

## Problem-Solving Courts and the Defense Function: The Wisconsin Experience

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The emergence of problem-solving courts<sup>1</sup> 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,<sup>2</sup> 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 strong disagreement with proponents of problem-solving courts who urge that defense counsel abandon his traditional role in favor of a collaborative approach to advance treatment objectives.<sup>3</sup> Although well intentioned, this assertion is flawed in its failure to that the choice to seek treatment rather than litigate belongs to the client not the lawyer, and if the client chooses this path, collaboration may very well be what competent representation requires. In addition, this generalized criticism fails to recognize that defense counsel may serve several distinct roles in a problem-solving court, two of which do not necessarily conflict with the traditional responsibilities a lawyer owes his client. A second source of defense criticism is grounded in two deep seated and persistent beliefs among many defense

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<sup>1</sup> Throughout this paper the terms “problem-solving courts” and “treatment courts” will be used interchangeably.

<sup>2</sup> McCoy, *Community Courts and Community Justice: Commentary: The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 Am. Crim. L. Rev. 1513, 1528 (2003).

<sup>3</sup> See Hora, Schma & Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 Notre Dame L. Rev. 439, 479-480 (1999), Kaye, *Lawyering for a New Age*, 67 Fordham L. Rev. 1, 5 (1998).

attorneys.<sup>4</sup> 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,<sup>5</sup> finds support in several of the proposed revisions to the ABA Standards for the Defense Function<sup>6</sup> and in the reports of national defense organizations.<sup>7</sup> 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. 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 cannot trump an informed client's wishes. An exclusive focus on litigation fails to acknowledge that the vast majority of cases are settled rather than tried with procedures not altogether different than those in problem-solving courts.<sup>8</sup> A preoccupation with adversary processes risks

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<sup>4</sup> A third concern is perceived structural and operational flaws in some problem-solving 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. There is no question that many courts that claim to be problem-solving courts have serious design and implementation flaws. However, these are correctable and not a reason to abandon the promise of treatment for appropriate offenders. A defense presence in the planning and oversight of the court can prevent such procedures from inclusion in the local court design at all.

<sup>5</sup> For example, Meekins, *"Specialized Justice": The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 Suffolk U. L. Rev. 1 (2006), Spinak, *Community Courts and Community Justice: Commentary: Why Defenders Feel Defensive: The Defender's Role in Problem-Solving Courts*, 40 Am. Crim. L. Rev. 1617 (2003), Quinn, *An RSVP to Professor Wexler's Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged*, 48 B.C. L. Rev. 539 (2007), Quinn, *supra* n. 5.

<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> 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]

undervaluing the distinct skills necessary for effective advocacy in non-adversary settings. Finally, a defense predisposition against innovation will not prevent system experimentation. It only prevents the defense bar from meaningful involvement in the planning and implementation of such efforts.

My observations of Wisconsin problem-solving courts showed a very different picture than that described by critics of this model.<sup>9</sup> 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 – defense counsel 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”.<sup>10</sup> This role was distinct from the

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<sup>9</sup> The author has been involved in criminal law practice and teaching since 1976, both in the classroom and in the 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.

<sup>10</sup> See ABA Model Rules of Professional Conduct, Preamble, paragraphs one and six.

lawyer 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 current or former clients were program participants.

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 roles defense counsel played in Wisconsin problem-solving courts and the ethical implications of viewing the defense function 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 Wisconsin experience might contribute to discussions of how best to preserve the fundamental responsibilities of defense counsel while 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.<sup>11</sup> 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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<sup>11</sup> The ABA’s practice of having distinct standards for overlapping practice areas allows for detailed treatment of specific subject but also creates challenges for the casual observer to understand what the ABA’s position is on a particular issue. For example, in the criminal justice area alone the American Bar Association website lists twenty-three different standards. <http://new.abanet.org/sections/criminaljustice/Pages/Standards.aspx>. As of this writing, it appears that the Criminal Justice Standards Committee is preparing distinct standards on diversion and specialized courts that will likely address issues unique to problem-solving courts.

## 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 Wisconsin interest in problem-solving courts. The impetus was, without exception, local in nature with little input or assistance from the state.<sup>12</sup> More often than not discussions were initiated by a local judge or county government official.

