



# Prosecutor and Defense Counsel

Working Effectively on the  
Treatment Court Team

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# If Not Us, Then Who?

- In treatment courts, our roles provide the opportunity for a unique collaboration to effectuate positive change within the criminal justice system.
- While prosecutors and defense counsel may disagree on individual participants and legal matters, we have the common goal of ensuring that the treatment court produces the best possible outcomes.



# If Not Us, Then Who?

- The Prosecutor and the Defense Counsel also have the shared goals of reduced recidivism and increased community safety.
- Effective collaboration between the prosecutor and the defense counsel is vital for ensuring the treatment court operates effectively, avoids pitfalls, identifies areas needing improvement, and provides equal opportunities to participate.



# The ABA Criminal Justice Standards

## STANDARD 3-1.2 FUNCTIONS AND DUTIES OF THE PROSECUTOR:

(e) The prosecutor should be knowledgeable about, consider, and where appropriate develop or assist in developing alternatives to prosecution or conviction that may be applicable in individual cases or classes of cases.....

## STANDARD 4-1.2 FUNCTIONS AND DUTIES OF DEFENSE COUNSEL:

(f) Defense counsel should be knowledgeable about, consider, and where appropriate develop or assist in developing alternatives to prosecution or conviction that may be applicable in individual cases, and communicate them to the client.

# The ABA Criminal Justice Standards

## STANDARD 3-1.2 FUNCTIONS AND DUTIES OF THE PROSECUTOR:

...The prosecutor's office should be available to assist community efforts addressing problems that lead to, or result from, criminal activity or perceived flaws in the criminal justice system.

## STANDARD 4-1.2 FUNCTIONS AND DUTIES OF DEFENSE COUNSEL:

...Defense counsel should be available to assist other groups in the community in addressing problems that lead to, or result from, criminal activity or perceived flaws in the criminal justice system.

# The ABA Criminal Justice Standards

## STANDARD 3-1.2 FUNCTIONS AND DUTIES OF THE PROSECUTOR:

(f) The prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system. The prosecutor should seek to reform and improve the administration of criminal justice...

## STANDARD 4-1.2 FUNCTIONS AND DUTIES OF DEFENSE COUNSEL:

(e) Defense counsel should seek to reform and improve the administration of criminal justice...

# RPC 1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation *requires the legal knowledge, skill, thoroughness and preparation reasonably necessary* (emphasis added) for the representation.

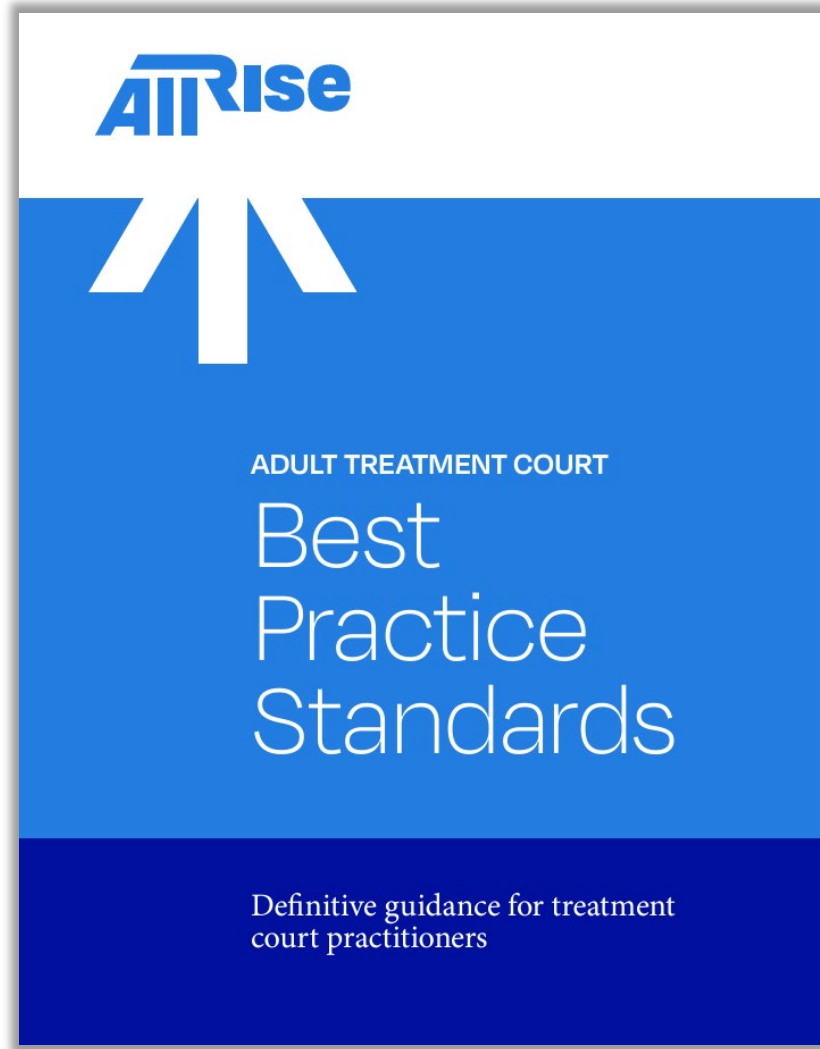
[Adopted effective September 1, 1985; Amended effective September 1, 2006.]

