creating partnerships between problem-solving courts, justice agencies and the community at large to support the initiatives.

All Wisconsin problem-solving courts have embraced these criteria in their court designs notwithstanding distinctions between individual courts.

E. The Treatment Team

At the core of all problem-solving courts was the treatment team. All Wisconsin treatment teams included the trial judge and treatment professionals. In most a probation

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16 Key Component #2, with its call to embrace a collaborative team approach to the defense function has predictably been criticized. Regrettably, its performance benchmarks fail to acknowledge client autonomy, the potential conflicting ethical duties of counsel or the varied and nuanced roles defense counsel may play in communities with problem-solving courts.
agent, prosecutor and Public Defender were also members, and, in a few, local law enforcement representatives. The team made both general policy and individual case decisions. The traditional roles of and separation between the functions of the trial judge, prosecutor, and defender, were replaced by a collaborative model, where all worked together, openly shared information and created individual treatment plans for each program participant.

F. Eligibility for Participation

Eligibility criteria were developed at the local level. There were four steps in the screening process: (i) a referral by the district attorney, (ii) an assessment and recommendation by a treatment professional, (iii) a request by the offender to participate, and (iv) the treatment team’s decision to admit or not admit the applicant. A documented serious substance abuse problem was a consistent feature in all treatment courts, ranging from chronic alcoholism to abuse of street drugs or prescription narcotics.

In one county the public defender temporarily withdrew from the team but has since rejoined. In another, the prosecutor refused to assign an assistant to the treatment court for stated reason of lacking sufficient staff. Since that time a new head prosecutor was elected and assigned an assistant to the treatment team.

The only external limit to admission was the exclusion of violent offenders as a condition of federal funding in communities relying in part on federal support.

In all Wisconsin communities cases were screened for prosecutive merit before any consideration of referral to a problem-solving court was made. If a case was determined to be lacking in proof or found otherwise wanting no charges were filed. There was no evidence of referring weak cases to treatment as reported in other jurisdictions. Quinn, supra n. 5 at 58-59. In some communities referral decisions were controlled by the prosecutors specializing in drug cases, some of whom did not believe in treatment rather than punishment. This created a risk of excluding appropriate treatment candidates and frustrating the basic objectives of the problem-solving court.

If an accused told his attorney he wished to seek treatment it was critical that counsel understood the admission criteria and process by which admission decisions were made. This was more complicated and varied than one might imagine.

Defining the target population for treatment was among the first issues decided in the planning stages of each treatment court. In northwestern Wisconsin it was methamphetamine abusers; in Madison there was a mix of crack cocaine, heroin, and prescription drug users. In Waukesha, the team treatment targeted chronic alcoholics with repeat drunk driving offenses. Some observers opined that some communities began with “easy” cases – casual use of recreational drugs - to ensure the success of the program and avoid a spectacular failure. In other communities some recommended a focus on offenders likely to receive jail rather than prison time. The expected savings in jail beds would provide support for the treatment program. Awareness of the contours of the local discussion was an important part of effectively advocating for admission.

Once the general target population was determined individual admission decisions typically had substantial flexibility. This flexibility provided opportunities for the advocate aware of the unwritten nuances that defined how decisions were made. The most experienced defense counsel were sensitive to fashioning arguments that would resonate with the actual decision-maker and more likely to be effective in preparing their clients for an intake interview.
G. Legal Control over the Problem-Solving Court Participant

All participants in Wisconsin’s problem-solving courts had pending criminal charges or had been convicted by a plea of guilty. Wisconsin problem-solving courts were not diversion programs. Formal charges were viewed as necessary to provide judicial authority to impose treatment conditions. Two variations were observed – pre- and post-judgment courts. In pre-judgment courts each participant was charged with a crime with traditional processes suspended while the defendant was involved in treatment. Typically, but not always, some future benefit such as dismissal or amendment of charges was offered, conditioned on successful completion of the program. A sub-class of pre-judgment drug courts saw offenders actually enter pleas of guilty, but not have judgment entered. 21 Authority over the participant derived from the bail authority granted trial judges under chapter 969 of the Wisconsin Statutes. 22 If the offender graduated from the program he or she would receive the promised concession, usually a dismissal or reduction of the original charge. If the offender was dismissed for non-compliance the case returned to the traditional case-processing track. 23

The most common Wisconsin model was post-judgment courts. Participants were convicted of a crime and sentenced to probation. Treatment requirements were incorporated as conditions of probation. This structure allowed for the transfer of supervision costs from the county to the state corrections agency. 24

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21 The defense bar has criticized requiring a defendant to plea guilty as a precondition to entry into a problem-solving court. Among the reasons advanced are a concern that coerced treatment is unlikely to be successful, that defendants should not have to forfeit procedural rights to obtain treatment, and a concern that treatment failures would be punished more severely than if the defendant had been convicted without participation in treatment. *America’s Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform*, supra n. 8 at 24-25.