### B. Planning and Advisory Committees

Each community began by forming an advisory and planning committee. The group typically consisted of a local judge, a county board member, a prosecutor, a representative from law enforcement and the local Public Defender.<sup>13</sup> The group visited communities with existing problem-solving courts and attended nationally sponsored training sessions. It was responsible for deciding threshold questions such as the target population, admission criteria, the legal status of treatment participants and program procedures. Although the dynamics and allocation of authority within these 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 court began operations, the committee continued in an advisory and oversight role.

### C. Treatment Court Funding

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

Treatment services were the largest operational expense. In some instances existing county resources were reallocated to provide the needed services. In others the county relied on 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

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<sup>12</sup> 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.

<sup>13</sup> 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.

program graduates successfully reintegrated into their communities. Participants were usually required to pay a fee to partially defray program costs and encourage financial responsibility. Community service was available to those unable to pay.

#### 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.<sup>14</sup> They include:

- (1) Integration of treatment services with traditional case-processing,
- (2) Adopting a non-adversarial, team approach to offenders’ problems,<sup>15</sup>
- (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.

To a large extent Wisconsin problem-solving courts have embraced these components.

#### E. The Treatment Team

At the core of all problem-solving courts was the treatment team. Wisconsin treatment teams included the trial judge and treatment professionals. In most a probation agent, prosecutor and Public Defender were also members, and, in a few, local law enforcement representatives.<sup>16</sup> The team made both general policy and individual case

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<sup>14</sup> See <http://www.ojp.usdoj.gov/BJA/grant/DrugCourts/DefiningDC.pdf>.

<sup>15</sup> 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.

<sup>16</sup> 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.

decisions. Traditional roles 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 and differed from court to court.<sup>17</sup> There were generally four steps in the screening process: (i) a referral by the district attorney,<sup>18</sup> (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 grant or deny admission. A common theme with all admitted participants was the desire to confront a serious drug or alcohol problem.<sup>19</sup>

#### 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

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<sup>17</sup> The only external admission limit was the exclusion of violent offenders as a condition of federal funding.

<sup>18</sup> 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 “dumping cases” – referring weak cases to treatment as reported in other jurisdictions. Quinn, *supra* n. 5 at 58-59. However, in some communities referral decisions were controlled by the prosecutors specializing in drug cases, some of whom did not believe in the treatment court model. This created a risk of excluding appropriate candidates and frustrating basic program objectives. A solution to this problem could be relying on written admission criteria developed by the oversight committee rather than the *ad hoc* decisions of individual prosecutors.

<sup>19</sup> If an accused asked counsel to explore admission to treatment it was critical for counsel to understand the admission criteria and the process by which admission decisions were made. This was more complicated and varied than one might imagine.

First, counsel needed to know if the client's situation fit into the targeted treatment population in the particular county. Defining who and what to treat was among the first issues decided in 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 provided opportunities for the experienced defense counsel to fashion arguments that would resonate with the actual decision-maker and contribute to effective client preparation in anticipation of an intake interview.

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 completion of the program. A sub-class of pre-judgment drug courts saw offenders actually enter pleas of guilty, but not have judgment entered.<sup>20</sup> Authority over the participant derived from the bail authority granted trial judges under chapter 969 of the Wisconsin Statutes.<sup>21</sup> 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.<sup>22</sup>

The most common Wisconsin model was post-judgment courts. Participants were convicted of a crime and sentenced to probation with treatment requirements as court-ordered conditions. This structure allowed for the transfer of supervision costs from the county to the state corrections agency.<sup>23</sup>

In all cases participants signed written contracts. They contained both generic information about their rights and obligations and conditions unique to individual cases. Contracts ran from nine months to two years with varying levels of treatment and aftercare.

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<sup>20</sup> 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.

<sup>21</sup> 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, enter 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 the interests of the defendant, the prosecutor and comply with Wisconsin statutory requirements. *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.

<sup>22</sup> 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.

<sup>23</sup> 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 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.

## H. Common Procedural Practices

**1. Timing of Admission.** The decision to consider treatment usually occurred shortly after criminal charges were filed.<sup>24</sup> There was no difference 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 that unprovable cases were referred for treatment or 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.<sup>25</sup>

**2. Treatment Team Staffings.** Several features distinguished problem-solving courts from traditional courts. 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 team staffings.