Note Comment (3): “...A lawyer can provide adequate representation in a wholly novel field through necessary study.’



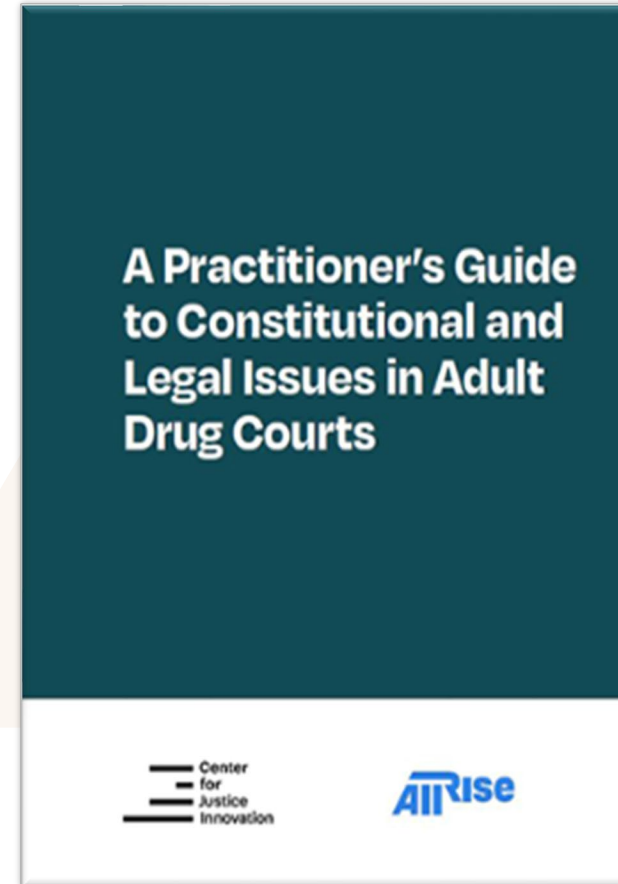
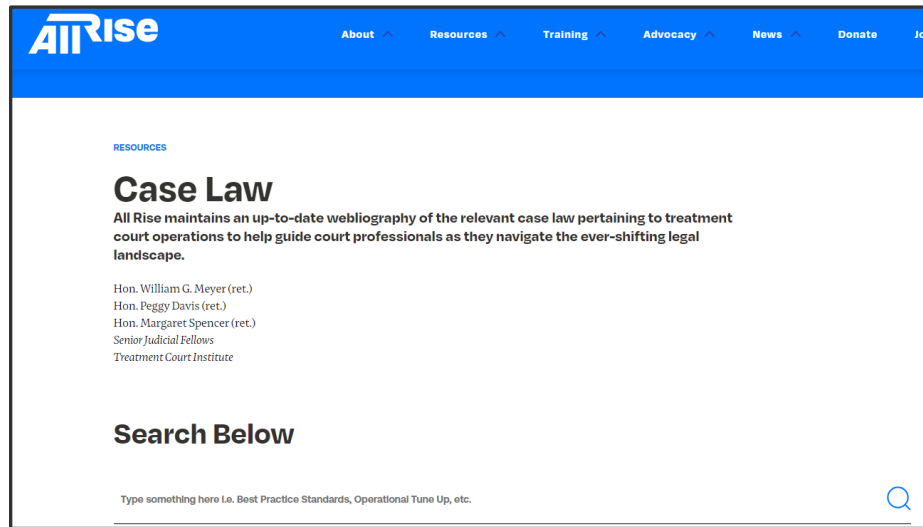
**Adult  
Treatment  
Court Best  
Practice  
Standards**