22 Conditional pleas of guilty were preferred – at least by prosecutors and trial courts – because they preserved a conviction in the event of a program failure. The defendant would appear in court, entry a plea of guilty or no contest and engage in a typical colloquy with the court. See Wis. Stat. §971.08. The court would find the plea was voluntary and intelligently made but judgment would not be entered on the plea, avoiding a conviction. If, weeks or months later, the defendant was expelled from treatment, judgment could be entered based on the prior findings and all that remained would be sentencing. On the other hand, if the defendant successfully completed the program charges could be dismissed without the need to vacate a conviction. In this way, a conditional plea could serve both the interests of the defendant and the prosecutor and appears consistent with Wisconsin case law. *Cf. State v. Daley*, 288 Wis. 2d 646, 709 N.W. 2d 888 (Ct. App. 2005) and *State v. Dawson*, 2004 WI App 173, 276 Wis. 2d 418, 688 N.W. 2d 12 (2004). Not surprisingly, the National District Attorney’s Association favors conditional pleas whereas defender organizations typically do not.

23 It has been suggested that in some treatment courts failures are followed by more severe punishments than if the offender had been convicted without being in treatment. No evidence of this was seen in the Wisconsin courts.

24 An exception was the OWI court given that probation was not an available sentencing option for third offense drunk driving cases, the target population for that particular treatment court. The practical consequence of this “get tough” legislative action was transferring the costs of supervision from the state to the county. Wisconsin law has recently changed to permit probation for certain repeat drunk drivers. This would permit use of state resources to supervise participants in post-judgment treatment courts.
In all cases participants were required to sign written contracts. They contained both generic information about their rights and obligations and conditions unique to their particular circumstances. Contracts ran from nine months to up to two years with different levels of treatment and aftercare.

H. Common Procedural Practices

1. Timing of Admission. The decision to explore treatment generally occurred shortly after criminal charges were filed. There was no discernible distinction in the early stages of a case between treatment court and non-treatment court cases. Police or citizen referrals were screened by prosecutors according to normal procedures, counsel was appointed and discovery was exchanged according to local practice. There was no evidence in Wisconsin of defendants being forced to decide whether to seek treatment before their attorney could review their case thoroughly. This appeared to be as much a function of resource levels as program design – in most communities there was a waiting period for admission to treatment.

2. Treatment Team Staffings. Several features distinguished problem-solving courts from traditional models. Two of the most significant were the requirement of frequent regular court appearances and team meetings before each court session to discuss each case on the calendar. It was at these meetings that critical case decisions were made. Team discussions were frank and open; traditional formulations of the roles of trial judge, prosecutor and defense attorney were noticeably absent. The unstated yet clearly shared goal was to make the offender succeed, not to “close” the case or remove him from the program. Neither participants nor their lawyers were present at any of the observed team staffings.

3. A Prototypical Treatment Court Hearing. From the first instant it became clear that problem-solving court hearings were different altogether from a traditional criminal court. Rare was the mention of case file numbers or offense names; the dialogue focused on the participants’ lives, their families, their problems, their successes and their failures. Depending on a participant’s progress or perceived treatment needs they were required to appear on a weekly, biweekly or monthly basis. If they did well since the last hearing they may be rewarded with a gift certificate from a local restaurant or movie theater or receive praise and encouragement from the court. If they had relapsed or failed to meet a condition they faced an immediate sanction - ranging from denial of permission to travel out of county to a night in jail to outright dismissal from the program. Many

25 In some communities treatment court was used as an alternative to revocation of probation and thus entry might not occur until months or years after conviction and sentencing.

26 Requiring a rushed and uninformed treatment court decision would be troublesome, especially if participation required conviction of a serious criminal offense. The program design of all problem-solving courts must accommodate the need for defense counsel to obtain discovery, investigate, and consult with the client.
admitted relapses, typically involving drug use, constituted criminal violations. The treatment contracts in all communities immunized participants from new criminal prosecutions based on these admissions.\(^\text{27}\)

Each participant scheduled to appear on a particular day was expected to remain for the entire session of drug court. They applauded a co-participant’s successes or voiced their collective disappointment upon learning of another’s failings. Participants who graduated from the program were awarded a graduation certificate. Different levels of aftercare services were often made available.