**3. A Prototypical Treatment Court Hearing.** From the first instant it became clear that problem-solving court hearings were different from traditional criminal court proceedings. 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 were praised and often rewarded with a gift certificate from a local restaurant or movie theater. If they relapsed or failed to meet a condition they faced an immediate sanction – ranging from denial of permission to travel out of the county to a night in jail to outright dismissal from the program. Many participants admitted relapses – using drugs or alcohol – usually early in the process. Although many violations constituted criminal conduct none were charged given the policy of immunizing participants from admissions made in the course of treatment.<sup>26</sup>

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<sup>24</sup> In some communities treatment court was used as an alternative to revocation of probation, parole or extended release. In this situation entry into treatment might be months or years after conviction and sentencing.

<sup>25</sup> Reports that in some jurisdictions defendants are forced to quickly decide whether to pursue treatment or forfeit the opportunity before their attorney had received discovery or completed investigation of the case are troubling. Without question, problem-solving courts must be designed to accommodate the need for defense counsel to obtain discovery, investigate, and consult with the client.

<sup>26</sup> There was general agreement that a participant’s admission of drug use could not be the basis of a new possession charge. Less clear was the propriety of use of admissions to investigate others who may have provided the drugs or what should occur if the participant admitted to a very serious crime, for example, a homicide or serious sexual assault. Several defense attorneys appropriately complained about the lack of

Each participant scheduled to appear on a particular day was expected to remain for the entire session of drug court even after their appearance was completed. As a group they applauded a co-participant's successes or voiced collective disappointment upon hearing of another's failings. Participants who graduated from the program were awarded a graduation certificate. Aftercare services were sometimes offered.

**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.<sup>27</sup> 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 evidentiary privileges did not apply. Whatever was known or suspected by any team member was known by all, including the trial judge. The trial judge and other team members knew significantly more about each participant than would be known about a defendant in a traditional criminal court setting. 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 in need of legal advice – suggesting how to deal with an overdue utilities bill or how to seek 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.<sup>28</sup>

**5. The Roles of the Team Members at the Hearing.** After the trial judge, treatment professionals and often probation agents were the second-most important players during the court hearings. This was not surprising. Treatment rather than retribution was the focus of the program and the treatment professionals and agents had

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clarity about the scope of immunity, explaining that it prevented them from fully and accurately explaining the risks of entry into a treatment program. The scope of immunity remains an issue in need of additional clarification in problem-solving court practice.

<sup>27</sup> See Boldt & Singer, *The Maryland/Georgetown Constitutional Law Schmooze: Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 Md. L. Rev. 82 (2006), Berman, *What Is a Traditional Judge Anyway?: Problem Solving in the State Courts*, 84 *Judicature* 78, 80 (2000), Nolan, *Therapeutic Adjudication*, *Society*, (Jan./Feb. 2002).

<sup>28</sup> 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.

more training and continuing contact with participant than the other team members. They were looked to for guidance in managing the participants' program experience. During court hearings the treatment professional 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 lesser roles at the hearings.<sup>29</sup> The prosecutor provided case information or answered legal questions that arose. The role of the public defender team member was less clear. Like the prosecutor, they were sometimes called upon to answer legal questions. They did not represent program participants and rarely had contact with a participant during a hearing.<sup>30</sup>

**6. The Role of the Participant's Defense Attorney.** Once the client was admitted into the treatment Wisconsin defense attorneys – public and private – assumed their role in the case was over. Not once did the author see defense counsel for a participant appear at a problem-solving court hearing. A number of explanations were provided.

The most common explanation, at least in post-judgment cases, was that the case was over and their responsibilities completed. Admission to treatment 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 counsel does not ordinarily track clients when they serve a jail sentence or are placed on probation none believed they had a responsibility to attend program court sessions.<sup>31</sup> Wisconsin Public Defenders 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 when 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 various treatment courts, expulsion was discussed only twice. Relapses were expected, especially early in the course of treatment. Although many relapses involved criminal

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<sup>29</sup> In one court there was no defense presence and in another no prosecutor.