**Updated!!!**





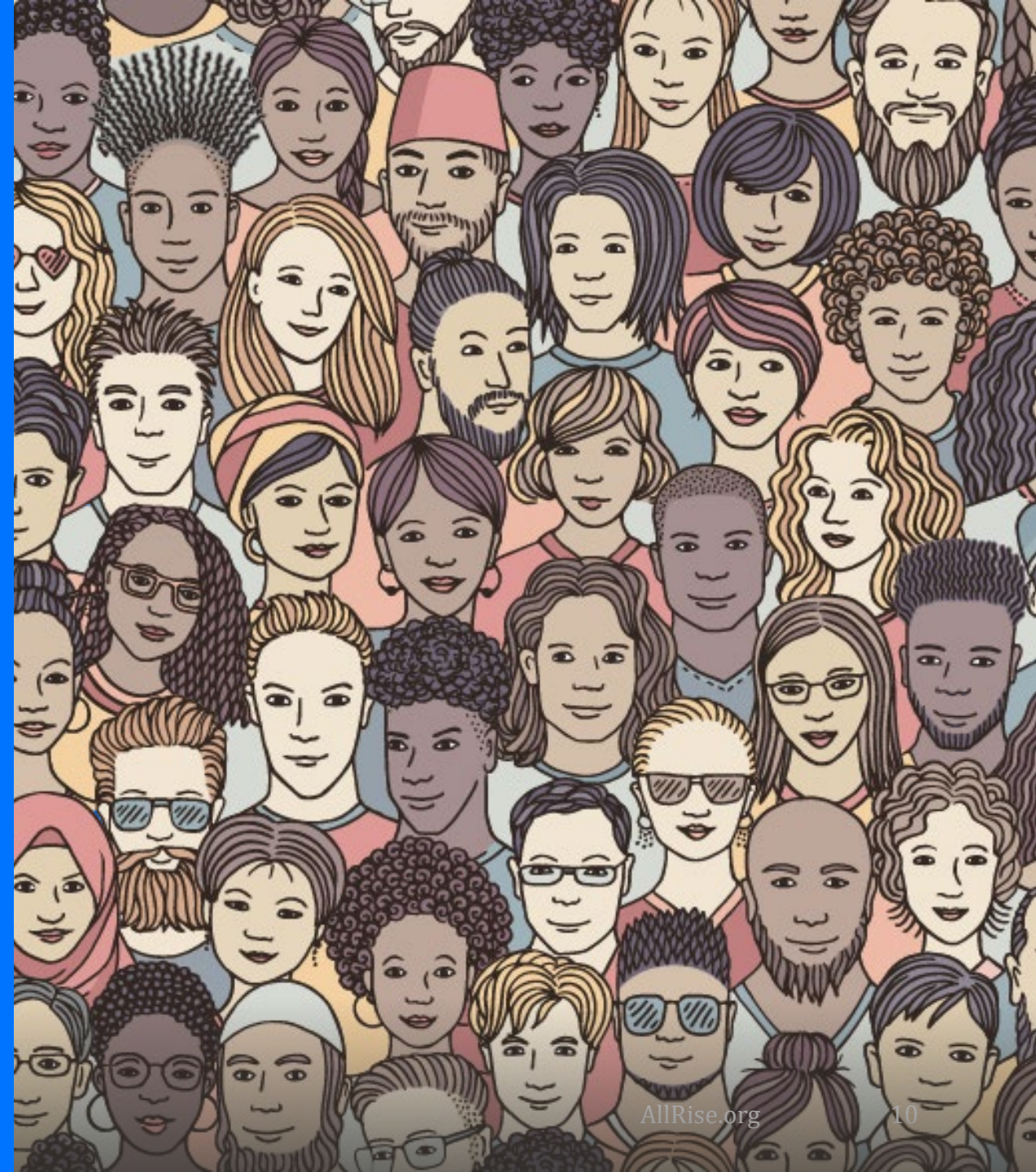
# Legal Resources – Allrise.org





# Standard I: Target Population

- High Risk
- High Need
- Alternative Tracks
- Program Structure
- Eligibility
- Entry Process
- Treatment and Resource Considerations