4. The Role of the Trial Judge. The trial judge’s role in problem-solving courts was very different from the traditional role of passive neutrality.\(^\text{28}\) In all cases the court was actively involved in treatment decisions and predisposed to do all in his or her power to help the participant succeed. Information flowed freely between judge, treatment professionals, prosecutor and defense attorney; the normal filters of confidentiality and application of evidentiary rules did not apply. Whatever was known or suspected by any team member was known by all, including the trial judge. The trial judge participated in weekly staff meetings, was familiar with the details of each defendant’s situation and personally engaged each participant at their court appearances.

In some cases the judge even acted as an advocate for the participant who needed legal advice – suggesting how to deal with an overdue utilities bill or what was necessary to obtain visitation with one’s children – in addition to monitoring the person’s treatment progress.

The trial judge was the central authority figure in treatment court, bearing ultimate responsibility to mete out an award or sanction or to permit a defendant to remain in the program. Although most decisions reflected the collective view of the entire team, the trial judge was in control, in both the eyes of the offender and those of the treatment team.\(^\text{29}\)

5. The Roles of the Team Members at the Hearing. Treatment professionals, and in some courts, the probation agent, were the second-most critical players during the

\(^{27}\) One important issue that did not arise during the course of the author’s observations was treatment of an admission to a very serious crime, for example, a homicide or serious sexual assault, while the offender was involved in treatment.


\(^{29}\) One criticism of problem-solving courts is their drain on scarce judicial resources. There is no question that this approach requires a greater investment of time in each case. Nonetheless, it seemed clear that the stature of the judge and respect for judicial authority was critical to the operation of each of the courts observed. It is difficult to imagine what other system actor could fill that role.
court hearings. This was not surprising given that treatment rather than retribution was the focus of the team’s efforts and counselors and agents invariably had greater training and greater continuing contact with each participant. Team members looked to them for guidance in responding to the participants’ various successes or failures. During court hearings the offender’s counselor or agent typically sat at counsel table where, in a traditional court setting, defense counsel would be.

The prosecutor and public defender team members played less prominent roles at the hearings. The prosecutor provided case information or answered legal questions that arose. The role of the public defender team member at the hearings was less clear. They did not represent individual program participants and rarely had one on one contact with participants during a hearing.

6. The Role of the Participant’s Defense Attorney. Once the client was admitted into the treatment Wisconsin defense attorneys – both public and private – saw their role in the case as over. There were no appearances by defense counsel in any of the treatment court sessions observed even though nothing prevented them from attending. A number of explanations were provided.

The most common explanation, at least in post-judgment cases, was simply that the case was over. Admission to treatment court was viewed as analogous to a sentence. And, in cases in which probation was ordered with treatment as a condition it was in fact a sentence. Just as defense attorneys do not ordinarily track clients as they navigate the requirements of a probation or jail sentence many viewed admission to treatment court the same, signaling the end of their trial court representation. Wisconsin Public Defenders took this view and closed their files at the point of admission to treatment.

Although many private attorneys did not view the end of representation in such technical terms many felt financially unable to attend entire sessions of treatment court simply to observe what would likely be a brief appearance, which could occur at any time during a two to four hour court session, and where the trial court wanted to hear from the client and not the lawyer.

7. Violation of Problem-Solving Court Rules. The issue of expulsion arose if the participant could not or would not comply with treatment requirements. Although a myriad of violations were observed in the nearly eighty cases observed in several court

30 In one court there was no defense presence at all and in another no prosecutor.

31 On occasion, the trial judge referred a question from a participant to the Public Defender and they spoke away from the others present. If the Public Defender team member did not represent the participant, information shared would not be confidential. MRPC Rule 1.6(a). This would seem to suggest that the Public Defender team member should clarify his role before speaking to a participant who might not understand this distinction. MRPC Rule 4.3.

32 This analogy would not apply as easily in pre-judgment courts where proceedings were suspended for the duration of the defendant’s participation in treatment.
sessions, expulsion was discussed only twice. Relapses were expected; more often than not repeated violations were seen as a failure of the treatment plan rather than evidence of culpable conduct. The most common response to a rule violation was to refine or modify the treatment plan. Treatment success rather than punishment was the uniform objective of the treatment team.

In the case in which the team was to consider expulsion, the presiding judge recused himself from the discussion of whether to expel the participant given that he expected to preside over the expulsion hearing should one be scheduled. In one other court the treatment judge transferred the case to another judge to conduct the hearing. If expulsion was recommended a separate hearing was set. Defense counsel would be appointed and the state would bear the burden of demonstrating a rational factual basis for the action.