<sup>30</sup> On occasion, the trial judge referred a question from a participant to the Public Defender team member. I was not privy to these conversations which were held conducted away from the others present in court. If the Public Defender team member did not represent the participant, information shared would not be confidential. MRPC Rule 1.6(a). This suggests that the Public Defender team member should explain this to the participant and clarify his role to avoid confusion. MRPC Rule 4.3.

<sup>31</sup> This explanation is less satisfactory in pre-judgment courts where treatment is a condition of bail and criminal charges remain pending. Nonetheless, there were no defense attorneys in either pre- or post-judgment Wisconsin problem-solving courts.

drug use they were seen as a failure of the treatment plan rather a reason to issue new criminal charges. The most typical response to a violation was modification of the treatment plan. Treatment success rather than punishment was the team's goal.

One of the presiding judges recused himself when expulsion was discussed, explaining that he expected to preside over the expulsion hearing should one be scheduled. Another said she would participate in all team discussions but would transfer the case to another judge if a hearing were recommended. Defense counsel would be made available to represent the participant faced with expulsion. The team suggested a hearing not unlike probation or parole revocation hearings with basic elements of due process.

**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 make admission decisions; the treatment records of participants<sup>32</sup> 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 tried 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 seek an independent assessment of the client to be fully informed about the risks and potential benefits of treatment. Even the most enthusiastic experienced lawyers noted that this option was viable only for certain clients. Those who struggled with probation or parole supervision might not survive the structure and

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<sup>32</sup> Each county had policies about access to and use of participant medical records.

discipline of a problem-solving court program. This group of attorneys believed candid and accurate client counseling was critical. As long as their clients' decisions were fully informed they were not troubled in the least by the broad waiver of rights that accompanied participation in treatment.

Another not insignificant 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 attorneys, often recent law school graduates or attorneys 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 have 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 recommend treatment to their clients 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 at the planning and design stage of a local problem-solving court had substantial value. The defense bar possessed knowledge of their clients and what services might best respond to their needs. They could be an advocate for insuring a measure of procedural fairness in the program design. Applied to problem-solving courts, a defense perspective can make valuable contributions in the discussion of several important issues,

- (1) What are the greatest substance abuse issues in our community and what is their impact?
- (2) As a consequence, what substances or offenders should be the target of the problem-solving court's efforts?
- (3) What are the admission criteria and should they be uniform or flexible?
- (4) How can procedures for case processing and admission to treatment be designed to ensure that defense counsel has sufficient time to receive discovery materials, investigate, consult and advise his client about the treatment option?
- (5) What concessions should follow a participant's successful completion of treatment?
- (6) What waivers of procedural rights and confidentiality 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, if any, is the proper role of defense counsel at treatment team staffings or court hearings?
- (10) What due process protections should apply when the treatment team seeks to remove a participant for rule violations?
- (11) 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?
- (12) How should cases be handled if the participant is terminated from the program?

These questions represent a non-exhaustive list of important issues in the design and implementation of any problem-solving court. Much of the criticism of this model reflects insensitivity to these concerns in many of the courts in operation.<sup>33</sup> It is undoubtedly more effective and efficient to address these questions as part of the initial program design rather than on a case by case basis. The procedures of Wisconsin treatment courts bore the unmistakable imprint of this defense voice.

Historically, the defense bar has often not been an equal player at the policy-making level of criminal justice systems. This is an opportunity lost. Decisions made with no defense input undervalue the interests of defendants and the importance of fair process. A review of literature confirms there has often been little or no defense involvement in planning and oversight of problem-solving courts.<sup>34</sup> Several reasons have been suggested.

In some communities it appears the defense bar may have 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, because of concerns that a problem-solving approach would not serve their clients' interests or out of a general distrust of problem-solving courts in general.<sup>35</sup>

Some attorneys have also suggested a defense presence in policy-making could result in system changes that might harm individual clients.<sup>36</sup>

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<sup>33</sup> See n. 4, 18, 22, and 25, *infra*.

<sup>34</sup> See Spinak *supra* n. 6 at 1618-1621.

<sup>35</sup> It is often true 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. *Id.* at 1619.