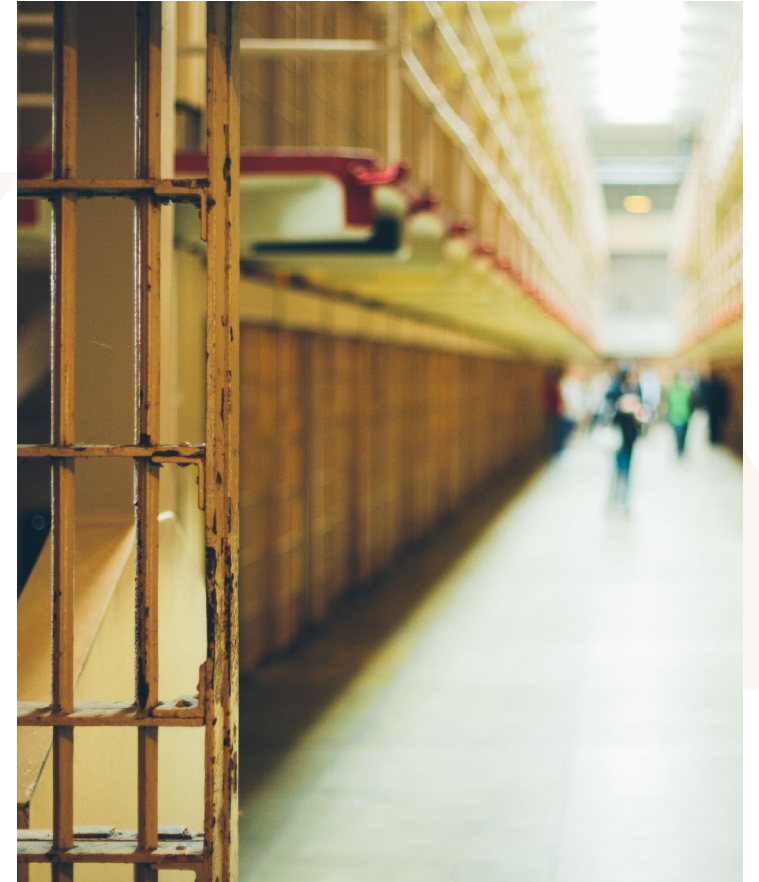


# Target Population

## EXAMINE DATA OF JUSTICE POPULATION

- Who's on community supervision?
- Who's in jail?
- What offenses, other than drug possession, are being committed because of substance use or mental health issues?
  - Felonies? Misdemeanors? DWIs? Probation Violators?

**ARE WE TARGETING THE POPULATION THAT WILL GENERATE THE GREATEST IMPACT IN OUR COMMUNITY?**





# Target Population

## HIGH RISK

Refers to those at significant risk for committing a new crime or failing to complete less intensive dispositions like probation.

**Risk does NOT refer to danger to the community.**

**Risk levels should be separated.**

## CHARACTERISTICS:

- ✓ Current felony or serious misdemeanor, such as domestic violence.
- ✓ Prior felony convictions, and/or
- ✓ Charges or histories that included property, financial crimes, drug sales, and non-aggravated assaults

# Target Population

## HIGH NEED:

Refers to those who have a moderate to severe substance use disorder.

Not all persons with substance use disorders require the intensity of treatment services of treatment court.

## SYMPTOMS:

- ✓ Substantial Inability to Reduce or Control Use
- ✓ Persistent Substance Cravings
- ✓ Withdrawal Symptoms and/or
- ✓ Pattern of Recurrent Binge Episodes

# Alternative Tracks



	High Risk	Low Risk
High Needs (dependent)	<u>Standard Track</u> Accountability, treatment, and habilitation	<u>Treatment Track</u> Treatment and habilitation
Low Needs (abuse)	<u>Supervision Track</u> Accountability and habilitation	<u>Diversion Track</u> Secondary prevention



Target Population





# Program Structure

## EXAMINE PROGRAM STRUCTURE

- Pre-Plea/Diversion
- Post-Plea
  - Deferred Sentencing
  - Probation
- Probation Revocation
- Re-Entry
- Mixed Models

***WHAT'S THE LEGAL INCENTIVE TO PARTICIPATE?***



# Objective Eligibility and Exclusion Criteria

- Treatment Courts must have clearly defined eligibility and exclusionary criteria.
- Treatment Courts should not apply subjective criteria for program eligibility (*The 3 P's*)
  - Personal Impressions*
  - Perceived levels of Motivation*
  - Prognosis for Success*

***No Voting!***

# Treatment and Resource Considerations

- Courts do not deny access to candidates who are receiving Medication for Addiction Treatment (MAT) or require psychiatric medication.
- Courts should not impose resource requirements as a condition of admission.
  - Stable housing
  - Reliable transportation
  - Payment of Program Costs