8. Graduation – Successful Completion of the Program. When a participant successfully completed treatment a graduation ceremony of sorts was held. I observed a handful of these hearings. Typically the participant was praised for their hard work, awarded a certificate of completion and applauded by all other participants present for the day’s hearings. They were among the most remarkable hearings I have seen in more than thirty years of practice and teaching. I did not see defense counsel at any of these hearings. Promised concessions were granted following program completion with minimal additional process, at most a perfunctory hearing, often with the participant unrepresented.

9. Evaluation and Assessment. Each county kept track of program successes and failures. Three types of data were generated – the results of risk assessment tools used to determine appropriateness for treatment; the treatment records of participants and treatment-jail cost comparisons to demonstrate jail bed savings. Only a few of the courts were in existence long enough to generate the type of statistical information that might begin to allow for a comprehensive the assessment of long-term outcomes.

I. Wisconsin Defense Attorneys: Perspectives on Problem-Solving Courts

I spoke to defense attorneys in each of the Wisconsin counties with problem-solving courts. They expressed a wide range of opinions and varying levels of knowledge about the underlying theory and day to day administration of these courts.

A substantial number of both Public Defenders and private defense attorneys were encouraged by the focus on treatment as a new way to deal with clients with chronic alcohol or substance abuse problems. They sought to learn as much as possible about their local program to enable them to accurately explain this option to their clients. Several admitted a need to learn more about addictive behaviors and effective interventions. At least one said he would try to obtain an independent assessment of a client’s treatment needs to counsel the client about the risks and potential benefits of such a program. Several of the more experienced attorneys noted that at best treatment was only viable for certain clients. For others, for example, those who struggled with probation or parole supervision, the attorneys believed the level of structure and
discipline would likely doom the client to failure. This group of attorneys believed candid and accurate client counseling was critical. As long as their clients made informed decisions they were not troubled in the least by the waiver of rights that accompanied participation in treatment.

A significant group of defense attorneys were predisposed against treatment courts as a matter of principle. They were outspoken and adamant about the danger of the wholesale waiver of procedural rights, the lost opportunity to challenge the charges by any and all means, and the abandonment of traditional safeguards for what they viewed as an unproven product. They did not know, or, it seemed, care to know, a great deal about their local problem-solving courts, had not observed them in operation and, for the most part, had no interest in doing so. It seemed clear that these attorneys would discourage their clients from pursuing this option regardless of the circumstances.

A few defense attorneys, often newer attorneys or those who were not criminal law specialists, were only generally aware of how treatment courts functioned, particularly in communities where the program was new. They did not express strong opinions for or against problem-solving courts. Rather, they often had a simplistic view of the option, seeing it only as another means to seek a charge or sentencing concession from the prosecutor. They seemed willing to advocate for a referral without a clear understanding of what the program required or whether the client had a realistic chance of success.

II. Different Roles: Defense Counsel as a Member of the Problem-Solving Court Planning and Advisory Group

In Wisconsin it was commonplace for a defense attorney, almost always a Public Defender, to be part of the problem-solving court planning and advisory group. A defense presence in the initial plans for and design of a local problem-solving court, or, for that matter, with any system-wide policy making body, has substantial ongoing value. The defense bar possesses knowledge of their clients and sensitivity to procedural fairness not always shared by other system actors. Their clients are often the disenfranchised, a population with little voice and extraordinary needs. A defense presence contributes to the quality of local policy-making and can improve the system in ways unattainable through representation of individual clients. Applied to problem-solving courts, a defense perspective can make valuable contributions in the discussion of several important issues,

(1) What type of substance abuse or addictive behavior should be the target of the problem-solving court’s efforts?
(2) What are the admission criteria and should they be uniform or flexible?
(3) How can admission procedures be designed to ensure that defense counsel has sufficient time to adequately investigate, consult and advise his client?
(4) What concessions should follow a participant’s successful completion of treatment?
(5) Should participants and their attorneys have access to the team discussions and the information upon which treatment decisions are made?
(6) What waivers of confidentiality or other procedural rights are necessary and appropriate and how can they best be explained to prospective participants?
(7) What safeguards are necessary to protect the privacy of the participant’s treatment records during and after participation in the program?
(8) To what extent should the participants’ admissions of criminal conduct be immunized if required as a condition of program involvement?
(9) What due process protections should apply when the treatment team seeks to remove a participant for rule violations?
(10) Should there be a written contract between the participant and treatment team, and, if so, what information should be included and who should sign the contract?
(11) Should early discovery procedures be developed to permit prompt treatment court decisions after the commencement of charges?
(12) How should cases be handled if the participant is terminated from the program?

It is undoubtedly more effective to address these questions as part of the initial program design rather than on a case by case basis. The rules and regulations of Wisconsin treatment courts bore the unmistakable imprint of this defense voice.