<sup>36</sup> It has been suggested to the author by defense attorneys on more than one occasion that the defense bar should not participate in reform of system flaws that some individual clients have been able to exploit for

Ethics codes and practice standards give only fleeting attention to defense counsel functioning as a policy-maker. 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.<sup>37</sup> The proposed ABA Defense Function Standards announce a duty to the "administration of justice" but suggest the primary means to do so is by providing quality representation to individual clients. Standard 4-1.2(b).<sup>38</sup> 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.<sup>39</sup> 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**

In one sense the role of defense counsel as a treatment team member can be easily described – he or she was an attorney who worked as part of a group whose collective goal was designing and managing a treatment program for a problem-solving court participant. The role became problematic only when defense counsel was expected to act as a team member and simultaneously represent program participants.<sup>40</sup>

An examination of the interests that inhere in the two roles demonstrates the difficulty. The defining feature of being a treatment team member was fidelity to the team – a commitment to an open and collaborative decision-making process and the objective of having the participant succeed in treatment. Defense counsel team members thrived in this role; they embraced it enthusiastically and added a valuable perspective not provided by other team members. In contrast, the lawyer for an individual client owes allegiance to the client, and must, as part of that responsibility, protect confidential

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their benefit. Justifications for this perspective range from the view that defense counsel must never act to eliminate a potential benefit for a current or future client to the opinion that defense counsel's responsibility to the system is limited to effective representation of individual clients.

<sup>37</sup> The only other mention of an attorney acting in an advisory or oversight capacity is found in MRPC Rule 6.3, discussing how the application of conflict of interest rules to the lawyer acting in a law reform capacity.

<sup>38</sup> Defense Function Standard 4-1.2(d) does provide that "[d]efense counsel should support efforts to improve the administration of criminal justice" when "inadequacies" or "injustices" exist. In the eyes of many defense attorneys this call to duty is limited to system practices that inure to the detriment of offenders and not overall system reform.

<sup>39</sup> 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. (Samples of Wisconsin problem-solving court policy and procedural manuals are on file with the author).

<sup>40</sup> Complications for the defense attorney team member could also arise if a former client or former firm client were involved in treatment. Possible solutions to these problems are offered in Section III.

information,<sup>41</sup> pursue the lawful objectives selected by the client regardless of the wishes of non-clients,<sup>42</sup> and avoid interests that would interfere with providing that which the client demands.<sup>43</sup> Imagine a participant who tired of treatment, wished to quit, began using drugs again and confided all of this to his lawyer. Imagine further that his lawyer was a treatment team member. If counsel honored his commitment to the client he would betray his responsibilities as a team member. If he shared the client's confidences with the team he would violate his duty to his client. There is no way the lawyer's "personal interest" in team membership could be maintained while serving his client's interests.

This presents a classic example of a concurrent conflict of interest. MRPC Rule 1.7(a)(2), ABA Defense Function Standard 4-3.5(a). Regrettably, this problem has not been given adequate attention by proponents of the problem-solving court model.<sup>44</sup> This conflict can and should be prevented by a blanket prohibition against representation of a program participant at a time when the lawyer is also serving as a treatment team member.<sup>45</sup> This seemed to be the practice in Wisconsin communities even though it had not evolved into a clear and unequivocal policy.<sup>46</sup>

Other ethical issues arose for the defense counsel team member. In Wisconsin, all were Public Defenders. On several occasions they knew a participant as a former or current agency client. If they shared knowledge about the participant with the team they were disclosing client confidences.<sup>47</sup> If they withheld relevant information they were not honoring their commitment to the team. An ethical violation could only be avoided by seeking a waiver of confidentiality from the participant.

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<sup>41</sup> See MRPC Rule 1.6.

<sup>42</sup> See MRPC Rule 1.2(a).

<sup>43</sup> See MRPC Rules 1.7-1.10.

<sup>44</sup> See n. 15, *infra*.

<sup>45</sup> 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.

<sup>46</sup> This separation would be difficult in smaller communities with a limited defense bar. If separation of roles is not possible, another, less desirable response would be to require participants to make informed written waivers of the conflict.

<sup>47</sup> 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.