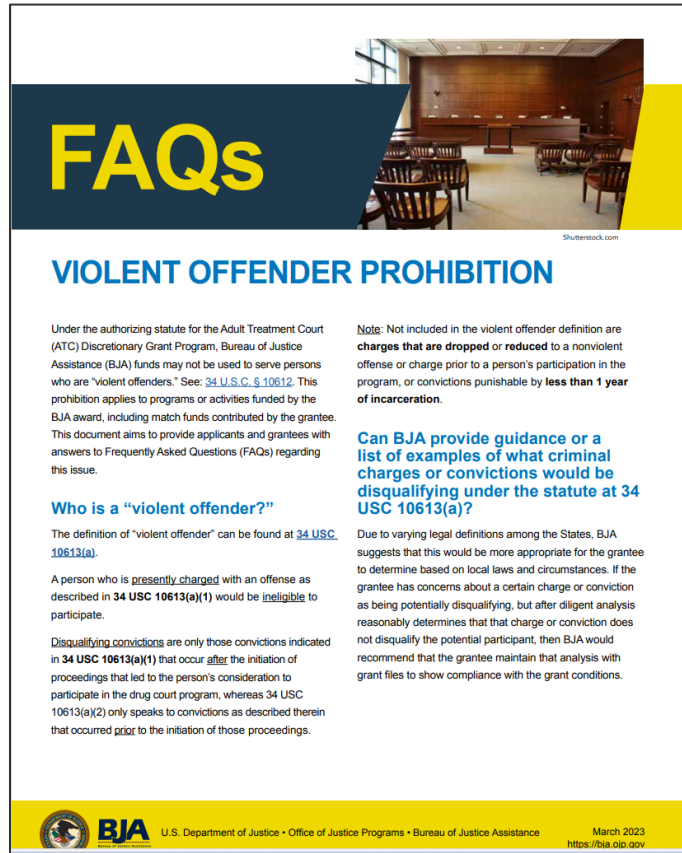
# Violent Offenses

- Evidence does not support blanket exclusions.
  - Removing blanket restrictions assists in increasing equitable access.
  - Should be considered on a case-by-case basis.
- Persons convicted of violent crimes do not recidivate at a higher rate.
  - Less likely to be rearrested than those incarcerated for drug or property offenses. \*

***Perform as well or better than persons charged with drug or property offenses.***

\*\*

# BJA Funding – FAQ sheet



The image shows the cover of a document titled "FAQs" with a sub-heading "VIOLENT OFFENDER PROHIBITION". The cover features a photograph of a courtroom interior. The text on the cover includes a note about the Adult Treatment Court (ATC) Discretionary Grant Program, a definition of "violent offender" from 34 USC 10613(a), and a section titled "Who is a 'violent offender?'" which explains that individuals currently charged with an offense are ineligible to participate. It also mentions that disqualifying convictions are those that occur after the initiation of proceedings. At the bottom, there is a BJA logo and the text "U.S. Department of Justice • Office of Justice Programs • Bureau of Justice Assistance" and "March 2023 https://bja.ojp.gov".

Does *not apply* to:

- Veterans Treatment Courts
- Current charge or prior conviction for violent misdemeanors
- Prior violent felony arrest without conviction

*Other funding can be used to serve these individuals.*

<https://bja.ojp.gov>

# Drug Sales

- Evidence does not support blanket exclusions.
- If drug sales serve to support a compulsive use disorder rather than for financial gain, the person should be referred to treatment court.

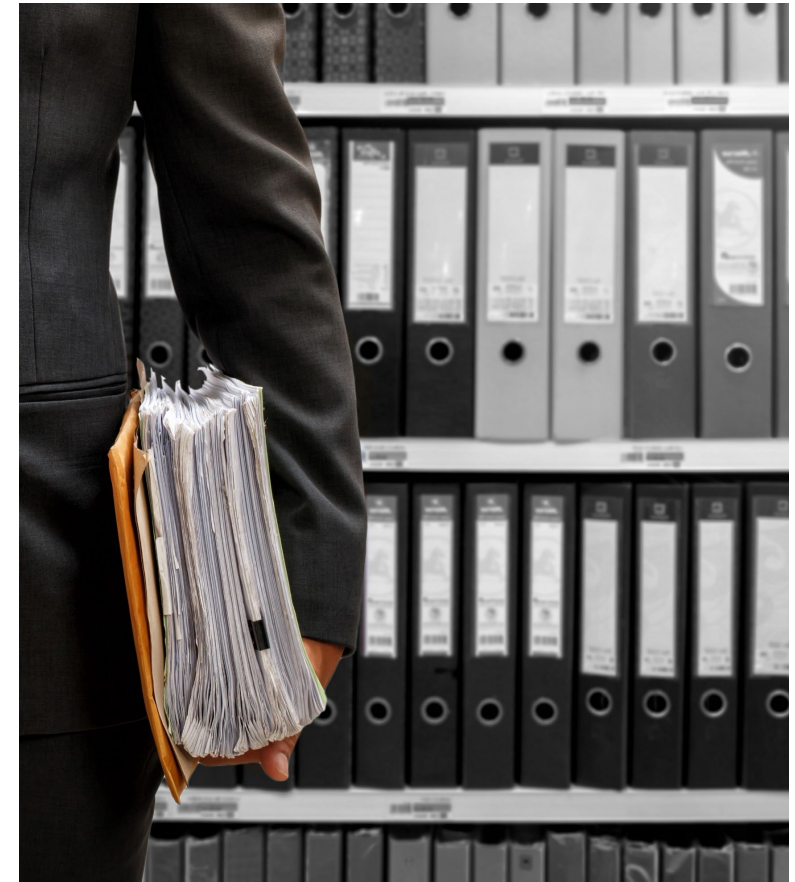
***Perform as well or better than persons charged with drug or property offenses.***

\*

\* (Cissner et al., 2013; Marlowe et al., 2008)

# Keep In Mind....

- Prosecutors must accept that defense attorneys will advocate for the admission of probation violators and other aggravating cases with clients who have substantial records.
- Defense attorneys must accept that prosecutors may be required to consider the wishes of victims and the community or other stakeholders.