Historically, the defense bar has not been an equal player at the policy-making level of local criminal justice systems. This is an opportunity lost. Decisions made with no defense input often undervalue the interests of defendants and the importance of fair process. A review of literature confirms there has often been no defense involvement in planning and oversight of problem-solving courts.\textsuperscript{33} Several reasons have been suggested.

In some communities apparently the defense bar has been intentionally excluded. If true, this is unfortunate, inconsistent with notions of collaboration which inhere in treatment modalities, and deprives the community of valuable information unavailable elsewhere.

In other instances the defense bar has apparently chosen not to participate, for fear of not being an equal partner, out of concern that a problem-solving approach would not treat their clients appropriately or truly serve their interests or out of a general distrust of problem-solving courts in general.\textsuperscript{34}

Some attorneys have also suggested involvement in policy-making could result in system changes that might harm individual clients.

Ethics codes and practice standards have given little attention to defense attorneys, or for that matter, any attorney, acting in such a role. The ABA Model Rules of Professional Conduct mention the attorney’s role as an “officer of the court” and a “public citizen having special responsibility for the quality of justice” only in the Preamble.\textsuperscript{35}

\textsuperscript{33} See Spinak \textit{supra} n. 6 at 1618-1621.

\textsuperscript{34} It is often true as well that defense attorneys do not speak with a single voice and that even within a single defender agency there can be significant differences of opinion on matters of policy. \textit{Id.} at 1619.

\textsuperscript{35} The only other mention of an attorney acting in an advisory or oversight capacity is found in Rule 6.3, discussing how conflict of interest rules would apply to such a position.
proposed ABA Defense Function Standards announce a duty to the “administration of justice” but limit its scope to providing adequate client representation. Standard 4-1.2(b).

This is unfortunate and ironic given that much of the ABA’s work reflects lawyers, both private and public, giving of their time to help improve the profession and legal system. The potential benefits of an active defense presence at this level of system functioning are clear. And, if defense counsel sees himself as an “officer of the court” and a “citizen” with special knowledge this role presents no conflicts or other ethical problems in relation to existing clients.

III. Different Roles: Defense Counsel as a Member of the Problem-Solving Court Treatment Team

Defense counsel as a team member is a more difficult and complex role to define and reconcile with the attorney’s other responsibilities. Without exception, the attorney team members observed demonstrated allegiance to the team – not to any current or former clients. Their involvement added value to the process by providing a unique perspective that could not be supplied by other team members. At the same time, being an involved and committed team member was irreconcilable with the duties an individual lawyer owed his client, particularly if the client wished to act in a way different from what the treatment team wanted. This would present a classic concurrent conflict of interest. MRPC Rule 1.7(a) (2), ABA Defense Function Standard 4-3.5(a). It could best be avoided by prohibiting active representation of participants by the defense attorney team member. Admittedly, this would be difficult in smaller communities with a limited defense bar. If separation of roles is not possible, participants would need to make informed waivers of the potential conflict in writing.

Additional ethical issues affected the defense attorney team member. In Wisconsin, all were Public Defenders. On several occasions the Public Defender team member knew a participant as a former or current agency client. Information shared with the team about the participant seemed to clearly involve the disclosure of former client confidences.

36 The policy and procedure manuals adopted by Wisconsin treatment courts bear the imprint of defense input on many of these issues, reflecting a balance between treatment goals and procedural fairness. (Illustrative examples on file with author).

37 At least one treatment court model in an adjoining state involved a single defense attorney as team member and counsel for all participants. This exposes counsel to the risk of multiple conflicts between the duty owed each individual team member and the duty owed the team as well as conflicts between individual team members. In a population of chronic alcohol and drug abusers it is not uncommon for participants to have knowledge of the violations of other participants nor is it unusual for them to serve as sources of information. The potential conflicts for a single lawyer serving in these multiple roles are manifest and should be avoided.

38 MRPC Rule 1.7(b) (4).

39 MRPC Rule 1.6 protects all “information” related to the representation and imposes no time limit on the duty of confidentiality. Unless some form of consent to disclosure were obtained it would be inappropriate for the Public Defender team member to share past knowledge about a participant.
There seem to be two possible responses to this structural problem – exploring whether screening is viable or obtaining waivers of confidentiality from the participant.

Developing procedures to prevent improper conflicts is complicated by the rules of imputed disqualifications and the limited screening rules in most jurisdictions.