Given the rule of imputed disqualification,<sup>48</sup> some action would be necessary even if the team member was not familiar with the former agency client's case. Under ABA Model Rule 1.10 and state variants of the rule, 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 led 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.<sup>49</sup> Whether screening would be a viable solution to conflict problems would require examination of the particular jurisdiction's screening rules. If screening was permissible, the lawyer could continue as a team member even if the conflicted former agency client objected.

If screening was not possible, the participant would have to waive any objections to the team member's presence. Such waivers need not be completely open-ended. They could provide some agreed upon limit of disclosure or screening in return for a waiver of conflict and confidentiality protections.<sup>50</sup> The waiver would have to be in writing, signed by the participant.<sup>51</sup>

The manner in which cases are staffed also presents issues 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 certain other rules.<sup>52</sup> 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. The most direct solution would be to

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<sup>48</sup> See MRPC Rule 1.10.

<sup>49</sup> Wisconsin Supreme Court Rule 20:1.10.

<sup>50</sup> 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 to the task of avoiding conflicts of interest for the problem-solving court team member.

<sup>51</sup> See MRPC Rule 1.7(b) (4).

<sup>52</sup> See MRPC Rules 4.2 and 4.3.

require participant consent to communications for the purpose of staffings as a condition of program involvement.<sup>53</sup>

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 the thicket even if it is not the most clear or direct path. The proposed ABA Defense Function Standards do not acknowledge this role and, as a consequence, do not provide useful commentary on how it might be structured or separated from the other roles defense counsel may play.<sup>54</sup>

#### **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 provides an answer to the first objection, a legitimate concern in jurisdictions that have sought to combine the roles either for fiscal reasons or a failure to carefully consider the different 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 when a client participates in treatment he has chosen this path and rejected litigation, a choice that is his to make.

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<sup>53</sup> 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.

<sup>54</sup> Caution suggests it would also be best if the defense attorney team member did not see themselves as attorney for the team. 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 member and participant at the court hearing. This problem is avoided if the 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.

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.<sup>55</sup>

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.<sup>56</sup>

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, what procedural rights would be waived, available charge or sentence concessions, and the consequences of failure.

Making sure the client's decision is truly informed may be counsel's most important responsibility in this type of case because the option is so different from traditional choices 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 were several attorneys interviewed by the author, it would be inappropriate to not fully and accurately present this option to the client.<sup>57</sup> If defense counsel has satisfied this responsibility and the client understands his options, his informed choice controls the direction of the case and defense counsel's contrary preferences become moot.<sup>58</sup> Of

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<sup>55</sup> 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.

<sup>56</sup> 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.

<sup>57</sup> *See* ABA Defense Function Standards 4-5.1 (Advising the Accused) and 4-6.1 (Duty to Explore Disposition Without Trial).

<sup>58</sup> *See* MRPC Rule 1.2, ABA Defense Function Standard 4-5.2 (Control and Direction of the Case).

course, 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.<sup>59</sup> There is no clear authority imposing this duty and, as discussed, there are reasonable alternative viewpoints.<sup>60</sup> 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 model of representation. 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.<sup>61</sup> He

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<sup>59</sup> 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.

<sup>60</sup> 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 (5<sup>th</sup>. Ed 2009).

<sup>61</sup> 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 in the contract – some thoroughly describing all aspects of the program and others providing a much more abbreviated document. It would seem wise to err in favor of detail. Presumably if counsel had thoroughly

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 the requirements of due process. Their early efforts did not draw clear distinctions between the various roles of defense counsel in treatment courts.<sup>62</sup> Missteps were made. At the same time, they have

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advised the client beforehand the contract would simply provide another review of matters previously discussed.

<sup>62</sup> 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:

### **Public Defender's Office/Defense Attorney**

shown continued good faith, cooperation, and an openness to critically examine their own actions and the viability of a problem-solving approach to drug and alcohol abuse. Their commitment to problem-solving is practical rather than 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 succeed. 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 analysis of the new and often complex ethical issues presented by problem-solving courts unnecessarily difficult and problematic. A careful examination of exactly what roles defense counsel plays and what these separate roles demand allows for the development of a structure grounded in fact and experience – the Wisconsin approach – rather than a dialogue based on stereotypical caricatures of system actors’ roles. This approach is best suited to lead to the development of 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 the A.B.A. criminal justice standards can make an invaluable contribution to this dialogue.

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- 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.