# Entry Process

## WHAT PROCESS GETS CLIENTS INTO THE TREATMENT COURT?

- Referral/Application
  - Who and When?
- Legal Screening
  - Who and When?
- Risk and Clinical Assessments
  - Who and When?

## Proactive Recruitment





## IV. Incentives, Sanctions, and Service Adjustments

- Jail
- Advanced Notice and Procedural Fairness
- Prescription Medications
- Medical Marijuana
- Effective Communication



# Critical Distinction

☐ Incentives – Participants *want* them.

✓ Emphasis on incentives, even if a sanction is imposed.

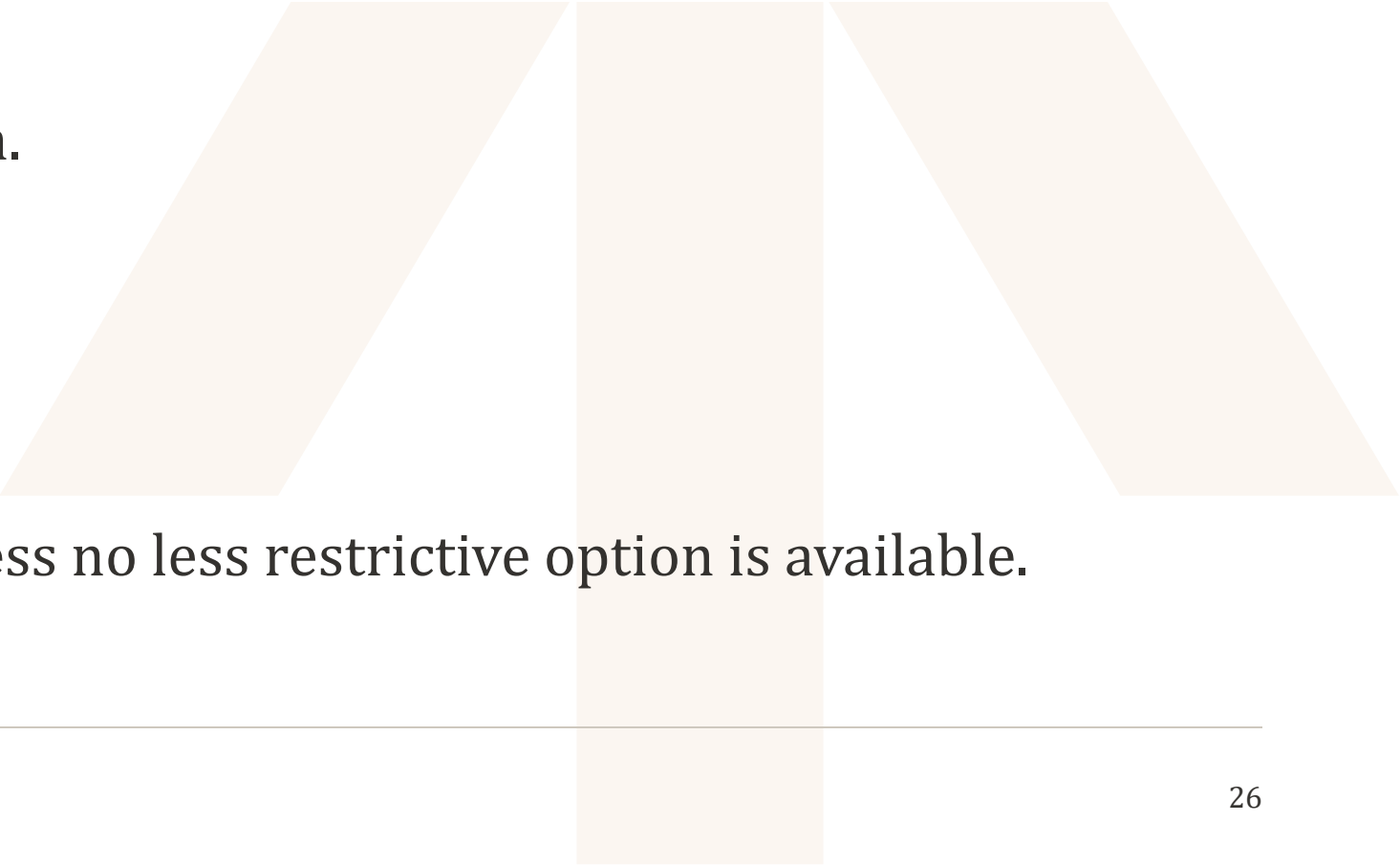
☐ Sanctions – Participants *do not want* them.

✓ Used for violations of proximal goals.

☐ Service Adjustments – Participants *need* them.

✓ Used for violations of distal goals, along with encouragement and admonishment.