Under ABA Model Rule 1.10 and state variants, the conflict of one firm member is imputed to all firm members. A Public Defender agency would seem to be a firm within the meaning of the rules. In the context of problem-solving courts, this means if any assistant Public Defender would be conflicted out of a case all others in his office would be as well. The strictest interpretation of the rule would mean that no Public Defender could serve as a team member if any participant was ever represented by someone in the same office. The rigidity of this rule in other contexts has lead to a call for exceptions that would allow conflicted attorneys to be screened from involvement in the case giving rise to the conflict. Whether and under what circumstances screening should apply has been a divisive issue within the ABA and state ethics committees with more than twenty distinct responses in different jurisdictions. By way of illustration, Wisconsin has a narrow screening provision that applies in very narrow circumstance and would not resolve the conflict between a Public Defender functioning as a treatment team member when colleagues are or have represented treatment court participants. Whether screening would be a viable solution to conflict problems would require examination of the particular jurisdiction’s screening rules. If they applied the lawyer could proceed with the representation even if the conflicted former client objects.

A more viable response would be to require waivers from the former client as a precondition to entry into treatment. Such waivers would not necessarily have to be completely open–ended. They could provide some agreed upon level of screening in return for a waiver of conflict and confidentiality protections. Of course, any such waiver would have to be in writing, signed by the participant.

It would also be best if made clear that the defense attorney team member did not represent the team or any other client when acting in the role of team member. This would avoid another potential ethical problem – contact with represented persons without the consent of their lawyer. ABA Model Rule 4.2 prohibits an attorney “representing a client” from contact with a person known to be represented in the same matter. This rule could be violated if the team member was viewed as representing the team, the interests of the team and the participant were potentially adverse, the treatment court participant continued to be represented by separate counsel, and there was contact between the team...

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40 Wisconsin Supreme Court Rule 20:1.10.

41 MRPC Rule 1.7(b) (4). The proposed ABA Defense Function Standards contain conflict of interest provisions which somewhat parallel those of the Model Rules. They add little of value to structuring the role of a problem-solving court team member to avoid disclosure of confidences or conflicts with current or former clients, real or imputed.

42 See n. 38, infra.
member and participant at the court hearing. This problem could be avoided by making clear that the defense attorney team member does not act as attorney for the team or any participant. It would also be good practice for the defense attorney team member to explain his role to a participant – especially that he is not a lawyer for the participant or the team – whenever there is contact between the two. This could go far to avoid the risk of confusion regarding the relationship between the Public Defender team member and program participants.  

There is also the matter of ex parte communications. ABA MRPC Rule 3.5 prohibits an attorney from having ex parte contacts with the court. The text of the rule does not limit its reach to representation of clients as do ABA MRPC Rules 4.2 and 4.3. As a consequence, the rule appears to prohibit contacts by the attorney team members with the judge – both the Public Defender and the prosecutor – in the absence of the participant or his lawyer regardless of how one envisions the roles of the attorney team members. A strict reading of the rule suggests that common staffing practices violate this rule. The most direct solution would be to require written participant consent to staffings as a condition of program involvement.

There are similarities between the defense attorney member of a planning or oversight committee and an attorney team member. In a sense, both act as “officer[s] of the court” and “public citizen[s] having special responsibility for the quality of justice”. Neither role inherently involves representation of a client. However, the defense attorney team member participates in real cases with real clients and makes real decisions that could be adverse to a current or former client. This distinction makes constructing the team member’s role more complex and fraught with ethics questions. The Model Rules provide a path through this thicket even if it is not the most clear or direct or clear path. In contrast, the proposed ABA Defense Function Standards neither acknowledge this role nor provide useful commentary in clarifying the role of defense counsel as a team member.

**IV. Different Roles: The Lawyer Representing Individual Clients in Communities with Problem-Solving Courts**

A fundamental and well-founded defense objection to problem-solving courts is that defense counsel should not be forced to embrace a collaborative role which may be antithetical to his client’s wishes. A second objection is systemic in nature – that treatment is improperly purchased at the cost of abandoning nearly all traditional procedural safeguards enjoyed by the accused.

Separation of the roles of defense counsel as proposed here answers the first objection, a legitimate concern in jurisdictions who have sought to meld the distinct roles into one either for fiscal reasons or due to the failure to carefully consider the different

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43 Cf. MRPC Rule 4.3 discussing contact with unrepresented persons.

44 Another view expressed is that at staffings the judge is not acting as a “court” and thus that the rule would not apply to these meetings.
responsibilities that inhere in each role. The second objection reflects an overly simplistic view of advocacy, failing to take into account that the dynamics of a treatment court require a very different type of presence than a contested trial or hearing, an approach to advocacy discussed later in this section. The objection also fails to acknowledge that presumably whenever a client participates in treatment he has chosen this path and rejected litigation, a choice that is his to make.