# Jail - Best Practice Recommendations

- Not in the first 30 – 60 days.
  - Only for proximal infractions after low and moderate sanctions have been unsuccessful.
  - No more than 3 – 6 days in length.
  - Not for distal infractions.
  - Not for treatment.
  - Not to deter overdose.
  - Not for preventive detention unless no less restrictive option is available.
- 

# Incarceration While Awaiting Treatment Bed

- Jail is not a level of care.
- Jail carries the potential for serious negative consequences.
- **Jail should not be used to prevent overdoses or self-harm without first conducting an adversarial hearing and a judge determines by clear and convincing evidence that:**
  - Jail is necessary to protect the participant from imminent and serious harm, and
  - The client's safety cannot be ensured through less restrictive means.

# Sanctions - Advanced Notice and Procedural Fairness

- ✓ Understandable advance notice about requirements, responses, and team processes.
- ✓ Documentation, such as the Participant handbook, is clear and easily understood.
- ✓ Fair opportunity to respond to factual controversies and the appropriateness of the sanction.
- ✓ Clear rationale for the judge's decision.
- ✓ Delivered without expressing frustration or dislike.
- ✓ Assistance of defense counsel.

# Prescription Medication

- Treatment courts may not refuse admission, impose sanctions, or discharge participants unsuccessfully for prescribed medications, including MAT, psychiatric medication, and medications for other medical conditions such as pain or insomnia.
- Participants should be required to inform the prescribing medical practitioner that they are enrolled in treatment court and should execute a release of information for communication with the treatment team.



# Monitoring Prescription Medication

- Observe medication ingestion
- Conduct random pill counts
- Use medication event monitoring devices
- Monitor urine or test specimens for the expected presence
- Use abuse-deterrence formulations, if available (e.g., injections)
- Review prescription drug monitoring program reports
- Observe medication ingestion using facial recognition, smartphone, or other technology

# Medical Marijuana

- If a jurisdiction has legalized or decriminalized marijuana for nonmedical or recreational purposes, then best practices are no different than they are for alcohol.
- “Medical Marijuana” – depends upon the specific language in the medical marijuana statute and caselaw interpreting that language.

# Medical Marijuana Fact Sheet

<https://allrise.org/publications/medical-marijuana-faq/>



FREQUENTLY ASKED QUESTIONS:  
**Medical Marijuana and Treatment Courts**

October 2022

The legalization of medical marijuana raises important questions for treatment courts. To what extent do treatment courts have the authority to restrict a participant's use of medical marijuana? How should treatment courts supervise participants who are permitted to use medical marijuana? This FAQ document explores the legal status of medical marijuana in the United States and the impact of medical marijuana legalization on treatment courts.<sup>1</sup>

**1 Marijuana is an illegal drug under federal law. So why is it an issue for treatment courts?**

Marijuana is classified as a Schedule I drug under the federal Controlled Substances Act,<sup>1</sup> meaning it is regarded as having high potential for abuse and no accepted medical use.<sup>2</sup> As a result, it is unlawful to possess or use marijuana under federal law.<sup>3</sup> In 2005, the U.S. Supreme Court confirmed that the Controlled Substances Act prohibits marijuana possession despite state laws to the contrary. The Court expressly concluded that the federal prohibition on marijuana possession contains no exception for the use of medical marijuana in compliance with state laws.<sup>4</sup>

Despite federal law, however, states have continued to enact laws that allow for the medical use of marijuana. In some states, the Department of Justice has declined to enforce the Controlled Substances Act when a person buys, sells, or possesses medical marijuana in accordance with state law.<sup>5</sup> Since 2014, Congress has reinforced this arrangement by defunding the Department of Justice's prosecution of the exchange of medical marijuana in cases "where it is legal under state law."<sup>6</sup>

In sum, marijuana remains illegal under federal law, but federal authorities forgo prosecution when the use of marijuana is legal under state law. Therefore, treatment courts must consider state law and determine how it affects the rights of participants.

# Effective Communication



## STAFFING

### Yes!

- Ensure Inclusiveness
- Ensure everyone “stays in their own lanes”

### No!

- Regularly engage in adversarial behavior
- “Voting” on client eligibility





## II. Equity and Inclusion

- Data
- Intent v. Impact
- Written Materials



# Collect and Review Data

Collect demographic data at three processing points:

- Age, Sex, Race, Ethnicity
- Referral, Admission, and Exit (successful completion, absconders, or voluntary withdrawals)

*What does it tell you?*

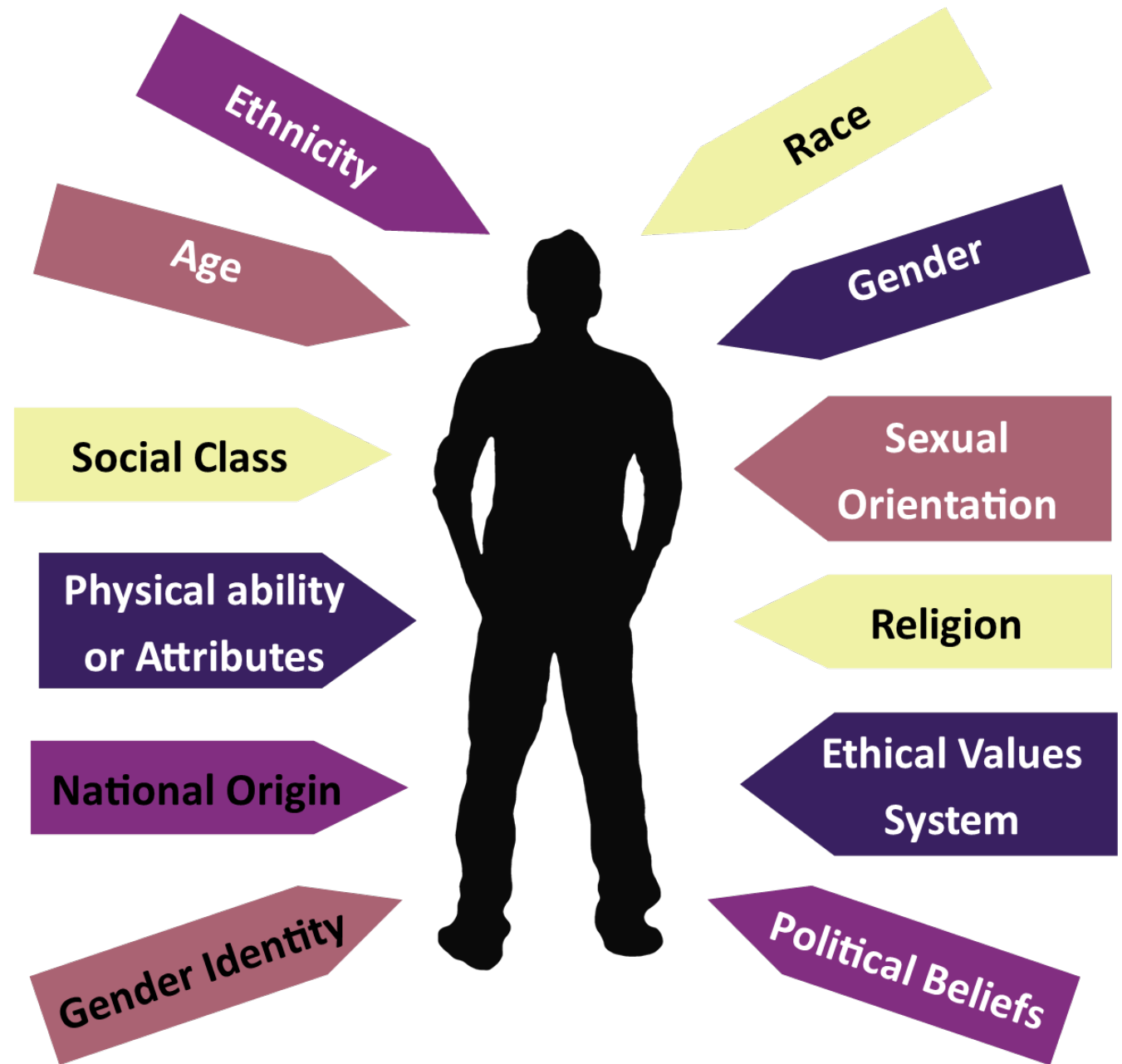


# Diversity Is Reality

**Diversity** is the range of human differences.

**Inclusion** is an act and takes practice.

**Equity** acknowledges that we all do not start from the same place.





# Be careful: Intent vs. Impact

- Transportation
- Housing
- Program Fees
- Sober
- Attitude
- Full-Time Employment

It's *not the intent* of the policies, procedures, and practices - it's their *impact* that matters.



# Journal of Advancing Justice

- Research outlines practices that work
- Consider adding these to your program to improve outcomes

**JOURNAL**  
for Advancing Justice

**AJ** Advancing  
Justice



# The Equity & Inclusion Toolkit



## Equity & Inclusion



### EQUIVALENT ACCESS ASSESSMENT *and* TOOLKIT

Adult Drug Court  
Best Practice Standard II

# Regularly Review Program's Written Materials

## POLICY AND PROCEDURES MANUAL

- Updated and Accurate?

## PARTICIPANTS MANUAL

- Understandable resource?

## PARTICIPANTS CONTRACT

- Explains expectations and consequences?

## MEMORANDUMS OF UNDERSTANDING

- Identifies specific responsibilities?



# Evaluation



<https://cvent.me/KNy825>

1. On your compatible phone or tablet, open the built-in camera app.
2. Point the camera at the QR code.
3. Tap the banner that appears on your phone or tablet.
4. Follow the instructions on the screen to complete the evaluation.
5. After completion, you will be provided with a certificate that can be saved and printed.



**Thank  
You** 

John M. Haroldson

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