The advent of problem-solving or treatment courts changes the context but not the nature of defense counsel’s responsibilities to the client. Unchanged are the responsibilities to protect client confidences, MRPC Rule 1.6, to provide competent representation including investigation of the facts and law, MRPC Rules 1.1, 1.3, and, to present an informed assessment of the case – the client’s choices and the likely consequences of each, MRPC Rules 1.2, 1.4.45

At the early stages of any case counsel needs sufficient time to investigate and consult with the client. This means that problem-solving courts must be structured to accommodate reasonable time for counsel to do so – to obtain discovery, explore whether the government case is provable, whether viable defenses exist or evidence may be subject to suppression – and to discuss his findings and conclusions with the client.46

Informing a client of his options and the potential risks and benefits of each is among the most important responsibilities of any lawyer in any type of case. In the context of problem-solving court there appear to be at least three components to the consultation: (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) precisely what the treatment court experience would involve on a day-to-day basis – the program requirements, available concessions, and the consequences of failure. Making sure the client’s decision is truly informed may be counsel’s most important responsibility in such cases because the option is so different from traditional options and can involve extraordinary demands upon the client, albeit with the chance for extraordinary benefits. Even if counsel is predisposed against the problem-solving court model, as several attorneys the author interviewed, it would be inappropriate to not fully and accurately present this option to the client.47 If defense counsel has satisfied this responsibility and the client understands his options, his informed choice controls the direction of the case

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45 The proposed contours of effective representation when treatment is an option find support in the proposed ABA Defense Function Standards. For example, Standards 4-5.1 and 4-5.4 emphasizes the importance of a thorough investigation to enable counsel to adequately discuss all aspects of the case with his client. This may involve treatment – Standard 4-6.1 – and the need to engage experts. Standard 4-4.3.

46 Inadequate time to investigate was not a problem in Wisconsin, largely due to waiting lists for entry into treatment. It may be that a vocal defense presence at the planning stage can develop procedures to accommodate these legitimate concerns and obviate the need to raise them in individual cases. See ABA Defense Function Standard 4-4.1, Duty to Investigate.

47 See ABA Defense Function Standards 4-51 (Advising the Accused) and 4-6.1 (Duty to Explore Disposition Without Trial).
and defense counsel’s contrary preferences become moot. If the choice is to reject treatment, representation will follow a traditional trajectory.

A remaining issue is the proper role of counsel after the client is admitted to treatment, or, for that matter, if counsel should have any role at all.

As noted earlier, when admission to treatment follows conviction and is part of a probation sentence many attorneys believe their representation is over even as the demands on the client are just beginning. This view is not without support. Rare is the case where an offender sentenced to jail or probation – even with demanding conditions – enjoys the continued involvement of counsel to mediate issues with the jailor or probation agent. Does the fact that the problem-solving model involves continued court involvement rather than simply a custodian or probation agent change the responsibilities of defense counsel? Implicit in some of the criticisms of treatment courts is the assumption that counsel has a continuing responsibility to the client until he either graduates from treatment or is removed and the case is resolved by other means. There is no clear authority imposing this duty and, as discussed, there are reasonable alternative viewpoints. Nonetheless, even if not statutorily or constitutionally required continued defense counsel involvement can have value even if counsel’s presence is more nuanced and distinct from a traditional role. In traditional litigation the attorney stands between the client and the state. The attorney speaks for his client, asserts procedural protections to prevent the client from making admissions of culpable conduct. In contrast, if the client has agreed to treatment he has also agreed to be candid and forthright; to admit to relapses and missteps, and ultimately, to be accountable for the choices he has made. Interposing defense counsel between the client and the court or treatment team to frustrate this form of accountability is irreconcilable with the philosophy of treatment and what the client has presumably agreed to. A traditional approach to advocacy could do the client more harm than good.

This is not to say that there is no productive role for counsel to play. He may work to insure a fair admission process and treatment contract geared to his clients needs. All treatment court participants were required to sign a written contract. Counsel would do well to review the contract, seek modifications if appropriate and possible, and make sure the client understands what he is agreeing to. Some counties anticipate the involvement of defense counsel, and included a signature line for defense counsel. Others did not. There were wide variations in the information included

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48 See MRPC Rule 1.2, ABA Defense Function Standard 4-5.2 (Control and Direction of the Case).

49 Implicit in the duty to provide competent representation is a responsibility to see the case through until its conclusion. MRPC Rule 1.1. The proposed ABA Defense Function Standards addresses the continuing responsibilities of counsel. Standard 4-1.3 (The Continuing Duties of Defense Counsel). Of course, in the new world of problem-solving courts there are differing views of when a case is concluded.

50 The Sixth Amendment right to counsel has been interpreted to apply when one is accused of a crime and faced with a “critical stage” of the proceeding. Although the initial sentencing hearing is deemed a critical stage and due process has been interpreted as requiring the assistance of counsel in probation revocation proceedings there is scant discussion in case law or literature of whether the regular court appearances required in problem-solving courts should be viewed as “critical stages” of the proceeding. See in general La Fave & Israel, Criminal Procedure 598-600 (5th. Ed 2009).

51 All treatment court participants were required to sign a written contract. Counsel would do well to review the contract, seek modifications if appropriate and possible, and make sure the client understands what he is agreeing to. Some counties anticipate the involvement of defense counsel, and included a signature line for defense counsel. Others did not. There were wide variations in the information included.
can prepare the anxious or inarticulate client for his regular court appearances. He can bring important facts and concerns to the attention of the team. He can work to make sure the testing processes and procedures are not prone to error, and, if so, to bring his concerns to the attention of the court and treatment team. He can remain a continuing source of support and encouragement for the client who is struggling to overcome his addiction. These actions can involve out of court contact with the client or a measured presence at team staffings and court hearings.

Continuing involvement can also ensure the attorney is informed of the client’s progress and be adequately informed should the need arise to defend against a claimed rule violation, if the client chooses to leave the program, or is involuntary expelled. The length and duration of defense counsel’s obligation to a client in treatment is one of the important unresolved issues in the problem-solving court model.

V. Wisconsin Efforts to Redefine Roles and Beyond

From the earliest stages, Wisconsin treatment court team members acknowledged that their responsibilities and relationships would be substantially different from a traditional adversary model. It has seemed that as one new and important question is answered two more emerge. Nonetheless, Wisconsin actors continue to work to balance a problem-solving approach with traditional ethical responsibilities and due process procedural requirements. Their early efforts did not draw clear distinctions between the various roles of defense counsel in treatment courts.\(^{52}\) At the same time, they have shown continued

\(^{52}\) For example, the initial Memorandum of Understanding for the Eau Claire County Drug Court Program explained the defense role as follows:

**The Public Defender’s Office**

Shall assign a lawyer who will provide the following services:

1. Attend team meetings as necessary
2. The public defender or private defense attorney will make referrals to the drug court team after explaining the nature, purpose, and rules of drug court
3. The public defender or private attorney will encourage the participants to be truthful with the judge and treatment staff since admitting drug or alcohol use in court will not be the basis of new criminal charges
4. The public defender will be an active member of the drug court treatment team
5. The public defender will review the client’s progress in treatment and advocate for fair process when a client is facing sanctions or termination
6. Provide representation for the participant in termination proceedings if eligible
7. The public defender will be a community advocate for the Drug Court Program

Note that items 2, 3, 5, and 6 address the role of counsel as attorney for a client. Items 1, 4, and 7 speak to defense counsel as a member of the treatment team.

Similarly, the St. Croix County Drug Court Program Policies and Procedures Manual envisions a slightly different, but also mixed, defense role:
good faith, cooperation, and an openness to critically examine their own actions and the underlying premise of a problem-solving approach to drug and alcohol abuse. Their commitment to problem-solving is practical not theoretical – as long as it helps clients for whom traditional approaches had little to offer it will continue. If, over time, this approach proves unsuccessful I expect it would be abandoned, or at least modified and refined to apply to the cases where it is most likely to be successful. Wisconsin practitioners have also made efforts to share their experiences and questions beyond their local communities, to be part of a state wide and even national dialogue.

From these experiences the distinct roles described here have emerged. Mixing these distinct roles into a single traditional view of the defense function makes client identification and analysis of the new and often complex ethical issues presented by problem-solving courts unnecessarily difficult and problematic. A careful examination of exactly what defense counsel does in their various roles and developing a structure grounded in fact and experience – the Wisconsin approach – rather than a dialogue based on stereotypical caricatures of system actors’ roles can best help develop performance standards and ethical guidelines for defense counsel’s work in and with problem-solving courts. Given the respect and guidance that has long been afforded the work of the American Bar Association, discussion of these issues in either in the Criminal Justice Standards or elsewhere can make an important contribution to this dialogue.

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**Public Defender’s Office/Defense Attorney**
- Attend Team Meetings as necessary
- Discuss pros and cons with potential participant before entering drug court
- Review cases for potential legal issues
- Discuss resolution of case with District Attorney before entering drug court
- Remain accessible to participant
- Advocate for fair process
- Maintain a non-adversarial role during Court proceedings
- Provide representation for the participant during termination proceedings if eligible

Here items 1 and 7 focus on the Public Defender as team member. Item 6 presumably applies to the Public Defender as a member of the initial planning group and treatment team and items 2, 3, 4, 5 and 8 focus on the Public Defender as attorney for a client.